Insolvency Service of Ireland

Stakeholder e-Brief

January 2020

ISI

Tackling problem debt, together

Insolvency Service of Ireland
e-Brief January 2020

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Introduction

This is the tenth 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*.

1 Message from the Director

As the newly appointed Director of the Insolvency Service of Ireland I wanted to take this opportunity to reach out to all of our stakeholders. I have met many of you over the last three months and hope to meet as many more of you as possible over the coming months. I'm looking forward to working with you to make Ireland's insolvency framework stronger, more accessible and more frequently used by all those who need it - both debtors and creditors alike.

Our framework can provide a holistic, transparent, structured and sustainable approach to a negotiation process that can sometimes break down easily or that can veer towards a temporary solution that doesn't necessarily resolve a debt problem for the long term. Using the framework to resolve insolvency quickly and fairly through active engagement between debtors and creditors benefits both parties and ultimately wider society as a whole.

The opportunity for us as stakeholders, therefore, is to work together to make sure that all those who need one of the solutions offered under the framework, can access them. The challenge for us then is to work the framework more efficiently so that a higher percentage of restructuring proposals are agreed first time and without recourse to the Courts. That means actively negotiating for a fair and sustainable compromise and learning from structures that have already been accepted or from precedents already established through the Courts (and summarised in these e-Briefs).

While it is still evolving, we have a very strong insolvency framework which provides a platform to finally help resolve our remaining debt and mortgage arrears crisis. I look forward to working with you all in the future to make that a reality.

Michael McNaughton

2 Courts

2.1 Hurley and Phelan cases – living below reasonable living expenses ("RLEs")

This case was an appeal against two section 115A Circuit Courts applications, interlocking applications relating to Mr and Mrs Hurley, and an application relating to Ms Phelan. In each case, the Circuit Court rejected the applications and did not approve the proposed personal insolvency arrangements ("**PIA**"). The issues in each case were broadly the same – (a) whether it is lawful for the debtors and their dependants to live at a level below the reasonable living expenses ("**RLEs**") for a period of time; and (b) even if it is lawful, whether the arrangements are sustainable.

The legal position in relation to RLEs

Judge McDonald referred to the mandatory requirements set out in section 99 of the Personal Insolvency Act, 2012 (as amended) (the "**Act**") which must be complied with in order for an arrangement to come into effect, in particular the considerations around the reasonable standard of living of the debtor and his/her dependents. The submissions of the two creditors argued that an arrangement cannot lawfully contain a term which would require the debtor to live below the RLEs. The Judge did not agree with this, and concluded that the statutory provisions do not *"prohibit any arrangement that may have the effect of requiring a debtor to live below the reasonable living expenses",* but rather prohibit an arrangement where the debtor would not have sufficient income to "*maintain a reasonable standard of living for the debtor".* Commenting on section 23 of the Act and the formulation of guidelines, he said that the fact they are referred to as "*guidelines*" reflects the intention that they are to be used as a "*guide*", which he said is to be distinguished from an "*instruction*" or "*prescription*".

Will the debtors have a sufficient income to maintain a reasonable standard of living?

In his affidavit, Mr Hurley explained that since 2008, his family had been reducing their living costs and did not have to adopt a new standard of living in order to enable payment as set out in the PIA. His overriding concern was to try and avoid repossession proceedings and for his family to remain in their family home. The Judge acknowledged this, and was of the view that if the Hurley's were to lose their home, it would be "*far more injurious to them as a family unit*" than changes to social inclusion and participation, or other factors as set out in the guidelines.

The Judge was satisfied that there was a "*proper evidential basis*" in the Hurley case to conclude that the criterion of section 99(2)(e) was satisfied insofar as the payment terms as set out in the arrangement were not of such an amount that they would not have sufficient income which would prevent them from maintaining a reasonable standard of living.

