

# CORPORATE RECOVERY & RESTRUCTURING

## Call for 'major overhaul' of bankruptcy laws

By Dave Boland

**T**he bankruptcy regime in Ireland must be overhauled in order to protect entrepreneurs and support economic recovery, according to Niamh Ni Mhurchú, a partner in Sligo-based law firm Callan Tansey.

"There is no doubt that a major overhaul of the current bankruptcy laws is needed if we are to emerge from this period of economic stagnation," Ni Mhurchú said.

"Otherwise, fear of failure will inhibit entrepreneurial risk and strategic investment, which are essential to stimulate the economy."

Many businesses have failed, not through the fault of the owners, but rather due to the downturn in the economy. In the same way, the recession has left some individuals facing debts that they have no prospect of discharging. Among this group are struggling business owners who were required to provide huge personal guarantees to secure finance during the boom.

"Without reform of the bankruptcy regime in this country, we will lose the entrepreneurs and businesspeople that we need to get the wheels of industry moving again," said Ni Mhurchú.

The bankruptcy regime in Ireland was more severe than that of our European neighbours. The maximum duration for bankruptcy used in most other European member states is around five years.

In Ireland, it lasts for a period of 12 years, whereafter an individual can emerge from bankruptcy only once the costs



Niamh Ni Mhurchú, a partner in Sligo-based law firm Callan Tansey

COLIN GILLAN

of the bankruptcy and the preferential creditors have been discharged.

"I am not advocating that

individuals who have been reckless, irresponsible and those who have engaged in fraudulent activity to the detri-

ment of others, should be rewarded," Ni Mhurchú said.

"There should be procedures in place for dealing with

this type of activity similar to the restriction and disqualification proceedings for company directors."

Bankruptcy tourism could also pose a risk, according to Ni Mhurchú, as under British regulations, bankruptcy can end after a period of just 12 months. "There is no reason why people couldn't travel to Northern Ireland where a bankruptcy period of one year applies," she said.

"It must, however, be borne in mind that, despite the fact that the laws of England and Wales would apply to the general aspects of bankruptcy, the laws of Ireland would still apply to any property situated here."

Crippling personal debt has been the distinguishing feature of this recession, following the freeflow of credit that continued through the boom years.

"The recapitalisation of the banks has been well documented, but appropriate attention has not yet been given to the plight of the individual," said Ni Mhurchú.

"More and more often, we are encountering highly-stressed individuals who gave personal guarantees and borrowed heavily to secure credit for their businesses during the boom years. They are now facing judgment after judgment, with very little light at the end of the tunnel."

According to Ni Mhurchú, it is not accurate to say that the only people facing bankruptcy are reckless individuals, who squandered money to support grand lifestyles.

"The most common concern for the individuals coming to us for advice is in regard to their family home," she said.

"The sanctity of the 'family home' is engrained in our subconscious as Irish people, but, as things stand, the family home is not safe from bankruptcy proceedings and the official assignee can and does go after the family home."



Mark Homan, partner in commercial litigation, corporate restructuring and insolvency team, Lavelle Coleman

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## Receivership not necessarily the end

By Dave Boland

News of receiverships have become a mainstay of the media during the recession, but not all receiverships are the same – and not all spell the end of a business.

"People often view receiverships as being the end of a business, but this is not necessarily the case," said Mark Homan, a partner in the commercial litigation, corporate restructuring and insolvency team at Dublin-based legal firm Lavelle Coleman.

"Just because a company is in receivership, it doesn't mean that the company is dead, nor does it necessarily mean that the company is insolvent. It comes about after an act of default, although it is fair to say that usually a receiver won't be involved unless a company is in distress. It is very unusual where a bank wants to disengage from a company for a reason other than distress."

The role and function of receivers and receiver managers differ depending on each scenario. Some are sent into troubled companies to realise assets; others to run the business as a going concern under the auspices of its banking provider, until a buyer can be found.

According to Homan, the common feature of any receivership is that there is a bank that wants to protect its assets. In many cases, receivers are appointed to companies that own properties or other fixed assets.

In these cases, the bank is trying to realise this fixed asset. For example, you might have a developer with a landbank that it is no longer in a position to develop. If it has defaulted on its obligations to its bank, the bank will want the land back.

"There are also examples of receivers being appointed to trading companies and, in these cases, it might make sense to

appoint a receiver manager," Homan said.

"This was done in the cases of the Sunday Tribune and of Celtic Bookmakers, where the bank wished to preserve the asset for future sale."

Take the example of a shop selling groceries. The bank would probably take the view that it would make more sense to put an operator in to keep the shop going than it would to close the shop. If it did this, it would depreciate its value through loss of goodwill and lessen scope to collect debt.

"The classic example of receiver managers being appointed is in the hotel sector," said Homan.

"There are many hotels around the country which have had receiver managers appointed. These put in place operating teams to keep the business going and they might even take the view that it is worth retaining some key people in the management team."

"If there was a good working relationship between the company and the bank, then I don't think the bank would have too much difficulty with the current team remaining on, assuming that the team was reporting to the receiver."

