Insolvency Service of Ireland Stakeholder e-Brief

December 2018

ISI

Tackling problem debt, together

Insolvency Service of Ireland
e-Brief December 2018

Table of Contents

1 Introduction

This is the eight edition of the Insolvency Service of Ireland's (ISI) e-Brief. This publication aims to keep you as a stakeholder informed of ongoing activities of the ISI and key metrics of interest captured through our systems. In particular, the e-Brief aims to support and facilitate development of the personal insolvency process through the reporting of detail on court case decisions considered relevant for our stakeholder community. This document along with other resources can be found in the Stakeholder Information section on our *website*.

2 Courts

Please see below summaries of recent Court cases which highlight particular issues of interest.

2.1 McNamara Case – High Court- Amendment of Orginating Notice of Motion

This judgment deals solely with the relief sought in the notice of motion brought by a personal insolvency practitioner ("**PIP**") on behalf of a debtor in which the PIP sought to amend the wording of the notice of motion previously filed in these proceedings. The previously filed motion sought an order pursuant to section 115A(9) of the Personal Insolvency Act 2012 (as amended) (the "**Act**").

The issue arose because, although the originating notice of motion was signed by the PIP, the opening words clearly suggested that the application was made on behalf of the debtor himself. As a consequence of two decisions of Judge Baker in the High Court – *Darren Reilly* and *Niamh Meeley* – both delivered after the originating notice of motion had been issued, it was clarified that, under the Act, the only party who can make an application under section 115A is a PIP.

The arguments of the parties in this case

There was fundamental disagreement between the parties as to the governing rule or other jurisdiction for an application of this kind. It was argued by counsel for the PIP that an application of this kind fell within (a) Order 28, rule 12 of the Rules of the Superior Courts (RSC); (b) section 115A(14) of the 2012 Act (as amended); (c) Order 28, rule 1 (RSC); or alternatively under the inherent jurisdiction of the court. In contrast, the case made on behalf of the objecting creditor was that the present application is, in substance, an application to substitute a new party – namely an application to substitute the PIP for the debtor. It was argued that the

only application which might be capable of curing the error would be an order substituting the PIP as applicant in lieu of the debtor.

Order 28, rule 12

As set out by Judge McDonald in his judgment, Order 28, rule 12 provides as follows:

"*The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issues raised by or depending on the proceedings."*

Judge McDonald gave careful consideration to the arguments on both sides in this case. He also carefully considered the evidence and the terms of the originating notice of motion, which he considered important. Although the motion recites that the application is to be made by solicitor/counsel on behalf of the debtor, the Judge noted there were a number of other features of the motion which made it very clear that the PIP was the party who was actually involved, not only in the manner of its preparation and presentation but also in a substantive way.

At paragraph 49 of his judgment, Judge McDonald set out the two aspects to Order 28, rule 12. The first is that there is a defect or error in the proceedings. The second is that the defect or error has in some way prevented the real question or issue raised by the proceedings being determined. In Judge McDonald's view, both of those aspects were present in this case. While there was an obvious defect or error in the originating motion the real question raised by the originating notice of motion was apparent on the face of the motion. He went on to state that the "*notice of motion deals with everything that one would expect a practitioner to address in an application properly brought under s.115A. The only "fly in the ointment" is that the name of the debtor is given as the applicant in the opening paragraph of the notice of motion."*

The Judge was of the view that the correction of the defect or error in the notice of motion was not, in substance, the substitution of a new party. He stated that it was clear from the terms of the originating notice of motion that the PIP was, in truth, a party to the motion. The PIP had signed the motion, he had provided all the detail contained in the motion and there was a written instruction from the debtor to the PIP to make the application. In all of the circumstances and based on the arguments presented, the court was of the opinion that Order 28, rule 12 gives power to the court to make an order amending the motion.

The remaining grounds on which the PIP relied are set out below.

Section 115A(14)

Under section 115A(14) the court is given power to make such order as it deems appropriate on an application under section 115A. Given the approach taken by Kelly J. in the *Cavan Crystal* case, Judge McDonald was of the view that section 115A(14) provides an alternative basis on which the order to amend the motion could be made.

