

## THE HIGH COURT ON CIRCUIT

[C:IS:ESMH:2016:000337]

## EASTERN CIRCUIT COUNTY OF MEATH

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

AND IN THE MATTER OF MICHAEL ENNIS OF DONORE, LONGWOOD, COUNTY MEATH ("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 27th day of February, 2017.**

1. Michael Ennis ("the debtor") made a proposal for a Personal Insolvency Arrangement ("PIA") pursuant to the Personal Insolvency Acts 2012 – 2015 ("the Acts") which was rejected by the sole creditor, EBS Limited ("EBS") by notice of objection dated 9th June, 2016. EBS holds security over the principal private residence of the debtor.

2. The debtor made application pursuant to s. 115A(9) of the Acts that the Circuit Court would approve the coming into operation of the PIA notwithstanding the objection of EBS.

3. The application under s. 115A was rejected by O'Malley Costello J., of the Circuit Court, on 14th December, 2016, by which she upheld the objection of the creditor.

4. This judgment is given in the appeal by the debtor of the decision of the Circuit Court.

**Relevant provisions of the proposed PIA**

5. The debtor is a self employed carpenter, and sole owner of his principal private residence situate at Donore, Longwood, Co. Meath, the valuation of which, for the purposes of s. 105 of the Acts is €105,000. The debtor has no other assets save for an old motor vehicle which he uses for the purposes of his trade. The amount due on the loan secured on the principal private residence of the debtor at the date of the preparation of the PIA was €380,276.35, leaving negative equity of €275,276.35.

6. The proposal to deal with the secured debt includes the writing down of a substantial part of the capital and the payment by the debtor of a fixed monthly interest only repayment for the period of the proposed PIA, 72 months, and provision for a repayment on a full interest and capital basis thereafter, at the prevailing variable interest rate. It is proposed that the capital amount owing on the mortgage would be €105,000 and the balance written off at the end of the PIA. Provision is also made for the payment over the six year period of the proposed PIA of an additional payment of €523 per month, to provide additional payment to the secured creditor and the modest fees and expenses of Tara Cheevers, the personal insolvency practitioner ("PIP").

7. The return to the secured creditor from the proposed PIA will provide a dividend of €42,791, and ongoing payment of capital and interest on the written down mortgage debt. The dividend on a bankruptcy would be much less, €94,500, the net figure following the deduction from the sale price of the costs of realisation.

8. The benefit to the debtor of the exercise by the court of its jurisdiction under s. 115A of the Acts is that it would permit him to retain occupation of his principal private residence where he resides alone, and where his young daughter visits him at weekends.

9. The primary basis of the objection by EBS is that the proposed PIA is unfair and inequitable in circumstances where it has already obtained an order for possession of the principal private residence of the debtor, and where it is asserted that there are no reasonable prospects that the debtor will be reasonably likely to be able to comply with the terms of the proposed PIA.

**The secured loans**

10. By loan offer made on 5th March, 2004, EBS offered to advance a loan to Mr. Ennis in the sum of €230,000 for the stated purpose of the purchase of a domestic dwelling for his own personal use at the purchase price of €250,000, and subject to the securing of the advance by way of a first charge on the lands to be purchased.

11. A charge was duly put in place on the lands comprised in Folio 23680 of the Register County Meath and EBS is the owner of that charge.

12. A second loan of €80,000 was drawn down by the debtor in six tranches between 25th April, 2007 and 18th February, 2008. A further charge was executed in respect of the second advance and was registered on the folio lands.

13. The payment history of the debtor has been poor for eight years. The debtor argues that his default in payment arose in the context of financial difficulties experienced by him following the collapse in property development and the consequential loss of work opportunities for a person with his skills.

14. EBS made demand on foot of the loan facilities by letter of 10th March, 2014, at which time the amount the arrears stood at almost €80,000. The total amount due and owing on the two loans to include interest at that date was almost €350,000.

