Neutral Citation [2017] IEHC 18

THE HIGH COURT ON CIRCUIT

Record No. C:IS:SETA:2016:000666

SOUTH EASTERN CIRCUIT COUNTY OF TIPPERARY

IN THE MATTER OF PART III, CHAPTER IV OF THE PERSONAL INSOLVENCY ACTS 2012 - 2015

AND IN THE MATTER OF SARAH HILL OF PALMERS HILL, CASHEL, COUNTY TIPPERARY (A DEBTOR)

AND IN THE MATTER OF AN APPLICATION PURSUANT TO S. 115A (9) OF THE PERSONAL INSOLVENCY ACTS 2012 - 2015

JUDGMENT of Ms. Justice Baker delivered on the 18th day of January, 2017.

1. This judgment is given in an appeal by the debtor of an order of the Circuit Court of 19th October, 2016, by which it upheld the objection of Pepper Finance Corporation (Ireland) DAC ("Pepper") and refused an application by the debtor under s. 115A(9) of the Personal Insolvency Acts 2012 to 2015 ("the Acts").

2. One net question arises for determination in this appeal, whether the debtor had at the time of the commencement of the process a relevant debt such that the jurisdiction to make an order under s. 115A (9) existed.

3. Ms. Hill made a proposal for a Personal Insolvency Arrangement ("PIA") which was rejected at the vote taken at a meeting of her creditors on 17th June, 2016, at which all of her creditors holding secured and unsecured debt were present and voted. The total debts of the debtor are €166,643.71, of which €150,976.66 is secured on her principal private residence at Palmers Hill, Cashel, Co. Tipperary. Pepper is the owner of that security and debt.

4. The premises has an estimated value of €55,000, as a consequence of which the debtor was shown to have a significant negative equity. The PIA put to the meeting of creditors provided for the restructuring of the mortgage, the write-off of a substantial part of the debt, the payment on an interest only basis for a period of 6 years and the payment of capital and interest on an annuity basis for the balance of a 25-year term. It was anticipated by the Personal Insolvency Practitioner ("the PIP") engaged to act on behalf of the debtor that the restructured mortgage would enable the debtor to continue to reside in her home. The proposal also included a provision for the fixing of interest at 5.15% for the full 25-year mortgage term. As is required by the legislation, the proposals to restructure the mortgage repayments and term were made having regard to the current and projected income and reasonable living expenses of the debtor.

5. The other creditor who attended and voted at the meeting, Affinity Credit Union Limited, held an unsecured debt and voted in favour of the proposal.

6. The debtor is employed part-time as a bookkeeper and lives with her daughter in her residence which had been purchased jointly with her former partner, from whom she is now estranged.

Section 115A (9): power of the court to approve an arrangement

7. Section 115A(9) of the Act was inserted by the Personal Insolvency (Amendment) Act 2015 and created the power in the relevant court to confirm the coming into effect of a PIA notwithstanding that it had been rejected by the creditors at a creditors' meeting at which a vote was taken on the arrangement. The subsection provides as follows:

> "(9) The court, following a hearing under this section, may make an order confirming the coming into effect of the proposed Personal Insolvency Arrangement only where it is satisfied that—
>
> (a) the terms of the proposed Arrangement have been formulated in compliance with section 104,
>
> (b) having regard to all relevant matters, including the terms on which the proposed Arrangement is formulated, there is a reasonable prospect that confirmation of the proposed Arrangement will—
>
> (i) enable the debtor to resolve his or her indebtedness without recourse to bankruptcy,
>
> (ii) enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit, and
>
> (iii) enable the debtor—
>
> (I) not to dispose of an interest in, or
>
> (II) not to cease to occupy, all or a part of his or her principal private residence,
>
> (c) having regard to all relevant matters, including the financial circumstances of the debtor and the matters referred to in subsection (10)(a), the debtor is reasonably likely to be able to comply with the terms of the proposed Arrangement,
>
> (d) where applicable, having regard to the matters referred to in section 104(2), the costs of enabling the debtor to continue to reside in the debtor's principal private residence are not disproportionately large,
>
> (e) the proposed Arrangement is fair and equitable in relation to each class of creditors that has not approved the proposal and whose interests or claims would be impaired by its coming into effect,
>
> (f) the proposed Arrangement is not unfairly prejudicial to the interests of any interested party, and
>
> (g) other than where the proposal is one to which section 111A applies, at least one class of creditors has accepted the proposed Arrangement, by a majority of over 50 per cent of the value of the debts owed to the class."

