Part 2 - SECURED CREDITORS IN BANKRUPTCY

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OFFICIAL ASSIGNEE IN BANKRUPTCY

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1. Introduction

This paper deals with the operation of the Bankruptcy Act 1988 in relation to secured creditors, particularly mortgagees of family homes. It sets out the position of such mortgagees solely from the perspective of the Official Assignee in Bankruptcy whose duty it is to administer the estate of a bankrupt, which vests in him on the adjudication. It also covers the right of Official Assignee to seek income payments from a bankrupt towards his bankruptcy debts and his right to have deducted there from allowance for reasonable living expenses, including mortgage payments on his family home. Finally, it very briefly covers the right of Official Assignee to sell the family home, with approval of Court pursuant to Section 61(4) of the Bankruptcy Act 1988.

2. General Proof of Debt Process

Section 136 of the Bankruptcy Act basically states that once a person is adjudicated bankrupt, a creditor has no right other than his rights set out in the Act, however nothing in the Act affects right of a secured creditor to realize or otherwise deal with his security. The process for creditors proving their debts in the bankruptcy are as follows:

(a) The Official Assignee will write to all creditors (secured and unsecured) set out in the Statement of Affairs of the bankrupt, requesting them to submit vouched claims in respect of debts owed to them by the bankrupt at the time of the order of adjudication. He can request claims to be made on affidavit. He will fix a time for sending to him of such proofs of debt, normally a date 3 weeks from receipt of letter.

(b) He will at same time also publish a notice in a national newspaper and in Iris Oifigiul (an official notice journal) seeking claims to be submitted to him before above date.

(c) A creditor shall, unless the Court otherwise orders, bear his own costs of proving a debt.

(d) Creditor will submit claims duly vouched within required period, which can be extended by the Official Assignee.

(e) The Official Assignee will prepare a list of claims allowed and disallowed.

(f) He will refer disputed debts by motion to the Court for adjudication.

(g) Any creditor aggrieved by the decision of the Official Assignee may by motion appeal to the Court.

(h) He will close the proof of debt and draft a claim sheet of creditor claims admitted by him (and by the Court on rare occasion that occurs) and it is to these creditors in due course estate will be distributed when assets realized.

3. Specific Proofs required of Secured Creditors

See **Proofs** section of **Appendix A** (which is an information sheet given to financial institutions to assist them regarding their duties to the Official Assignee and their claims in bankruptcy).

4. Secured Creditor Position v Official Assignee

The Official Assignee is a liquidator not a receiver and will in normal course seek as soon as convenient, to realise all the assets of a bankrupt person and distribute the proceeds thereof to his creditors (see **Appendix B** – S 61 of Bankruptcy Act – Functions of Official Assignee)

He will however afford the bankrupt, with proceeds of realisation and other funds the bankrupt may otherwise be able to raise (from friends/family), the option of seeking to agree a composition of his debts, which would discharge him from bankruptcy. If a composition is not possible, the Official Assignee will pay out estate by interim dividend to his creditors, and the bankruptcy will continue. Where there is equity in properties he will sell them, pay off charges and pay balance into bankrupt's estate account for distribution to creditors. Where there is no equity in properties or not likely to be equity in medium term (3-5 years) he will surrender

properties to secured creditors, if they have not already (as they are increasingly doing these days) appointed receivers over properties given advantages this course has over going in as mortgagee in possession (eg receiver is regarded of agent of mortgagor who is liable for any negligence, losses on receiver's part and mortgagee not even initially liable for any income tax arising on rent, capital gains on disposals). The position of Official Assignee in seeking to realise the family home is covered separately in **6.** below.

As stated above at all times secured creditor remedies are not affected by the restrictions placed on unsecured creditors, who may only claim through the Official Assignee and be entitled to a pari passu (i.e. equal) share of unsecured assets, after payment of pre-preferential debts (under S19 S.W. Consolidation Act 2005), preferential debts (under S 81 of Bankruptcy Act) and costs, fees and expenses in estate.

5. Secured Creditor Options

The options of a secured creditor (set out in First Schedule of Bankruptcy Act 1988 – See Appendix C) are as follows:

5.1 Confirm whether it wishes to rely on its security and remain outside this bankruptcy, or,

5.2 Abandon its security and claim in the bankruptcy for full debt, or

5.3 Realise the asset or value its security held and then claim in the bankruptcy for any balance owed in excess of the net proceeds received or valuation.

5.1 First option – Mortgagee relying on its security and remaining outside the bankruptcy

A mortgagee may rely on its security by:

5.1.1 Selling the property where mortgage is not being paid, or

5.1.2 Ignoring technical mortgage default on adjudication of bankruptcy under mortgage deed and allowing mortgagor(s) to pay mortgage on agreed terms, so no real default occurs.

5.1.1 Mortgagee sells property where mortgage is not being paid

Financial institution mortgagees (with exception of subprime lenders generally) are not petitioning for bankruptcy. They are doing everything they possibly can to facilitate payment of mortgages, mainly through allowing mortgagors pay interest only to enable them overcome their difficulties (eg unemployment, sickness etc) and avoid defaulting on their mortgages. Subprime mortgagees are more often bankrupting people because their clients tend to be in much more dire straits than those of prime lender mortgagees and were when mortgages were taken out or would not have taken out mortgages with them in the first place.

A financial institution will avail of the first option where its security when realised is more than sufficient to discharge the loan principal and interest due and costs of realisation. It should confirm in writing to the Official Assignee that it is relying on its security by selling the property and undertake to provide any balance of proceeds remaining after such deductions to the Official Assignee, for distribution to unsecured creditors in bankruptcy.

Interest

A mortgagee staying outside and not claiming in the bankruptcy is entitled to be paid principal and interest up to date of redemption (sale of asset), in accordance with the terms of and at rate provided for in, the charging document. Such a mortgagee is not subject to Section 75(2) of Bankruptcy Act

1988, which limits contractual rights of creditors claiming in bankruptcy, to claims for principal and interest payments up to date of adjudication only.

5.1.2 By allowing mortgagor(s) to pay mortgage on agreed terms, so no default occurs

Mortgage deeds provide inter alia that an act of default will occur where a mortgagor is adjudicated bankrupt and some provide that a default occurs, on the presentation of a bankruptcy petition against a mortgagor. In practice even after adjudication once mortgage is being paid on terms acceptable to mortgagees, they have always ignored this technical default.

The issue of allowing a bankrupt make mortgage payments however, is a complicated one and raises 3 separate issues:

5.1.2.1 Does the Bankruptcy Act restrict a bankrupt from making payments directly to a creditor in respect of a pre-adjudication liability, outside the bankruptcy process?

5.1.2.2 Should the Official Assignee not claim any income bankrupt has to make such payments, as part of his bankruptcy estate?

5.1.2.3 If such mortgage payments are allowable, should there be a uniform rate at which such mortgage payments should be permitted?

5.1.2.1 Does Bankruptcy Act restrict bankrupt from making payments directly to a creditor in respect of a pre-adjudication liability, outside the bankruptcy process?

The following sections of Bankruptcy Act 1988 are relevant in answering this question:

Section 44 – On adjudication all then property of a bankrupt vests in Official Assignee.

- All property subsequently acquired by bankrupt vests in Official Assignee, if and when he claims it.

Section 57 - Fraudulent preferences to creditors up to 1 year before adjudication can be declared void by Court, as against Official Assignee.

Section 136 – In respect of bankruptcy debts, a creditor has no remedy against property or person of bankrupt apart from claiming in the bankruptcy.

Whilst bankruptcy is a collective process in which all unsecured creditors (save for preferential creditors) share all unsecured bankruptcy assets equally amongst them; there is no specific provision in Act that prevents a bankrupt paying any off any of his creditors, once he or someone else, does so with non bankruptcy assets eg monies received from friends, family or after acquired funds not claimed by the Official Assignee. It is not unknown for a bankrupt to apply such funds (including after acquired assets unclaimed by Official Assignee) to pay off a trade supplier who he needs supplies from to carry on his business, post adjudication. If the creditor has initially claimed in bankruptcy he withdraws his claim on payment by the bankrupt. Whilst these payments are clearly against the spirit of collective treatment of unsecured creditors under the Act, once bankruptcy assets are not used to make the payments concerned, no breach of the Act occurs.

5.1.2.2 Should the Official Assignee not claim any income the bankrupt has to make such payments, as part of his bankruptcy estate?

Before answering this question the powers of the Court and Official Assignee in relation to claiming bankrupt's income should first be explained.

