Insolvency Service of Ireland Stakeholder e-Brief October 2020

ISI

Tackling problem debt, together

Insolvency Service of Ireland
e-Brief October 2020

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1 Introduction – Message from the Director

I am pleased to introduce the eleventh 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.

The Covid-19 Pandemic has had an enormous logistical impact on all of us as stakeholders and the severity of the economic downturn that is already happening as a result of this health crisis is yet to be fully established. In light of this the ISI has welcomed the important changes to be contained in the upcoming Personal Insolvency (Amendment) (No. 1) Bill 2020. This Bill has Government approval for priority drafting and is a priority for the autumn session under the Government Legislative Programme. We continue to work with the Department of Justice and Equality to ensure that these changes are supplemented as quickly as possible with the further reforms contemplated in our submissions made under section 141 of the Personal Insolvency Act 2012.

The ISI was also pleased to help facilitate an agreement between PIPs (through APIP) and BPFI members regarding procedures for payment breaks, where required, for those debtors who are party to a statutory arrangement and also to relax procedures around proxy voting requirements. In addition, we are grateful to the Courts Service for continuing to facilitate the continuation of the personal insolvency process through hearing court cases remotely. We believe this is operating very effectively.

In September, the ISI launched our new Phoenix Case Management system. Given the logistical challenges associated with Covid-19 over the previous 7 months, this was a very difficult process and I'm grateful to our project team for their hard work in reaching this milestone. I am particularly grateful for the patience and constructive feedback from all our users as they become familiar with Phoenix and we address the inevitable teething issues that arise on the launch of a new system.

Finally, I look forward to meeting as many of you as possible, albeit probably virtually, over the coming months to discuss how we can make the insolvency framework work better for all of our stakeholders.

In the meantime, stay safe.

Michael McNaughton

2 Courts

2.1 Fay case - alleged inconsistences in affidavit evidence; retention of commercial unit

This case was brought as an appeal by Pepper Finance Corporation (Ireland) DAC ("**Pepper**") against the decision of the Circuit Court to approve a personal insolvency arrangement under section 115A of the Personal Insolvency Act 2012 (as amended) (the "**2012 Act**").

Relevant facts

Pepper was owed €482,149 which was secured over a property valued at €200,000. The proposed arrangement provided for the servicing of a €210,000 mortgage, with the written down amount of €272,149.00 being treated as an unsecured debt. Revenue preferential debt and the hire purchase debts were to be paid in full, with unsecured creditors receiving a 2% dividend.

The creation of exhibits subsequent to the swearing on the affidavit

Much of Judge McDonald's judgment is taken up with the issue of the creation of exhibits subsequent to the swearing of the debtor's affidavit sworn on the 22 May 2018 (the "**May 2018 Affidavit**").

In support of an averment made by the debtor in the May 2018 Affidavit, a printout from Daft.ie was exhibited. The exhibit sheet for the relevant exhibit was dated the 22 May 2018; however, the extract from the Daft.ie website was dated 16 July 2018. Furthermore, a handwritten estimate of costs exhibited in the May 2018 Affidavit was stated to have been prepared and signed by the debtor on 6 July 2018. These matters did not appear to be noticed by counsel for either party during the course of the Circuit Court proceedings. They were, however, brought to Judge McDonald's

attention by counsel for Pepper on the first day of the hearing of the appeal in October 2019 and Judge McDonald deferred making any ruling on the appeal and directed that a full explanation would have to be provided on affidavit by the relevant parties including by the solicitor acting for the practitioner and the solicitor before whom the affidavit was sworn. Judge McDonald noted at paragraph 18 of his judgment that it is *"of crucial importance to any court proceedings that parties and their legal advisors are aware of the fundamental obligation to ensure that the evidence given to the Court is truthful and presented in the correct manner."* Affidavits were subsequently sworn by the principal of the firm of solicitors acting for the practitioner, the solicitor before whom the affidavit was sworn and also by the debtor himself.

Pepper's submissions

Counsel for Pepper argued that when considering whether the requirements of section 115A of the 2012 Act have been satisfied in a case, reliable evidence must be before the Court to demonstrate that the requirements of section 115A are satisfied. Counsel submitted that it was not "*good enough"* that a moving party could proceed with an appeal on the basis of evidence which they knew was defective and there should be consequences for such. Counsel submitted that to show the Court's displeasure, the Court must refuse the relief sought under section 115A. Counsel for the creditor also argued that the retention of the commercial unit at the front of the property meant that the debtor had not brought the full range of his assets to bear for the benefit of his creditors. Counsel further argued that the practitioner had failed to conduct the assessment required under section 104 of the 2012 Act and that there was a large number of discrepancies in the papers before the Court.

Judge McDonald's consideration

Judge McDonald noted in his judgment that he gave very careful consideration to the submission that the Court should show disfavour by allowing Pepper's appeal and refusing relief under section 115A. The Judge, however, in the circumstances set out at paragraphs 98–102 of his judgment, concluded that it would be wrong to dismiss the section 115A application solely on the ground that exhibits were created after the debtor swore his affidavit. The Judge also concluded that it would be wrong to reject the entirety of the evidence given by the debtor on affidavit and wrong to dismiss the application on that basis. The Judge was further satisfied that the arrangement was formulated

in accordance with section 104 of the 2012 Act having considered the evidence placed by the practitioner as a whole and concluded that when taking into account the factors discussed at paragraphs 143–146 of his judgment, the cost of retention of the family home was not disproportionate in all of the circumstances. Judge McDonald further came to the conclusion that the house and commercial unit were not severable, and stated that even if he was wrong in his conclusion, it was clear from the bankruptcy comparison that Pepper would do better under the proposed arrangement than the immediate sale of the debtor's property in the event of bankruptcy. The Judge ultimately concluded that the appeal must be dismissed and the decision of the Circuit Court affirmed.