Order 28, Rule 1

The Judge was of the view that the notice of motion under Order 76A, rule 21A was clearly a 'pleading' within the meaning of Order 28, rule 1. The Judge noted that generally an amendment will be allowed unless to do so would cause injustice to the opposing party. He further noted that it was clear from the terms of the originating notice of motion (taken as a whole), and from the affidavit evidence, that the party who framed the notice of motion in this case and settled every facet of it was the PIP and not the debtor. Judge McDonald was of the view that it was clear that the amendment sought would not cause injustice in the sense understood in the case law. In all of the circumstances outlined, the Judge was of the view that the order to amend the motion could also quite properly be made under Order 28, rule 1.

The inherent jurisdiction of the court

Judge McDonald did not feel it was appropriate to consider whether or not there might also exist an inherent jurisdiction to permit the proposed amendment, in circumstances where he had come to the view that the proposed amendment was permitted under Order 28, rule 1, Order 28, rule 12 and also section 115A(14).

Conclusion

Judge McDonald was of the view that the amendment proposed in this case should be allowed and he made the order under Order 28, rule 1, Order 28, rule 12 and section 115A(14) of the Act.

The full text of the judgment can be found here [Link].

2.2 Hickey Case – Court of Appeal – PC Protection Period

This was an appeal by the debtor against the judgment and order of the High Court (Judge Baker) dated the 31st May 2018 wherein an objection raised by a creditor to the debtor's application under section 115A(9)

of the Personal Insolvency Act, 2012 (the "**Act**") was upheld. This resulted in the application being dismissed since the debtor did not meet the eligibility criterion set out at section 91(1)*(i)*(i)[1] of the Act.

Judge Baker, in her judgment delivered on the 31st May 2018, concluded that the debtor had been subject to a previous PC during the 12-month period immediately preceding the PC which issued on the 20th November 2017 and therefore was ineligible to make a further proposal for a Personal Insolvency Arrangement ("PIA") under section 91. For that reason she dismissed the debtor's application under section 115A(9) of the Act for an order confirming the coming into effect of the PIA notwithstanding its rejection at a creditors' meeting held on the 25th January 2018. For a chronology of events, please see the table below.

Chronology of events

First Protective Certificate

Day 1	4th July 2016	First PC issues (70-day duration).
Day 68	9th September 2016	Creditors' meeting rejects the proposed PIA.
	23rd September 2016	Notice of motion under s.115A issued.

Hickey No.1 Ruling

	18th January 2017	Application dismissed. S.115A application dated the 23rd September 2016 out of time (day 15). Day of creditors meeting to be included in calculation of 14-day statutory time limit.

Second Protective Certificate

Day 1	20th November 2017	Second PC issues (70-day duration).
Day 67	25th January 2018	Creditors' meeting rejects the proposed PIA.
	5th February 2018	Second s.115A application issued (day 12 of 14-day period following creditors' meeting within which an application must be issued as provided by s.115A).

[1] 91(1)*(i)*(i) that the debtor has not –

(i) been the subject of a protective certificate issued under section 95 less than 12 months prior to the date of the application for the protective certificate,

Hickey No.2 Ruling

	31st May 2018	Application dismissed. S.91(1)(i)(i) condition not met (i.e. that debtor had not been the subject of a PC within the last 12 months).

Hickey No.3 Ruling (Court of Appeal)

	5th December 2018	S.91(1)(i)(i) condition not breached as first PC ceased as of 9th September 2016. The PC did not remain in place until 18th January 2018. Case returned to High court for determination.

The sole ground of appeal stated in the debtor's notice of appeal was:

> "*The learned trial judge erred in fact and law in determining that the debtor did not meet the eligibility criteria under section 91 of the Personal Insolvency Acts.*"

Judge Peart was of the view that while the question of the debtor's eligibility was undoubtedly the core issue on this appeal, its determination depended on other questions, such as whether or not Judge Baker correctly construed s.115A, and whether she was correct to resort to the kind of purposive construction provided for by section 5 of the Interpretation Act 2005. The Judge felt that the determination of that question in turn led to another question, namely the effect of that construction on the life of the previous PC that issued on the 4th July 2016. The court was also of the view that a third issue which arose "*potentially at least*", was the effect of Judge Baker's earlier judgment in Hickey No. 1 [Link] on the question of eligibility in the light of her conclusions, in her judgment of the 31st May 2018, as to the proper construction of s.115A of the Act.