Only the Court can compel a bankrupt person to make a contribution towards his bankruptcy debts. Where the Official Assignee cannot reach an agreement on the contribution with the bankrupt towards his bankruptcy debts he has a right under current legislation to apply to Court pursuant to Section 65 of the Bankruptcy Act 1988 for an order compelling the bankrupt to make a contribution. Under the section the Court is given power to direct a bankrupt to make payments *having regard to the family responsibilities and personal situation of the bankrupt* and Court may on application of any interested person also vary such order, *having regard to changes in the family responsibilities and personal situation of the bankrupt.* There is no case law in Ireland on criteria to be adopted in assessing *the family responsibilities and personal situation of the bankrupt* but wording has been interpreted by Official Assignees as applying a subjective test as to what are the reasonable domestic needs of each bankrupt person and his family (given for example fact that numbers of dependents in families vary) but necessarily an objective test, in applying an average household allowance for such family group based on location and under Central Statistics Office Household Budget Survey, which is reduced by deductions for items of expenditure for non essential / luxury items eg cable tv etc. The statistics have allowed us develop an assessment process of income and expenditure of bankrupts that enables us transparently and fairly calculate their *net disposable income*; out of which contributions can be agreed or ordered by the Court, to be paid into their bankruptcy estate for distribution to their creditors.

The Insolvency Service in accordance with its duty under S 9 (i) of Personal Insolvency Act 2012 have published guidelines as to what constitutes a *reasonable standard of living and reasonable living expenses* under S 23 of said Act (**See Appendix D**). Section 85D of the Bankruptcy Act 1988 (as inserted by section 157 of the Personal Insolvency Act 2012 repealing S 65), provides that

a Court when making a bankruptcy payment order, may have regard to these guidelines and the Official Assignee will equally have regard to the guidelines, (when similarly having to assess *net disposable income* after paying *reasonable living expenses*) in agreeing income payment agreements with bankrupt persons. (The current assessment process by the Official Assignee is described separately below)

Income Payment Agreements in England & Wales

The England & Wales Insolvency Service guidelines to Official Receivers on income payment agreements succinctly states its core principle position, "It is important to remember that it is the reasonable domestic needs of bankrupt and his family, not just their basic domestic needs, that need to be considered - - "

"Some bankrupts may find it difficult to assess the outgoings of themselves and/or their family where their expenditure is sporadic rather than monthly or prior to bankruptcy they have not been in a position to meet their reasonable domestic needs as a result of other pressing debt repayments. In these circumstances it may be necessary for the Official Receiver/trustee to refer to average expenditure figures (such as those provided in the Household Expenditure Survey (HES)."

Very briefly the main features of the England & Wales, Income Payments Agreement (IPA) are:

1. Binding signed contract agreement between O.R./Trustee and bankrupt, terms of which are enforceable, as though it was an Income Payments Order (IPO).
2. May provide for payments be made by third party eg employer
3. Must specify

(a) Total amount payable

(b) Frequency of payments

(c) Amount payable in each payment

(d) Length of agreement, which cannot be longer than 3 years

(e) 14 day cooling off period

4. Must be entered into pre discharge and can continue post discharge.
5. O.R./Trustee in assessing **real disposable income** under agreement **may not reduce bankrupt's income below that required to meet reasonable domestic needs.**
6. O.R./Trustee while assessing on individual basis, needs of bankrupt and his family conduct an objective assessment of information supplied and have regard to Household Expenditure Spreadsheet (HES) supplied by National Statistics Office showing average monthly expenditure of variety of different domestic groups in the format of a table, to allow easy comparison with the information provided by the bankrupt in his Statement of Affairs or Preliminary Information Questionnaire.
7. Intranet for ORs has a calculator for calculating surplus income and once calculated the full amount is assessed as payable on a monthly basis under IPA.
8. All income including pension amounts is assessable but not income if sole source is State benefits.
9. However, where both State benefits and other income is being received by bankrupt income is assessable but once allowable expenditure deducted, real disposable income assessed cannot be more than other income.
10. Average monthly expenditure be assessed for self-employed.
11. Rental income on a bankruptcy property is likewise a bankruptcy asset and is therefore not assessed as a bankrupt's income.
12. Partners

Appropriate and reasonable to assume partner pays half of household expenses and if exact information of partner's income is received, OR/Trustee may re-calculate income and expenditure of bankrupt. Calculation of his real disposable income is achieved by adding income of both, deducting reasonable household expenses of both and apportioning from surplus, his share of total income. (Calculator assists in process)

13. Adult children and adult members of household

    Similarly, as above it is reasonable and appropriate to require any of above who have an income to contribute something towards household expenses and such contribution is included in calculation and again claim can only be made against surplus arising from the bankrupt's income.

14. If his income substantially increases, his contribution within agreement may significantly be increased but only for balance of existing IPA.
15. Monies due under IPA and IPOs are collected by a collection agent under contract, which is currently a solicitor's firm and a clear 10 point protocol sets out recovery actions where default occurs.

See:

Appendix E - Position of UK Insolvency Service on income payment agreements and allowances for deduction from income for reasonable living expenses

Appendix F – Malcolm and Official Receiver – leading case in UK on income payment agreements

Irish Law Reform Commission (LRC) Proposals on Income Payment Agreements

Whilst the LRC in its report did not deal with income payment agreements or orders in bankruptcies, it did deal at paragraphs 1.280 – 1.301 with analogous position of income allowable to debtors by trustees in the context of Debt Settlement Agreements (DSAs). At paragraph 1.295 it recommended that "whilst while the amount of repayments under a DSA is primarily a matter to be agreed by the creditors meeting, primary legislation should establish the principle that the terms of

a DSA should not require such repayments, as would leave the debtor with insufficient income to maintain a reasonable standard of living for the debtor and his family." At paragraph 1.296 it recommended that, whatever authority is responsible for drafting reasonable expenditure and essential income guidelines it should take account of:

- Structural framework of MABS Financial Statement
- Definition of "poverty" in National-Anti Poverty Strategy 2007 and National Action Plan for Social Inclusion 2007-2016
- Amount of the Basic Supplementary Allowance subject to conditions below regarding the need to incentivise the debtor to seek and maintain employment by
    - ♦ Ensuring reasonable essential income permitted to be maintained by a debtor is higher than that which debtor would receive if unemployed and reliant on social welfare payments for income
    - ♦ Ensuring debtor entitled to significant portion of any income increase
    - ♦ Providing for proportionate reductions in the amount of payments to be made as reward for completing certain stages of payment plan
    - ♦ Ensuring level of income allowed to the debtor under DSA is greater than that exempted under an instalment order, attachment of earnings mechanism or other method for the enforcement of judgements.

Assessment Process by Official Assignee

Unlike England & Wales where once parties agree that there is surplus income to contribute towards debts, a formal income payment agreement is drawn up evidencing agreement (under IA 1986 S310A), here the Official Assignee does not draw up such an agreement but simply requires the bankrupt to confirm his agreement in writing to direct payments of agreed

sum on a monthly basis to OA Holding Account, which funds when received in account are subsequently transmitted to bankrupt person's estate account.
It is envisaged that an amendment to the Personal Insolvency Act will be made providing a similar statutory basis here as in England and Wales for income payment agreements.

The assessment commences with the Official Assignee requesting the bankrupt on adjudication to fill out a form (Statement of Personal Information) detailing all his income and household and any other necessary expenses on a monthly basis. The form also sets out contributions of all others in household contributing to such expenses. All items of income and expenditure are vouched by payslips, bills etc. In assessing a bankrupt for contributions towards payment of his debts from income, allowance is made for reasonable living expenses, one of the most important and substantial elements of which is, his accommodation expense. Where a bankrupt is renting, allowance is made for his share of rental payments. On the same basis and as in many other jurisdictions, England & Wales, Northern Ireland and Australia (indirectly) where he is not renting, allowance is also made for reasonable mortgage payments on his family home. In addition to the humanitarian ground justification for deduction of reasonable mortgage payments as an allowable expense out of income (founded on both constitutional and European Convention on Human Rights rights), is the ground that such allowance is also preserving the equity of Official Assignee in the family home. If there is or will be in a reasonable period (eg in next 5 years) equity in house for bankruptcy estate, Official Assignee can be regarded as preserving his share of equity in house as against a spouse; if he allows bankrupt contribute to mortgage payments, as otherwise spouse will in 5 years be able to maintain her share of house equity has increased proportionately to her increased mortgage payments over his in the period

and deduct such sum in any sale of property or sale of interest of Official Assignee to her, at that stage. With massive 50% drop in house prices over last 4 years, many homes are likely to be in negative equity for 15 years or more and it is increasingly difficult in relation to such cases to justify allowing bankrupts pay their mortgages on this commercial ground.
(Discussion in relation to rates at which a bankrupt person is permitted to pay mortgage payments from his income is dealt with separately below.)