15. Proceedings seeking possession were commenced in the Circuit Court, which granted an order for possession on 26th January, 2015, with a stay of six months. At the time the protective certificate was issued to the debtor pursuant to s. 95(2)(a) of the Acts, on 23rd March, 2016, EBS was awaiting execution by the Sheriff of the order for possession.

**Unfair prejudice**

16. EBS argues that the proposed PIA causes unfair prejudice to it within the meaning of s. 115A(9)(f) of the Acts. The evidence of EBS, contained in the affidavit of Alan Desmond, an agent of EBS, is that as of 12th July, 2016, the amount owing on foot of the two loans was over €380,000. Certain factual propositions are advanced:

(a) The debtor has not shown how he proposes to service the increased repayments which will be due at the end of the six year period of the proposed PIA.

(b) The payment history of the debtor for most of the loan term shows very significant breach of his repayment obligations. No

payments at all were made to the main mortgage account from December, 2013 to 28th April, 2016. Capital and interest loan repayments on the top-up or second loan account ceased in August, 2008, only months after it was fully drawn down, and no payments at all have been made on this account since 11th November, 2010.

(c) The principal private residence of the debtor requires significant work for which payment is not catered in the proposed PIA.

(d) No provision is made for increase in maintenance payments currently being made on a voluntary basis in respect of the dependent child of the debtor.

### **The condition of the principal private residence of the debtor**

17. EBS objects to the extent of the proposed write-down in mortgage debt of in excess of 72%, where it argues that no credible basis exists on which the court could take a view that the revised mortgage, after this write-down, is capable of being serviced by the debtor.

18. Section 105 of the Acts requires that an agreed valuation be contained in any proposal for a PIA which includes a secured debt, and that if an agreement cannot be reached between the PIP and a secured creditor as to the estimate of the value, an independent expert be appointed to determine the market value for the purposes of the application.

19. Sections 105(1) to (3) provide as follows:

“(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).

20. The valuation of the principal private residence of the debtor for the purpose of this section is €105,000. The value was said to be €200,000 in the standard financial statement provided by the debtor on 9th March, 2016, only days before the application for a protective certificate was made in the Circuit Court, and EBS describes the loss of value as “significant and worrying in the extreme”.

21. A valuation prepared by a property adviser and valuer on 28th April, 2016, describes the premises as a “three bedroom detached extended cottage situated on circa one acre site with a garage/storage shed to the rear”. The property is described as being “in need of refurbishment”, and there are no kitchen units or appliances, no oil boiler or oil tank to service the central heating installed in the property, and no running water, as there are no pipes and conduits from the well which is intended to service the premises. The lounge extension and garage/storage shed were constructed or extended without planning permission. There are indications of leaks in the ceiling in the hallway.

22. EBS argues that as a condition of the security agreement entered into with the debtor, the debtor was required to maintain the premises in good repair and condition and not to make any structural alterations to the premises. Clause 6(c) of the mortgage conditions requires the debtor to:

“Put and keep the Property and any additions to it in good repair and condition to the satisfaction of EBS.”

23. Clause 6(g) requires the mortgagor to comply with statutes:

“To observe and comply with the provisions of all statutes and the orders of competent authorities insofar as they affect the Property and generally to do everything concerning the Property which is required by law or regulation.”

24. EBS argues that the current structural and repair condition of the premises suggests a clear breach by the borrower of the terms and conditions in the mortgage, and objects to any “indulgence” of a court when the circumstances point to default by the borrower of the mortgage conditions having led to a devaluation of the premises.

### **The evidence of the debtor**

25. The debtor, in his first affidavit, says that he initially approached Ms. Cheever on or about 4th March, 2016, after what he describes as a “period of extreme pressure, mental health difficulties and on-going failure to reach a resolution with my secured creditor”. He realised that he was facing a very real prospect of losing his home but that he had “buried his head in the sand” regarding his financial difficulties for a number of years.