In terms of whether Judge Baker correctly construed s.115A, Judge Peart stated that "*in circumstances where it is not expressly provided in the Act that the debtor who lodges a section 115A application outside the 70-day life of the protective certificate, yet within the 14 days of the creditors' meeting, continues to enjoy the protection of the protection certificate, the trial judge was correct to avail of s.5 of the Interpretation Act, 2005 in order to give construction which, having regard to the Act as a whole, gives effect to the clear intention of the Oireachtas".*

The Judge went on to "*uphold the conclusions of the trial judge at para. 62 where she stated:*

"62. I consider that the Oireachtas did intend the benefit of a statutory protection from creditors to enure to the benefit of a debtor pending the determination of an application under s.115A. Further, the time limited for the lodging of such an application (being 14 days from the creditors' meeting) does not leave the continued protection at large, but in my view, ***and provided an application is lodged within the statutory 14 days period,*** *the Oireachtas did intend, in light of its intention in the Act stated in broad and positive terms in recitals and preamble, that the debtor would continue to have the benefit of a protective certificate until the conclusion of the s.115A process" [Emphasis provided]" ,*

Judge Peart felt that it was necessary to turn to what flowed from this conclusion for the debtor since his first s.115A application was not only lodged outside of the 70-day protective period, but also, as found in Hickey No. 1, one day outside of the 14-day period prescribed by s.115A. The Judge noted that the debtor's first application failed because of his failure to bring his application within the time prescribed by s.115A(2). The Judge further noted at paragraph 41 that "*the trial judge found that he continued to be protected by the first protective certificate after the expiry of the protective certificate, notwithstanding that his section 115A application was not brought within the 14 day period provided for, and was therefore ineligible to bring his second application for a PIA because the certificate continued in effect until 18th January 2017".* In Judge Peart's view, Judge Baker erred in concluding this, given that the PC had ceased to have effect by the end of day 70, and there is nothing in the Act to suggest that it was intended that upon the lodgement of a s.115A application outside the 70-day life of the certificate and beyond the 14-day period in s.115A(2), the protection provided by the PC will revive and endure until the s.115A application is determined.

Judge Peart disagreed with Judge Baker's conclusion as stated in paragraph 63 of her judgment that the PC which issued to the debtor on the 4th July 2016 continued in force until the motion under s.115A issued on the 23rd September 2016 was determined by the dismissal of that application following her judgment delivered on the 18th January 2017 and that the debtor therefore did have a PC which continued in force until the 18th January 2017.

Judge Peart noted that the creditor argued that, if this is the correct position, it puts a creditor in an impossible position if it receives a late s.115A application, since it would require the creditor to make a decision as to whether the application was late, and whether it could nonetheless proceed to take or continue enforcement steps in the face of an application, the validity of which was yet to be determined by the court. In this regard, the Judge acknowledged that it was true that it may not be until the hearing of the application that it may be found to be invalid. However, the Judge stated that "*it is a simple task to decide whether or not a s.115A application is or is not brought within the periods provided for in the legislation."*

The Judge stated that if the application was late, the creditor could choose not to take any steps until the matter was heard, but the Judge was of the view that the creditor would be *"free to do so".* The Judge went on to state that the perceived difficulty facing the creditor in that situation could not, in his view, lead to a conclusion that it was to be implied within the scheme of the Act that a lapsed PC revives once a late application is lodged seeking an order under s.115A.

For the reasons stated, Judge Peart upheld Judge Baker's interpretation of the section, but allowed the appeal in respect of eligibility under s.91(1)*(i)*(i) of the Act, and remitted the s.115A application to the High Court for determination.

Summary

The protection afforded to the debtor from a PC remains in place until a section 115A application is determined by a court provided the application is made within the statutory deadline (within 14 days of creditors' meeting).