In some bankruptcies bankrupts are not earning any income, nor are they entitled to Social Welfare payments (e.g. self employed such as property developers) and the mortgages are not being paid. In other cases Department of Social Welfare is paying interest only on mortgages (under the Mortgage Interest Supplement) or individuals are claiming other benefits from it, which they are using to pay their mortgages and under S 283 of the Social Welfare Consolidation Act 2005, the Official Assignee has no entitlement to claim any of such benefits, which is also position in UK where only income of bankrupt is State benefit.

5.1.2.3 If such mortgage payments are allowable, should there be a uniform rate at which such mortgage payments should be permitted?

As stated above the Official Assignee in assessment of income payments from the bankrupt person, allows him deduct sufficient sums from his income to pay *reasonable living expenses*, the most substantial and most important deduction of which is for reasonable accommodation expenses ie his rental or mortgage payments. Applying the criteria set out in Section 65 of the Bankruptcy Act 1988 to *have regard to the family responsibilities and personal situation of the bankrupt,* the Official Assignee assesses the accommodation requirements of the bankrupt and his family and where the cost of the share of the mortgage payments paid by the bankrupt is

not appropriate having regard to reasonable requirements of family, because for example the property is very substantial, the Official Assignee will either request his spouse to buy him out of his equity in property or if no equity, seek Court approval to have family reduce mortgage re-payments by moving to more modest accommodation and surrendering the property to the financial institution. He will only approve a deduction at appropriate rate, request income payment on basis of approved deductions only and if bankrupt not agree thereto, apply to Court pursuant to S65 for guidance and an order for an income payment. This approach is consistent with England & Wales policy on matter described above and that of the LRC described at paragraph 1.325 of its report. It stated therein that "the guidelines on reasonable income to be prepared should include a reasonable allowance towards mortgage payments in respect of accommodation appropriate to needs of debtor and his family. Where guidelines are breached because portion of debtor's income required to service mortgage payments is higher than that specified in relevant guidelines for him and a family of its size and reasonable requirements, the family should move to more modest accommodation, with mortgage debt repayments within mortgage payment approved limits".

5.2 Second Option - Abandon its security and claim in the bankruptcy for full debt

If the financial institution wishes to avail of the second option, it should confirm this in writing to the Official Assignee and remove any mortgages off the title to property, to facilitate sale thereof by the Official Assignee. The Official Assignee will sell the property and after costs of realisation, Court fees and preferential debts have been paid, distribute proceeds of sale of assets of estate (including property sale proceeds) equally amongst all unsecured creditors (including former mortgagee). Rarely do mortgagees exercise this option and will only do so where a prior mortgagee debt is greater than value of property and they have no security therein.

5.3 Third option - Realise the asset or value its security held and then claim in the bankruptcy for any balance owed in excess of the net proceeds received or valuation.

If the financial institution wishes to avail of the third option, it should confirm this in writing to the Official Assignee. It should state the amount owed at the date of adjudication, realise the asset or formally value any security and confirm it wishes to claim for any balance owed in excess of the net proceeds received or valuation furnished. It should also provide necessary copy mortgage, statements, valuations, and other relevant proofs to vouch such claims and valuations. It should subsequently submit claim in respect of its unsecured debt – see again Section 24 of the First Schedule of the Bankruptcy Act, 1988 **Appendix C** in this regard, which is quite detailed on this option.

This is the option that most mortgagees would choose if mortgagees did not want to remove mortgagors from family homes but instead wished to release them from unaffordable mortgage payments having regard to their means, by reducing mortgage debt through debt forgiveness of the shortfall in their security, which shortfall would rank as an unsecured debt in respect of which they could claim in the bankruptcy. They would rank equally with other unsecured creditors and be entitled to share equally with them in realisation of any other assets in estate; after payment of costs, fees and expenses and any pre-preferential and preferential debts in estate. By valuing their security and claiming in bankruptcy they are limiting their claim outside bankruptcy on foot of continuing mortgage deed obligations to value placed on security, as valuation amendments subsequently, are only allowed where they can prove initial valuation was made bona fide on a mistaken estimate,

which rules out any possibility of them availing of appreciation on value, post valuation. If property is subsequently sold by mortgagee the realisation value is substituted for actual valuation and dividend paid or due is amended accordingly, which would mean refunding of any surplus amount received to estate.

The Official Assignee is the beneficiary together with any non bankrupt mortgagor (eg his spouse) of any appreciation in price from date of valuation. S 24 (4)(a) gives Official Assignee the right to redeem property at value placed by creditor or requiring it be offered for sale and S 24 (4)(b) in turn gives the creditor however the right to call on the Official Assignee to exercise his equity of redemption or lose it, if he has not done so within 3 months of service of notice. In such latter situation the creditor would get equity of redemption and value of his debt would be reduced by valuation amount. To date the exercise of rights under S 24 (4)(a) and (b) has been very rare, as exercise of option of valuing security and claiming in bankruptcy has been rare; as mortgagees tend to choose option 1, staying outside bankruptcy and wholly relying on security and either selling asset (as mortgage loan tended not to be impaired more than 10-15%) or allowing mortgage payments to be continued to be paid in normal course, on perhaps revised terms. These days with negative equity of 50-60% in certain houses as stated above, mortgagees are doing everything they can not to foreclose on mortgagors to keep them in their homes and avoid having to crystallise these losses.

Mortgagor

Whilst a mortgagee has the choice of claiming in bankruptcy in respect of shortfall in his security without having to realise the asset; the mortgagor has no such choice and he can only have the unsecured portion of his debt brought into bankruptcy where:

- the mortgagee values its security and claims in bankruptcy or
- pre bankruptcy he surrenders property to financial institution or

- post bankruptcy the Official Assignee surrenders property to financial institution or
- mortgagee appoints a receiver and mortgagee values its security and claims in bankruptcy.

However, if mortgagor simply stops paying his mortgage in reality he will force mortgagee to seek surrender of his share held by Official Assignee and will seek an order for possession against spouse (if any).

Section 136 states that in respect of bankruptcy debts, a creditor has no remedy against property or person of bankrupt apart from claiming in the bankruptcy. It further states that, "this section shall not affect the power of a secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been enacted".

The section is simply enshrining in the Act one of the fundamental principles of security law, that the security right itself is independent of the debt in respect of which it is created and hence its validity is unimpaired by the bankruptcy process and in particular by its discharge of bankruptcy debts. The security right can only be cancelled by payment of the debt in full. Whilst the section clearly preserves the rights of a secured creditor to realise his security, it does not significantly preserve its right post discharge to follow the discharged bankrupt for any shortfall then in his security and any right to do so pre discharge, can only be done by claiming like all other unsecured creditors within the bankruptcy process. Unlike in US there is no provision for recognising reaffirmation agreements in Irish bankruptcy law – see **Appendix G.**

Discharge does not of course release any person (such as a spouse or partner) who was jointly liable with the bankrupt for any debt (secured or unsecured), or anyone who has undertaken liability as surety for the bankrup

Keane Report

One of the recommendations of the Keane Report is the surrender of property of a mortgagor in distress to his mortgagee, the local authority taking 20 years lease of property from mortgagee and renting property back to original owner. Where a mortgagor is a bankrupt, if house is appropriate to needs of family, the Official Assignee would surrender his half interest together with the non bankrupt spouse to mortgagee and also would equally allow as deductible expense from assessed income (for relevant period of income payments order or agreement) his portion of rental income, to facilitate such an arrangement.

6. Sale of Family Home by Official Assignee – S 61(4) of Bankruptcy Act 1988

1. Interest of bankrupt in family home (like all other property of bankrupt) automatically vests in Official Assignee on adjudication, which severs a joint tenancy and converts it by operation of law into a tenancy in common.
2. A vesting cert is filed with Property Registration Authority, which registers the interest of Official Assignee in property.
3. The Official Assignee has full authority to sell or surrender to a mortgagee any property of a bankrupt, other than his family home.
4. Official Assignee under S 61(4) of Bankruptcy Act (see **Appendix B**) must apply to Court (Bankruptcy Judge) to sell the property and Court can order postponement of sale, having regard to the interests of the creditors and of the spouse and dependents of the bankrupt as well as to all of the circumstances of the case. Any disposition made without such sanction is void.
5. Spouse can buy out beneficial interest of debtor spouse, once mortgagee agrees to other spouse taking over full debt and release of debtor spouse. Where spouse proves she alone has being paying mortgage for a period, Official Assignee will credit her with such payments and reduce accordingly his interest in property, as indeed he will in relation to Judgement Mortgages

registered against bankrupt alone on title Folio, which are a prior charges against his half interest only.

