

Bankruptcy – Where to now? Expert advice

Deloitte Academy, Dublin
26 January 2011



Introduction

David Carson,
Reorganisation Services
Partner

Contents

- Irish Bankruptcy Today, Barry O'Neill, Partner, Eugene F. Collins
- Personal Insolvency In The UK, Louise Brittain, National Bankruptcy Partner, Deloitte UK
- Forensic Accounting Issues, Andrew Brown, Director, Deloitte
- The Law Reform Commission's Bankruptcy Recommendations, Patricia Rickard-Clarke, Law Reform Commissioner



EUGENE F. COLLINS

BARRY O'NEILL

26th JANUARY 2011





RELIEF



INDIVIDUALS



Context

Beginning

Middle

End



CONTEXT

Relief / Benefit

Creditors

Debtors

Punish



CONTEXT

Statistics

Bankruptcies

2009: 17

2010: 29



CONTEXT

Fundamentally

Changed World



CONTEXT

Framework

Bankruptcy

Arrangement



FRAMEWORK

Bankruptcy

(a) Order

(b) Voluntary



CONTEXT

Bankruptcy

12 (?) Years



BEGINNING

Petitioner (Voluntary)

- (a) Official Assignee**
- (b) Trustee**
- (c) Other**



BEGINNING

Other

Where?



BEGINNING

Where?

Ireland?

EU?

Elsewhere?



BEGINNING

EU

Freedom

Insolvency Regulation

COMI



BEGINNING

EU

Secondary

Proceedings



BEGINNING

€1,900



BEGINNING

High Court



BEGINNING

Edge

Security

Indemnity

Trustee



MIDDLE

Realisation

Investigation



MIDDLE

Investigation

Preference?

Wrongdoing?

Transfers?



TRANSFERS

Money

Goods

Land

Other

Here/elsewhere



TRANSFERS

(a) Bankruptcy

(b) Other



TRANSFERS Bankruptcy

(a) 2 years

(b) 5 years



TRANSFERS

“Other”

Legislation

2009 (1634)



Family Home



END

12 (?) Years

Offer



ARRANGEMENTS

2009: 7

2010: 10



ARRANGEMENTS

Court

Protection

Offer

Vest

Time Limit



ARRANGEMENTS

- Three fifths
- Costs
- Preferential



ARRANGEMENTS

“Other”

Formal

Informal



Changed World



Relief & Hope



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BARRY O'NEILL

26th JANUARY 2011



Personal Insolvency in the UK

Louise Brittain, National
Bankruptcy Partner,
Deloitte UK

Agenda

1. An overview of the UK process
2. The Role of the Official Receiver
3. The Role of the Trustee/ Liquidator
4. Differences, Advantages and Disadvantages of each regime
5. Antecedent Transactions
6. Other powers to assist Asset Tracing
7. International Asset Recovery
8. Bankruptcy Offences and Discharge

The UK process – An Overview

1. The History of UK Bankruptcy
2. Based on The Insolvency Act 1986 and the Enterprise Act 2004
3. Official Receiver – Part of BIS
4. Insolvency Practitioners
5. High Courts and County Courts

The UK process – An Overview

1. Statutory Demand / Judgment – who qualifies?
2. Petition
3. Bankruptcy Order
4. Official Receiver – Bankruptcy offences
5. Trustee in Bankruptcy – Financial aspects
6. Powers of Trustee extensive
7. Discharge
8. Individual Voluntary Arrangements
9. Debt Relief Orders
10. Sequestrations
11. Northern Ireland
12. Compulsory Liquidation

Differences, Advantages and Disadvantages of each regime

1. 2009 – 130,000 personal insolvencies in the UK
2. 2009 – 17 in Ireland
3. Official Receiver and Trustee vs Official Assignee
4. Discharge 1 year vs 12 years
5. Discharge from liabilities
6. Powers available to Trustee stronger in UK
7. International recognition

The Role of The Official Receiver

1. Government Department – 3,000 plus staff – National Network of Offices
2. Public Interest Unit - Treasury solicitor petitions in the Public Interest
3. Notified by the Court of every Bankruptcy and Compulsory Liquidation
4. Initial investigation – Appoints a Trustee/ Liquidator
5. Prosecuted offences, Bankruptcy Restriction Orders (BRO's), Disqualification
6. Suspension of Discharge, Public examinations
7. Doesn't litigate or deal with antecedent Transactions

The Role of the Trustee/ Liquidator

1. Financial Role – To realise assets and distribute
2. Report offences to the Official Receiver
3. Extensive Powers – some only with Sanction from IP Unit of OR
4. Regularly act on a CFA basis
5. Private examination, suspension of discharge
6. Recognised throughout the world – Trustee and Compulsory Liquidation
7. Regularly litigates

