Insolvency Service of Ireland Stakeholder e-Brief

May 2017

ISI
Tackling problem debt, together

Insolvency Service of Ireland Stakeholder e-Brief – May 2017

Contents

1 Introduction

This is the second edition of the Insolvency Service of Ireland's (ISI) e-Brief. This document along with other resources can be found in the Stakeholders Section on our website. Link

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 continues to be considered by the High Court.

2.2 High Court cases

The High Court has issued rulings in four recent cases.

Callaghan Case – Determination on warehousing

This case involved an appeal by an objecting creditor to the High Court following an order by the Circuit Court confirming the coming into effect of the debtors' proposed Personal Insolvency Arrangement ("PIA").

Details around secured debt:

- Mortgage Debt €285,647
- Value of Security €105,000
- Negative Equity €180,647

The debtors' proposed PIA included a write down of most of the negative equity, leaving a live mortgage of €120,000.

Under the objecting creditor's proposal, €15,000 of the debt was to be written off leaving a balance of approximately €270,000 to be treated as follows:

- Mortgage payments were to be made on one half of the remaining debt (€135,000) and
- the remaining €135,000 to be warehoused at 0% interest. The debtors were to be given a "lifetime tenure" in the property and the security was not enforceable until after they died.

The creditor argued that their proposal would have enabled the debtors to continue to reside in their home and would have resulted in a better return for the creditor in the long term, as they would in time recover the balance of the loan amount.

One of the matters for determination in this case was whether the Personal Insolvency Acts 2012 to 2015 (the "Act") allowed for warehousing of secured debt. The debtors had argued that the creditor's proposal involved a type of warehousing not permissible under the Act. The debtors were of the view that a proposal to warehouse a debt must bring the inactive element into account in the currency of the PIA. Baker J however was of the view that the legislation affords a "*very broad discretion in a PIP to formulate a proposal*" and determined that there was nothing in the Act precluding the warehousing of part of the debt or precluding that such warehoused amount becomes payable after the expiration of the term of a PIA.

Baker J, in refusing the appeal, concluded that the debtors proposed PIA did not unfairly prejudice the objecting creditor. The Judge said that the personal insolvency practitioner had correctly taken the view that the creditor's proposal was not reasonable.

In coming to this conclusion, the Judge stated that the court must be satisfied that a proposed PIA enables creditors to recover their debts to the extent of the means of the debtor. The judge stated that the "means" engaged "*are present income and capital assets and not projected means at a time so far into the future that the test is based on hypotheses and conjecture*".

The Judge did however acknowledge that there may "*on the other hand be circumstances where further certain or ascertainable means are to be brought into account*". The Judge stated that a warehousing solution should, on present or known figures, offer a solution to indebtedness that is likely to be achieved and commented that in this instance there was no future pension lump sum available that could deal with the warehoused amount. The judge stated that in this case the repayment of the inactive account is "*not predicated on any anticipated ability to pay into the future and is entirely on hazard*" and accordingly resulted in a material unfairness to the debtor. Link

Hickey Case – Second PIA proposal within twelve months

This case involved an appeal by an objecting creditor to the High Court following an order by the Circuit Court that the debtor be allowed to make a proposal for a Personal Insolvency Arrangement notwithstanding that he made such a proposal in the previous twelve months. This is permitted under Section 91(3) of the Act where the Court has made an order stating that it is satisfied that the current insolvency of the debtor arises by reason of exceptional circumstances or other factors which are substantially outside the control of the debtor and that it would be just to permit the debtor to make a proposal for a Personal Insolvency Arrangement.

The Judge stated that the reference to the "current insolvency" of a debtor must be to an insolvency which is different, new and not part of, or related to, the previous failed process. The Judge stated that the debtor's primary insolvency arose from the failure of his business and because the effect of a protective certificate is to stay the accrual of interest and charges on a debt , the mere fact that these once again come to accrue on a debt does not change the nature or type of insolvency in respect of which an application has failed.

Judge Baker considered that the legislation does not envisage an application under s.91(3) can be made if the difference in the insolvency of a debtor arises on account

of the costs incurred or awarded against a debtor in a previous failed application under the Act.

