THE HIGH COURT ON CIRCUIT

[2017 No. 115 CA]

[C:IS:MIOY:2016:000707]

MIDLANDS CIRCUIT COUNTY OF OFFALY

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012-2015

AND IN THE MATTER OF KATHLEEN MCDONNELL OF LAVENDER HOUSE, CREE, FONTAL, BIRR, CO OFFALY ("THE DEBTOR")

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015

JUDGMENT of Ms. Justice Baker delivered on the 3rd day of July, 2017.

1. This judgment concerns the interpretation of s. 105 of the Personal Insolvency Acts 2012 - 2015 ("the Act"), the provisions relating to the means by which secured property is to be valued for the purposes of the Act.

2. This is an appeal from an order of Judge Lambe made on 20th April, 2017, by which she dismissed the application of the debtor made pursuant to s. 115A of the Act, having upheld the objection of Start Mortgages DAC ("Start") that the Personal Insolvency Practitioner ("PIP") had not followed the statutory procedural requirements in obtaining the valuation. This judgment is given also in the appeal of an identical order made in the interlocking application of James McDonnell, Record No. 2017 116 CA.

Material facts

3. The PIP made a proposal for a Personal Insolvency Arrangement ("PIA") under the Act pursuant to his statutory function. Start voted against the proposed PIA, and the debtor appealed the rejection of the PIA pursuant to s. 115A of the Act. The Circuit Court dealt with the preliminary issue regarding the valuation presented by the PIP for the purposes of the PIA.

4. The Start valuation figure was €230,000 and the figure presented to the meeting of creditors was €180,000, a material and significant difference in the light of the overall debt figures.

The requirement for a valuation

5. For the purposes of the formulation of a PIA the value of a security must be ascertained as the relevant statutory provisions show:

> "102.— (1) Where a secured creditor has been notified by the personal insolvency practitioner that a protective certificate has been issued in respect of the debtor the secured creditor concerned shall furnish to the personal insolvency practitioner an estimate, made in good faith, of the market value of the security and the creditor concerned may also indicate, a preference as to how, having regard to subsection (3) and sections 103 to 105 , that creditor wishes to have the security and secured debt treated under the Personal Insolvency Arrangement
>
> (3) Subject to sections 103 to 105, the terms of a Personal Insolvency Arrangement may provide for the manner in which the security for a secured debt is to be treated which may include:
>
> (a) the sale or any other disposition of the property or asset the subject of the security;
>
> (b) the surrender of the security to the debtor; or
>
> (c) the retention by the secured creditor of the security.
>
> (4) Failure by the secured creditor to furnish valuation and the indication of preference relating to the security under subsection (1) within the period specified by the personal insolvency practitioner or such further period as may be offered by him or her shall not prevent the personal insolvency practitioner from formulating a proposal for a Personal Insolvency Arrangement.
>
> (5) Where a Personal Insolvency Arrangement provides for the sale or other disposal of the property which is the subject of the security for a secured debt, and the realised value of that property is less than the amount due in respect of the secured debt, the balance due to the secured creditor shall abate in equal proportion to the unsecured debts covered by the Personal Insolvency Arrangement and shall be discharged with them on completion of the obligations specified in the Personal Insolvency Arrangement.
>
> (6) Without prejudice to the generality of section 100 or subsections (1) to (3) and subject to sections 103 to 105, a Personal Insolvency Arrangement may include one or more of the following terms in relation to the secured debt:
>
> (a) that the debtor pay interest and only part of the capital amount of the secured debt to the secured creditor for a specified period of time which shall not exceed the duration of the Personal Insolvency Arrangement;
>
> (b) that the debtor make interest-only payments on the secured debt for a specified period of time which shall not exceed the duration of the Personal Insolvency Arrangement;
>
> (c) that the period over which the secured debt was to be paid or the time or times at which the secured debt was to be repaid be extended by a specified period of time;
>
> (d) that the secured debt payments due to be made by the debtor be deferred for a specified period of time which shall not exceed the duration of the Personal Insolvency Arrangement;

(e) that the basis on which the interest rate relating to the secured debt be changed to one that is fixed, variable or at a margin above or below a reference rate;

(f) that the principal sum due on the secured debt be reduced provided that the secured creditor be granted a share in the debtor's equity in the property the subject of the security;

(g) that the principal sum due on the secured debt be reduced but subject to a condition that where the property the subject of the security is subsequently sold for an amount greater than the value attributed to that property for the purposes of the Personal Insolvency Arrangement, the secured creditor's security will continue to cover such part of the difference between the attributed value and the amount for which the property is sold as is specified in the terms of the Personal Insolvency Arrangement;

(h) that arrears of payments existing at the inception of the Personal Insolvency Arrangement and payments falling due during a specified period thereafter be added to the principal amount due in respect of the secured debt; and

(i) that the principal sum due in respect of the secured debt be reduced to a specified amount.