Antecedent Transactions

1. Transactions at an undervalue
2. Preferences
3. Voidable transactions
4. Transactions in defraud of creditors

Other Powers to assist Asset Tracing

1. Search and Seizure
2. Postal redirection
3. Passport Order
4. Private / Public examination
5. Suspension of discharge
6. Committal

“Stand in the shoes of the bankrupt”

International Asset Tracing

1. Recognition
2. Parallel proceedings
3. Many jurisdictions based on UK Law
4. Local laws
5. Foreign creditors claims
6. USA – home stead rule

Bankruptcy Offences and Discharge

1. Discharge UK – 1 year v.'s Ireland – 12 years
2. Offences – Concealment of Property
 - Non disclosure
 - False statements
 - Non delivery of books and records
 - Failure to keep proper records
3. Creditors Trustee duty to report

Forensic Accounting Issues

Andrew Brown
Director, Deloitte

Agenda

How do you ensure you have complete disclosure?

How can you trace and value assets in Ireland and overseas?

How can you ensure that pre-insolvency transactions are valid?

The background

Ireland entered recession September 2008

Bankrupts may have had over 2 ½ years to anticipate proceedings

Complex business structures and arrangements

Multinational dimension

Agenda

How do you ensure you have complete disclosure?

How can you trace and value assets in Ireland and overseas?

How can you ensure that pre-insolvency transactions are valid?

How do **YOU** ensure you have complete disclosure?

The Statement of Affairs

Question 1) Does it disclose all of the assets and liabilities?

Question 2) Are the values attributed to them reasonable?

The Statement of Affairs

| SUMMARY OF STATEMENT OF AFFAIRS | |
|--|---------------------|
| | Part 1: Assets |
| A Moveable Property | |
| i) Cash | |
| ii) Bank and Building Society | |
| iii) Investments | |
| iv) Debts due to you | |
| v) Other assets | |
| B Immoveable Property | |
| | |
| | Part 2: Liabilities |
| i) Unsecured Debts | |
| ii) Secured Debts | |
| | |
| | Part 3: General |
| i) Income | |
| ii) Property in Expectancy | |
| iii) Books, Papers, Deeds, Etc | |
| | |
| | |
| | Part 4: Declaration |
| | |

| Part 1: - List of Assets | | | | |
|---|--------------------|--------------------------------|--------|-------------------------|
| iii) Investments | | | | |
| Give details of any investments you have ie stocks, shares, bonds, savings certificates, endowment insurance, pension, life policies, etc | | | | |
| | | | | |
| | | Name of Company or Institution | Ref No | Current Estimated Value |
| Number | Type of investment | | | |
| 11 | | | | |
| 12 | | | | |
| 13 | | | | |
| 14 | | | | |
| 15 | | | | |

The Statement of Affairs: Now and “then”

| Part 1: - List of Assets as at February 2011 | | | | |
|---|--------------------|--------------------------------|--------|-------------------------|
| iii) Investments | | | | |
| Give details of any investments you have ie stocks, shares, bonds, savings certificates, endowment insurance, pension, life policies, etc | | | | |
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| 11 | | | | |
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| 15 | | | | |

| Part 1: - List of Assets as at February 2007 | | | | |
|---|--------------------|--------------------------------|--------|-------------------------|
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| 11 | | | | |
| 12 | | | | |
| 13 | | | | |
| 14 | | | | |
| 15 | | | | |

When did the bankrupt know, or should have known, that he was, or might be insolvent?

How do you ensure you have complete disclosure?

Use The Statement of Affairs: Now and “Then” to answer the questions:

Question 1) Does it disclose all of the assets and liabilities?

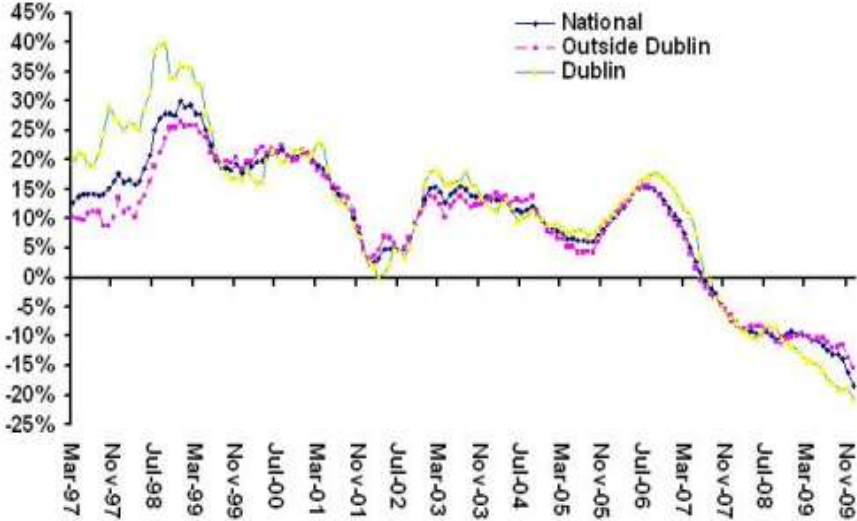
Reconcile all movements in assets and liabilities

Question 2) Are the values attributed to them reasonable?