In relation to Ms Phelan, Judge McDonald felt that the period during which she would be living below the RLEs was "*sufficiently short*", and acknowledging there may be some hardship experienced during this short period, the Judge expressed his view that such hardship during that period will be *"significantly less than the very severe hardship that would ensue for her and her family if the application under s. 115A were to be rejected and she was to lose her family home".*

The Judge was satisfied that the payments to be made under the arrangement would not reduce the standard of living to an unreasonably low level, and he concluded that the requirements of section 99(2) were satisfied.

Sustainability

The Court then addressed the issue of sustainability and whether the debtors would be in a position to comply with the terms of the proposed arrangements, which the objecting creditors argued they would not be. Judge McDonald expressed that it is important to bear in mind that in consideration of this issue, the test laid down by section 115A(9)(c) is one of reasonable likelihood not certainty.

The creditors submitted that the circumstances of the debtors into the future must be considered, as well as the position of the debtors during the course of the arrangements, and the Judge agreed. The Judge commented that there would be no point "*approving an arrangement if there was a reason to conclude that the debtors were likely to be unable to meet their financial commitments (including their mortgage repayments) in the future."*

The creditors, in their arguments, put forward that as the relevant arrangements require the debtors to live at levels below the RLEs, that it is unlikely they would be able to meet their obligations in respect of their mortgage repayments, and that in a choice between discharging a reasonable living expense and making a mortgage repayment, that the former will be prioritised.

In addressing the issues raised by the objecting creditors in relation to living on the RLEs for an extended period of time, previous case law was discussed including the judgment in *Lisa Parkin* [2019] IEHC 56 in which Judge McDonald said, as paragraph 42 that unforeseen expenses would be expected to arise over time (such as medical, upkeep/maintenance of family home). The Judge noted his comments in that case that the reasonable living expense guidelines are intended to be applied for the duration of a bankruptcy, PIA or DSA, and are not designed to apply over a lifetime. Therefore, post a personal insolvency arrangement period, it is reasonable for additional means to be in excess of the RLEs. The Judge expressed that it was important to note that a PIA is not unsustainable where the future income of a debtor is only marginally above the RLEs, and he acknowledged that the personal circumstances of the debtor have to be considered.

Conclusion

Judge McDonald was of the view that neither objecting creditor would suffer any unfair prejudice in the event that the proposed arrangements were confirmed by the Court, and he expressed that the creditors would do better under the arrangements than in bankruptcy. The Court confirmed the coming into effect of the proposed arrangements in accordance with their respective terms.

Other issues addressed by the Court

The Court addressed an issue in relation to the Recast Insolvency Regulation (Regulation (EU) 2015/848) arising on foot of an argument put forward by Bank of Ireland in relation to an overseas property subject to security held by BNP. Notwithstanding that no provisions of the Insolvency Regulation were put to the Court, the Judge did consider the Regulation and determined that BNP would be bound by the terms of the PIA. See paragraphs 67–69 of the judgment for further information.

The Court also addressed an issue in relation to whether the requirements of section 115(9)(g) (where at least one class of creditors has accepted the proposed arrangement by a majority of over 50%) had been complied with in respect of one of the applications where AIB voted in favour of the arrangement. AIB were an unsecured creditor, and characterised as a separate class of creditor to Bank of Ireland in the arrangement. Counsel for Bank of Ireland, the objecting creditor, argued that the bank should be included in that class for the unsecured portion of the debt. The Judge, reiterating his views in the *Lisa Parkin* decision, said that the rights and interests of AIB, and Bank of Ireland "*were so dissimilar as to make it impossible for them to consult together with a view to their common interest. They therefore formed separate classes*." See paragraphs 70–74 of the judgment for further information.

Hire purchase agreement concerns

Ms Phelan had a hire purchase arrangement for a car acquired at a time when AIB had agreed a moratorium on a loan, and AIB were not made aware of the HP agreement. AIB argued it was unfair and inequitable to retain this. The Judge did express some concerns in the failure to inform AIB of the agreement, however he acknowledged that the vehicle, the subject of the HP agreement, was necessary for the debtor to travel to and from work and thus remain in employment. See paragraphs 75–83 of the judgment for further formation.

