

Bankruptcy & The Official Assignee



COURTS SERVICE
An tSeirbhís Chúirteanna

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MANAGEMENT OF SECTIONS
PART I







Foreword



'Bankruptcy' is a relatively common and often quoted term. However there is not widespread knowledge or understanding of legislation dealing with personal insolvency. This information booklet aims to fill this gap by providing information on bankruptcy legislation to interested parties, be they members of the public or legal practitioners. It does not intend to provide, or replace, legal advice.

Bankruptcy has serious implications not only for debtors and their creditors, but for family members and for others who have entered into business arrangements with bankrupts. This information booklet seeks to explain these implications. It also sets out the role of the Official Assignee in Bankruptcy, as well as his powers and responsibilities. It seeks to answer some of the common questions in relation to bankruptcy such as, can a bankrupt continue to earn a living, do all creditors have the same status and how can a bankruptcy be discharged.

Despite changed attitudes to debt and easier access to credit in recent years, there remains a stigma attached to those who are bankrupt as a consequence of their inability to pay debts. The legislation is complex and it can be daunting for an individual bankrupt, in particular where property, including a family home, may be sold. It can be difficult for creditors who are owed, at times, significant amount of funds. This information booklet seeks to set out principles on which the legislation is founded, in particular the manner in which it seeks to balance the rights of creditors with those of bankrupts and the obligations placed on all parties as a bankruptcy case progresses.

Bankruptcy is normally a last resort used by creditors, when all other means of securing payment of a debt properly due to them are exhausted, alternatively it is sometimes used by debtors to seek protection from their creditors. I hope this booklet will inform debtors and creditors as well as other interested parties of the basic principles and practices regarding bankruptcy legislation in this jurisdiction.

The Honourable Miss Justice Elizabeth Dunne

Contents

Introduction	3
General	4
What is Bankruptcy	4
How does a debtor become Bankrupt	4
The Consequences of Bankruptcy	6
The Bankrupt	6
The family of a bankrupt	10
Commercial relationship with a bankrupt	11
Creditors	11
Discharge From Bankruptcy	13
How long does bankruptcy last	13
How is a person discharged from bankruptcy	13
Legislation	15
Enquiries	15

Introduction

The staff of the Office of the Official Assignee have prepared this booklet for the assistance of members of the general public in relation to personal insolvency. This booklet is not intended to provide legal advice. If you wish to obtain legal advice in relation to a bankruptcy matter, you should consult a solicitor.

The office is located on the 2nd floor, Phoenix House, 15/24 Phoenix Street North, Smithfield, Dublin 7 - see map below. The office is open from 10.00 a.m. to 4.30 p.m. daily and can be contacted by telephone at 01 – 888 6166 or by fax at 01 873 3835 or by email at officialassigneeinbankruptcy@courts.ie. Information on bankruptcy is also available on the Courts Service website at www.courts.ie. The Official Assignee and staff of the Official Assignee's office deal with the day to day administration of most bankruptcy matters.

Court documents for the Bankruptcy list of the High Court are lodged with the Office of the Examiner of the High Court. This office also deals with the administration of pre bankruptcy matters and maintains a public register of bankrupts. The Office of the Examiner of the High Court can be contacted by telephone at 01 888 6298, by fax at 01 888 5260 or by email: examinersmail@courts.ie

The Bankruptcy list of the High Court is generally dealt with every Monday during court terms. More information on this list may be found on www.courts.ie under 'Legal Diary', 'High Court' and 'Bankruptcy'.

Phoenix House



General

Q. What is Bankruptcy?

- A. Bankruptcy is a process where the property or assets of an individual, who is unable or unwilling to pay their debts (called a debtor), is transferred to a person given charge of the property by the High Court (called a trustee) to be sold.

When the property or assets are sold, the costs, expenses, court fees and certain priority debts are paid. After this, the net proceeds are distributed to those owed money (the creditors).

In nearly all cases, the Official Assignee in Bankruptcy, a court official is the trustee to whom this property is transferred. This is the person who administers the estate of bankrupt persons.

Bankruptcy proceedings are brought in the High Court. The application for a Bankruptcy Order (as well as any other application for the Bankruptcy list of the High Court) is filed in the Office of the Examiner of the High Court. Following this, the proceedings are dealt with by the High Court.

Q. How does a debtor become Bankrupt?

- A. The High Court makes a debtor bankrupt either at the request of a creditor or at his own request. In either case, this request is made in a document called a petition. This must be filed in the Office of the Examiner of the High Court.

When the petition is filed, the petitioning creditor or debtor undertakes to the court to advertise notice of the bankruptcy in various newspapers.

The advertisement must also contain details of the place, date and time the matter will next come before the court (called the statutory court sitting).

