



Royal Court of Jersey
Viscount's Department

***A GUIDE TO THE
BANKRUPTCY
LAW***

A GUIDE TO THE BANKRUPTCY LAW

This guide has been written to try to explain the Bankruptcy (Désastre) (Jersey) Law 1990 and its connected Rules in everyday language. Quite a lot has been simplified or omitted. The 1990 Law will be referred to as "the Bankruptcy Law" throughout this document.

Please contact the Insolvency Team or seek professional advice if there are matters either within the Law or guide which you may not be sure about.

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BACKGROUND INFORMATION

"Insolvency" means the inability of a debtor to pay his/her or its debts as they fall due. (A debtor can be an individual or a company.) The main remedy for dealing with insolvency in Jersey is *désastre*.

Other remedies include:

DEBT REMISSION ORDERS (DRO)

To learn more about DROs, please follow the link below:

<https://www.gov.je/TaxesMoney/Debt/Pages/DebtRemissionOrders.aspx>)

DÉGRÈVEMENT and REMISE DE BIENS

To learn more about *Dégrévement* and *Remise de Biens*, please follow the link below:

<https://www.gov.je/TaxesMoney/Debt/Pages/DebtCreditors.aspx>

CREDITORS' WINDING-UP

This process is summarised in the appendices section below:

DÉSASTRE

Broadly, the purpose of a *désastre* is to gather in and sell an insolvent debtor's assets, to find out why insolvency occurred and whether any bankruptcy offences were committed, and to distribute the net proceeds of the assets to those who are entitled to them.

Insolvency proceedings in the Courts are a last resort. Before a case comes to Court there has almost always been a great deal of behind-the-scenes activity by lawyers, accountants and the Viscount's Department to give an ailing business or an individual a chance of recovery. The underlying reason behind many *désastres* is that businesses get into trouble but fail to take expert advice on how to get out of that trouble; they also generally fail to tell their creditors that they are in trouble - this "head in the sand" approach is very common. Most creditors know from experience that if there is a *désastre* they are unlikely to recover more than about 20 pence in the £ of what is owed to them. The likelihood is that if creditors are contacted early enough they are more likely to agree to a recovery plan or to come to an arrangement with the debtor.

The Bankruptcy Law places heavy burdens on directors of insolvent companies. They might become personally liable for their company's debts if they ignore cash problems. Traders, whether they are individuals or companies, generally have to keep accounting records. There is more about these topics in the main text.

If the Bankruptcy Law does not cover a situation, or the Royal Court has to decide what something in the Bankruptcy Law means, the Court is able to take into account helpful cases decided before the Bankruptcy Law came in force.

Désastres are administered by the Viscount of the Royal Court. The Viscount is the Court's Executive Officer. The Viscount has a Deputy and officers who are sworn in by the Royal Court and known as "Viscount Substitutes", together with support staff. The Viscount's Department is the Court's arms and legs - it is the Viscount's job to enforce

orders of all the Courts, including collecting fines and enforcing judgment debts. There are many other duties not relevant here; for example, the Viscount and Deputy Viscount are Jersey's Coroners. Insolvency procedures make up a significant part of the Viscount's Department's work. The administration of a *désastre* is similar to that of the work carried out by the UK Official Receiver as well as incorporating work done by English "licensed insolvency practitioners" who are specially qualified accountants or lawyers in private practice.

SECURED CREDITORS

Jersey law generally treats immovable property and movable property very differently. "Immovable property" means, basically, lands, buildings and leases of lands or buildings for more than nine years. "Movable property" means everything else. (Until the Bankruptcy Law came into force, *désastre* only affected movable property.)

It is possible to mortgage immovable property. Most homeowners borrow money to buy their homes and the loans are "secured" on their homes. The bank (or other lender) obtains security by having the loan (or mortgage) registered in the Royal Court and that registration means that the proceeds of sale of that property are first applied to repay that loan before any other creditor or the owner recovers any of the cash. In the unlikely event that a property is sold without a mortgage on it being repaid, the new owner has to settle the outstanding loan on demand or give up the property to the mortgagee (lender). Mortgages created by agreement, such as domestic mortgages, are known as "conventional hypothecs". Mortgages can also be created by order of the Royal Court, when they are known as "judicial hypothecs". For example, a creditor can ask the Royal Court to register a judgment for debt obtained against a debtor; that registration effectively becomes a mortgage over all immovable property owned by the debtor.

