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Seirbhís Dócmhainneachta na hÉireann
Insolvency Service of Ireland

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e-Brief December 2023

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Tackling problem debt, together

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1. Introduction

This is the sixteenth edition of the Insolvency Service of Ireland's (ISI) e-Brief. This publication aims to keep you as a stakeholder informed of ongoing activities of the ISI and key metrics of interest captured through our systems. In particular, the e-Brief aims to support and facilitate development of the personal insolvency process through the reporting of detail on court case decisions considered relevant for our stakeholder community. This document along with other resources can be found in the Stakeholder Information section on our website.

2. Courts

2.1 DAVID LANGAN – CREDITOR PREFERENCE; REGISTRATION OF BURDENS; UNFAIR PREJUDICE

This judgment concerns an application by a Personal Insolvency Practitioner ("PIP") on behalf of a debtor pursuant to section 115A(9) of the Personal Insolvency Act 2012 (as amended) (the "2012 Act") for an order confirming the coming into effect of a Personal Insolvency Arangement ("PIA"). The application was made under the High Court's jurisdiction.

Promontoria Aran Limited ("PAL") was the objecting creditor. The first ground of objection was that in breach of section 120(h) of the 2012 Act, the debtor had given a preference as defined by section 2(5) of the 2012 Act to a solicitor within three years preceding the issue of the debtor's protective certificate ("PC"). The second ground of objection was that the proposed PIA did not comply with the requirements of section 115A(9)(f) of the 2012 Act that it is not unfairly prejudicial to the interests of any interested party.

The creditors' meeting

In the proposed PIA, the solicitor was described as a "secured" creditor who had a "first legal charge" in the sum of €236,800 on a property in Wexford (the "Wexford property"), where the debtor had executed a charge in favour of the solicitor on 3 January 2019 for outstanding legal fees. Various PAL accounts were also listed in the PIA as "unsecured". The proposal contained in the PIA was that the Wexford property would be placed on the market for sale and that the secured creditor would be repaid from the net sale proceeds and any surplus remitted into the PIA for the benefit of creditors. The PIA further noted that PAL had registered a *lis pedens* against the Wexford property and had issued High Court proceedings (the "2019 proceedings") seeking declaratory relief that an equitable mortgage arose in its favour by virtue of an agreement between the debtor and Ulster Bank Ireland Limited of 23 December 2008 which had not yet been determined. It was asserted that the benefit of this agreement had been subsequently transferred to PAL. The PIA further stated that no submissions were received from unsecured or secured creditors regarding how they wished to have their debt dealt with under the PIA even though the PIP had written specifically to PAL stating that he wished to "ensure that your debt is treated correctly".

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Creditor preference
Judge Sanfey considered the interpretation of the term "preference" in section 120(h) of the 2012 Act. Judge Sanfey was of the view that this required an examination of the nature of the payment impugned by an objecting creditor. The solicitor's evidence was that while the charge was executed in January 2019, there was an agreement in February 2017 that the debtor would sell the Wexford property to fund his legal fees and a charge was subsequently executed due to a real concern that the property had not sold. Judge Sanfey noted that PAL had in fact accepted that the solicitor had a first legal charge over the property but contended that the charge infringed section 120(h) of the 2012 Act. Judge Sanfey reviewed the circumstances giving rise to the execution of the charge and ultimately held that it was not a preference within the meaning of section 120(h) of the 2012 Act. He set out his reasoning at paragraph 61 of the judgment.

Unfair prejudice
The arguments submitted by Counsel for PAL in respect of the unfair prejudice ground of objection are detailed at paragraph 64. Having considered the submissions, the Court found that the PIP was entitled to treat PAL's debt as unsecured and furthermore, the fact that the registration of the solicitor's first legal charge had not taken place by the date of the creditors' meeting was not fatal to its treatment in the proposed PIA.

The PIP had sought to engage with PAL as to the nature of its security but received no response and had appropriately conducted statutory procedures. In relation to the *lis pedens* argument, Judge Sanfey accepted the submission on behalf of the PIP and the solicitor that while the *lis pendens* may be a registrable burden, it is not a charge or security on property. The Court also found that it was not part of its function in the context of the section 115A(9) application to adjudicate on the validity or otherwise of PAL's equitable mortgage. Judge Sanfey furthermore did not accept that PAL were unfairly prejudiced by being deprived of the opportunity to establish its equitable charge in the 2019 proceedings.

