

Part 3 - PERSONAL INSOLVENCY
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1. Causes of Financial Crisis – How did we get here?

The rapid rise in debt can be linked to the changes in access to and use of credit.

Over the last decade financial institutions were increasingly willing to lend, even to those who traditionally found it hard to access mainstream credit. There would appear to be a consensus amongst financial commentators and experts reporting on matter, that developments both international and national that facilitated the credit boom and ultimately caused our financial crisis include the following:

- **Entry into the euro area** which markedly reduced Irish interest rates.
- **Financial institutions increased access to market funding**, where cheap and abundant credit was already available owing to monetary policies in major countries; as well as increasing use of securitisation, where banks sold off their loans to investors.
- **Globalisation of markets and EU membership** increased foreign competition in the Irish financial market putting pressure on bank margins. A number of new, potentially high-risk retail products were introduced to the Irish market by new entrants (for example, tracker mortgages, 100% mortgages for first-time buyers)
- **Self-acknowledged reckless lending** by our financial institutions and foreign financial institutions operating here, adopting lower credit and security standards.
- Government accepted **poor regulation by Irish regulatory bodies of our financial institutions.**
- **Rapid growth in land and property prices** fuelled by easy access to credit and strong interest in individuals to acquire property from first half of decade.
- **International financial crisis** which caused bank funding from international markets to dry up.
- **Consequent restrictions on bank lending caused major liquidity difficulties** for particularly credit-driven property development sector initially, then financial institutions themselves which were under capitalised and then the wider economy

- **Property prices were dropping significantly from the start of 2007** causing significant difficulties in many cases for mortgagors and indeed mortgagees.

In seeking to resolve the financial crisis the Government in September 2008 gave a bank guarantee to protect the financial system against difficulties it envisaged would result from liquidity (funding) problems in certain financial institutions. This guarantee has resulted in the State having to contribute billions in funding to capitalise the financial institutions covered by the guarantee, with an ongoing liability for all their future losses. The strain on the national finances as a result of this crisis caused the need for an €85 billion assistance package being sought and received from, the ECB and IMF and including €7 billion from the UK.

2. Impact on individuals – Where we are now?

An individual seeking to deal with personal debt problems will firstly seek to reduce his outgoings and reach individual agreements with his creditors. He may seek to consolidate his credit card debt and other loans into one personal loan. With regard to his mortgage he may seek to pay interest only, extend the length of the mortgage and capitalise arrears that have built up or seek one of options proposed by Keane Report, to get through the financial crisis he is going through due to e.g. redundancy.

Similarly, a businessman in seeking to manage financial difficulties he is facing, will deal individually with his problems; reduce his costs, boost his sales, re-schedule his loans, be as aggressive as he can be with his customers in current climate to seek earliest payment of debts due to him, whilst seeking to extend credit terms as much as he can, with his suppliers.

In many cases these individual approaches work, and debtors both personal and business manage their debts and avoid legal action being taken against them for debt

recovery. With the credit boom we have experienced in Ireland over the last 9 years however, many other individuals and businessmen particularly those developing and/or investing in property; extended themselves way beyond their capacity to repay their debts, once the property crash, deep recession and credit crunch hit the country. For others the deep recession and credit crunch has destroyed otherwise perfectly sound businesses, despite best efforts of individuals involved. Increasingly there is a demand for more effective and efficient processes for dealing with individual indebtedness; both personal and business and the Law Reform Commission in its 2 reports on the subject, highlighted many of the issues involved and made significant recommendations for their resolution, in light of international best practice.

3. Personal Insolvency Bill 2012 – Government response to crisis.

The Government, in response to the demand for radical reform of our insolvency legislation to deal with the indebtedness crisis, to ensure financial institutions effectively manage the indebtedness on their books and in discharge of its obligations under the EU/IMF bailout agreement to resolve these issues, will soon enact the Personal Insolvency Act 2012.

The Act provides for a comprehensive reform of insolvency law. It provides 4 distinct avenues for people in debt to seek to resolve their debt problems – 3 new non bankruptcy processes and reform of the existing bankruptcy option

Three new Non-Bankruptcy Processes

The reform of personal insolvency law contained in the Act will involve the introduction of the following 3 new non-bankruptcy processes:

- **Debt Relief Notice (DRN)** to allow for the write-off of qualifying debt up to €20,000, subject to a three year supervision period;
- **Debt Settlement Arrangement (DSA)** for the agreed settlement of unsecured debt (unlimited) over 5 years;

- **Personal Insolvency Arrangement (PIA)** for the agreed settlement of secured debt up to €3 million (though this cap can be increased with the consent of all secured creditors) and unsecured debt over 6 years.

Bankruptcy Reform

The major bankruptcy reform in the act is the reduction of the automatic discharge from bankruptcy period, subject to certain conditions, from 12 years to 3 years. This development moves Ireland to the European norm for such discharge.

Insolvency Service

The new Insolvency Service of Ireland, established under the Act, has a role in certifying applications for a Debt Relief Notice, Debt Settlement Arrangement or a Personal Insolvency Arrangement and thereafter referring the relevant documentation to the Circuit Court. In order to protect the constitutional rights of all concerned provision has been made for Circuit Court oversight of these three new procedures.