If there is a breakdown in trust between the company and its bank, the latter might opt to put in place an entirely new operating team. Even in such cases, however, a significant number of the company's existing staff will be retained.

"It has to be said that the receiver's duty of care is solely to the entity that has appointed it, so it does not have a duty of care to unsecured creditors, or even strictly to employees," said Homan.

"It is there to get the maximum returns for the bank."

"Once a receiver is appointed, any contracts between suppliers will be with the receiver, and ultimately in a receivership situation, the company's interests are merged with those of the creditor."



Marc Woodcock, a solicitor with McDowell Purcell in Dublin and lecturer on the Diploma in Insolvency programme

## Law Society lends a practical hand

By Dave Boland

**T**he Law Society has introduced a number of programmes to provide up-to-date information on corporate recovery and insolvency.

Its Diploma in Insolvency & Corporate Restructuring and Certificate in Investment Funds Law & Compliance have been put in place to address the specific needs of solicitors and other professionals operating in these areas.

Marc Woodcock, a solicitor with McDowell Purcell in Dublin and lecturer on the Diploma in Insolvency programme, said the move was part of a more tailored approach to teaching law.

"Years ago, all that were available were general courses, which might have been delivered by retired solicitors," Woodcock said.

"Now the Law Society specifically approaches people who are currently practising and who have expertise in a given area. So, people who attend the courses are getting the information straight from the horse's mouth, rather than from an academic dissertation."

Woodcock said that some recent incidents of solicitors practising in areas outside their sphere of expertise, had damaged the reputation of the legal profession in Ireland.

He believes that the Law Society's specialised approach to teaching will go a long way to restoring faith in the profession.

"The whole profession is moving in a direction of increased specialisation," he said.

"The days when a sole practitioner can turn his or her hand to anything are gone, and instead I believe that sole practitioners should have a confined area of practice, because

they may not be qualified to act in certain areas."

One of the real advantages of these courses is that they are highly practical, setting out what lawyers should do in practice rather than simply teaching statutes.

This is particularly important given that the law is constantly evolving in response to case law and legislative changes.

While the best way to keep up to date is by practising in the area, another option is to learn first-hand from a lecturer who is already active in that area.

Because of this, diplomas and certificates from the Law Society offer an ideal starting point to lawyers who wish to specialise in niche areas. They are also handy for practitioners who have started to specialise as part of their training.

Woodcock said the courses might also suit general practitioners, many of whom were seeing a rise in queries about insolvency law and enforcement.

"Your average general practitioner would have no experience in these areas, but their clients need to know what to do," Woodcock said. "A course on insolvency law would allow them to advise their clients properly."

Law Society courses count towards continual professional development (CPD) requirements and are delivered via blended learning, which means that there is a mix of classroom-based and distance learning lessons.

The three-month Certificate in Investment Funds Law & Compliance provides learners with a comprehensive understanding of the regulatory authorisation and supervision regime applicable to the investment funds industry in Ireland.

The six-month Diploma in Insolvency and Corporate Restructuring is designed to give participants an in-depth and

practical knowledge of the practice and procedure of the discipline.

"I would recommend to any practitioner and any lawyer that they should do a course on insolvency law," said Woodcock. "The discipline will be the predominant force in the practice of law for the next number of years and even if people don't act for the banks, they will have clients who will be exposed to this legislation."

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Client focused advice

Lavelle Coleman's Corporate Restructuring and Insolvency Group can help you explore options, safeguard interests and maximise opportunities.

The group offers advice in:

- Voluntary liquidations
- Court liquidations
- Receiverships
- Examinerships
- Bankruptcy
- Cross-border insolvency
- Debt restructurings and schemes of arrangements
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Law Society of Ireland

The Law Society of Ireland's Diploma Team is pleased to announce the following courses commencing in Spring 2011:

**Diploma in Insolvency & Corporate Restructuring (webcast), Sat 02 April 2011, €2150\***

The course will run over six months and will provide in-depth and practical knowledge of the practice and procedure of insolvency and corporate restructuring in Ireland, from an analysis of basic concepts, such as, receiverships and liquidations to a consideration of more complex issues such as taxation and financing considerations that may arise during the corporate restructuring process. \*Open to non-lawyers

**Certificate in Investment Funds Law and Compliance (webcast), Wed 06 April 2011, €1,160**

This course will provide you with a comprehensive understanding of the regulatory authorisation and supervision regime applicable to the investment funds industry in this jurisdiction. \*Open to non-lawyers

**Diploma in Civil Litigation (webcast), Mon 04 April 2011 €2,150**

This course aims to impart a knowledge of substantive and procedural law to equip practitioners to deal competently and efficiently in this area.

**Diploma in Employment Law (webcast), Tues 05 April 2011, €2,150**

This diploma provides a comprehensive understanding of employment law, covering all aspects of the employer/employee relationship from recruitment through to termination. \*Open to non-lawyers

**Certificate in District Court Litigation & Advocacy, Sat 09 April 2011, €1,160**

This course will analyse some of the key areas of District Court practice, including, debt collection, licensing, road traffic offences and family law proceedings.

For further information:

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