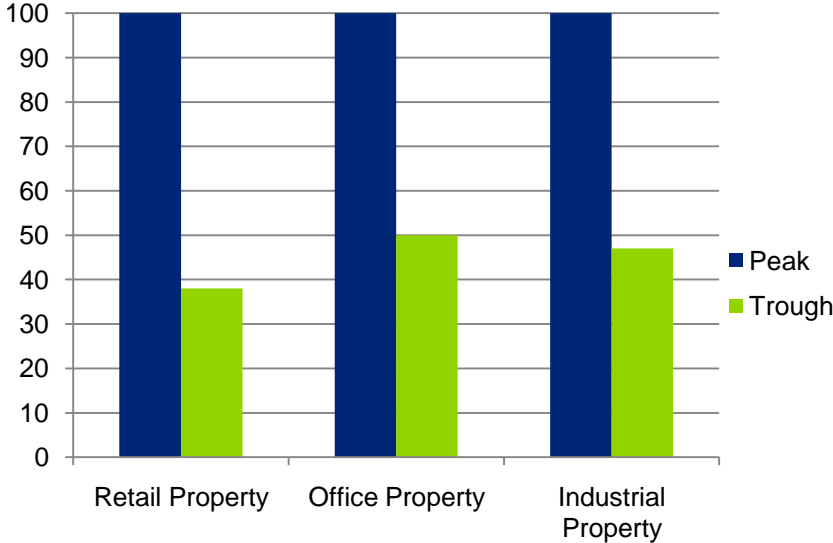
Ensure that any movements in value make sense

Some common-sense benchmarks

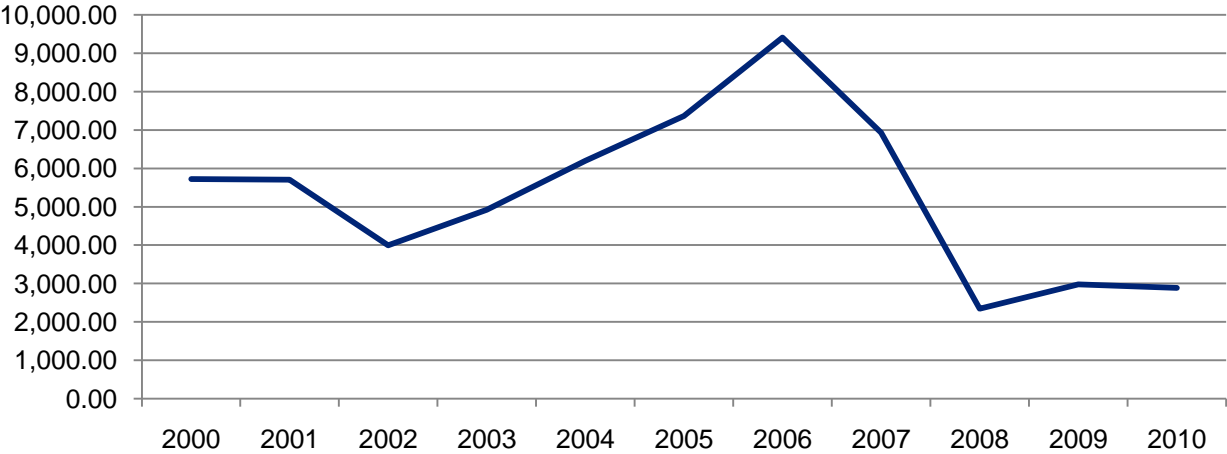
House prices



Commercial property market



ISEQ index



Practical issues in ensuring completeness

Individuals don't prepare accounts

Prevalence of unlimited companies, partnerships, trusts

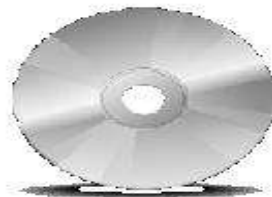
Valuation of minority shareholdings or other complex interests

