

## **Bankruptcy & Insolvency Searches - Guidelines**

### **Registers established under The Personal Insolvency Act, 2012**

#### **What should solicitors for purchasers of property do when an act turns up on an insolvency search carried out in a conveyancing transaction?**

The Conveyancing Committee was asked by solicitors to consider whether acts appearing on searches of the various insolvency registers under the insolvency legislation would prohibit an owner from dealing with his or her property by way of sale and to provide a practice note as to the guidance it could issue to the profession in this regard.

What solicitors should do when they find an entry on an insolvency register depends very much on the nature of the insolvency. Bankruptcy is relatively straightforward because there is an automatic transfer to the Official Assignee in bankruptcy in Ireland of title to property interests of a debtor who is adjudged bankrupt in Ireland. A similar transfer to an insolvency trustee of the title of property vested in a debtor who is adjudged bankrupt occurs in most foreign countries.

There is no automatic transfer of title of property vested in a debtor, or registered in a debtor's name, in other insolvency scenarios.

What is very clear to the Committee is that insolvency searches should be carried out.

Taking each situation in turn:

#### **BANKRUPTCY:**

Where someone's name comes up on a Bankruptcy Office search, showing that they have been adjudicated a bankrupt, a sale by the bankrupt is void as, by virtue of section 44 of the Bankruptcy Act 1988, the legal interest will have transferred by operation of law to the Official Assignee on the making of the order of adjudication. The legal interest remains vested in the Official Assignee (with one exception) notwithstanding the subsequent discharge by law of the bankrupt after the period of the bankruptcy expires.

In short, even though the bankrupt may be discharged from bankruptcy, the property remains with the Official Assignee to be realised for the benefit of creditors. The one exception to this is the family/shared home. After a period of three years, where steps have not been taken by the Official Assignee to realise the bankrupt's interest in the family/shared home, the legal ownership re-vests in the (by then former) bankrupt.

Section 85 of the Bankruptcy Act, 1988, as amended by section 10 of the Bankruptcy (Amendment) Act, 2015, now provides:

“(3A) Subject to subsections (3B) to (3F), where on the 3rd anniversary of the date of the making of the adjudication order in respect of a bankruptcy—

- (a) the unrealised property of the bankrupt referred to in subsection (3) includes an estate or interest in what was, at the date of the making of the adjudication order, the family home, shared home or principal private residence of the bankrupt, and
- (b) in the case of the family home or shared home, the Official Assignee has not applied to the Court for an order for sale of that home,

that estate or interest shall, on that 3rd anniversary, stand re-vested in the bankrupt without the need for any conveyance, assignment or transfer.”

This is commonly referred to as the “use it or lose it clause”. (A simple example of a situation where the Official Assignee would not take any steps to realise the interest of the bankrupt in such a property is where it is in negative equity and there would be no benefit for the creditors).

Accordingly, this is why it is necessary to include queries not just in relation to whether or not someone has been adjudicated a bankrupt in Ireland or elsewhere, but more particularly whether the property on the date of adjudication constituted a family home (within the meaning of the Family Home Protection Act 1976) or a shared home (within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010), and if so, whether within three years from the date of adjudication, proceedings were initiated by the Official Assignee with a view to realising the interest of the bankrupt debtor in the property, and if no such proceedings were initiated, whether the property has re-vested in the (by then) discharged bankrupt.

### **Register of EU Personal Insolvencies**

The fact that a vendor’s name appears on this register means that the vendor has been adjudicated bankrupt in another EU state, and confirms the fact that such adjudication has been registered here. This means that the property will most likely have vested in the foreign trustee by operation of the foreign law and the bankruptcy/insolvency may be governed by the local laws of that jurisdiction. In the event of a sale, the sale may then be effected in accordance with the local laws, presumably by the EU insolvency trustee.

If a vendor’s name appears on this register, a purchaser from him is at risk. If a solicitor acts for a purchaser from such a vendor and completes the purchase of a property his client may not acquire any title to the property. The apparent title of such a purchaser can be set aside at the instance of the EU insolvency trustee in such other EU State subject to the exception mentioned below.

