

BANKRUPTCY LAWS IN THE BAHAMAS

McCartney's Short Commentary

Depending on your cultural background the concept of bankruptcy may take on slight technical differences, however the base definition of the word refers to a situation in which a person, company or any other entity goes financially broke. Various jurisdictions such as the US for example, may have various forms of bankruptcy which may involve the individual or entity admitting not being able to pay his debts, or declaring that a company requires some form of corporate reorganization or financial restructuring. Nevertheless, bankruptcy refers to a situation whereby the assets of a Debtor who is unable to, or refuses, or neglects to pay his debts, are administered and distributed amongst his Creditors by an order made by a judicial court.

Legal Foundation

In The Commonwealth of The Bahamas, the law of bankruptcy is governed by the Bankruptcy Act of 1870, and its formal procedures called the Bankruptcy Rules 1958 in the Act's statutory subsidiary follow the first and second schedules of the United Kingdom's Bankruptcy Act of 1915. It is important to note that the Bankruptcy Act of 1870 refers to individual Debtors only, and excludes partnerships, associations, and incorporated companies from being adjudged bankrupt (S3, Bankruptcy Act 1870). Nevertheless should one wish to initiate bankruptcy proceedings against a company incorporated in The Bahamas, proceedings should be taken under the Companies Act of 1992, which specifies the procedures in which directors and corporate officers may be held personally liable for actions conducted by the company.

Who Can Become Bankrupt?

Bankruptcy legislation in The Bahamas allow an individual to petition for their own bankruptcy (S94, Bankruptcy Act 1870), however in normal circumstances Creditors either alone or jointly, may apply for a debtor to be made bankrupt. It is also important to note that only persons residing, conducting business in The Bahamas, or holding assets within The Bahamas are subject to the local bankruptcy laws (S4 (1) (2) (3), Bankruptcy Act 1870).

Grounds for Adjudging a Person Bankrupt

Some of the grounds for adjudging an individual bankrupt are based upon acts deemed to be "acts of default" under the Bahamian bankruptcy laws include:

- Must be indebted to a Creditor for the minimum sum of B\$200.00 (S4, Bankruptcy Act, 1870);

- Where the Debtor has made a fraudulent conveyance, gift, delivery, or transfer of his property or any part thereof (S4(2) Bankruptcy Act, 1870);
- Where the Debtor has, with the intent to defeat or delay his liability to his creditors, departed out of The Bahamas, or being out of The Bahamas, remains out of The Bahamas, or being a trader, departed from his dwelling house, or otherwise absented himself (S4(3) Bankruptcy Act, 1870);
- Where the Debtor has filed in the prescribed manner in the Court a declaration admitting his inability to pay his debts, etc.
- Where the Debtor is deemed to be a judgment debtor by the judicial court;
- Where the Debtor's Summons demanding payment and the Debtor fails to pay the amount owed within 3 weeks.

Commencing Bankruptcy Procedures in The Bahamas

Bahamian bankruptcy laws indicate that an act of default by the Debtor must be committed within the period of 6 months prior to the commencement of the bankruptcy proceedings.

In acting within the statutory period mentioned above, Creditors will usually file a Debtors Summons. This is a statutory demand which requires the Debtor to either:

- Pay the relevant amount;
- Offer to secure the amount owing against a property;
- Offer to repay the debt in a way that is satisfactory to the Creditor, i.e., payments made by way of installments (S5, Bankruptcy Act, 1870)

Upon commencement of the proceedings an application is made to the Supreme Court using a Bankruptcy Petition supported by an Affidavit verifying the statement contained in the Petition, and both documents must be served on the Debtor (S62 (1) Bankruptcy Act 1870). Upon filing a copy of the documents within the Supreme Court Registry, the Supreme Court will hear the Petition and will make an Judgment Order.

After 21 days (7 days allowed for individuals involved in trade) the Creditor can petition for a Bankruptcy Order (S4 (6), Bankruptcy Act 1870). If the Debtor wants to avoid bankruptcy he should consider:

- Making payments to reduce the debt to less than the sum of \$200.00, or;
- Apply to have the statutory demand set aside (S7, Bankruptcy Act 1870).

Setting Aside a Debtors Summons

Up to 21 days after the serving of the Debtors Summons, the Creditor can petition for the Debtor's bankruptcy unless it has been set aside (S5, paragraph 2, Bankruptcy Act 1870).