Some assets may be “overlooked” eg motor cars, yachts, works of art, antiques

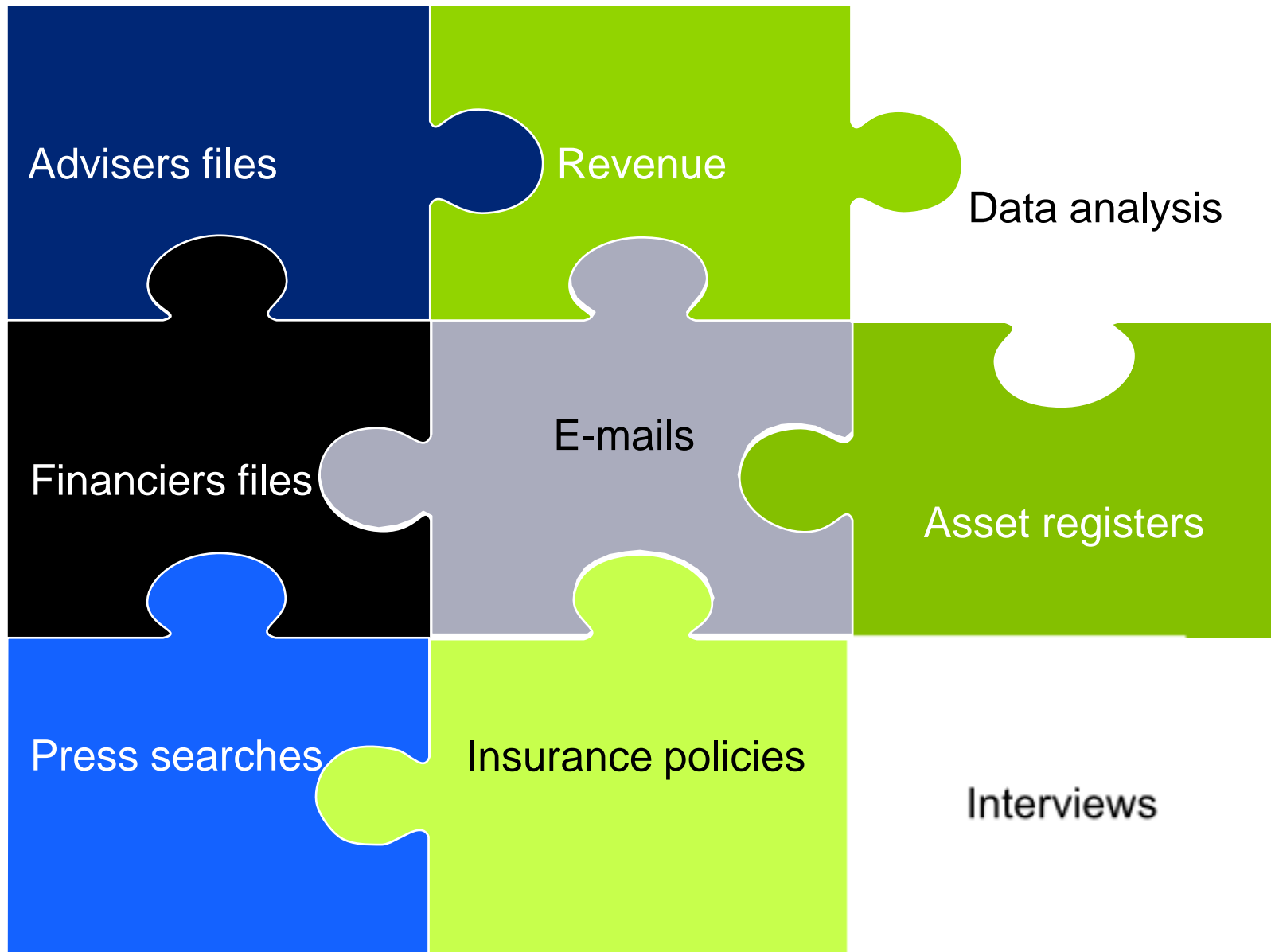
Don't forget:

One of the most valuable assets

Information: A valuable asset



The “jigsaw” of information sources



Agenda

How do you ensure you have complete disclosure?

How can you trace and value assets in Ireland and overseas?

How can you ensure that pre-insolvency transactions are valid?

Following the trail

Case study

Minority shareholding in Caribbean company

An undated valuation supported a negligible valuation of the shares

The Caribbean jurisdiction was advertised as a good location to:
“shield (your) assets from lawsuits, agencies and financial creditors”

Only asset was oil exploration rights in Central America

Research indicated the company had discovered reserves with a value of \$1billion!

