



## Bankruptcy in Ireland 2009

How effective is bankruptcy as a means of recovery of debt?

What are the procedures involved?

Bankruptcy is a legal process where an individual who is unable or unwilling to discharge their debts is declared "bankrupt" by order of the court. Upon being declared bankrupt, the property or assets of that individual are transferred to the Official Assignee or a trustee to be sold. The proceeds from such a sale are distributed equitably amongst the individual's creditors on a pro-rata basis subject to the rule of preference.

The bankruptcy process was not widely pursued by creditors in Ireland in recent years due to the protracted and complex nature of the procedure, the legal costs involved, the devastating effect upon a debtor and the positive economic environment. But this is changing: recent figures published by the Courts Service show that 30 petitions were presented in 2007, 17 in 2008 and bankruptcy petitions lodged in the High Court in 2009 have increased even more. Undoubtedly the number of petitions will increase again primarily as a result of the significant downturn in the economy and in particular the problems associated with the personal guarantees given as security for significant loans.

In this respect, the following two recent Supreme Court decisions are noteworthy:

- *B.D. v. J.D.* [2008] (Unreported High Court, Dunne J., December 2008)
- *Harrahill v. Cuddy* (Unreported Supreme Court, Geoghegan J, *ex tempore*, February 2009).

Both of these decisions have made bankruptcy a more viable remedy for those seeking orders to pursue a debt. This is the case whether the debts arise from a judgment (including family law orders) and also where the debt is not actually as a result of a judgment but an uncontested debt.



## How to Begin the Bankruptcy Process?

It is important to note that a debtor must commit an “act of bankruptcy” before bankruptcy proceedings can be initiated.

**Section 7** of the relevant legislation (the Bankruptcy Act 1988<sup>1</sup>) sets out the instances in which an individual commits an act of bankruptcy:

### **7.—(1)**

- (a) *if in the State or elsewhere he makes a conveyance or assignment of all or substantially all of his property to a trustee or trustees for the benefit of his creditors generally;*
- (b) *if in the State or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof;*
- (c) *if in the State or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudicated bankrupt;*
- (d) *if with intent to defeat or delay his creditors he leaves the State or being out of the State remains out of the State or departs from his dwelling-house or otherwise absents himself or evades his creditors;*
- (e) *if he files in the Court a declaration of insolvency;*
- (f) *if execution against him has been levied by the seizure of his goods under an order of any court or if a return of no goods has been made by the sheriff or county registrar whether by endorsement on the order or otherwise;*
- (g) *if the creditor presenting a petition has served upon the debtor in the prescribed manner a bankruptcy summons, and he does not within fourteen days after service of the summons pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor.*

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<sup>1</sup> as amended by SI 595 of 2001



Generally the most common grounds for a creditor's petition are those in Sections 7(1)(f) and (g) i.e. execution against goods and by way of a bankruptcy summons.

It is important to note in the decision of *Harrahill v. Cuddy*, the Supreme Court stated that the practice which had developed in the High Court whereby an unsatisfied judgement and a nulla bona was required before a bankruptcy summons would issue, was incompatible with the Bankruptcy Act.

This judgment has the effect of shortening the time frame in which bankruptcy proceedings can be brought, and reducing the costs of bringing bankruptcy proceedings. Creditors can now proceed to issue a bankruptcy summons as long as they have complied with requirements of the Act.

### Application to make a Debtor Bankrupt

The application for bankruptcy is made *ex parte* (i.e. without having to give notice to the other party). The procedure is set out in Section 8 of the Bankruptcy Act and a Particulars of Demand and Notice is initially sent prior to the issue of the bankruptcy summons. The court will require evidence that the debt is liquidated and that the Particulars of Demand was served. The amount on the summons must be exact as otherwise there is a risk that the summons will be dismissed.

There are other requirements under the Act which a creditor must also heed when a petition is being presented to the court. **Section 11(1)** of the Act sets out same:-

*"A creditor shall be entitled to present a petition for adjudication against debtor if*

- (a) the debt owing by the debtor to the petitioning creditor (or if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to €1,900 or more,*
- (b) the debt is a liquidated sum,*
- (c) the act of bankruptcy on which the petition is founded has occurred **within three months** before the presentation of the petition, and*
- (d) the debtor (whether a citizen or not) is domiciled within the State or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in the State or has carried on business." (emphasis added).*



One would anticipate that some debtors may try and avoid a petition of bankruptcy against them and rely on Section 11(1)(d) as a defence. It is worth noting that a foreign resident who is not domiciled in Ireland but whose centre of main interests ("COMI") within the meaning of Article 3 of EU Insolvency Regulation (1346/2000) can be deemed to be domiciled for the purposes of Section 11(1)(d).

Creditors should bear in mind the requirement that the act of bankruptcy must have taken place within three months of the presentation of the petition. The time limits are strict in this respect. Debtors will accordingly be put under considerable pressure to address matters upon receipt of a demand for payment.