Observations in relation to the quality of affidavit evidence in cases under the 2012 Act

Judge McDonald addressed at paragraphs 104–107 of his judgment the responsibility that practitioners have in the insolvency process to ensure that the quality of affidavit evidence presented to the Court is not formulaic but bespoke to the individual facts of every case, something which he believed could lessen the scope for legal challenge. He noted that it is "*all too common to find that affidavits sworn by practitioners contain formulaic averments which are repeated word for word from one affidavit to the next*". He went on to state that they often bear no relationship to the facts of the case and that practitioners appear to be cutting and pasting the same paragraphs without any real consideration of the facts of the individual case. He stated that affidavits are not application forms to be adapted, but rather every affidavit must address particular facts of the case and put those facts before the Court. Judge McDonald also noted that that it is "*equally important*" that practitioners bear in mind their role as independent intermediaries and understand that this requires practitioners to apply appropriate ethical standards.

Wasted Costs Order

The Judge made a wasted costs order against the firm acting for the practitioner. In assessing the sum to be paid, the Judge had regard to the "*gravity of the issue*" and also the principal of the firm's very "*proper attitude*" in response to the concerns raised by the Court.

Judgment on Costs

For reasons set out in Judge McDonald's decision of 8 May 2020, no costs were awarded against the creditor in this matter.

The full text of both the main decision and the costs decision can be found here:

Personal Insolvency Acts, 2012 to 2015 v Fay (a Debtor) 6 April 2020

Personal Insolvency Acts, 2012 to 2015 v Fay (a Debtor) 8 May 2020

2.2 Forde Egan case - creditor's rights against husband (a discharged bankrupt)

This case concerned an appeal to the High Court following the decision of the Circuit Court to reject an objection by Bank of Ireland Mortgage Bank (the "**Bank**") to an application under s.115A(9) of the Personal Insolvency Act, 2012 (as amended) (the "**2012 Act**")

Relevant facts

The debtor owed the Bank €624,457 in respect of the loan secured on the family's principal private residence ("PPR"). For the purposes of the arrangement, the PPR was valued at €410,000. The proposal included a write-down of the debt to €451,000 with the residual balance being treated as unsecured debt.

Would confirmation of the proposed arrangement deprive the Bank of its rights against the debtor's husband under section 116(6) of the Act?

The Bank objected on a number of grounds, but the main argument made was that approval by the court of the coming into effect of the arrangement would have the effect of depriving the Bank of its rights against the debtor's husband, a discharged bankrupt, under the provisions of section 116(6) of the 2012 Act.

As set out by Judge McDonald at paragraph 9 of his judgment, section 116(6) of the 2012 Act permits a creditor to take action against a person who is jointly liable with the debtor. In this regard, Judge McDonald noted that the provisions of section 116(6) of the Act have been considered in a number of cases and a review by Judge McDonald of the relevant findings in *JD* [2017] IEHC 119, *Lisa Parkin* [2019] IEHC 56 and *Ahmed Ali* [2019] IEHC 138 can be found at paragraphs 10–17 of the judgment.

Adjudication in bankruptcy of the debtor's husband

The Bank submitted that as a consequence of Mr. Egan's adjudication in bankruptcy, the debtor and her husband held separate moieties in the family home as tenants in common and therefore the debtor could not offer, in circumstances where she only owned 50% of the property, 100% of the value of the property as security for a loan for which she was now solely liable.

On the basis of the above mentioned scenario the Bank made two submissions:

1. The Court was precluded by section 115A(9)(b)(iii) of the 2012 Act from making an order confirming the coming into effect of the proposed arrangement if the Court could not be satisfied that there is a reasonable prospect that confirmation of the arrangement would enable the debtor not to dispose of an interest in, or not to cease to occupy all or a part of her principal private residence. As set out in paragraph 24 of the judgment, the Bank submitted that this condition could not be satisfied in circumstances where under section 116(6) of the 2012 Act, the Bank must be entitled to pursue a remedy against the debtor's husband under section 31(2)(a) of the Land and Conveyancing Law Reform Act 2009.
2. It would be unfair and prejudicial to the Bank's interests if the Bank was precluded from realising Mr. Egan's 50% share in the family home.

Judge McDonald noted in his judgment that the debtor was not offering 100% of the value of the property as security for the mortgage loan. He stated that the security was already in place and the debtor was "*simply seeking to compromise the level of her indebtedness to her creditors without disturbing the existing security in any way*"

In response to the Bank's first submission as set out above, the Judge, while acknowledging that the Bank had the *"undoubted right"* to pursue the debtor's husband whether by partition or by an order for sale in lieu of partition it would be wrong to conclude that section 115A(9)(b)(iii) of the 2012 Act could not be satisfied. For the reasons set out at paragraph 30 of his judgment, Judge McDonald was of the view that the outcome of any proceedings to enforce the Bank's security against the debtor's husband was so uncertain that it was appropriate to conclude that if the Court was to confirm the arrangement, there was, at a minimum, a reasonable prospect that this would secure the continued occupation of the family home by the debtor and her children.

In addressing the Bank's second submission set out above, Judge McDonald was of the view that it was "*entirely unreal*" to suggest that the Bank would be unfairly prejudiced if, for practical reasons, it was not feasible for the Bank to pursue enforcement against the debtor's husband as a consequence of the proposed arrangement being confirmed by the Court. Judge McDonald stated that this was for the *"very simple reason that the bank will fare much better under the proposed arrangement than it would by pursuing action against Mr. Egan".*

Alternative case on unfair prejudice

The Bank submitted that the effect of the proposed arrangement was to frustrate the Bank's right to realise its security against the debtor's husband, a former bankrupt, *"while, at the same time, putting any further acquired assets including his pension beyond the reach of his creditors".* The Bank submitted that such a proposal was so unfair and prejudicial to its rights and interests that the Court was precluded under section 115A(9)(e) and (f) of the 2012 Act from confirming it. The Bank also made the case that the proposed arrangement would not enable the Bank to recover its debt to the extent that the means of the debtor reasonably permit. However Judge McDonald, having considered both matters, concluded that the argument on unfair prejudice fell away (see paragraphs 34–48).