The full text of the judgment can be found here [Link]

2.3 Thomas Finnegan Case – Circuit Court – Serving parties (Under Appeal)

This judgment was delivered by Judge O'Malley Costello on the 25th of October 2018. In this case the objecting creditor submitted that the section 115A application must be dismissed on a preliminary basis as the application was made outside of the statutory time limit prescribed by section 115A of the Personal Insolvency Act (as amended) (the "**Act**").

As such, the Court was ultimately asked to determine if a section 115A motion is required not only to be filed within the 14-day statutory time limit, but also served on all prescribed parties within the said period such that the application can be deemed made within the meaning of the Act.

It was accepted that the key relevant dates in the proceedings were as follows:

- Creditors' meeting held on **6 December 2016**;
- Section 115A motion filed on **19 December 2016** (**day 14**),
- Relevant parties served on **21 December 2016** (**day 16 –** date of posting of the motion and supporting documentation which is service within the meaning of the Act).

Counsel on behalf of the objecting creditor submitted that the section 115A application was required to have been made on or before the 19th of December 2016, but that this time limit was not complied with as the relevant parties were not served until the 21st of December 2016.

The Court was referred by Counsel for the objecting creditor to the consideration of the words 't*he making of an application'* by Judge Baker in the case of *Meeley* [2018] IEHC 38. A number of other court decisions were also referred to as part of the objecting creditor's legal argument including, *Humphreys* [2014] IEHC 539, *KSK Enterprises Limited. v. An Bord Pleanála* [S.C. No. 70 of 1914] and *Lehane v Burke & Anor* [2017] IEHC 426.

Having considered these cases in the context of personal insolvency, the Judge agreed that it was essential that creditors be served an application under section 115A in the time frame provided for by the Act.

Counsel for the personal insolvency practitioner argued that since the Circuit Court Rules provided for four days for service, the application was served on time. However the Judge accepted the submission that the requirement that all required parties be served with the section 115A application not later than four days after its issuance did not purport to amend/extend the 14-day time limit mandated by the Act. As the High Court has already confirmed that the Court does not have the power to extend the 14-day time limit prescribed by the Act, the Judge was of the view that it would be wholly inconsistent with the legislation and its interpretation by the High Court if the four-day requirement in the rules were deemed to extend the 14-day statutory limit by a further four days.

The Judge found that the only manner in which the Act can be interpreted is if the section 115A application is required to be both issued and served within the 14-day time limit in order to be made within the meaning of 115A(2) of the Act.

Accordingly, the Judge determined that the application, not having been issued and served on the required parties prescribed by the Act within 14 days, had not been made within the mandatory time limit and was accordingly dismissed on a preliminary basis.

This decision has been appealed to the High Court.

A link to the written judgment can be found here.

2.4 Fetherston Case – High Court – Payment History of the Debtor

This case was an appeal to the High Court from the decision of the South Eastern Circuit Court to uphold the objection of a creditor to the coming into effect of a proposed Personal Insolvency Arrangement ("**PIA**"). The debtor was a single self-employed builder with no dependants. His principal private residence ("**PPR**") was in significant negative equity.

The present application

The objecting creditor's objection centred on three main points: -

(a) In the first place, it was submitted that the payment history was such as to persuade a court to refuse relief under section 115A of the Personal Insolvency Act 2012 (as amended) (the "**Act**");
(b) Secondly, it was contended that the payment history was such as to call into question the *bona fides* of the debtor;
(c) Thirdly, it was suggested that the means of the debtor (in particular in the period following the expiry of the PIA) showed that the debtor could pay more to the objecting creditor than was provided for under the PIA.

The payment record of the debtor

The Judge stated in his judgment that the practitioner/debtor bears the onus of proof in applications under section 115A of the Act and therefore it is essential that a poor payment record should be appropriately explained on affidavit by the debtor. The Judge was, however, of the view that even in cases where the explanation may seem unsatisfactory or incomplete, the court retains a discretion if there are countervailing considerations that apply such as to persuade a court that, in all of the circumstances of the case, the section 115A relief should nevertheless be granted.

Judge McDonald viewed the response by the debtor to the objecting creditor's averments in relation to the poor payment history over a four-year period – most of which was before the issue of the protective certificate ("**PC**") – as entirely inadequate and lacking in detail. However, he felt that it must be considered in the round with all of the other evidential factors before the court.

