Insolvency Service of Ireland Stakeholder e-Brief

December 2017

ISI
Tackling problem debt, together

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1 Introduction

This is the fourth edition of the Insolvency Service of Ireland's (ISI) e-Brief. This document along with other resources can be found in the Stakeholder Information section on our website.

2 Courts

2.1 Recent Court Rulings – High Court

(a) Reilly Case – Locus Standi

The objecting creditor to an appeal before the High Court of a section 115A application raised, by way of preliminary point, the locus standi of the appellant in circumstances where the Notice of Appeal was brought by the debtor on his own behalf, rather than by the "PIP on behalf of the debtor". The objecting creditor argued that the appeal was not validly made and that the Court could not determine the appeal.

Judge Baker, in her judgment delivered on 5 October 2017, noted that the High Court in the present case was acting as an appellate court in the determination of a Circuit Court appeal, and its jurisdiction was thereby constrained in the context of the requirement for the High Court to hear the appeal by way of a rehearing of the action, the subject of the appeal, without additional evidence being given (unless with special leave of the judge). Consequently, Judge Baker was of the view that in order to be properly constituted, an appeal from a decision of a section 115A application must, in accordance with statutory provisions set out in section 115A(1), be an appeal brought by a PIP.

Judge Baker acknowledged that the role of the PIP is one of responsibility and substance – not a mere administrative role - and in bringing an application under section 115A, a PIP must exercise professional judgement. The Judge continued that the Oireachtas, in bringing a professionally qualified person (the PIP) into the heart of

the statutory process, sought to "*achieve the orderly processing and formulation*" of a PIA and of an application by way of review to court for the benefit of the debtor, but the Judge said, it was not a process driven by the debtor. The Judge commented that the debtor cannot engage the process without an intermediary, "*who cannot be said to act merely on instructions, but is required at all times to seek to achieve the resolution of debt, to do so in the exercise of professional judgement, and to engage his or her knowledge or experience in financial matters to fashion a remedy which is satisfactory to all parties concerned*".

The Court stated that while a debtor is an aggrieved person whose interests are likely to be impacted by the decision of a court, that does not of itself mean that a debtor can bring an appeal without observing the statutory and mandatory provisions of the legislation, i.e. section 115A (1) provides that an application under the section must be instituted by a PIP on behalf of a debtor, and thus a debtor has no statutory standing to initiate the application without the active and substantive engagement of the PIP with the process. The Court dismissed the appeal of the debtor on the basis that the preliminary objection raised by the objecting creditor that the appellant did not have the locus standi to bring the application was correct.

Costs

While no application for costs was before the Court in the case, the Judge did refer to the Court's decision in *Nugent and Personal Insolvency Acts*[1] wherein the Judge commented that in relation to awarding costs against a PIP that "*such jurisdiction would be exercised sparingly and only in exceptional circumstances*". In the Reilly judgment, the Judge said that if a PIP "*lodges an application bona fide and in exercise of his or her professional and reasonable judgement, and prosecutes an appeal in a similar fashion, it seems unlikely that a PIP would be subject to an award of costs*". Link.

[1] *(No. 2)* [2016] IEHC 309 - Nugent and Personal Insolvency Acts

(b) Jurisdictional Issue – Preliminary Hearing before High Court (Meeley, Taaffe and Foye cases)

The jurisdictional issue on locus standi of applicants in section 115A applications has greatly impacted on the hearing and conclusion of cases before the Circuit and High Courts. In an attempt to assist in this preliminary jurisdictional issue, the ISI recently made submissions in three High Court cases before Judge Baker - Meeley, Taaffe and Foye, all of which are originating High Court jurisdiction cases. These three cases each concern locus standi, which was dealt with on a preliminary basis in one High Court hearing. The hearing ran from 27 – 29 November, and has been adjourned to 21 December when it is expected to conclude.

The Notice of Motion in two of the section 115A application was brought by "*solicitor/counsel on behalf of the debtor*". The third Notice of Motion was brought by "*Personal Insolvency Practitioner on behalf of the Debtor, and/or the Debtor".* The various creditors in each of the cases objected on the basis that the respective applicants did not have locus standi to bring a section 115A application. They argued that the applications must be brought by a PIP, and that the hearing of the application must be conducted by the respective PIP. The debtors on the other hand put forward arguments to the contrary. Counsel for the debtors acknowledged that a PIP is required under section 115A to bring an application, but arguments were presented that the PIP brings the application on behalf of the debtor, and thereafter, the debtor can proceed with the hearing of the application.

