

Introduction

Welcome to the Summer 2011 Edition of the Lavelle Coleman Newsletter.

The last few months have continued to be difficult for the business community. Instability in the banking sector is impeding recovery with many businesses continuing to experience difficulty obtaining credit.

Economists, however, appear to agree that we are at the bottom of the cycle and the position of the business sector should start to improve. Exports continue to remain strong and if a proper banking sector can be put in place, the economy can stabilise and grow. The latest stress tests on Ireland's banks have helped confidence in the markets and have been viewed as a major step toward restoring the Irish banking system to health, which is crucial for sustained revival of growth and employment.

However, Ireland has substantial business and household debt and the banking community and business community have to deal with the level of debt in the economy.

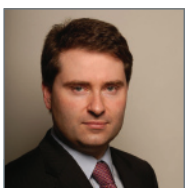


Michael Lavelle, Managing Partner

To do so, the legal system has to be changed to provide for an efficient mechanism for dealing with personal debt. In this edition, we are looking at some of the mechanisms available in other jurisdictions and how some of the difficulties being faced by individuals can be dealt with by the legal system.

It is becoming clear that the legal system has to be changed to support the business sector to assist economic recovery.

Fixed Charge Receivers



Paul McMahon
Partner

Overview

Historically, fixed charge receivers were rarely used in Ireland, until the current economic crisis. They have been used to a much greater extent in England, under almost identical legislation. Fixed charge receivers under English mortgages are usually chartered surveyors.

The appointment of a fixed charge receiver is a method by which a bank may enforce a mortgage or charge over real property (land and buildings). The fixed charge receiver manages the property and collects the rents. They are most suited to investment properties, which generate rental income.

The appointment of a fixed charge receiver has the advantage of immediacy. The lender does not generally require a Court order. Provided that the borrower is in default, the lender may trigger its right to enforce the mortgage or charge, usually by demanding repayment of all sums due.

The receiver insulates the bank from the legal risks and obligations that would arise if the lender acted directly. The bank does not, for example, assume the responsibilities of the landlord. The actions of the receiver are deemed those of the borrower. However, the receiver acts in the interests of the bank.

Appointment

In the case of registered title, the power to appoint a receiver does not arise until the mortgage deed has been registered. If there is no signed mortgage or charge in place, it is possible to apply to Court to have a receiver appointed.

The right to appoint a receiver applies in the circumstances defined in the mortgage deed. There are conditions laid down in legislation for the appointment of a receiver, but they are usually modified, so that the power to appoint a receiver may be exercised in the event of a default.

The appointing bank may agree to indemnify the person appointed as a receiver, principally to cover the risk that there is invalidity in the appointment or the mortgage deed. The extent of the indemnity will be a matter of negotiation.

Role of Receiver

The receiver's primary duty is to ensure that the debt is serviced and interest paid. He must account for receipts and outgoings. He has a duty to try to bring about a situation where the debt itself can be repaid. The receiver is not just a rent collector. He must be pro-active in the management and preservation of the property. He should insure the property and enforce the terms of leases.

A receiver has power to demand and recover rent from the mortgaged property. He may bring legal proceedings in the name of either the bank or mortgagor. If the tenant pays rent to the borrower, the receiver can still demand the rent over again.



Fixed charge receivers continued.

The powers of the receiver are usually extended in the mortgage deed, beyond those specified in legislation. The receiver is often granted extended powers of management and sale. If the receiver has a power of sale, he may generally choose the time of sale and should obtain the best price reasonably obtainable at that time.

Application of Funds

The order of application of proceeds or income are set out in legislation. The receiver should apply monies received as follows:

- paying rents, taxes, rates and outgoings;
- paying sums having priority to the mortgage under which it is appointed;
- in payment of permitted commission, insurance and repairs;
- paying interest under the mortgage (including arrears);
- the residue to the person who but for the possession of the receiver is entitled to receive the income of the property.

Under the Land and Conveyancing Law Reform Act, 2009, it is expressly stated that the balance may be paid towards reduction of the principal.

Remuneration

A receiver appointed under the statutory power may retain monies for his remuneration in satisfaction of all cost charges and expenses incurred by him. A commission not exceeding 5% of the gross amount of all monies received may be retained. Application may be made to Court to fix a different rate.

2009 Mortgage Law Reforms

The power to appoint a receiver has been preserved in the 2009 land and mortgage law reforms. However, some restrictions have been placed on the exercise of the rights for mortgages signed after 1st December 2009. These may be changed by the mortgage deed, other than in housing loan cases.

