Insolvency Service of Ireland Stakeholder e-Brief

February 2017

ISI

Tackling problem debt, together

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Contents

1 Introduction

The Personal Insolvency Act has been in operation for a number of years. Personal Insolvency Practitioners (PIPs) and Creditors have practical experience of progressing cases through the system and dealing with appeals as these arise.

In the past the Insolvency Service of Ireland (ISI) has issued communications on an ad-hoc basis on specific issues and, in some cases, these communications were overlooked in email flows between the ISI, PIPs and creditors. For this reason, the ISI has decided to formalise its communications as an e-Brief that will issue on a periodic basis. The email accompanying the e-Brief will contain the heading *Insolvency Service of Ireland Stakeholder e-Brief* to distinguish it from other emails. This e-Brief will also appear on the ISI's website.

2 Courts

2.1 Court updates

Statutory interpretation of the Personal Insolvency Act 2012 ("the Act") by the courts provides clarity and guidance. The review provision contained in section 115A has been considered by the High Court in a number of recent cases. The summary of cases below is divided into High Court cases and Circuit Court cases.

2.2 High Court cases

The High Court has issued a number of rulings in recent cases.

<u>Hickey case – 14 Day Rule</u>

In Hickey Judge Baker relied on section 18(h) of the Interpretation Act 2005 to determine that where "a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period."

She concluded that a debtor was out of time for lodging an appeal under Section 115A (9) where the application was made more than 14 days after the creditor's meeting when the date of the creditors meeting was included in the calculation of the 14 days. ***Link***

Hill case – Relevant Debt

In Hill judge Baker considered that a purposive approach to the interpretation of section 115A (9) was appropriate. She remarked that what the "Oireachtas had in mind in fixing the threshold requirement for an application under s.115A(9) was that a debtor not merely be treated by its lender as falling within the MARP framework but to have actually entered into an arrangement by which the provisions for the repayment of a mortgage were re-negotiated and agreed in a way that met the needs of both parties." She remarked that in the present case "no arrangement was made by which the contractual terms and conditions of the mortgage were varied by agreement" and concluded that even though Ms. Hill had made late payments on 5 occasions Ms Hill did not have a relevant debt at 1 January 2015 in respect of which a PIA could be approved by the Court. ***Link***

Dunne case – Unfair Prejudice, Debtor's means, PIP liability

In Dunne Judge Baker considered two questions: whether the PIA unfairly prejudiced the creditor's interests and whether the means of the debtor have been appropriately brought to bear on the proposals for repayment of the secured debt as envisaged by the Acts. In coming to her decision that upheld the creditor's objection, she arrived at some conclusions including:

- There is no support in legislation for the broad proposition that a PIA should seek to ensure the continuing solvency of a debtor outside the period of a PIA. The legislation cannot be read as offering an umbrella protection for a debtor outside the term of the PIA, which cannot, as a matter of law be more than six or seven years.

- While the court is obliged to enquire as to whether it is reasonably likely that a debtor will meet the terms of the PIA, the court is not required to engage the broader question as to whether the debtor is reasonably likely to be able to perform the obligations as reformulated in the PIA with regard to the repayment of a secured debt over the length of the repayment term of that secured debt.
- The scheme of the personal insolvency legislation cannot be viewed as requiring that a PIA ensure the continuing solvency of a debtor post-PIA. A PIA may fail and the legislation cannot protect against unpredicted events that give rise to the failure of a PIA in its currency, or thereafter. The purpose of the legislation is to provide a means of orderly debt resolution, not to guarantee continued solvency outside its timeframe. The statutory provisions do not envisage protection of continued solvency post-PIA as a correct approach.
- The PIP's concern that should he not include a clause providing for a restriction on the right of review of the warehoused debt, he could find himself met with a claim in negligence was addressed. It was pointed out that a PIP engages in a role somewhat akin to that of a legal representative as an officer of the court and that a PIP has the added protection of court approval of a PIA. It is, therefore, difficult to envisage circumstances in which personal liability might arise should the PIP engage in his role with independence and professional competence. It is not the role of the court to protect him should he fail to achieve the standard required of his office.

