[2018] IEHC 314

THE HIGH COURT ON CIRCUIT

[2017 No. 161 CA]

[C:IS: MIWH: 2016:001493]

MIDLAND CIRCUIT COUNTY OF WESTMEATH

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

IN THE MATTER OF PHILIP ENRIGHT ("A DEBTOR") AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 112(3) OF THE PERSONAL INSOLVENCY ACTS, 2012 TO 2015.

JUDGMENT of Ms. Justice Baker delivered on the 31st day of May, 2018

1. This judgment is directed to the difference between an "amended" proposal for the purposes of s. 111A(3) of the Personal Insolvency Act 2012 to 2015 ("the Act") and a "modification" for the purposes of s. 111A(5). The distinction is of some consequence, as where a proposed Personal Insolvency Arrangement ("PIA") has been amended, the time limit for the service by a creditor of an objection to the proposed PIA is enlarged.

2. Section 111A of the Act, as inserted by s. 15 of the Personal Insolvency (Amendment) Act 2015, commenced by SI 414 of 2015, governs engagement by a PIP where a debtor has only one relevant creditor entitled to vote on a proposed PIA. This amending section replaces the procedures set out in ss. 106, and 108 to 111 of the Act of 2012 by obviating the need, in those circumstances, for the holding of a formal meeting of creditors.

3. The general procedure provided by s. 111A(2)(a) requires the PIP to:

> "give written notice to the creditor that the proposal for a Personal Insolvency Arrangement has been prepared and that the creditor may, within [14 days of the giving to him or her of such notice], notify the personal insolvency practitioner in writing of his or her approval or otherwise of that proposal".

4. The PIP, in addition to giving notice of the proposal for a PIA, must furnish the creditor with the documents identified in s. 107 of the Act, including a statement of the debtor's financial affairs in the form of a prescribed financial statement ("PFS"), the terms of the proposal for a PIA, together with a report of the PIP describing the outcome for creditors and expressing a view that the proposal PIA represents "a fair outcome for the creditors" and how that outcome differs from the likely outcome in bankruptcy, and indicating that he or she considers that the debtor is reasonably likely to comply with the terms of the proposed PIA.

5. These documents must be served also on the Insolvency Service of Ireland ("ISI").

6. Section 111A(6) makes provision for the response by a single creditor by which it indicates "approval or otherwise" of a proposed PIA within the time limits therein provided:

> "A creditor to whom this section applies shall notify the personal insolvency practitioner in writing of his or her approval or otherwise of a proposal for a Personal Insolvency Arrangement within —
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> (a) 14 days of the giving to him or her of the notice under subsection (2), or
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> (b) if later, 7 days of the date on which a notice under subsection (4)(a) is first given to him or her."

7. Section 111A(7)(b) of the Act makes provision for a stark result so that, if a single creditor fails to notify an objection within the statutory time limit, the proposed PIA is deemed to have been approved by the creditor concerned.

The present appeal

8. This is an appeal from an order of Judge Lambe made on 24 May 2017, by which she determined that certain alterations made to the proposed PIA of the debtor were amendments to which the provisions of s. 111A(3) applied, and that the extended time period provided by s. 111A(6)(b) applied to the proposal.

9. Whether this conclusion was correct depends on the correctness of her finding that a second document sent by the PIP was, in truth, an amended PIA. If the second proposed PIA was an amended PIA, the proposed PIA fails, subject only to a possible application by the debtor under s. 115A(9) of the Act. If the second proposed PIA was a modification, the proposed PIA is deemed to have been approved by the single creditor.

10. The judgment also deals with the appeal of an identical order of the Circuit Court judge in respect of the wife of the debtor, Patricia Enright, an interlocking debtor (Record No. 2017 160 CA).

Material dates

11. On 13 October 2016 a Protective Certificate issued to the debtor in accordance with s. 95(2)(a) of the Act. On 4 November 2016, proof of debt was served by Capita Asset Services (Ireland) Limited ("Capita"), the duly authorised loan management agent on behalf of ACC Loan Management DAC ("ACC").

12. The PIP, Mr. Colm Arthur, made a proposal for a PIA ("the first proposed PIA") in respect of Mr. and Mrs. Enright and on 7 December 2016, in performance of his obligations under s. 111A(2), the PIP sent the proposal to ACC.