### Obstacles A Creditor Will Encounter From A Debtor

Although a creditor can now proceed to petition for bankruptcy without formal judgment, it is nevertheless advisable to obtain such judgment where the debt is disputed by the debtor. There are circumstances where a debtor can make an argument against adjudication or can have the adjudication set aside for cause. Section 8(6)(b) of the Bankruptcy Act states that the court must dismiss an ex parte application for bankruptcy summons where it is satisfied that an issue would arise for trial.

A debtor, when faced with an application for bankruptcy, would be advised to prepare a statement of affairs to show the creditor the extent of assets which are available. This will sometimes help in the early settlement of the proceedings.

### Debtors Petition And Other Options Open To A Debtor

A creditor should bear in mind that a debtor can bring his own petition for bankruptcy and that the Superior Court Rules Order 76, Rule 26 sets out the form in which such a petition is made. This would not be a route generally taken by a debtor in cases where the rules of discharge are very strict and the bankrupt may not be discharged until 12 years have elapsed from the date of the bankruptcy order.

In the UK, there were over 50,000 bankruptcies in 2008 and in the United States there were over a million personal bankruptcies. In the UK a formal bankruptcy will last 12 months and at the end of the period the bankrupt is discharged and ceases to be liable for his bankruptcy debts.



In the US the most common types of personal bankruptcy for individuals are under Chapter 7 and 13 of the Bankruptcy Code. Essentially a Chapter 7 filing cancels debt while a Chapter 13 filing facilitates the re-structuring of debt.

Some Irish debtors may try to relocate to other jurisdictions with less harsh personal insolvency laws to circumvent the bankruptcy process in Ireland but there is no guarantee that they would be successful.

It is also open to a debtor to enter into a voluntary arrangement with creditors to settle debts due to them to avoid bankruptcy proceedings. This process is called composition. The arrangements are made outside the control of the High Court and therefore are less expensive from the perspective of legal costs and court duty, which can be as high as 15% of the value of the assets.

Another alternative available to a debtor is to apply for an arrangement under the supervision of the High Court. In effect, the debtor requests protection from the court against proceedings to give them time to present a proposal to their creditors. Any such proposal must receive the support of at least 60% in number and value of the unsecured creditors voting on it in order to succeed. The costs, court fees, expenses and preferential debts must also be discharged in full.

## Implications of Bankruptcy For A Debtor

All property held by the bankrupt will vest in a court official called the "Official Assignee" for the benefit of the creditors. The Official Assignee will then sell the property and distribute the proceeds.

- The bankrupt may not carry on the role of a manager, auditor, liquidator, receiver or most importantly, a director of a company.
- The bankrupt is entitled to continue in employment subject to the caveat that the High Court may appropriate their salary or pension for the benefit of the creditors.
- The bankrupt cannot hold certain positions as an elected representative.
- The bankrupt cannot obtain credit over €630 without disclosure of his status whereby a bankrupt will encounter grave difficulty continuing in business.
- The bankrupt will not inherit as an inheritance will be distributed amongst the creditors.



- With respect to the family home, this can also be appropriated by the Official Assignee. If the home is jointly owned, the Official Assignee must apply to the High Court for permission to sell. A court will take into account the needs and financial resources of the spouse and offspring but the interests of the creditors will remain a priority. If the court makes a decision to sell the family home, the proceeds will be used to initially discharge the mortgage with the remaining money being divided equally between the non-bankrupt spouse and the official assignee.
- Once a person is made bankrupt their name and address is entered into the bankruptcy register, which has implications when one is buying or selling property as searches are conducted against this register.
- **Anyone who is made a bankrupt will remain so for a period of at least 12 years** from the date of the bankruptcy order unless they have been discharged by the court under Section 45 of the Bankruptcy Act. In order to obtain a discharge, the costs of the assignee, High Court fees, costs of the petitioning creditor and preferential debts of the bankrupt must be paid in full. Even after the expiration of the 12 year period, discharge is not automatic and requires an application to the court. Furthermore the bankrupt whether discharged or not will remain on the register of bankruptcies indefinitely in Ireland, unlike the UK where a bankrupt's name is removed from the register three months after their discharge.



## Conclusion

For the reasons cited above creditors must pay particular attention to whether they can satisfy the criteria of the Bankruptcy Act when presenting a petition and must also bear in mind the obstacles that can arise.

Bankruptcy is a difficult journey in pursuing monies due, but where a creditor is satisfied that they can meet the criteria and are aware that the debtor has assets to discharge their debts, they should act with utmost speed.

The remedy of bankruptcy will undoubtedly strike significant fear into any debtor as the implications are so serious in this jurisdiction. A creditor should be aware that proposals to satisfy debts may be approved by the court even when they are not to the satisfaction of the creditor. However as these may be the only prospect of payment, a creditor should take them into account.

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