

THE BANKRUPT'S ASSETS

Bankrupt's estate

The Official Receiver's must gather in and protect the bankrupt's estate. A bankrupt's "estate" refers to all of his assets at the time of commencement of bankruptcy. This includes all his assets whatsoever, future or present. A bankrupt's estate vests in the bankruptcy trustee immediately on his appointment. These assets are available to the creditors for distribution.

The following assets only are excluded from bankrupt's estate which vest in the trustees:-

- ❖ tools;
- ❖ books;
- ❖ vehicles;
- ❖ equipment necessary for the use personally in employment, trade or vocation;
- ❖ clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying basic domestic needs of the bankrupt and his family;
- ❖ property held by the bankrupt on trust for others;
- ❖ income for reasonable domestic needs;
- ❖ after acquired property;
- ❖ certain pension schemes.

As with liquidations, the Official Receiver and trustees in bankruptcy have power to bring assets back into the estate which would otherwise be excluded. Where they believe that the value of household effects is high, the trustee can claw back such items where realisation would benefit the creditors.

Bankrupt's Income

A bankrupt's income does not form part of the estate available to creditors. However, the trustee in bankruptcy can apply to Court for an order that part of the bankrupt's income be paid over. In practice, trustees will only apply if they are unable to

negotiate a figure with the bankrupt. Any Court order that is made, must leave the bankrupt with sufficient income to meet his basic domestic needs and those of his family. The Court can vary or discharge the order upon the application of the trustee or the bankrupt.

The income payment agreement procedure (IPA) is designed to reduce the need for Court involvement in non-contentious cases. An IPA is a written agreement between the bankrupt and the trustee by which a bankrupt voluntarily agrees to pay a sum to the estate for a specified period. The bankrupt or his trustee can vary the IPA on application to Court.

Prior to the Enterprise Act 2002, an IPA generally ceased upon discharge of the bankrupt. Because of the reduced period of discharge to 12 months, the IPA is now for a maximum period of three years from the making of the order. Therefore, payments may have to be made under it notwithstanding discharge from bankruptcy.

Where a bankruptcy order is made, rights under an approved pension arrangement are excluded. This covers both personal and occupational pension schemes. The Official Receiver is entitled to apply for income payments from any pension payments made to the bankrupt. He can also apply to Court for an order that contributions previously made by the bankrupt into his pension be paid back to creditors. The Court may order the pension payments to be restored.

The Official Receiver/trustee in bankruptcy is entitled to disclaim so called onerous property. "Onerous" property is any enforceable contract or other property in an estate which is unsaleable and not realisable, which may give rise to a liability to pay or perform obligations. The typical example is a commercial lease.

Setting Aside Pre-Bankruptcy Transactions

A trustee has power to unwind certain earlier transactions by the bankrupt in order to recover assets for the estate.

A pre-bankruptcy transaction at an undervalue can be set aside. An undervalue transaction includes a gift or a transaction at an undervalue, within five years prior to the bankruptcy petition. Where the transaction is between two to five years before

the petition date, then it must be shown that the individual was insolvent at the time. Insolvency does not need to be shown if the transaction was in the last two years. Insolvency is presumed where the recipient is an associate of the bankrupt.

A preference is given by a bankrupt to a creditor if he does anything which has the effect of putting that person into a position which, in the event of a bankruptcy, would be better than the position that he would have been in if the thing had not been done. This can include the granting of security over assets.

An application can be made to Court to set aside a "preference payment" to a creditor made before bankruptcy. The Court may make an order in respect of a preference if it is shown that there is a desire to produce a preference for the benefit of the person concerned. The debtor must have been insolvent at the time. The desire is presumed where the preference is given to an associate.

A transaction is "extortionate", if the terms are such as to require grossly exorbitant payments to be made in respect of the provision of credit or otherwise offends against the ordinary principles of fair dealing. If a person is adjudged bankrupt and has been party to an extortionate transaction, the Court may, make an order in relation to an extortionate transaction which took place in three years prior to commencement to bankruptcy.