6. Official Assignee is able to claim value in excess of all debts and costs of bankruptcy to pay interest to creditors, as creditors are entitled to interest, if there are enough assets in the bankruptcy estate for all such payments.

7. APPENDICES

APPENDIX A

INFORMATION SHEET TO FINANCIAL INSTITUTIONS FROM OFFICIAL ASSIGNEE IN BANKRUPTCY

A. Guidance on Reporting Duties to Official Assignee

The following is the position in relation to the duty of a bank when the Official Assignee sends a notice on date of adjudication requiring details of assets and liabilities of the bankrupt:

- Bank should check its records for all assets and liabilities bankrupt has with bank.
- Bank should as soon as possible provide full details as of date of adjudication of bankrupt to Official Assignee's Office.
- Bank should send all vouching documents requested in letter e.g. statements, copy mortgages, guarantees (including full vouching documents required in relation to proof of liabilities under the guarantees) to Official Assignee's Office as soon as possible.
- Bank can of course consider whether it is entitled to set off credit balances against debit balances under the Bankruptcy Act 1988.
- Bank can consider whether it wants to continue to allow bankrupt operate a bank account going forward. The Official Assignee has no objection to bankrupt operating an account. The Bankruptcy Act states that if he seeking credit over €650 he must disclose to the proposed lender that he is an undischarged bankrupt. It otherwise places no restriction on a bankrupt operating a bank account.

- Bank is not under any continuing duty to notify Official Assignee of funds coming into any account post adjudication. It is function of the Official Assignee to inquire of bank and bankrupt of funds and he must specifically claim same under the Act before they vest in him, as *assets in the bankruptcy.*
- The bank is not responsible for rental monies on properties of bankruptcy coming into accounts post adjudication. It is responsibility of bankrupt person and Official Assignee to ensure that such funds are applied for benefit of bankruptcy estate.

B. Guidance on Claims

Secured Creditor Options

The options of a secured creditor claiming in a bankruptcy are as follows:

- Confirm whether it wishes to rely on its security and remain outside bankruptcy by not making any claim therein, or,
- Abandon its security and claim in the bankruptcy in full amount of liability of bankrupt owed at date of adjudication to secured creditor, or
- Value its security held and then claim in the bankruptcy for any balance owed at date of adjudication in excess of its valuation.

If it wishes to avail of the third option, it should confirm this by letter to this office. In some cases an affidavit may be required by the Official Assignee. The officer acting on behalf of the secured creditor should specify in his letter / affidavit the amount owed at the date of adjudication, formally value any security and confirm the financial institution wishes to claim for any balance owed in excess of such valuation. He should also enclose / exhibit necessary proofs to vouch such valuations

and claims – see **Proofs** below and Section 24 of the First Schedule of the Bankruptcy Act, 1988 in this regard.

Proofs

All creditors claiming in respect of unsecured debt should provide relevant proofs to vouch such claims such as:

a) Copy deeds / folio (if any)

b) Copy of loan facility and statement showing balance plus interest up to date of adjudication

c) Copy of mortgage

d) Copy of demand

e) Valuation (if any)

f) Personal guarantee (if any)

A completed table in following format in relation to **each** charge / mortgage would greatly assist in assessment of your claim:

Loan account number	
Balance at date of adjudication*	
Facility Letter dated	
Mortgage/ Charge dated	
Demand Letter dated	
Property Address (es)	1. 2.
Property Folio(s) / Registration of Deed	1. 2.

Reference Number(s)	
Personal guarantee date and company's / person's name & address in respect of which / whom guarantee granted	
Valuation(s), if any dated	

Interest *

Please note where you are claiming in the bankruptcy in respect of a shortfall in security that under S 75(2) of Bankruptcy Act 1988 you are only entitled to claim interest, up to the **date of adjudication.**

Where you are not claiming in the bankruptcy because security is sufficient, you are entitled to claim interest under mortgage deed **until you realise the property** and would then be obliged to lodge balance of proceeds (less costs and expenses entitled to deduct there from under mortgage deed) in this office. A judgement creditor is limited however, to claiming interest to a maximum of 6 years from date of judgement.

Security on foot of a Judgement Mortgage

A creditor is secured in respect of judgement debt and interest accrued at Court rate, up to date of registration of affidavit. It appears that further affidavits may be filed securing interest at Court rate thereafter, up to a maximum of 6 years from date of judgement.

Statute Barred Mortgagee

A mortgagee is statute barred from issuing proceedings in respect of its mortgage debt, after 12 years of act of default.

NAMA

Financial institutions receiving a letter from Official Assignee in respect of an estate in respect of liabilities transferred to NAMA should forward letter / e-mail to NAMA representative and copy letter/e-mail to Official Assignee, notifying him of individual processing the request.

The information contained in sheet is provided for assistance of financial institutions. No responsibility or liability lies with Official Assignee in respect of any errors or omissions herein, as it is obviously the responsibility of each financial institution to take its own legal advice, in respect of all matters covered herein.

APPENDIX B

Section 61 of Bankruptcy Act 1988

Functions of Official Assignee in bankruptcy and vesting arrangements.

61.—(1) This section applies to every bankruptcy matter and vesting arrangement.

(2) The functions of the Official Assignee are to get in and realise the property, to ascertain the debts and liabilities and to distribute the assets in accordance with the provisions of this Act.

(3) In the performance of his functions the Official Assignee shall, in particular, have power—

(*a*) to sell the property by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in lots and for the purpose of selling land to carry out such sale by fee farm grant, sub fee farm grant, lease, sub-lease or otherwise and to sell any rent reserved on any such grant or any reversion expectant upon the determination of any such lease,

(*b*) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim present or future, certain or contingent, ascertained or sounding only in damages whereby the bankrupt or arranging

debtor may be rendered liable,

(*c*) to compromise all debts and liabilities capable of resulting in debts and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the bankrupt or arranging debtor and any debtor and all questions in any way relating to or affecting the assets or the proceedings on such terms as may be agreed and take any security for the discharge of any debt, liability or claim, and give a complete discharge in respect thereof,

(*d*) to institute, continue or defend any proceedings relating to the property,

(*e*) to refer any dispute concerning the property to arbitration under the terms of section 11 of the Arbitration Act, 1954 ,

(*f*) to mortgage or pledge any property to raise any money requisite,

(*g*) to take out in his official name without being required to give security, letters of administration to any estate on the administration of which the bankrupt or arranging debtor would benefit,

(*h*) to agree a sum for costs where the Court so directs or where he considers that the amount which would be allowed on taxation would not exceed £1,000,

(*i*) to agree the charges of accountants, auctioneers, brokers

and other persons,

(*j*) to ascertain and certify to the Court the amount due in respect of a mortgage debt and the due priority thereof with power to the Court to vary such certificate,

(*k*) to draw out of the account referred to in *section 84 (1)* any sum not exceeding £100 by way of indemnity in respect of costs incurred by him.

(4) Notwithstanding any provision to the contrary contained in *subsection (3)*, no disposition of property of a bankrupt, arranging debtor or person dying insolvent, which comprises a family home within the meaning of the Family Home Protection Act, 1976, shall be made without the prior sanction of the Court, and any disposition made without such sanction shall be void.

(5) On an application by the Official Assignee under this section for an order for the sale of a family home, the Court, notwithstanding anything contained in this or any other enactment, shall have power to order postponement of the sale of the family home having regard to the interests of the creditors and of the spouse and dependants of the bankrupt as well as to all the circumstances of the case.

(6) The Official Assignee may in case of doubt or difficulty seek the directions of the Court in connection with the affairs of any bankrupt or arranging debtor.

(7) The exercise by the Official Assignee of the powers conferred by this section shall be subject to the control of the

Court, and any creditor or other person who in the opinion of the Court has an interest may apply to the Court in relation to the exercise or proposed exercise of those powers.

(8) The powers and functions conferred on the Official Assignee by this section may be exercised and performed—

(*a*) in the case of an adjudication founded on a petition of a debtor, on adjudication,

(*b*) in the case of an adjudication founded on a petition by a creditor, on the expiration of the time for showing cause,

(*c*) in the case of a vesting arrangement, on approval of the proposal by the Court.

APPENDIX C

FIRST SCHEDULE TO BANKRUPTCY ACT 1988

Proof of Debts - Section 76

1. Every creditor shall prove his debt and a creditor who does not do so is not entitled to share in any distribution that may be made.

2. (a) A creditor may prove his debt by delivering or sending by post to the Official Assignee particulars of his debt (in this Schedule referred to as a "*proof of debt*").

