Insolvency Service of Ireland Stakeholder e-Brief

June 2018

ISI
Tackling problem debt, together

1 Introduction

Welcome to the sixth 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 Hickey case – Validity of Protective Certificate protection [2018] IEHC 313

The judgment in this case considers whether the protection afforded by a Protective Certificate ("PC") continues when a debtor evokes the provisions of section 115A of the Personal Insolvency Act 2012 (as amended) ("the Act").

This case involved a procedural objection that the debtor did not satisfy the eligibility criteria for the issue of a PC set out in section 91 of the Act. The debtor obtained a PC in July 2016 resulting from which a Personal Insolvency Arrangement ("PIA") proposal was rejected by creditors in September 2016. The Personal Insolvency Practitioner ("PIP"), on behalf of the debtor, made a section 115A review application in September 2016 but this was ruled out of time by the High Court in January 2017. In November 2017 an application for a further PC was made on behalf of the debtor. The question before Baker J was whether the debtor had ""*been the subject of a*

protective certificate" less than twelve months prior to the date of the application for the third protective certificate". The court pointed out that the matter would fall "*to be determined in the light of a consideration of whether the protection afforded by a protective certificate continues when a debtor evokes the provisions of s. 115A*".

In arriving at her determination, Baker J stated that section 115A(5) makes express provision for the continuation of the protection afforded by a protective certificate if the application under section 115A is made during the currency of the protective certificate. She was of the view that this continuing protection "*pending the determination by the relevant court or on appeal of the application under s.115A appears to be logical, and the plain words of the subsection are in no way lacking in clarity*". She pointed out that it was not necessary "*that an application under s.115A be made in the currency of the protective certificate*" and that the central question for determination was whether a debtor who makes an application under s.115A outside the currency of a PC "*is entitled to protection from enforcement action by his or her creditors in the same way as he or she would be, had the application under s.115A been made in the currency of the protective certificate*".

In applying a purposive approach to legislative interpretation, Baker J concluded that "*enforcement action by a creditor must be stayed pending the determination of the application under s. 115A, irrespective of whether that application was made within the currency of a protective certificate or after it had expired. Any other interpretation would fail to support the legislative intent*." The import of the judgment was that the debtor had a PC that continued in force until January 2017 and that the application for a further PC in November 2017 did not satisfy the eligibility criteria in section 91, since the debtor was the subject of a PC less than 12 months prior to the date of application. As section 91 is a mandatory precondition to the court exercising its jurisdiction under s. 115A(9), the debtor was not competent to make application for review under s. 115A.

The full text of the judgment is available here.

2.2 Enright case – 'Amended' versus 'modification' of a proposal [2018] IEHC 314

In this case, Baker J considered the difference between an 'amended proposal' (section 111A(3)[1]) and a 'modification' (section 111A(5)[2]); the latter used to correct or clarify.

As stated by Baker J in her Judgment, "*The distinction is of some consequence, as where a proposed Personal Insolvency Arrangement ("PIA") has been amended, the time limit for the service by a creditor of an objection to the proposed PIA is enlarged*".

In this case, the PIP provided the single creditor with two proposed PIAs. The grounds on which the creditor argued that 'the second proposed PIA' was different to 'first proposed PIA', and that the difference amounted to an amended PIA, related to a small plot of land, circa 0.33 acres, valued under section 105(3) of the Act at €6,000. In the first proposed PIA*, "the small plot was described in the schedule of assets, at p. 36 thereof, by reference to its value of €6,000, but not designated otherwise with an address or folio number, but as "0" (or perhaps the capital letter "O"). As the land was not held as security, it did not thereafter appear in the proposal, as the statutory form does not provide for further reference to unsecured assets unless it is intended to treat them for the purpose of the PIA*".

[1] Section 111A(3): A personal insolvency practitioner who has complied with *subsection* (2) may, where he or she believes it is in the interests of obtaining approval of a proposed Personal Insolvency Arrangement by the creditor and with the consent in writing of the debtor, prepare an amended proposal for a Personal Insolvency Arrangement.

[2] Section 111A(5): A proposal for a Personal Insolvency Arrangement may, before the creditor has notified the personal insolvency practitioner of his or her approval or otherwise of the proposal, be subject to a proposal for a modification where the modification addresses an ambiguity or rectifies an error in the proposed Personal Insolvency Arrangement and where-

(a) the modification has been proposed by the creditor or the personal insolvency practitioner, and
(b) the debtor gives his or her written consent to the modification.

In the second proposed PIA, a narrative was added specifically referable to the small plot. This text reads as follows:

> "The debtor and his wife own 0.1322 Hectares of land, less than 1/3 of an acre which is unencumbered. This piece of land is landlocked with no road entrance and is therefore unsaleable. This piece of land is to be retained as part of the debtor's horse enterprise."

It is that addition in the second proposed PIA which the single creditor sought to characterise as an amended proposal within the meaning of section 111A(3).