See the full judgment for further information on the points discussed above [Link].

2.2 Matthews case – treatment of jointly-owned property

This was an appeal from an order of the Circuit Court refusing an application for an order pursuant to section 115A of the Personal Insolvency Act, 2012 (as amended) (the "2012 Act") approving a proposed PIA. The main issue for consideration related to the way in which the proposed PIA dealt with a property jointly owned by the debtor and his former wife, which was subject to a mortgage. .

Relevant facts

The debtor owns or jointly owns three properties: his current family home, his former family home, and a third property in which his former wife currently resides. The debtor's family home is subject to a mortgage in favour of Mars Ireland, is in substantial negative equity and is subject to an order for possession not yet recovered. The second property is subject to security in favour of Ulster Bank, and is in slight positive equity. The third property is subject to a mortgage in favour of Mars Ireland, which is being paid by the debtor's former wife, and is in moderate positive equity. The loan is not in arrears but is currently subject to an interest-only arrangement. There is also a debt due to Bank of Ireland which is secured by a judgment mortgage over the debtor's family home, and an excludable debt to the property management company of the former family home. The debtor wishes to (i) retain the family home (his principal private residence) and reduce the mortgage to the market value of the property and place a moratorium on the mortgage for a year at 0% interest, (ii) sell his former family home and (iii) transfer his beneficial interest of the third property to his former wife, who is a joint borrower.

The objection of Mars Ireland

Mars Ireland argued that the proposed treatment of the secured debt on the third property is contrary to the provisions of section 103(2) of the 2012 Act, which prohibits the reduction of the principal sum due in respect of a secured debt to less than the value of the security in cases where the relevant security is not to be sold but is to be retained.

Mars Ireland also argued that the proposed PIA was unfairly prejudicial to it for a number of reasons:

- the transfer by the debtor of his beneficial interest in the third property to his former spouse, thus reducing the parties liable to Mars;
- the one-year moratorium on payments with a 0% interest rate;
- the extent of the write-down on the loan;
- the reduction in the interest rate for five of the six years of the proposed PIA in respect of the family home (see judgment for further details on the proposed PIA).

Section 103(2) of the 2012 Act

Section 103(2) deals with circumstances where there is no sale or disposal of a secured asset under a proposed PIA. Judge McDonald expressed the view that the subsection is clearly referring to a reduction in the principal sum due in respect of a secured creditor. Mars Ireland argued that the unwillingness of the debtor's former wife to sell the third property in effect involves the writing down of the debt owed by the debtor to it in respect of this property to zero. The practitioner submitted that the proposal in relation to the third property makes practical, logical and commercial sense, and it was submitted that Mars Ireland is not at risk in respect of the third property or the loan, as all contractual obligations are being met and the loan is not in arrears, plus the property is in positive equity. The Judge acknowledged these "*pragmatic considerations"*, but said that the issue to be determined was a legal one and, if the proposed arrangement did not comply with section 103(2), "*the pragmatic considerations…cannot cure the non-compliance".*

The Judge, at paragraphs 19–24, addressed whether the proposed arrangement in respect of the third property (surrender of the debtor's interest to his former spouse) satisfied the provisions of section 103(2). The Judge did not accept the practitioner's submissions that the debt due by the debtor to Mars in respect of the third property was not being reduced. In this context he referred to a number of paragraphs of the practitioner's submissions which acknowledged that the debt due by the debtor would be extinguished under the proposed arrangement. The Judge commented that "*it may seem incongruous*" that the co-borrower, the debtor's former spouse, would be liable for the entire debt, while the joint and several debt owed by the debtor to Mars Ireland would be reduced to nil. In this respect, the Judge said that *"it must follow that the provisions of s. 103(2)(b) are not satisfied".*

The Judge further challenged the suggestion that the security was not being retained. "*The powers of a practitioner to deal with secured property are carefully circumscribed by the provisions of s. 103 of the 2012 Act*", and "*In the absence of some statutory power entitling a practitioner to formulate proposals … providing for the release of that mortgage, the mortgage remains in place"*. The Judge found that the mortgage was being retained, and he concluded that the arrangement contravened section 103(2).