Judge McDonald was also satisfied that the class of creditors that supported the proposed arrangement was valid, and that *"notwithstanding the relatively modest proportion of the debts due to them, the unsecured creditors should be treated as a valid class…".* He was also of the view that given the comprehensive nature of the evidence provided regarding the debtor's family circumstances, her poor payment record in the two years preceding the granting of the protective certificate would not justify the court refusing the application.

Finally, Judge McDonald was satisfied that the counterproposal by the Bank did not represent a sustainable or affordable option, given the circumstances of the case. He believed all the requirements of section 115A of the 2012 Act had been met and affirmed the order of the Circuit Court approving the coming into effect of the arrangement.

Costs

For the reasons set out in his judgment of 2 March 2020, Judge McDonald concluded that it would be appropriate to make an order for costs against the Bank in relation to the appeal.

The full texts of both the main decision and the costs decision can be found here:

Personal Insolvency Acts, 2012 to 2015 v Forde Egan (a Debtor) 20 Dec 2019)

Personal Insolvency Acts, 2012 to 2015 v Forde Egan (a Debtor) 2 March 2020

2.3 Lowe Case - lawfulness or otherwise of debt for equity swap

This was an appeal from an order to 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 the proposed personal insolvency arrangement ("**PIA**"). The main issue for consideration related to the lawfulness or otherwise of a PIA which proposed a debt for equity swap.

Relevant facts

The debtor had a total indebtedness of €561,685. The secured creditor ("**Bank**") had two loans in the total sum of €358,502 secured on the family home. There was also a sum of €9,913 secured by way of a judgment mortgage. The family home was valued at €300,000.

Under the proposed arrangement, the Bank's debt of €358,502 would be written down to €300,000, being the value of the property. The remaining sum of €58,461 was to be written off and rank as an unsecured debt in the arrangement. Out of the reduced mortgage debt of the €300,000, the sum of €170,000 was to be treated as the live mortgage balance, while it was proposed that the remaining indebtedness of €130,000 would be swapped for a 43.3% equity share in the property.

Submissions on behalf of the Bank

Paragraph 18 of Judge McDonald's judgment sets out the grounds on which the creditor opposed the section 115A application. These included the following:

1. on a proper interpretation of the 2012 Act, a "debt for equity" swap can only take place with the consent of the relevant secured creditor;
2. a "debt for equity" swap can only take place where there is positive equity in the property;

3. the proposed arrangement contravened section 103(2) of the 2012 Act as the arrangement proposed a reduction of the principal sum to less than the value of property; and
4. the Bank would get no more than the "hope value" of the property based on the hope that the value of the property would increase in the future.

Is the consent of the secured creditor required?

Judge McDonald, having regard to the language used in both sections 103(1) and 103(2) of the 2012 Act, concluded that section 103(2) of the 2012 Act made it very clear that the principal sum cannot, without the consent of the creditor concerned, be written down to less than market value. He stated that the "*requirement of consent would be meaningless if the subsection was to be interpreted as being merely directory or aspirational.*"

The personal insolvency practitioner ("**PIP**") argued that the principal sum had not been reduced below the value of the property. The PIP submitted that the arrangement was consistent with section 103(2) of the 2012 Act and that the entire market value of the property was accounted for, in that in addition to repayment of €170,000, the Bank was to receive a 43.3% interest in the family home which, on the basis of the current market value of €300,000, equated in value to €130,000.

Judge McDonald, however, did not believe that the PIP's arguments withstood any *"serious level of scrutiny*", and for the reasons set out paragraph 32 and 33 of his judgment, concluded that the reality was that the principal sum had been reduced to €170,000.

He stated at paragraph 34 that "*The fact the arrangement provides some other form of value to the bank does not, in my view, alter the fact that the principal sum has been reduced to €170,000. It seems to me that the reduction in principal occurs even where compensation is also provided to the secured creditor under the terms of the arrangement in the form of an equity share. By its very nature that "equity share" will fluctuate in value."*

Section 102(6)(f) of the 2012 Act

Judge McDonald then went on to consider, in circumstances where the principal sum had been reduced below the market value of the property and therefore could not be confirmed in the absence of creditor consent, if there was some other provision of the 2012 Act that would permit the PIP to proceed in the manner proposed. In this regard, the PIP submitted that section 102(6)(f) of the 2012 Act expressly permitted the arrangement proposed.

Judge McDonald however held the view that section 102(6)(f) of the 2012 Act "*clearly contemplates that the share of a debtor's equity to be given to the secured creditor is not treated as part of the reduced principal sum.".* He was of the view that "*the granting of a share in the debtor's "equity" is treated as the quid pro quo for the reduction in the principal sum."*

The Judge further stated that it was clear from the wording of section 102(6) that the provisions of section 102(6)(f) are subject to section 103(2) and, as such, any reduction in the principal sum due to the creditor, on the basis that the creditor will be granted a share in the debtor's equity in property, could not be set at a figure less than the market value of the property without the creditor's consent. The Judge stated that it was not possible to construe section 102(6)(f) "*as overriding or taking precedence over the requirements of section103(2)"*.

Conclusion

In light of the Judge's views on the proper interpretation of sections 103(2) and 102(6)(f), he was unable to reach a view that the requirements of section 99 of the 2012 Act had been satisfied in the case and, as such, the application under section 115A of the Act could not succeed.