6. Section 105 provides the statutory mechanism for arriving at a valuation and sets out the stages to be engaged by the parties. The valuation is binding for all purposes connected with the process of the resolution of debt. Because the Act envisages the forgiveness or scheduling of secured debt the valuation of secured assets is a central factual element in the process.

7. I quote the section in full:

"105.— (1) Subject to the provisions of this section the value of security in respect of secured debt for the purposes of this Chapter shall be the market value of the security determined by agreement between the personal insolvency practitioner, the debtor and the relevant secured creditor.

(2) Where the personal insolvency practitioner does not accept a secured creditor's estimate of the value, if any, of the security furnished by the secured creditor under section 102, the debtor, the personal insolvency practitioner and the secured creditor shall in good faith endeavour to agree the market value for the security having regard to any matter relevant to the valuation of security, including the matters specified in subsection (5).

(3) In the absence of agreement as to the value of the security, the personal insolvency practitioner, the debtor and the relevant secured creditor shall appoint an appropriate independent expert to determine the market value for the security having regard to any matter relevant to the valuation of security, including the matters specified in subsection (5).

(4) Where the personal insolvency practitioner, the debtor and the secured creditor are unable to agree as to the independent expert to be appointed under subsection (3) the issue may be referred by any of them to the Insolvency Service which shall appoint such independent expert as it considers appropriate to determine the market value of the security concerned having regard to any matter relevant to the valuation of security, including the matters specified in subsection (5), and the valuation carried out by such expert shall be binding on the personal insolvency practitioner, the debtor and the secured creditor concerned.

(5) The matters referred to in subsections (2) to (4) as the matters specified in subsection (5) are:

(a) the type of property the subject of the security;

(b) the priority of the security;

(c) the costs of disposing of the property the subject of the security;

(d) the price at which similar property to that which is the subject of the security has been sold within the 12 months prior to the issue of the protective certificate;

(e) the date of the most recent valuation or transaction with respect to the property the subject of the security and the value attributed to the property in respect of that valuation or transaction;

(f) the value attributed to the property the subject of the security in the debtor's accounting records (if any);

(g) the value attributed to the security in the secured creditor's accounting records (if any);

(h) whether the market for the type of property the subject of the security is or has been subject to significant changes in conditions;

(i) data made available to the public by the Property Services Regulatory Authority pursuant to Part 12 of the Property Services (Regulation) Act 2011 and which relate to property similar to the property the subject of the security; and

(j) any relevant statistical index relating to the valuation of the same or similar types of property as the property the subject of the security.

(6) In this section "market value"—

(a) as respects property the subject of security for a secured debt, means the price which that property might reasonably be expected to fetch on a sale in the open market;

(b) as respects security for a secured debt, means the amount that might reasonably be expected to be available to discharge that secured debt, in whole or in part, following realisation of the security by the secured creditor concerned and, where permitted by the terms of the security or otherwise, after deducting all relevant costs and

expenses in connection with the realisation of the security.

(7) The creditor concerned and the personal insolvency practitioner shall each pay 50 per cent of the costs of carrying out the valuation by the independent expert pursuant to subsection (3) or (4).

(8) The amount paid by the personal insolvency practitioner pursuant to subsection (7) shall be treated as an outlay for the purposes of the Personal Insolvency Arrangement.

(9) For the purposes of this section, the personal insolvency practitioner, the debtor, the secured creditor concerned and any independent expert shall be entitled to assume, in the absence of any clear evidence to the contrary, that the market value of the security which is a first charge is the lesser of—

(a) an amount equal to the market value of the property the subject of the security, or

(b) unless the nature of the security and the property concerned would make it unreasonable to do so, an amount equal to the market value of the property the subject of the security less an adjustment to that value as respects the costs and expenses which would normally be necessarily incurred by a secured creditor in the realisation of a security of a similar kind to that of the security concerned, provided that the adjustment is no greater than 10 per cent of the market value of the property the subject of the security."

