Insolvency Service of Ireland Stakeholder e-Brief

September 2018

ISI
Tackling problem debt, together

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1 Introduction

Welcome to the seventh 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 Re Taaffe and the Personal Insolvency Acts 2012-2015 – Identity of Principal Private Residence ("PPR")

This case is concerned solely with a preliminary issue raised by a creditor that the debts covered by the proposed personal insolvency arrangement ("PIA") did not include a "relevant debt"[1] as defined in section 115A(18) of the Personal Insolvency Act 1012 (as amended) (the "Act"). Justice McDonald neatly summarised the creditor's case at paragraph 30 of his judgment as follows:

"It is clear from this description of the main features of the PIA that the creditors of the debtor were asked to vote on a proposal which identified the Co. Clare property as the debtor's principal private residence. Counsel for the bank argues that the debtor, in seeking relief under s. 115A of the 2012 Act, can only seek confirmation of the PIA as it stands. The bank says that

[1] 'relevant debt' means a debt —
(a) the payment for which is secured by security in or over the debtor's principal private residence, and
(b) in respect of which —
(i) the debtor, on 1 January 2015, was in arrears with his or her payments, or
(ii) the debtor, having been, before 1 January 2015, in arrears with his or her payments, has entered into an alternative repayment arrangement with the secured creditor concerned

the debtor, in the PIA, has very clearly identified the Co. Clare property as his principal private residence. That is the only PIA before the court. That is the only PIA that has been the subject of consideration by the creditors of the debtor. Furthermore, it is the only PIA in respect of which an application is made under s. 115A. In essence, the bank's case is that the debtor is constrained by his own application. On the basis of the PIA before the court, the only principal private residence is in Co. Clare. There is no "relevant debt" in respect of that property. Thus, the bank argues that the "gateway" provisions are not engaged and the application to confirm the PIA does not get off the ground.

As stated by Justice McDonald in his judgment, the issue which he had to resolve *"boils down to whether the debtor is entitled to put forward on the hearing of the s. 115A application a different property as his principal private residence to that set out in the PIA. In other words, is the debtor bound for the purposes of the s. 115A application by what has been said in the PIA as to the identity of his principal private residence."*

As part of his considerations, the Judge looked at what happens when a PIA is confirmed by the Court. He noted that if a PIA is registered by the Insolvency Service of Ireland, it takes effect according to its terms. He also felt that is was necessary to bear in mind the good faith obligations set out in the Act which he was of the view extended to all steps involving the debtor under Chapter 4 of Act.

Justice McDonald was of the view that if a creditor had voted in favour of an arrangement in a particular form and had organised its affairs on that basis, it would be difficult to see any circumstance in which the debtor could thereafter seek to suggest that, in respect of such a creditor, he or she would not be bound by the way in which the material terms of the arrangement had been expressed. Accordingly, the Judge was of the view that in cases where creditors have accepted the PIA by voting in favour of the proposals contained in the PIA, it may be difficult for a debtor, at the subsequent hearing to confirm the PIA, to resile from the express terms of the arrangement (at least in so far as they are material) or even to suggest that there was an error in any of its material terms.

The Judge stated however that there was a significant difference between the above mentioned scenario and this case. In this case the creditor never accepted the proposal. The creditor had voted against it and there was nothing in evidence to suggest that the creditor would have voted in favour of the proposal even if a different location had been given as the debtor's PPR.

The Judge also stated that it was open to question whether the description of the PPR in the PIA was in fact material to the operative provisions of the PIA. In this regard, the Judge having considered the structure and terms of the PIA, stated that while as a matter of law, the identity of the PPR is critical to the potential application of section 115A, it did not appear to him to be critical to the operation of the arrangement contained within the PIA. It was the Judge's view that the "*arrangement would be capable of taking effect and would be legally enforceable (if confirmed by the court under s. 115A) irrespective of the identification of the Co. Clare property as the principal private residence of the debtor."*

The Judge's considerations then brought him to the question of how the "*gateway relevant debt requirement*" should be addressed on a section 115A application. The Judge was of the view that for the purposes of any contested application under section 115A, neither the court nor the objecting creditor can be bound by the description of the PPR given in the PIA.