Obiter Comments

Judge McDonald was of the view that it might be helpful to address the argument made by the Bank that a '*debt for equity'* swap can only take place where the debtor has some equity (i.e. positive equity) in the property. He stressed however that anything he said on this was purely *obiter*.

The Judge noted that, as recorded in paragraph 16 of his judgment, counsel for the PIP had argued that the word 'equity' as set out in section 102(6)(f) of the 2012 Act should be interpreted as meaning ownership. The Judge stated, however, that the difficulty with this argument is that it is contrary to the ordinary meaning of the word 'equity' which is concerned with the extent of the value held by the legal owner in property which is subject to a mortgage. The Judge came to the view, purely on an obiter basis, that 'equity' must be interpreted as positive equity in the property in the sense described at paragraph 12.05 of Wylie's book *"Irish Land Law"* 5th edition (an extract of this paragraph is set out at paragraph 43 of Judge McDonald's judgment).

The Judge went on to state that he fully appreciated the submission that an arrangement of the kind proposed might work significantly better in practice than most forms of warehousing, as depending on the circumstances, such arrangements could give rise to insolvency at the end of the mortgage

term. However if such arrangements were to be made available, the Judge was of the view that *"significant amendments"* would have to be made to 2012 Act.

The full text of the judgment can be found here:

Personal Insolvency Acts, 2012 to 2015 v Lowe, a Debtor

2.4 Nuzum case - costs associated with remaining in PPR, disproportionately large

This case concerned an appeal to the High Court following the decision of Dublin Circuit Court to uphold an objection by Promontoria (Aran) Ltd ("**Promontoria**") to an application under section 115A(9) of the Personal Insolvency Act, 2012 as amended (the "**Act**").

Relevant facts

This was a single creditor case where Promontoria objected to a PIA that provided for the retention of the family home which was valued at €1 million and which was subject to a mortgage of almost €711k, with equity of approximately €289k in the property. Promontoria rejected the arrangements and contended that the debtors had the means available to discharge the debt from the proceeds of sale of their residence and accordingly could not be considered to be insolvent for the purposes of the Act.

The objection of Promontoria

Promontoria objected on a number of grounds:

1. that the debtors were not insolvent;
2. that they were unfairly prejudiced
   (a) where the costs of enabling the debtors to continue to reside in their residence were disproportionately large and where the residence is said to be excessive for their needs;
   (b) where they would incur the costs of a personal insolvency arrangement and a home loan restructure in circumstances where the residence of the debtors is in substantial positive equity; and
   (c) where the proposed term extension would extend beyond the ordinary retirement age of the debtors to age 78.

Promontoria claimed that bankruptcy would provide a better – and immediate – return.

Paragraphs 19 to 21 of the judgment provide details of the contents of replying affidavits filed by the personal insolvency practitioner ("**practitioner**"), Promontoria and the debtors respectively. Judge McDonald refused the practitioner's application to submit evidence to the Court regarding the debtors' business which should have been provided at the hearing, not the appeal.

Insolvency under section 2(1) of the Act

There was some discussion regarding the meaning of the word "insolvent" in the context of the definition contained in the Act, and paragraphs 26–50 included much reference to legal precedents to which the Court had regard. Judge McDonald also considered the applicable principles extracted from case law in relation to insolvency at paragraph 51–56 – namely the consideration of cash flow versus balance sheet insolvency, and whether a family home (PPR) represents a "*readily realisable*" asset. The Judge rejected Promontoria's submission that for the purposes of considering solvency of a debtor, a court could take account not only of cash flow, but also the balance sheet position. In his judgment, Judge McDonald concluded "*properly analysed, the 2012 Act does not envisage the use of a balance sheet test in determining whether or not a debtor is insolvent".*

In the case of the debtors, the Judge concluded that whilst the positive equity in the family home was not a small amount, in his view it was not on a scale which "*would make it absurd to disregard it"* for the purposes of determining the solvency of the debtors. The Judge found that the family home was not an asset which was *"readily realisable"* for the purposes of the application of the cash flow test for several reasons, including the necessity of the debtors to find a suitable alternative before selling the family home. Judge McDonald ultimately held that the debtors were insolvent within the meaning of section 2(1) of the Act and were therefore entitled, on that basis, to seek relief under the Act.

Are the requirements of section 115A satisfied in this case?

Promontoria raised issues as to whether the requirements of section 115A(9)(a), (b), (c), (d) and (f) of the Act were satisfied in this case. Judge McDonald, in paragraphs 57–88 of the judgment sets out in detail his reasoning as to how the statutory requirements had not been satisfied in the case.

For the purposes of section 115A(9)(a) and (d), Judge McDonald noted that the Court must be satisfied that a proposed arrangement has been formulated in accordance with section 104 of the Act. Section 104 provides that when formulating a proposed arrangement, the practitioner must ensure, as far as practicable, continued occupation by the debtors of their PPR subject to the considerations set out in section 104(2), including whether or not the costs of remaining in the PPR are disproportionately large, and practitioners must also consider "*any appropriate alternatives".* Appropriate evidence to that effect should be provided by the practitioner to the Court. The Judge commented *"By imposing these requirements, it seems to me that the Oireachtas was seeking to strike a balance between the obvious desirability of a debtor being able to retain the family home, on the one hand, and the need to ensure that this did not give rise to excessive or unrealistic costs, on the other. Depending on the circumstances, it may be counter-productive, in some cases, to attempt to retain the existing family home, particularly if the costs of doing so create a real risk of future insolvency."*

Having considered the affidavit evidence provided by the practitioner and a number of the points raised by one of the debtors in her affidavit (on behalf of both debtors), Judge McDonald agreed with the complaint of Promontoria that the evidence to the extent provided by the practitioner in the affidavits was *"pro forma in the extreme"* and *"very generalised."* On the basis of the evidence, Judge McDonald concluded that as there "*wasn't a sufficient basis to form the view that the terms of the proposed arrangement had been formulated in compliance with s. 104*" the condition set out in section 115A(9)(a) was not satisfied in this case.