In the event of a vendor’s name appearing on this register, i.e. the Register of EU Personal Insolvencies, further enquiries have to be made of the EU insolvency trustee in order to confirm the up-to-date position. In the UK for example, they also have a “use it or lose it clause” such as has been described above providing for re-vesting of the title in the (former) bankrupt, so it would be necessary to make enquiries as to whether or not the property remained vested in the foreign trustee or had re-vested in the bankrupt, and if so whether this was by deed or by operation of local law in the relevant jurisdiction.

### **INSOLVENCY REGISTERS**

The following new registers have been established under the Personal Insolvency Act, 2012 (as amended) (the “2012 Act”), namely:

- Register of Debt Relief Notices
- Register of Protective Certificates
- Register of Debt Settlement Arrangements
- Register of Personal Insolvency Arrangements

To determine whether it is necessary to search each of these registers when acting in the purchase of property from a natural person, one needs to consider the implication of an entry in each register for the sale of property.

## **The debt resolution processes**

The 2012 Act created three new debt resolution processes for insolvent natural persons, namely:

1. Debt Relief Notices (“DRN”);
2. Debt Settlement Arrangements (“DSA”); and
3. Personal Insolvency Arrangements (“PIA”).

Each of these processes is a voluntary arrangement that an insolvent debtor may use to seek to resolve his debts, under the oversight of the Insolvency Service of Ireland (the “Insolvency Service”). The effect of these arrangements is that the debtor is protected from the initiation or continuation of proceedings by creditors specified in the particular arrangement for the period of the arrangement provided the debtor complies with his obligations under the 2012 Act and the terms of the DRN, DSA or PIA, as applicable.

There is no provision in the 2012 Act vesting the debtor’s property in the Insolvency Service or any other third party. Notwithstanding this, we should still consider what effect these arrangements may have on the debtor’s ability to freely dispose of property.

Where a debtor enters into one of these arrangements, the Insolvency Service records basic information regarding the arrangement in the Register of Debt Relief Notices, the Register of Debt Settlement Arrangements, or the Register of Personal Insolvency Arrangements, as applicable. Where a debtor intends to make a proposal for a DSA or a PIA, the first step is to apply for a protective certificate (“Protective Certificate”). An entry in the Register of Protective Certificates indicates that the debtor is working with a Personal Insolvency Practitioner (“PIP”) on a proposal for a DSA or PIA.

We need to consider each of the new debt resolution processes in turn.

### **1. Debt Relief Notices**

A Debt Relief Notice (DRN) enables an eligible insolvent debtor with limited disposable income and assets to write off his qualifying debts of up to €20,000.00 in circumstances where he is insolvent and it is unlikely that his financial situation will improve in the next three years.

To be eligible for the DRN process a debtor must, among other things, not have assets, including real property, worth more than €400.00 (you are also allowed 1 item of jewellery not exceeding a value of €750.00, one motor vehicle worth a value of €2,000.00 or less and reasonably necessary household equipment/tools the combined value of which does not exceed €6,000.00). Because of the low threshold it seems at first glance to be irrelevant in relation to the sale of property. However, it may still be prudent to carry out a search on the Register of Debt Relief Notices.

It is possible in certain circumstances that the vendor of property could have a DRN issued, e.g. where property was acquired by gift or inheritance after the DRN issued, or where the debtor failed to include the property in his prescribed financial statement when the DRN was applied for on the basis that he did not hold both legal and beneficial interest, or where the DRN was fraudulently obtained by an ineligible debtor.

If property is acquired after the issue of a DRN, this is a material change in the debtor’s circumstances which the debtor is required to inform the Insolvency Service about as soon as practicable. If the debtor receives a gift or payment worth €500 or more, he is required to surrender to the Insolvency Service 50% of the value of that gift or payment.

The Insolvency Service may apply to court to have a DRN terminated in a number of circumstances, including the debtor failing to surrender 50% of the value of a gift, the debtor being ineligible for the DRN process, or a material inaccuracy or omission from the debtor's prescribed financial statement. If the DRN process is terminated, the protection will no longer apply and creditors may obtain judgment against the debtor, register judgment mortgages against property, or have the debtor declared bankrupt. The court may also "make such other order as it deems appropriate".