13. The first proposed PIA contained a number of inconsistencies which were clarified in a telephone communication on 14 December 2016, between the PIP and Ms. Jackie Sheridan of the Debt Solutions Department of Capita. In particular, the creditor had sought confirmation as to whether the proposed term of the PIA was 24 or 72 months, as both terms had been included in the proposal. The creditor also clarified the extent of its security interests and that ACC already held a second charge or an extension of an existing charge over the principal private residence of the debtors. No discussion was had between the PIP and the agent of the creditor with regard to the treatment of a small plot of land which is central to this judgment. For ease, I will refer to this land as "the small plot".

14. On 16 December 2016, following the telephone conversation, a second proposed PIA ("the second proposed PIA") was prepared and served on Capita.

15. No response for the purposes of s. 111A(6)(a) was served within the 14 day time limit provided therein, and the PIP therefore treated the proposed PIA as having been approved on 21 December 2016 by virtue of s. 111A(7)(b), and thereafter issued a "Notice of Outcome" to the creditor in accordance with the statutory procedures.

The basis of objection
16. The creditor brought an application pursuant to s. 112(3) of the Act, objecting to the coming into force of the second proposed PIA on the grounds that time had not run against it for the purposes of the Act, as an amended proposal had been served within the meaning of s. 111A(3) and the time for delivery of the vote of the creditor had been extended for a period of seven days in accordance with s. 111A(6)(b).

The facts on which the creditor bases its objection
17. Three factual changes were identified by the creditor in the Circuit Court. The first concerned the term of the proposed PIA as in different parts of the statutory form "24 months" and "72 months" were mentioned. The second related to the nature of the security. These first two ambiguities were clarified and the proposal amended. The Circuit Court rejected the argument of the creditor that the second proposed PIA was, on account of the correction of these errors, to be considered to be an amendment. That ground of objection is no longer maintained.

18. The ground on which the creditor argues that the second proposed PIA was an amended PIA governed by s. 111A(3) concerns the details of the small plot, an asset comprising 0.1322 hectare of land, circa 0.33 acres, in the joint names of the debtors and held free from encumbrances, and in respect of which the creditor argued, and the Circuit Court accepted, the second proposed PIA provided for a different treatment amounting to an amendment.

19. The ownership of the small plot was disclosed by each of the debtors in their respective PFS, in the case of Mr. Enright, on p. 6 of his PFS, and in the case of Mrs. Enright, on p. 8 of hers.

20. In an email of 25 November 2016, and before the first proposed PIA was prepared, ACC had indicated its intention to rely on its security over two named folios: the principal private residence of the debtors (folio WH20718F) and lands at a different address (folio WH12726) with a value of €30,000. The small plot was not mentioned in this email as it was not held by ACC as security and the purpose of the letter was to identify the intentions of ACC regarding its security.

21. On 6 December 2016, following the creditor's request under s. 105(3) of the Act which allows the PIP, the debtor, or the relevant secured creditor, to "appoint an appropriate independent expert to determine the market value for the security", DNG Duncan was appointed to value the secured assets, and their report valued the small plot at €6,000. In her affidavit, Ms. Sheridan avers that it was only on 6 December 2016, when she received the valuation from DNG Duncan, that she became aware of the plot of land in question, what she describes as "a further asset".

22. The PIP then prepared the first proposed PIA, and the small plot was described in the schedule of assets, at p. 36 thereof, by reference to its value of €6,000, but not designated otherwise with an address or folio number, but as "0" (or perhaps the capital letter "O"). As the land was not held as security, it did not thereafter appear in the proposal, as the statutory form does not provide for further reference to unsecured assets unless it is intended to treat them for the purpose of the PIA.

23. In the second proposed PIA, a narrative was added specifically referable to the small plot. This text reads as follows:

> "The debtor and his wife own 0.1322 Hectares of land, less than 1/3 of an acre which is unencumbered. This piece of land is landlocked with no road entrance and is therefore unsaleable. This piece of land is to be retained as part of the debtor's horse enterprise."

It is that addition in the second proposed PIA which ACC seeks to characterise as an "alteration" within the meaning of s. 111A(3).