He further noted that the PIAs would also see the debtors having to repay a total of €1,202,928.48 to Promontoria over 30 years, an increase of some 69% on their existing liability. He was of the view that the costs likely to be incurred by the debtors by remaining in occupation of their current home were *"disproportionately large*", and that by seeking to maintain their current home they were exposing themselves to future insolvency.

A term of the proposed arrangement extended the mortgage payments until the debtors were 78 and 79. Given the lack of evidence before the Court in relation to how the debtors would pursue their current occupations until that age, the Judge could not establish that the debtors would sustain

the mortgage up to ages 78 and 79. Thus, he found that section 115A(9)(c), the sustainability of a proposed arrangement was not satisfied.

Judge McDonald concluded that the retention of the family home was not in the best interests of the debtors nor was the public interest served by confirming the PIAs. He also considered that there was an unfair prejudice to Promontoria in circumstances where it is exposed to the risk of future default by the debtors. He concluded that the requirements of sections 115A(9)(a), 115A(9)(b)(i), 115A(9)(c), 115A(9)(d) and 115A(9)(f) were not satisfied in this case. In his view, the applications under section 115A could not succeed. The Judge dismissed the appeals and affirmed the orders previously made by the Circuit Court.

The full text of the judgment can be found here:

Personal Insolvency Acts, 2012 to 2015 v Nuzum, a Debtor

2.5 Hyde case - judgment mortgage creditor treated as an unsecured creditor

This case dealt with an objection lodged by Promontoria (Scariff) DAC ("**Promontoria Scariff**") under section 112(3) of the Personal Insolvency Act (as amended) (the "**2012 Act**") to a personal insolvency arrangement ("**PIA**") one of the grounds that *"the procedural requirements specified in this Act were not complied with".*

The objection

At the hearing of the objection, Promontoria Scariff argued that the procedural requirements specified in the 2012 Act had not been complied with because the personal insolvency practitioner ("**practitioner**") had incorrectly classified a judgment mortgage creditor, GE Capital Woodchester Limited ("**GE Capital**"), as an unsecured creditor.

GE Capital had voted against the proposed PIA but their vote was outweighed by the value of the debt owed to the remaining unsecured creditors who voted in favour of the arrangement. If the debt due to GE Capital had been treated as a secured debt, this would have altered the total value of the secured debt from 50.3% voting in favour and 49.7% voting against the proposal to 48.24% voting in favour and 51.76% voting against. In such circumstances, the requirements of section

110(l) of the 2012 Act that creditors representing more than 50% of the value of secured debts voted at the creditors' meeting must vote in favour of the proposal could not be satisfied and the proposed arrangement could not be considered to have been approved by the creditors.

The case made by Promontoria Scariff

Counsel for Promontoria Scariff firstly submitted, given the definition of "*secured creditor*" and "*secured debt*" in the 2012 Act, that there could be no doubt but that GE capital was a secured creditor for the purposes of the arrangement proposed.

Counsel for Promontoria Scariff then set out the various mechanisms under the 2012 Act by which a secured debt could be treated as unsecured and an argument as to how each of the mechanisms did not apply/could not be relied on in this case (see paragraphs 11–20 of the judgment).
Counsel argued that unless the statutory procedures set out in the 2012 Act are followed, there is no other mechanism by which a secured debt can be treated as an unsecured debt for the purposes of the vote by creditors on a proposed arrangement.

The practitioner's submissions are set out in paragraphs 21–23 of the judgment, and include that as GE Capital chose to prove the debt owed as an unsecured creditor, it had waived any claim to be treated as a secured creditor for the purposes of the proposed arrangement or for the purposes of voting on that arrangement. Counsel for the practitioner further argued that where a secured creditor waives it status in such a way, an express statutory mechanism permitting such a waiver is not required and furthermore, where a statute expressly provides for one or more such mechanism, "*there is no requirement that the secured creditor must utilise such an mechanism in order to validly waive its status as a secured creditor*".

Discussion

Judge McDonald felt it was clear from the proof of debt form submitted by GE Capital that it accepted that it had no security over the debtor's property and that it did not consider itself to be a secured creditor notwithstanding the judgment mortgage held by it. Referring to Promontoria Scariff's argument that a creditor can only waive or dispense with its status as a secured creditor under one of the provisions of the 2012 Act, Judge McDonald considered that the principle of statutory interpretation "*expressio unius est exclusio alterius"* (the explicit mention of one (thing) is

the exclusion of another) should not apply here in circumstances where, as a matter of law, virtually any right can be waived either expressly or by implication or by conduct including a statutory right in the absence of any express statutory provision to the contrary. He noted that there was no provision in the 2012 Act prohibiting all forms of waiver of rights by a secured creditor other than those specifically provided for in the 2012 Act and could see nothing in the general tenor or scheme to suggest that the Oireachtas intended to displace or exclude the ordinary operation of the law of waiver. Judge McDonald was of the view that in *"these circumstances, the fact (if it be a fact) that the procedures set out in the 2012 Act (which would give rise to a statutory loss of secured status) may not have been followed, does not, to my mind, mean that a waiver of GE Capital's secured status could not take place".* He felt it was to be expected that GE Capital as a commercial entity would accept, following the valuation agreed with Promontoria Scariff, that the debtor had no remaining equity against which the judgment mortgage could be enforced, that it was *"entirely logical and commercially sensible to accept that it should no longer be considered to be a secured creditor"*, and that there would be no sense in valuing more than the security held by a first charge holder.