<u>JD case – Unfair Prejudice, Public Interest, Civil Liability Act 1961, Co-Debtor's means, Income</u>

In JD, in allowing the debtor's appeal Judge Baker made the following observations:

- There is an express requirement in section 115A that the court be satisfied that a PIA is not unfairly prejudicial before giving consideration to the exercise of its jurisdiction to approve a PIA notwithstanding its rejection by creditors. The engagement of the court is not simply to be with the figures and calculations, but with the fairness of the proposal having regard to the circumstances of the creditors and debtor.
- One factor relevant to the consideration of fairness is the public interest expressly identified in the long title to the personal insolvency scheme, namely, the "rational resolution" by a debtor of his or her debts with a view to that debtor continuing to engage in the economic activity of the State. More concretely that public interest, for which an exceptional remedy is provided for in section 115A, refers to the continued occupation (as opposed to continued ownership) by a debtor of a principal private residence provided the costs of continued occupation are not disproportionate.
- The court may approve a scheme in circumstances even when a creditor is likely to do worse under the scheme than in bankruptcy, and there is no mandatory condition that the court be satisfied that the return on bankruptcy would be less favourable. The primary argument of the secured lender in the current case is not the bankruptcy comparison but rather that the PIA prejudices its claim against the co-debtor and co-mortgagor.
- The argument that the secured creditor will lose rights against the co-debtor and co-mortgagor is not correct. By its very nature a PIA does not bind or benefit a debtor not a party thereto. Section 116(10) preserves the rights of a creditor against a guarantor. Section 17(1) of the Civil Liability Act 1961 provides that the release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged. Laffoy J. in

A.C.C. Bank Plc v. Malocco took that view that in the case of a husband and wife who were jointly and severally liable on foot of a debt it was immaterial whether the debtors were jointly liable or jointly and severally liable for the debt. In drawing on these sources she concluded that the contractual protection expressed in the proposed PIA, and the statutory protection of Section 17 of the Civil Liability Act 1961 combine to afford protection to the creditor with regard to its claim against the co-borrower and co-mortgagor.

- The prejudice in the current case to the secured lender is caused, not by the fact that the co-borrower and co-mortgagor is not brought into the restructured arrangement, but by the extent of the negative equity. Therefore, any consideration of the argument of unfairness arising from the revised mortgage falls to be considered on its merits, and whether it unfairly prejudices the secured lender in itself, and not by reason of the argument regarding the co-borrower and co-mortgagor.
- It is clear that the Acts do not mandate that joint debtors make a proposal for an interlocking PIA, and indeed it envisages circumstances where a debtor who has joint debts may make a proposal without the co-operation of, or any form of involvement with, the co-debtor. Thus joint debts, whether secured or not, are included within the scheme of the Acts, and a debtor is not precluded from seeking relief under section 115A on account of the fact that he or she does not own the entire of the interest in the principal private residence, and is not the sole mortgagor.
- An objection to the sustainability of the arrangement by the secured creditor related to the lack of evidence as to the means of the co-debtor against whom the debtor had obtained a court order for maintenance and an attachment of earnings order. In rejecting the objection she pointed out that the test of sustainability of a PIA is one which must engage the question of reasonableness. In ascertaining what is reasonably likely a

court must have regard to the extent to which a debt is secured, and security by means of a court order and an attachment of earnings is sufficient security in her view to characterise the payment of child maintenance as being reasonably secure or reasonably certain into the future. What is reasonably likely to occur is not to be equated with what is certain to occur. The court cannot be expected to engage in hypothetical concerns, or to consider the likely consequences of unfortunate and unexpected events.

- She accepted that the debtor rationally approached her finances in the circumstances as she understood them, albeit that she had been led astray by her engagement with an unregulated entity and dismissed the creditor's objection.
- She also accepted as reasonable and proper that the debtor did not discontinue her AVC and health cover, whose discontinuance was set out as additional income sources in the PIA, until the PIA was approved by the relevant court, particularly so having regard to the fact that she was relying on the discretionary power of the court to override the result of the creditors' meeting. In addition, the omission of Christmas and back-to-school payments, in the sum of €50 per month in two lump sum payments by the debtor's separated spouse, was regarded as *de minimus* and the argument that their omission rendered the PIA figures inaccurate was rejected. ***Link***

<u>Smyth case – Continuance of bankruptcy proceedings following a failed DSA proposal</u>

In Smyth Judge Costello was asked to direct under the Bankruptcy Act that a defeated proposal for a DSA be resubmitted in either its existing form or in an improved form. The debtor argued that the purpose of bankruptcy is to realise

assets and recover payments due to the petitioning creditor and that once it becomes apparent that these purposes can't be met then the maintenance of proceedings is improper. Costello concluded that in the circumstances of the case there was no reasonable or practical reality, in the words of Baker J., in a DSA being available to the debtor having regard to the attitude of the petitioner in this case.

