THE HIGH COURT

CIRCUIT APPEAL

[2022] IEHC 497

[Record No. 2021/57CA]

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

AND IN THE MATTER OF JANE MORAN DOYLE OF COOLROE, ARDATTIN, CARLOW

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

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 11th day of August 2022.

Introduction

1. This judgment concerns an appeal by Jane Moran Doyle ('the debtor') by notice of 6th May, 2021 against the refusal of the Circuit Court (Her Honour Judge Mary Enright) on 5th May, 2021 of an application by the debtor's personal insolvency practitioner Eugene McDarby ('the PIP') pursuant to s.115A(9) of the Personal Insolvency Acts 2012-2015 (collectively referred to herein as 'the Act').

2. A notice of objection was filed on 11th September, 2019 by Promontoria Oyster DAC ('PODAC' or 'the objecting creditor'). When the matter came before the Circuit Court, written submissions were proffered by the objecting creditor which narrowed the objections down to the following grounds: -

> "(a) The proposed PIA does not satisfy the requirement in section 115A(9)(C) of the Act that the debtor will be reasonably likely to be able to comply with the terms of the proposed Arrangement. The proposed PIA sets out that the Debtor's total monthly net income is €3400. €1,000 of this comes by way of a maintenance payment from her husband, Brian Doyle, who himself is insolvent. The Debtor was 60 years' old on 27th February, 2021, and the affordability of the proposed PIA is reliant on the Debtor receiving €1,000 per month from her insolvent husband, for its six-year term.
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> (b) The proposed PIA does not satisfy the requirement in section 115A(9)(b)(i) of the Act that the debtor will be able to resolve her indebtedness without recourse to bankruptcy. Once the proposed PIA is completed, the affordability of the Debtor's proposed restructured mortgage, is predicated on the Debtor receiving €1,000 per month, from her insolvent husband, until she is 80 years' old.
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> (c) The Debtor has failed to disclose in her Prescribed Financial Statement ('PFS') that she owns 99% of the shareholding in a company, Carlow E-Learning Direct Limited."

3. The objecting creditor relied upon these written submissions in the hearing before this Court also. No written submissions were proffered on behalf of the PIP.

The personal insolvency arrangement ('PIA')

4. PODAC is the sole creditor of the debtor. Following the issue of a protective certificate, the PIP served a notice pursuant to s.111A on PODAC on 15th July 2019, requesting PODAC's confirmation in writing of its approval or otherwise of the PIA. PODAC replied on 22nd July, 2019 indicating that it did not agree to the proposal. The PIP then lodged the s. 115A application on 2nd August 2019, i.e. within the 14 days required by statute.

5. As of July 2019, the debtor was 58 years old. She has two children, one of whom in July 2019 was 17 years of age, and therefore dependent. The debtor is employed by Carlow E-Learning Direct Limited, and describes her operation as 'business developer'. The debtor is separated from her husband, and receives maintenance from him in a manner which I will describe in further detail below.

6. The debtor's principal private residence ('PPR') has an agreed current market value of €310,000. The mortgage balance in July 2019 was €1,377,650.54. There is therefore a deficit of €1,067,650.54 in respect of the PPR. The only indebtedness to PODAC is in respect of the PPR mortgage.

7. The debtor is stated to have total net monthly income of €3,400. After deduction of set costs, a mortgage repayment of €193.75, college costs and life cover, there is a contribution available of €1,320.19. The PIA is structured over 72 months, with a total contribution by the debtor over the PIA term of €40,991.52.

8. The mortgage will be restructured. Current arrears will be capitalised, and the term of the mortgage extended to 240 months (20 years). The amount of the debt secured over the property is to be reduced to €310,000, which is the agreed value of the

property. The remainder of the debt is to be treated as an unsecured debt as part of the arrangement. The interest rate will remain the tracker rate, which at the time of the PIA was 0.75%. Repayments for the first year of the PIA are to be €193.75; from month thirteen onwards, full interest and capital payments of approximately €1,459.25 are to be made on the mortgage for the duration of the PIA. After successful completion of the PIA, full interest and capital payments of approximately €1,459.25 would be made on the mortgage for the duration of the term.