Conclusion
Judge Sanfey concluded that none of the objections raised by PAL were valid and made an order pursuant to section 115A(9) of the 2012 Act confirming the coming into effect of the proposed PIA. Judge Sanfey further stated that he was satisfied that the approval of the PIA did not constitute an unfair prejudice against PAL and was influenced in that conclusion by the very considerable delay of PAL in initiating proceedings to establish the alleged equitable mortgage and its complete failure to engage with the PIP during the proof of debt process.

The full text of the judgment can be found here: [Link] and [Link]

2.2 JANETTE SIMPSON – APPLICATION BY CREDITOR TO SET ASIDE GRANT OF PROTECTIVE CERTIFICATE

This judgment concerns a motion by Start Mortgages DAC (the "Applicant") for an Order setting aside a Protective Certificate ("PC") in respect of a debtor pursuant to the Circuit Court's inherent jurisdiction or, in the alternative, an Order directing that the PC shall not apply to the

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Applicant pursuant to section 97 of the Personal Insolvency Act 2012 (as amended) (the "2012 Act").

On 23 July 2007, Nua Mortgages Limited advanced the sum of €200,000 to the debtor (and another), which was registered as a burden on the folio of a property (a dwelling house). The Applicant later succeeded in title to Nua Mortgages Limited and the burden on the folio was registered in its name on 15 January 2015.

The debtor defaulted on the mortgage repayments and repossession proceedings issued. An Order for Possession was granted on 11 February 2022, with a stay of 6 months. An Execution Order of Possession issued on 20 September 2022. The Monaghan County Sherriff took possession of the property on 24 March 2023, whereupon possession was transferred to the Applicant's agent.

On 8 May 2023, Monaghan Circuit Court granted a PC to the debtor in respect of (inter alia) the debt owing to, and as against, the Applicant. This was granted on the basis of the debtor's Prescribed Financial Statement which stated that an Order for Possession had been granted to the Applicant. The application did not state that an Execution Order of Possession had also issued and that the County Sherriff had taken possession of the property on 24 March 2023, with the debtor having since reoccupied the property contrary to the Court Order.

The two issues which arose for determination by the Court were, firstly, whether the property remained "the property of the debtor" within the meaning of section 91(1)(c) of the 2012 Act to satisfy the eligibility criteria to make a proposal for a Personal Insolvency Arrangement ("PIA") after the Execution Order of Possession was granted and the Monaghan County Sheriff and the Applicant's agent acquired possession of the property (or at least the lawful right of possession), and secondly, whether the Circuit Court has an inherent jurisdiction to set aside the Order granting the PC and if so, whether that discretion ought to be exercised.

Jurisdiction to set aside an Order

Judge Connolly noted that unlike the High Court, the Circuit Court is not vested with "full original jurisdiction" under the Constitution and instead it is a Court of local and limited jurisdiction, established under statute. Judge Connolly held that he must conclude that setting aside its own Order is undoubtedly within the limited range of powers exercisable by all Courts under the umbrella of regulating its own affairs. Judge Connolly was of the view that an application for the granting and issuance of a PC is an ex parte application and referred to the decision of McCracken J. in Voluntary Purchasing Groups v. Insurco International Ltd & Agrichem Ltd [1995] 2 ILRM 145, at 146:

"There is an inherent jurisdiction in the Courts in the absence of an express statutory provision to the contrary, to set aside an Order made ex parte on the application of any party affected by that Order".

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Judge Connolly was further satisfied that there is jurisprudence for the setting aside of an Order where there has been material non-disclosure, fraud, error or omission and that the 2012 Act did not abolish the Circuit Court's jurisdiction to set aside its own Order granting a PC.

Judge Connolly's view was that had the Circuit Court been made aware of the legal issues which arose, the Court would have convened a hearing and directed that the Applicant be put on notice.

Meaning of "Property of the Debtor"

The Court referred to the eligibility requirements for the making of a proposal for a PIA as set out in section 91(1)(c) of the 2012 Act and also referred to section 95(2)(a) of the 2012 Act which provides that the Court shall grant a PC where the eligibility requirements have been met. The debtor submitted that she met the eligibility requirements by reason of the fact that on the date of the PC application she was the registered owner of the property on the Property Registration Authority folio and, consequently, the Court had no jurisdiction to set aside the PC as the provisions of section 95(2)(a) of the 2012 Act are mandatory. The Applicant submitted that once it became a mortgagee in possession, it became the lawful title holder of the property, or at least the Applicant was entitled to be registered as owner.