Accordingly, Judge McDonald concluded that GE Capital waived its status as a secured creditor and was correctly treated by the practitioner as an unsecured creditor for the purposes of the votes taken at the creditors' meeting, and dismissed the objection raised by Promontoria Scariff.
The full text of the judgment can be found here:
Personal Insolvency Acts, 2012 to 2015 v Gary Hyde, a Debtor

2.6 Varvari case - costs

Relevant facts

This case concerned an application by an objecting creditor for costs against a personal insolvency practitioner (the "**practitioner**") relating to an unsuccessful appeal by the practitioner from an order made by the Circuit Court refusing the practitioner's application under section 115A(9) of the Personal Insolvency Act, 2012 (as amended) (the "**Act**").

The objecting creditor's, Tanager DAC ("**Tanager**"), grounds of objection included that the practitioner failed to carry out adequate due diligence to establish the debtor's income position and did not exercise his own independent function to satisfy himself in relation to the debtor's

income. Tanager also argued that the earnings of the debtor and his wife fell significantly short of the household income on which the proposed arrangement had been predicated, which they alleged the practitioner was aware of, and therefore the appeal should not have been pursued as it was likely to fail.

The thrust of the creditor objection, and the court's concern, centred on the apparent lack of appropriate verification by the practitioner of the income of the debtor and his wife. The practitioner relied at the time of swearing his affidavit in June 2018 on information provided by the debtor's accountant, but further affidavits put before the Court in 2019 did not rectify the income figures, despite their availability through relevant tax returns. Instead, the practitioner confirmed on affidavit that the debtor's *"current income, current expenditure, current affordability has been assessed and verified".* In his judgment, Judge McDonald placed emphasis on the obligations on the practitioner under both the Act and procedures under the agreed PIA Protocol, and felt that in this instance, the practitioner had fallen far short of these obligations.

Relevant law

It was put to the Court by both parties that the Court's jurisdiction to award costs against a practitioner must be exercised sparingly, and the decisions of Baker J. in Re*: James Nugent* [2016] IEHC 309, Re*: Darren Reilly* [20171 IEHC 558 and Re: *Niamh Meeley* [2018] IEHC 38 were referenced in this regard. Judge McDonald noted, at paragraph 59, that *"there is a recognition and understanding on the part of all participants in the process that an application for costs will only be entertained in exceptional circumstances…"*

Judge McDonald also emphasised the requirements for full and appropriate disclosure by debtors, and the practitioner's obligation to ensure that has been done. In the case of applications under section 115A, the Judge noted the importance of practitioners understanding that they are "*independent professionals*" and have a duty to place all facts before the court which are relevant to any of the statutory conditions in section 115A. See paragraphs 40–62 for further discussion on the relevant law.

Conclusion

Judge McDonald identified a number of areas of concern:

- the practitioner did not take the necessary steps to verify the income of the debtor in accordance with Appendix 3 to the Protocol. Relying on information from the debtor's accountant was permissible, however Judge McDonald felt that the letter from the accountant came "*nowhere near the level of verification that was required to be undertaking by the practitioner*". He did not believe, however, this failing came within the "*rubric of exceptional circumstances as envisaged by Baker J. in Niamh Meeley".*

- Judge McDonald was also concerned about the practitioner's apparent *"unquestioning reliance"* on the PFS made by the debtor without an examination of the information disclosing the debtor's financial affairs as required under section 50(1) and (2) of the Act. However, the Judge did not believe that, taken on its own, it could be said to give rise to a liability in costs.
- Judge McDonald was of the view that the averments in the June 2018 affidavit were misleading, and gave the "*false impression that a careful and comprehensive process of verification had taken place".* The Judge McDonald was of the view that this was within the "*Meeley rubric and is of sufficient gravity to merit an award of costs being made against the practitioner - subject to the existence of any countervailing circumstances that might justify a different outcome."*

- In circumstances where the tax returns "plainly demonstrated" that the proposed arrangement was unsustainable, the Judge expressed his concern in the practitioner bringing the appeal given that it was "bound to fail". The Judge said "*…it was blindingly obvious that the appeal should have been withdraw. The pursuit of the appeal was accordingly vexatious"*, thus exposing the practitioner to a liability in costs for the appeal (subject to consideration of any countervailing circumstances).

The Judge considered whether there were any countervailing circumstances relevant to the exercise of the Court's discretion under section 115A(14) of the Act. While noting that the practitioner did not put forward any satisfactory explanation for proceeding in the way that he did, he has shown genuine remorse and regret, and acknowledged his own failings. The Judge noted that the practitioner did disclose the evidence in relation to the tax returns but did not take any

steps to bring the appeal to an end at that stage. However, these factors were not of "*sufficient weight*" to prevent a costs order being made against the practitioner in this case, but were relevant to the extent of the liability to be imposed.

In consideration of the practitioner's admission of errors, and as it was the first costs order to be made, a costs order in the sum of €6,000 plus VAT (if applicable) was made against the practitioner, which represented two thirds of the fees (excluding VAT) that the practitioner would have earned had the arrangement been confirmed by the court. Noting that it was a "*fraction of the cost*" which the creditor has incurred, given it was the first such order made, the Judge commented that there was no reason in the future why "*practitioners should not be fixed with a more significant liability for costs of proceedings which would never have been incurred had they acted properly.*"
The full text of the judgment can be found here:
Varvari -v- The Personal Insolvency Acts 2012 to 2015

2.7 McNamara case - class of creditor, service and sustainability

The High Court appeal decision was delivered in two separate judgments, the first on 20 August 2019 ("**the 2019 judgment**") and the second on 2 March 2020 ("**the 2020 judgment**"). For the purposes of this summary, we deal with the judgments collectively.
A broad range of issues was raised by the objecting creditor Tanager DAC ("**Tanager**") in the case including:

- service of the section 115A applications on the statutory notice parties, which Judge McDonald felt had no real substance (paragraphs 13 to 16 of the 2019 judgment); and
- whether there was an appropriate class of creditors that had voted in favour of the proposed arrangements for the purposes of section 115A(9)(g) of the 2012 Act, the appropriateness of which the judge was satisfied with, and which is dealt with extensively in paragraphs 17 to 61 of the 2019 judgment. Of particular note was the Judge's comment that *"the voice of Revenue is important, notwithstanding the size of the debt due",* a point similar to one made in *Ahmed Ali* [2019].

