



REFORMING DEBTOR PETITION BANKRUPTCY AND EARLY DISCHARGE FROM BANKRUPTCY

Comments by the Association of Business Recovery Professionals ('R3') in response to the consultation document issued by the Insolvency Service in November 2009

Introduction

1. Our comments are addressed primarily to the proposals for reform of the debtor petition process. We have few comments on the early discharge proposals.
2. Before responding to the questions set out in the document we make some general observations on issues which are not specifically addressed in the questions themselves.

The role of the Decision Maker (DM) and the court

3. The proposals envisage removing the court entirely from the process of making a bankruptcy order (although it will continue to play a role after the order is made). However, there will always be some cases which present issues of doubt or difficulty which would best be dealt with at the petition stage, and which would benefit from judicial input. An example is the question of COMI and the debtor's eligibility to apply for a bankruptcy order in the jurisdiction. The case law has established that a debtor is free to move his COMI at will. However, establishing the debtor's true COMI can be a difficult and time-consuming exercise. This problem has been highlighted by the recent development of bankruptcy tourism. Unlike the position in corporate insolvency, there is no rebuttable presumption which can serve as a starting point for deciding COMI. Length of residence in the jurisdiction is not a determining factor, and each case needs to be decided in the light of its own facts. Where the EC Regulation does not apply, the debtor will, of course, have to satisfy the conditions set out in section 265 of the Insolvency Act 1986.
4. It would be helpful if the application documentation included information to help the DM come to a view as to COMI and compliance with section 265. We suggest that where the debtor has not been resident in England and Wales for a specified period, the question should automatically be referred to the court.
5. Another potential area of difficulty is the petition that is presented for an ulterior motive and which may be an abuse of process, for example where it is intended as a means of defeating the claims of a spouse. It is difficult to see

through a petition of this kind, because it only lists the debts, with no evidence that they are genuine or accurate.

6. Partnerships are another area that can involve complicated issues.
7. We therefore believe that in cases of doubt or difficulty, the DM should have the power to refer the matter to the court for a decision.

The status and effect of the application

8. Although this is not specifically dealt with in the document, it is important that for the purposes of the Insolvency Act an application should have the status of a petition. This is necessary for the purposes of the provisions relating to restrictions on proceedings and remedies, dispositions of property, undervalue transactions and preferences.

The identity of the debtor

9. We remain concerned that there is scope for abuse and malicious applications by third parties. This possibility is dismissed in the document with little discussion and for reasons which we find unconvincing. We believe it needs to be given further consideration.

Cost savings

10. In the Initial Impact Assessment at Appendix E of the document, minimum savings to the Court Service are stated to be a minimum £21m per annum (page 44). It is not clear how this figure is calculated. We calculate a figure of about £13m. It is also not clear why it should take almost two hours for the court staff to deal with a petition. We set out our calculations in the annex to this response.
11. Our answers to the individual questions are as follows.

Q.1 What skills and experience do you think it is appropriate that a Decision Maker should have in order to make bankruptcy orders administratively?

12. The DM will need to be familiar with issues relating to jurisdiction, COMI, provable and non-provable debts, and should therefore be a person of at least AOR or equivalent rank.

Q.2 Should the Decision Maker role sit within The Insolvency Service or elsewhere?

13. The DM must be seen to be independent. His role should therefore sit outside the Insolvency Service.

Q.3 What links should there be between the Decision Maker and other bodies?

14 We do not see why there should be any links with other bodies. The DM should be fully independent.

Q.4 Would a requirement on debtor applicants, to confirm both that the consequences of bankruptcy have been read and understood and that they still want to submit the application, be sufficient to ensure that those who apply for their own bankruptcy appreciate the seriousness of taking this step?

15 Yes. The application should have the same effect as a document which is subject to a statement of truth and is signed as such.

Q.5 Would information about other debt relief mechanisms, provided as part of the application process, be enough to ensure that debtors have sufficient opportunity to consider whether opting for bankruptcy is the right decision for them?