Baker J, in allowing the appeal, concluded that there is no new or different insolvency arising from different factors or circumstances to permit the debtor to bring an application for a protective certificate within the twelve month statutory period. Link

Michael Ennis case – Legal and practical issues, Absence of Detail, Bona Fides

In the Ennis case Judge Baker, in making an order refusing the debtor appeal and upholding the creditor objection, in what was she described as "an unusual case", pointed out that the following factors weighed on her mind:

- the debtor's evidence – the Judge concluded that the debtor singularly lacked convincing and concrete evidence that he is reasonably likely to be able to comply with the terms of the proposed Arrangement;
- the debtor's evidence - having regard to the proportionality and reasonableness in section 104, the debtor had not adduced to the Judge sufficient evidence that the debtor could overcome the significant legal (absence of planning permission) matters and meet the practical (state of disrepair of the property) costs likely to be incurred by the debtor in remaining in occupation of his principal private residence;
- the bona fides of the debtor – the Judge concluded that the debtor had not engaged bona fide with the PIP nor with his legal team;
- whether the debtor had engaged with the process in good faith – the Judge concluded that while there is nothing express in the legislation that requires a debtor to engage in the process in good faith such an obligation is implicit in any application where a litigant engages the discretion of the court. Link

Varma case – Time Limit – Creditor objection to a review application

In the Varma case Judge Baker considered two questions: whether the time limit for the lodging of a notice of objection is one that is capable of being extended; and whether the specialist judge of the Circuit Court has jurisdiction to extend the time. In coming to her decision that answered both questions in the positive, she arrived at some conclusions including:

- Service and participation in the hearing is not confined to those creditors who serve a notice of objection. The [section 115A] process is envisaged as being one in which the debtor and all creditors are entitled to participate and is envisaged as an inter partes hearing.
- The Act is silent as to the effect on the engagement a creditor may have at the hearing of the motion under section 115A when that creditor has not lodged a notice of objection. It seems evident that the purpose of the notice of objection is to provide a form of pleading which sets out the basis of the objection. The purpose of the notice of objection is to foster expedition and to provide a cost effective means by which the hearing is to be conducted, and this is also consistent with the express provisions in the Rules by which the court may make case management directions.
- The word "shall" appears in s. 115A(3), but that mandatory direction regulates the form of the notice to creditors, and not the time limit within which the creditor is to lodge the notice of objection in statutory form. A creditor has a right to lodge a notice of objection within fourteen days, but the fourteen day time limit is not found in a free standing and mandatory direction which regulates the time limits. The time limit, being directory rather than mandatory, is capable of being extended.
- A debtor making an application under s. 115A is engaging a statutory and not a constitutional right. On the other hand, an application under s. 115A could have an impact on the contractual rights of that creditor, and as a result the property rights of the creditor could be significantly impaired. A creditor is entitled to be heard both under the express words of the statute and as a matter of constitutional fairness.

- The specialist judge may exercise only those powers and jurisdictions conferred by statute. The specialist judges of the Circuit Court by statute have been vested with the power to make any order that may be made by a County Registrar under s. 34(1) of the Second Schedule to the Court and Court Officers Act 1995. The specialist judge, having the jurisdiction of a County Registrar, may extend the time for the doing of any act, including the lodging of any notice.
- The scheme of the personal insolvency legislation, and the power granted to the specialist judges of the Circuit Court under the Act, does permit the extension of time. The factors that might influence the granting of an extension of time are discretionary factors, the elements of which are a matter for the forum in which the matter is argued, and to be dealt with in the light of relevant discretionary factors. Link

3 Meetings/Events

3.1 Mortgage to Rent

Action 3.3 of the Review of the Mortgage to Rent Scheme for borrowers of commercial private lending institutions published in February 2017 contains a commitment to provide targeted training to insolvency practitioners. The Department of Housing will arrange for the Housing Agency to deliver a number of training events over the coming months and invitations will issue to those on the ISI Register of Personal Insolvency Practitioners.

3.2 Protocol Oversight Committee and Consultative Forum

The Protocol Oversight Committee and the Consultative Forum met on 15 March.

The Protocol Oversight Committee decided to establish two sub-groups. The first will examine the current Bankruptcy Comparison template to consider the time value of money and other issues. The second will look at the payments of dividends to unsecured creditors from the point of view of the certainty as to when dividends will be paid and their amount.