Tanager questioned the sustainability of the arrangement in circumstances where, following a term extension as part of the solution, the debtors would both be in their mid- to late-70s. However, Judge McDonald acknowledged that while 70 is usually regarded as the upper age limit on extensions of mortgage terms, he noted that retirement age is moving upwards in recent years, and that the debtors are both in self-employed professions in which many people continue well beyond normal retirement age. Having taken this into consideration along with the figures in the arrangement (paragraphs 65–69), which showed a modest buffer during the term of the arrangement and a larger one beyond it, Judge McDonald was satisfied as to its sustainability.

The matter of the conduct of the debtors during the two-year period prior to the issue of the protective certificates was dealt with in paragraphs 70–75. The Judge was influenced by the fact that, notwithstanding their previous repayment history, real efforts had been made since August 2017 to make substantial monthly payments to Tanager, noting that *"the commencement of proceedings under the 2012–2015 Acts has had a salutary effect".* He concluded that their past payment performance should not operate to prevent an order being made under section 115A(9).

The remaining grounds of objection, (i) proposed arrangements were unfairly prejudicial to Tanager, (ii) alleged discrepancies between the Prescribed Financial Statement ("**PFS**") and Standard Financial Statement ("**SFS**") and (iii) no reasonable prospect of Tanager recovering their debts to the extent that the means of the debtors reasonably permit, are dealt with in paragraphs 86–99 of the 2019 judgment, and further in the 2020 judgment.

At the conclusion of the first hearing, Judge McDonald, while minded to approve the arrangements, was unable to do so until a further debtor affidavit specifically in relation to (ii) was received and considered. It is these grounds that were specifically dealt with in the second judgment of the Court of 2 March 2020.

The central points of objection by Tanager were that the figures contained in the PFS differed substantially (lower) than had been previously included in the SFS with regard to the value of Mr. McNamara's late father's inheritance. This was explained by the debtor as having been entered at its full value, and not a value that represented only his share and reduced for costs that would be incurred in the realisation of the value of the property on a sale. The discussion also involved rent that had been received by the debtors but not disclosed in the PFS. Tanager had submitted that the

value of the rental income received since the protective certificate was granted would have to be repaid to the estate of the debtor's late father, and argued that on the basis that family members had organised to gift the amount owed, the debtors had therefore increased their liabilities which would mean the proposed arrangement would not return them to solvency. Tanager had further submitted that there would be capital acquisitions tax (CAT) due on the gifted amount; however, the debtor explained that the structure of the gift was done in a way that would not cause any tax liability to occur. The discussions around these matters are set out comprehensively in paragraphs 6–20 of the 2020 judgment.

Judge McDonald was satisfied that the discrepancy between the SFS and PFS had been adequately explained. He was troubled, however, by the lack of full disclosure regarding the rental income, noting that full disclosure is required under the Act, and that it took until after the Court's first judgement in August 2019 before the matter was adequately explained. He was critical of both the practitioner and the debtor in this regard when it was not adequately explained on affidavit, noting *"the approach taken by the practitioner and by Mr McNamara in response to Ms O'Brien's affidavit does not reflect well on either of them".* Following the explanations given however, Judge McDonald accepted the reasons for which the rental income was not disclosed in the PFS, which was that it was not expected to be a feature of Mr McNamara's income for more than a very short period of time. The Court's assessment of the various points raised is dealt with in paragraphs 21–38 of the 2020 judgment, and the conclusion at paragraphs 39–40. In summary, Judge McDonald found that notwithstanding the lack of adequate disclosure, there was *"substantial compliance with the requirements of the subsection"* (section 91(1)(e)), that *"the assets of the debtors have been brought to bear for the benefit of their creditors"*, and that *"the proposed arrangement did not unfairly prejudice the interests of Tanager".* On 31 July 2020, following confirmations sought by the Court following its partial ruling in March 2020, Judge McDonald approved the coming into effect of the PIAs.

The full text of both judgments can be found here:

Personal Insolvency Acts, 2012 to 2015 v Frank and Teresa McNamara 20 August 2019

Personal Insolvency Acts, 2012 to 2015 v McNamara (a Debtor) 2 March 2020

2.8 New High Court Judge

The High Court has a new Judge dealing with bankruptcy matters. Mr. Justice Humphries has replaced Ms. Justice Pilkington. A Practice Direction seeking to replace HC65 (**Service of the Statement of Affairs and the Statement of Personal Information on the Official Assignee and the Publication of the Notice of Adjudication**) and HC66 (**Personal Insolvency Practitioner Letters in Bankruptcy Matters**) is under consideration in relation to management of the Bankruptcy List. Any ideas from interested parties for improving the efficiency of the list especially considering the Covid-19 circumstances are welcome and can be provided to the Bankruptcy Registrar at **examinersmail@courts.ie** by 21 October 2020.

3 Business Metrics

3.1 ISI Statistics Quarters 1 and 2, 2020

The ISI statistical reports covering the first (Q1) and second quarters (Q2) of 2020 are published on the ISI website via the following links: Q1, Q2.

While total numbers of Protective Certificates (PCs) issued and Arrangements approved in Q1 2020 increased by 13% and 11% respectively over the same period in 2019, activity was impacted by the Covid-19 pandemic with March seeing a significant decrease in the numbers of both PCs issued and Arrangements approved. When March is excluded from the Q1 figures, the first two months of the year show a 50% increase in both the numbers of PCs issued and Arrangements approved compared to the same period in 2019. Quarter 2 figures show that the total number of PCs issued and Arrangements approved decreased by 57% and 63% respectively over the same period in 2019. As expected, activity in the quarter was significantly impacted by the effects of the Covid-19 pandemic. In respect of bankruptcies, the downward trend evident in 2019 has continued into 2020.