16 Debtors should be encouraged to take advice before they enter into the process, and not leave it to the application stage. At the application stage the debtor should simply be asked to state whether or not he has taken advice, and if so, from whom.

Q.6 Should debtors be encouraged to consider alternative debt resolution procedures before submitting an application for bankruptcy?

17 Yes. See above.

Q.7 Is there a need for the Decision Maker to be given power to direct someone into an alternative debt relief mechanism?

18 No. See above.

Q.8 Should there be any exemptions or remissions of the application fee?

19 Under the present system, court fees are waived for those on benefits. We believe the same should apply under the proposed new system. Debtors should not be prevented from entering bankruptcy because of lack of funds.

Q.9 If yes, how would you suggest that the cost of any fees forgone could be met in order to keep the application process self-financing?

20 Remissions should be budgeted for within the overall costings.

Q.10 Do you think that there should be differential pricing of a bankruptcy application, according to whether it is made electronically or on paper?

21 No.

Q.11 Should there be a facility to enable debtors to make their bankruptcy applications on paper forms?

22. Yes, for the reasons given in the document.

Q.12 Should there be a facility to enable payment to be made on line at the same time as the application form is submitted?

23. Yes. Despite the comments made in the document, we also think that there should be provision for a short cooling-off period, say of seven days, to enable the debtor to withdraw the application.

Q.13 Is a maximum of 10 days an appropriate period of time to allow between receipt of acknowledgement of the application and payment of the fee that covers both the cost of administering the application and the deposit?

24. Yes.

Q.14 If you have answered 'no' to the previous question, what period do you consider appropriate and why?

25. N/A.

Q.15 Should the application form automatically expire if payment is not made within a specified period of time?

26. Yes.

Q.16 Have we suggested any powers for the Decision Maker that you think are unnecessary? If so, which powers and why might they be unnecessary?

27. No.

Q.17 Are there any additional powers that the Decision Maker should have? If so, what powers and why do you think these are necessary?

28. Yes. As we argue in our opening remarks, we believe that the DM should be able to refer questions of doubt or difficulty to a district judge.

Q.18 Within what set period of time should a debtor be required to provide further information, after which time the application will be deemed withdrawn? Please provide reasons for your choice.

29. We suggest seven days.

Q.19 Should the Decision Maker have a general power to stay a bankruptcy application? If yes, would you please explain your reasons and outline the circumstances in which you think such a power would be useful.

30. No. We believe the power to refer matters to a district judge/bankruptcy

registrar is sufficient and preferable.

Q.20 Should the Decision Maker have the power to appoint a trustee? If yes, would you please explain your reasons and outline the circumstances in which you think such a power would be useful.

31. No. This is a matter for the official receiver. The exception might be where the debtor is subject to a failed IVA, when there should be power to appoint the supervisor as trustee.

Q.21 Do you think that assets may be at risk in the period between a bankruptcy application being accepted and a bankruptcy order being made?

32. Yes. This is why we have argued that the application should have the status of a petition.

Q.22 In order to ensure that assets at risk are protected, should the Decision Maker have the power to appoint an interim receiver in the period between a bankruptcy application being accepted and a bankruptcy order being made?

33. No. This should be dealt with by referral to a district judge/bankruptcy registrar.

Q.23 If you have answered 'no' to the previous question, can you describe a better way of ensuring that such assets are protected?

34. N/A.

Q.24 Do you agree with the duties we have outlined for the Decision Maker?

Q.25 Have we suggested any duties that you consider are unnecessary? If so, which ones and why?

Q.26 Are there any other duties the Decision Maker should have? If so, what are they and why do you think they are necessary?

35. We have nothing further to add to our above comments.

Q.27 Do you think that two working days, from when an application is deemed to have been submitted, is an appropriate period of time within which to require the Decision Maker to make a decision?