9. The bankruptcy comparison at part VI of the PIA suggests that the secured creditor will receive 20.4% of monies due to it in a bankruptcy situation, whereas the projected return in a PIA, which includes the debtor's contribution over the 72 month period net of the PIP's fees, is 24.8%. The projected return for unsecured creditors in a bankruptcy is 1.24%, as against 2.68% in a PIA. The bankruptcy comparison suggests therefore that the PIA is marginally more beneficial for PODAC than an adjudication in bankruptcy would be, albeit that, in bankruptcy, PODAC as a secured creditor would realise its asset and receive the net proceeds of sale, whereas the PIA is predicated on the debtor retaining the PPR.

The maintenance payment

10. There was an extensive exchange of affidavits in the matter between the PIP and the debtor on one hand, and Colm Waters of Link Asset Services ('the servicer') on behalf of PODAC, in relation to various aspects of the PIA. In his affidavit of 3rd December, 2019, Mr. Waters noted that the PIA was predicated on the debtor receiving a monthly payment of €1,000 per month from the debtor's former husband, Brian Doyle. It was suggested that these payments were sporadic and could not be relied upon. In a replying affidavit of 7th December, 2020, the debtor exhibited the maintenance agreement of 27th February, 2016 on foot of which Mr. Doyle makes a payment to her

of €12,000 per annum, and averred that the sum of €230.77 has been paid weekly by Mr. Doyle since that date; her bank statements only reflected payments since November 2018, as the amount had been paid in cash prior to that date. In the circumstances, the debtor averred that the payment was "reliable and consistent". As Mr. Doyle is jointly and severally liable for the PPR debt, it was not contested by the debtor that he is also insolvent, in the sense of being unable to discharge the contractual mortgage repayments as they stand.

11. The debtor avers that her former husband had an engineering business which was reliant on the construction sector, and that between 2005 and 2007 he borrowed money to grow the business. In the wake of the economic recession of 2007-2008, his efforts to save the business were to no avail, and the business went into liquidation in June 2010. The debtor avers that this gave rise to "…a severe strain on our relationship that led to us separating. We were financially ruined with no way out…". To her credit, the debtor returned to the workforce and appears to have established a sustainable career, albeit with a large overhang of debt which she is unable to repay.

Carlow E-Learning Direct Limited

12. The objecting creditor complained in Mr Waters' first affidavit that the debtor failed to disclose in her PFS that she owns 99% of the shareholding of Carlow E-Learning Direct Limited ('the company'). In this regard, Mr Waters exhibited a form B1 annual return for the company for the period to 19th December, 2018. Further evidence from a website called "search4less.com" was adduced by the servicer which stated that the debtor in fact owns only 1% of the shares of the company, suggesting that the debtor had disposed of 98% of her shareholding.

13. In her affidavit of 7th December, 2019, the debtor averred that she transferred any interest she had in the company to her eldest daughter Zoe in March 2016 in

accordance with the terms of the maintenance agreement with her former husband. It appears to have been the intention of the debtor and her husband to transfer the business to both of their children, Zoe and Eva; however, this was not possible as Eva was a minor at the time.

14. The debtor exhibited a letter of 6th May 2019 from an accountancy firm acting for the company, N. O'Carroll & Co., acknowledging the agreement to transfer the shares, and stating that the B1 form submitted by the firm was "an oversight on the part of this office". Notwithstanding this, it appears that a B1 annual return made up to 19th December, 2019 also set out that the debtor holds 99% of the shareholding of the company. The maintenance agreement contains a term to the effect that, having transferred the shareholding to her daughter Zoe, "Jane Moran Doyle will not exert any influence on Zoe Doyle to transfer back this shareholding at any point in the future".

15. The court was told at the hearing that Mr Doyle runs the company, thereby generating the income to discharge the maintenance as well as providing a salary for himself and the debtor. No evidence was adduced as to how the company is performing; however, there was no suggestion that the company is not trading successfully as a going concern.

16. The objecting creditor places considerable reliance on the two B1 annual returns, pointing out that the second return postdates the letter of 6th May, 2019 acknowledging the accountancy firm's error in failing to submit a B1 form which acknowledged the correct situation. The court is invited to rely on the B1 forms and infer that they reflect the true situation, on the basis that "it is highly implausible that [the accountant] would make the same mistake when filing the annual return for 2019 that he had for 2018, unless of course, there never was any mistake…" [written submissions para. 11].