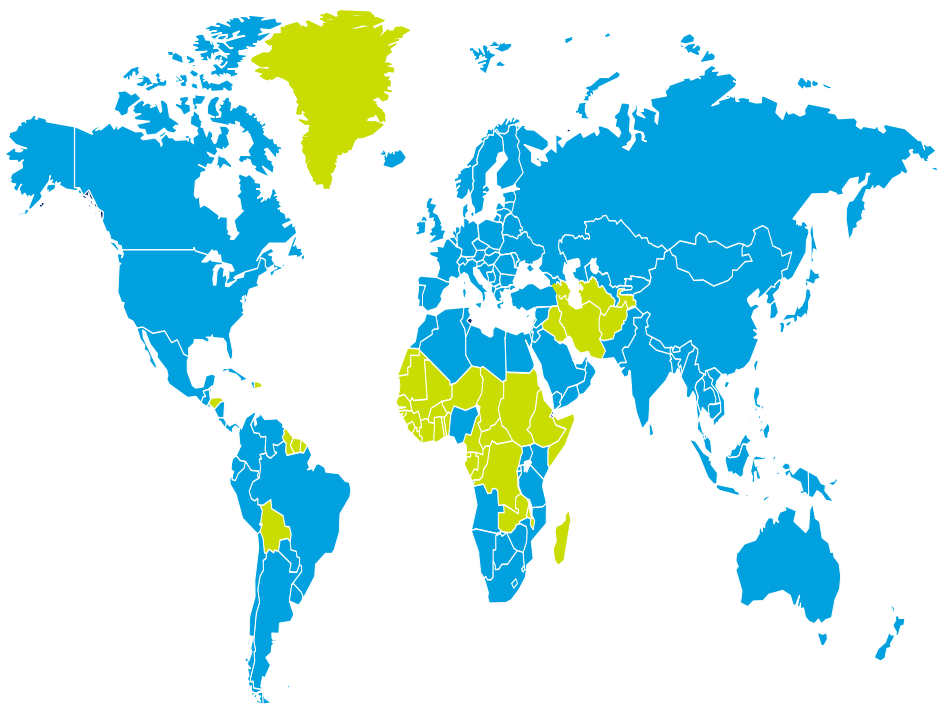
Striking oil!

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search ID: vsh0389

Tracing and valuing assets overseas



Huge amount of public information is available

Local knowledge is essential

We use a network of in-country offices PLUS “sources”

Help to identify information and formulating the right questions

Agenda

How do you ensure you have complete disclosure?

How can you trace and value assets in Ireland and overseas?

How can you ensure that pre-insolvency transactions are valid?

The Statement of Affairs: How did we get here?

| Part 1: - List of Assets as at February 2011 | | | | |
|---|--------------------|--------------------------------|--------|-------------------------|
| iii) Investments | | | | |
| Give details of any investments you have ie stocks, shares, bonds, savings certificates, endowment insurance, pension, life policies, etc | | | | |
| | | | | |
| Number | Type of investment | Name of Company or Institution | Ref No | Current Estimated Value |
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| 11 | | | | |
| 12 | | | | |
| 13 | | | | |
| 14 | | | | |
| 15 | | | | |