8. The statutory provisions were formulated to enable a qualifying applicant to preserve an entitlement to retain ownership, or remain in occupation, of a principal private residence in certain circumstances, and have the effect that a creditor holding security over a principal private residence of a debtor may find that its rejection of a PIA can be overridden by the court. The creditor holding security of that type is treated differently from creditors holding other security, or unsecured creditors.

9. However the court's power arises only where the debts which are proposed to be dealt with by a PIA include a "relevant debt". Section 115A(18) defined a relevant debt as:—

> " 'relevant debt' means a debt—
>
> (a) the payment for which is secured by security in or over the debtor's principal private residence, and
>
> (b) in respect of which—
>
> (i) the debtor, on 1 January 2015, was in arrears with his or her payments,
>
> or
>
> (ii) the debtor, having been, before 1 January 2015, in arrears with his or her payments, has entered into an alternative repayment arrangement with the secured creditor concerned."

10. Section 115A(18)(a) does not give rise to any difficulty and it was the intention of the legislature to enable the court to override the result of a meeting of creditors only when the debtor did have a liability secured on his or her principal private residence. It is in regard to the balance of the definition of a relevant debt that the issue in this case comes to be determined.

11. It is common case that Ms. Hill was not, on 1st January, 2015, in arrears with her payments on the mortgage on her principal private residence. Her counsel argues that she did have a relevant debt, in that she had been in arrears on at least five occasions before 1st January, 2015, and had entered into an alternative repayment arrangement with her bank concerning these arrears.

12. I first set out the events that occurred in 2014 regarding payments by Ms Hill of her mortgage.

The late payments
13. The debtor failed to make the monthly payment on her mortgage on five separate occasions before 1st January, 2015. The relevant circumstances are as follows:

> 1. The debtor phoned an agent of the Bank on 28th March, 2014, advising she was in financial difficulty and was "struggling to pay her mortgage each month" and asking if there was "anything to help her" including an "interest only arrangement". The reports of this conversation suggest that the agent of the Bank advised her that as the loan was relatively new, an interest only arrangement would not be advisable as the capital would be left outstanding. It is clear that in that conversation the debtor did ask that one of the alternative repayment arrangements of the type envisaged by the Central Bank Code of Conduct on Mortgage Arrears ("the Code") would be at least considered by the Bank, but the matter ended there.
>
> 2. The borrower made contact with her lender on 8th May, 2014, advising that she was in financial difficulty and the internal bank notes suggest that she was treated as being in "pre-arrears" for the purposes of the Mortgage Arrears Resolution Process ("MARP") provided in the Code. On 9th May, 2014 an arrangement was made by phone with an agent of the Bank that the payment due could be made by Laser card a few days late. A few days earlier, in the course of a conversation initiated by the Bank the debtor had been asked to fill in a standard financial statement, one step in the resolution process required to be engaged by the lender under MARP.
>
> 3. The payment for July, 2014 was not made in the amount or on the date agreed and the borrower contacted an agent of the Bank by telephone and made a "promise" to meet the payment which she did, albeit a few days late, by debit card from a different account.
>
> 4. On 12th September, 2014 the direct debit payment from the current account of the debtor was not made by her bank and on 15th September, 2014 the debtor spoke on the telephone to an agent of the lender. From the report or "chat notes" of this conversation it appears that the account was identified as being in arrears but not "in ARA period", that is that the arrears was not for 31 days. In the course of a conversation on 9th September, 2014 the debtor informed the employee of the Bank that the direct debit for September would not be met but that payment would be made a few days late by way of a Visa debit card. The debtor informed the agent of the Bank that "she was experiencing financial difficulties" as she was not working due to illness and was "unable to support mortgage payments for the future". The payment was made on 15th September, 2014 and no further action was taken by the Bank.
>
> 5. On 14th October, 2014 the direct debit of the debtor was returned unpaid. Later that day Ms. Hill telephoned the Bank and made the required payment which brought her account up to date.