17. It is suggested that the failure by the debtor to declare her ownership constitutes a failure to comply with her obligation in s.50(3) of the Act to make a full and honest disclosure in the PFS of her financial affairs, and her obligation under s.91(1)(e) similarly to make "a complete and accurate account of her assets and liabilities", and that such failure is fatal to the debtor's application.

Sustainability of the PIA

18. The first two objections made by the objecting creditor are in reality on the basis that the proposed repayments are unsustainable, contravene the requirement in s.115A(9)(c) of the Act that the court be satisfied that the debtor will be reasonably likely to be able to comply with the terms of the PIA, and indicate that the debtor will be unable to resolve her indebtedness without recourse to bankruptcy contrary to s.115A(9)(b)(i) of the Act.

19. It is suggested that Brian Doyle, who has a contractual obligation to repay approximately €6,000 a month in respect of his PPR indebtedness, is clearly insolvent and "…will more than likely be adjudicated bankrupt or have to avail of the Personal Insolvency regime…should this occur, it is submitted that the €1,000 per month payments to his wife will cease (payments under maintenance agreements are not preferential debts under either the bankruptcy or personal insolvency regime)" [Written submissions para. 7].

20. It was also suggested that there was no evidence in relation to the age of Mr Doyle, and therefore no means of assessing how likely he was to be able to make payments of €1,000 a month in 15-20 years' time. However, the B1 forms exhibited by Mr Waters state that Mr Doyle's date of birth is 24th February, 1967. To the extent that the B1 forms are reliable documents – and there is some basis for doubting that proposition – they suggest that Mr Doyle is therefore six years younger than the debtor,

and will be 75 years of age in 2042. There is no evidence before the court to suggest that he would not be in a position, as regards his age or health, to be generating income at that stage of his life if it were required.

21. Counsel for the PIP relied heavily on the judgment in *Re JD, A Debtor* [2017] IEHC 119, pointing out that the fact that the debtor in that case not only relied for the purpose of complying with her PIA on a maintenance payment from a former husband, but had obtained maintenance and attachment of earnings orders to enforce it's payment, was no barrier to approval of the PIA in that case.

22. It was submitted on behalf of the debtor that it can often be difficult to obtain evidence from an estranged spouse which would establish the reliability of payments into the future. In the present case, Mr Doyle is a director of the company and is effectively generating income for both himself and the debtor and for the purpose of discharging maintenance. The debtor's position is that the company is owned by her daughter Zoe, or possibly at this stage by both daughters, as the intention of the debtor and Mr Doyle appears to have been to transfer ownership of the company to both daughters, which could only be effected when Eva came of age; at para. 12 of her affidavit of 7th December, 2019, the debtor avers that "I agreed with Brian Doyle, that I would transfer those shares to both my daughters. This was a specified condition of the Maintenance Agreement…", although the agreement in fact refers only to a transfer by the debtor of all of her shareholding to Zoe Doyle. However, it is clear that the success of the company is integral to the concerns of all of the family members.

23. Counsel for the objecting creditor submitted that it was significant that, in *JD*, an order of court for payment of the maintenance had been obtained. Section 2 of the Act includes in its definition of "excluded debt" any "liability of the debtor arising out of a domestic support order…". Section 89(6)(a) of the Act provides that a PIA "…shall

not contain any terms that would release the debtor from an excluded debt or otherwise affect such a debt…". If such a domestic support order were obtained against Mr. Doyle, he would not be able to cease the maintenance payment by reason of availing of the personal insolvency regime, as the order would fall outside the terms of his PIA; it is suggested that, in the absence of such an order, Mr Doyle could avoid having to make the payment if he availed of a PIA which enabled him to do so. Counsel suggested that the accepted insolvency of Mr Doyle made this scenario more likely than not.

24. Counsel for the PIP suggested that it would be likely that Mr Doyle would be permitted to discharge the maintenance as a special circumstance cost in a PIA, or that the Official Assignee in Bankruptcy would permit payment of the maintenance as an allowance in bankruptcy. In this regard, I note that s.71 of the Bankruptcy Act 1988 ('the 1988 Act') gives the court power to "make to the bankrupt out of his estate such allowances as the court thinks proper in the special circumstances of the case". Counsel in any event suggested that, if a PIA or bankruptcy which would have the effect of allowing Mr Doyle to avoid paying maintenance – if he were minded to do so – were imminent, the debtor, suitably forewarned by that suggestion in these proceedings, could apply to court for a domestic support order at that point.