The new personal insolvency laws will in addition to providing new legal remedies, also provide a significant incentive for financial institutions to develop and implement realistic agreements to resolve debt issues with their customers, such as those recommended by the Keane Report. The provisions relating to a Personal Insolvency Arrangement are specifically designed to facilitate a debtor's continued ownership and occupation of his principal private residence, unless the debtor does not wish to do so or the costs of the debtor continuing to reside in it are disproportionately large. The failure to agree a suitable non-bankruptcy settlement between debtors and creditors will leave open the option of debt enforcement or bankruptcy.

Individual circumstances vary and the solutions found within the context of the DSA and PIA processes will also vary. Persons experiencing difficulties in regard to mortgage arrears should engage with their lenders so as to seek a satisfactory solution and also lenders should constructively engage with their customers in genuine financial difficulty. The protections afforded under the Central Bank Code of Conduct on Mortgage Arrears (CCMA) will continue to be available to co-operating borrowers.

If creditors fail to constructively engage in the DSA or PIA process or if agreement does not prove possible, the option of initiating an application for a Court adjudication of bankruptcy is available both to creditors and to an insolvent debtor. The Act does not provide for the automatic writing-off of negative equity, where such may exist. Where a person is in a position to service their mortgage or other debt obligations, they must continue to do so. This Act does not relieve solvent debtors of their responsibility to meet their contractual obligations.

4. Scheme of the Personal Insolvency Act 2012

Part 2 - Insolvency Service of Ireland

The Act (in Part 2) provides for the establishment of an Insolvency Service of Ireland to operate the new non-judicial debt resolution processes.

Part 3 - Insolvency Arrangements

The Act (in Part 3), in 6 Chapters, provides for:

- three new non-bankruptcy processes (**DRNs, DSAs and PIAs**),
- the appointment of Personal Insolvency Practitioners for these insolvency arrangements,
- offences, and
- miscellaneous provisions.

Part 4 - Bankruptcy Reform

Part 5 - Personal Insolvency Practitioners

The Personal Insolvency Act 2012 is available on the Oireachtas website;

<http://www.oireachtas.ie/>

5. Insolvency Arrangements - Part 3

5.1 Debt Relief Notice (DRN)

5.2 Debt Settlement Arrangement (DSA)

5.3 Personal Insolvency Arrangement (PIA)

5.1 Debt Relief Notice

(Part 3, Chapter 1) provides, subject to certain conditions, for the issue of a Debt Relief Notice (DRN) to permit the write-off of qualifying debts totalling not more than €20,000 *for a person who is insolvent and has no likelihood of becoming solvent within the period of 3 years commencing on the application date, while also maintaining a reasonable standard of living*. The intention is to create an efficient non-bankruptcy process of allowing such a person to resolve his/her unmanageable debt problem. The process is akin to bankruptcy in its broad approach but provides a low cost insolvency option, having regard to the extent of the debts involved. An application for a DRN must be submitted on behalf of the debtor by an authorised approved intermediary body, (e.g. the Money Advice and Budgeting Service - MABS).

The approved intermediary would:

- Advise the debtor as to his/her options and the qualifying requirements,

- Assist in the preparation of the necessary Prescribed Financial Statement which must be verified by means of a statutory declaration - and any other required documentation
- If the qualifying criteria are met, transmit the debtor's application to the Insolvency Service to have a DRN approved and
- Not be entitled to charge any fee for its services.

General conditions for application for a DRN

- a) Debtor would have *qualifying debts* of €20,000 or less;
- b) Debtor would not be eligible where 25 per cent or more of the *qualifying debts* were *incurred in the 6 months preceding the application*;
- c) *Qualifying debts* - Debts qualifying for inclusion in a DRN are *all debts that are not excluded debts* or *excludable debts* where consent to include not given nor deemed to have been given, after failure within 21 days to object to notice served by MABS on the excludable creditor. Typical examples of qualifying debts be, *credit card, personal loan, catalogue payments, rent, utility bills, called up guarantee liabilities* etc;
- d) *Excluded debts*: (i) Domestic support order liability
 - (ii) Tort liability on Court order in personal or fatal injury action
 - (iii) Liability on a loan obtained through fraud, misappropriation or fraudulent breach of trust.
 - (iv) Liability under Court order for criminal fine or under Proceeds of Crime Acts 1996.
- e) *Excludable debts*: (i) All liabilities due to the State ie tax, duty, levy or other charge payable to the State, Household Charge, rates, HSE Nursing Home Support Scheme & SW Consolidation Act 2005.
 - (ii) Management fees to an owner's management company and such annual service charges.
- e) Debtor will have a *net monthly disposable income* of €60 or less, after provision for "*reasonable*" living expenses and payments in respect of excluded debts (if any).

“Income” includes wages, welfare benefits (other than child benefit), pension payments, contributions from other household members and any other income available to him/her;

f) Debtor would hold assets (separately or jointly) to the value of €400 or less. Value of an asset is its market value irrespective of any mortgage, charge or other security e.g. lien. There are exemptions however from the asset test for:

- i) *essential household appliances, tools, etc required for business* up to total of €6000;
- ii) one motor vehicle up to value of €2000;
- iii) one item of jewelry up to value of €750, and
- iv) any asset in a *relevant pension scheme* {ie most pensions other than Approved Retirement Funds (ARFs)}

g) Debtor must act in *good faith and co-operate fully*.