An order may provide for setting aside any obligation created by the transaction, varying the terms of the transaction, requiring any person who is party to the transaction to repay sum requiring the party who surrenders security or requiring an account to be taken.

Family / Matrimonial Home in bankruptcy

Bankruptcy will "sever" a joint tenancy. This means that the interest of a husband or wife will be separately owned from then onwards. Where a family home is in the bankrupt's name only and the other spouse cannot show a beneficial share by way of contributions, then the entire value will be available to the bankrupt's creditors.

When a property is in two names, the beneficial ownership of each party will depend on property law principles. This will generally depend on what contributions may have

been made by each party. There may have been an intention, written, implied or verbal that the equity be owned 50/50. This will be commonly the case with spouses.

Where a property is in the sole name of the bankrupt, the non-owning spouse may be able to claim an entitlement to part ownership by virtue of contributions made to the purchase or repayment of a mortgage. Correspondingly, if a property is in the name of the non-bankrupt spouse, the trustee may be able to claim a share on the basis of the bankrupt's beneficial share.

A bankruptcy trustee has a number of options to realise the equity in property to which the bankrupt is entitled. The trustee could approach the non-bankrupt spouse with a view to that spouse buying out the bankrupt's share. The non-bankrupt spouse could agree to put the property up for sale in the open market, so that the bankrupt's and the spouse's respective shares are divided.

If the bankrupt's spouse cannot or will not co-operate, the trustees could apply for a Court Order for sale. The Court may make such order it thinks just and reasonable having regard to the interests of the bankrupt's creditors, the conduct of the spouse or former spouse in contributing to the bankruptcy, the needs and resources of the spouse, the needs of the children and all the circumstances of the case. The bankrupt's interests are not considered.

There are certain rights of occupation which may (though not necessarily) impede an order for possession. The non-bankrupt spouse may have a statutory right of occupation, irrespective of ownership of shares in the property. This right arises under legislation. The spouse has a right of occupation where he or she has a beneficial interest in the property and a person under 18 has his or her home there.

If either of these situations apply, then after a period of one year, it is deemed that the interests of the bankrupt's creditors outweigh other consideration, unless the circumstances are exceptional. This is likely to postpone sale for at least a year. The Courts will not generally refuse sale except in circumstances where there is a prospect of repayment or if considerable hardship would be caused (e.g. if persons suffering from illness, unwell, elderly person reside in the property). If the Court refuses an Order and the Court application is dismissed, the property will vest back in

the bankrupt, unless the Court orders otherwise. The proceedings will often therefore be adjourned by trustees.

If the property cannot be sold, the trustees can apply for a charging order. Trustees have the power to apply for a charging order, where they are unable to sell or realise a share in the dwelling house occupied by a bankrupt's spouse or former spouse. The effect of the charging order is that the benefit of the charge is available for the creditors but that the property ceases to become comprised in the estate and re-vests in the bankrupt. The effect is that the trustee has lost control of how and when the property is sold.

A trustee cannot call a final meeting to be released from his obligations, if he has been unable to realise an interest in the dwelling house, unless he has applied to Court for a charging order. If a charging order is an unsuitable option, a trustee may apply to the Secretary for State for a certification that it is inappropriate or inexpedient to apply. It may be inappropriate where there are no funds to make the application or the creditors or unwilling to fund further litigation.

Where a property in a bankrupt's estate consists of a share in a dwelling house which is the residence of the bankrupt spouse or former spouse, then at the end of three years from the date of bankruptcy, the house will re-vest in the bankrupt and will no longer form part of the assets available for creditors. This prevents trustees sitting on the value of house waiting for the value to rise and later applying for repossession. The trustees must within 3 years sell or realise the interest in the property, apply for an order for sale or possession, apply for a charge or enter into an agreement.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.