Arguments of counsel
24. The debtor argues that the second proposed PIA was not an amended proposal but that the alterations were modifications rectifying an error or addressing an ambiguity in the first proposal. That proposition is accepted with regard to the discrepancy found regarding the length of the proposed PIA and the nature of the security, and counsel argues that a similar treatment ought to be afforded to the addition of the narrative regarding the proposed retention of the small plot, and that no amendment was made within the meaning of s. 111A(3).

25. Counsel for the creditor argues, on the other hand, that the second proposed PIA did contain an alteration within the meaning of s. 111A(3) in that it made for the first time a proposal as to the treatment of the debtor's ownership in the unencumbered plot, *i.e.* that it be retained as part of the debtor's horse enterprise. It is argued that in the first proposed PIA no treatment whatsoever was proposed, and that no error was corrected. It is further argued that no ambiguity had been identified either by the creditor or the PIP which needed to be clarified, and that accordingly, the second proposed PIA was a new or amended proposal in respect of which the creditor had a further seven days in which to respond.

26. It is also argued by the creditor that to be a rectification or a modification, the error or ambiguity must be "minor", not in the sense that the difference must be small with regard to the value of an asset, but "minor" in the sense that it is not material.

The correction of errors and the clarification of ambiguities
27. A proposed PIA may contain errors or ambiguities or require for one reason or another to be rectified. The need to amend or rectify can arise in the normal course because an error which is no more than a typographical or calculation error might have been discerned, or because an element of the proposed PIA lacks clarity. In that case, the PIP has power from s. 111A(5) to modify a proposed PIA "where the modification addresses an ambiguity or rectifies an error". The circumstances in which this can occur are set out in s. 111A(5) as follows:

> "A proposal for a Personal Insolvency Arrangement may, before the creditor has notified the personal insolvency practitioner of his or her approval or otherwise of the proposal, be subject to a proposal for a modification where the modification addresses an ambiguity or rectifies an error in the proposed Personal Insolvency Arrangement and where —
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> (a) the modification has been proposed by the creditor or the personal insolvency practitioner, and

(b) the debtor gives his or her written consent to the modification."

Amendments to a proposed PIA

28. However, a perceived need to change a proposal may arise following further consideration by the PIP of an intended proposal where, for example, after consultation with one or more creditors, the PIP forms a view that an alternative proposal is more likely to be acceptable, or where a third party has come forward and offers to make available a lump sum to assist in the resolution of the insolvent debtor's financial affairs. The PIP may then need to alter a proposed PIA, for which provision is made in s. 111A(3):

> "A personal insolvency practitioner who has complied with subsection (2) may, where he or she believes it is in the interests of obtaining approval of a proposed Personal Insolvency Arrangement by the creditor and with the consent in writing of the debtor, prepare an amended proposal for a Personal Insolvency Arrangement."

29. The preparation of an amended proposal occurs only when the PIP believes that an amendment is likely to result in approval by the single creditor of the proposal, or might alleviate or fully deal with concerns expressed by the single creditor, or even arising by implication from observations or informally made objections.

30. Thus, an amendment of a proposal for a PIA is envisaged by the Act as arising following a discourse or further consideration by the PIP of the proposals, perhaps in the light of new information obtained from the debtor, or information gleaned by the PIP from other sources, including perhaps decided cases, or other applications in which the PIP has been involved or in which a particular observation or objection has been rejected or upheld. The amendment must be made in the light of a belief by the PIP that that amendment is likely to make the proposed PIA more attractive to a creditor.

31. The amendment of a proposal is not permitted merely on account of a desire on the part of the debtor to amend the proposed PIA, and the PIP must exercise his or her own personal and reasoned judgment in coming to a belief that the amendment is likely to be positively received before the PIP may avail of the provisions of s.111A(3).

32. Two statutory provisions exist by which a creditor may make formal submissions regarding the treatment of its debt, or give an indication as to its preference as to how it wishes to have a security and secured debt treated before the PIA is formulated. Section 98 is to be triggered, and permits the general body of creditors to make submissions. Section 102 envisages that a secured creditor would indicate a preference as to its preferred outcome. In either case, the PIP is obliged by statute to have regard to these formal submissions or indications of preference. It is essential, therefore, that the PIP have the capability to make alterations or clarify ambiguous or incorrect entries in the proposal before it is submitted to a vote or for consideration by a single creditor.

33. Section 111A(3) was inserted by the Oireachtas to deal with the circumstance where a PIA is prepared without any prior indication of preferred treatment of a creditor, and enables the PIP to formulate an amended proposal after discussions have led him or her to a view that an amended proposal was likely to be accepted.