Remember: Recession officially started September 2008

Identifying invalid pre-insolvency transactions

Use the Statement of Affairs: Then and now comparison to validate movements

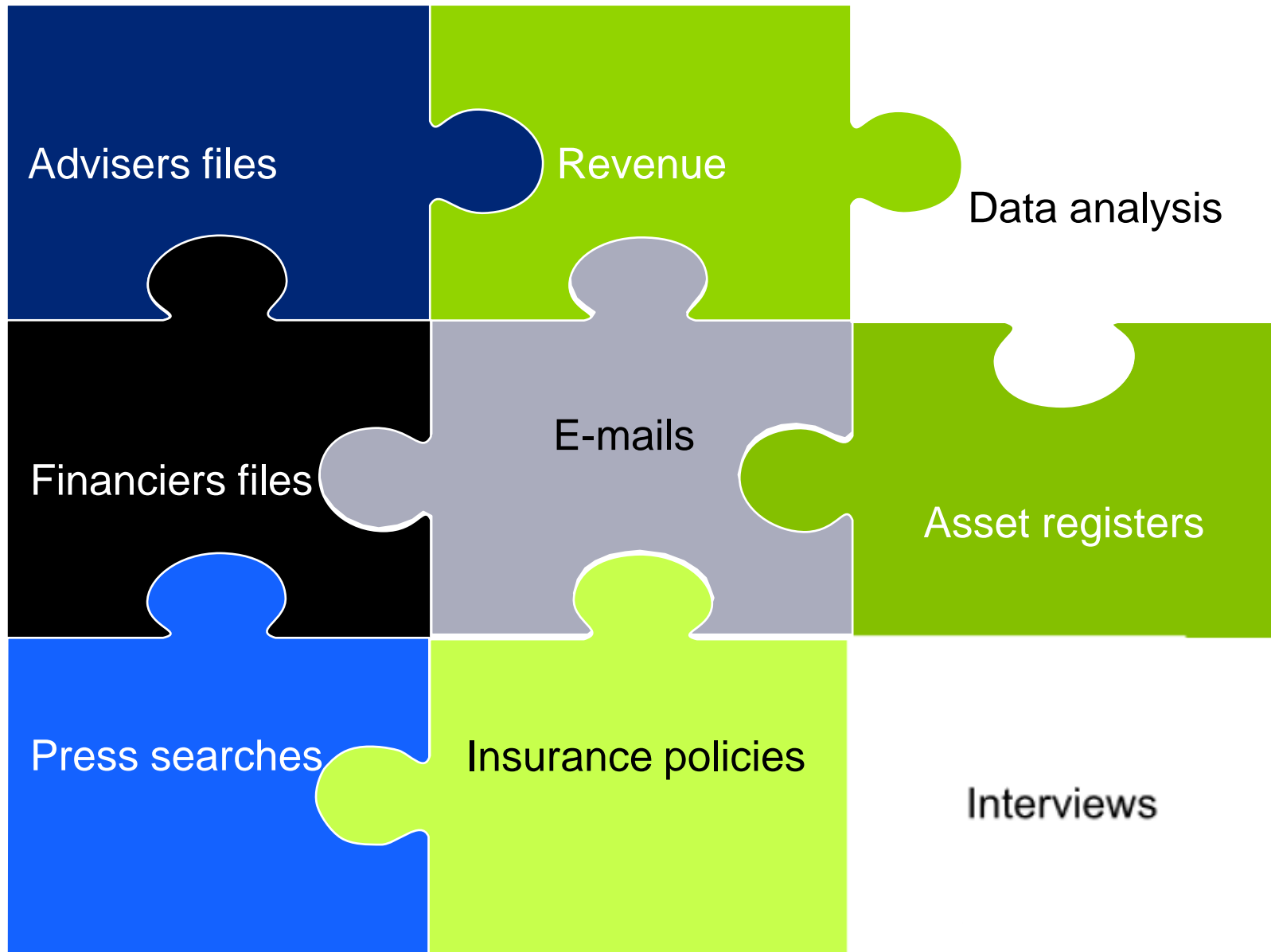
Detailed transactional analysis – data analytics, key word searches, search for matching transfers (amounts and dates)