The ISI's submission was general in nature, and did not address the facts of the particular cases. The ISI, in its submissions, put forward that the High Court's decision in the Reilly case is the correct basis for proceeding with a section 115A application. The ISI expressed the view that it believes that PIPs, and debtors, can each be involved in a hearing of a section 115A application, and that the legislation does not seek to exclude either party from the process of the hearing of the application.

The ISI noted in its submission its agreement with the clear statement of the legal position set out in the *Reilly* case that an award of costs against a PIP should be exercised by a court sparingly and in exceptional circumstances, so that, if a PIP lodges an application bona fide and in exercise of his or her professional and reasonable judgement, and prosecutes an appeal in a similar fashion, it is unlikely that a PIP would be subject to an award of costs. Notwithstanding this, the submission also noted that many PIPs remain reluctant to commence applications under section 115A because of a fear of an adverse costs order. The ISI requested the Court to provide further clarity on the approach to costs where a PIP commences a section 115A application in good faith and it fails.

Judge Baker, at the hearing, referenced the Court's decisions in the *Nugent* and *the Reilly* cases, which she said should provide comfort to PIPs in connection with costs. The Judge did however say that she was aware of PIPs concerns on costs, but she explained that the Court cannot take into account the motivation for altering applications in its interpretation of the legislation.

The ISI set out its view that the Court has a broad role and function in ensuring that the substantive matter at issue in any proceeding or application is fully and finally addressed. Consequently, the ISI expressed in its submission that an application for substitution of the PIP on behalf of the debtor, for the debtor as applicant, should ordinarily succeed in any relevant case, and that objecting creditors should not ordinarily oppose any application by a PIP for substitution. It should be noted that an application for substitution was not before the Court in the respective cases.

The preliminary hearing in the three cases is next before the High Court on 21 December, and assuming it concludes on that date, judgment is expected in early 2018.

(c) Hayes Cases – Main issue for determination - Unfair Prejudice

The secured creditor, an investment fund, objected to interlocking PIAs on the basis that the arrangements were each unsustainable, that they would not return the debtors to solvency, and were unfairly prejudicial to its interests because the proposed extension of credit to the debtors departed radically from those generally available to borrowers from lenders in the Irish market. The creditor's objections were upheld by the Circuit Court, and the debtors appealed the decision to the High Court.

The High Court noted the two primary issues for consideration were (i) the proposed extension of the mortgage term from just over 18 to 27 years and (ii) the proposal to fix the mortgage interest rate to 3.65% for the entire term. The extension of the mortgage term had to be considered in circumstances when one co-borrower will be 79 years of age at the end of the term, the other co-borrower would be 68 years of age.

Sustainability of the proposed PIA

The creditor argued that based on the current known information, there would be a shortfall in the family income when the older of the debtors retires (it generally being accepted that the older debtor would retire before 79, in or around year 18 of the mortgage term) and consequently, taking the reasonable living expenses as issued by the Insolvency Service ("RLEs") into account, the debtors would not be able to meet the mortgage repayments following retirement. The creditor and debtors each put forward figures representing the monthly shortfall which might arise in year 18, the debtors' figure being lower, and the debtors argued that if there was no increase in income, then the debtors could choose to live below the RLEs. The creditor challenged this and argued that the Court could not approve a PIA that requires a debtor to live below the relevant RLEs. The Judge accepted that a court should not approve a PIA where evidence suggests the restructured mortgage is unsustainable, and the debtor is likely to fall into arrears at the expiry of the PIA, or some identified period in the future. The Judge acknowledged that the debtors may have to life below the RLEs in year 18, however these assumptions into the future were, in the Court's view, unsafe to rely on as determinative. The Judge referred to the PIA being predicated in part on

an assumption that the income of the debtors is unlikely to increase qualitatively over the working lives of the debtors and the Judge said that she could not safely test the affordability of mortgage repayments in year 18 against present salaries and social welfare entitlements of the debtors.

The Judge was satisfied that, based on the current figures presented by the PIP, the PIAs were reasonably likely to be sustainable during their term and on into the reasonable foreseeable future.