8. The Act envisages four possible stages in arriving at a valuation:

9. The "market value" is to be determined by agreement between the PIP, the debtor and the relevant secured creditor.

10. When agreement cannot be reached s. 105(2) requires the relevant parties to "in good faith endeavour to agree the market value", and certain matters are specified in s. 105(5) to guide that exercise.

11. If agreement cannot be reached following the endeavour to do so, s. 105(3) requires the relevant parties to attempt to agree an appropriate "independent expert" to determine the market value, also in accordance with section 105(5).

12. The final stage of the process is engaged if the parties fail to agree on who is to act as independent expert, and s. 105(4) provides for reference to the Insolvency Service of Ireland ("ISI") to appoint an independent expert.

13. The valuation before the meeting of creditors in the present case was determined by an independent expert appointed by the ISI, but Start argues that circumstances giving rise to the power to appoint the expert had not arisen.

The parties disagree as to the stage of the process that had been reached, and the debtor argues that the ISI was properly vested with the power to appoint an independent expert in the circumstances of the case.

14. **Chronology**

15. On 10th June, 2016, Start provided the PIP with its proof of debt and indicated that a valuation would subsequently be provided. This was done on 12th July, 2016, when a valuation figure of €230,000 was proposed. A formal valuation report was not provided, although it was clear that Start did have a written valuation.

16. In correspondence between 13th July, 2016, and 15th July, 2016, the PIP sought a copy of the written valuation report, and argues that in declining to furnish this Start was not engaging with the process in good faith as is required by the Act. In emails of 15th July, 2016, at 8.54 and at 17:15 Start said "under no circumstances will the valuation be provided".

17. Start then proposed that the parties would seek to agree the appointment of an independent expert under s. 105(3), and offered to furnish a list of its preferred experts, or "panel". The PIP rejected the tender of the panel list and without further reference to Start sought the appointment of an independent expert by the ISI on 18th July, 2016. The ISI appointed an expert on 20th July, 2016. A valuation report was received on 25th July, 2016, which gave a value of €180,000. That valuation was furnished to Start on 25th July, 2016, and after that, on 27th July, 2016, Start shared a copy of its written valuation.

18. The debtor argues that because it was clear to the PIP that the relevant parties were unable to agree a valuation, it was necessary and appropriate in accordance with statutory scheme for the PIP to apply to the ISI to appoint an independent expert. It is also argued that Start failed to act in good faith in refusing to share its written valuation report, and proposing that an agreed expert be appointed from its list of preferred auctioneers and estate agents.

19. The objecting creditor argues that it did fully engage with the letter and spirit of s. 105, and that circumstances have not arisen in which the power vested in the ISI to appoint an independent expert had been triggered.

Are the provisions of s. 105 mandatory or directory?

20. The first question to be determined is whether the statutory provisions are mandatory or directory.

21. The legislation is framed in language which suggests that it is mandatory for the parties to engage each step, and that ISI assistance be sought only if the prior engagement had failed to achieve either an agreed valuation or an agreed independent expert to provide such valuation.

22. On a literal reading of subsections 105(3) and (4), there being no ambiguity or lack of clarity, and giving the words their ordinary and natural meaning, the parties must engage in the four stages in seeking to come to a valuation. The section clearly envisages and requires a level of engagement between the parties at each of those stages.

23. It is not always the case that the word "shall" in a statutory provision denotes a mandatory obligation. *Monaghan UDC v. Alf-a-Bet Promotions* [1980] I.L.R.M 64 and *State (Elm Developments Ltd) v. An Bord Pleanála* [1981] I.L.R.M 108 dealt authoritatively with the question.

24. In *Monaghan UDC v. Alf-a-Bet Promotions Ltd*, the Supreme Court considered that words importing a necessary requirement were

in general to be treated as mandatory, Griffin J at p. 73 explained :

> "It is a well established rule of construction that the ordinary sense of words used in a statute or in regulations made thereunder is primarily to be adhered to; that requirements in public statutes which are for the public benefit are to be taken to be mandatory or imperative; and that provisions which on the face of them appear to be mandatory or imperative cannot without strong reason be held to be directory. In its ordinary sense shall is to be considered as mandatory or imperative."