An application to set aside the Debtors Summons can be made if:

- There is a substantial dispute about the money owed (S7, Bankruptcy Act 1870);
- There is a counterclaim of more than the money owed;
- The Creditor holds security that equals/ exceeds the debt in value (S4, final paragraph, Bankruptcy Act 1870);
- On other grounds, which can include:
 - The demand was issued in error, e.g., for a secured debt or for an amount of less than \$200.00;
 - Execution has been stayed on a judgment;
 - Negotiations pending the liquidation of the affairs by arrangement or for the acceptance of a composition by the Creditors (S62 (7), Bankruptcy Act, 1870);
 - The Creditor has failed to comply with the rules and prejudiced the Debtor in the process;
 - The Court may feel the need to require more information from the Creditor

Judgment Orders Made by the Supreme Court of The Bahamas

At the court hearing the Judge can decide one of 3 things:

- Dismiss the Bankruptcy Petition (S5, paragraph 2, Bankruptcy Act, 1870);
- Order a 'stay' in proceedings, i.e., suspend the proceedings if it feels it requires further information to make a decision (S62 (7), Bankruptcy Act, 1870);
- Make an Order for Bankruptcy.

If and when a Judgment Order is made, declaring an individual bankrupt, a copy of the said Order adjudging the Debtor to be bankrupt is then published and advertised in the local gazette (an official publication which contains legal notices) and shall be conclusive evidence of such adjudication of the Bankrupt (S8, Bankruptcy Act 1870).

Trustee in Bankruptcy

Upon Judgment the Court, and on application made by the Creditors, the Court will summon a general meeting of the Bankrupt's Creditors and by resolution, creditors will appoint a 'Trustee of the property of the Bankrupt'. This is an official Receiver, a Trustee, or a Registrar which has the responsibility for administering the bankruptcy and protecting the assets from the date of the Bankruptcy Order (S12, Bankruptcy Act 1870). He will also act as trustee of the bankruptcy estate unless an insolvency practitioner is appointed.

The Trustee has the power to appropriate the Bankrupt's property and is also responsible for investigating the financial affairs for the period before and during the bankruptcy administration process. He is obligated to report his findings to the Court and to the Creditors (S23, Bankruptcy Act, 1870). The Trustee will also give notice of the bankruptcy order to local authorities, utility suppliers, courts, bailiffs, investors, and any other relevant professional bodies. Enquiries will also be made to local banks, credit unions, mortgage, pension, and insurance companies, attorneys, landlords, and any other persons or organizations who may be able to provide details of any assets or liabilities that the Bankrupt has, or has had an interest in (either on his own, or jointly with others).

Creditor Inspection Committee

The appointment of a 'Creditor Inspection Committee' of no more than 5 Creditors who will oversee the administration of the Trustee of the Bankrupt's property (S12 (3), Bankruptcy Act, 1870).

Preferential and Excluded Debts

Preferential debts, which will be considered by the Court and the Creditors include debts owed to the Government, 'servant wages' no more than 4 months, and National Insurance Contributions.

Excluded debts which will be considered by the Court and all Creditors include property held by the Bankrupt on trust for others, tools of his trade, clothing and bedding belonging to his spouse, and children and himself valued to the sum of \$80.00.

Bahamas Bankruptcy Laws used as a Double Edged Sword

The assertion that The Bahamas laws on Bankruptcy may be used as a double edged sword can be derived from section 10 of the Bankruptcy Act 1870, whereby some level of protection is granted to an individual declared bankrupted. No doubt, section 10 of this act bounds the Creditor to the adjudication of the Court in respect to the bankruptcy proceedings which states:

“Where a Debtor shall be adjudicated a bankrupt, no creditor to whom is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt, except in matter directed by this Act, but this section shall not affect the power of any creditor holding a security upon the property of the Bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed.”

Clearly stated, it is evident that section 10 provides more or less, a loophole for a bankrupt to avoid further actions against Creditors for debt.

Implications of Bankruptcy

If an individual is declared bankrupt in The Bahamas, he can expect that the following results may occur:

- Lose control of assets;
- Can not act as a company director or trustee, nor be involved in the incorporation of a Bahamian company (S83, S93, Companies Act 1992);
- Professionals, such as Attorneys, Accountants, etc. may be barred from practice;
- May be barred from exercising or furthering legal action within the Bahamian Courts;
- May be barred from holding public office within The Bahamas.