Role of the Insolvency Service in DRN

On receipt of the completed application, the Insolvency Service shall consider it and make such enquiries as it considers appropriate to verify the information, including enquiries with the Department of Social Protection, Revenue Commissioners or State bodies and agencies. There is a specific duty placed on any person who receives an enquiry from the Insolvency Service to furnish information requested to it, as soon as practicable. The Insolvency Service shall be entitled to presume that the eligibility criteria for the DRN have been met, if it has no reason to believe that the information is incomplete or inaccurate. The Insolvency Service, being satisfied as to the application, shall issue a certificate to that effect and furnish the certificate and supporting documentation to the Court. The Court will consider the application and if satisfied issue the DRN and notify the Insolvency Service.

The Insolvency Service will notify the approved intermediary and the creditors of the issue of the DRN and register it in the Register of Debt Relief Notices.

The effect of the issue of the DRN is that the debtor is subject to a supervision period of three years. During that period, creditors may not initiate or prosecute legal proceedings or seek to recover payment for a debt or recover goods or contact the debtor, in respect of debts covered by the notice. (If he has incurred new liabilities not covered by the DRN, creditors are fully entitled to sue for the recovery of such new debts.)

The DRN will last 3 years from date of registration of its issue. At that time (and subject to no other action) the DRN terminates and the qualifying debts are discharged and the debtor will be removed from the Register of Debt Relief Notices. Only one DRN per lifetime is permitted and it cannot be sought within 5 years completion of a Debt Settlement Arrangement or Personal Insolvency Arrangement. There is a restriction on the debtor from applying for credit over €650 during the DRN supervision period, without informing the lender of his/her status.

The debtor must act honestly, co-operate fully with approved intermediary (MABS) and inform the intermediary and the Insolvency Service of any material change in financial circumstances. So as not to reduce the incentive to seek and obtain employment following approval of a DRN, there is provision for the debtor to repay a portion of the debts in circumstances where his financial situation improves. These circumstances include receipt of gifts or windfalls over €500 or where the debtor's income has increased by over €400 per month, in which case half of gift / windfall and income increase shall be given to Insolvency Service for distribution to creditors. The debtor will transmit funds to the Insolvency Service to be paid on a pari pasu (equal) basis to the listed creditors. Should a debtor make repayments totalling 50 per cent of the original debt, the debtor will be deemed to have satisfied the debts in full, the DRN will cease to have effect and the debtor will be removed from the Register and all of the debts will be discharged.

Creditor objection

A creditor is entitled to challenge before the Court any decision of the Insolvency Service and also to object against a DRN on grounds that:

- Debt was not a *qualifying debt*,
- There was a *material inaccuracy* in Prescribed Financial Statement
- Debtor *failed with an obligation, committed an offence or procedural requirements not followed*, under the Act
- Debtor is an *undischarged bankrupt*.

Court can:

- Revoke/ amend any decision of Insolvency Service
- Terminate DRN
- Remove a debt from DRN
- Extend supervision period by a period not exceeding 12 months.
- Make any order it thinks fit in circumstances.

Example – See Appendix A

Part 3, Chapter 2 - Appointment of Personal Insolvency Practitioners for the purposes of: - **Debt Settlement Arrangement (DSA) (Part 3 Chapter 3) or**
- **Personal Insolvency Arrangement (PIA) (Part 3 Chapter 4).**

Part 3, Chapter 2 provides for a range of practical matters in regard to the appointment of a personal insolvency practitioner, the duties and obligations on such a practitioner and the documents to be prepared in an application for a DSA or PIA. A key requirement is the provision for the completion of the Prescribed Financial Statement by the debtor with the assistance of the personal insolvency practitioner. The Statement must be verified by means of a statutory declaration. These Statements are the critical element in application for the debt resolution processes. The Minister may prescribe in regulations the details required.

Similar to DRNs it provides in relation to DSAs and PIAs, that any asset of a debtor in a *relevant pension scheme* (ie most pensions other than Approved Retirement Funds (ARFs)) shall not be regarded as debtor's asset in the DSA / PIA. However, where debtor would receive any income or any other sum of money from the relevant pension scheme, by performing an act or exercising an option, then such funds would be treated as an asset in his / her DSA or PIA.

5.2 Debt Settlement Arrangement (Unsecured Debts only i.e. no mortgage, charge)

(Part 3, Chapter 3) provides for a system of Debt Settlement Arrangements (DSA) between a debtor and one or more creditors to repay an amount of unsecured debt over a period of up to 5 years (with possible agreed extension to 6 years). The DSA would assist persons who have such income and assets and debts that they would fall outside the eligibility criteria for a Debt Relief Notice i.e. unsecured debts over €20,000. The Chapter provides for all aspects of the eligibility, application, determination, duties and obligations arising, Court application, objection by creditor and discharge from qualifying debts under the DSA process.

