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Insolvency Service of Ireland

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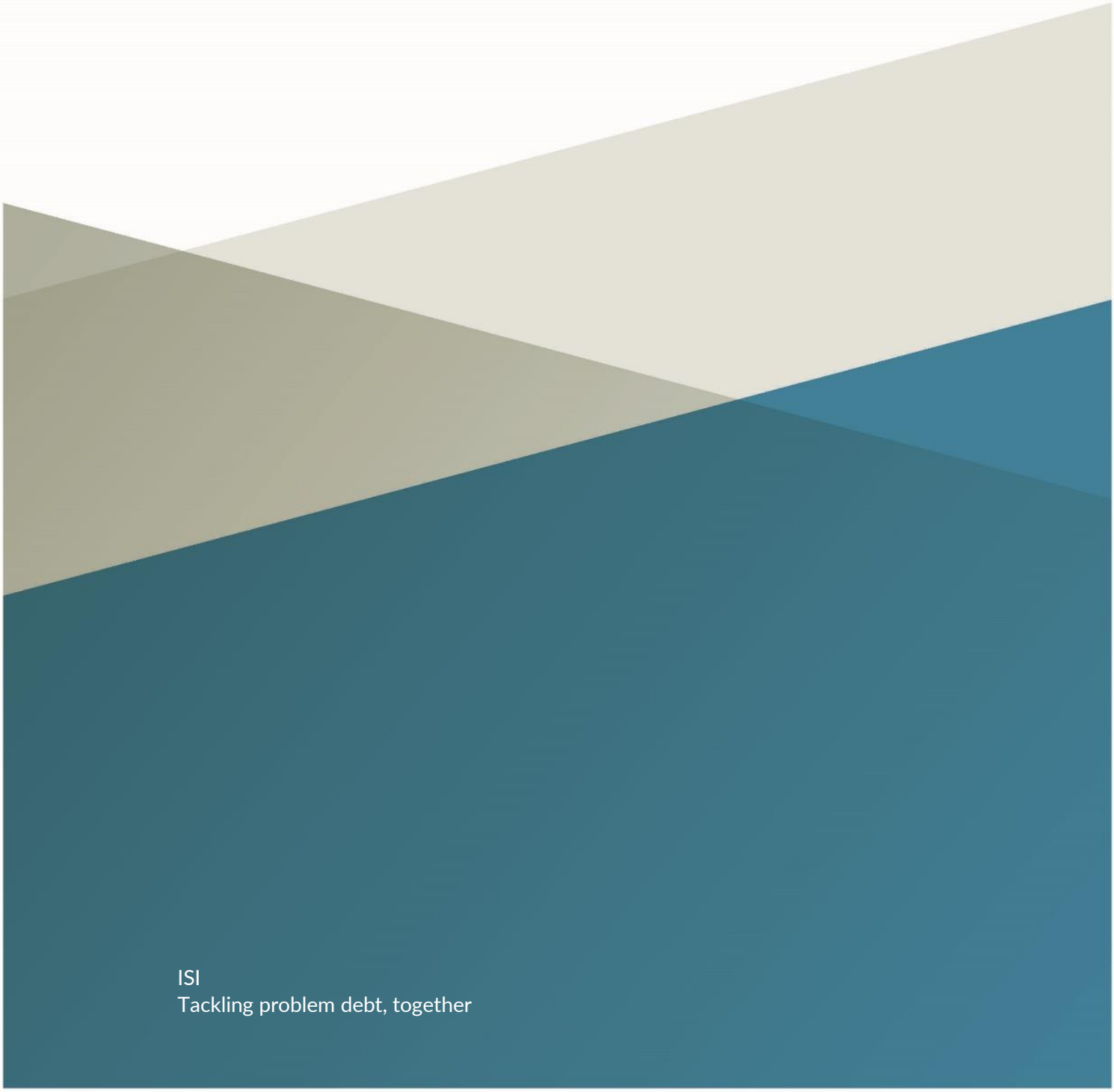
Supplemental e-Brief December 2023