The Judge felt that the debtor had an ongoing income which, under the terms of the PIA, was to be applied for the benefit of his creditors for the duration of the PIA. The second factor to be taken into account was that there was nothing in the correspondence between the objecting creditor and the practitioner which

expressed any concern on the part of the objecting creditor to the non-payment history of the debtor prior to or after the grant of the PC. The third factor was that the objecting creditor made a counterproposal, showing that notwithstanding the previous payment record of the debtor, the objecting creditor considered that an arrangement with the debtor was feasible. The remaining factor was the fact that the Revenue Commissioners supported the PIA, suggesting that Revenue were not concerned with past payment performance and that they had confidence that the debtor would be in a position to meet his obligations under the PIA going forward. When all of the above factors were taken into account, Judge McDonald was of the view that the balance shifted in favour of the debtor despite his failure to explain his poor payment record in the two-year period prior to the grant of the PC.

The failure to make payments during the protection period

Counsel for the objecting creditor submitted that a failure to make any payments during the protection period was relevant to the exercise of the discretion of the court under section 115A and cited in this context the *Michael Ennis* case, where Judge Baker, in her decision, referred to the obligation imposed on a debtor to act in good faith. Judge McDonald was of the view that Judge Baker was very concerned about the lack of candour on the part of the debtor in that case, but noted that in the present case, there was no lack of candour on the part of the debtor in relation to his failure to make payments during the protection period.

The Judge was further of the view that the failure of the debtor to address his liabilities to the objecting creditor during the currency of the protection period, was not sufficient, of itself, to persuade him to exercise his discretion against the grant of relief under section 115A, given all the pertinent elements of the debtor's situation and of the proposal.

The liabilities of the debtor in the post-PIA period

There was a sharp difference of opinion between counsel for the practitioner and for the objecting creditor as to whether the court should have regard to the affordability of payments by a debtor in the post-PIA period. In this regard, arguments from previously determined cases were put forward by both sides, namely *Laura Sweeney, Clive Casey, Paula Callaghan and Hill*. Judge McDonald was of the view that *"those extracts from the judgments of Baker J. show very clearly that there was no hard or fast rule in relation to how debt is to be treated after the expiry of a PIA".* He stated that everything will depend on the circumstances of the individual case and the court will not involve itself in speculation about what might potentially happen in the future. In the Judge's view *"the principal concern of the court will inevitably be focused on what is to happen during the currency of the PIA. The approach taken by the court in relation to a PIA period will always be informed by what the court considers the means of the debtor will reasonably permit."*

Judge McDonald was of the view, in all of the circumstances, that there was no sufficient basis, on the evidence available, to suggest that the post-PIA repayments to be made to the objecting creditor in respect of the mortgage gave rise to unfairness to the objecting creditor or to some disproportionate benefit to the debtor. He was of the view that the proposed PIA was fair to all of the creditors of the debtor.

Conclusion

The Judge was persuaded by the evidence and the submissions made that this was an appropriate case in which to grant the relief claimed under section 115A(9) of the Act and confirmed the coming into effect of the proposal for the PIA in accordance with its terms.

A link to the full judgment can be found here [Link].

2.5 Tinkler Cases – High Court – Treatment of PPR and Other Secured Creditors

This judgment relates to two cases where the debtors brought applications under 115A of the Personal Insolvency Act 2012 (as amended) (the "**Act**") in the High Court. The debtors were married and held property, including their principal private residence ("**PPR**") in common. The proposed personal insolvency arrangements ("**PIAs**") were not approved at the creditors' meetings, however the PPR creditor voted in favour of the proposals. The objection to the section 115A applications was brought by a secured creditor (the "**objecting creditor**"), which held security over a commercial property, rental from which formed a significant part of the debtors' income.

Grounds of Objection

There were essentially three grounds relied upon by the objecting creditor at the hearing, namely:-

(a) concern was expressed about the treatment of Revenue debt in the PIAs which, it was suggested, would have unintended consequences for unsecured creditors given that part of the Revenue debt had preferential status;

(b) the objecting creditor argued that the proposed PIA in each case was not fair and equitable in relation to each class of creditor that had not approved the proposal and whose interests or claims would be impaired by its coming into effect;

(c) the proposed PIA in each case was alleged to be unfairly prejudicial to the interests of the objecting creditor.