25. The mandatory nature of a requirement may be relaxed as Henchy J. stated at p. 69:

> "In other words, what the legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."

26. This was further clarified in *State (Elm Developments Ltd) v. An Bord Pleanála*, where Henchy J. stated that the statutory context was essential to the correct interpretative approach, and whether the provision was a substantive element of a statutory scheme:

> "Whether a provision in a statute or a statutory instrument, which on the face of it is obligatory (for example, by the use of the word 'shall'), should be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused." (at p. 110)

Discussion

27. A number of factors suggest that s. 105 is mandatory in nature. First, the purpose of the section is to finalise a valuation which will be binding as part of a PIA. Hence, the section plays a substantive role in the aim and scheme of the legislation. Second, it is clear the legislature did not intend the ISI to micro-manage the process of valuation. It can be assumed that, as a State body, the ISI has limited resources, and its function was intended to be administrative. Third, the statutory scheme requires engagement by all relevant the parties to initiate the valuation process, and it must have been intended that they should at least attempt to find a resolution either by agreeing on a valuation or by agreeing on an independent expert before engaging the ISI. The ISI should be engaged only if all other options included in s. 105 have been exhausted.

28. Further, the preamble to the Act identifies the general purpose of the Act to achieve the rational and orderly resolution of debt by agreement. In that context an agreed valuation or one prepared by an agreed expert is a desirable element of the consensual and orderly approach on which the Act is predicated.

29. Because the scheme of the legislation envisages a consensual resolution of burdensome debt which has resulted in the insolvency of a debtor, it is understandable that while the legislation provides a means to resolve a dispute regarding the identity of an independent expert, it saw the role of the ISI as being one which was to be engaged only as a last resort if all other attempts to achieve consensus failed. The legislature intended to involve the ISI only when the parties themselves could not reach a consensus.

30. I consider for these reasons that the provisions of s. 105 are mandatory.

Excuse of non-compliance

31. I am not satisfied that I may excuse non-compliance with the mandatory requirements of the Act as the objecting creditor will suffer prejudice should I do so. The debtor relies on the judgment of Hogan J. in *Re Belohn Ltd* [2013] IEHC 157, in which a breach of the mandatory requirement in the Act that an examiner should consent in writing to accept an appointment was excused as it was "at most a technical" breach of a mandatory requirement, and he was prepared to excuse it as he was satisfied no prejudice was suffered.

32. There is in my view an obvious prejudice to the objecting creditor were a court to accept a valuation which is far less than the one it proposes. The valuation achieved as a result of the processes is binding on all parties.

33. The valuation ultimately achieved may or may not be correct, but the failure to observe the mandatory requirements of the valuation section has the effect that there was no truly binding valuation on which the Circuit Court could engage its jurisdiction under s. 115A in the circumstances.

Was the secured creditor obliged to furnish its written valuation report?

34. The debtor argues that the failure of the objecting creditor to furnish a written valuation is a reflection of the extent to which it failed to engage with the process of attempting to agree a valuation in good faith. She also argues that the objecting creditor acted unreasonably in failing to fully engage the process of agreeing an independent expert, and that its correspondence showed that it was prepared to agree a valuer only from its own list or panel of preferred valuers. The debtor argues in those circumstances that it was apparent to the PIP that the objecting creditor was not engaging and would not engage in good faith and that the only solution to the impasse was to seek the assistance of the ISI.

35. The Act requires the parties to endeavour to achieve an agreement regarding a valuation *bona fide*, that is openly, in good faith, and by using their best endeavours. The express requirement of "good faith" in s. 105(2) suggests that parties should conduct themselves in a manner which aims to achieve resolution. That language is also found in s. 102

36. This means in my view that a proffered valuation figure should be sustainable, supported by credible evidence and not a hypothetical figure proposed for negotiation purposes, or a starting point. The secured creditor should value its security in this open manner. The Act is predicated on agreement on the value of securities, and the scheme provides for a protective certificate to be in force for 70 days, as follows:

> "95. (5) Subject to subsections (6) and (7) and section 113(2), a protective certificate shall be in force for a period of 70 days from the date of its issue."