The application for a DSA must be made through a personal insolvency practitioner (PIP) appointed by the debtor. The PIP must:

- Advise the debtor as to his/her options in regard to insolvency processes,
- Assist in the preparation of the necessary Prescribed Financial Statement which must be verified by means of a statutory declaration and any other required documentation, and
- If the qualifying criteria are met, apply to the Insolvency Service for a Protective Certificate to allow time for preparation of a DSA.

The Insolvency Service if satisfied that qualifying criteria have been met shall so certify to the Court, which if equally so satisfied, will make the protection order stopping creditors enforcing their debts against the debtor for a period up to 70 days, which can on further Court application be extended a maximum of a further 40 days.

A joint application is permitted where the particular circumstances might warrant such approach. The debtor must normally be resident in the State or have a close connection. Only one application for a DSA in a lifetime is permitted.

Debts qualifying for inclusion in a DSA are *all debts that are not excluded debts or excludable debts* where consent to include not given nor deemed to have been given, after failure within 21 days to object to notice served by PIP on the excludable creditor.

Preferential Debts In addition, any debt that would have a preferential status in bankruptcy will also have a preferential status in a DSA e.g. taxes, rates for 12 month periods – see S 81 of Bankruptcy Act 1988. Given most preferential debts are excluded debts anyway, their priority in payment over general creditor debts is effectively doubly provided for.

The Insolvency Service, being satisfied as to the application, shall issue a certificate to that effect and furnish the certificate and supporting documentation to the Court. The Court will consider the application and subject to the creditor's right to appeal, if satisfied, issue the Protective Certificate and so notify the Insolvency Service. Once such approval is granted, the Protective Certificate is registered in the Register of Protective Certificates and a "stand-still" period of 70 days applies to permit the PIP to propose a DSA to the listed creditors. That period may, on application to the Court, be extended for no more than a further 40 days. The PIP will inform the creditors of the issue of the Protective Certificate. The effect of the issue of the Protective Certificate is that the creditors may not initiate or prosecute legal proceedings or seek to recover payment for a debt or recover goods or contact the debtor. The rights of secured creditors are unaffected. A creditor is entitled to appeal to Court that protective certificate should not apply to him and if Court satisfied that creditor would suffer irreparable damage and no other creditor affected would

suffer unfair prejudice, may grant order that protective cert not apply to that specific creditor, pending full hearing of issue.

The Court, on application by a PIP or a creditor, if it is satisfied that the debtor has in 3 years preceding the application for protection made excessive pension contributions to a *relevant pension arrangement*; may direct that such part of the contribution shall be paid to the PIP, for distribution to debtor's creditors.

A DSA proposal does not require the debtor to dispose of or cease to occupy their principal private residence where appropriate. If the DSA proposal is accepted (by 65% in value of the creditors present in person or by proxy voting at creditors meeting) it is binding on all creditors. The PIP shall inform the Insolvency Service who shall then transmit the agreement to the relevant Court for approval. If satisfied and if no objection is received by it within 10 days, the Court shall approve the DSA and so notify the Insolvency Service, which will register it in the Register of Debt Settlement Agreements whereupon it comes into effect. The PIP will then administer the DSA for its duration.

The Insolvency Service has no role in the negotiation and agreement of a DSA. While there is provision for a wide range of repayment options, the default position unless otherwise agreed, is that creditors be paid on a *pari-passu* (equal) basis. Conditions attach to the conduct of the debtor during the DSA. There is provision for an annual review of the financial circumstances of the debtor and the agreement could if necessary be varied or terminated. On the termination or failure of the DSA, a debtor could risk an application for adjudication in bankruptcy. At the satisfactory conclusion of the DSA all debts covered by it are discharged.

Example – See Appendix B

5.3 Personal Insolvency Arrangement (Secured and Unsecured Debts)

Part 3 Chapter 4 provides for a system of Personal Insolvency Arrangements (PIA) between a debtor and one or more creditors to repay an amount of both secured and unsecured debt over a period of 6 years (with possible agreed extension to 7 years). The PIA would assist those persons who have difficulty in the repayment of both secured debt (e.g. mortgage arrears) and unsecured debt. The Chapter provides for all aspects of the eligibility, application, determination, duties and obligations arising, Court application, objection by creditor and discharge from qualifying debts under the PIA process.

The application for a PIA must be made through a personal insolvency practitioner (PIP) appointed by the debtor. The PIP must advise:

- the debtor as to their options in regard to insolvency processes. A debtor may only propose a PIA if he or she is cash flow insolvent (i.e. unable to pay his or her debts in full as they fall due) and there is no likelihood within a period of 5 years that the debtor will become solvent.
 - assist in the preparation of the necessary Prescribed Financial Statement – which must be verified by means of a statutory declaration - and any other required documentation, and
 - if the qualifying criteria are met, (which includes cooperation with the secured creditor in respect of the debtor's principal private residence, under a mortgage arrears process approved or required by the Central Bank), may apply to the Insolvency Service for a Protective Certificate in respect of the preparation of a PIA.
- A joint application or an interlocking PIA is permitted where the particular circumstances might warrant such approach. The debtor must normally be resident in the State or have a close connection. Only one application for a PIA in a lifetime is permitted.

Debts qualifying for inclusion in a PIA are *all debts that are not excluded debts or excludable debts* where consent to include not given nor deemed to have been given, after failure within 21 days to object to notice served by PIP on the excludable creditor. In addition, any debt that would have a preferential status in bankruptcy will also have a preferential status in a PIA.