3.2 Abhaile

At the close of Quarter 3 2020, over 22,533 Abhaile scheme vouchers had been issued, of which 15,800 relate to vouchers to enable debtors to avail of the services of a PIP. This equates to a monthly equivalent for PIP vouchers of approximately 329 vouchers. The balance of the issued

vouchers relate to the legal advice side of the scheme with 4,546 for consultations and 1,855 relating to the pursuit of section 115A reviews.

4 General

4.1 Strategic Plan

Earlier this year, the ISI published its third Strategic Plan, covering the period 2019–2021. This can be viewed on the ISI website here. The plan identifies five high level goals and associated objectives which the ISI will continue to pursue in order to ensure we deliver on our core objective of restoring insolvent persons to solvency. We are also very proud of our collective achievements during the previous strategic planning period, and some of these achievements are set out in the plan.

4.2 ISI Annual Report 2019

The ISI published its annual report for 2019 in June which can be accessed on the ISI website here. While the report highlights the achievements of stakeholders in respect of statistics on returning individuals to solvency, innovations in the personal insolvency space are demonstrated through case studies which show how the PI legislation is being applied in different circumstances to help resolve financial difficulties. The report also provides an outline of the main stakeholder engagements that occurred during the year.

4.3 Always On Presence in Digital for the Remainder of 2020

Since August, the ISI has been running a campaign to maintain an “Always On” presence in digital media. This campaign will continue until the end of the year. The campaign is guiding people in financial difficulty towards the ISI’s debtor focussed Back on Track website and promoting the ISI’s solutions.

The campaign is using the ISI’s video and digital posters and the following four strategies to maintain the “Always On” presence.

Programmatic Video on Demand (VOD) is using YouTube and Amnet (Amnet is a programmatic service that is part of the media buy company). In the Quarter 1 2020 campaign, VOD performed very well for us so it was important to include it in the always on digital approach.

Audience Targeting is using audience lists curated by Google trusted data partners - simply put, we will target users that have been collected due to their online behaviours. Our set target audience is adults who are 35 years and older, but with audience targeting the ISI can build awareness across users who are 35 plus who are also researching and engaging with content surrounding things such as debt, debt consolidation, consolidation loans, mortgage arrears, bankruptcy and insolvency.

Custom Affinity is another strategy we are using to build a bespoke audience. This bespoke audience is built by again focusing on the keywords people have searched such as "debt", "personal insolvency", "bankruptcy", "financial advice" etc. This enables us to build awareness and create reach with people who have shown an interest in topics relevant to personal insolvency.

Programmatic Guarantee is also a strategy that worked well in our Quarter 1 campaign. It involves buying directly from publishers, in this case RTE.ie and Journal.ie. We are guaranteed to be on these sites and deliver a set number of planned impressions a month. This is a good way for us to guarantee that we are getting in front of our audience as these sites would index highly for our target audience.

4.4 Abhaile Autumn Campaign

Abhaile's autumn campaign is running from 5 October 2020. This will run for six weeks and will include a full sweep of traditional and digital media placements.

4.5 Engagement Opportunities

The ISI has recently kicked off a further series of dialogue meetings with creditors. As part of a meeting, the ISI is interested in receiving creditors' feedback on Arrangements presented by PIPs, and to *inter alia* discuss compliance in respect of the Protective Certificate Target Timeline and views on the Reasonable Living Expenses (RLEs). Requests for meetings to be held online due to current Covid-19 circumstances are being issued from the Policy Division at the ISI. Further, the ISI intend

on holding a meeting of the Protocol Oversight Committee in early 2021 to discuss in particular, progress made in respect of the Working Groups in place (Working group on Proof of Debt Template and Working group on Annual Review/Variation Documentation/Dividend Payments).

4.6 Dedicated Email Address for Receipt of Legal Documents for Cases before the Courts

The Courts Team within the ISI's Case Management Division, which handles all aspects of cases before the Courts relating to sections 115A and section 120 in particular, have a new dedicated email address to which all documents relevant to such cases are to be sent – cmcourtsteam@isi.gov.ie. This new email replaces the casemanagement@isi.gov.ie address only in relation to such cases. In respect of all other matters, the casemanagement@isi.gov.ie email address should continue to be used.

4.7 Electronic Communications Agreement

The ISI would also like to take this opportunity to remind stakeholders about the Electronic Communications Agreement ("ECA") Register. Section 134 of the Personal Insolvency Act 2012 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 (ECA) that provided for the electronic exchange of information with and between all the relevant parties to the agreement. The September 2018 e-Brief contained a further invitation. Taking into account the reality that most exchanges are carried out electronically, the ISI encourages all Approved Intermediaries, Personal Insolvency Practitioners and Creditors to become party to the Agreement. Being party to the Agreement removes the necessity to seek individual agreements with relevant stakeholders. A copy of the ECA and accompanying subscription form can be found on the ISI website here. The ISI maintains a database internally detailing those stakeholders who are signed up to the Agreement ("ECA Register"). Section 3.3 of the Agreement refers to the ISI being permitted to publish a list of those stakeholders subscribed to the Agreement. The ECA Register is published on the ISI website

in the 'Stakeholder Information' section. The ISI would continue to urge stakeholders not already signed up to the ECA to do so. For those stakeholders already registered we would also ask you to review your own entry to ensure details are up to date. If you wish to subscribe to the ECA, amend contact details or cease being party to the Agreement, please email ISI at info@isi.gov.ie with 'ECA' in the subject line.

The next ISI e-Brief is scheduled to issue in Q1 2021.

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