Public information

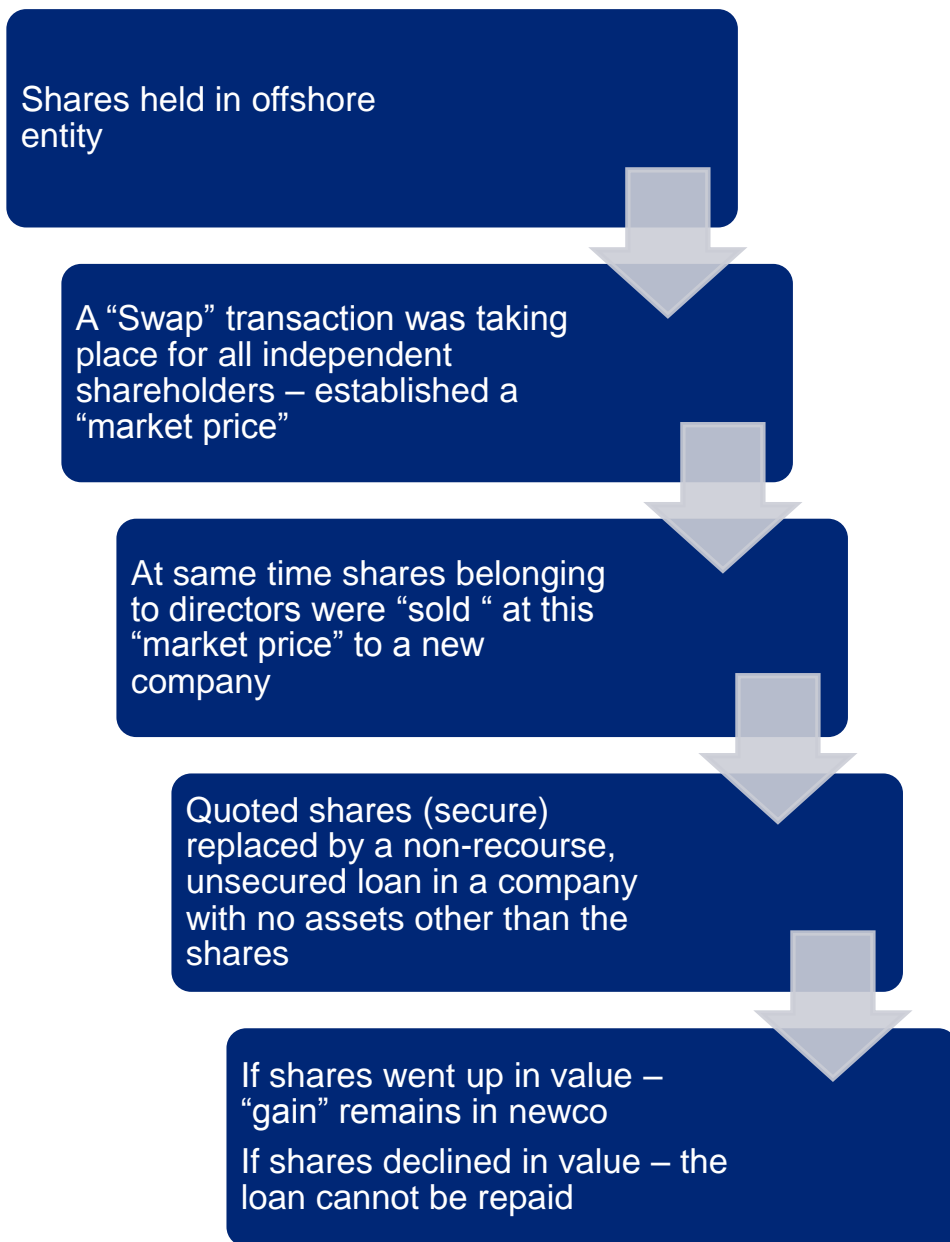
Digital evidence

No real substitute for methodical forensic analysis

The “jigsaw” of information sources



Pre-insolvency transactions: Does it make sense?



Forensic analysis required

Lots of information came from the company's own website

Understanding of the relevant markets

What is the commercial benefit?
Win:Win for directors

Debt Management and Debt Enforcement Law Reform Commission's Recommendations

Deloitte Bankruptcy Seminar
26 January 2011

Deloitte and Touche House
Earlsfort Terrace Dublin 2

Patricia T Rickard-Clarke

www.lawreform.ie

Personal Debt Project

- CP (September 2009)
 - Suggestions for consideration: implementations by other bodies, e.g. Central Bank
 - Provisional recommendations for reform
- Interim Report - Action Plan (May 2010)
 - Financial Regulation, Codes of Practice, Legal Processes and Information
- Report and draft Personal Insolvency Bill (December 2010)

Bankruptcy

- Commission's view - personal insolvency should be resolved outside of court process whenever possible - therefore suggests a non-judicial scheme
- Bankruptcy proceedings – a last resort
- *Bankruptcy Act 1988* should be reformed
- Rationale for reform proposals – key to understanding the Commission's recommendations

Bankruptcy

Key reform proposals

- Minimum debt level to bring creditor petition
 - From €1,900 to €50,000
- Removal of precondition requirement of debtor's available estate
- Insolvency test
- Pre-Action Protocol – creditor petitions
- Stay on proceedings to consider alternative means
- Debtor's petition processed and order of bankruptcy made administratively
- Personal Insolvency Trustee - regulated

Bankruptcy Reforms

Discharge Provisions

- Precondition to realise bankrupt's estate abolished
 - Estate remain vested in the Official Assignee
 - Debtor under duty to cooperate
- Discharge
 - Automatic discharge on expiry of period of 3 years
 - Court discretion to require debtor to make payments to creditors for up to 5 years
 - Official Assignee/Personal Insolvency Trustee can apply to court on specified grounds
 - Court discretion to suspend discharge for 2 years
 - If debtor has previously availed of bankruptcy discharge presumption to apply but can be rebutted

Bankruptcy Reforms

Further Issues

- Removal of requirement to pay expenses, costs, fees and preferential payments before discharge
- Priority Debts
 - Revenue debts no longer be given preferential status
 - Others to be considered/significantly reduced
- Excluded debts and liabilities
- Exempt Assets
- Restrictions on bankrupt during bankruptcy

Non Judicial Debt Settlement

- Recommendation
 - A non-judicial debt settlement mechanism known as a Debt Settlement Arrangement should be established under Irish law
 - Primarily a matter for agreement between debtor and creditors with flexibilities to enable appropriate arrangements to be reached
 - A holistic approach to debt management
 - Allow creditors to assert their rights
 - Core mandatory terms of settlement be specified in legislation

Non Judicial Debt Settlement

Rationale and Aims

- Provide earned fresh start
- Primarily aimed at insolvent individuals to repay debts in so far as possible over a period
- Provide a balance relieving individuals of over-indebtedness while providing a return to creditors
- Most debt claims do not raise justiciable issues
- Costs lower for debtor and creditor
- Saves costs for the State