The Insolvency Service, being satisfied as to the application, shall issue a certificate to that effect and furnish the certificate and supporting documentation to the Court. The Court will consider the application and, subject to the creditors right to appeal, if satisfied issue the Protective Certificate and notify the Insolvency Service. Once such approval is granted, the Protective Certificate is registered in the Register of Protective Certificates and a "stand-still" period of 70 days applies to permit the PIP to propose a PIA to the listed creditors. That period may, on application to the Court, be extended for no more than a further 40 days. The PIP will inform the creditors of the issue of the Protective Certificate.

The effect of the issue of the Protective Certificate is that the creditors may not initiate or prosecute legal proceedings or seek to recover payment for a debt or recover goods, enforce security or contact the debtor. A PIA proposal does not require the debtor to dispose of or cease to occupy their principal private residence where appropriate. There are certain specific protections for secured creditors (See **Appendix E**), including a "claw back" in the event of a subsequent sale of a mortgaged property, where the mortgage has been written down.

If the PIA proposal is accepted it is binding on all creditors, subject to protections provided secured creditors in S 99 of Bill (see **Appendix E**). A PIA must be supported by

- at least 65% of all creditors voting at the creditors meeting (based on the value of the total of both secured and unsecured debt owed to those voting creditors) and
- more than 50% of secured creditors voting (based on the **lesser of value** of the security (property) underpinning the secured debt or the amount of that debt) and
- 50% of unsecured creditors (based on the amount of the debt).

The PIP shall inform the Insolvency Service of the agreement and the Service will then transmit the agreement to the relevant Court for approval. If satisfied and if no objection is received by it within 10 days, the court shall approve the PIA and notify the Insolvency Service will register it in the Register of Personal Insolvency Arrangements and it comes into effect. The PIP will then administer the PIA for its duration.

Conditions attach to the conduct of the debtor during the PIA. There is provision for an annual review of the financial circumstances of the debtor and the agreement could if necessary be varied or terminated. On the termination or failure of the PIA, a debtor could risk an application for adjudication in bankruptcy.

The Court, on application by a PIP or a creditor, if it is satisfied that the debtor has in 3 years preceding the application for protection made excessive pension contributions to a *relevant pension arrangement*; may direct that such part of the contribution shall be paid to the PIP for distribution to debtor's creditors.

The Insolvency Service has no role in the negotiation and agreement of a PIA. At the satisfactory conclusion of the PIA all unsecured debts covered by it are discharged. Secured debts are only discharged at the conclusion of the PIA, if and to the extent, specified in the PIA. To the extent that they are not provided for in the

PIA, all other debt obligations will remain e.g. if financial institution (mortgagee) gives debt forgiveness of €40,000 of €200,000 mortgage, the borrower (mortgagor) is still legally obliged to pay balance of €160,000 plus contract interest on foot of loan facility (contract) and security document (mortgage) through period of 6 year agreement and thereafter until debt paid, as well obviously as the commitments under actual PIA.

Example – See Appendix C

Offences under Part 3

(Part 3, Chapter 5) provides for a single offences chapter in Part 3 in regard to all of the non-judicial debt resolution processes. Offences include false representation, falsification of documents and fraudulent disposal of property and may be prosecuted on both a summary or indictment basis.

Miscellaneous

(Part 3, Chapter 6) provides, inter-alia, for the creation and maintenance of the insolvency registers to record details of persons concerned with the various debt resolution processes. The registers would in electronic form and members of the public may inspect a register and may take copies of, or extracts from, entries in a register.

6. Bankruptcy – Part 4

The Act (in Part 4) provides for a number of amendments to the Bankruptcy Act 1988 to provide for a more enlightened, less punitive and less costly approach to bankruptcy.

The main new provisions are as follows:

6.1 Bankruptcy Summons:

- (a) The new minimum amount for a creditor or combined non-partner creditor's petition for bankruptcy is €20,000. (The current limits are €1,900 for a creditor and €1,300 for combined non-partner creditors).
- (b) Fourteen days notice must be provided to ensure that a bankruptcy summons is not brought prematurely by a creditor, so as to allow the debtor to consider other options such as a Debt Settlement Arrangement or a Personal Insolvency Arrangement.

6.2 Bankruptcy Petition

a) Creditor Petition

- (i) The creditor must prove for a debt of more than €20,000 (the current limit is €1,900).
- (ii) The Court will be required to consider the assets and liabilities of the debtor and assess whether it may be appropriate to adjourn proceedings to allow the debtor to attempt enter into a Debt Settlement Arrangement or Personal Insolvency Arrangement

b) **Debtor Petition**

- (i) Debtor must swear an affidavit that he/she has made reasonable efforts to make use of alternatives to bankruptcy, such as a Debt Settlement Arrangement or Personal Insolvency Arrangement and
- (ii) Present a Statement of Affairs, which must disclose that his/her debts exceed his/her assets by more than €20,000.

6.3 Excepted assets

The maximum value of household furniture or tools or equipment required by a bankrupt for a trade or occupation is increased from the current level of €3,100 to €6,000. The Official Assignee will not seize *excepted articles*, up to the €6,000 threshold allowed.

