THE HIGH COURT

[H:IS:HC: 2016:000019]

IN THE MATTER PART 3, CHAPTER 4 OF THE PERSONAL

INSOLVENCY ACTS 2012 – 2015

AND

IN THE MATTER OF MICHAEL HICKEY OF

KILMACOMMA HILL, CLONMEL, WATERFORD

("THE DEBTOR")

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO

SECTION 91 (3) OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015

JUDGMENT of Ms. Justice Baker delivered on the 22nd day of May, 2017.

1. On 6th February, 2017 Michael Hickey ("the debtor") was granted an order pursuant to s. 91(3) of the Personal Insolvency Acts 2012-2015 ("the Act") that he be allowed to make a proposal for a Personal Insolvency Arrangement ("PIA") notwithstanding that he made such a proposal in the previous twelve months.

2. The legislation permits application for an order dispensing with the statutory criteria outlined in s. 91(1)(i) of the Act to be made ex parte and on notice only to the Insolvency Service of Ireland.

3. Having regard to the fact that it was made ex parte, the solicitor for the debtor was directed to notify all specified creditors of the making of the order.

4. This judgment is given in the application by KBC Bank Ireland plc ("KBC") by motion dated 10th March, 2017 that pursuant to the inherent jurisdiction of the court the order made on 6th February, 2017 be set aside. No argument is made that the court has no jurisdiction to make the order sought by KBC.

5. The question for determination is whether the current insolvency of the debtor arises by reason of exceptional circumstances or other factors substantially outside his control, such that it would be just to permit him to make a proposal for a PIA before the twelve-month period has elapsed.

The statutory time restrictions

6. In order to be eligible to make a proposal for a PIA a debtor must meet the eligibility criteria set out at s. 91(1) of the Act. Section 91(1)(i) provides that in order to be eligible the debtor must not have had the benefit of a protective certificate under s. 95 in the twelve months immediately prior to the date of the application.

7. Section 91(1)(i) provides:

> "91. (1) Subject to the provisions of this section and this Chapter, a debtor shall not be eligible to make a proposal for a Personal Insolvency Arrangement unless he or she satisfies the following criteria—
>
> (i) that the debtor has not—
>
> (i) been the subject of a protective certificate issued under section 95 less than 12 months prior to the date of the application for a protective certificate,
>
> (ii) had his or her debts discharged pursuant to a final Debt Relief Notice less than 3 years prior to the date of the application for a protective certificate,
>
> (iii) had his or her debts discharged pursuant to a Debt Settlement Arrangement less than 5 years prior to the date of the application for a protective certificate, or
>
> (iv) been discharged from bankruptcy less than 5 years prior to the date of the application for a protective certificate.

8. The Act provides for the relaxation of this strict rule in certain circumstances as follows:

> "91. (3) The criterion specified in subsection (1)(h) shall not apply where the debtor has, on notice to the Insolvency Service, made an application to the appropriate court and the court has made an order stating that it is satisfied that the current insolvency of the debtor arises by reason of exceptional circumstances or other factors which are substantially outside the control of the debtor and that it would be just to permit the debtor to make a proposal for a Personal Insolvency Arrangement."

9. The debtor was granted a protective certificate on 4th July, 2016, and thereafter made a proposal for a PIA which was rejected at a meeting of creditors on 9th September, 2016. The debtor subsequently made application to the High Court under s. 115A of the Act that the court would approve the PIA notwithstanding that it had been rejected at a meeting of creditors.

10. The application under s. 115A failed on the procedural ground that the application under s. 115A had not been made on time. The reason why this is so is set out in my written judgment, [2017] IEHC 20.

11. In summary, the PIP mistakenly believed that he was entitled to be treated as an electronic user for the purposes of the Act and

that therefore the s. 115A documentation was lodged within time by email. While the legislation does permit the use of some electronic lodging of papers, it can occur only when the person so availing of electronically lodging of papers has been authorised in advance. In the course of my judgment, I accepted the evidence of the PIP that he was unaware of the strict requirements of authorisation, and that this was the first occasion when this question came for consideration by the High Court.

12. No jurisdiction arose by which I could extend the statutory period for the lodging of an appeal. Irrespective of this however, I did note that the appeal documentation would have been out of time even had the purported lodging by email been effective.