34. This restriction on the ability of a PIP to reformulate a proposal is consistent with the purpose of the Act that resolution of indebtedness be done in an "orderly" manner (see recital to the Act of 2012 and In *Re Nugent* [2016] IEHC 127) and also, is necessary in the light of the strict and short time limits within which the process is intended to be completed. A long and fluctuating process could not be readily justified in the light of the statutory protection from action by creditors during the period of protection, and a debtor may not unduly prolong the considerable benefit that such protection affords by unnecessarily seeking to alter the proposals, as the making of an alteration is the decision of the PIP on a reasoned expectation of obtaining approval from creditors.

35. Simple clarification or rectification of an error of a PIA does not require that the PIP have formulated a view that the modification or rectification of an error is likely to lead to acceptance by a creditor, and the mere modification of a PIA for the purposes of clarification or rectification requires a much less onerous procedure.

Consideration of the statutory meaning

36. An alteration or modification of a proposed PIA must fall to be characterised either as an amendment for the purposes of s. 111A(3) or a modification for the purposes of section 111A(5). The making of provision for the correction of clerical errors or addressing an ambiguity is logical and practical and can benefit of both parties.

37. It seems to me that the Oireachtas did not intend that the provisions of s. 115A(3) or (5) were to be distinguished on account of the monetary value of an asset. Rather, it seems that the Oireachtas intended a rectification or modification to be permissible to correct something obviously incorrect or unclear, and that the change would not be material.

38. If the correction of an error results in, for example, a material change in the income or liabilities of a debtor, the change could be sufficiently material to amount to an amendment. If the correction is merely made to correct an ambiguity in the document itself, the alteration does not change the proposal but, rather, is a modification made so that the proposed PIA is clearer.

The principles of statutory interpretation

39. Counsel for the creditor relies on the rule of statutory interpretation *expressio unius est exclusio alterius* and the interpretation of that maxim by Laffoy J. in *O'Connell v. An t'Árd Chláraitheoir* [1997] 1 IR 377:

> "In my view, the grammatical or linguistic meaning of the definition of 'occupier' in s. 38 is quite clear and unambiguous and the words 'or his agent' do not relate back to the first limb and the first limb stands on its own. Secondly, in my view, the *ejusdem generis* principle has no application in the construction of the first limb: the first limb does not postulate a narrow genus followed by wider words. In my view, the canon of construction which comes into play in construing the first limb is the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another). It is obvious that the draftsman doubted that the word 'occupier' in its ordinary meaning would include the various officials of public institutions mentioned in s. 38 and he expressly included them in the definition. The draftsman having expressly included the named officials, it must be implied that other officials and employees of such public institutions are excluded."

40. It is argued that, as s. 111A(5) identifies two limited circumstances, namely the clarification of an ambiguity or the rectification of an error, all other alterations must be amendments within the meaning of section 111A(3).

41. I agree, and I consider that the Oireachtas intended the use of the less onerous s. 111A(5) procedure only when an alteration is a clarification of something that is not clear or the correction of an error, where the error is likely to confuse or make it difficult to reconcile one part of the proposal with another, or to elucidate and avoid confusion.

42. An error for the purposes of s. 111A(5) is to be treated as equivalent to an amendment where, for example, the value of an asset or the amount of income or liabilities are altered. The change must alter the proposal in some material way, by alerting the description or value of the assets or liabilities, the proposed treatment of the asset, or other solution to the insolvency.

43. In the light of these considerations I turn now to analyse the two versions of the PIA and whether the addition of the narrative concerning the small plot means that there was alteration in the second proposed PIA within the meaning of section 111A(3).

The standard terms of a PIA: discussion

44. Clause 6 of the second proposed PIA deals with the "Arrangement Assets" and is the focus of the argument made by the objecting creditor. The standard PIA requires at clause 6.1 the identification of any assets proposed to be sold by the debtor, and this subject line was marked "N/A" not applicable. Clause 6.1.2, under the heading "Assets other than secured arrangement assets", and at 6.2, under the heading "transfer of assets to creditors" were also marked "N/A".

45. Clause 6.3, under the heading "other treatment", was blank in the first proposed PIA, and there was no entry regarding the small plot. The second proposed PIA contained the narrative that explained that the debtor and his wife intended to retain the small plot of land as part of the debtor's horse enterprise.