Similar to DRNs, DSAs and PIAs, it provides that any asset of a bankrupt in a *relevant pension scheme* {ie most pensions other than Approved Retirement Funds (ARFs)} shall not vest in the Official Assignee or PIP. However, where the bankrupt would have received before or at date of adjudication or up to 5 years thereafter, any income or any other sum of money from the relevant pension scheme, by performing an act or exercising an option, then the Official Assignee or PIP may perform the act or exercise the option to vest the funds in him or her, for distribution thereof to creditors of bankrupt. The Court, on application by the Official Assignee, PIP or a creditor, if it is satisfied that the bankrupt has in 3 years preceding the adjudication order made excessive pension contributions to a *relevant pension arrangement*; may direct that such part of the contribution shall be paid to the Official Assignee or PIP for distribution to bankrupt's creditors.

6.4 Avoidance Procedures in Bankruptcy Act Amendments

- (i) Avoidance of *fraudulent preferences* and certain transactions made before adjudication in bankruptcy: the current time period of 1 year is extended to 3 years - S 57 Bankruptcy Act.
- (ii) Avoidance of *transactions at an under value* made before adjudication in bankruptcy: the current time period of 1 year is extended to 3 years – S 58 Bankruptcy Act.
- (iii) Avoidance of certain *settlements* made before adjudication in bankruptcy: the current time periods in regard to certain voluntary settlements of property is extended from 2 years to 3 years - S 59 Bankruptcy Act.

6.5 Discharge from Bankruptcy

The following new provisions will apply:

- (i) The automatic discharge from bankruptcy period is reduced from 12 years to 3 years.
- (ii) Bankruptcies existing for 3 years or more at the time of commencement of the Act will be automatically discharged after a further six months have elapsed, this latter time to allow for any creditor objection.
- (iii) The bankrupt's unrealised property will remain vested in the Official Assignee in Bankruptcy after discharge from bankruptcy and the discharged bankrupt will be under a duty to co-operate with the Official Assignee in the realisation and distribution of such of his or her property as is vested in the Official Assignee.
- (iv) The Official Assignee, PIP or a creditor may apply to the Court to object to the discharge of a person from bankruptcy. The grounds for such an objection are that the debtor has failed to co-operate with the Official Assignee or PIP or has hidden or failed to disclose income or assets. The Court may suspend the discharge pending further investigation or extend

the period before discharge of the bankrupt, up to a maximum of 8 years from the date of adjudication.

6.6 Income Payment Orders / Agreements

The Court may order a bankrupt to make payments from his or her income or other assets to the Official Assignee or PIP for the benefit of his or her creditors. In making such an order, the Court must have regard to the *reasonable living expenses* of the bankrupt and his or her family. The Court may vary a bankruptcy payment order where there has been a material change in the circumstances of the discharged bankrupt. Such an order must be applied for before the discharge from bankruptcy, may operate for no more than 5 years and if still in place will terminate automatically on 8th anniversary of adjudication order. In practice the Official Assignee concludes Income Payment Agreements with bankrupts in practically all cases, without requirement of a Court order and such agreements are subject to same time limits as income payment orders. It is obviously very much in a bankrupt's interests to commence such an agreement at earliest possible date after his / her adjudication, to ensue 5 year period of payments terminates as soon after discharge as possible.

6.7 Bankruptcy Restrictions

There are no prohibitions contained in the Bankruptcy Act 1988 with regard to restrictions on the nature of employment or profession of a person adjudicated bankrupt. Such prohibitions, where they exist, are contained in sectoral legislation, e.g. in the Companies Acts (S 184) disqualifying bankrupts acting as company directors, in Electoral Acts in regard to Dáil membership or in contracts of employment, e.g. in the legal profession).

Example – See Appendix D

7. Regulation of Personal Insolvency Practitioners - Part 5

The Bill in Part 5 provides for the regulation of Personal Insolvency Practitioners by the Insolvency Service in DSAs and PIAs, authorising it inter alia to:

- Issue regulations setting out procedures governing them carrying on practice as PIPs including the standards to be observed by them in performance of their duties
- Issue regulations setting out insurance and qualifications required of PIPs
- Maintain a register of PIPS which it must publish on its website.
- Process applications by PIPS to act, receiving required documents specified in S 163 of Bill and certify acceptance and rejection of such applications, whilst allowing an aggrieved person apply to Circuit Court to appeal any such decision
- Issue regulations setting out procedures governing keeping of accounts and records by PIPs
- Apply to High Court in relation to banking records or assets of PIPs in interests of protection of debtors and creditors in DSAs and PIAs.
- Appoint inspectors to monitor performance of duties of PIPs and a Complaints Committee to hear complaints against PIPs, which can in turn make recommendations for sanctions it considers appropriate to High Court for its determination.
- Apply to High Court for an order allowing it suspend or revoke PIPs authorisation to act

APPENDICES

Appendix A – Debt Relief Notice Example

Debtor – Aidan unemployed divorcee with 1 child

Assets

(No house property – rents apartment and no pension)	€
- Personal computer	1000
- Tools and equipment	1000
- General household (TV, DVD Player, Dishwasher etc)	<u>3500</u>
	5,500
Car	€ 1950
Ring	€ 750

He pays family maintenance (for wife and 1 child) to wife of €130 per week.