Other matters

The Judge made some brief observations in relation to other issues which were debated at the hearing – suitability of the family home, the allegation of unfair prejudice to the objecting creditor, the suggestion regarding the debtor living below RLEs and the conduct of the debtor prior to the issue of the PC – see paragraphs 26–31.

On the matter of class of creditor, Judge McDonald disagreed with the position put forward by Mars Ireland that Ulster Bank and Bank of Ireland were not a separate class of creditor to Mars itself. The Judge held that Mars was a separate class due mainly to its position as holding security over the family home, which was the debtor's principal private residence. The Judge acknowledged that the rights of security holders over a principal private residence were capable of being "*affected in a uniquely different way*" to other security holders.

Judge McDonald dismissed the appeal on the basis that the proposed arrangement did not comply with the provisions of section 103(2) of the 2012 Act.

A full text of the judgment can be found here [Link].

2.3 Flynn case – class of creditor

The judgment addresses a preliminary issue relating to classes of creditor, and whether at least one class of creditor has accepted the proposed arrangement by a majority of over 50% of the value of the debts owed to the class as required by section 115A(9)(g) of the Personal Insolvency Act, 2012 (as amended) (the "Act").

The PIP argued that a firm of solicitors, which voted in favour of the proposed arrangement, were a different class of creditor than the general body of unsecured creditor on the basis that they had previously provided professional services, and a fixed sum invoice was due and owing, and the PIP classified them as the "*Professional Services Class of Creditor*". They further argued that unlike the other unsecured creditor, the solicitors firm had provided services, and that they would be entitled to exercise a lien over deeds and documents held by them on behalf of the debtor. This classification was disputed by the objecting creditor.

The constitution of classes of creditor for the purposes of the Act

There was extensive debate around the legal principles applicable to the constitution of classes of creditors for the purposes of the Act, and Judge McDonald identified the decision of Baker J. in *Sabrina Douglas* [2017] IEHC 785 as the principal authority in this context. In that case, Judge Baker said

"*It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest".*

Counsel for the objecting creditor put forward arguments that a test applied in an examinership in determining a class should be considered where the PIP argued that that test was based on a scheme of arrangement in a corporate setting, and must be distinguished from a personal insolvency arrangement. See paragraphs 12 to 27 for further discussion on this issue.

Judge McDonald determined that each of the unsecured creditors have similar rights, namely the right to be repaid the debt owed to them. Under the proposal, each unsecured creditor was to receive a dividend calculated in the same way; the rights to be released or varied were all the same; and the new rights to be given under the proposal were all the same. The Judge held that the rights of each of the unsecured creditors were "*sufficiently similar to the rights of the others that not only can they properly consult together but they should be required to do so*."

Other issues considered by the Court included:

- **The security held by the objecting creditor -** it was submitted that there was a distinction to be made between the firm of solicitors, and the objecting creditor, in circumstances where the objecting creditor holds security over property of a company in respect of which the debtor had given a guarantee. However, Judge McDonald felt this was an entirely academic point. Further details relating to this point can be found at paragraphs 28 – 30.
- **The allegation of *animus* –** see paragraphs 32 – 34 of the judgment for discussion on this issue.
- **Creditor holding security over a principal private residence *("PPR")* –** Judge McDonald reiterated his previously stated position that "*a creditor holding security over a principal private residence is capable of constituting a separate class of secured creditor for the purposes of section 115A(9)".* See paragraph 35.