26. The debtor suffered a sports injury in 2008, in which he shattered his elbow in four places and required two operations. His affidavit evidence is that it took a full year to recover from his injury and that social welfare payments received in the period were sufficient to support his day to day expenditure only, but not to meet any mortgage repayments. He says that he suffered stress, depression and “seizures” as a result. The short medical exhibits suggest the debtor was unable to work for six months, not a year as he states.

27. He now works on a self-employed basis as a subcontractor on a two year contract, the precise commencement date of which was not identified, save that it seems to be in 2016. He expresses himself “confident” that his income will thrive with the improvement in the construction industry generally.

28. The affidavit evidence of Mr. Ennis is that since he first engaged with the PIP, he has been making monthly payments in excess of the agreed payments on his mortgage by way of a “genuine effort on my part to show my bona fides” and that the proposal is sustainable and affordable. His affidavit evidence shows ad hoc, but reasonably regular, payments of €150 or €200 per week in the months of April, May, June and July, 2016.

29. Mr. Ennis says that after the order for possession was served on him in the month of October, 2015, he moved out “temporarily”

as he understood that this was required of him. He says that during that time, the premises was broken into and the water pump, oil burner and oil tank were stolen. He accepts that the premises did fall into disrepair but says that the work on the lounge was completed before the mortgage was drawn down, and that it is within planning exemption.

30. The debtor did not adduce any expert evidence as to the planning status of the extension constructed in the dwelling house, but EBS has exhibited an email from an engineer, whose qualifications are not stated, whose opinion is that the extension is not planning permission exempt, and that the "entire property will require retention application" as the development was not constructed in accordance with the original planning permission granted in 1988.

31. The debtor has not contradicted this evidence.

32. The debtor says that he is able to "manage" to live in the house without running water or heat but that he is "currently working on restoring water". He says that he proposed having some form of functioning heat by winter. He says that from his point of view, the house is perfectly habitable. He is "confident" he can meet the repayment provisions and extra payment provisions in the proposed PIA on the expiration of the six year term.

33. He exhibits a table of projected income prepared by "Bac2 Excellence", although the precise qualifications of the person who prepared those figures, exhibited in an unsigned and unvouched form, are not disclosed. The projected monthly income figures show a likely profit in the period to 31st December, 2017 of €2,710, allowing for income of €2,695. Additional income included under the heading "miscellaneous others" of €6,500 per annum is not explained. The figures suggest an increase in income, albeit modest, to the end of December, 2018.

#### **The mortgage payments since engagement with the PIP**

34. The debtor in a supplemental affidavit sworn on 7th December, 2016, says that whilst from May to August, 2016, he made weekly payments in sum of €200 per week to his mortgage account, he stopped doing this in September, 2016 "in the light of the tone of the affidavit and objection raised by the bank", but has been saving this sum in his current account. The "mini statement" from Ulster Bank of what is described as a "standard account" does not bear this out, and while it discloses a credit balance, it does not show any history of lodgements of that account. No explanatory narrative is contained in the affidavit.

35. It seems that the premises is now heated by way of a solid fuel stove and electric heaters. Mr. Ennis uses bottled water for drinking and domestic use, and uses his local gym to shower. His evidence is that a water pump will cost in the region of €200 "if same is needed in due course" but that the foul water system is fed from a rainwater tank in the attic.

36. Mr. Ennis also avers on affidavit that he has a friend a plumber who has agreed to carry out the work of putting in central heating at no cost to him.

37. It is unsatisfactory that if Mr. Ennis' friend is to do such extensive work as installing a central heating system, no explanation is given as to why his friend's generosity with his time was not availed of by Mr. Ennis to install running water in the premises.

38. Mr. Ennis' supplemental affidavit, sworn on 7th December, 2016, provides no concrete evidence of his income, but at para. 12 he indicates confidence that there has been a "marked up lift" and that his work is becoming much more predictable and certain as time moves on. It does not exhibit his work contract or explain his income projections. His sole concrete reference to his income is that it is "a steady wage".