(b) Subparagraph (a) is without prejudice to the entitlement of a creditor to prove his debt at a sitting of the Court.

3. The Official Assignee may fix a time within which proofs of debt shall be sent to him. A proof submitted thereafter shall not be allowed except by order of the Court.

4. Proof of debt may be furnished by way of a detailed statement of account, an affidavit of debt or other prescribed means.

5. The creditor shall specify the vouchers or any other evidence by which the debt can be substantiated. He shall also give particulars of any counterclaim that, to his knowledge, the bankrupt or arranging debtor may have, and he shall indicate whether or not he is a secured creditor.

6. Proof of debt in respect of money lent by a moneylender shall have annexed thereto the particulars required by section 16 (2) of the Moneylenders Act, 1933 .

7. An affidavit shall be required in any case where the debt is disputed or the Court or the Official Assignee thinks fit.

(1857, s. 246)

8. Proof of debt may be given by the oath or affidavit of the creditor himself or by the oath or affidavit of some person authorised by or on behalf of the creditor and, if made by a person so authorised, shall state his authority and means of knowledge.

9. Subject to paragraph 24 (5), a creditor may, with the consent of the Official Assignee, amend his proof of debt.

10. Every creditor who has lodged a proof of debt is entitled to see and examine the proofs of other creditors.

11. A husband and wife may prove a debt against each other as if they were not married.

(New)

12. A sole trustee (including a personal representative) who is a bankrupt or an arranging debtor shall be entitled, without leave of the Court, to prove in his own bankruptcy or arrangement in respect of a debt due from him to the trust estate. Any dividend in respect of such a debt shall be paid to the Accountant of the High Court for credit of the trust estate.

(1872, s. 48)

13. If any bankrupt or arranging debtor, at the date of the adjudication or order for protection, is liable in respect of distinct contracts, as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are, in whole or in part, composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts.

(cf. 1857, s. 260)

14. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the adjudication, the creditor may prove for interest at the rate currently payable on

judgment debts to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment.

(cf. 1857, s. 252)

15. In respect of debts due after the adjudication or order for protection, the liability for which existed at the date of such adjudication or order for protection, a creditor may prove for the value of the debt at that date.

16. Where a person who is liable to make any periodical payment (including rent) is adjudicated bankrupt or is granted an order for protection on a day other than the day on which such payment becomes due, the person entitled to the payment may prove for a proportionate part of the payment for the period from the date when the last payment became due to the date of the adjudication or order for protection as if the payment accrued due from day to day.

(1857, s. 251)

17. (1) Where there are mutual credits or debts as between a bankrupt and any person claiming as a creditor, one debt or demand may be set off against the other and only the balance found owing shall be recoverable on one side or the other.

(2) Section 36 of the Civil Liability Act, 1961 (which provides for the set-off of claims), as amended by section 5 of the Civil Liability (Amendment) Act, 1964 , shall apply with the substitution in section 36 (3) of a reference to subparagraph (1) for the reference to section 251 of the Irish Bankrupt and Insolvent Act, 1857.

18. This Schedule is without prejudice to section 61 of the Civil Liability Act, 1961 (which provides for proof of claims for damages or contribution in respect of a wrong) and section 62 of the said Act (which provides for the application of moneys payable under certain policies of insurance where the insured becomes a bankrupt).

19. A creditor shall, unless the Court otherwise orders, bear his own costs of proving a debt.

(1857, s. 246)

20. Any person seeking to prove a debt or from whom additional proof is required, or any other person, may be examined by the Court in relation thereto.

21. Where a creditor or other person with intent to defraud makes any false claim or any proof, declaration or statement of account before the Court or in his affidavit which is untrue in any material particular in connection with the proof of debts, the Court may, in addition to any other penalty provided in this Act, disallow the claim in whole or in part.

22. Before deciding on a claim, the Official Assignee may require a creditor to furnish additional information or proof or to attend before him.

23. The Official Assignee shall deal in the following manner with claims:

(a) He shall prepare a list certified by him of the claims.

(b) This list shall record—

(i) the claims allowed by him, which shall be deemed to be admitted, and

(ii) the claims either disallowed by him or which he considers should not be admitted without reference to the Court.

(c) He shall refer disputed debts to the Court for adjudication.

(d) The decision of the Official Assignee in regard to a claim shall be confirmed in writing to the creditor.

(e) Any person aggrieved by the decision of the Official Assignee may appeal to the Court.

(f) The Official Assignee shall place a copy of the list on the Court file.

(g) The list shall be open to public inspection on payment of a prescribed fee but no fee shall be charged to creditors inspecting the list.

Secured Creditors

(1872, s. 21)

24. (1) If a secured creditor realises his security, he may prove for the balance due to him after deducting the net amount realised and receive dividends thereon but not so as to disturb any dividend then already declared. If he surrenders his security for the general benefit of the creditors, he may prove for his whole debt.

(2) If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date on which it was given and the value at which he assesses it, and he shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(3) A secured creditor shall not be entitled to surrender his security after the time fixed by the Official Assignee for receipt of proofs of debt, except by order of the Court.

(4) (a) Where a security is valued by the creditor, the Official Assignee may at any time redeem it on payment to the creditor of the assessed value. If the Official Assignee is dissatisfied with the assessed value he may require that the property comprised in any security so valued be offered for sale at such time and on such terms and conditions as may be agreed upon between him and the creditor or, in default of agreement, as the Court may direct. If the sale be by public auction the creditor, or the Official Assignee on behalf of the estate, may bid or purchase.

(b) The creditor may, however, at any time by notice in writing require the Official Assignee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be offered for sale, and if the Official Assignee does not, within three months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in

the security which is vested in the Official Assignee, shall vest in the creditor and the amount of his debt shall be reduced by the amount at which the security has been valued.

(5) Where a creditor has valued his security he may at any time amend the valuation and proof on showing to the satisfaction of the Official Assignee, or the Court, that the valuation and proof were made bona fide on a mistaken estimate, but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the Official Assignee allows the amendment without application to the Court.

(6) Where a valuation has been amended in accordance with subparagraph (5), the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the amended valuation or, as the case may be, shall be entitled to be paid, out of any money for the time being available for dividend, any dividend or share of dividend which he has not received by reason of the inaccuracy of the original valuation before that money is made applicable to the payment of any future dividend but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.

(7) If a creditor having valued his security subsequently realises it, or if it is realised under the provisions of subparagraph (4), the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

(8) If it is found at any time that the affidavit made by or on behalf of a secured creditor has omitted to state that he is a secured creditor, such creditor shall surrender his security to the Official Assignee for the general benefit of the creditors unless the Court on application otherwise orders, and the Court may allow the affidavit to be amended upon such terms as to repayment of any dividend or otherwise as the Court may consider just.

(9) If a secured creditor does not comply with subparagraph (8), he shall be excluded from all share in any dividend.

(10) Subject to the provisions of subparagraph (4), the creditor shall in no case receive more than one pound in the pound and interest, where the creditor is entitled to prove for interest.

(11) Where a mortgagee holds as security a policy of assurance on the life of a bankrupt or an arranging debtor which in the event of the non-payment of premiums provides for their automatic discharge out of moneys payable under the policy, the value of the policy for the purpose of proving in the bankruptcy or arrangement shall be taken to be not less than the value as at the date of adjudication or order for protection; provided that, if the bankrupt or arranging debtor dies before the policy is surrendered, the mortgagee may apply to the Court for the purpose of revaluing his security.

APPENDIX D – Reasonable Living Expense Assessment Criteria

Section 9 of the Personal Insolvency Act 2012 ("the Act") lists the preparation and issuance of guidelines as to what constitutes a *reasonable standard of living* and *reasonable living expenses* under section 23 of the Act amongst the principal functions of the Insolvency Service.

Section 23 of the Act requires the Insolvency Service to hold consultations on these guidelines and specifies certain things which are to be taken into account in preparing the guidelines. Section 23(3) of the Act requires the Insolvency Service to have regard to:

a) such **measures and indicators of poverty set out in Government policy publications on poverty and social inclusion** as the Insolvency Service considers appropriate,

b) such official statistics (within the meaning of the Statistics Act 1993) and **surveys relating to household income and expenditure published by the Central Statistics Office** as the Insolvency Service considers appropriate,

c) the **Consumer Price Index** (All Items) published by the Central Statistics Office or any equivalent index published from time to time by that Office,

d) **such other information as the Insolvency Service considers appropriate** for the performance of its functions under this section,

e) **differences in the size and composition of households**, and the **differing needs of persons**, having regard to matters such as their **age, health** and whether they have a **physical, sensory, mental health or intellectual disability**, and

f) the need to facilitate the **social inclusion** of debtors and their dependants, and their **active participation in economic activity in the State.**

APPENDIX E – UK Insolvency Service – Income Payment Orders / Agreements

1. Stephen Speed, Former Inspector General UK Insolvency Service advice on its position regarding income payment orders and mortgage payments.