Net monthly welfare income after paying maintenance and household bills is €45.

Debts	€
Credit card AIB Visa	8,000
Credit Card MBNA Visa	5,000
GE Money - Lease net balance after sale of Hiace van	2,000
Credit Union loan	2,000
AIB personal loan	<u>2,500</u>
	19,500

Aidan, 55 lost his job as a site foreman 3 years ago and has not been able to get another job since. His work van was repossessed and a balance on lease agreement of €2000 remains outstanding. He has not made any payments against his loans in last 2 ½ years.

Effect

If successful in application for DRN at end of 3 year supervisory period he will have all these *qualified debts* written off. If his net income increases by over €400 or more per month or he receives a gift or payment of €500 or more, he will have to give Insolvency Service for distribution to his creditors 50% of that increase or gift. However, once he has paid over 50% of his *qualified debts* then the DRN terminates and he is automatically discharged from *qualified debts* and from the supervisory DRN process.

Appendix B – Debt Settlement Agreement

Debtor – Carmel single mother aged 45 with 1 child

Assets

(No house property – rents apartment)	€
- Phone and PC	1000
- Personal items	1000
- General household (TV, DVD Player, Dishwasher etc)	<u>3500</u>
	5,500

Car (replacement for one repossessed) €2000

Occupational pension will mature when 65

Ring €750

A year ago with consent of Bank of Scotland (Ireland) she sold her apartment; paid sale proceeds to it but still owes it €25,000. She has been attempting to pay off her loans but she has not been able to do so, given her household expenses and child minding fees. She is a local authority employee on an annual salary of €32,000.

Debts	€
Bank of Scotland (Ireland)	25,000
MBNA Credit Card	11,000
Friends First Lease (€15,000 - €5,000 car sale proceeds)	10,000
Bank of Ireland personal loan	7,000

Effect

She agrees a DSA with her creditors to pay them a dividend of 25% of their debts in monthly payments over 5 years, after which the balance is written off by them.

Appendix C – Personal Insolvency Agreement (Secured and Unsecured Debt)

Debtor Ted – Single with 2 retail businesses, one of which is a limited company but he has given personal guarantees anyway for most company business debts

Debts

Secured – 2 mortgages

Mortgage A BOI - balance	€500,000 – House worth €250,000 - Voting €250,000
Mortgage B Ptsb –balance	€400,000 – House worth €170,000 - Voting €170,000

Unsecured debts

Mortgage A BOI - balance	€500,000 – House worth €250,000 - Voting €250,000
Mortgage B Ptsb –balance	€400,000 – House worth €170,000 - Voting €230,000
Ulster Bank	€20,000
Revenue Preferential debt	€6,000
Revenue Non Preferential debt	€78,000
Rates Preferential debt	€5,000
Personal Business creditors (including those personally guaranteed)	€360,000

Ted pays mortgage A on his family home but cannot pay mortgage B on his holiday home. There are no fixed or even equal returns guaranteed in any PIA. A creditor's return is based on whatever the relevant required majorities agree at the creditor's meeting to pass the deal. If any creditor believes he / it is being unfairly prejudiced he/it can always apply to Court to review whatever is agreed by creditors. Likely proposal is sale of holiday home with all proceeds going to Ptsb (and possibly a proportion of balance owing being written off) and Ptsb sharing whatever dividend

payable to unsecured creditors on remaining portion. BOI may be asked to lengthen the mortgage term to 30 years and debt forgive a portion of its debt.

- If both secured creditors do not agree or mortgagee A does not agree with deal proposed by the Personal Insolvency Trustee on behalf of the debtor, no deal can be agreed as 50% of secured creditors must agree to any deal.
- Equally, if more than 50% of unsecured creditors do not agree to deal the PIA will fail.
- If 50% of each class of creditor agree but debtor does not get 65% of total voting debt in favour of deal, it will similarly fail.

NB It is very important that creditors attend in person or by proxy and vote, as if they do not vote, whatever is agreed at meeting is enforceable against all creditors (subject to the protections for secured creditors provided in S 103 of Bill – see Appendix E.)

The debtor must have enough income to pay:

- His own *reasonable living expenses*
- Personal Insolvency Trustee fees
- Preferential debts in full
- Any other *excluded debts* in full eg his non preferential taxes and rates
- Reduced mortgage payments to BOI, and
- Monthly payments agreed under PIA to unsecured creditors over 6 years.

Appendix D – Bankruptcy

Debtor Bob – Single with 2 retail businesses one of which is a limited company but has given personal guarantees anyway for most company business debts

Debts

Secured

Mortgage A BOI - balance	€500,000 – House worth €250,000 = €250,000
Mortgage B Ptsb –balance	€400,000 – House worth €170,000 = €230,000

Unsecured

BOI mortgage shortfall	€250,000
Ptsb Mortgage shortfall	€230,000
Ulster Bank	€20,000
Revenue Preferential debt	€6,000
Revenue Non Preferential debt	€78,000
Rates Preferential debt	€5,000
Personal Business creditors (including those personally guaranteed)	€360,000

If Bob despairs at finding any workable solution to his indebtedness or his PIA proposal is rejected, he can choose to apply to Court to adjudicate himself bankrupt. The Court will seek proof that he has earnestly attempted to seek a non bankruptcy solution to his debt problems and if satisfied that he has and he satisfies other qualifying requirements, it will declare him bankrupt.