14. Payments in November and December, 2014 and January, 2015 were made on time. The debtor fell into arrears on 10th March, 2015 and payments in February and March had been missed. By letter of 10th April 2015 Pepper advised Ms. Hill that her mortgage loan account was in MARP, as arrears of more than 31 days had accrued.

Relevant debt
15. The legislative scheme was fashioned to offer protection to borrowers in arrears on 1st January, 2015, or who had been in arrears before that time but where the arrears had been dealt with by arrangement with the secured creditor concerned. The legislation does not contain a definition of "alternative repayment arrangement", nor what it means for a debtor to be in "in arrears with his or her payments", but only those persons who can show an underlying or persistent inability to pay or an element of insolvency regarding such payments could avail of the scheme.

16. While no definition of an alternative repayment arrangement is found in the Acts some assistance can be taken from the Code issued by the Central Bank of Ireland in 2013. The personal insolvency legislation was made in the broad financial and economic context of the Code. While no direct interpretative link is found between the Code and the Acts, and whilst it is not correct as a

matter of law to interpret a statutory provision by reference the Code albeit it has a statutory source, it is helpful to consider the language used by the Code with regard to the resolution of debt on a principal private residence.

17. The Code is directly referenced in Section 91(1) (g) of the Acts requires a debtor to make a declaration in writing that he or she has co-operated for a period of least six months with any creditor holding security over his or her principle private residence in accordance with the "process relating to mortgage arrears or operated by the secured creditors concerned which has been approved or required by the Central Bank of Ireland", a direct reference to MARP. The PIP must complete a statement or declaration pursuant to s. 54 of the Act that the debtor meets the eligibility criteria contained in s. 91.

18. The Code in turn makes reference to the Acts. MARP is a defined "process relating to mortgage arrears" for the purposes of ss. 52(3) (c), 91(1) (g) and 91(2) of the Act of 2012. "Arrears" arise where a borrower "has not made a full mortgage repayment, or only makes a partial mortgage repayment, in accordance with the original mortgage contract, by the scheduled due date". The definition includes as arrears a payment not made in full, or was made late even if it was made in full. Ms. Hill was in arrears in that sense, but MARP is not activated until there are arrears of 31 days, which did not happen in her case.

19. The Code does not provide a definition of "alternative payment arrangement" Clause 39, headed "Resolution" requires a lender to "explore all of the options for alternative repayment arrangements" and the clause provides that such arrangements "may include" twelve classes of arrangements including interest only payments on the mortgage for a specified period of time, reducing temporarily or permanently the interest rate, deferring part of a scheduled mortgage repayment for a period, extending the term of the mortgage, adding arrears and interest to the principal amount due, warehousing and changing the type of the mortgage.

20. The phrase is also found in Clause 18 which provides that the MARP framework is to be applied when an "alternative repayment arrangement" breaks down, or has expired.

21. These twelve types of arrangements are not intended to exclusively define the type of arrangement that may be entered into between a lender and a borrower. But, what is clear is that each of them envisages some form of agreement for forbearance, or compromise, or the temporary or permanent alteration of repayment terms and conditions, or which might entitle the borrower to pay late or in a different amount without consequences. MARP is intended to resolve debt to achieve a variation satisfactory to borrower and lender.

22. The word "arrangement" can connote a degree of informality not found in the contractual context, and an arrangement could for example create a mutual understanding by which both parties knew where they stood without complying with formal contractual requirements, such as the Statute of Frauds.