If there is more than one mortgage on a property, the mortgagees have rights based on date - an earlier mortgage ranks for repayment before a later one.

It is not possible to create a mortgage over most movable property. This comes as a surprise to English bankers when they are first appointed to a Jersey branch: in England, it is everyday business to create a type of mortgage over a borrowing of company's stock and other assets, but this cannot be done in Jersey. The only exception to this rule of law is when a "security interest" is created under the stringent terms of the Security Interests (Jersey) Law 1983 or now under the Security Interests (Jersey) Law 2012. Under these Laws, a security interest can be taken over "intangible movable property other than a lease" - if you can physically touch movable property, you cannot mortgage it. For example, in a domestic context it is now quite usual for someone taking out a mortgage to buy a home and to take out at the same time a life assurance policy designed to repay the mortgage automatically upon death - the lender is given a security interest over the life assurance policy. The person holding the security interest (the lender) has similar rights to a mortgagee of immovable property.

SOME IMPORTANT FEATURES OF THE BANKRUPTCY LAW

The Application for a *Désastre*

The debtor (or a director of a debtor company) or any creditor with a claim greater than £3,000 can apply to the Royal Court for the debtor's property to be declared *en désastre*. If a debtor has died, the property cannot be declared *en désastre*. The person making the application to the Court has to give at least 48 hours' advance notice of the application to the Viscount: the debtor does not necessarily have to be notified if a creditor is making the application. However, unless there is a risk that assets will disappear before the application is made, the expected course of action is that the debtor will be put on notice. Generally, the applicant has to complete a specified form giving some information about the debtor's assets and liabilities and has to swear an affidavit that the debtor is insolvent but has realisable assets.

The Royal Court hears the application, usually at "*ex parte*" time on Friday afternoons, in between passing contracts (immovable property transactions) and dealing with the "table", or list, of named cases - at about 3pm. Unless the debtor has made the application, the Court generally only hears the creditor's side of the case. Because of this, if the debtor can show within twelve months that a *désastre* was declared even though the debtor was not insolvent, unless the creditor can prove that the creditor was acting reasonably and in good faith the declaring creditor will have to pay damages to the debtor.

After the *désastre* has been declared, creditors entitled to claim in the *désastre* cannot sue the debtor - their only remedy is to make a claim in the *désastre*. A *désastre* can be recalled at any stage if the debtor can prove to the Court's satisfaction that there are enough assets to pay all creditors' claims in full.

As soon as a *désastre* has been declared, all of the property of the debtor is vested in the Viscount. Basically, the Viscount becomes legal owner of the debtor's property world-wide. Mortgages and security interests remain valid against the property they were secured upon. The debtor will now be called "the bankrupt" in this document. Property owned jointly by the bankrupt and one or more others is treated as though it is split into equal shares, and the bankrupt's share is vested in the Viscount.

The Matrimonial Home

An important provision in the Bankruptcy Law is that the matrimonial home can be protected by the Royal Court, even if that home is wholly owned by the bankrupt (e.g. not owned jointly by a significant other). This also applies if the bankrupt and their significant other are unmarried but what amounts to marriage "by habit and repute" (or under the Civil Partnership (Jersey) Law 2012 a person with whom the debtor is in civil partnership) can be demonstrated. The significant other has to apply to the Royal Court within three months of the *désastre* and the Royal Court decides, basically, whether to give all or part of the property to the significant other, or to allow the significant other and any dependents to continue living in the property for a specified period, or to allocate part of the sale proceeds of the property to the significant other. In fact, the Court has very wide powers and can devise a wide range of orders, provided that it gives "first consideration" to keeping the property available as the family home.

Pension Schemes

The States of Jersey have the power to make Regulations so that an approved pension arrangement can be excluded from the bankrupt's property for the purposes of a *désastre* either by court order or by agreement with the Viscount. Typically, there are two different types of approved pension arrangements, namely, a personal pension scheme which is taken out by an individual and an occupational pension scheme which is administered by an employer for the benefit of employees. Generally, pension arrangements, since 2006, are no longer considered an asset of a *désastre* administration except where excessive contributions have been paid into a scheme to the detriment of the creditors. Most public-sector pension benefits are in any event protected by law as is the Jersey old age pension.