The position of the Revenue

The objecting creditor had a number of issues of concern in relation to the way in which the Revenue Commissioners ("**Revenue**") were dealt with. Judge McDonald was of the view that it was unsatisfactory that a PIA should be presented to creditors and voted upon by them in circumstances where the PIA did not expressly identify the preferential element of the debt due to Revenue. Furthermore, in his view, the objecting creditor was correct in suggesting that, absent a written consent from Revenue, section 101(1) of the Act continues to apply and that it would therefore be open to Revenue, notwithstanding the existence of the PIA, to enforce its right to be paid in priority in respect of the preferential debt.

Is the proposed PIA fair and equitable in relation to each class of creditor?

Counsel for the objecting creditor argued that the PPR creditor and the objecting creditor were in different classes and that the proposed PIA was not fair and equitable as between those classes. The Judge, having noted the guidance provided by the judgment of Judge Baker in *Sabrina Douglas,* as well and other relevant case law, concluded that the PPR creditor and the objecting creditor were not to be treated as being in the same class for the purposes of the application under section 115A.

The next question for the Judge to determine was whether the proposed PIA was unfair and inequitable as between these secured creditors, and whether there was some objective justification for the difference in treatment between the two creditors.

The Judge noted that the PIP appeared to suggest in sworn evidence that the PPR creditor was entitled to preferential treatment because it held security over the PPR of the debtors. The Judge, while acknowledging that the legislation includes a number of provisions which display a clear legislative intention to protect the PPR, also noted that there is nothing in the legislation which suggests that the holders of security over a PPR should be treated more favourably than other secured creditors. The Judge found it is very difficult to understand the justification for the more favourable treatment of the PPR debt in this case which involved a significant term extension, interest-only payments at a low interest rate for the duration of the PIA, capitalisation of arrears and full repayment of the mortgage. In contrast, the secured debt of the objecting creditor was to be reduced to the current market value, with a significant residual balance treated as unsecured and then confined to a dividend of somewhere between 6% - 6.3%.

The Judge also indicated he was troubled by an averment on the part of the personal insolvency practitioner ("**PIP**") which suggested that the PIP considered it necessary to offer favourable terms to the PPR creditor in order to obtain its support for the proposed PIA. In the Judge's view, such an approach was manifestly at odds with the requirement that there should be fair and equitable treatment of different classes of creditors.

Judge McDonald noted that the PIP made the point in his affidavits that, in contrast to the PPR creditor, the objecting creditor did not engage pursuant to sections 98 and 102 of the Act and did not respond to the notice under section 98. The Judge, while acknowledging that it is not mandatory for a secured creditor to indicate any preference as to how the secured debt should be dealt with, stated that it is "*highly desirable*" that a secured creditor should indicate a preference so that the PIP will not have to approach the matter "*in the dark*".

Accepting that the PIP was placed in a difficult situation in circumstances where he received no communication from the objecting creditor, the Judge could see no basis on which their failure to respond could relieve the PIP from the obligation to formulate a proposal for a PIA that was fair and equitable as between all classes of creditors.

Judge McDonald concluded that the proposals which were formulated in the interlocking cases were not fair and equitable in relation to objecting creditor (when compared with the proposals insofar as they affect the PPR creditor) and as such, the requirement set out in section 115A(9)(e) of the Act could not be satisfied.

Unfair prejudice

The Judge felt that it was clear that *"the proposed PIA here is prejudicial to the interests of the objecting creditor in circumstances where its secured debt is being written down to the value of the underlying securities and where they will receive only a dividend of between 6% and 6.3% in respect of the balance of the sum due to it."* The question to be answered by the Judge was whether that prejudice was unfair in all of the circumstances.