23. The word "arrangement" is found in company and bankruptcy law, for example in the examinership process created by the Companies (Amendment) Act 1990, and such arrangements often have contractual effect only if approved by the court. Indeed the PIA under the Acts is an "arrangement", and that word rather than "agreement" is used, presumably because the arrangement has force and can impact on the rights of parties only when approved by the creditors and by the court.

24. But in my view, an arrangement is not a mere indulgence on the part of the lender, or a mere acceptance of a breach of the terms of repayment which could be said to give rise, at best, to an estoppel of the type first formulated in *Central London Property Trust v. High Trees House Ltd.* [1947] KB 130.

An arrangement not within the meaning of the Code?

25. Counsel for the debtor argues that the class of alternative repayment arrangement envisaged as being the likely or desirable result of an engagement with the MARP framework is the not only form of arrangement that gives rise to the ability of a debtor to call in aid the provisions of s. 115A(9). I agree.

26. While some assistance can be found in understanding the meaning of the phrase by reference to the general scheme of the Code, certain differences in emphasis and intention must be noted. The resolution process provided for in MARP can be triggered only when a borrower is in arrears for at least 31 days or where there is an alternative repayment arrangement which has either broken down or expired by effluxation of the time agreed.

27. Some debtors who become insolvent will not be dealt with under MARP which regulates only a bank governed by the Central Bank Act 1942 holding security over the primary residence of a borrower.

28. The scheme of the Code requires that the lender explore the various alternative repayment arrangements with a view to ascertaining whether one or several of them may benefit or be viable in a particular case, and to offer one or several elements of an alternative payment arrangement to the borrower. It is to not determinative of the ways in which a debtor, through a PIP, may engage the resolution processes created by the scheme of the insolvency legislation. Indeed it could be said that MARP offers an alternative to a borrower which could mean that he or she does not need to engage the insolvency scheme.

29. Section 91(1) (g) requires a debtor who applies for a PIA to certify that he or she has engaged with the MARP process relating to the mortgage on his or her principal private residence, and that notwithstanding co-operation has not been able to agree a alternative repayment arrangement, or that the secured creditor is unwilling to enter into such arrangement. Thus the achieving of an alternative repayment arrangement within MARP is not a precondition to the commencement of the personal insolvency process.

30. Some note might be taken of the fact that s. 115A(18) refers to an alternative payment arrangement in the singular, although of itself it does not seem to me that the Oireachtas intended to exclude from the operation of the section a debtor who had entered into a series of arrangements, provided it could be shown that what was entered into or agreed between borrower and lender was an arrangement for an alternative payment of a mortgage debt, either in the amount of capital or interest payable, or by some other scheme or formula.

31. Counsel for the debtor argues that the purpose of protecting the principal private residence of a debtor continued in the Act of 2015 must inform me in my considerations.

The Act of 2015

32. The provisions of s. 115A were intended to allow for a separate treatment of a mortgage debt secured on a principal private residence and to offer particular and unique protection for that property. This is clear also from the provisions of s. 104 of the Act, which required a PIP, insofar as was reasonably practicable and having regard to the financial and other circumstances of the debtor, to formulate a proposal which did not require a debtor to dispose of an interest in, or cease to occupy, all or part of his or her

principal private residence.

33. Having regard to the unique protection afforded by the legislation to the principal private residence, one which echoes the constitutional protection of what is there called "a family home", and having regard also to the long title of the Act of 2012, I consider that a purposive approach to the interpretation of s. 115A(9) is appropriate. The long title of the Act of 2012 identifies the need to ameliorate difficulties experienced by debtors in discharging their indebtedness due to insolvency and identifies in the interests of the common good the need to enable insolvent debtors to resolve their indebtedness in an orderly and rational manner without recourse to bankruptcy.

34. I considered the broad purpose of the legislation in my judgment in *Re Nugent & Personal Insolvency Acts* [2016] IEHC 127 and, as I noted there, the purpose of the legislation was to further the interests of the common good in the rational resolution of debt and the avoidance of bankruptcy.