Court Receiver

Where the statutory power of appointment of a receiver is not available, an application to Court may be made for appointment of a receiver. In this case, the receiver owes obligations to the Court. A Court appointed receiver may be appointed where the security is defective.

This article is based on a chapter in our "Legal Guide to the Management and Enforcement of Loans and Security in Ireland" (2009). This Guide is available on our website at <http://www.lavellecoleman.ie/Security-Management-and-Enforcement.aspx>

The UK Bankruptcy System

The global economic downturn has forced many countries to re-examine their bankruptcy regimes. In Ireland it has become clear that our current system to deal with personal debt is grossly ineffective. While some initial steps have been taken to try and reform our system, these simply do not do enough.

Along with the banking crisis there is a growing concern in Ireland over the rapidly increasing level of personal debt. It is essential if we are to deal with this problem that we establish a system that is capable of dealing with personal debt effectively and efficiently.

Ireland's bankruptcy laws are out of date and penal. A bankrupt must wait 12 years before they are discharged from their debts. The current system is arguably anti-entrepreneurial and in much need of modernisation.

Ireland should consider following the example of the three UK jurisdictions (England and Wales, Scotland and in particular Northern Ireland) and the systems they have in place to deal with personal debt.

The UK jurisdictions have developed a two step approach to personal debt. The first step to consider is the alternatives to bankruptcy.

1) Alternatives to Bankruptcy

Before a person considers bankruptcy, they should first consider the following options and assess whether they might be a more suitable solution.

Debt Relief Order (DRO)

DRO's provide debt relief subject to some restrictions. They are suitable for people who do not own their own homes, have little surplus income and assets and liabilities of less than £15,000. An order lasts for 12 months and in that time creditors named on the DRO cannot take any action to recover their money without the permission of the Court. DRO's are managed by The Insolvency Service and not the Courts. After a 12 month period has expired, if an individual's circumstances have not changed, they will be freed from all the debts included in the DRO.

Informal Arrangement

If a person cannot pay their creditors then they should consider contacting their creditors individually in order to see if they can reach a compromise. The disadvantage with an informal arrangement is that it may not be legally binding so your creditors could ignore it later and ask you to pay in full.

Administration Orders

If one or more of a person's creditors have obtained a Court judgment against them, then a Court may make an administration order. This is a Court procedure whereby the debtor makes regular payments to the Court to pay their



creditors. The debtor's total debts must not exceed £5000 and they will need enough regular income to make weekly or monthly repayments. If the debtor does not pay regularly, the Order could be cancelled and they may become subject to the same restrictions as someone who is bankrupt. If their circumstances change and they cannot pay as ordered, they can apply to the Court to change the order.

Individual Voluntary Arrangements (IVA)

An IVA begins with a formal proposal to a person's creditors to pay part or all of their debts.

To establish an IVA the debtor must first appoint an insolvency practitioner to act for them. Once this is done, they must then apply to the Court for an interim order. While an interim order is in place it prevents a person's creditors from presenting, or proceeding with a bankruptcy petition against them.

The insolvency practitioner will explain the IVA proposals to the Court and whether in his/her opinion a creditors meeting should be called to consider it. If a creditors meeting is called, then it is important that all creditors are put on notice of the meeting. The reason for this is that only creditors who have received notice of the meeting will be bound by it.

At the meeting the creditors vote on the proposal. If over 75% in value of the creditors vote for the proposal then it is passed and will be binding on all creditors who had notice of the meeting.

The insolvency practitioner supervises the arrangement and pays the creditors in accordance with the scheme. It should be noted that while it is advisable and cheaper to propose an IVA prior to bankruptcy proceeding, an IVA can also be established after bankruptcy proceedings have begun.

2) Bankruptcy

In Ireland, if you are bankrupt, normally you will remain an 'undischarged bankrupt' for 12 years. However, in Northern Ireland and other UK jurisdictions, a bankruptcy can end after as little as 12 months.

"Many heavily indebted Irish individuals are now considering filing for bankruptcy in England. To present a petition for bankruptcy in England, an individual's 'Centre of Main Interests' (COMI) must be located there", states Gordon McElroy, Partner at MKB Russells Solicitors in Belfast.

"The bankruptcy period of one year also applies in Northern Ireland, and for logistical reasons it is obviously a more attractive and convenient location for an Irish national to pursue this strategy. Travelling to Belfast to file for bankruptcy is viewed as a realistic and viable option for Irish nationals".

Gordon outlines below the main criteria that a debtor must satisfy to successfully present a bankruptcy petition in Northern Ireland.