The petitioner must also lodge €650.00 towards the costs and outlays of the bankruptcy in the Official Assignee's Office and give an undertaking to the Official Assignee as to the further costs and outlays which may be incurred.



Petition by a debtor:

A debtor may bring a petition for his/her own bankruptcy where he/she is unable to pay debts to creditors and where his/her available estate (for example assets and property) is sufficient to produce at least €1,900.00.

Petition by a creditor:

A creditor may petition for bankruptcy against a debtor where the debtor has committed an act of bankruptcy within the previous three months.

The most common acts of bankruptcy relied upon by a creditor are:

- (a) failure by the debtor to comply with a bankruptcy summons requesting payment of a specific sum due, within fourteen days from service of the summons on the debtor, and
- (b) the making of a return of no goods in respect of the debtor, by the sheriff or county registrar.

For a creditor to be entitled to petition the court to make a debtor bankrupt, a number of conditions must be met. These include:

- ▶ the petition must be presented within three months of the act of bankruptcy,
- ▶ the amount of debt owed must be set out in an affidavit,
- ▶ the debt owed must be at least €1,900.00,
- ▶ the debtor must be either resident in the State or within a year prior to presentation of the petition, have ordinarily resided, had a dwelling house or place of business, or carried on business within the State.

The creditor's petition must state whether any security (for example, a mortgage or a charge) is held by them in respect of the debt. If so, the creditor must indicate whether he/she intends to give up the security for the benefit of other creditors or put a value on their security.

The Consequences of Bankruptcy

Bankruptcy impacts not only on the person made bankrupt, but also on their creditors, as well as others, including their family members or people who have a commercial relationship with the bankrupt.

The Bankrupt

Q. Will others know that I have been made bankrupt?

A. Following adjudication (the court order making you bankrupt) a notice of this is published by the petitioning creditor or you (if you have made yourself bankrupt) in one national and one local newspaper. This notice will also contain information about the next statutory court sitting. A local newspaper is one which is published in the area where you live or carry on business.


Other creditors may appear at the statutory court sitting and may make a claim under the bankruptcy. Other notices are also published at various stages of the bankruptcy, such as advertising for creditors and notice of discharge of bankruptcy. A Bankruptcy Register is maintained in the Office of the Examiner of the High Court and searches can be made against this register.

Q. Can I stop the Bankruptcy?

A. You may apply to the High Court within 3 days of the service of the bankruptcy order on you, giving reasons why you should not have been made bankrupt. This is called a 'show cause' application.

Q. What am I required to do when I am made bankrupt?

A. You must co-operate fully with the Official Assignee's office in all matters relating to your bankruptcy. You must inform the Official Assignee if you change address. Initially you must attend for interview with the Official Assignee. You must also file a Statement of Affairs in the Office of the Examiner of the High Court. This document sets



out all of your financial details including assets held and all amounts owed by you. The statutory court sitting will only be passed in the High Court when your Statement of Affairs has been filed.

You also have other legal obligations in connection with the administration of your estate and assets. This includes:

- ▶ the delivery of your accounts or papers to the Official Assignee when requested,
- ▶ the delivery of your title deeds to property and any other possessions to the Official Assignee,
- ▶ assisting the Official Assignee in the administration of your estate, and
- ▶ disclosing any property acquired by you since the date of your Bankruptcy Order to the Official Assignee

Where you fail to co-operate with the Official Assignee, the High Court may summon you to examine you under oath.

Q. What happens to my property when I am made bankrupt?

- A. All property held by you when you are made bankrupt vests in the Official Assignee for the benefit of your creditors. The role of the Official Assignee is to sell or otherwise dispose of this property (called realisation) and distribute the proceeds to your creditors. A vesting certificate is lodged in the Office of the Examiner of the High Court and with the Property Registration Authority. This document records the interest of the Official Assignee in any property held by you at the date of adjudication. It means that you cannot sell or use this interest in the property as security to take out a loan.

The only property that does not vest in the Official Assignee is essentials up to a value of €3,100.00 (or more if the High Court allows). Any property you acquire after you are made bankrupt, transfers to the Official Assignee, if and when the Official Assignee claims it.

Q. What about property I own abroad?

- A. Under EU legislation, (EU Insolvency Regulations 2002) bankruptcy proceedings in Ireland may be recognised as proceedings in most other EU member states. In most cases, this should allow the Official Assignee to realise such property for the benefit of your creditors.

Q. Does it have implications for my salary and pension?

- A. Yes, the High Court may appropriate your salary or pension for the benefit of your creditors. However this is subject to any provision the High Court may make to meet your family responsibilities and your personal situation.

Q. Can I operate a bank account while I am bankrupt?

- A. Yes, you can operate a bank account. However if you obtain credit of €650.00 or more without disclosing your bankruptcy, you are guilty of an offence.