The Court ultimately found that it could not satisfy itself to the requisite standard that the property was "property of the debtor" at the date of the PC application to satisfy the statutory requirements of section 91(1)(c) of the 2012 Act in circumstances where an Execution Order of Possession had issued on 20 September 2022 and the Monaghan County Sheriff had taken possession of the property on 24 March 2023.

Material Non-Disclosure

Having found that the eligibility requirements were not met prior to the granting of the PC, the Court considered whether the failure on the part of the debtor to indicate within her application that she did not meet the eligibility requirements constituted a material non-disclosure, such that the Order granting the PC should be set aside. The Court noted that section 95(2)(a) of the 2012 Act is unambiguous that a PC cannot be granted unless the Court is satisfied that the eligibility criteria in section 91 of the 2012 Act have been met. Judge Connolly found that he would not only have been persuaded by the disclosure of the relevant information, but bound to refuse an Order granting a PC.

Conclusion

The Court ultimately held that as of the date of the granting of the PC, the debtor no longer met the eligibility criteria and this was a material non-disclosure to such an extent that it was appropriate that the Court exercise its discretion to set aside the Order granting the PC and vacate the Order in its entirety and ab initio.

**** NOTE: This judgment has been appealed to the Court of Appeal but the matter has not yet been heard.***

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2.3 NUALA MCCARTHY AND EDWARD MCCARTHY – PENSIONS INCOME; AFFORDABILITY OF ARRANGEMENT

This judgment concerned appeals to the High Court by a married couple (the "debtors") against the refusal of the Circuit Court to approve the coming into effect of their Personal Insolvency Arrangements ("PIAs") under section 115A(9) of the Personal Insolvency Act 2012 (as amended) (the " 2012 Act").

The issues that arose on the appeals were as follows:

1. Whether the debtors had proved on the balance of probability that they were "reasonably likely" to be able to comply with the terms of the PIAs as required by section 115A(9)(c) of the 2012 Act;
2. Whether the proposed PIAs had been formulated in compliance with section 104(2) of the 2012 Act, as required by section 115A(9)(a) of the 2012 Act that the costs of enabling the debtors to continue to reside in their principal private residence ("PPR") were not disproportionately large;
3. Whether the debtors should trade down and buy a new house;
4. Whether the proposed Arrangements complied with the mandatory requirement in section 99(2)(e) of the 2012 Act which precludes the inclusion in any PIA of a term that would require the debtors to make payments of such an amount that they would not have sufficient income to maintain a reasonable standard of living ("*RSL*") for themselves and their dependents.

The debtors live 6 kilometres outside Wexford town. One of the debtors is in poor health and their PPR had been modified to accommodate her disability. The PPR was valued at €350,000 and was mortgaged to Ulster Bank DAC (the "Bank"). The total due on the mortgage in July 2020, when the proposed PIAs were submitted to the Bank and rejected, was €42,784 for principal and interest. This included over €11,000 in arrears. The Bank wanted the debtors to trade down and pay off their liabilities.

Under the terms of the proposed PIAs, the arrears on the mortgage would be capitalised to principal giving a sum of €42,782.46 to be paid off by 156 monthly instalments over 13 years using the debtors' monthly pension income.

Due to the length of time between when the proposals were formulated and the hearing of the appeals in the High Court on 16 January 2023, Judge Owens was of the view that it is necessary that a Court be provided with accurate figures for the amount of principal and interest outstanding at the date of the hearing. Judge Owens further stated that if changes of circumstances since the proposals were formulated are relevant, the parties should deliver affidavits setting out the new facts and, if there is an appeal, they should seek leave to admit such evidence.

The Bank referred to changes in guidance issued by the ISI in November 2022 on what constituted a RSL and reasonable living expenses ("RLEs") and submitted that revisions to RLEs since the PIAs were formulated ceased to make the proposals sustainable. The debtors asserted that they could make savings on their RLEs.

Judge Owens was satisfied that the debtors had the capacity to make the proposed monthly repayments in discharge of their mortgage, while noting that their capacity depended on curtailing expenditure choices somewhat over the proposed period of restructured borrowing. The Court was also persuaded by evidence that they could maintain a RSL if they adhered to the terms of the proposed PIAs. Judge Owens was satisfied that the departure from current guidelines on RLEs was manageable in the circumstances. In reaching its conclusion on affordability, the Court was influenced by the fact that the debtors had demonstrated capacity to meet monthly repayment commitments since they sought protection under the 2012 Act.