#### **Discussion**

39. Section 115A of the Acts, as inserted by the Personal Insolvency (Amendment) Act 2015, gives the court a far reaching power to overrule the result of a vote at a creditors' meeting if the court is satisfied that a debtor may, as a result of the proposals contained on a PIA, continue to reside in, and/or not be required to dispose of an interest in, his or her principal private residence. The court must be satisfied before engaging its jurisdiction under s. 115A that the proposal is not unfairly prejudicial to the relevant creditor. In the present case, the sole creditor is EBS, which holds security over the principal private residence of the debtor, and which objects to the coming into force of the PIA.

40. I have considered the provisions of s. 115A in a number of judgments, most recently in *Re JD (a debtor)* delivered on 21st February, 2017 and it is clear that the court, in the exercise of the statutory power, must consider the fairness of the proposed PIA, and in that regard a comparison with bankruptcy is an essential element of the manner in which the court engages the question of fairness.

41. As noted in my judgment in *Re JD (a debtor)*, the protection of the principal private residence of a debtor was a factor identified in s. 104 of the Act of 2012, by which a PIP must insofar as was reasonably practicable, formulate a proposal on terms that would not require a debtor to dispose of an interest in, or cease to occupy his or her principal private residence. The court, however, was required under that section to have regard to the proportionality and reasonableness of such continued occupation or ownership. In particular, s. 104(2) requires that regard be had to certain matters as follows:

"(a) the costs likely to be incurred by the debtor by remaining in occupation of his or her principal private residence (including rent, mortgage loan repayments, insurance payments, owners' management company service charges and contributions, taxes or other charges relating to ownership or occupation of the property imposed by or under statute, and necessary maintenance in respect of the principal private residence),

(b) the debtor's income and other financial circumstances as disclosed in the Prescribed Financial Statement,

(c) the ability of other persons residing with the debtor in the principal private residence to contribute to the costs referred to in subsection (2), and

(d) the reasonable living accommodation needs of the debtor and his or her dependants and having regard to those needs the cost of alternative accommodation (including the costs which would necessarily be incurred in obtaining such accommodation)."

42. Section 115A, as inserted by the Act of 2015, gives the court a much broader and far-reaching power to preserve the continued occupation by a debtor of his or her principal private residence. The costs likely to be incurred by a debtor in remaining in occupation of a principal private residence, and the reasonable living accommodation needs of the debtor and his or her dependants are expressly required by ss. 104(2)(a) and (d) of the Act of 2012 to be a factor in the exercise of the jurisdiction under the Acts, and these requirements are repeated in ss. 115A(9)(a) and (d) of the Act of 2015.

43. The debtor now owes a sum in excess of €380,000 in respect of a premises with a value of €105,000. The significant and unusual factor in this case is that the premises is in a relatively poor state of repair in that there is no running water, there is no kitchen and the central heating is not functioning. It is not my function to consider whether the premises is habitable, and in that regard there can be many approaches to the degrees of comforts that might be required by a person in contemporary Ireland. However, the absence of running water, and the fact that the debtor relies on the shower in his local gym and on bottled water to maintain basic living arrangements in his house, is a matter of grave concern to EBS.

44. I too am concerned that the debtor has no reasonable prospect of continuing to reside in the premises in its current condition. Subsection 115A(9)(c) requires that I must have regard to the financial costs of enabling the debtor to continue to reside in his principal private residence, and that these are not disproportionately large. No explanation is given by the debtor as to how he accommodates his young daughter in the house at weekends when there is no running water, or why the generosity of his friend who is a plumber has not been engaged to provide a basic living requirement of running water in the house, or why, if the premises was insured, as is required by the mortgage conditions, the insurance policy has not met the cost of a replacement pump following the robbery.

45. I consider also that the debtor has not adequately, or at all, addressed the fact that the premises is arguably constructed in its entirety in breach of planning permission, and even taking the evidence of the debtor at its height, no answer at all has been given by him with regard to the fact that the garage or outhouse on the lands may have been built wholly without planning permission. No estimate of the cost of dealing with the planning difficulties has been provided by the debtor, and while in his affidavit he confirms that he will "deal with the planning difficulties if the proposal is approved", he has not provided any means by which I can be confident that he has the means to do so, as he has not addressed the extent of the difficulty or the cost of remedial action.