Q. Can I still trade while I am bankrupt?

- A. Yes, as long as you trade in your own name. If you trade in a name other than that in which you were made bankrupt without disclosing this name, you are guilty of an offence. You must notify the Official Assignee of any business or trade in which you engage.

Q. Can I manage a company or become a director of a company?

- A. No, under the Companies Acts it is an offence for a bankrupt to act in various capacities in relation to a company. These include director, auditor, manager, liquidator or receiver of a company.

Q. Can I seek employment while bankrupt?

- A. Yes, and you can continue in current employment or seek employment.



Q. Can I travel outside the jurisdiction?

- A. There is no outright prohibition on you travelling abroad but you should inform the Official Assignee if you intend to do so. You may be arrested if it appears to the High Court that you may be leaving the State in order to avoid the consequences of your bankruptcy.

Q. Are there other consequences?

- A. Yes, bankrupt persons are not entitled to hold elected representative office, in local authorities, in the Dáil or the Seanad.

Q. Are there alternatives to being made a bankrupt?

- A. Yes, a debtor may enter a voluntary arrangement with their creditors to settle debts due to them and to avoid bankruptcy or other proceedings against them. Arrangements made outside of the control of the High Court tend to be less costly in the long run.

Alternatively, a debtor can apply for an arrangement under the protection of the High Court. This is where a debtor asks the High Court for protection against proceedings to give them time to present a proposal to their creditors. This proposal could be to pay a dividend (normally a percentage of the amount owed) on their debts or to transfer property to the Official Assignee to be sold and the proceeds distributed among their creditors. The proposal must receive the support of at least sixty per cent in number and value of the unsecured creditors voting on it to succeed. The costs, court fees, expenses and preferential debts must also be paid in full.

Q. I have been discharged from bankruptcy; will my name be removed from the Register?

- A. No, the Register is a record of all bankruptcies, including those that have been discharged. A person searching the Register is told the status of the bankruptcy (discharged) and the date it was discharged. No information is given about the address of the former bankrupt.

The family of a bankrupt

Q. Can the family home be sold?

- A. The bankrupt's interest in the family home vests in the Official Assignee as with all other property. However the Official Assignee may not sell the family home without obtaining permission from the High Court. Where the Official Assignee seeks this permission, the High Court may postpone the sale of the family home having regard to the interests of the creditors and of any spouse and dependants of the bankrupt.

Q. What if we already have a mortgage or have borrowed against this home?

- A. Then this is a secured loan against the property and the Official Assignee's interest only relates to the equity remaining in the property.

Q. I jointly own the family home with the bankrupt, what about my interest?

- A. Where the bankrupt owns property jointly with a spouse or partner, the bankruptcy causes the joint ownership to be split. The Official Assignee and the non-bankrupt co-owner then hold separate interests in the property.

Q. As a bankrupt can still earn a living, what about our income?

- A. The Official Assignee may apply to court for the appropriation of part of the bankrupt's salary, income or pension. If the High Court directs any deduction to be made, it may have regard to the bankrupt's family responsibilities and personal situation.

Social welfare and unemployment payments are not liable to appropriation.



Commercial relationship with a bankrupt

The following are some common examples of third parties dealing with a bankrupt:

Property owned jointly with a bankrupt

Where a person owns property jointly with a bankrupt, the bankruptcy splits the joint ownership. The non-bankrupt co-owner and the Official Assignee then hold separate interests in the property.

Property transferred by the bankrupt

Bankruptcy has legal implications for property transfers and possibly sales where the bankrupt entered into such transactions within certain time limits prior to the bankruptcy.

Partnerships

A partnership where the bankrupt is a partner is dissolved by the bankruptcy. This is unless the terms of the partnership provide for it to continue.

Creditors

Q. What can I do if a bankrupt owes me money?

A. You cannot use normal remedies (for example, execution, instalment orders and registration of judgment mortgages) to secure payment of your debt if the money is owed at the date of bankruptcy. You must make a claim in the bankruptcy for payment.

Q. Will I automatically be paid the amount owed to me?

A. Only if funds are available to the Official Assignee to distribute. In addition, all creditors must prove their debt. This means they must provide evidence of their debt to the Official Assignee, for example, invoices, bank statements, judgment orders or affidavit of debt.

An advertisement for creditors will be placed in newspapers during the bankruptcy process. This asks creditors to submit proof of their

debt to the Official Assignee. But creditors do not have to wait until the advertisement – they can send their proof to the Official Assignee before that date if they wish. Dividends to creditors will only be paid after this advertisement appears and a proof of debt sitting is held by the Official Assignee. This is where the Official Assignee decides if a debt (or the amount of a debt) is admitted.