Judge Owens noted that in examining any proposal for a PIA, the Court is concerned with evidence which shows present capacity to service indebtedness. He was of the view that payments, or the lack of them, during the two-year period prior to the issue of the protective certificate may also be evidence of a debtor's capacity to make payments out of available means and capacity to exercise budgetary discipline.

Submissions were considered by the Court as to whether it is permissible to propose Arrangements which restructure loans into retirement periods of borrowers and concluded that there is no reason in principle why this type of restructuring could not be permitted. Judge Owens was of the view that it is not always necessary for a Court to take a view on whether debtors will be "reasonably likely" to make payments right up to the end date of the extended term under the Arrangement, but that what matters is that it is "reasonably likely" that debtors will be able to pay in full the amount of the liability within the period of repayment.

Judge Owens did not accept submissions that future events such as a deterioration in health or death of one of the borrowers before the contractual date for final repayment of loan instalments should automatically be equated with a lack of proof that a debtor is "reasonably likely to be able to comply with the terms of the proposed Arrangement".

Judge Owens was of the view that section 104 of the 2012 Act was also relevant and noted that it was unfortunate that the initial affidavit evidence of the Personal Insolvency Practitioner ("PIP") did not address in detail how he approached the matters which a PIP must have regard to under section 104(2) of the 2012 Act. The Court noted that further evidence had been submitted which showed that the accommodation needs of the debtors was discussed and considered, that they were unwilling to consider moving from their home, which the Court viewed as acceptable, and that evidence established that the PPR was not extravagant to their circumstances.

Judge Owens concluded that the evidence demonstrated that the cost of the debtors remaining in their PPR was not disproportionately large, that the repayments were affordable and the

proposed PIAs met the criteria specified in section 115A(9) of the 2012 Act and other relevant statutory requirements.

The full text of the judgment can be found here: [Link]

3. Business metrics

3.1 ISI STATISTICS QUARTER 3, 2023

The ISI statistical report covering the third quarter of 2023 is published on the ISI website here. Key statistics for Q3 include 419 new cases submitted, 297 protective certificates, 201 arrangements approved and 12 bankruptcies. The total number of protective certificates issued in the 9 months to 30 September 2023 amounted to 925 while the total number of arrangements approved for the same period amounted to 653. This represents an increase of 12% and a drop of 20% respectively when compared to the same period in 2022. There were 39 bankruptcy adjudications for the 9 months to 30 September 2023. This is a drop of 54% compared to the same period in 2022 and continues a declining trend since numbers peaked in 2016 at 526 for that year.

3.2 ABHAILE

At end September 2023, over 29,104 Abhaile scheme vouchers had been issued, of which 19,750 relate to vouchers enabling borrowers to a free consultation with a PIP. This equates to a monthly equivalent for PIP vouchers over the lifetime of the Abhaile Scheme of approximately 227 vouchers. The balance of the issued vouchers relate to the legal advice side of the scheme with 6,023 for consultations and 2,660 relating to pursuit of section 115A reviews.

4. Assisted Decision-Making (Capacity) Act 2015

The Assisted Decision-making (Capacity) Act 2015 (the "2015 Act") [Link] contains provisions relevant to personal insolvency that were commenced on 26 April 2023. PIPs should ensure a debtor entering into a formal statutory insolvency solution is made aware of the 2015 Act and its impact where a debtor is currently undertaking a role under that Act or may take on one of the roles during the term of their insolvency solution.

Sections 11, 18, 39 and 65 of the 2015 Act specify persons who are not eligible to be appointed as a decision-making assistant, co-decision-maker, decision-making representative or an attorney under an enduring power of attorney respectively. An individual is not eligible if he or she is an undischarged bankrupt or is currently in a debt settlement arrangement or personal insolvency arrangement.

Sections 13, 40 and 66 provide for the disqualification of a person from being, respectively, a decision-making assistant, decision-making representative or attorney under an enduring

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power of attorney where, subsequent to the person's appointment, they become an undischarged bankrupt or subject to a debt settlement arrangement or personal insolvency arrangement.

Section 20 provides that where subsequent to registration of a co-decision-making agreement the co-decision-maker becomes an undischarged bankrupt or subject to a debt settlement arrangement or personal insolvency arrangement, the agreement will be null and void from that date.

This is a brief summary of those provisions. Further information can be found on the website of the Decision Support Service: [Link].

Disclaimer

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