Debtors must satisfy one of the following conditions:

- (i) be domiciled in Northern Ireland;
- (ii) be personally present in Northern Ireland on the day in which the petition is presented, or;
- (iii) at any time in the 3 years immediately preceding that day:
 - (a) have been ordinarily resident or have had a place of residence, in Northern Ireland,
 - or;
 - (b) have carried on business in Northern Ireland in person or by a firm or partnership of which he is a member or by an agent or manager for him or for such a firm or partnership.

Filing a Bankruptcy Petition in Northern Ireland

In order to file for bankruptcy, a number of forms require to be completed. These forms are available free of charge from the Bankruptcy and Chancery Division of the High Court in Belfast.

- The Bankruptcy Petition - this is a form of application to the High Court. The debtor must state the reasons why they are applying for bankruptcy within the petition;
- The Statement of Affairs - this is a form in which the debtor is required to list all their assets and liabilities. The debtor is also required to make a sworn statement before a solicitor as to the accuracy and completeness of the form.

Fees are payable in order to present the Petition and Statement of Affairs to the Court. These are:

- A deposit of £345 is required to be paid to the Official Receiver at the Insolvency Service, Belfast;
- A Court fee of £115;
- There is also a fee payable to the solicitor before whom the contents of the Statement of Affairs are sworn. This fee is usually £7.

The completed forms, together with the receipt for the deposit paid to the Insolvency Service, are presented at the High Court in Belfast.

The Bankruptcy Order

At the subsequent Court hearing, the Bankruptcy Master will decide whether to make a Bankruptcy Order against the debtor. The debtor becomes bankrupt on the day and at the time, the Order is made. After the Bankruptcy Order is made the debtor is required to attend the office of the Official Receiver to detail their assets and liabilities. One of the Official Receiver's main duties is to investigate the debtor's financial affairs prior to and during the bankruptcy.

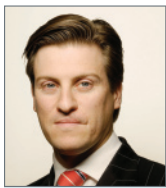
How long does bankruptcy last?

In Northern Ireland, bankruptcy normally lasts for one year. The discharge can occur in under a year if the debtor fully cooperates with the Official Receiver. After this period, the debtor is discharged from the bankruptcy regardless of how much they still owe.

However, if a bankrupt does not cooperate with the Official Receiver or behaves irresponsibly in any other manner, then the bankruptcy can last for longer. Harsh penalties can be imposed on those who are considered to have caused the bankruptcy through reckless or irresponsible behaviour.



The Multi-Unit Developments Act 2011 signed into law



Giles G. Smyth
Partner

The Multi-Unit Developments Act 2011 ("the Act") came into full effect on the 1st April 2011.

The Act provides a statutory framework to regulate the operation of multi-unit developments and establishes a system of dispute resolution.

A "multi-unit development" is defined as a development being land on which there stands a building or buildings comprising units where it is intended that the units share amenities, facilities and services and where the development contains not less than 5 units intended for residential use.

The main provisions of the Act include the following:

- The requirement to establish a management company at the expense of the developer;
- For new developments the Act requires that the common areas be transferred to the owners' management company prior to sale of the first residential unit;
- For existing developments in which a residential unit has already been sold but the common areas have not been transferred, the transfer must be made before the 30th September 2011;
- A sinking fund must be established for existing developments before the 1st October 2012;
- The Circuit Court has exclusive jurisdiction to decide disputes, although alternative dispute resolution methodologies are promoted by the Act and there are cost implications if not utilised;
- Restrictions on the length of time a management company can enter into contracts for goods and services;
- Subject to certain exceptions, voting rights must be on a one unit one vote basis;
- Requirement to hold annual general meetings and prepare detailed annual reports;
- Establishment of a scheme of annual service charges and expenditure categories;
- Extension of the length of time a struck-off management company has to take action to restore itself to the Register of Companies; and
- The making of house rules to ensure quiet and peaceful occupation.

The passing of the Act has been long-awaited and has important implications for both owners and developers/management companies.

The Act now sets a deadline by which such management companies must be established and also creates greater transparency by setting minimum levels of information that must be made available to the owners.

Owners have often proved reluctant in the past to pursue a dispute through the Courts because of the cost implications of an unsuccessful action. The introduction of alternative dispute resolution mechanisms means that disputes should now prove to be both faster and less expensive to resolve.

Common criticisms of management companies include their lack of transparency and the inability of owners to exert proper control over their operations.

In most cases, developers will no longer be able to structure management companies in such a way that they retain effective voting control.

Owners will now be able to vote through changes to their service charge or the other operations and decisions of the management company; as many owners can testify, this has not always been the case in the past.