ISI
Tackling problem debt, together

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1. Introduction

This is a supplemental issue in light of the two recent Supreme Court decisions, to the e-Brief issued earlier this month. It is the seventeenth 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 FERGUS O'CONNOR – THE MEANING AND APPLICATION OF THE TEST FOR INSOLVENCY

On 30 November 2023, Judge Baker delivered the judgment of the Supreme Court which related to an appeal by Promontoria Oyster DAC (the "Appellant") of an order of the High Court on an appeal from the Circuit Court approving the coming into effect of a Personal Insolvency Arrangement ("PIA") pursuant to section 115A of the Personal Insolvency Act 2012 (as amended) (the "2012 Act").

The Supreme Court granted leave to appeal, being satisfied that the issue identified by the Appellant met the threshold of exceptional circumstances for a further appeal.

The primary question for consideration in the appeal concerned whether the respondent to the appeal (the "Debtor"), was insolvent within the meaning of the 2012 Act and that question turned on the meaning of the phrase "readily realisable asset" in the context of insolvency and section 99(1)(d) of the 2012 Act.

Background to the Appeal

The Circuit Court made an order pursuant to section 115A of the 2012 Act approving the coming into effect of the Debtor's proposed PIA, notwithstanding that it had not been approved at the statutory meeting of creditors. The Appellant objected to the approval of the PIA on the ground, inter alia, that the Debtor did not meet the threshold requirement of being insolvent under the 2012 Act.

The Debtor is a farmer and operates a farming business over eleven folios totalling approximately 190 acres. The Debtor is also the owner of a rental property on a separate folio.

The Debtor is indebted to the Appellant on foot of two separate loan facilities. The Appellant is the largest creditor of the Debtor and holds security over some, but not all, of the lands of the Debtor, including the folio lands on which the Debtor's principal private residence ("PPR") is situated. The Appellant argued that the sale of lands would generate ample funds to repay the Debtor's debts and restore him to solvency.

The PIA provided for a restructure of the Debtor's liabilities to the Appellant and for a full discharge of the debts to the other creditors. The liabilities to the Appellant are to be paid in full, but the term for the debt due to the Appellant is to be extended to a period of thirty years. For the first 36 months of the PIA, 50 per cent of the debt is to be warehoused. The PIA does not require the Debtor to dispose of any real property assets, or of his chattels and items of personality, including the farm machinery and animals used in his farming enterprise.

In the Circuit Court, Judge Enright held that the Debtor was insolvent for the purposes of the 2012 Act and that the agricultural land belonging to him was not a "readily realisable asset" for the purposes of assessing his solvency.

On appeal before the High Court, Judge Owens considered that three questions arose for consideration in determining whether the Debtor was insolvent within the meaning of the 2012 Act:

1. The meaning of the statutory test for insolvency;
2. Whether only realisable assets can be used to determine solvency; and
3. Whether evidence about future funding was credible.

He adopted the test that only "readily realisable" assets fell for consideration in the calculation of insolvency for the purposes of the 2012 Act. Judge Owens held that the land and other assets of the Debtor, referred to as "tools of the trade", including his PPR, would take a "considerable amount of time to sell", and that to compel the Debtor to dispose of these assets to satisfy the debt would result in the loss of his livelihood, and thus fell to be excluded from the PIA under section 99 of the 2012 Act. The appeal of the Circuit Court order was therefore dismissed by Judge Owens in the High Court.

The Appeal before the Supreme Court

The central legal issue before the Supreme Court concerned the meaning of "insolvent" for the purposes of the 2012 Act or what is precisely meant by the statutory definition that a person is insolvent if he or she is "unable to meet one's debts when they fall due". The issue arose because the value of the assets of the Debtor far exceeded the amount of his liabilities. The Appellant argued that if the Debtor disposed of assets, he could discharge his liabilities in full and remain a person of substantial net worth. The Debtor argued that should he dispose of his assets he would not, as a result, achieve a return to solvency because his farming enterprise would thereafter be unsustainable and not viable.