In this regard, the Judge was of the view that it was clear from the observations of O'Donnell J. in *Re: McInerney Homes Ltd*, that the concept of "unfair prejudice" is a flexible one and that, in assessing whether prejudice is unfair, the concept of fairness should be considered in the round. Judge McDonald was also of the view that it was clear from the observations of Fennelly J. in *Re SIAC Construction Ltd.* "*that the concept of unfairness is not confined to cases where a creditor will fare worse in an examinership* (or in this case a PIA) *as compared to a receivership or bankruptcy. Inequality of treatment is also a facet of unfairness".*

Counsel for the objecting creditor submitted that they would be worse off under the PIA than in bankruptcy. In bankruptcy, they would be entitled to rely upon their security and appoint a receiver over the commercial premises to collect the rent roll. Under the proposed PIA, the objecting creditor would not recover any part of the rent.

Judge McDonald felt that there were obvious commercial advantages for them in appointing a receiver, and that they would be much better off in the context of a receivership than under the proposed PIAs. In this regard, the Judge stated at paragraph 62 of his judgment that "*one can readily see that Cheldon would be significantly better off in the context of a receivership than under the proposed PIAs. In these circumstances, it seems to me that, based on the generally accepted understanding of "unfair prejudice" as explained by the Supreme Court in McInerney Homes and in SIAC, Cheldon would be unfairly prejudiced by the proposal. More correctly, in the context of section 115A(9)(f), I cannot be satisfied that the proposed PIAs are not unfairly prejudicial to the interests of Cheldon, as an interested party.*"

The Judge was deeply unimpressed by the actions of the debtor in what the Judge described as a "*very naked attempt*" to manufacture evidence to support the proposition that the objecting creditor would be worse off in a receivership than it would be under the PIA. In this case the debtor had exhibited two letters from tenants of commercial premises, which the Judge felt bore all the hallmarks of having been pre-prepared and placed in front of the tenants for signature. He stated that it was very important to bear in mind that, in an application of this kind, the onus is on the practitioner and the debtors to place appropriate evidence before the court to show the proposals are not unfair.

Conclusion

For the reasons set out above, in each case, Judge McDonald upheld the objection of the objecting creditor and refused the application made by the practitioner in each case for an order confirming the coming into effect of the proposals.

A link to the full judgment can be found here [Link].

3 Business metrics

3.1 ISI Statistics Quarter 3 2018

The ISI statistical report covering the third quarter of 2018 (Q3) is published on the ISI website here. Figures for this period show the number of debtors securing Personal Insolvency Arrangements (the solution that returns debtors to solvency while keeping them in their homes), are up 60% compared to Q3 2017 while the number of applications, Protective Certificates and bankruptcies are down.

3.2 Abhaile

To date, over 14,700 Abhaile Scheme vouchers have been issued, of which over 10,500 relate to vouchers to enable debtors avail of the services of a PIP. This equates to a monthly equivalent for PIP vouchers of approximately 362 vouchers. The balance of the issued vouchers relate predominantly to vouchers to avail of legal advice. 1,169 vouchers have issued for the purpose of providing legal advice to applicants pursuing section 115A reviews.

4 General

4.1 PC Target Timeline

The Protective Certificate (PC) Target Timeline as detailed in the E-brief issued in March 2018 came into effect from February this year. The Timeline aims to increase efficiency and transparency in the insolvency process for the benefit of all stakeholders and ultimately the debtor. An oversight group, comprising the Banking and Payments Federation Ireland (BPFI) as the creditor representative, a representative of the PIP community and the ISI as Secretary, was established to oversee implementation of the Timeline and to address any blockages that might occur.

During 2018, the group met four times and have concentrated to date on the initial days of the PC as clarity and efficiency here help to reduce delays later in the period. While there appears to be a noticeable improvement in engagement between creditors and PIPs generally, challenges remain. In particular, obtaining and agreeing property valuations can significantly delay progress. Other items raised were the challenges faced by creditors in supplying a proof of debt and the suggested treatment of debt by day 15 and the challenges facing PIPs caused by the late submissions of counter-proposals from creditors. While it is acknowledged that the PC timeline of 70 days is challenging for all, it is accepted that the Target Timeline to which relevant stakeholders are committed, is a useful tool in helping to manage the process. In early 2019, it is the intention of the oversight group to facilitate a focused workshop with broader representation from the stakeholder groups to discuss continued improvements with respect of implementation of the Timeline and the lessons learned thus far.

The next ISI e-Brief is scheduled to issue at the end of Q1 2019.

Disclaimer

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