Bankruptcy

All his estate will vest in the Official Assignee (OA) who will realise his estate for the benefit of his creditors. OA can only sell his house after obtaining permission of Bankruptcy Judge under S 61(4) of Bankruptcy Act. He will be required to enter into an Income Payment Agreement for 5 years to contribute towards his bankruptcy debts, from surplus income after paying his *reasonable living expenses*. If agreement cannot be reached on amount the Court will make an Income Payment Order, having considered what are his *reasonable living expenses*. All his unrealised estate will remain vested in OA when debtor is automatically discharged from bankruptcy after 3 years. This automatic discharge period can be extended by Court if Bob has not been honest or co-operative in his dealings with OA over 3 year period or in period before bankruptcy he has sought to defraud his creditors.

If bankrupt's estate is significant enough to pay fees of a Personal Insolvency Trustee, the creditors may appoint a PIP to administer the estate, replacing the OA; if 60% of creditors in number and value so vote at the Statutory Sitting. A PIP so appointed, will have all powers of the OA and administer the estate in similar manner to him, as required under Bankruptcy Act 1988.

**Appendix E – Protections for secured creditors in
Personal Insolvency Arrangement.**

103.—(1) A Personal Insolvency Arrangement which includes terms providing for the sale or other disposal of the property the subject of the security shall, unless the relevant secured creditor agrees otherwise, include a term providing that the amount to be paid to the secured creditor shall amount at least to—

(a) the value of the security determined in accordance with *section 105*; or

(b) the amount of the debt (including principal, interest and arrears) secured by the security as of the date of the issue of the protective certificate, whichever is the lesser.

(2) A Personal Insolvency Arrangement which includes terms providing for—

(a) retention by a secured creditor of the security held by that secured creditor, and

(b) a reduction to a specified amount of the principal sum outstanding in respect of the secured debt, shall not, unless the relevant secured creditor agrees otherwise, specify the amount of the reduced principal sum referred to in *paragraph (b)* at an amount less than the value of the security determined in accordance with *section 101*.

(3) A Personal Insolvency Arrangement which includes terms involving—

(a) retention by a secured creditor of the security held by that secured creditor, and

(b) a reduction of the principal sum due in respect of the secured debt due to that secured creditor to a specified amount, shall, unless the relevant secured creditor agrees otherwise, also include terms providing that any such reduction of the principal sum is subject to the condition that, subject to *subsections (4) and (5)*, where the property the subject of the security is sold or otherwise disposed of for an amount or at a value greater than the value attributed to the security for the purposes of the Personal Insolvency Arrangement, the debtor shall pay to the secured creditor an amount additional to the reduced principal sum calculated in accordance with *subsection (4)* or such greater amount as is provided for under the terms of the Personal Insolvency Arrangement.

- (4) Subject to *subsections (5), (6) and (7)*, the additional amount referred to in *subsection (3)* shall be the lesser of—
- (a) the entire of the difference between the value of the property on disposition and the value attributed to the security for the purposes of the Personal Insolvency Arrangement, and
- (b) the amount of the reduction in the principal sum due in respect of the secured debt under the Personal Insolvency Arrangement as referred to in *subsection (3)(b)*.
- (5) For the purposes of *subsection (4)*, any portion of the increase in the value of the property attributable to improvements made to (or other measures taken which have made a material contribution to the increase in the value of) the property over which the debt is secured which were made subsequent to the valuation of the security for the purposes of the Personal Insolvency Arrangement shall be disregarded in calculating the additional amount payable by the debtor.
- (6) *Subsection (5)* shall not apply unless the secured creditor has given his or her consent in writing to the improvements or other measures concerned.
- (7) For the purposes of *subsection (4)*, any payment to the secured creditor pursuant to the Personal Insolvency Arrangement properly attributable to a reduction of the principal sum due in respect of the secured debt shall be deducted from the additional amount referred to in *subsection (3)*.
- (8) For the purposes of *subsection (4)*, the expenses and costs borne by the debtor in connection with the sale or other disposal of the property shall, to the extent that those costs and expenses are of a type and amount normally payable by the vendor of property of that nature, be deducted from the value attributable to the property.
- (9) The obligation to pay an additional sum arising by virtue of this section shall not apply where the amount referred to in *subsection (4)(a)* is less than the amount of the debt secured by the security immediately prior to the sale or other disposition of the property.
- (10) Any additional sum payable by virtue of this section shall be secured in the same manner as the principal sum referred to in *subsection (3)(b)*.
- (11) The obligation to pay an additional sum arising by virtue of this section shall cease—
- (a) on the expiry of the period of 20 years commencing on the date on which the Personal Insolvency Arrangement comes into effect, or
- (b) on the day on which the debtor is scheduled or permitted

to fully discharge the amount secured by the security (or such later date as may be specified for so doing in the Personal Insolvency Arrangement) and does so discharge his or her indebtedness, whichever first occurs.