It was the Judge's view, "*given the critical importance of the "relevant debt" requirement in the context of s. 115A, the relevant factual constituents of the "relevant debt" would require to be proved by appropriate evidence at the hearing under s. 115A."*

Justice McDonald also felt that, having regard to the debtor's obligation of good faith, the debtor would be required to disclose to the court on the hearing of the section 115A application where he or she ordinarily resides even if this is different to the address given for the PPR in the PIA. This would involve the debtor giving evidence on affidavit.

Judge McDonald stated that he did not believe that a debtor is necessarily bound by the description of the PPR given in the PIA, but he would not go so far as to suggest that a debtor will never be bound. He stated that the debtor and the PIP must take all appropriate care to ensure the accuracy of a PIA prior to placing it before the creditors.

He stated that if the address of the PPR given in the debtor's affidavit is different to that stated in the PIA, the reasons for this would have to be fully explained on affidavit and if the discrepancy arises as a result of input by the PIP, then the PIP would have to provide an explanation on affidavit.

Decision

The Judge was of the view that the PIA is capable of taking effect even if the court ultimately determines the Smithfield apartment *(the other property)* is the PPR of the debtor. The Judge however stated that this was subject to a number of contingences:

1. It is dependent upon the evidence to be adduced;

2. It will be necessary for the debtor and possibly the PIP to place evidence before the court explaining how the discrepancy arose. He noted that the discrepancy has the potential to call into question whether the debtor is in breach of his good faith obligation. The Court will, at the substantive hearing, have to consider the evidence and submissions from both sides as to whether there has been a breach of any good faith and, if so, what are the consequences that potentially flow from that breach;

3. The creditor will be free to place its own evidence before the court as to the true location of the debtor's PPR and as to whether any prejudice arises to it as a consequence of the inconsistency between the PIA and the debtor's affidavit or as a consequence of the fact that the PIA, if confirmed by the Court, will continue to show the County Clare property as the PPR of the debtor.

The Judge was of the view that no finding could be properly made at this stage of the proceedings that the debtor is bound by the description of his PPR as set out in the PIA. Any such issue will fall to be considered at the substantive hearing.

The full text of the judgment is available here [Link]

2.2 Re Sweeney and the Personal Insolvency Acts 2012-2015 — Repayment capacity, special circumstances cost, length of Arrangement and role of Personal Insolvency Practitioner ("PIP")

This judgment is given in the appeal from the decision of the Circuit Court to refuse to approve the PIA on application for a review pursuant to section 115A (9) of the Act.

The debtor is a married woman employed full-time with one young dependent child. Her husband derives a very small income from a start-up self-employed business enterprise and his contribution to the family income is minimal. The debtor's sole major asset is her Principal Private Residence, which is in her sole name and is in significant negative equity.

The PIP's proposed PIA, which was rejected by the debtor's single creditor, was for a six year duration with a write down of the mortgage on the PPR to its current market value. Mortgage repayments were on a capital and interest basis on a variable interest rate, and at the end of the six year PIA, the negative equity portion of the mortgage would be written off. For the currency of the PIA that balance was to be treated as an unsecured debt on which a small dividend would be paid. The monthly payment under the proposal was €594.72.

The creditor had made a counter proposal (the "Creditor's Proposal") which provided for the splitting of the mortgage into an active mortgage and a warehoused amount to be paid at the end of the proposed 364-month term and under which the monthly repayment at variable interest rates was €1,082.00.