The Duties of the Bankrupt

The bankrupt - or a director, secretary, manager or other officer of a bankrupt company - is obliged to assist the Viscount "to the utmost of the debtor's power". The debtor has to provide information about assets and liabilities; hand over any property still under the debtor's control - and any property the debtor may come into during the course of the *désastre*, attend before the Viscount whenever called upon; and notify the Viscount immediately in writing of any change of address or employment. If the debtor fails to do this, the debtor commits an offence.

The Viscount has a wide discretion as to how much to allow a personal bankrupt to keep of the debtor's wages etc during the course of a *désastre*. The personal bankrupt has to hand over any surplus income for the benefit of their *désastre* proceedings, as decided by the Viscount, until the debtor receives a discharge.

A personal bankrupt commits an offence if he or she borrows more than £250 in total without informing the potential lender of the fact of the *désastre*. During the course of the *désastre*, a personal bankrupt cannot be a company director or sit on a jury and suffers from various other legal "disabilities".

The Duties of the Viscount

The Viscount currently advertises in the Jersey Gazette (www.gov.je/gazette) and in any other publications he thinks necessary (such as the London and Edinburgh Gazettes) for creditors to file their claims with the Viscount by a set date. That date is usually forty days from the date of the *désastre* declaration. If any creditor fails to file a claim with the Viscount by the set date the creditor, effectively, loses the claim and gets nothing.

At the end of the claims' period the Viscount makes the creditors' claims available for inspection - that inspection is advertised in the same publications as stated above. Any interested person can object to any claim within one month.

Some time after the end of that month, the Viscount examines the claims, decides upon disputed claims and gives notice to creditors and objectors as to his decisions. If a creditor's claim includes interest (there will have been a contract of some sort between the creditor and the bankrupt covering this), the Viscount may reduce the rate of interest claimed if he considers it to be extortionate. The Viscount's decisions will be reviewed by the Royal Court if a person affected by them so requests.

The Viscount can summon before him for interview anybody he believes capable of providing information about the bankrupt, or anyone he thinks has property or documents belonging to the bankrupt. It is an offence to fail, without reasonable excuse to attend before the Viscount at the time appointed or to lie to, or attempt to mislead, the Viscount. The interviewee can refuse to answer questions if they believe the answers could incriminate the interviewee or a third party.

During the course of the *désastre*, the Viscount considers whether any offences have been committed and whether a director of a bankrupt company has become personally liable to pay any of the company's debts. These areas are summarised below.

The Viscount gathers in the bankrupt's assets and sells them. The Viscount can "disclaim certain onerous property" - if a contract or other asset is likely to cost more to perform or maintain than it is worth overall, the Viscount can abandon it. Mortgagees get paid from the net sale proceeds of the property against which their debts were secured. If insufficient cash is realised from the sale of mortgaged property to pay off all mortgages in full, the mortgages lapse and do not run against the new owner of the property. In that event, the mortgagees become ordinary, unsecured creditors for the unpaid part of their mortgages.

Cash is kept in an interest-bearing account for the benefit of the *désastre*. The Viscount may give progress reports to creditors, but in a straightforward case he will usually only make one report at the end of the case. The Viscount takes any necessary action in the Courts, such as suing to recover debts due to the bankrupt.

Summary of Criminal Offences in the Bankruptcy Law

If the Viscount finds evidence of any of the offences listed here, he reports the facts to the Attorney General who decides how the matter should be dealt with.

This is not an exhaustive list, as the whole body of criminal law applies in the normal way in addition to the specific *désastre* offences. Examples are: (i) a director might have stolen money from a bankrupt company, in which case the director will be reported for larceny, probably after an investigation by the States of Jersey Police; (ii) a bankrupt might have pocketed the cash from the sale of a car being bought under a hire purchase agreement, in which case the person will be reported for fraudulent conversion.

Article Number of the Law	Offence	Maximum Penalty
18	Failure to co-operate with the Viscount, disclose relevant information, hand over property, etc	Fine and 6 months imprisonment
19	Bankrupt (or director of bankrupt company) has failed to keep or preserve proper accounting records in the two years prior to the <i>désastre</i> . Does not apply if total claims in the <i>désastre</i> are less than £20,000 or the accused proves that the omission was honest and excusable in the circumstances.	Fine and/or 6 months imprisonment
20	Failure (without reasonable excuse) to respond to summons from the Viscount. Lying to the Viscount. Wilfully misleading or attempting to mislead the Viscount.	Fine and/or 6 months imprisonment
24	Personal bankrupt failing to comply with legal disabilities (e.g., acts as a director)	Fine and 6 months imprisonment
25	Personal bankrupt borrows more than £250 during the <i>désastre</i> without disclosing the fact of the <i>désastre</i> to the lender(s).	Fine and/or 6 months imprisonment

Pre-Désastre Transactions that can be Undone

The five years' prior to a *désastre* declaration are important in deciding whether anybody has received an unfair benefit from a bankrupt's assets. If the Viscount thinks that someone has received an unfair benefit as set out below, he can ask the Royal Court to make orders restoring matters to what they would have been if that unfair benefit had not been obtained.

