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## Insolvency & Restructuring - Ireland

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### Personal Insolvency Act and pensions in bankruptcy

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The bill to overhaul personal insolvency has been amended and passed as the Personal Insolvency Act 2012, and is expected to be brought into operation between April and June 2013.

The act provides for discharge from bankruptcy after three years,<sup>(1)</sup> subject to a possible bankruptcy payments order that payments be made from income and assets for up to a further five years.<sup>(2)</sup>

The act also establishes three new debt resolution processes for individuals:

- debt relief notices, which permit the write-off of debts of up to €20,000 for persons with little or no material assets or net disposable income who are insolvent and have no realistic prospect of being able to pay their debts within the next three years;
- debt settlement arrangements, which deal with unsecured debt over a period of up to five years (which may be extended for another year); and
- personal insolvency arrangements, which deal with secured (less than €3 million or higher if all secured creditors consent in writing) and unsecured debt over a period of up to six years (which may be extended for another year).

An application for a debt relief notice is to be dealt with by an approved intermediary. In the case of debt settlement and personal insolvency arrangements, proposals for these are to be made on behalf of the debtor by a personal insolvency practitioner.

An insolvency service is being established which will, among other things, authorise, supervise and regulate personal insolvency practitioners.

The act takes the opportunity to legislate in respect of the treatment of pensions in bankruptcy. This issue is addressed in Section 65 of the Bankruptcy Act 1988, which provides that whenever a bankrupt is in receipt of or is entitled to receive any pension, the court may, on the application of the official assignee, make such order directed to the bankrupt and any party from which the bankrupt is entitled to receive any pension for payment to the official assignee of all or part of such pension, subject to such conditions as to payment as the court may specify, having regard to the family responsibilities and personal situation of the bankrupt.<sup>(3)</sup>

Section 150 of the Personal Insolvency Act<sup>(4)</sup> introduces a new Section 44A into the Bankruptcy Act, providing that assets relating to a 'relevant pension arrangement', other than payments already received or that the bankrupt was entitled to receive, will not vest in the official assignee in bankruptcy. However, in addition to payments already received or that the bankrupt was entitled to receive, where the bankrupt would receive an income or an amount of money if he or she performed an act or exercised an option, he or she is considered to be in receipt of such amount and such amount vests in the official assignee.<sup>(5)</sup> This includes moneys which would be received if the bankrupt performed an act or exercised an option either before or within five years of the date of adjudication.

This clearly covers a pension which a person is entitled to draw subject to payment of tax.<sup>(6)</sup> It remains to be seen whether there will be any judicial decisions in which the entitlement to pension is discretionary.

An example of the sort of difficulty which can arise where a pension entitlement is discretionary is shown by *EBS Building Society v Heffernon*.<sup>(7)</sup> In that case the High Court held that a receiver by way of equitable execution could not be appointed in respect of pension funds held by trustees such that on retirement his interest in the fund was to be applied to the provision of pension for the member and/or his dependents in a manner to be agreed between the member and trustees.<sup>(8)</sup>

The Pensions Act<sup>(9)</sup> provides that where a member of a scheme becomes bankrupt:

*"the trustees of the scheme may, at their discretion, apply any provision of the scheme, under which a benefit may be forfeited and paid, to the member or such other person specified in the provision."*

In *Crowe Engineering Ltd v Lynch*<sup>(10)</sup> the court observed that where there was not an enforceable right to direct where the payment of the moneys should go, the discretion of the trustee is exactly that: a discretion. Where the trustees are given discretion, the court will not interfere with its exercise, unless such exercise was made in bad faith.

The Personal Insolvency Act also introduces new Section 44B, which provides that in a case where the bankrupt or a person on his or her behalf made excessive contributions to pension in the three years before being adjudicated bankrupt which materially contributed to the bankrupt's inability to pay his or her debts, or which substantially reduced the sum available for creditors, the official assignee or trustee in bankruptcy can apply to the court for an order to ensure that excessive contributions be made available for distribution to the creditors.

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## Endnotes

<sup>(1)</sup> The court has the power to order that the discharge be later (but not later than the eighth anniversary of the adjudication order) in cases where the bankrupt has failed to cooperate in the realisation of assets or hidden or failed to disclose income or assets.

<sup>(2)</sup> In making a bankruptcy payments order, the court must have regard to the reasonable living expenses of the bankrupt and his or her dependants.

<sup>(3)</sup> For an indication of how to interpret the principles relevant to this area, see the following English decisions:

- *Re Landau (A Bankrupt)* 1998 CH 223;
- *Krasner v Dennison and Lawrence v Lesser* 2001 CH 76; and
- *In re Malcolm* 2004 EWCA Civ 1748.

<sup>(4)</sup> Sections 44A(1) and (2) of the Personal Insolvency Act 2012 state:

*"Subject to subsection (2), where a person is adjudicated bankrupt, and he or she is, or may become entitled to, payments under a relevant pension arrangement, assets relating to the arrangement (other than payments already received by the bankrupt, or that the bankrupt was entitled to receive, under the arrangement) shall not vest in the Official Assignee for the benefit of the creditors of the bankrupt..."*

*Where a bankrupt has an interest in or entitlement under a relevant pension arrangement which would, if the bankrupt performed an act or exercised an option, cause the debtor to receive from or at the request of the person administering that relevant pension arrangement – (a) an income, or (b) an amount of money other than income, in accordance with the relevant provisions of the Taxes Consolidation Act 1997, that bankrupt shall be considered as being in receipt of such income, and such amount of money shall vest in the Official Assignee or the trustee in bankruptcy."*

See also Sections 85D(6) and (7), introduced by Section 157 of the Personal Insolvency Act in regard to pensions and bankruptcy payments orders; Note S26(6)(c)(v) and (12) on debt relief certificates, and Section 51 on debt settlement and personal insolvency arrangements; and Note S787K of the Taxes Consolidation Act.

<sup>(5)</sup> A similar result appears to arise in England under *Raithatha (as trustee in bankruptcy for Williamson) v Williamson* [2012] EWHC 909 (Ch), which held that:

*"a bankrupt does have an entitlement to a payment under a pension scheme not merely where the Scheme is in payment of benefit but also where, under the rules of the scheme, he would be entitled to payment merely by asking for payment."*

<sup>(6)</sup> For example, a receiver by way of equitable execution has been appointed over a retirement fund owned by and available to the beneficiary subject to payment of income tax on funds drawn (unreported High Court Decision of Justice Peter Kelly, April 14 2010)

<sup>(7)</sup> [2012] IEHC 399 judgment of Justice Brian J McGovern

<sup>(8)</sup> In the United Kingdom, but in very different circumstances, the Privy Council held that a power of revocation of trusts was tantamount to ownership and that such power be delegated to receivers by way of equitable execution (*Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17).

<sup>(9)</sup> Section 36 of the Pensions Act 1990, as amended by Section 13 of the Pensions (Amendment) Act 1996 and Section 24 of the Pensions (Amendment) Act 2002.

<sup>(10)</sup> 4 Irish Tax Reports 340 judgment of Justice Mella Carroll (July 24 1991).

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