35. A specific element of the common good identified expressly in s. 104, is the protection of the principal private residence. Section 115A provides a further mantel of protection to a debtor who may seek the assistance of the court in furthering that protection and s. 115A is in its clear terms formulated in order to offer specific and unique protection to the continued occupation of the principal private residence by a debtor who satisfies the statutory tests.

36. The discretion of the court engaged by s. 115A (9) requires that the Court be satisfied that the proposed PIA enables a creditor to recover debts due to them to the extent that the means of the debtor reasonably provide, and that the proposal will enable the debtor not to dispose of an interest in, or not to cease to occupy, his or her principal private residence, and that the costs of enabling the debtor to continue to reside in that premises are not disproportionately large. The court must be satisfied that the proposed arrangement is "fair and equitable" in relation to each class of creditors that has not approved the proposal and whose interests or claims would be impaired by its coming into effect. The Court is also required under 115A (10) to consider the conduct of the debtor in the previous two years in seeking to pay the debts concerned.

37. Section 115A is not intended to give a broad unfettered discretion to the court to protect a principal private residence, and to do so could lead to an undesirable lack of certainty in financial arrangements, and to a lack of a proportionate approach to the interests of the debtor and creditor regarding such loans. Thus the court's sympathy for a person who is likely to lose a principal private residence if a PIA is not accepted by the creditors is not a factor that may be taken into account. The statutory factors relate to the proportionality of the arrangement, the likely differences between the PIA and an arrangement on bankruptcy, and whether the PIA is fair to all classes of creditors. While the intention of the Oireachtas was to offer a unique and special protection to the principal private residence, that protection did not enable the court to override the vote of a creditor holding security over such property merely on account of the fact that the property was a principal private residence, and other factors resonant of an attempt to achieve a degree of balance of each of them is found in the legislation.

38. The legislation envisages the court examining not merely the prospective likely performance by the debtor of the terms of the PIA, but also whether the debtor has acted reasonably with regard to his or her debts and presumably not irrationally or carelessly found himself or herself in a situation where an insolvency arrangement is a last minute or emerging solution to a ongoing problem. It does not in my view envisage that a debtor will readily persuade the Court that a PIA is "fair and equitable" and that his or her conduct has been appropriate if he or she ignores all correspondence from the bank and ignores a gathering storm of indebtedness.

39. The court's discretion is constrained by the statutory factors and s. 115A (9) is not intended to benefit those debtors where insolvency is likely to lead to personal hardship. Personal hardship or the hardship that might be experienced by a family is not an individual factor identified in the Act.

40. Ms. Hill most certainly has shown diligence in meeting her mortgage payments, and made effort on each of the five occasions when she encountered financial difficulties to meet her payments by another means, albeit in each case she was a few days late. The lender, equally, cannot be said to have failed to respect her diligence and good faith, and on each occasion accepted late payment, as a forbearance or tolerance.

41. There was not however, in my view, an alternative payment arrangement entered into between Ms. Hill and the Bank such as to bring her within the type of arrangement envisaged as the gateway or precondition to the making of an application under s. 115A. The words of s. 115A (18) (b) (ii) are expressed in such a way as suggests that the Oireachtas required that there be more than a series of *ad hoc* or one-off acceptance of breach, but that there be an arrangement as a result of which some alternative terms and conditions as to the repayment of a secured loan were agreed to govern the repayment obligations of the borrower.

42. Having regard to what I consider to be one principle that guides the legislation, the requirement that the court would look at the balancing of interest between creditor and debtor, and also having regard to the fact that what in my view the legislation intended was that the parties agree an alternative arrangement whether on a temporary or permanent basis, I consider that what the Oireachtas had in mind in fixing the threshold requirement for an application under s. 115A(9) was that a debtor not merely be treated by its lender as falling within the MARP framework but to have actually entered into an arrangement by which the provisions for the repayment of a mortgage were re-negotiated and agreed in a way that met he needs of both parties.

Did Ms. Hill have an alternative repayment arrangement?