37. Because of this requirement, a secured creditor ought not to unreasonably propose a figure unless it is one that is real and capable of being accepted by all relevant parties so as to enable the process to conclude without the need to seek a court extension of the period of protection.

38. The ISI Stakeholder eBrief of May, 2017 "strongly encourages all parties involved to engage meaningfully and as quickly as possible in the valuation process in order to avoid situations in which, through failure to reach agreement, Protective Certificates have to be extended". The eBrief has no legal force but is informative and explains the preferred approach of the ISI.

39. It is not necessary that a proposed valuation be supported by a written valuation report. If one is prepared and is requested by the other party there may be an element of lack of good faith in a continued refusal to furnish the written report when the written report will contain a description of the property, the comparators and other elements material to the valuation that could inform the approach of the other party, and may lead to a resolution of a disagreement or facilitate agreement. A reluctance to show a written report is at best unhelpful and unlikely to instil confidence in a proffered figure. A seriously made request for a valuation report should in general therefore not be refused without cause.

40. I agree therefore with the statement in the ISI eBrief May, 2017 that good practice under s. 105 requires "the sharing of available valuations already obtained by the parties".

41. Start's refusal to furnish the valuation documentation was in my view indicative of a lack of good faith or of a meaningful engagement in the process of agreeing the market value. I do not go so far as was urged by the debtor as to say that Start was "trying to hide their valuation" as the correspondence between the parties was open and frank, it was not overly formalistic, but its approach was not the open one required by the Act.

Agreed independent expert

42. However, the matter does not rest there.

43. Start did seek to engage the process provided at the third stage and the PIP in my view wrongly ignored its overture. The PIP failed to explain in correspondence why or even that he objected to the use of a panel valuer, and made an assumption, wrongly in my view, that Start would not move from its proposal that a valuer be appointed from its panel. Further, I do not consider that Start insisted on the use of a panel valuer, and that circumstances have not arisen which justified the engagement of the ISI under section 105(4).

44. By an email of 15th July, 2016, at 8.54, Start confirmed agreement "for an independent valuation to be carried out", said it had a list of approved agents and offered to supply the names and contact details of agents on that list. An email sent at 11.27 by Mitchell O'Brien, the PIP, engaged primarily with the question of the refusal of Start to provide a written valuation.

45. Later that afternoon, at 17.15, Start replied saying it was agreeable to an additional valuation being provided on the basis, as identified in the Act, that the cost be shared equally.

46. Having read the correspondence, I consider that the PIP was mistaken in his characterisation. I do not consider that Start had, by its emails of 15th July, indicated it was prepared to agree an independent valuer only if he or she was from its approved panel or list of valuers. I consider that the PIP misconstrued the correspondence and that he was mandated by statute to engage with the proposal by Start that attempts be made to reach consensus on an agreed expert. I consider that the PIP moved too quickly to engage the services of the ISI, and that he ought to have counter proposed by identifying an independent expert or experts, and awaited a response before moving to the next stage.

47. I consider that it is not within the competence of the parties to ignore the statutory process of achieving a valuation, and that the stage envisaged at s. 105(3) must be engaged before the ISI is requested to appoint an expert. The PIP failed to address that third stage of the process.

The role of the ISI: scrutiny?
48. I reject the suggestion that the ISI has an obligation to satisfy itself that the parties have failed to either agree a valuation or an expert to provide such valuation, The statutory role envisaged is one akin to that often contained in an arbitration agreement where the power to nominate an expert is conferred on the president of the Law Society of Ireland, the chair of the Bar Council or other professional body. The ISI has no obligation to ask for evidence on which it should be satisfied that it statutory role has been properly engaged. It is, it seems to me, entitled to assume that a request is properly made.

49. Therefore, I reject the arguments that because the ISI nominated an independent expert in performance of its statutory role, the process is to be deemed to have arrived at a stage where the statutory power had become exercisable.

Conclusion
50. I am not satisfied that there was sufficient engagement by the PIP with the third stage and am satisfied that he moved with undue haste to the fourth stage. In those circumstances, therefore, I consider that the Circuit Court was correct in the approach taken to the valuation. The valuation was not binding on the parties and not a relevant one for the purposes of the process as it had not been achieved in accordance with the requirements of section 105.

51. I dismiss the appeal.