

On the 24th June, 2011 The Minister for Justice Equality and Defence announced the Publication of the Civil Law (Miscellaneous) Provisions Bill 2011 ("the Bill")

The Bill provides for a number of reforms across a broad range of civil and regulatory law and includes a number of important amendments to Irish Bankruptcy Law. The proposed amendments to the Bankruptcy Act 1988 ("the Act") are contained in Part 7 of the Bill.

S85 - Discharge and Annulment

The most significant amendment is to Section 85 of the Act which sets out the circumstances upon which a Bankrupt may be discharged from Bankruptcy. It is anticipated that this section of the Bill will have a commencement date of the 1st October, 2011.

Automatic Discharge (12 years)

The Bill provides for an automatic discharge from Bankruptcy after a period of 12 years. Any property of the Bankrupt which remains vested in the Official Assignee in Bankruptcy at this date shall be returned to the Bankrupt and such property will re-vest in the Bankrupt for his own use and benefit. However, before such property can be returned to the Bankrupt provision must be made for the payment of the costs, fees and expenses of the Bankruptcy and the debt due to any Preferential Creditor. If however, at the 12 year anniversary of the Bankruptcy, there is no property available to re-vest in the Bankrupt he will still be discharged and will have no obligation to pay the costs, fees and expenses of the Bankruptcy or to discharge any of his Preferential Creditors. The Debtor will simply be discharged, a line will be drawn in the sand, and he will be free of his historic debts.

It is anticipated that this proposed amendment to the legislation will affect more than 365 cases currently in the system.

Conditional Discharge (5 years)

The Bill, also introduces a new "5 Year Rule" which provides that a Bankrupt may apply to Court for an Order discharging him from Bankruptcy after a period of 5 years. In order to avail of this provision, a Bankrupt must firstly be in a position to prove that he has;

- (a) Realised his Estate in full;
- (b) Paid the costs, fees and expenses of the Official Assignee in Bankruptcy;
- (c) Paid his Preferential Creditors in full;
- (d) Disclosed all of his After Acquired Property;
- (e) The Court must also confirm that it is reasonable and proper to discharge the Bankrupt.

In reality, it will remain extremely difficult for a Debtor to emerge from Bankruptcy under the proposed 5 Year Rule as the payment of the Preferential Debt (outstanding taxes, clawed back capital allowances etc) will have to be discharged in full prior to any

Application to Court to be discharged. The Court will also have to be satisfied that the Bankrupt's Estate has been fully realised which means that the Family Home will either have to be sold (with the Bankrupt's portion of the proceeds being lodged with the Official Assignee for the benefit of his Creditors) or the Spouse of the Bankrupt will have to seek to purchase the interest of the Official Assignee if the Home is to remain within the Family. In the current climate, many Spouses will find it difficult to come up with the necessary funds to purchase the interest of the Official Assignee in the Family Home.

It had been hoped that the Government would take this opportunity to remove such obstacles from Debtors seeking to be discharged from Bankruptcy as, even under the proposed amendments to the Legislation, our Bankruptcy system remains punitive and out of line with our closest neighbours in the United Kingdom where an individual can be discharged from a Bankruptcy after 12 months.

S57 & s58 - Amendment to the Provisions regarding Fraudulent and Voluntary Conveyances:

There are significant amendments to Section 57 and 58 of the Bankruptcy Act which provides for the avoidance of fraudulent preferences in Personal Insolvency. The Act renders invalid every Conveyance or Transfer of property and every Charge created against property which was carried out by an individual who was adjudicated Bankrupt within 6 months of the date of the Conveyance, Transfer or creation of the Charge. The proposed amendment to Section 57 increases this period of 6 months to a period of 1 Year.

Section 58 which deals with the avoidance of certain transactions has also been amended to the effect that if, within a period of 1 Year (originally 3 months) before he is adjudicated Bankrupt, a Debtor commits an act of Bankruptcy and thereafter either sells any of his property at a price which, in the opinion of the Court, is substantially below its market value or enters into or is a party to any other transaction which, in the opinion of the Court, has the effect of substantially reducing the sum available for distribution to his Creditors, then such transaction shall be void as against the Official Assignee. The onus will be upon the person benefiting from the Transfer to prove that the transaction was bona fide entered into and that the beneficiary had not, at the time of the transaction, notice of any prior act of Bankruptcy committed by the Bankrupt.

Technical Amendments

The Bill also proposes a number of technical amendments to the Bankruptcy Act, 1988 and same can be summarised as follows:-

Section 11 (i) (d) has been amended to provide that a Creditor shall be entitled to present a Petition for Adjudication against a Debtor if the Debtor (whether a Citizen or not) is domiciled in the State or, within 3 Years before the date of the presentation of the Petition, has ordinarily resided or has had a dwelling house or place of business in the State. This Section previously only applied to Debtors who were either domiciled in the State or, who were, within 1 Year before the date of the presentation of the Petition, ordinarily resident in the State. This proposed amendment may conflict with the European Insolvency Regulation in respect of a

debtor's Centre of Main Interests (COMI).

Section 18 of the Act has been amended to insert a Section 18 (a) which provides that the Revenue Commissioners must, when requested to do so by the Official Assignee in Bankruptcy, furnish information to the Official Assignee on the person adjudicated Bankrupt in relation to the carrying on of any trade or profession or in relation to any matter in respect of which a return is required to be made to the Revenue and to which the Bankrupt is, or was, a party.

Section 75 (Debts Provable in Bankruptcy and Arrangements) has also been amended to the effect that where interest, or any pecuniary consideration in lieu of interest, is reserved or agreed for on a debt which is overdue at the date of adjudication, the Creditor shall be entitled to prove or to be admitted as a Creditor for such interest or consideration up to the date of adjudication.

What next?

The Government has acknowledged that the amendments to the Bankruptcy Legislation contained in the Civil Law (Miscellaneous) Provisions Bill, 2011 are imply an interim measure designed to address a key commitment in the Programme for Government to reduce the discharge time for Bankrupts. The Government has confirmed that major reform of this area will be effected through a Personal Insolvency Bill which is expected to be published in early 2012 pursuant to the Memorandum of Understanding which the Irish State entered into under the EU/IMF Programme of Financial Support for Ireland.

It is to be hoped that the Personal Insolvency Bill will introduce a more radical reform of Personal Insolvency Legislation in this Country, and perhaps implement some of the Recommendations which were contained in the Law Reform Commission Report of December 2010 which proposed, amongst other matters an automatic discharge from Bankruptcy after 3 Years together with an abandonment of the preferential status afforded to the Revenue Commissioners in the Bankruptcy process.