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Personal Insolvency - the current position

10 February 2011



By O'Gradys Solicitors

Personal Insolvency in this jurisdiction is currently governed by the 1988 Bankruptcy Act. In March 2010 - following on from The Law Reform Commission's (LRC) Interim Report - the Government introduced the Company Law (Miscellaneous Provisions) Bill 2010 which included proposed amendments to the current Bankruptcy regime.

The publication of the Bill was initially met with considerable enthusiasm however a closer examination of its terms confirmed that in reality the proposed amendments would have little practical impact.

The March 2010 Bill introduces, for the first time, an entitlement for a Bankrupt to be automatically discharged after 20 years. Whilst the introduction of an automatic discharge is to be welcomed, the 20 year period is excessive and somewhat of a life sentence for a Debtor.

The Bill also introduces a new "6 Year Rule" which provides that a Bankrupt may be discharged from his Bankruptcy after a period of 6 years however, the finer detail of the text indicates that in order for a Bankrupt to avail of this 6 year discharge, he must firstly:-

- Realise his Estate in full;
- Pay the costs, fees and expenses of the Official Assignee (OA);
- Pay his Preferential Creditors in full;
- Disclose all of his after acquired property;
- The Court must confirm it is reasonable and proper to discharge the Bankrupt.

In reality, the likelihood of an individual debtor emerging from Bankruptcy under the proposed 6 Year Rule is extremely limited. Many individuals currently facing bankruptcy, particularly property developers who have availed of significant capital allowances which will be clawed back if they are declared bankrupt, will have significant Preferential Revenue debts. In the current climate, even if their Estates are fully realised, sufficient funds may not be generated to discharge the costs, fees and expenses of the OA together with the preferential debt. In addition, if an Estate is to be fully realised, the family home must be offered up to the OA which means that the family home will either have to be sold (with the Bankrupts portion of the proceeds being lodged with the OA) or the Spouse of the Bankrupt will have to seek to purchase the interest of the OA if the home is to remain within the family. Again many Spouses are currently finding it difficult to come up with the necessary funds to purchase the interest of the OA in the family home.

When the March 2010 Bill was introduced, it was acknowledged by both the Commission and the Government that this was an interim measure and both Bodies were acutely aware that an overhaul of the entire Bankruptcy process was required.

The LRC went so far as to describe the 1988 Act as being based on "the philosophy of punishment" and criticised the Act as being unable to provide an effective system of personal insolvency law capable of serving the needs of the credit society. The failure of the 1988 Act was also highlighted by reference to the extraordinary low numbers of Bankruptcies in Ireland when compared with similar legal systems. In 2009, 17 people were adjudicated Bankrupt in the Republic of Ireland. In the year up to the 30th September, 2010 the figure was only 19. This contrasts hugely with the statistics for Northern Ireland where there were 1,237 Bankruptcies during the same period.

The LRC has acknowledged that, after 20 years under the current regime, the opportunity now exists to bring Irish Bankruptcy Law into line with our European Partners.

Proposed Reforms in Personal Insolvency

On the 16th December, 2010, the LRC launched its Report on Personal Debt Management and Debt enforcement. The Report, which runs to 440 pages makes 200 recommendations for reform which advance significantly on the measures proposed by the Commission in its May 2010 Interim Report.

The main proposed reforms to current Bankruptcy Legislation are:-

1. An automatic discharge from Bankruptcy after 3 years subject to:-
 - Leaving the Bankrupts full Estate (including any house) in the Bankruptcy and
 - Allowing the Official Assignee in Bankruptcy to order the Bankrupt to make repayments for up to 5 years.
2. An increase in the minimum debt level necessary to bring forth a Creditors Bankruptcy Petition from €1,900.00 to €50,000.00.

3. Revenue to lose its preferential status in the Bankruptcy process.

4. The introduction of a system in Personal Insolvency similar to Section 150 / Section 160 of the Companies Acts (Restriction/Disqualification of Company Directors).

The LRC has also recommended radical changes to the processes and procedures which deal with Personal Debt Settlements. The Report recommends the creation of a Debt Enforcement Office which would oversee an out of Court debt settlement system. It is proposed that, for those individuals who are in a position to discharge at least some of their debts, the Debtor and his Creditors (under the supervision of a Personal Insolvency Trustee) would enter into a legally binding commitment whereby an agreed amount of the debt would be repaid over a period of up to 5 years. The process will require the support of 60% of Creditors and obliges the Debtor to make full disclosure of all assets and to act in good faith. Should the Debtor comply with the Debt Settlement Arrangement, he will be deemed to have repaid his debts in full and will be in a position to "draw a line in the sand" and start afresh.

Where a Debtor has no prospect of ever repaying any proportion of his debt, it is proposed, that the Debt Enforcement Office could make a once off Debt Relief Order. The effect of this Order would be to deem all of the debts discharged, unless the Debtors circumstances changed dramatically.

One obvious shortfall is that Mortgage related debt will fall outside this process unless the Mortgage Provider has crystallised the Mortgage debt through enforcement proceedings.

Finally, the LRC has also recommended that the practice of imprisoning individuals for failure to pay debts be abolished, replacing the sanction for those who "can but won't pay", with a Community Service Order.

Conclusion:

The Recommendations contained in the December 2010 LRC Report are long overdue and are a considerable improvement on the March 2010 Bill. As to when we might expect to see the Recommendations implemented, it now falls to the Government to introduce the necessary legislation. The Government has entered into a Letter of Intent and Memorandum of Understanding with the EU/IMF committing the Government to bring legislation before the Oireachtas before the end of the first quarter of 2012. It is to be hoped therefore that by the end of 2011/early 2012 we will see personal insolvency in this jurisdiction evolve into a process more befitting of the current social and economic environment and which will bring Irish Bankruptcy Law into line with modern European insolvency standards.

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Facilitated by Kavanagh Fennell - Insolvency & liquidation experts

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