46. In order to characterise that correction, it is necessary to note the definition of "Arrangement Assets" in the standard form PIA, where such assets are defined as meaning "the assets of the Debtor specified in clause 6 of part IV which are to be made available to Creditors in accordance with part IV for the purposes of the arrangement". The entries in clause 6, therefore, are intended to identify "arrangement assets", whether they be secured or unsecured assets, and the means by which they are to be made available to creditors, whether by sale, the provision of new or additional security, or the alteration of such security. It is not intended that clause 6 would contain details of assets not intended to be made available to creditors for the purposes of the arrangement, as such assets are not "arrangement assets".

47. In that regard, it is also of note that "Creditors" is defined in the interpretation section of the statutory form (clause 1(e) as meaning "unsecured creditors who, upon the Arrangement coming in to effect are […] party and subject to the Arrangement in accordance with section 116(2)".

48. "Secured Arrangement Asset" is defined in clause 1(ee) of the statutory as an "Arrangement asset which is a Secured Asset", and therefore, an asset which is not secured, and in the case of Mr. and Mrs. Enright, the small plot, is not a secured arrangement asset.

49. No treatment for the purpose of the PIA was intended, as it was not intended that the small plot was to be treated as an arrangement asset, i.e. it was not to be made available to creditors.

Analysis: was there an alteration of the proposed treatment?

50. I accept that the terms of the statutory form may, because of its format, create some ambiguity, and the PIP is not to be faulted for inserting in the second proposed PIA the narrative regarding the proposed retention of the small plot, but it seems to me, on a reading on the interpretation section, that as an arrangement asset is an asset intended to be made available to creditors, there was no requirement for the inclusion of any reference to the small plot in clause 6.

51. In the second proposed PIA, the small plot was included in clause 6, more by way of a negative assertion than a positive statement of an intention regarding its treatment, as it was an asset intended to be excluded from the arrangement assets, and intended to be treated as not available for creditors.

52. For that reason, I reject the argument by the creditor that the alterations to the second proposed PIA went further than the mere correction of an error or the clarification of an ambiguity and that the second proposed PIA proposed a new or amended different treatment with regard to the treatment of the small plot. No treatment was proposed in either draft.

53. The small plot is identified in both versions of the PIA by reference to its value of €6,000. The creditor reviewing the PIA for the purpose of coming to a determination whether to oppose or support it, could not but have been aware of the total value of the assets of the debtors and that what was purposed to be included as arrangement assets were the principal private residence and the plot over which security existed. What was proposed was the restructure of the mortgage on the principal private residence and the writing off of a portion of the secured balance at the successful completion of the proposed PIA. A reading of the first proposed PIA would have left no ambiguity regarding the treatment of the small plot of land but the PIP, in the second proposed PIA, spelt out that it was not intended to dispose of or offer this plot as security, i.e. that that plot of land was not to be offered as an arrangement asset.

54. I reject the argument of the creditor that the altered clause 6 in the second proposed PIA introduced an unencumbered asset which had not been previously referred to and made a proposal for the treatment of that asset for the first time. It is the case that no reference was made to the small plot in clause 6 of the first proposed PIA, but that is because it was not proposed to treat the small plot as an arrangement asset. The treatment that the small plot was to be retained was clear from a reading of the first proposed PIA. It was not therefore necessary, or possibly even appropriate, that there should have been any reference to the small plot in clause 6 which is specifically referable to arrangement assets, whether they be secured or not secured. The PIP saw fit to add a narrative but did not change the proposal or propose for the first time for the retention of this asset.

55. Accordingly, I consider that the inclusion of a narrative relating to the small plot in clause 6.3 of the second proposed PIA did not amount to an alteration within the meaning of section 111A(3). There was in fact no new proposal for the treatment of this asset and no material change in the value of the assets proposed to be retained or kept outside the arrangement.

Conclusion

56. I consider that the alteration was not one regarding the substance or meaning of the proposal, but was a clarification, and possibly one that was not essential, as the intention to retain the small plot was apparent from the first proposal, and that the second proposed PIA contained corrections or clarifications within the meaning of s. 111A(5).

57. I therefore consider that the Circuit Judge was in error and that the appeal is to be allowed in this matter and that of the interlocking debtor.