46. These are significant legal and practical reasons why the costs likely to be incurred by the debtor in remaining in occupation of his principal private residence are relevant and central factors in this application, and I am not satisfied that the debtor has adduced sufficient evidence for me to be satisfied regarding the quantum of such costs, or whether they can be met by him.

47. The factor that weighs most on my mind in considering this application is the singular lack of convincing and concrete detail contained in the application. For this, the PIP does not bear responsibility, and I am satisfied that she was not aware of some of the troubling factors in this case until they were brought to her attention by the affidavit evidence of EBS. I am satisfied that the PIP was not aware that the debtor had ceased to make payments on his mortgage in September, 2016, in the currency of the application before this Court, and while he had the protection of a protective certificate.

48. For these reasons I am not satisfied that the debtor has adduced sufficient evidence to persuade me that the proposals are sustainable. He has provided no narrative to accompany or explain the projected income, or no contract of employment or for services. At best, his evidence is that he is employed as a self-employed subcontractor for a two year term. He describes himself as "confident" of his ability to meet the payments on the mortgage, and the proposed additional payments in the proposed PIA, but he has not adduced sufficient evidence to instil that confidence in me, and in reliance on which I could be satisfied in accordance with s. 115A(9)(c) that he is reasonably likely to be able to comply with the terms of the proposed Arrangement.

49. Another factor weighs also in my considerations. A debtor is required in the context of the protection afforded to him or her by virtue of the granting of a protective certificate to engage with the process in good faith. There is nothing in the personal insolvency legislation equivalent to the provisions of s. 85A of the Bankruptcy Act 1988 as amended, by which the court has power to extend the period of a bankruptcy on account of the behaviour of a bankrupt, but the general duties and obligations of the debtor arising under the Acts are set out in some detail in section 118. The relevant s. 118(1) is as follows:

"118.—(1) A debtor who participates in any process under this Chapter is under an obligation to act in good faith, and in his or her dealings with the personal insolvency practitioner concerned to make full disclosure to that practitioner of all of his or her assets, income and liabilities and of all other circumstances that are reasonably likely to have a bearing on the ability of the debtor to make payments to his or her creditors."

50. Such an obligation is also implicit in any application where a litigant engages the discretion of the court, and arises from the nature of the process which affords a debtor a chance of the resolution of debt by the forgiveness of significant debt due to secured or unsecured creditors, or the variation of the conditions of a loan.

51. Further, the court is required in the context of s. 115A to have regard to the relevant matters contained in s. 115, including ss. 115(9)(b) and (c), and to the grounds of challenge contained in section 120. These factors engage questions of the bona fides of the debtor. Indeed, the debtor himself recognises this and at para. 17 of his first affidavit sworn on 24th August, 2016, he expresses the proposition that he has been making monthly payments in excess of the payments proposed in the PIA since he met Ms. Cheevers, the PIP, "in a genuine effort on my part to show my bona fides". At the time that affidavit was sworn, Mr. Ennis had ceased making those payments and had commenced making payments into a bank account.

52. Counsel for EBS suggests that the behaviour of the debtor is akin to "holding the process to ransom", and while I do not propose to adopt that description, I am satisfied that the debtor has not engaged bona fide with the process, nor with the PIP engaged to act as financial intermediary in the process, nor with his legal team.

53. He has made it clear that the decision to cease payments was made unilaterally, and avers at para. 5 of his second affidavit that the payments were stopped without first consulting either the PIP or his legal team. Indeed, it seems that the debtor permitted his affidavit to be presented for the purposes of a notice of appeal lodged on 20th December, 2016, without informing his PIP or his legal advisors of that very significant discrepancy. His lack of candour is material and serious.

54. For those reasons, and in the exercise of my discretion, I propose making an order refusing the appeal and thereby upholding the objection of EBS.