Following our legislation, a Court may not make an income payments orders against a bankrupt if its effect would be to *reduce the income of the bankrupt to a level which is insufficient to meet the reasonable, not basic, domestic needs of the bankrupt and his family.*

As such, mortgage payments will be allowed as an expense in arriving at the required, often agreed, monthly payment.

But there are limits to this. In the example of a single person living alone in a 5 bedroom property, purchased with a large mortgage debt, the official receiver would seek to argue that the mortgage payments should not be allowed in full as there is no reasonable domestic need for the individual to live in such a property. In practice it is necessary to support such arguments with evidence to show that it is possible to rent a more modest property in the same location at a lower rent than the mortgage payments being made.

The attitudes of courts to such cases vary, as the effect of an order without the full deduction will be to impair the ability of the bankrupt, and the family, to meet the mortgage obligation, in turn, possibly, bring the mortgage into arrears leading to the property being repossessed.

As such, if courts are minded to act in this way, and not all will, the bankrupt is given a period of time, often three months, to find new accommodation so that they, and the family, do not become homeless.

An example of this in action arose in the case of Malcolm v Official Receiver [1999] BPIR 97. As such, official receivers do not apply a set allowance to the situation, looking at each case individually.

One aspect of this which may be available to you relates to second and any subsequent charge holders. If there is a second charge over a property, unless the charge holder has a financial interest in the property, because the first charge holder is fully secured, and more, the second and any subsequent charge holder are prevented from taking recovery action against the property. Thus, in practice, the second charge holder and any subsequent charge holder, are considered to be unsecured creditors for this purpose with the consequence that mortgage payments to them are disallowed when considering contributions under an income payments order.

We publish our guidance to official receivers on this topic on our website under the Freedom of Information Act publications scheme. The following link will take you to the correct place.

http://www.insolvencydirect.bis.gov.uk/freedomofinformation/technical/TechnicalManual/Ch25-36/Chapter31/part7/Introduction.htm

Insolvency Service Website on Income payment agreements:

One of the aims of bankruptcy is to relieve a debtor of unmanageable debt problems. A consequence of this is that the bankrupt, who no longer has to make payments to the majority of his/her creditors, may have a surplus income beyond that needed to meet the reasonable domestic needs of him/herself and his/her family. The trustee in bankruptcy, or the official receiver, is able to reach agreement with the bankrupt, or

to obtain an order of court, for payments to be made from any surplus income to the bankruptcy estate for the benefit of the creditors.

In effect, an IPA works in the same way as an IPO but removes the need for the trustee to make an application to court for an order with the potential for time delays that may ensue. The official receiver can enter into the agreement before a trustee is appointed which also means that payments are likely to commence at an earlier stage in the bankruptcy. With the reduction in the discharge period introduced by EA2002, it is hoped that in the majority of cases where the bankrupt has income in excess of expenditure, an IPA will be obtained. It is envisaged that an IPO will be sought only in those cases where the bankrupt fails to consent to the proposed IPA or fails to co-operate with the collection of an IPA.

APPENDIX F

Malcolm v Official Receiver

(http://www.insolvencydirect.bis. All England Official Transcripts (1997-2008))

Bankruptcy - Appeal against order from County Court - Income payment order - Appellant failing to make payments - Whether payment order appropriate - Insolvency Act 1986, s 310

CHANCERY DIVISION RATTEE J 28 APRIL 1998

The Appellant appeared in Person W Kirkham for the Official Receiver

RATTEE J: This is a bankruptcy appeal against an order made by District Judge Winslett in the Brighton County Court on 30 January of this year, whereby he ordered the bankrupt to pay the sum of £150 in three instalments of £50 a month; the first instalment to be payable on or before 27 February, and the other two instalments in March and April. The learned District Judge by his order directed a further hearing of the matter before him on 24 April. I am told that on that occasion the matter was further adjourned to a date at the end of May.

The order for payment of £50 a month was an income payment order under s.310 of the Insolvency Act 1986, such payments to be made to the Official Receiver towards the bankrupt's very substantial debts. The bankruptcy order in the case was made on 11 December 1996 on the petition of the Commissioners of Inland Revenue based on indebtedness of the bankrupt to the Commissioners in a sum of £35,000-odd. The statement of affairs, dated 5 February 1997, produced by the Official Receiver, shows that the bankrupt, Mr Malcolm, had net assets of £7,900-odd, with unsecured liabilities of £144,000-odd. He was then, and still is, living in a house which is vested in himself and his wife (from whom he is separated) jointly, subject to a substantial charge in favour of the Royal Bank of Scotland in respect of which, according to the

statement of affairs produced by the Official Receiver, there was at the date of that statement apparently likely to be a shortfall of some £64,000 in the value of the security below the amount of the indebtedness charged on the property, and subject also to a charge in favour of the Alliance & Leicester Building Society to which I shall have to refer a little later.

Mr Malcolm had been carrying on business in partnership and, according to him, he was badly let down by his partners and in effect, as I understand it, saddled with a liability to the Inland Revenue not all of which ought to have been borne by him.

The Official Receiver made an application on 3 December last year to the County Court under s.310 of the Insolvency Act for an order for income payments to be made for the benefit of his creditors by Mr Malcolm in the sum of £105 a month. In support of that the Official Receiver set out some figures for Mr Malcolm's then income and expenditure based on figures produced by Mr Malcolm on 31 December 1996. That showed that Mr Malcolm was earning a net sum of some £1,100-odd per month, but the figures showed that he had monthly outgoings of some £1,560 a month. Quite where the balance was found from does not appear from the evidence. By far the largest outgoing claimed by Mr Malcolm, according to his figures, was a monthly mortgage repayment in the sum of (then) £865-odd made to the Alliance & Leicester Building Society in respect of a mortgage on the house in which he is living.

The Official Receiver suggested in his application, understandably, that that represented far too high a mortgage payment being made by a man in Mr Malcolm's financial position. He suggested that a more realistic amount to be allowed by way of mortgage repayment, or payment of rent in respect of the cost of providing Mr Malcolm with alternative accommodation, was the sum of £450. The Official Receiver also suggested that the amounts said to be spent on Council tax, electricity and telephone bills were excessive. The conclusion reached by the Official Receiver

was that in fact, if the reductions which he suggested were appropriate were made in Mr Malcolm's expenditure, he would be left with an excess of income over expenditure of £189.99 a month, thereby enabling him to make the £105 a month payment for the benefit of his creditors suggested by the Official Receiver.

However, when the matter came before the District Judge, the Official Receiver accepted, as I understand it, that *Mr Malcolm was not going to be able to pay £105 a month until some further arrangements had been made to find himself alternative accommodation, so that he could stop paying the present mortgage repayment on the house*. The Official Receiver's suggestion, which was accepted by the District Judge, was that for a period of three months £50 a month should be paid, the matter then coming back to the District Judge to review the situation, presumably in the light of proposals that were then going to be made by Mr Malcolm as to how he was going to deal with the need to find himself alternative accommodation.

Mr Malcolm put in a statement in opposition to the Official Receiver's application, in which he included slightly revised figures for income and outgoings, showing net monthly salary income of £1,208 and total monthly outgoings of £1,490, including mortgage payments of £820 a month to the Alliance & Leicester Building Society. Mr Malcolm in his statement sought to rebut the Official Receiver's other criticisms of his outgoings on the basis that his Council tax had already been reduced to the lowest possible figure applicable to single person occupancy of the house, as he is now occupying it on his own; that the charges for electricity criticised by the Official Receiver were really not to be criticised having regard to the fact that electricity is the only source of power (apart from wood or coal) for heating and lighting the property; and that his telephone usage of £55 a month really could not be reduced any further.

The District Judge, having heard representations from Mr Malcolm and the Official Receiver, made the order which I have mentioned, against which Mr Malcolm now

appeals. The only reasons expressed in a brief manuscript note made by the District Judge which is before me appear to be, so far as I can decipher the note:

"The area of issue relating to mortgage repayment. No effort by debtor to make payment."

Then the learned judge recorded his order for payment of the £50 a month for three months.