In its objection to the section 115A application, a number of arguments were presented by the creditor primarily focused on the assertion that the debtor was not proposing to bring into account all of her means. Judge Baker was satisfied that, taking into account the present and current known liabilities of the debtor and the current income of her husband and the needs of her dependent child, the argument made by the creditor that the debtor could afford a mortgage payment greater than that proposed in the PIA was not made out. The Judge noted that the debtor could afford to meet a mortgage payment of €1,082.00 per month or thereabouts, but *"only if the childcare costs are reduced or entirely eliminated*". The Judge stated that the argument of the creditor that the debtor "*has greater capacity to meet her debt than that identified in the PIA ignores the fact that there are family and living costs which are primarily or almost exclusively met by the debtor*".

The creditor also argued that the level of special circumstances, especially childcare costs was excessive. However the Judge noted that no evidence was adduced to suggest that the childcare costs of €650.00 per month was other than the market rate for childcare for a child in primary school and the Judge found that as a matter of fact, the childcare costs for which evidence had been given were reasonably incurred and correctly stated.

In addressing the creditor's argument that no write-off of her secured debt was necessitated, the Judge stated that the capital mortgage figure is to be assessed in light of the amount of the repayment capacity of the debtor at present interest rates and she was satisfied in those circumstances that the write-down of the secured element of the PPR to the current market value was not unfairly prejudicial to the creditor. Judge Baker noted that a write down of a mortgage to market value is not mandated by the Act, and it may be possible in certain cases to split or warehouse part of a loan. She stated that the determination as to whether a mortgage debt is to written down is to be made by reference to the affordability of payment.

Judge Baker highlighted that the court hearing a section 115A(9) application has no power to vary or modify the proposed PIA. She stated that while certain criticisms of the creditor to elements of the proposed PIA in this case may be attractive, a margin of appreciation to be given to the PIP as an independent intermediary who brings to the process financial specialist knowledge must be respected. The Judge did however state that it is the court and not the

PIP that ultimately approves the PIA and the PIA will only be approved if all the statutory tests are met and this is irrespective of the position advanced by the PIP.

The creditor had also presented an argument that the proposed duration of the PIA of 72 months was unreasonable and prejudicial to its interests. The primary basis for this argument was that the PIP's estimated fee and outlay on a six year PIA was excessive and that on a one year PIA the PIPs costs would be considerably less. In addressing this argument in the penultimate paragraph of her judgment, Judge Baker stated that she agreed in general that where the only objection of the creditor is to the length of the PIA, the creditor's preference for a short PIA would be respected and this would have the effect that the PIPs costs would be less and the secured creditor would receive somewhat more in respect of the unsecured amount of the debt. The Judge however felt that as the length of the PIA was only one of the many factors, it was not sufficient to persuade her to refuse the order under section 115A(9) of the Act.

The Judge at paragraph 62 of her judgment set out the factors which were central to her decision to approve the PIA. It seemed inevitable to the Judge, in circumstances where the single creditor has commenced proceedings seeking possession of the debtor's PPR, that the failure to approve the PIA would mean that the debtor and her family would lose their PPR, and this factor, taken with the uncontested evidence that the financial outcome for the creditor on a sale should it take possession would be less than that to be achieved under the proposed PIA, was central to the Judge's decision to approve the PIA.

The Role of the PIP

The Creditor's Proposal was the subject of some correspondence between the PIP and the creditor, which led to *"an argument in the course of the* [initial] *hearing that the PIP appeared to have accepted the counter proposal but thereafter presented for approval a PIA in quite different terms"*. In her judgement Justice Baker noted that it "*did give the impression*" to the creditor "*that the suggested amendments would be incorporated into the draft PIA*,.."

Justice Baker was of the opinion that the engagement of the PIP with the insolvency agent of the creditor was "*mystifying*" and the PIP "*deserves some criticism for the manner in which he engaged the correspondence which in the court's view is neither careful nor clear*".

Accepting that the PIP was under pressure to conclude the draft of the proposal, the Judge was of the view that the urgency did not justify the PIP's failure to clearly outline what he now says was the reason for presenting quite a different PIA.

The full text of the judgment is available here [Link]

3 Business Metrics

3.1 ISI Statistics Quarter 2 2018

The ISI statistical report covering the second quarter of 2018 (Q2) is published on the ISI website here. Figures for this period show that while the number of applications have decreased marginally following strong growth in recent quarters, the number of Protective Certificates and approved Arrangements are up 19% and 15%, respectively compared to Q1.