Fixing of interest rate

The PIAs proposed a fixing of the mortgage interest rates at 3.65% for the remaining 27 years of the mortgage term, something the objecting creditor described as "*completely unheard of in banking practice*", and unfairly prejudicial. The PIP advised that he proposed a long-term fixed interest rate, which is higher than current variable rates, in order to formulate a "*conservative and prudent treatment*" of the debt, with a view to maintaining a sustainable mortgage for the debtors. Judge Baker noted that section 102, in providing for terms relating to payment of interest, permitted that such rates may be fixed or variable, or linked to a reference rate, and the legislation does not limit the period of time for which this can be done. The objecting creditor stated that the proposal to fix at 3.65% represented a radical departure from the most competitive rates available in the open market, arguing that it would be impossible for the creditor to borrow an equivalent sum to the restructured mortgage at 3.65% fixed over anything approximating 27 years. Reference was made to other available fixed rate products available. The objecting creditor went on to say it would be impossible to quantify the actual loss a lender might suffer if interest were fixed at a low level which did not reflect, or in some way track, ECB rates.

The Court noted that the PIA proposed a restructure, not a refinancing of the mortgage and in light of this, the Court said that in considering the reasonableness of a proposed long term interest rate, the test is not always to test the rate against the projected future borrowing needs of a mortgage lender. In the instant case, the Court said that the fairness of the rate is to be tested on the actual circumstances of the

objecting creditor. The loan is an asset of the creditor, secured over real property and the proposal offers a fixed, albeit long-term return on the investment, with repayments proposed at an amount certain over time. The Judge felt that the asset value might be more accurately compared to a bond, and that the objecting creditor *"may establish that the return from such an investment is unfairly or prejudicially low by reference to an investment or bond market, and not to interest rates".*

The Court indicated that it was not satisfied that the objecting creditor had shown the Court that it would be unfairly prejudiced merely on account of the interest rate proposed.

(d) Phelan case – Timeline for serving notice of motion on parties

South Eastern Circuit Court ruled that the 4-day limit set out in the Circuit Court Rules (Order 73, Rule 29A(4)), within which the PIP shall send a copy of the issued notice of motion to the Insolvency Service, the debtor and to each creditor concerned, had not been adhered to, and consequently ruled that the Court had no jurisdiction to extend the period.

Upon appeal to the High Court, Judge Baker ruled that specialist judges of the Circuit Court have power to extend time once there is good reason to do so and no prejudice to the creditor. In this case, the creditor was not objecting to the appeal and not seeking costs. In arriving at her decision, Judge Baker commented that the application was lodged in time and the motion was issued in time but due to an administrative frailty, the motion was not served in time. She commented that four days to serve an issued notice of motion is very tight especially over weekends as it is common practice in the Circuit Court to post the issued notice of motion so it will never be received on the day it is issued.

Judge Baker granted an order to extend service and made no order as to costs.

(e) Summary of High Court section 115A Appeal Rulings

The table below sets out a summary of section 115A appeal rulings made by the High Court in 2017. The table shows the relevant cases in respect of which judgments have issued, and briefly identifies the main issue dealt with in the rulings.

Case	Main Issues dealt with	Date	Link to Judgment	e-Brief Issue
Hill	Existence of relevant debt. Existence of agreed alternative repayment arrangement.	18/01/2017	Link	February 2017
Hickey	Timeline for application to be lodged	18/01/2017	Link	February 2017
Dunne	Unfair prejudice. Continuing solvency.	06/02/2017	Link	February 2017
Doyle (JD)	Unfair prejudice. Co-borrower cooperation. Sustainability of arrangement.	21/02/2017	Link	February 2017
Ennis	Conduct of debtor. Sustainability of arrangement.	27/02/2017	Link	May 2017
Varma	Timeline for creditor objection to be lodged	06/04/2017	Link	May 2017
Callaghan	Warehousing. Provision for future solvency.	22/05/2017	Link	May 2017
Phelan	Timeline for serving Notice of Motion	19/06/2017	No written judgment issued	December 2017
McDonnell	S.105 Valuation	03/07/2017	Link	August 2017
Reilly	Locus standi	05/10/2017	Link	December 2017
Hayes	Unfair prejudice. Fixing of interest rate.	01/11/2017	Link	December 2017

3 Meetings/Events

3.1 Private Members' Bills

The private member's bill, Mortgage Arrears Resolution (Family Home) Bill 2017, which passed through second stage in the Dáil in July, was considered by the Joint Oireachtas Justice and Equality Committee in October. The stated purpose of the Bill is "to provide for the establishment of a Mortgage Resolution Office; to provide for a non-judicial Mortgage Resolution Order concerning mortgages over family homes; to provide for an independent appeals process against decisions of the Mortgage Resolution Office; and to provide for related matters." The Committee heard submissions from Deputy Michael McGrath, the Bill's sponsor, Mr David Hall, Irish Mortgage Holders Organisation, and Lorcan O'Connor, Director, Insolvency Service of Ireland.