Judge Baker in considering the meaning and application of the test of insolvency in the 2012 Act was of the view that it is relevant that the Oireachtas deliberately chose to define insolvency by reference to an inability to pay debts as they fell due, thereby introducing a temporal element to the analysis, rather than testing solvency by the mathematical calculation of whether assets exceed liabilities. She found that "the test for insolvency is not so narrow as to mean that a debtor is insolvent if he or she cannot pay liabilities as they fall due from immediately accessible or available cash assets. The legislation envisages an inability to pay in the broad sense and requires an assessment of available assets and whether they can in fact be used to pay a liability. The test is one of timing and of the nature of the assets".

Judge Baker determined that a debtor ought not to be considered insolvent, even where his cash flow does not allow him to meet his current liabilities, provided that he has assets which could be sold without legal impediment in relatively short order. She was of the view that this is particularly so in respect of assets for which there is an established, liquid market, such as that which exists in real property.

She was further of the view that the appropriate test requires a court to have regard to the speed and ease with which an asset may be realised for the purposes of ascertaining whether the asset is "readily realisable" for the purposes of ascertaining insolvency.

Consequently, Judge Baker held that in the application of the statutory cash flow test in the High Court, Judge Owens had sufficient evidence before him on which to determine that the Debtor was insolvent, having regard to the impediments in the particular circumstances of the Debtor to a swift sale of assets and that the Debtor's current income was insufficient to meet his current liabilities.

Judge Baker also analysed the particular role played by a Personal Insolvency Practitioner ("PIP") in the operation of the 2012 Act and considered that the role placed the PIP in the position of independent intermediary by which a PIP has an obligation to both creditor and debtor, the ISI and to the relevant court.

Judge Baker determined that the consideration of an application under section 115A of the 2012 Act requires that the court must be satisfied that the proposed arrangement is not "unfairly prejudicial to the interests of any interested party", and the exercise of judicial functions involves a balancing of interests, and an assessment of reasonableness and proportionality.

Judge Baker held that "nothing in section 115A [of the 2012 Act] mandates the absolute protection of the PPR, and the section is rather one which permits the continued protection of ownership or occupation of a PPR provided that it is reasonable, and not unfairly prejudicial to the creditors. Equally, the [2012] Act does seek to preserve the business and employment assets of a debtor, so that he or she may continue to be an economic actor in the State, but the protection available to the debtor to resolve debt inter alia by a rescheduling or reduction in liabilities, and the rights and interests of creditors, including property interests, requires an

analysis of whether the proffered solution is proportionate, not excessive and affords protection to the creditor by not being unduly prejudicial".

Judge Baker stated that it was unsatisfactory that there "is in the present appeal no useful evidence regarding the possibility that the lands of the Debtor could be sold or that part of his lands could be sold. There was no proper analysis…" of the liabilities of the Debtor or burdens on the property folios. Judge Baker was therefore of the view that a robust analysis of the facts was not conducted to properly balance the competing rights and obligations of the parties, nor was there a sufficient and robust assessment of whether the proposed PIA was sustainable, fair and equitable in accordance with the 2012 Act.

Having regard to the fact that a court considering an application under section 115A of the 2012 Act must itself be satisfied that a PIA is fair to the creditors who will be affected by a rescheduling or forgiveness of some or all of its debts, Judge Baker considered that the present application should be returned to the High Court for proper consideration of whether the statutory requirement of fairness and the other provisions in section 115A of the 2012 Act are satisfied on the facts of the case.

Accordingly, while the Supreme Court held that the Debtor was insolvent within the meaning of the 2012 Act and thereby allowed the appeal in part, the Court ordered that the application under section 115A of the 2012 Act be remitted to the High Court for further determination.