In arriving at her judgement she cited the following conclusions:

- The Oireachtas has recognised the right of creditors to reject a proposed DSA even where the creditor(s) are aware that the outcome in bankruptcy will be less favourable than in the proposed DSA.
- The Oireachtas has not conferred a power on the Court to confirm the coming into effect of a DSA which has not been accepted by the required majority of the debtor's creditors.
- It remains the case that creditors are free to reject a DSA and the Court has no role in reviewing or ultimately compelling creditors to accept a DSA which they have rejected at a creditors' meeting.
- The continued maintenance of a petition to bankrupt a debtor by a creditor who has voted to reject a proposed DSA does not amount to an abuse of process, notwithstanding that there may be no assets to be realised in the bankruptcy process nor moneys for the payment of debts of creditors. ***Link***

Applications for an extension of a Protective Certificate

In a recent unreported case Judge Baker commented that the number of applications for PC extensions was giving her concern and that this suggested that creditors may be engaging too late in the process. Her view is that creditors must engage with the process and engage at an early stage.

2.3 Circuit Court cases

The ISI attends a range of Circuit Court hearings across the country. Based on its attendance, it is the ISI's view that the following be taken into account in considering cases, albeit based on the specifics of the case. Some of the cases mentioned are under appeal.

1. Principal Private Residence (PPR) secured debt is considered separate and distinct from Buy-to-Let (BTL) secured debt for the purposes of establishing a class of creditor.
2. Commercial property secured debt is considered separate and distinct from Buy-to-Let(BTL) secured debt for the purposes of establishing a class of creditor; Credit Union debt was not proven as a separate class of creditor to other unsecured creditors.
3. Debt write-down on a secured PPR loan was recognised as separate from 'ordinary' unsecured creditors (due to the existence of the clawback provision under section 103(3)).
4. A secured creditor's objection was upheld on proportionality grounds (disproportionately wide) where the objecting secured creditor had 99.6% of the votes in comparison to 0.4% of votes for the supporting unsecured creditor: the validity of the classes of creditors was accepted in this case.
5. Different approaches are being taken on costs. While the position of 'costs following the event' is often cited, in some cases orders for costs against unsuccessful debtors have been refused on the basis that an insolvent debtor is unlikely to comply with the order.

In O'Callaghan Judge Lambe gave a written decision in October 2016. In arriving at her decision to uphold the objection of the Bank she made the following observations:

- Section 115A was a particular protection offered in legislation in respect of the principal private residence of a debtor and regard must be had to the preamble to the legislation and the need to balance the rights of debtors and creditors.
- The legislation does envisage secured debt continuing beyond the term of an arrangement and that while the legislation does not make reference to warehousing of mortgage debt it does not preclude it in circumstances where the outcome provides a reasonable prospect of returning a debtor to solvency and is not unfairly prejudicial to a creditor or creditors.
- The PIA in this case is unfairly prejudicial to the interests of the banks because it seeks to treat as "Lifetime non recourse warehoused", a term that is not defined in the legislation or in the PIA before the court, a significant portion of the Bank's mortgage debt at 0% during the lifetime of the debtor and his spouse, thereby leaving the warehoused portion of the mortgage debt due to the Bank as a liability in the Estate of the Debtor or his spouse. It was commented that the proposed 12-month PIA had none of the advantages that a longer term arrangement may provide such as monitoring by the Personal Insolvency Practitioner of windfall gains and additional income to allow for the possibility that some of the warehoused amount be discharged during the lifetime of the debtor. ***Link to judgment not available but PDF circulated with e-Brief.***

3 Meetings/Events

3.1 Creditors

The ISI held meetings with a range of creditors in February to obtain feedback on the operation of the personal insolvency solutions, including bankruptcy.

3.2 EU Matters

The ISI has provided observations to the Department of Justice and Equality and the Dáil Committee on Justice, Defence and Equality on the new EU Commission proposal for a Directive on preventative restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. A copy of the observations can be found at ***Link***.

3.3 Debt Advice Clinics

The ISI hosts free Debt Advice clinics at locations across the country. At these clinics a debtor can meet in private with a PIP or an Approved Intermediary to discuss the debtor's debt position and to explore potential debt solutions. Recently booked out clinics were held in the Liffey Valley Clarion and the Green Isle hotels on Saturday 18 February 2017.

3.4 Lunch and Learn

One of the functions of the ISI under the Act is to arrange for the provision of such education and training as it sees fit. The ISI organises periodic regional meetings with PIPs to discuss in a supportive environment the practical operation of the Act. Meetings are scheduled for the Hillgrove Hotel, Monaghan on 10 March and the Annebrook House Hotel, Mullingar on 24 March 2017.