36. Two days is rather short, and we suggest it should be longer, say five days. The important thing is that once the application is made the estate is protected.

Q.28 Do you think that the two working days within which the Decision Maker is required to make a decision should be stayed if the Decision Maker stays his or her consideration of a bankruptcy application pending receipt of further information and/or evidence?

37. N/A. See above.

Q.29 Should failure to respond to a request for further information be treated as the application being withdrawn by the debtor?

38. Yes.

Q.30 Would 14 days be sufficient time to give to the debtor to ask the Decision Maker to review his/her decision? If not, why? How long do you think it should be?

39. We believe 14 days should be sufficient.

Q.31 Do you think that early discharge should be repealed?

40. Yes.

Q.32 If you do not think that early discharge should be repealed, what specific benefit do you think there is in keeping early discharge? Please provide figures if you can.

41. N/A

Association of Business Recovery Professionals
20 January 2010

**Consultation
Reforming Debtor Petition
Bankruptcy and Early Discharge
From Bankruptcy
Cost Savings**

In the Initial Impact Assessment at Appendix E of the consultation document minimum savings to the Court Service are stated to be a minimum of £21M per annum (*page 44*). It is not clear how this figure is calculated. We calculate a figure of c.£13M. It is also not clear why it should take almost 2 hours for the Court staff to deal with a petition.

The cost to the Court Service of each Debtor's Petition is calculated as follows

Average time to deal with a debtor's petition	(<i>page 47</i>)	Minutes	75.45
Average time to make the bankruptcy order	(<i>page 48</i>)		43.41
		A	<u>118.86</u>
Court Staff time per minute		B	£2.42
Court Staff Aggregate cost		C	<u>£287.64</u>
			Minutes
District Judge's average time to make bankruptcy order		D	10.00
Judicial time is billed at		E	£2.78
Judiciary Aggregate cost		F	<u>£27.80</u>
In 2007 the total average cost per case to HMCS in dealing with a debtor petition and the making of the bankruptcy order is (<i>page 48</i>)		G = C + F	<u>£315.44</u>
The court fee is			£150

Not all debtors pay the fee. Research shows the following (*page 48*)

Table 3: Debtor contribution to court fees

Fee amount	Percentage of debtors
£150 (full fee)	48%
Over £100	3%
£51 to £100	1%
£50 or less	1%
Nothing	44%

Weighted Average recovery of court fee		H	<u>£76.00</u>
Net cost to HMCS		I = G-H	<u>£239.44</u>
In 2008 debtor petitions totalled approximately	(<i>page 45</i>)	J	56,570
On those figures total cost would be		=J x I	£13,545,189
If Court Staff took 30 minutes to deal with a petition, the cost to HMCS would be (Note 1)		K	£24.40
On 2008 numbers the cost would be		=K x J	£1,380,308
If Court Staff took 60 minutes to deal with a petition, the cost to HMCS would be (Note 2)		L	£97.00
On 2008 numbers the cost would be		=L x J	£5,487,290

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Note 1

30 minutes option - time	A	30
Court Staff time per minute	B	£2.42
	A x B=C	£72.60
Judiciary Aggregate cost	F	<u>£27.80</u>
In 2007 the total average cost per case to HMCS in dealing with a debtor petition and the making of the bankruptcy order is (<i>page 48</i>)	C + F	<u>£100.40</u>
Weighted Average recovery of court fee	H	£76.00
Net Cost		<u>£24.40</u>

Note 2

60 minutes option - time	A	60
Court Staff time per minute	B	£2.42
	A x B=C	£145.20
Judiciary Aggregate cost	F	<u>£27.80</u>
In 2007 the total average cost per case to HMCS in dealing with a debtor petition and the making of the bankruptcy order is (<i>page 48</i>)	C + F	<u>£173.00</u>
Weighted Average recovery of court fee	H	£76.00
Net Cost		<u>£97.00</u>