Within the year leading up to the *désastre*

UNDUE PREFERENCE: A future bankrupt pays off a creditor, or a guarantor of a debt, or makes other arrangements of advantage to that person, intending to make sure that that person will be better off in the forthcoming *désastre* than the creditor would otherwise have been. The future bankrupt is insolvent at the time of the transaction or becomes insolvent because of it. In these circumstances, the Court can undo the transaction or make another appropriate order.

Up to five years prior to the *désastre*

TRANSACTION AT AN UNDERVALUE WHILE INSOLVENT: A future bankrupt gives assets away or sells assets at significantly less than their true value and is at the time insolvent or becomes insolvent as a result of that transaction. In these circumstances, the Court can again undo the transaction or make any other appropriate order.

In either case, there are very high standards of proof to be met by recipients defined in the Bankruptcy Law as being "connected" to or "associated" with the debtor such as their significant other.

Additional Provisions Concerning Bankrupt Companies

Disqualification of Directors

Generally, if the Attorney General or the Viscount forms the opinion that the conduct of a director of a company was such that the director is unfit to be involved in the management of another company, they can ask the Royal Court to make an order disqualifying that person for up to fifteen years from taking part in the management of a company.

If someone directly or indirectly takes part in the management of a company while disqualified from being a director, that person (i) commits an offence, and (ii) becomes jointly liable with the company for the company's debts. If the company the director is involved with is declared *en désastre*, that person will have to make good any deficiency personally.

Wrongful Trading

If a director allows a company to continue to trade when the director knows, or should know, that the company will probably be declared *en désastre* at some time in the future, unless the director takes reasonable steps to minimize potential losses to the company's creditors, the director becomes personally liable for the company's liabilities arising from then onwards.

Fraudulent Trading

If a business has been carried on with intent to defraud creditors, the Companies Law allows the Royal Court to order that persons who were knowingly parties to the carrying on of the business, make such contributions to the company's assets as it thinks proper.

Conclusion of a *Désastre*

Distribution of Funds

As shown above, mortgagees are paid (so far as possible) out of the property their debts were secured upon.

The Viscount's fees and expenses are deducted. The Viscount's fee is generally 10% of the value of assets realised, plus 2½% of the funds distributed to creditors. The Viscount can, however, apply discretion depending on the circumstances. For example, the Viscount is unlikely to charge the full fee against the realised value of immovable property.

If insufficient assets are realised to pay the Viscount's expenses (such as adverts and bought-in legal and accountancy services), the creditor who applied for the *désastre* to be declared may have to reimburse the shortfall.

If there are insufficient funds to pay out all debts with a priority, the available funds are shared between the priority creditors proportionately. For example, a creditor with a priority claim for £2,000 will receive twice as much as a creditor with a priority claim for £1,000. Ordinary creditors share proportionately funds remaining after creditors with priority claims have been paid in full.

Debts given a priority are:-

- a) Prior priority (immediately following payment of the Viscount's fees, emoluments, costs, charges and expenses)
 - in respect of expenses of a liquidator as defined by Article 15(7) of the Dormant Bank Accounts (Jersey) Law 2017;
 - monies paid by the Jersey Bank Depositors' Compensation Board where it gives compensation to a depositor in return for taking over the depositor's rights against a bank, in the context of failure of a financial institution registered under the Banking Business (Jersey) Law 1991.
- b) Arrears of wages or salary owing to an employee for up to six months before the *désastre* was declared, to a maximum of £6,300, plus holiday pay and bonuses due to that date, to a maximum of £1,800. If the amount due is greater, the employee will receive any ordinary dividend on the balance.
- c) The full amount due to the Social Security Department.
- d) Income Tax (or in the case of the bankrupt being an employer, both the bankrupt's income tax and ITIS payments on behalf of employees) due for the year in which the *désastre* was declared, and for the preceding year.
- e) GST due for the year in which the *désastre* was declared, and for the preceding year.