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

2.2 MICHAEL O'FLYNN –V–JOHN O'DRISCOLL, ALAN MCGEE AND THE ISI – PROOF OF DEBT AND LOCUS STANDI TO LODGE AN OBJECTION TO A PIA

On 30 November 2023, Judge Dunne delivered the judgment of the Supreme Court which considered whether a creditor (the "Appellant") who has failed to prove their debt under section 98(2)(a) of the Personal Insolvency Act 2012 (as amended) (the "2012 Act"), has locus standi to object to the coming into effect of a Personal Insolvency Arrangement ("PIA") pursuant to section 112 of the 2012 Act. The Insolvency Service of Ireland being a notice party to the proceedings did not intend to advocate for a construction of the 2012 Act which was favourable to either party but wished to be of assistance to the Court.

Background to the Appeal

The Appellant is a creditor of the first named respondent (the "Debtor") and failed to file a proof of debt when requested to do so by the Debtor's Personal Insolvency Practitioner ("PIP"), the second named respondent. The PIP informed the Appellant in accordance with section 98(2)(b) of the 2012 Act that a creditor who does not file a proof of debt is not entitled to vote at a creditors' meeting or share in any distribution made under the PIA.

The Appellant disputed the Debtor's Prescribed Financial Statement ("PFS") and inter alia claimed that the Debtor was not insolvent and that his PFS was incorrect. The Appellant, through his solicitor, requested an extension of time to lodge a proof of debt. This request was denied by the PIP and the Appellant was called on to file a proof of debt within the prescribed time period. The Appellant once more contended that the Debtor was abusing the insolvency process and that the information contained in the PFS was not complete and accurate. A second PFS was completed by the Debtor and on the same date, notice of the creditors' meeting issued to the Appellant together with the documentation required pursuant to section 107 of the 2012 Act. The Appellant issued correspondence to the PIP to indicate that he would not be attending or voting at the creditors' meeting. The Appellant, while still failing to prove his debt, issued a notice of motion seeking leave to execute against the Debtor pursuant to section 96(3) of the 2012 Act and an order refusing the coming into effect of the PIA pursuant to section 115(2)(b) of the 2012 Act. The PIA was subsequently approved at the creditors' meeting and the PIP wrote to all creditors, including the Appellant, informing him that the PIA had been approved and if an objection was forthcoming, a notice of objection in accordance with section 112(3) of the 2012 Act could be lodged within 14 days. The Appellant lodged a notice of objection in accordance with section 112(3) of the 2012 Act.

The Circuit Court dismissed the Appellant's motion and objection to the PIA, holding that the Appellant had no locus standi to pursue an objection to the PIA as he had not proved his debt in accordance with the procedure set out in the 2012 Act. Consequently, the Circuit Court did not consider the substantive objections raised by the Appellant and approved the PIA. The Appellant appealed to the High Court, arguing that he was a creditor who had standing to make an objection under section 120 of the 2012 Act, that the same constitutional rights as those in Re Varma [2017] IEHC 218 were engaged, and furthermore that the only restrictions on the participation of a creditor who failed to prove their debt were contained in section 98(2)(b) of the 2012 Act. Judge Owens in the High Court upheld the decision of the Circuit Court that the Appellant did not have locus standi to make an objection as he had failed to prove his debt and also did not consider the substantive objection made by the Appellant.

The Appeal before the Supreme Court

The Appellant was granted leave to appeal to the Supreme Court as the Court considered that this case raised important questions on the interpretation of the 2012 Act.

The Appellant's overarching submission was that the High Court gave an overly broad interpretation to section 98(2)(b) of the 2012 Act and that the decision of the High Court had the effect of limiting a creditor in a third way that is not envisioned by the 2012 Act. The Appellant further argued that section 120 of the 2012 Act must be read alongside section 112 of the 2012 Act as otherwise a creditor who has not proved his debt cannot object, even though that same creditor is entitled to be informed of his right to object. It was submitted by the Appellant that this is an absurd result that could not have been intended by the Oireachtas.