Apparently, when the matter was relisted before the District Judge pursuant to his order on 24 April, Mr Malcolm did not appear, because he says he had been told he did not need to, having regard to his pending appeal against the District Judge's order of January. I am told by a representative of the Official Receiver that the learned District Judge made no order save to adjourn the matter for a further period until a date at the end of May. The result of that, of course, is that, quite apart from the outcome of this appeal, no further payments are due under the District Judge's order over and above the £50 a month intended to be paid up to and ending on 24 April.

Mr Malcolm submits that he is just not in a position to make the payment that has been ordered, unless and until he ceases to keep up the existing mortgage payments to the Alliance & Leicester Building Society. He tells me that there is pending litigation brought by his wife against the Royal Bank of Scotland in relation to indebtedness claimed by that bank as charged on the property. Mr Malcolm says that it is his hopeful expectation that that litigation, which he says is likely to be resolved in the latter part of this year, will mean he will find himself in a much more healthy financial position and able to make payments in respect of his substantial debt.

Unfortunately, there is no evidence before me whatever as to the nature of the litigation to which he refers. It was apparently referred to in front of the District Judge, who simply recorded in his note that Mr Malcolm told him that there was a dispute with the Royal Bank of Scotland. I have no means of forming any view as to whether that litigation is really likely to result in any improvement in Mr Malcolm's present financial position. He maintains that, pending the outcome of that litigation, he should not be expected to take any steps such as to stop payment to the Alliance & Leicester Building Society which would result in the house necessarily being repossessed, and he tells me (as he told the District Judge) that his wife, who has a joint interest in the house, is very much against the house being lost. That of course is a matter completely irrelevant to any consideration I have to make as to the position between Mr Malcolm and his creditors.

I do find the whole situation disclosed by the evidence before me at the moment very unsatisfactory. It seems to me perfectly plain that in the interests of Mr Malcolm's creditors, and in particular the Commissioners of Inland Revenue on behalf of the body of taxpayers generally, some steps have got to be taken urgently to reduce Mr Malcolm's outgoings by way of mortgage repayments on this house. It seems to me wholly unreasonable that he should be living in a house on his own involving payments of £820 a month in mortgage instalments to the building society, which are made at least in part for the benefit of his wife as a joint owner of the property, while his substantial unsecured creditors, and in particular the Inland Revenue, are left in a position of receiving absolutely nothing towards the substantial debts which are due from him to them.

However, I am troubled by the reality of the order which was made for the payment of £50 a month for three months, given that it was made in the context that it was expected to operate during a period when Mr Malcolm had not yet found alternative accommodation and which necessarily involved him, if he was not to be put out on

the street, in keeping up the mortgage repayments. It is difficult - indeed it is impossible - to ascertain from the brief note of the District Judge's decision to which I have referred quite what reasoning of the District Judge was in taking the view that, even without for the time being moving out of the house, Mr Malcolm was going to find himself in a position to pay £50 a month on the basis of the financial evidence which was before the District Judge. It may be that the District Judge had sound reasons for taking the view which he did, but it is unfortunately impossible to ascertain those reasons from the note of his decision.

In those circumstances, it seems to me that the appropriate course is to allow the appeal, that I should set aside the existing order of the District Judge, but on the clear understanding that, when the matter comes back before the District Judge at the end of May, Mr Malcolm has got to be in a position to put before the District Judge concrete, carefully worked out proposals as to how he is going to put himself in a position to reduce his payment by way of mortgage instalments, and that means of course finding alternative accommodation, so as to be able to make significant payments for the benefit of his creditors, because that has got to happen very, very quickly. I do not accept that the existence of other litigation against the Royal Bank of Scotland, so far as I know about it at the moment, is any good reason for Mr Malcolm not being in a position to move out of the house, find alternative accommodation and stop paying the existing mortgage payments. But if he wants to try and persuade the District Judge on the further hearing that there is anything in that litigation which would make it inappropriate and unjust for him to be expected to find alternative accommodation at that stage, then he must put in full evidence relating to that litigation and his reasoning for making that submission before the District Judge when the matter comes back before him.

Nothing I have said in my judgment on this appeal should be taken as any indication to the District Judge as to what course he should take on the further

hearing of the matter at the end of May. I would only warn Mr Malcolm that he has got, in my judgment, to be in a position on that date to make very concrete proposals as to what steps he is going to take in order to enable himself to make some reasonable payments towards his very substantial indebtedness to unsecured creditors. But I think the District Judge when the matter comes back will have to consider the whole situation, including the proposals then put by Mr Malcolm as to finding alternative accommodation and reducing his present mortgage repayments, and the District Judge will then have to make a decision in the exercise of his discretion in the light of those proposals.

I should perhaps just say this: while I realise the difficulties in which the District Judge finds himself in dealing with these matters in the necessarily short space of time allotted for them, it would be helpful if, when the matter comes back before him, the learned District Judge could give a rather fuller indication of the reasoning by which he reaches whatever conclusion he does reach, so that, if the matter should go further by way of appeal, this court can have a clear indication as to the reasoning in the District Judge's mind for reaching his conclusion.

So I shall allow the appeal, set aside the existing order of the District Judge, as I have said, on the understanding that the matter will come back before the District Judge for full consideration at the end of May. Anything else? No. Very well. Thank you both.

APPENDIX G

Reaffirmation Agreements

A **reaffirmation agreement** in United States bankruptcy law refers to an agreement made between a creditor and the debtor that waives discharge of a debt that would otherwise be discharged in the pending bankruptcy proceeding. A properly executed, timely filed reaffirmation agreement modifies the discharge such that it is rendered inoperable against the subject debt. Most statutory authority for reaffirmation agreements is codified at 11 U.S.C. § 524(c).

A debtor may wish to pay a debt, even though that debt would be discharged in bankruptcy. For example, a debtor may wish to keep a vehicle. As a promise to pay that debt, a debtor must enter into a reaffirmation agreement with the creditor. Reaffirmations are voluntary and not required by law. It is recommended that the debtor carefully consider whether or not the agreed upon payments can be made before entering into a reaffirmation agreement. **Any agreement to reaffirm must be made before the discharge is entered.** If you are in the process of reaffirming a debt and feel it will not be filed before the discharge deadline, notify the clerk's office in writing to delay entry of the discharge until the reaffirmation is filed. Reaffirmations are strictly voluntary. If you wish to reaffirm (agree to pay back) any particular debt, you must enter into a written agreement with the creditor, which legally obligates you to pay all or a portion of a dischargeable (wiped out by the bankruptcy) debt. The form for this is Form 240A Reaffirmation Agreement. The creditor and debtor must fully complete the form indicating the nature of the debt, the value of the collateral, and the reason for reaffirmation. Both parties to the reaffirmation must sign on the appropriate signature lines. Since you are not represented by an attorney, the reaffirmation will be automatically set for hearing and you will receive written notice of the hearing date and time. You must appear at the hearing where the judge will determine if it is in your best interests to reaffirm, based on your circumstances and the nature of the reaffirmation. For example, the court may not allow you to reaffirm a debt of $3,000 for a vehicle that may be worth $1,000. If a debtor reaffirms a debt and fails to pay it, the debt remains owed as though there were no bankruptcy and the creditor can take action to collect the debt. This reaffirmed debt is not discharged or wiped out by the bankruptcy filing. The Court does not need to approve a reaffirmation agreement which applies to consumer debt secured by real estate. This applies to any mortgages on your home or other debts secured by your home. In addition, the Court does not approve any reaffirmation agreements between debtors and credit unions. They are filed and become part of the record without a hearing. You have the right to cancel (rescind) any reaffirmation at any time prior to the entry of your discharge or within 60 days after the reaffirmation

agreement is filed with the court, whichever occurs later. To rescind a reaffirmation agreement, you must mail a written notice to the creditor stating that you are withdrawing your decision to reaffirm and revoking the agreement. Send the original letter to the creditor and a copy to the clerk's office to be made part of your file. Completion of Reaffirmation Agreement Form All reaffirmations must be filed with Official Form B27, the reaffirmation cover sheet. The Reaffirmation Agreement (Official Form B240A) has been amended effective December 1, 2009. In order to allow filers sufficient time to implement the form change, the Court will allow a six-month transition period during which time either the old (1/07), or new (12/09), versions of the Reaffirmation Agreement may be filed. Note: Effective April 1, 2010, the newly amended Reaffirmation Agreement form will become mandatory. All pro se reaffirmation agreements that do not involve credit unions or real estate will be automatically set for hearing, regardless of whether a presumption of undue hardship has arisen. If the reaffirmation agreement involves real estate and/or a credit union, no further action will be taken. The January 2007 Reaffirmation Agreement is divided into various parts. Parts A-E - consisting of the Debtor's Disclosures, Reaffirmation Agreement, Attorney Certification, Debtor's Statement in Support of Reaffirmation, and Motion for Court Approval make up the document required to reaffirm a debt. Instructions appear within the reaffirmation agreement form.