In arriving at her determination, Baker J pointed out that the "*preparation of an amended proposal occurs only when the PIP believes that an amendment is likely to result in approval by the single creditor of the proposal, or might alleviate or fully deal with concerns expressed by the single creditor, or even arising by implication from observations or informally made objections…The amendment must be made in the light of a belief by the PIP that that amendment is likely to make the proposed PIA more attractive to a creditor…The amendment of a proposal is not permitted merely on account of a desire on the part of the debtor to amend the proposed PIA, and the PIP must exercise his or her own personal and reasoned judgement in coming to a belief that the amendment is likely to be positively received before the PIP may avail of the provisions of s.111A(3)*."

Baker J concluded that "*the Oireachtas did not intend that the provisions of s. 111A(3) or (5) were to be distinguished on account of the monetary value of an asset. Rather, it seems that the Oireachtas intended a rectification or modification to be permissible to correct something obviously incorrect or unclear, and that the change would not be material*." She pointed out that the "*small plot is identified in both versions of the PIA by reference to its value of €6,000. The creditor reviewing the PIA for the purpose of coming to a determination whether to oppose or support it, could not but have been aware of the total value of the assets of the debtors and that what was purposed to be included as arrangement assets were the principal private residence and the plot over which security existed*."

Accordingly, in rejecting the argument of the creditor that "*the second proposed PIA introduced an unencumbered asset which had not been previously referred to and made a proposal for the treatment of that asset for the first time*", she determined that "*the second proposed PIA contained corrections or clarifications within the meaning of s. 111A(5)*" that did not amount to an amended proposal.

The full text of the judgment can be found here.

2.3 Hanrahan case - Equity Participation; Excludable Debt and Solvency

A recent unreported High Court Section 115A case considered equity participation and excludable debt in the specific circumstances of the case as described below.

Equity Participation

The debtor had a judgment mortgage of €28,751 which was registered on the debtor's principal private residence ("PPR"). This judgment mortgage was included in total debt of approximately €3m owed to creditors. The PPR was in positive equity. As part of the terms of the PIA, the judgement mortgage will be converted into a 13% share in the PPR. The percentage was calculated with reference to the amount of the debt relative to the current market value of the PPR.

Excludable Debt and Solvency

An excludable creditor, owed debt of €179,508, opted out of the Arrangement. The Court considered the effect this could have on the debtor's ability to return to solvency. However, the creditor had provided an assurance that while it had taken steps to enforce its debt – through a second charge on the PPR – it will not move on it or take other enforcement action. The Court was of the opinion that the approach of the creditor was sufficiently protective of the debtor that it was satisfied to approve the PIA on the strength of the creditor assurance given.

2.4 Coady (a Former Bankrupt) [2017] IEHC 653

This case provides clarity on the construction of section 44A of the Bankruptcy Act 1988 (as amended) which deals with pensions in bankruptcy. It also confirms that the Official Assignee requires a bankruptcy payment order to access an annuity. These proceeding were brought under section 61(6) of the Bankruptcy Act 1988 (as amended) (the "Bankruptcy Act") to ascertain what rights, if any, vested in the Official Assignee in relation to the former bankrupt's pre-retirement personal pension policy ("PPP") upon his adjudication as a bankrupt. The former bankrupt took no part in the proceedings and the pension provider and the Revenue Commissioners were notice parties in the case and made submissions in relation to the issues arising. In her judgment, Judge Costello provided welcome clarity on the construction of section 44A of the Bankruptcy Act. The Judge neatly summarised her findings at paragraph 34 of her judgment, as follows:

"In summary, payments received or payments which a bankrupt was entitled to receive at the date of adjudication under a relevant pension arrangement vest in the Official Assignee. The underlying assets relating to the relevant pension arrangement do not. If a bankrupt has an entitlement to perform an act or exercise an option under the relevant pension arrangement the Official Assignee may perform the Act or exercise the option in place of the bankrupt. If the act or option would cause the bankrupt to receive an income the bankrupt is considered to be in receipt of the income. If, on the other hand, the act or option would cause the bankrupt to receive an amount of money other than income, the money, that is the lump sum but not the assets from which the lump sum is paid, vest in the Official Assignee."

The Court found that it was open to the Official Assignee, pursuant to section 44(A)(4) of the Bankruptcy Act, to exercise one of the options available to the former bankrupt under his PPP, if he considered that to do so would be beneficial to the former bankrupt's creditors.