The Consultative Forum agreed to seek consensus from members making a single submission to the Department of Justice and Equality's consultative process on the review of Personal Insolvency Act required under section 141. (see 6.1 below) Since the March meeting, members have submitted details of recommended amendments to the Personal Insolvency Act they wish considered and further meetings have taken place.

3.3 Proposal for a new Insolvency Directive

The Oireachtas Joint Committee on Justice and Equality considered the Report on COM (2016) 723 - Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU in February 2017.

Following its deliberations, the Committee wrote to Donald Tusk, President of the Council of the European Union. The Committee's considered reasoned opinion on the application of the principles of subsidiarity and proportionality is that the proposal does not comply with the principle of subsidiarity. Link

The ISI's submission to the Committee can be found on the ISI website. Link

4 Business metrics

4.1 ISI Quarter 1 2017 Statistics.

The ISI has published statistics covering the first quarter of 2017. Link

This quarter saw continued growth in new applications thanks largely to Abhaile.

While the number of Personal Insolvency Arrangements continues to rise, there has been a fall in Debt Relief Notices. The ISI is liaising with MABS who advise clients in relation to Debt Relief Notices in order to address any underlying issues.

4.2 Abhaile

To date, over 6,000 Abhaile Scheme vouchers have been issued, of which over 75% (in excess of 4,700) relate to vouchers to enable debtors avail of the services of a PIP. The balance of the issued vouchers relate predominantly to vouchers to avail of legal advice. Over 130 vouchers issued for the purpose of providing legal advice to applicants pursuing section 115A reviews.

An information campaign to build on the success of Abhaile - Free Mortgage Arrears Support, was launched by the Tánaiste and Minister for Justice and Equality, Frances Fitzgerald and the Minister for Social Protection, Leo Varadkar on 27 February 2017. The information campaign features a mix of radio, poster and online advertisements. To date, the take-up of the scheme is ahead of expectations and the debtor feedback is positive.

5 General

5.1 Practice Direction HC 65 – Bankrutpcy Application

Mr Peter Kelly, President of the High Court issued Practice Direction HC 65 on 16 August 2016 Link

This provides that on the day of adjudication, a person who has been adjudicated bankrupt on foot of his/her own petition, shall produce to the Bankruptcy Inspector or e-mail the Bankruptcy Division of the ISI, a copy of his/her Statement of Affairs (SOA) produced by him/her to the Examiners Office at the time of the filing of his/her Petition under Section 11(5) of the Bankruptcy Act, together with a Statement of Personal Information (SPI).

Currently some individuals arrive to Court without these documents. The ISI would like to remind Personal Insolvency Practitioners to ensure their clients bring both the SOA and SPI with them on the day of adjudication.
The Bankruptcy Division is then able, to more efficiently process the estate and, where completed correctly, it reduces the need for contact with the bankrupt or their representatives.

5.2 Insolvency, Credit Recording and Credit Repair

The ISI has been contacted in recent months by a number of individuals enquiring about credit rating, recording and repair post-insolvency solution.

Returning to solvency should not to be confused with a return to credit worthiness, which is determined by each financial institution using its own criteria. A debtor can seek credit from a financial institution post-insolvency. However, since insolvency has an adverse effect on a debtor's credit rating this may be taken into account by a financial institution from whom credit is sought by a previously insolvent person.

Credit rating information is held by the Irish Credit Bureau (ICB). This is compiled from periodic loan reports submitted to them by financial institutions. Missed payments and events such as loan write-offs, loan restructures and insolvency will be reported to the ICB and may affect credit rating. The ICB holds information about borrowers and their loans for 5 years after a credit agreement is closed. The ICB cannot change a credit report unless a financial institution requests it to do so. The ISI understands financial institutions have procedures in place to ensure this happens.

By law, a financial institution must ensure that information it holds or gives to a third party about a customer/debtor is correct and up to date. A customer/debtor has the right to insist that a financial institution correct any incorrect information about that person. Lenders should act immediately on a written request to correct any mistake and amend a debtor/customer's credit report. However, if a debtor experiences problems or delays, or if a lender fails to put things right, the debtor can consider making a complaint and referring the matter to the Office of the Data Protection Commissioner. Further information can be found here. Link

The ISI notes the practice in other jurisdictions whereby an insolvent debtor who proactively seeks to address their financial issues through a statutory process sees their credit rating repair over time and generally regains access to credit.