- f) Arrears of rental by reference to common law rules. This is somewhat complicated. Basically, a landlord is entitled to preference for up to six months' arrears of rental, provided that there are sufficient assets on the rented premises to cover those arrears. If the bankrupt's own assets on the premises are insufficient to cover those arrears, goods on the premises belonging to third parties may be realised by the landlord to meet the arrears. The landlord can also realise goods belonging to the debtor which were located on the rented premises within the forty days prior the *désastre* being declared.
- g) Parish rates for up to two years.

The Viscount's Report to Creditors

When the Viscount has completed the case, he supplies all creditors with a report and accounts relating to the *désastre*. At the same time, he pays any final dividend. In the ordinary course of events, the administrative processes take about 18 months to complete.

However, if the bankrupt is an individual, the *désastre* continues until the debtor receives a discharge (about which there is more below). If the bankrupt is a company, the Viscount notifies the Registrar of Companies that he has concluded the case and the Registrar proceeds to dissolve the company.

Discharge of Personal Bankrupts

Four years after an individual has been declared *en désastre*, the Viscount generally brings an application to the Royal Court for an order discharging the bankrupt.

Subject to certain exceptions specified in the Bankruptcy Law, the discharge means that the bankrupt is no longer liable for debts incurred prior to the *désastre* and the various legal disabilities the debtor has been subject to cease to apply. The Viscount, the bankrupt or a creditor can ask the Court to reduce or extend the normal four-year period.

The Court has very wide discretion as to whether to grant a discharge immediately, to make it conditional, to delay it, or to refuse it outright. If the discharge is refused, the Viscount, the bankrupt or a creditor can re-apply to the Court "from time to time".

APPENDICES

WHERE THE BANKRUPT IS AN EMPLOYER

Employee Insolvency Benefit

When an employer becomes insolvent the employees may be able to claim 'Insolvency Benefit' from the Social Security Department. This benefit was introduced to provide prompt financial assistance to employees whose employment ends because their employer becomes insolvent. An employer who has ceased trading is not necessarily insolvent, and in order to claim the benefit the employer must have entered into a formal insolvency procedure such as being declared bankrupt or entering into administration, receivership or liquidation.

In order for an employee to claim Insolvency Benefit the following conditions must apply:

1. The employer is undergoing a formal process of insolvency and this is the main reason why the employee is no longer employed.
2. The employee was employed by the employer mainly in Jersey.
3. The employer was liable to pay Class 1 contributions on the employee's behalf in one or more of the three months before the employer became insolvent.

The maximum amount of Insolvency Benefit a former employee can be paid is £10,000, plus the employer's liability for Social Security and Income Tax on any such payment. The Insolvency Benefit is calculated having regard to the pay owed to an employee by the former employer in respect of any of the following four elements:

1. Unpaid wages relating to the 12 months prior to employment ending.
2. Holiday pay relating to the 12 months prior to employment ending.
3. Statutory redundancy pay (one week's pay for each year of service, subject to a minimum of two years' service).
4. Pay in lieu of notice of termination of employment (up to 12 weeks' pay).

CREDITORS' WINDING UP

There are two types of creditors' winding up:

Debtor process

The shareholders of an insolvent company can, if the company's creditors agree, have the company's affairs wound up by an approved liquidator (usually an accountant in private practice).

Creditor process

A creditor must have a claim for not less than £3,000 to be able to make an application to the Royal Court for an order commencing the winding up. The creditor will need to demonstrate to the Court either that the order is being made with the consent of the company or provide evidence that the company is unable to pay its debts or is insolvent. As with the debtor process, the administration will be carried out by an approved liquidator.

These procedures are governed by Chapter 4 of the Companies (Jersey) Law 1991 and is a similar process to a *désastre*.

FURTHER INFORMATION

The Bankruptcy (Désastre) (Jersey) Law 1990 and its associated Rules and Orders are accessible free of charge on the Jersey Legal Information Board website at www.jerseylaw.je.

The textbook entitled “Jersey Insolvency and Asset Tracking” is available through the States Greffe Bookshop, or via the Jersey Legal Information Board website at www.jerseylaw.je.

A list of Jersey Law firms (Advocates and Solicitors) is available on the Jersey Legal Information Board website at www.jerseylaw.je.

Other helpful organisations include:

Jersey Legal Aid Office: www.legalaid.je

Citizens Advice Jersey: www.citizensadvice.je

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