The 2012 Act does not include any provision prohibiting the transfer of property by a person who has been issued with a DRN, or nullifying any such transfer, although the vendor may be guilty of an offence in certain circumstances. However, section 74(3) of the Land and Conveyancing Law Reform Act, 2009 (the "2009 Act") provides that "any conveyance of property made with the intention of defrauding a creditor or other person is voidable by any person thereby prejudiced". Section 74(4) provides protection for a bona fide purchaser for value who did not have notice of the fraudulent intention at the time of the conveyance. However, an entry in the Register of Debt Relief Notices puts any potential purchaser on notice that the vendor is insolvent and is in an insolvency process whereby he should not hold property worth more than €400, or if he has received such property as a gift, 50% of the value should go to the Insolvency Service. This should set off alarm bells of a possible fraudulent disposition within the meaning of section 74 of the 2009 Act.

In summary, a debtor availing of the Debt Relief procedure is by definition someone who does not have any assets by way of real property, as the procedure is dealing only with unsecured debt in what is commonly described as a "no assets, no income" situation, so at best this is merely notification that the debtor is insolvent. If a debtor, having dealt with his debts by means of a Debt Relief Notice, later goes on to acquire property, the registration is of historical relevance only.

## **2. Debt Settlement Arrangements**

Although a DSA is an arrangement for settlement of unsecured debts only, the eligibility criteria for a DSA do not include any limit on the value of assets which a debtor may hold. Therefore a vendor of property could have a DSA in place.

Section 66(2) of the 2012 Act sets out a non-exhaustive list of matters which may be included in a DSA, including:

- "(c) an agreement by the debtor to transfer some or all of the debtor's property to a person (who may be the personal insolvency practitioner) to hold the property in trust for the benefit of the creditors;
- (d) a transfer of specified assets of the debtor to creditors generally or to a specified creditor;
- (e) a sale of specified assets of the debtor by the personal insolvency practitioner and the payment of the proceeds of such sale to creditors."

Section 81(5) of the 2012 Act provides that:

"A debtor in respect of whom a Debt Settlement Arrangement is in effect shall not transfer, lease, grant security over, or otherwise dispose of any interest in property above a prescribed value otherwise than in accordance with the terms of the Debt Settlement Arrangement."

Clearly, if a search on the Register of Debt Settlement Arrangements indicates that a DSA is registered against the vendor of property, the purchaser should enquire whether the transfer is being effected in accordance with the terms of the DSA. If the sale is not in accordance with the terms of the DSA, it will be prohibited.

A DSA can only deal with unsecured debt, but that is not to say that it might be envisaged that a property be sold to generate the funds to deal with the unsecured creditors. A solicitor for a purchaser will want confirmation that the DSA proposals do not affect the property in sale in any way. A solicitor acting for a vendor should furnish an appropriate confirmation that the DSA proposals do not affect the property in sale and insert a special condition obliging a purchaser to accept this. A purchaser's solicitor will want reasonable evidence to the same effect.

There is no mechanism to register a discharge of a DSA.

### **3. Personal Insolvency Arrangements**

A vendor of property could have a PIA in place. A PIA is an arrangement for dealing with secured and / or unsecured debt. Although a limit of €3m applies to the amount of secured debt that can be included in a PIA (unless all secured creditors consent to the inclusion of a higher amount), the eligibility criteria for a PIA do not include any limit on the value of assets which a debtor may hold.

Section 100(2) of the 2012 Act sets out a non-exhaustive list of matters which may be included in a PIA, including:

- “(c) an agreement by the debtor to transfer some or all of the debtor's property to a person (who may be the personal insolvency practitioner) to hold the property in trust for the benefit of the creditors;
- (d) a transfer of specified assets of the debtor to creditors generally or to a specified creditor;
- (e) a sale of specified assets of the debtor by or under the supervision of the personal insolvency practitioner and the payment of the proceeds of such sale to creditors; or
- (f) in respect of secured debts, subject to sections 102 to 105, an arrangement for the treatment of the security and the satisfaction or restructuring of the secured debt.”