The Court further found that if the Official Assignee wished to recover an annuity, he was required to have a bankruptcy payment order. In the Judge's view, section 85D(6)

of the Bankruptcy Act contemplates an order of the court directing a person from whom the bankrupt is entitled to receive "*any….income…pension or other payment to make payments to the Official Assignee or trustee".* This, the Judge stated includes "*payments a bankrupt would be entitled to receive under an annuity*. As such payments fell within the scope of subsection (6), "*then it follows that the Official Assignee requires an Order pursuant to s.85D before the provider of the annuity could pay the sums due, or any part of the sums, directly to the Official Assignee".* The Judge further stated that to "*construe this section as meaning that a bankruptcy payment order was not required in the case of income payable in the future to the bankrupt under an annuity would be inconsistent with the fact that the right to receive the payment was not vested in the Official Assignee by virtue of the provisions of s.44(1)".*

The full text of the judgment is available here.

3 Business metrics

3.1 ISI Statistics Quarter 1 2018

The ISI statistical report covering the first quarter of 2018 (Q1) is published on the ISI website here. Figures for this period show that while the number of applications have increased compared to Q4 2017, the number of Protective Certificates, Arrangements and Bankruptcies have decreased slightly.

3.2 Abhaile

To date, over 12,500 Abhaile Scheme vouchers have been issued, of which over 8,000 relate to vouchers to enable debtors avail of the services of a PIP. This equates to a monthly equivalent for PIP vouchers of around 360 vouchers. The balance of the issued vouchers relate predominantly to vouchers to avail of legal advice. 734 vouchers have issued for the purpose of providing legal advice to applicants pursuing section 115A reviews.

4 General

4.1 Section 141 Review

A recent parliamentary question (June 2018) to the Minister for Justice and Equality concerns the Department's Section 141 review pertaining to Part 3 of the Personal Insolvency Acts. Part 3 relates to the practical operation of Debt Relief Notices, Debt Settlement Arrangements and Personal Insolvency Arrangements. The Department has confirmed it is currently finalising the review, consultation on which concluded a year ago. While a number of reforms have already been introduced to further develop the personal insolvency legislation, the Minister, in consultation with the Minister for Finance, will shortly bring forward proposals for legislative change where deemed necessary. Suggestions made by the ISI as part of its submission to the review, in addition to those of the Consultative Forum established by the ISI are amongst those being considered.

The parliamentary question and response can be accessed on the Oireachtas website here.

4.2 Protective Certificate Target Timeline Oversight Group

The inaugural meeting of the Protective Certificate ("PC") Target Timeline Oversight Group took place in May. The Group consists of a PIP, a creditor and an ISI representative.

The initial meeting focused on agreeing a Terms of Reference (see below) and a general working method. Further meetings will consider practical issues as they arise.

The Terms of Reference for the Group are:

- To oversee implementation of the PC Target Timeline
- To act as a means through which good practice (creditors and PIPs) can be discussed and shared
- To provide a forum through which appropriate issues can be raised and learning points identified and implemented.

The current membership of the Group is:

- Creditor Representative – Niamh Murphy (BPFI);
- PIP Representative – Colm Arthur (6 month rotation)
- ISI Head of Policy and Regulation – John Farrell

4.4 New Regional Governance Structure for MABS

The Citizens Information Board (CIB) has statutory responsibility for the Money Advice and Budgeting Service (MABS) national network.

The Board of CIB are changing its governance arrangements from 51 individual service delivery companies to an 8-region model. The new model, when fully operational, will comprise 8 new regional companies for MABS. The aim of the change is to improve the effectiveness of the control environment, financial management and governance of the MABS network, which is 100% State-funded.

The first 3 regional MABS companies were formed on April 16th 2018. These are: South Munster MABS, South Dublin MABS and North Leinster MABS. All the staff, assets and business of the former MABS companies in these areas transferred into these new companies. In Autumn 2018, the remaining 5 regional companies will be formed. Please see the table below for an overview of the composition of the new regional companies:

MABS Regions	Existing MABS Companies to transfer into the new regions
North Connacht & Ulster MABS	Cavan MABS Donegal North MABS Donegal South MABS Donegal West MABS Leitrim MABS Monaghan MABS Sligo MABS
South Connacht MABS	Galway North MABS Galway South MABS Mayo North MABS Mayo South MABS Roscommon MABS
North Munster MABS	Clare MABS Limerick MABS Tipperary North MABS Tipperary South MABS Waterford MABS Waterford West MABS
South Munster MABS	Charleville MABS Cork City MABS Cork North MABS Cork West MABS Kerry MABS
North Leinster MABS	Athlone MABS Drogheda MABS Dundalk MABS Kildare MABS Longford MABS Meath MABS Mullingar MABS
South Leinster MABS	Arklow MABS Bray MABS Carlow MABS Kilkenny MABS Laois MABS Offaly MABS Wexford MABS
Dublin North MABS	Ballymun MABS Greater Blanchardstown MABS Dublin North City MABS Dublin North East MABS Fingal MABS Finglas Cabra MABS
Dublin South MABS	Clondalkin MABS Comac Cherry Orchard MABS Dublin 12 Area MABS Dun Laoghaire MABS Dublin South East MABS Dundrum Rathfarnham MABS Liffey South West MABS Tallaght MABS

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

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