

Bankruptcy in
Ireland:
A Process Best
Avoided?

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BANKRUPTCY IN IRELAND: A PROCESS BEST AVOIDED?

There has been some recent publicity about a well known celebrity chef in Northern Ireland attempting to reach a deal with his creditors to avert a petition to have him declared bankrupt. Apparently, the celebrity is working with his advisers to reach what is called an Individual Voluntary Arrangement (“**IVA**”) with creditors. The IVA is a relatively cheap, court-supervised, legal process that is available in parts of the United Kingdom which allows individuals to work with an insolvency practitioner to reach agreement with creditors and thereby avoid the publicity and stigma of bankruptcy.

So why don't we hear more about IVA's in Ireland? The simply reason is that there is really no equivalent to the IVA in Ireland. We have a court-controlled system for seeking to make arrangements with creditors but it is such an unwieldy, expensive, process-laden system and is so unattractive to overburdened debtors and to out-of-pocket creditors that proceeding with a bankruptcy usually seems the more rational alternative. It is no secret that our bankruptcy laws are in need of change.

What is bankruptcy?

To quote the oft-used definition, “Bankruptcy is a law for the benefit and the relief of creditors and their debtors, in cases in which the latter are unable and unwilling to pay their debts.”

Either a debtor or a creditor may petition the High Court to have the debtor adjudicated bankrupt. A primary pre-requisite to bringing the petition is that there is liquidated debt of more than €2,000 owing. Bankruptcy law is said to act for the benefit and relief of debtors because, for an admittedly heavy price, it frees debtors of the burden of excessive debt and of vindictive creditors and allows the debtors eventually to make a fresh start. Bankruptcy law is said to act for the benefit and relief of creditors because it secures some equality of distribution of the bankrupt's assets and property among the creditors and, of course, punishes fraudulent debtors.

A bankrupt is somebody who has been adjudicated bankrupt by an order of the High Court. Once a debtor is adjudicated bankrupt, bankruptcy law requires the mandatory vesting of all of the bankrupt's assets and property (including his family home, all of his stocks and shares and all assets and property acquired by the bankrupt after being adjudicated bankrupt) in the person of an Official Assignee (or sometimes in the person of a private trustee).

Under the supervision of the Court, the Official Assignee will realise the bankrupt's assets and distribute the assets rateably among the creditors. The Court will take account of the bankrupt's family responsibilities and of his personal situation. The Court may, for example, delay the sale by the Official Assignee of the debtor's family home.

The bankruptcy process does not have many attractions for either the bankrupt or his creditors. For the bankrupt, there is the unfortunate stigma attached to being declared bankrupt. If a person is adjudicated bankrupt, a notice of the adjudication must be published in *Iris Oifigiuil* (i.e. an official publication in Ireland) and in one national and one local newspaper. The specific legal effects of bankruptcy are described below. For the creditor perhaps the most noticeable pitfall in the bankruptcy system is the fact that the petitioning creditor gains no priority over other creditors in relation to the payment of his debt if he makes the debtor bankrupt. The petitioner, whether debtor or creditor, must also indemnify the Official Assignee as to his costs, fees and expenses.

The Legal Effects of Bankruptcy

When a debtor is adjudicated bankrupt, the most notable effects on his personal situation are as follows:

- (a) All the debtor's assets and property vest automatically in the Official Assignee. It will be of little comfort to the bankrupt to know that the Bankruptcy Act 1986 allows the bankrupt to retain "such articles of clothing, household furniture, bedding, tools or equipment of his trade or occupation or other necessaries for himself, his wife, children and dependent relatives residing with him, as he may select, not exceeding in value [€3,175] or such further amount as the Court on an application by the bankrupt may allow".
- (b) The bankrupt must disclose to the Official Assignee any property acquired after being adjudicated bankrupt.
- (c) Any payment or any transfer of property by the bankrupt to a creditor in preference over other creditors that took place in the six-month period prior to being adjudicated bankrupt shall be deemed to have been fraudulently done and may be undone or otherwise dealt with by the Court (subject to certain exceptions for bona fide recipients or transferees).

- (d) Any sale of property at an under value that the bankrupt carried out in the three-month period prior to being adjudicated bankrupt may be avoided and undone by the Official Assignee (subject to certain exceptions for sales to bona fide purchasers).
- (e) Any person who is known or suspected to have in his possession or control any property of the bankrupt or to have disposed of any property of the bankrupt or who is supposed to have indebtedness to the bankrupt or any person who is capable of giving information relating to the trade, dealings, affairs or property of the bankrupt may be summonsed by a Court.
- (f) The bankrupt's salary is likely to be attached in favour of the Official Assignee.
- (g) The Court may make to the bankrupt out of "his" assets (those that now vest in the Official Assignee) such allowances as the Court thinks proper in any special circumstances brought to its attention.
- (h) Certain of the bankrupt's post may be re-directed to the Official Assignee.
- (i) It is an offence for the bankrupt to act as an officer of or directly or indirectly take part or be concerned in the promotion, formation or management of any Irish company or even of any foreign company which has an established place of business in Ireland.
- (j) The bankrupt cannot obtain credit over €630 without disclosing his status as a bankrupt.
- (k) After twelve years the bankruptcy may be discharged.

The bankrupt commits an offence if he does not disclose all his property to the Court or conceals any part of his estate or if he obtains by false representation any property or credit. Offences carry the penalty on summary conviction of a fine not exceeding €630 or up to twelve months prison or both and on indictment of a fine not exceeding €1,000 or up to five year prison or both.

The Priorities of Creditors' Claims

The costs of the bankruptcy rank in priority to all other claims. After that, the priority of claims is very similar to that which applies in the case of a company's liquidation. Priority is next given to preferential claims such as those relating to local rates due from the bankrupt and

all property and income tax assessed on him. These preferential claims, which also include wages and salaries that the bankrupt owes, rank equally between themselves. Thereafter, non-preferential claims rank equally as between themselves also.

Alternatives to Bankruptcy

Part IV of the Bankruptcy Act, 1988 prescribes the Irish process for entering into settlement arrangements with creditors while being under the supervision and protection of the Court. It is a court-controlled process and necessarily requires a number of court hearings. This all takes time and money. The IVA process in the UK that is referred to at the opening of this article gives more control of the settlement process to the debtor and, more particularly, to the insolvency practitioner that the debtor retains. This allows the courts to adopt a more hands-off and less intrusive approach.

Conclusion

There has been much speculation of late that the number of bankruptcy petitions in Ireland will increase considerably over the next few months and years. It is a pity that we do not have the legal systems and processes in place to assist debtors in coming to arrangements with their creditors and thereby giving those debtors a chance to avoid being adjudicated bankrupt.

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