43. The debtor made a late payment in May, 2014, June, 2014, July, 2014, September, 2014 and October, 2014. On each of those five dates the payment was made from an account other than the account from which the direct debit mandate was agreed to be made. On each occasion the debtor was in contact with the "Arrears Support Unit" of the Bank, and on each occasion the debtor stated that she was in financial difficulty, and sought the indulgence of her lender. On no occasion did the period of arrears meet the 31 day threshold provided in the Code, and this fact was noted on the internal Bank records of the phone conversations. On each occasion also, a letter was sent to the debtor advising her that she was regarded by the bank as being in arrears or "pre-arrears" and that the bank was thenceforth intending to deal with the mortgage under the MARP framework. The debtor was asked to complete a standard financial statement and a copy of the MARP information booklet was sent.

44. In each case the lender sent a letter for the purposes of clause 9 of the Code which requires a lender to communicate promptly and clearly with the borrower to establish why the mortgage payment agreement had not be adhered to.

45. It is clear however that in each of the five occasions when the mortgage payments were made late, and by a different method from that provided in the contractual arrangement between borrower and lender, that no arrangement was made by which the contractual terms and conditions of the mortgage were varied by agreement, save in regard to the individual payment in question. There was, for example, no agreement that the amount of the payment be reduced, that the debtor be entitled to make payments on

an interest only basis for an identified period, or that there be a moratorium on full payments for a time.

46. The late payments and the phone contact had between the debtor and the agent for the lender show that the debtor was in financial difficulties through 2014 and was having a particular difficulty in meeting her mortgage payments on five consecutive months. The lender regarded the conversations with the borrower to be an indication that the borrower was in "pre-arrears", a specific category identified in the MARP framework, and that the reason for late payment was not inadvertence or some other factor which did not denote a difficulty arising from an inability to meet the payment.

47. That Ms. Hill did not on any one of the five occasions make an arrangement on which she could rely and by which she was entitled without being in breach to vary the repayment dates or manner of payment, is clear from the fact that on each of the occasions when she fell into arrears she made contact with the Bank or, in the case where the Bank contacted her, she spoke openly to the agent of the Bank, and sought the indulgence or forbearance of the Bank in regard to the repayment. She did achieve that forbearance or indulgence

48. I am not satisfied therefore that the *ad hoc* acceptance of breach could be called an alternative arrangement, and Ms. Hill did not reach an arrangement for amended terms and conditions of repayment.

49. The Oireachtas chose to fix a particular means by which it would afford protection to debtors with distressed mortgages, and presumably to prevent strategic defaulters taking advantage of the revised scheme implemented by the amending legislation in 2015, the Oireachtas envisaged a cut-off of 1st January, 2015, a date considered, by economists at least, by which the worst of the financial crisis and historic mortgage debt crisis were over, or has stabilized.

50. The court under the legislation does not have power to override the result of a meeting of creditors in circumstances where the distressed debt secured against a principal private residence was not shown to be distressed in one of the two ways identified by the Oireachtas by s. 115A(18), and Ms. Hill, while she undoubtedly had difficulty in making her mortgage payments, and undoubtedly was identified by her lender as being likely to continue to have such difficulties, did not have an arrangement which the Act applied on the operative date of 1st January, 2015.

51. The result is harsh for Ms. Hill. She has made every effort, and been diligent in seeking to meet her repayments. Her mortgage debt is relatively small and she is hopeful that her income will improve and as she has shown, it has improved in the recent past. But Ms. Hill may not seek that I would exercise my discretion under the amending provisions on account of the sympathy which I do have for her, and which in all the circumstances arose from matters over which she had insufficient personal control.

52. Because of the cut-off point of 1st January, 2015, Ms. Hill found herself, as a result of proactively engaging with her lender and making payments by alternative means and a few days late on five separate times in the calendar year 2014 in a position whereby she was not in arrears on that date.

Decision

53. In the circumstances, I consider that the provisions of s. 115A (9) are not engaged in this application, and that Ms. Hill did not have a relevant debt in respect of which a PIA could be approved by the Court.