3.5 Creditor Seminar

A creditor seminar was held by the ISI Bankruptcy Division in November 2016. The seminar was targeted primarily at representatives from the insolvency, arrears and legal divisions within financial institutions. The seminar was mainly focused on exploring issues within the sphere of bankruptcy and facilitated

dialogue between creditors and the bankruptcy team. Over 50 representatives from all the major creditors operating in the Irish market attended. The seminar addressed legislative developments, bankruptcy trends, comparison of bankruptcy with a Personal Insolvency Arrangement and the Official Assignee's property policies.

4 Business metrics

4.1 Quarter 4 2017

The ISI statistical report covering the fourth quarter of 2016 (Q4) was published in recent days. The number of bankruptcy cases continue to rise. There has been a minor fall in the number of Arrangements issued. This in part reflects the number of cases currently in the Courts system seeking a Court review of proposals rejected by creditors. There has been strong growth in new applications (up over 100% on equivalent quarter in 2015) and in Protective Certificates (up 50% on equivalent quarter in 2015). The report is available at ***Link***.

4.2 Abhaile Scheme

The Abhaile national awareness campaign was launched by the Tánaiste and Minister for Justice and Equality and the Minister for Social Protection at the Citizens Information Board Headquarters, Townsend Street on Monday 27 February 2017. The Abhaile Scheme, is the State-funded service for people in home mortgage arrears. It provides a range of services - insolvency advice, financial advice and legal advice - for borrowers in home mortgage arrears. To date, almost 4,500 Abhaile Scheme vouchers have been issued, of which nearly

80% relate to vouchers to enable debtors avail of the services of a PIP. The balance of the issued vouchers relates predominantly to vouchers to avail of legal advice. Approximately 120 vouchers have issued for the purpose of providing legal advice to applicants pursuing section 115A reviews.

5 Electronic Communications

Section 134 of the Act 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 that provided for the electronic exchange of information with and between all the relevant parties to the agreement. Since then the volume of document transfer and exchange has increased particularly with the operation of section 115A and confirmation to court that agreement to exchange documentation between the case parties was made in advance.

Taking into account the reality that most exchanges are carried out electronically, the ISI would ask that all Approved Intermediaries, Personal Insolvency Practitioners and creditors not already signed up to the agreement might do so as soon as possible. A copy of the form is available on the Stakeholders Information section of the ISI website. If you have any queries please contact ISI's Policy Team at policy@isi.gov.ie.

6 General

6.1 Legal Aid Board

The Legal Aid Board held a training event in late January for solicitors interested in joining the legal aid panel that provides assistance to debtors under the Abhaile scheme. The ISI presented at the event.

6.2 Short Notice Applications

The ISI receives a number of requests to consent to short service of Notices of Motion in the case of applications for Protective Certificate extensions. For such requests, PIPs are reminded that the ISI should be furnished with a copy of the Notice of Motion, the relevant affidavit for each application and an Exhibit copy of the current PC. The request and documents should be provided in a timely manner. The ISI considers each case on its merits and the ISI's consent should not be presumed.

For consistency purposes standard templates should now be used in all cases. These templates are available under Download Files – Apply for PC – for both DSA and PIA. Short Notice applications should not be the norm and the ISI Regulation Team will monitor the number of these applications.

6.3 COMI Certificates

Council Regulation (EC) No 1346/2000 on insolvency proceedings (Insolvency Regulation) provides that the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to

open insolvency proceedings. A COMI certificate indicating a debtor's centre of main interest (COMI) must be supplied as part of any application that contains EU debt. It has been brought to the ISI's attention by the Courts that COMI certificates for some applications, which include EU debts, contain other debts. Please note that the COMI certificate should only list applicable foreign debt and not contain all the debts shown on a Prescribed Financial Statement. A PIP who requests a COMI certificate to be forwarded to Court, should advise the ISI when the certificate has been uploaded.

6.4 Termination of arrangements – ISI Registers

PIPs are reminded 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.

6.5 Communications Update

The first step in debt resolution is debtor engagement; resolution can only happen through engagement. The ISI seeks to influence engagement through its publications, its information and its advertising. Some recent ISI initiatives include:

- The current advertising campaign that includes Video on Demand (VOD), digital advertising and outdoor, press, radio and TV advertisements;
- An 8-page sponsored supplement in the Daily Star in January titled "Get 2017 off to a good start"; and
- Articles on RTE.ie, Joe.ie and Journal.ie.

To supplement the advertising campaign Back on Track booklets were sent to each TD and Senator.

7 Future Consultations

The next meeting of the Protocol Oversight Committee and the Consultative Forum is scheduled for March 2017.

Disclaimer

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