3.2 Abhaile

To date, over 13,800 Abhaile Scheme vouchers have been issued, of which over 9,900 relate to vouchers to enable debtors avail of the services of a PIP. This equates to a monthly equivalent for PIP vouchers of around 380 vouchers. The balance of the issued vouchers relate predominantly to vouchers to avail of legal advice. 1,053 vouchers have issued for the purpose of providing legal advice to applicants pursuing section 115A reviews.

4 General

4.1 Publishing of Electronic Communications Agreement Register

Section 134 of the Personal Insolvency Act 2012 provides for the giving of notices between parties, and the methods through which such notices may be given and received. In particular, it provides that where notices are given by electronic means, agreement must have been made in advance by the person giving and the person receiving such notice. In July 2014, the ISI invited Approved Intermediaries, Personal Insolvency Practitioners and creditors to sign an Electronic Communications Agreement (ECA) that provided for the electronic exchange of information with and between all the relevant parties to the agreement. Taking into account the reality that most exchanges are carried out electronically, the ISI encourages all Approved Intermediaries, Personal Insolvency Practitioners and Creditors to become party to the

Agreement. Being party to the Agreement removes the necessity to seek individual agreements with relevant stakeholders. A copy of the ECA and accompanying subscription form can be found on the ISI website here.

The ISI maintains a database internally detailing those stakeholders who are signed up to the Agreement ("ECA Register"). Section 3.3 of the Agreement refers to the ISI being permitted to publish a list of those stakeholders subscribed to the Agreement. The ISI will publish the ECA Register on its website in the 'Stakeholder Information' section by Friday, 05 October 2018, to facilitate increased efficiency in the Personal Insolvency process. When published, there will be increased transparency for all stakeholders on parties to the Agreement, thus removing the necessity to seek clarification from the ISI or others as required.

If you wish to subscribe to the ECA, amend contact details or cease being party to the Agreement, please email ISI at info@isi.gov.ie with 'ECA' in the subject line.

4.2 Expressions of Interest sought for Membership of the Debt Solutions Protocol Oversight Committee at the ISI

The ISI is currently seeking expressions of interest from suitably qualified persons to expand the membership of the Debt Solutions Protocol Oversight Committee.

Background

The Debt Solutions Protocol Oversight Committee ("Committee") was established in July 2015 to monitor how the respective protocols for Debt Settlement Arrangements (DSAs) and Personal Insolvency Arrangements (PIAs) are working in practice. The Committee which meets periodically is made up of creditors and creditor representatives, personal insolvency practitioners (PIPs), PIP representatives, consumer and debtor representatives and the ISI itself. This Committee was established following the development of Protocols for both DSAs and PIAs through the Debt Solutions Protocol Steering Group.

Why get involved?

Through the steering group and subsequently the Committee, stakeholders, working in collaboration have impacted positively on both the DSA and PIA processes for the benefit of all. In more recent times there have been changes to the economic landscape and to the nature of the stakeholders involved (i.e. the increasing involvement of investment funds and

credit servicing firms), in addition to the ongoing evolution in insolvency practice. It is therefore considered timely to seek expressions of interest from other suitably qualified and relevant persons/organisations to expand membership of the Committee.

How to get involved

The ISI will consider the expressions of interest it receives from those wishing to participate on the Committee and will select and invite representatives from practitioners, creditors, debtors and others. Candidates for the Committee should have relevant knowledge of and experience in personal indebtedness and insolvency. The Committee will act to both monitor the Protocols and suggest and agree amendments to the Protocols and may establish working groups to progress discrete work streams where considered necessary.

To take this opportunity to engage and contribute, please express your interest by visiting the ISI website and completing and submitting the expression of interest form by close of business on 01 November 2018. Please see here.

The next ISI e-Brief is scheduled to issue in December 2018.

Disclaimer

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