Debt Settlement Arrangement General Conditions

- Good Faith Test – full disclosure (SFS)
- Insolvency Test
- Threshold Amount
- Once only in a 10 year period unless exceptional factors
- Approval at creditors meeting
 - 60% in value of votes cast
 - If not approved deemed to have come to an end
- Does not include secured debt
- Excluded Debts/Liabilities

Debt Settlement Arrangement

Key Principles

- Maximum duration of a DSA will be 5 years
- DSA will provide for performance of obligations over the specified period
- Changed circumstances taken into account
- On completion of obligations specified, debtor will be discharged from remainder of debts covered by arrangement – debt deemed to be repaid in full
- Offences – fraudulent or dishonest conduct

Debt Settlement Arrangement

Key Principles

- DSA shall not contain terms requiring sale of essential business assets
- DSA shall not contain terms requiring repayments as would leave debtor with insufficient income to maintain reasonable standard of living
 - Debt Settlement Office prepare and publish Guidelines
 - Structural framework of the Standard Financial Statement
 - Incentivise debtor to seek and maintain employment
 - Income allowed greater than exempted income for enforcement of judgment debts

Debt Settlement Arrangement Procedures

- Protective Order
 - stay on enforcement proceedings
- Creditors meeting
 - Copy of DSA to Debt Settlement Office / DSO to Cir Ct.
- Registration in Personal Insolvency Register
 - Unless creditor enters objection within 30 days
- Effect of registration
 - No creditor may present a bankruptcy petition
 - No creditor may commence legal proceedings to recover debt covered by arrangement
 - No action may be taken by an enforcement officer to enforce a judgment debt owed by debtor

Role of Court in DSA

- Creditor application to the Circuit Court
- Grounds for challenge limited
 - Procedural requirements not followed
 - Material inaccuracy/omission in debtor's statement
 - Eligibility requirements not satisfied
 - Arrangement unfairly prejudices interests of creditors
 - Debtor commits offence
- Circuit Court upholds objection
 - DSA shall be deemed to come to end
 - Protective Order shall cease to have effect
- Circuit Court rejects objection
 - DSA shall be deemed to have effect

Debt Settlement Arrangement Variation/ Termination

- Variation
 - Requires 60% in value of creditors
 - Filing and registration requirements
- Termination
 - (i) Non court termination
 - (ii) Court termination
 - (iii) Deemed failure – 6 month arrears default
- Application for adjudication in bankruptcy on ending, termination or failure of DSA

Structural and Institutional Framework DSA

Personal Insolvency Trustee

- Personal Insolvency Trustee
 - Intermediary role – the role before a DSA is agreed
 - Administrator role – the role after a DSA is agreed and is being implemented
- Functions, powers and duties of Personal Insolvency Trustee
 - Agree to act, SFS, prepare proposal and consider viability/alternatives, arrange creditors meeting
 - Ensure that DSA proceeds in accordance with terms, ensure creditors kept informed, deal with debtors property

Structural and Institutional Framework Personal Insolvency Trustee

- Must hold a Personal Insolvency licence
- Must comply with prescribed conditions
 - General fitness and good character
 - Whether convicted of any offences eg fraud/dishonesty
 - Disclosure of conflicts of interests
 - Education/Training/Skills
 - Level of insurance/security
- Panel of qualified persons/3 year period
- Fees

Structural and Institutional Framework

Debt Settlement Office

- Independent unit in Debt Enforcement Office
- Issue licences to Personal Insolvency Trustees
- Receive and review reports
- Enter and inspect business premises of PIT
- Investigate complaints
 - Powers of investigation and sanction
 - Revoke licence
 - Impose restrictions or conditions or financial sanction
- Develop and publish Codes of Practice on Standards

Debt Settlement Arrangement Debt Relief Order (DRO)

- Low cost 'No Income, No Assets' procedure
- Debt discharge after a short waiting period
- No release from secured debt/excluded debts
- Application for DRO through MABS
- Application to Debt Settlement Office
- Registration DRO in Personal Insolvency Register
- Debt Settlement Office may refuse application
- Effect of DRO

The background of the slide is a solid purple color. On the right side, there are several concentric, light purple circles that create a ripple effect, centered towards the right edge of the frame.

Thank You

Patricia T Rickard-Clarke

www.lawreform.ie

For further information visit –

[http://www.deloitte.com/view/en_IE/ie/
services/corporate-finance/index.htm](http://www.deloitte.com/view/en_IE/ie/services/corporate-finance/index.htm)

Or call David Carson/ Warren Baxter
on 01 417 2200

Thank You!



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