Conclusion

Judge McDonald determined that the firm of solicitors could not be considered a separate class to the other unsecured creditors. Therefore, the condition set out in section 115A(9)(g) of the 2012 Act was not satisfied. A full text of the judgment is available here [Link].

2.4 New High Court Judge

The High Court now has a new judge hearing personal insolvency matters. Mr Justice Mark Sanfey has replaced Mr Justice Denis McDonald. However, Judge Sanfey has indicated that with regard to documents and papers relevant to a particular matter coming before the Court, they must be filed by the Wednesday of the week preceding the hearing of the matter. This is a continuation of the practice directed by Judge McDonald.

3 Business Metrics

3.1 ISI Statistics Quarters 2 and 3 2019

The ISI statistical reports covering the second (Q2) and third quarters (Q3) of 2019 are published on the ISI website via the following links: Q2, Q3.

In Q2 2019, the ISI completed a targeted awareness campaign designed to increase awareness of insolvency solutions. In comparison with Q1 2019, the number of arrangements approved and Protective Certificates secured increased by 4 and 40%, respectively while bankruptcy adjudications were down by 32%. These statistics now show the value of original debt involved in insolvency arrangements approved by the Courts as opposed to debt at the time of application for a Protective Certificate.

Due to the Courts summer recess, comparisons between Q3 2019 and Q3 2018 are more meaningful to identify trends than comparing Q3 2019 to Q2 2019. The number of Protective Certificates issued increased by 3% while the total number of arrangements approved have declined in the quarter. The number of PIAs (the solution that deals with secured debt, including family home debt) increased by 5% for the 9 months to Q3 compared to the same period in 2018. The level of bankruptcy adjudications for the 9 months to Q3 fell by 35% compared to the same period in 2018.

3.2 Abhaile

At the close of Quarter 4 2019, over 18,500 Abhaile Scheme vouchers had been issued, of which over 14,250 relate to vouchers to enable debtors avail of the services of a PIP. This equates to a monthly equivalent for PIP vouchers of approximately 340 vouchers. The balance of the issued vouchers relate predominantly to vouchers to avail of legal advice, of which 1,561 vouchers have issued for the purpose of providing legal advice to applicants pursuing section 115A reviews.

4 General

4.1 2020 'Back on Track' Information Campaign

January marks the start of the ISI's 2020 'Back on Track' information campaign with components across TV, radio, outdoor and social media. As with previous information campaigns, this campaign takes place at a time when people are reflecting on their Christmas spending and possibly in financial difficulty. The aim of the campaign is to assist and guide people in financial difficulty towards the correct services. This campaign has been refocussed somewhat to take account of feedback and the findings of research carried out following our Q1 2019 campaign.

TV continues to be a key medium with the campaign starting with a strong four week burst in January to target people straight after the Christmas period. Then it will follow a 3 weeks on and 1 week off approach for February and March. We are making use of both Broadcast Players Programmatic Video on Demand to ensure that we are extending our reach across different platforms.

We are creating an awareness through radio with two 40 second radio ads (one on Insolvency and the other on the subject of PIA) that will run over 700 spots across national and regional stations on a 2 week on, 2 week off basis giving an "always on" feel over the 3 months of the campaign.

Our out of home advertising is targeting formats to give a strong roadside presence nationally including bus shelters, adboxes, commuter points, purchase points and Luas columns. The campaign also includes a press and digital partnership with the Mirror, which includes 30 press insets, 3 months of digital activity and a continuation of last year's survey.

Digital media is a significant feature of the campaign allowing us to take a more targeted approach and build our audience based on the keyword searches through Facebook, Twitter, Journal.ie, RTE.ie, etc. We will be targeting those actively viewing content around welfare, unemployment and counselling services to raise awareness with these users. We will also be targeting users who have shown interest in content surrounding personal debt, debt consolidation loans and mortgage arrears.

Disclaimer

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