5.3 Valuation of Security – Section 105 of the 2012 Act

The value of security in respect of secured debt for the purposes of a personal insolvency arrangement is defined in section 105(1) of the Personal Insolvency Act 2012 as the market value of the security determined by agreement between the PIP, the debtor and the secured creditor. While section 105 sets out the process for obtaining an independent valuation the section should not be used as the norm.

The Act is predicated on agreement on the value of securities. Section 102 puts the onus on the secured creditor to furnish an "estimate" of the market value of their

security while acknowledging that the PIP may, or may not accept that estimate. Where agreement cannot be reached section 105 provides a mechanism for the parties to agree a valuation, or in the absence of agreement, for the ISI to obtain an independent valuation of the security.

Where the PIP does not accept the secured creditor's estimate of the value, the PIP, debtor and secured creditor should in good faith endeavour to agree the market value having regard to any matter relevant to the valuation including those matters listed in section 105(5). Where agreement cannot be reached, the PIP, debtor and relevant secured creditor should appoint an appropriate independent expert to determine the market value. However, where the PIP, debtor and secured creditor are unable to agree on the appointment of the independent expert, any of them may refer the matter to the ISI for the ISI under section 105(4) to appoint an expert, with any subsequent valuation carried out being binding on all parties.

All parties should consider the implications of delay in appointing a valuer before invoking the valuation referral in section 105(4). Such delay may arise from:

(i) any potential or perceived conflict of interest that may arise as a result of a particular valuer being on an existing creditor panel, or

(ii) having previously had any dealings directly with any of the parties.

Where the ISI receive a section 105(4) request it will normally check that the preliminary steps (just described) have been carried out and, if it does not already have confirmation, will request confirmation from the referring party that the relevant parties have been unable to reach agreement on the appointment of an independent valuer.

The process of procuring a suitable expert for the purposes of section 105(4) is effected by the ISI seeking quotes from three valuers with the lowest being selected to carry out the valuation. The ISI will carry out its role in this process with due expedition as far as is practicable. The ISI will issue the selected valuer with guidance

notes, in relation to the factors to be taken into account when carrying out the valuation, with particular emphasis on those matters referred to in section 105(5). The creditor and the PIP each pay 50 per cent of the valuation costs.

The ISI strongly encourages all parties involved to engage meaningfully and as quickly as possible in the valuation process in order to avoid situations in which, through failure to reach agreement, Protective Certificates having to be extended. This will generally result in further time and cost being incurred, cost which is less easily borne by a debtor.

The ISI holds the view that the sharing of available valuations already obtained by the parties – a practice not engaged in frequently enough at present - should be adopted and implemented in order to avoid any delays and associated increased costs.

5.4 Section 115A reviews – agreements reached

The ISI requests that it be informed by PIPs of all section 115A review cases which do not proceed to a full hearing where negotiations result in an informal agreement between the parties. The ISI does not need the details of the agreement but simply confirmation that an agreement has been reached.

5.5 Data Protection

The ISI authorises Personal Insolvency Practitioners (PIP) and Approved Intermediaries (AI). Each PIP and AI is given a unique login to the ISI portal for the purposes of interacting with the ISI in relation to applications on behalf of debtors for PIAs, DSAs and DRNs. Since the access to the portal is unique to the PIP or AI that PIP or AI bears full responsibility for the actions of any other person who uses those access credentials to interact with the ISI.

6 Future Consultations

6.1 Public Consultation of the operation of the Personal Insolvency Act

The Department of Justice and Equality on 30 March issued an invitation to organisations or individuals wishing to contribute views on the operation of Part 3 of the Personal Insolvency Acts 2012 -2015. Submissions should be marked "Consultation - Personal Insolvency Acts, Part 3", and should arrive no later than Friday 30 June 2017. Submissions should set out the reasons for the views expressed and provide any available evidence on the need for any proposed changes and on their likely impact. Link

The next ISI e-Brief is scheduled to issue in August 2017.

Disclaimer

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