Part A - Debtor's Disclosures: Summary of Reaffirmation Agreement. Complete this section giving details of the agreement: Amount to be reaffirmed, percentage rate, payment to be made. Part B - The Reaffirmation Agreement Requires signature(s) of both the representative of the creditor and the debtor(s).

Part C - Certification by Debtor's Attorney - Not Applicable for a Pro Se Debtor Part D - The Debtor's Statement in Support of the Reaffirmation. Debtor's signature required! This section indicates to the Court that the debtor can make the payments without undue hardship. If there is a presumption of undue hardship, the debtor can explain how the hardship will be overcome. Part E is the Debtor's Motion for Court Approval and must be signed by Debtors who are not represented by an attorney. Defective Reaffirmation Agreements A reaffirmation agreement will be considered defective and will be stricken if: • It is not filed on Official Form 240 A(1/07), or if • The debtor and/or creditor fails to sign any of the required parts of the agreement.

A reaffirmation agreement will be considered defective if Part E is not completed. Failure to submit a completed Part E within the deficiency period (15 days) will result in the agreement being stricken.

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US Law - Should I Reaffirm My Mortgage in my Chapter 7 Bankruptcy Case?

As a Waco Bankruptcy Attorney my clients frequently ask me if they should reaffirm the debt owed on their home mortgage when they file a Chapter 7 bankruptcy case. In this scary real estate market, many homes with mortgages are underwater, which means that these homes are worth less than what is owed against them. Therefore, reaffirming debt on a home is a serious legal question. For example, if you file a Chapter 7 bankruptcy case, your home is worth $200,000.00 and you owe $240,000.00 on it. You can file a Chapter 7 bankruptcy case, move to another home and get discharged from the debt owed to your mortgage company.

However, as a Waco Bankruptcy Attorney, I find that most of my clients that file a Chapter 7 bankruptcy case want to keep their home. Obviously, you must to be able to make the monthly mortgage payments on your home after you file your Chapter 7 bankruptcy case if you want to keep your home. You must also keep the home insured, and keep the property taxes on the home paid, just like you were required to do before you filed your Chapter 7 bankruptcy case.

When you file a Chapter 7 bankruptcy case, you are discharged from the debt owed to your home mortgage company. Their lien or mortgage on your property is not discharged and if you want to keep the home you must keep making your monthly mortgage payments. If you move, get fired, get divorced, get sick…..or experience anything that renders it impossible or too difficult to make your mortgage payments, you can stop making the mortgage payments and let your mortgage company foreclose on your home. If the home is sold at the foreclosure sale for less than you owe against it, you are not liable for that deficiency. Continuing to make the mortgage payments after the bankruptcy discharge is received does not reinstate your personal liability on the home mortgage.

Mortgage companies sometimes send us “Reaffirmation Agreements” and we are asked to sign them and have our clients sign them when the clients are in a Chapter 7 bankruptcy case. A Reaffirmation Agreement “reaffirms” or “reinstates” your personal liability on the home mortgage as if there was no bankruptcy case filed. If you reaffirm the debt during your Chapter 7 bankruptcy case and then

do not pay it, you owe that debt as if you never filed bankruptcy. If you do not or can not make your mortgage payments, your mortgage company will foreclose
on the home and then attempt to collect from you the deficiency after the foreclosure sale.

Do you have to reaffirm your mortgage debt in order to keep your home? Do you have to reinstate that personal liability on your home as if there was no bankruptcy order to keep your home? The answer is simple….no.
I have yet to see a mortgage company in Texas foreclose on someone's home, after a Chapter 7 bankruptcy case is filed who was keeping the payments, home insurance and property taxes, just for not signing a reaffirmation before the Chapter 7 discharge.

Chrysler and Ford Motor Credit will repossess your car or truck that you are financing with them if you do not reaffirm their debt. These companies lobbied Congress in order to get special provisions in the Bankruptcy Code that only apply to car lenders in Chapter 7 bankruptcy cases. Therefore, many times we do reaffirm debt owed to these lenders if the clients want to keep their cars after their Chapter 7 bankruptcy case is filed.

Home mortgage debt is different. I look at the upside versus the downside. I see no downside to not reaffirming. Some banks and mortgage companies say they will not inform the credit reporting agencies that you are current on the payments unless you reaffirm their debt. However, you have the right to include accurate information in your credit report. You can add you correct information to your credit report at least once a year, yourself, without them. They are required to give you at least annual statements reflecting your outstanding mortgage.
The downside? Big .You reaffirm, something else goes wrong, and you cannot stay current, they foreclose for the $100,000 the house is worth, and chase you for the $40,000 difference. Unless you are getting some fantastic modification, we typically advise our clients not to reaffirm their home mortgage debt.
To learn more about options under Chapter 7 bankruptcy and Chapter 13 bankruptcy,

ADVICE You will need to check with the attorney that filed your case.

Lessa July 22, 2011 at 10:50 am

If filing Chapter 7 in Iowa, what is the difference between reaffirmation and retain collateral and continue monthly payments for mortgage and vehicle loans. Do I have to make the choice or are there rules that determine the best selection. I had good credit until last fall when a series of events led to the decision of filing bankruptcy. I want to keep both my house and car, but need more information of what is best and what is decided for me.
Also, I have student loans that are not covered in the bankruptcy; any suggestions?
Thank you for your assistance

ADVICE Since you live in Iowa, I would strongly suggest speaking with an Iowa bankruptcy attorney and most attorneys offer a free consultation. I am in Texas and the state rules vary from state to state. I am not licensed in Iowa. The National Association of Consumer Bankruptcy Attorneys, NACBA, would be a good source of finding a local attorney.

kimberly July 23, 2011 at 6:34 am

I live in new york and I filed for bankruptcy in 2008. I did not reaffirm my mortgage. Now i want to sell my home and buy a new one, i have made all my mortgage payments on time. However it doesnt show on my credit report, so i have no credit and no one will give me a mortgage or even call me back. I have called the mortgage company and they said i would have to call my attorney and file a reaffirmation of my mortgage. my attorney has retired and moved out of the country. Is there any other way to sell my home and get another mortgage?

I recommend you speak with an attorney in New York

ADVICE

I'm sorry, but I am only licensed to practice law in Texas. Each state has their own bankruptcy laws in addition to the Federal bankruptcy laws. I would suggest contacting a bankruptcy attorney in Michigan. The National Association of Consumer Bankruptcy Attorneys (NACBA.ORG) is a great source to find attorneys that stay up to date in all the changes in bankruptcy laws. They have an attorney finder on their website and should be able to refer you to a NACBA attorney in your area of Michigan.

US LAW - What Is A Reaffirmation Agreement?

A reaffirmation agreement is an agreement where a debtor chooses to become legally obligated again to pay all or portion of a debt which would be discharged in the bankruptcy case. A reaffirmation agreement must be filed within 60 days after the meeting of creditors date. Reaffirmation agreements are voluntary. They are not required by the Bankruptcy Code or other state or federal law. After bankruptcy, a debtor can voluntarily repay any debt rather than sign a reaffirmation agreement, but since October 2005, there may be valid reasons for signing a reaffirmation agreement (at least in regard to vehicles).

Attorneys can certify for their clients that signing a reaffirmation is not a hardship for their client. If there is no attorney, the Court usually wants to meet with the debtor to make sure the debtor knows that the reaffirmation is voluntary. If a judge does not believe that a reaffirmation agreement is in a debtor's best interest, the judge may refuse to allow the reaffirmation agreement to be entered as a binding agreement.

Since a reaffirmation agreement takes away some of the "fresh start" given by a discharge of debts in bankruptcy, some attorneys will advise strongly against signing one. Even if one is signed, the Debtor has 60 days after the agreement is filed with the court or from the discharge date to change his mind. All that is needed, is a letter saying "I don't want this agreement", with the letter being sent to the court and to the creditor.

Before October 2005, when the bankruptcy law was changed, there were four choices in Chapter 7 in regard to secured debt.

1. Redemption (buying the value of the car from the creditor — which requires a source of funds);

2. Surrender (giving the item which secures the debt back to the creditor);

3. Reaffirmation (discussed above); and

4. "Keep and Pay" (as long as the debtor keeps paying for the secured item, the debtor can keep the secured item).

Since 2005, the status of "keep and pay" is uncertain as that option is not mentioned in the new Act (while the other three are specifically mentioned). The ability to "keep and pay" is a right under state law, not bankruptcy law, so each state will be determining position.