The options for satisfaction or restructuring of secured debt set out in Section 102 include provision for:

- “(a) the sale or any other disposition of the property or asset the subject of the security;
- (b) the surrender of the security to the debtor; or
- (c) the retention by the secured creditor of the security.”

Clearly a PIA may include provision for sale or transfer of property. Pursuant to section 118(5):

“A debtor in respect of whom a Personal Insolvency Arrangement is in effect shall not transfer, lease, grant security over, or otherwise dispose of any interest in property above a prescribed value otherwise than in accordance with the terms of the Personal Insolvency Arrangement.”

As with a DSA, if a search on the Register of Personal Insolvency Arrangements indicates that a PIA is registered against the vendor of property, the purchaser should enquire whether the sale of the property is being effected in accordance with the terms of the PIA. If the sale is not in accordance with the terms of the PIA, it will be prohibited.

It may be that the property is to be surrendered to the secured lender for sale, or it may be that property is being sold by the debtor himself. Where a PIA provides for such treatment of the secured asset, the PIA has the benefit of a Court Order approving the PIA and therefore the sale or surrender. The solicitor acting for the vendor should address this issue by way of special condition in the Contract for Sale. A purchaser's solicitor will want reasonable evidence such as a confirmation from the Personal Insolvency Practitioner that the PIA proposals do not affect the sale of the property in any way or, if they do, that it does not have any adverse effect on the sale.

There is no mechanism to register a discharge of such a notice.

### **Protective Certificates**

As noted above, where a debtor intends to make a proposal for a DSA or a PIA the first step is to apply for a Protective Certificate. A Protective Certificate allows the debtor some breathing space (70 days, although this may be extended in limited circumstances) to work with a PIP on a proposal for a DSA or PIA. While the Protective Certificate is in place, creditors cannot initiate or continue legal proceedings for recovery of debts, execution or enforcement of judgments etc.

The 2012 Act does not contain any prohibition on dealing with property while a Protective Certificate is in place, although there is a general obligation on the debtor to act in good faith, and in his dealings with the PIP to make full disclosure to that practitioner of all of his assets, income and liabilities and of all other circumstances that are reasonably likely to have a bearing on the ability of the debtor to make payments to his creditors. The debtor would be guilty of an offence if property is transferred for no consideration or at a significant undervalue for the purpose of obtaining an insolvency arrangement, avoiding variation or termination of an insolvency arrangement or avoiding obligations under the 2012 Act.

An entry in the Register of Protective Certificates acts as notice that the debtor is insolvent and is working with a PIP on a proposal for a DSA or a PIA. As the existence of the Protective Certificate is registered on a public register, any purchaser would be deemed to be on constructive notice of this fact. While the sale of property is not prohibited, a prudent purchaser should consider whether the disposal of the property made within the period that a Protective Certificate is in force might be considered a fraudulent disposition which would be voidable pursuant to section 74(3) of the 2009 Act.

In the view of the Committee a search against the Register of Protective Certificates should be obtained when acting for a purchaser buying property from a natural person.

Where a vendor's name appears on the Register of Protective Certificates, it alerts a purchaser's solicitor to the need to get confirmation from the PIP, (in the absence of further registration in the DSA Register or PIA register), as to whether the sale of the property was to be affected by any proposed DSA or PIA proposals. It might for example be envisaged that the property would be surrendered to the secured lender and if so, then the right of sale would pass to the lender. Details of the relevant PIP would appear on the Register.

There is no mechanism to register a discharge of a Protective Certificate.

## **Conclusion**

In summary, in the view of the Committee, when acting for a purchaser purchasing from a natural person, searches should be carried out against each of the following registers:

Register of Bankruptcy

Register of Debt Relief Notices

Register of Protective Certificates

Register of Debt Settlement Arrangements

Register of Personal Insolvency Arrangements

Register of EU Personal Insolvencies.

An entry appearing on one of the registers will not necessarily prevent completion, but will alert the solicitor that further enquiries are required in relation to the debt resolution process that the vendor is engaged in to ensure that the sale is not in breach of whatever arrangement which the vendor debtor is putting in place.

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## **Conveyancing Committee**

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