All creditors are entitled to examine the proofs of other creditors. Only debts owed on the date of adjudication are admitted under the bankruptcy. The High Court decides on disputed debts. This is where the bankrupt and the creditor do not agree on the amount owed or the amount admitted by the Official Assignee.

Q. Once my debt is admitted will I be paid in full?

A. Not necessarily, this depends on a number of factors:

- ▶ the amount of funds available for distribution
- ▶ status of your debt
- ▶ value of the bankrupt's estate
- ▶ method of discharge

Q. Do all creditors have the same standing in the bankruptcy?

A. No, there are different categories of creditors and their standing in a bankruptcy depends on whether they hold security for their debt or not. Once a debtor is made bankrupt, the petitioning creditor ranks equally along with all the other unsecured creditors. However the costs of the petitioning creditor must be paid before a bankruptcy is discharged.

Q. What is a secured creditor?

A. A secured creditor holds security such as a mortgage or judgment against a property owned by the bankrupt. The secured creditor can rely upon this security and sell the asset comprising the security. They must account to the Official Assignee in respect of the sale and may claim for any amount (if any) still owed following the sale.



After this and payment of any other secured claims, the secured creditor must pay any surplus to the Official Assignee and/or others having an equity in the property. There can be a number of creditors holding security against a single property.

Alternatively, the secured creditor may abandon their security and make a claim as an unsecured creditor for the entire debt.

Q. What is a preferential creditor?

- A. A preferential creditor is a creditor whose debts have priority for payment before other creditors. These include taxes, rates and certain kinds of employee claims and benefits. These must be paid in full before a bankruptcy is discharged.

Q. What is an unsecured creditor?

- A. An unsecured creditor does not hold any security, for example, trade creditors and other business debts. They rank equally with other unsecured creditors

Discharge from Bankruptcy

Q. How long does bankruptcy last?

- A. Anyone who is made a bankrupt remains a bankrupt, even after death, unless or until they are discharged by the High Court. There is no right to automatic discharge.

Q. How is a person discharged from bankruptcy?

- A. A bankrupt may be discharged from bankruptcy in a number of ways. No bankrupt can be discharged unless there are enough funds to pay:

- ▶ The costs of the Official Assignee
- ▶ High Court fees
- ▶ The costs of the petitioning creditor
- ▶ The preferential debts of the bankrupt

When someone is discharged from bankruptcy, any funds or properties remaining with the Official Assignee are returned to the former bankrupt.

(a) Discharge after payment of debts in full:

This is where the bankrupt's creditors are paid in full. If the High Court so allows, interest may also be payable. Normally, interest is only paid where surplus funds are available.

(b) Discharge with the creditors' consent:

This is where all of the bankrupt's unsecured creditors consent to the discharge.

(c) Discharge after making composition with the creditors:

This is where unsecured creditors agree to accept payment of a certain percentage of their debt in settlement of the full amount. This must be supported by at least sixty per cent in number and value of those creditors who vote at a sitting of the High Court for this to be accepted. The bankrupt must provide the Official Assignee with sufficient funds to make this settlement and pay his/her unsecured creditors. This is called an Offer of Composition.

(d) Discharge after paying fifty cent in the Euro:

This is where all of the bankrupt's property has been fully sold or disposed of and his/her creditors have received fifty cent in the Euro on their debts.

(e) Discharge after twelve years:

This is where the bankruptcy has lasted for twelve years and all of the bankrupt's property has been fully sold or disposed of. The court must be satisfied that the bankrupt has disclosed any property acquired since his/her bankruptcy and that it would be reasonable and proper to discharge the debtor from bankruptcy.



Legislation

The main provisions of bankruptcy law are contained in the Bankruptcy Act, 1988, the Bankruptcy Rules and Forms, Order 76 and Appendix O of the Rules of the Superior Courts, the Deeds of Arrangement Act, 1887 and the decisions of the courts.

The court fees payable in bankruptcy and arrangement matters are contained in the Supreme and High Court Fees Order available on the Courts Service website **www.courts.ie**

Enquiries

If you have any enquiries about a particular bankruptcy or arrangement matter, you should contact:

The Office of The Official Assignee,
2nd Floor, Phoenix House,
15/24 Phoenix Street North, Smithfield,
Dublin 7,

Tel: 01 888 6166,

Fax: 01 873 3835,

Email: officialassigneeinbankruptcy@courts.ie

Web: www.courts.ie

or

The Office of the Examiner of the High Court

Tel: 01 888 6298,

Email: examinersmail@courts.ie

All enquiries about Court Orders or applications for the Bankruptcy list of the High Court should be directed to the Office of the Examiner of the High Court.



This is an information leaflet. This leaflet does not provide legal advice. If you need legal advice please consult a solicitor.

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