Addressing the Committee, the Director stated that in his view the existing Personal Insolvency Act, with certain modifications, was the most appropriate way to achieve the Bill's objectives. A copy of his Opening Statement is available here, while a link to the Bill is available here.

A further private member's bill, the Personal Insolvency (Amendment) Bill 2017, was introduced by Deputy McGrath in November. The stated purpose of the bill is "to provide clarity with regard to certain applications before the courts." The bill has passed first stage unopposed. Link

3.2 Abhaile Training

The ISI has recently carried out Abhaile information and training for PIPs. Events were held in Cork, Limerick, Sligo, and Dublin. The purpose of the events was to reflect on the successes of the first year of operation of the scheme and to explain the requirements on Abhaile panel PIPs under the scheme's terms and conditions.

3.3 Advertising Campaign

The ISI advertised on radio, online, press and digital platforms throughout October and November as part of ongoing promotion of the Back on Track campaign. Further activity is planned for the first quarter of 2018.

4 Business metrics

4.1 ISI Quarter 3 2017 Statistics

The ISI Quarter 3 2017 statistics were published on the 14th of November 2017. Please see link on the ISI website.

4.2 Abhaile

To date, over 10,000 Abhaile Scheme vouchers have been issued, of which over 7,600 relate to vouchers to enable debtors avail of the services of a PIP. This equates to a monthly equivalent for PIP vouchers of around 420 vouchers. The balance of the issued vouchers relate predominantly to vouchers to avail of legal advice. 250 vouchers issued for the purpose of providing legal advice to applicants pursuing section 115A reviews.

5 Statutory Instruments

The ISI expects two new Statutory Instruments to be finalised before the end of December. They cover the following:

DRN Car value

Section 26 of the Personal Insolvency Act 2012 sets out the eligibility criteria for a Debt Relief Notice. This includes a limit on the value of a retained motor vehicle. In accordance with Section 26 (6) (c) (iii) (I), the new Statutory Instrument will permit the retention of a motor vehicle up to a value of €5,000. This figure is currently

€2,000. The Statutory Instrument shall come into operation on the 1st February 2018. A copy of the finalised Statutory Instrument will be available on the ISI website in due course.

Fees Waiver

The fee payable to the Insolvency Service of Ireland in respect of an application for a Debt Relief Notice and a Protective Certificate is currently waived until the end of 2017. The new Statutory Instrument shall extend this waiver until the end of 2020. A copy of the finalised Statutory Instrument will be available on the ISI website in due course.

6 General

6.1 EU Payment Account Directive

The EU Payment Account Directive includes provisions setting out that access to a payment account with basic features should be ensured by Member States irrespective of the consumers' financial circumstances, such as their employment status, level of income, credit history or personal bankruptcy. The Directive has been transposed into Irish Law. The transposition means that anyone who does not have a payment account can get a payment account with basic features with any of the following Irish banks (AIB, BOI, EBS, KBC, PTSB and Ulster Bank).

Further information and assistance with opening one of these accounts is available through MABS or directly from any of the aforementioned banks.

6.2 Payment for independent valuations carried out under section 105(4)

The ISI has been requested on a number of occasions to follow up the non-payment of invoices issued by valuers after carrying out valuations under section 105(4). This makes the continuing procurement by the ISI of independent valuations under the Act increasingly difficult.

The ISI requests that PIPs and creditors make every effort to ensure invoices are dealt with quickly.

6.3 Termination of arrangements – ISI Registers

PIPs are reminded again of their obligations under sections 122 through 125 of the Act to notify the ISI of the successful completion or termination of an arrangement. Failure to notify the ISI of the date of completion or termination will result in a debtor's details remaining on an ISI Register longer than they should be.

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

Disclaimer

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