The Debtor submitted that when the words of section 120 of the Act are read in the context of the 2012 Act, it is clear that a creditor stands outside of the arrangement until they prove their debt, and is not, in fact, a creditor for the purposes of the 2012 Act at all. The Debtor further argued that section 112 of the 2012 Act as a whole indicates that only "creditors concerned" are entitled to notice of their right to object to the approval of a PIA. It was submitted on behalf of the Debtor that "concerned" suggests that the creditor has proved their debt and is entitled to a distribution under the PIA and that a creditor who has not proved their debt is not "concerned" with the PIA at all.

The PIP's submissions were in essence that as the Appellant had failed to prove his debt and was thereby not entitled to share in any distribution or vote at the creditors' meeting, he fell outside the definition of "creditor" within the meaning of the 2012 Act.

The Supreme Court considered the interpretation of sections 98 and 112 of the 2012 Act. Judge Dunne was of the view that section 98(2)(b) of the 2012 Act is unambiguous in its terms setting out the consequences for a creditor who does not comply with a PIP's request to furnish a proof of debt and that there is no category of creditors described as non-proving creditors that are required to be treated differently by virtue of any of the provisions of the 2012 Act, save for those contained in that section. Furthermore, Judge Dunne observed that section 98(2)(c) of the 2012 Act clearly envisages that a creditor may take part in the process subsequent to the approval of a PIA or after a distribution has been made, if granted an extension of time within which to furnish a proof of debt.

Judge Dunne considered submissions in respect of the phrase "each creditor concerned" in sections 112(1) and 112(1A) of the 2012 Act, and whether it had any bearing on the question of locus standi. Judge Dunne rejected the contention that only creditors who have proved their debt and are thereby entitled to participate in creditors' meetings and share in the dividend are "creditors concerned" for the purposes of lodging an objection under section 112(3) of the 2012 Act. Rather, Judge Dunne held that the phrase "creditor concerned" encompasses those who are affected by the process of the PIA and that the use of the word "concerned" did not appear to her to alter the status of the creditor in any given situation. Judge Dunne held that it is clear from the provisions of section 116(2) of the 2012 Act that there is no dispute whatsoever that once a PIA comes into effect, a specified creditor with a specified debt is a creditor concerned and is bound by the terms of the PIA, notwithstanding that they have chosen not to prove their debt. She determined that it cannot be said in those circumstances that the creditor has "dropped out" of the process as they are bound by the process and cannot recover the debt due to them. Judge Dunne stated that "as a matter of fairness, it must be the case that in order to be in a position to make an objection, a creditor, even one who has not proved their debt, requires to be notified of the matters provided for in section 112 [of the 2012 Act]". Judge Dunne was of the view that "it is hard to conceive of any similar situation in which a party bound by a decision of a court, such as the one in this case, would not have a right to be heard before a final decision was made".

Judge Dunne held that given the presumption against unclear changes in the law, had the Oireachtas wished to exclude a creditor, one would have expected that this would have been done in express terms by means of a specific prohibition in the 2012 Act and not in some indirect or oblique fashion.

Judge Dunne was therefore satisfied that in the absence of express language to the contrary in the 2012 Act, a creditor in the position of the Appellant, who did not file a proof of debt, is entitled to lodge an objection and thus, has the requisite locus standi to make such an objection to a PIA and be heard on foot of that objection, thereby allowing the appeal of the Appellant. She also concluded that there is nothing in the 2012 Act which precludes a creditor who has not proved his or her debt when requested to do so by the PIP from doing so at a later stage in the terms prescribed by paragraph 2 of the First Schedule of the Bankruptcy Act 1988 (as amended). Judge Dunne further held that it would therefore be appropriate for the matter to be remitted for further consideration of the issue, and the matter was adjourned for submissions from the parties within a period of two weeks as to which court to remit the matter and in respect of any ancillary orders to be made by the Supreme Court.

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

Disclaimer

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