Application for 2nd protective certificate

13. The question for determination in this application is whether the current insolvency of Mr. Hickey arises by reason of exceptional circumstances or other factors which are substantially outside of his control.

14. The affidavit of Mr. Hickey sworn on 1st February, 2017 avers that his financial circumstances have worsened since the refusal of the application under s. 115A on 18th January, 2017 and the resultant expiry of his protective certificate.

15. Mr. Hickey has had difficulty repaying his mortgage since March, 2011. At para. 7 of his affidavit, having identified that he first approached Grant Thornton Debt Solutions in July, 2014, regarding his financial difficulties, he made the following averment:

> "I say that my insolvency arose due to failure of my business which was a bar and restaurant that I ran prior to the downturn in the economy."

16. The proposal for a PIA put forward by his PIP at a meeting of creditors on 9th September, 2016, did not get the requisite support. At para. 28 of his affidavit, Mr. Hickey says that following the expiry of the protective certificate his "financial difficulties returned at a worsened level" and that his "overall indebtedness has increased". Arrears, interest and penalties have now accumulated on his debts.

17. Of more importance to the argument made by Mr. Hickey is the fact that the failed application under s. 115A had the result that an order for costs was made against him in the High Court. These costs have not yet been agreed or taxed and counsel for Mr. Hickey was unable to advise me of the likely level of such costs.

18. A number of factual matters are apparent from the grounding affidavit of Mr. Hickey. It is of central importance that he identifies his primary insolvency as having arisen from the failure of his business, which long predates the first application for a protective certificate or the failed PIA. In order to be eligible to apply for a protective certificate and avail of the insolvency legislation, a debtor must be insolvent, and I consider that what the provisions of s. 91(3) envisage is that new or different circumstances have arisen which give rise to a "current" insolvency which is of a different nature or scale, or arises for different reasons from the previously existing insolvency.

19. I consider that the legislation does not envisage that application under s. 91(3) can be made if the difference in the insolvency of a debtor arises on account of the costs incurred or awarded against a debtor in a previous failed application under the Act. The costs are part of the previous application, and the reference to "current insolvency" must, it seems to me, be understood to mean an insolvency which was not part of the original application or arises from circumstances not then apparent or known, or which did not arise in the currency of that process. The costs order arises from the failed PIA, and I do not consider that the Oireachtas intended that a debtor who incurs a liability for costs can, on account of that fact alone, argue that his or her financial circumstances are new or different or changed from those prevailing at the time a proposal for a PIA failed.

20. The reference in the subsection to the "current insolvency" of a debtor must be to an insolvency which is different, new and not part of, or related to, the previous failed process.

21. Because the effect of a protective certificate is to stay the accrual of interest and charges on a debt, the mere fact that these once again come to accrue on a debt does not change the nature or type of insolvency in respect of which an application has failed, but rather relates purely to an arithmetic difference.

22. I consider that the Oireachtas intended to give to the relevant court power to dispense with the statutory restriction on the making of an application for a second PIA only in circumstances which were new or different from, and not related to, the previous proposed PIA. I do not consider that the Act merely requires a court to engage in an exercise of arithmetic, and that a mere difference in the calculations, whether that arises by virtue of interest that has accrued or as a result of costs from the failed process, is not the process engaged.

23. This conclusion is fortified by the factors that are required by the Act to be connected to the "current" insolvency of a debtor and these must be either exceptional matters or matters substantially outside of his or her control. A causative connection between those exceptional or outside matters must be made.

Conclusion

24. I accept in principle the argument that the failure of the PIP to lodge the application under s. 115A in time was a matter which was outside the control of the debtor, and that a PIP is not an agent of the debtor for the purpose of the Act. The failure of the s. 115A application has had the effect of increasing the liabilities of Mr. Hickey by the unascertained amount of costs awarded against him. While the matter of the lodging of the application may have been outside Mr. Hickey's control, his current insolvency is related to, or sufficiently related to, his previous insolvency to enable me to come to the conclusion that there is no new or different insolvency arising from different factors or circumstances which might give rise to the exercise of the exceptional jurisdiction to permit him to bring application for a protective certificate within the twelve month statutory period.

25. For that reason, I propose making an order acceding to the application of KBC setting aside the order under s. 91(3) of the Act made on 6th February, 2017.