Discussion

25. The court is required to be satisfied, when evaluating the viability of a PIA, that "…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" [Section 115A(9)(c)]. Given the unpredictability of events in the future, certainty is not required in carrying out this exercise. I agree with the comments of Baker J in *JD* at para. 83 of that judgment as follows: -

> "In Hill & Personal Insolvency Acts, I rejected the argument of the PIP that his role, and by implication that of the court, was to examine a PIA with a view to ascertaining whether it would guarantee or ensure the continued solvency of a debtor. The same analysis applies to the test of whether the means of a debtor are reasonably likely to be able to meet the PIA. What is reasonably likely to occur is not to be equated with what is certain to occur. The court cannot be expected to engage in hypothetical concerns, or to consider the likely consequence of unfortunate and unexpected events that might have a catastrophic effect on the means either of the debtor, or of any person, including his or her employer or maintenance debtor, on whom the debtor's income depends in whole or in part."

26. The objecting creditor does not raise any issue pursuant to s.115A(10)(a) of the Act. In its email of 23rd July, 2019 to the PIP, it acknowledges that "…the debtor is paying €600 per month as this was the arrangement she had with Promontoria. She is maintaining these payments until another arrangement is put in place".

27. The main issue in this application is the sustainability of the payment given that it is dependent on payment by the debtor's former husband of maintenance. Under the maintenance agreement, the debtor is entitled to this payment for the rest of her life. The payment itself derives from income accruing to Mr Doyle from his role as a director of the company, in the success of which all of the family have a stake. There is no evidence before me other than that the company is a successful going concern, capable of generating sufficient profit to allow Mr Doyle to make the payment, as he appears to have done consistently to date. Unlike the case of *JD*, the debtor in the present case has not had to apply to court for orders enforcing the maintenance agreement; I would

regard this as a positive factor, rather than inferring, as I am invited to do by the objecting creditor, that the absence of a court order militates against approving the PIA.

28. It is difficult to see how bankruptcy would yield a better outcome for the objecting creditor. The comparison in the PIA, which suggests that an arrangement yields a better result than bankruptcy, has not been seriously impugned. Also, a bankruptcy payment order pursuant to s.85D of the 1988 Act would be for a maximum of three years. Even if a court were to deem that a bankruptcy payments order against the debtor in respect of the maintenance of €1,000 per month were appropriate, that must be set against the prospect of the €1,000 contributing to payments to the objecting creditor for a period of nineteen years after the initial year in which only €193.75 per month is payable.

29. While the debtor does not have a private pension, the PIP avers at para. 19 of his affidavit of 30th November, 2020 that the debtor will become entitled to the State Old Age Contributory Pension at age 66 of €1,075.97 per month. The debtor acknowledges that, as of the date of her affidavit of 7th December, 2020, college costs in respect of her younger daughter Eva are likely to be incurred for a further five years at the current allowance rate permitted by the Insolvency Service of Ireland Guidelines of €549.00 per month. However, these costs will not be incurred after this five-year period, which has in any event been further reduced by the lapse of time since July 2019. The debtor states that she is in good health, working and earning a steady income. She avers that she has no compulsory retirement age and can continue to work for as long as she chooses to do so.

30. The fact that the PIA is a six-year arrangement allows it to be "road-tested", as it were, over a protracted period. Although there will be diminished payments to PODAC in the first year, those payments will increase very considerably in year two

for the duration of the 20-year period. In the event that the debtor is in fact unable to abide by her commitments, the objecting creditor can rely on its security or apply to adjudicate the debtor bankrupt in the normal way.

Conclusions

31. Taking account, as I must, of all relevant matters and in particular the financial circumstances of the debtor, I am satisfied that she is "reasonably likely to be able to comply with the terms of the proposed Arrangement" [s.115A(9)(c)], and that there is a "reasonable prospect that confirmation of the proposed Arrangement will… enable the debtor to resolve…her indebtedness without recourse to bankruptcy…" [s.115A(9)(b)(i)].

32. In coming to this conclusion, I do not consider that the evidence warrants the inference that the debtor is the owner of 99% percent of the shares in the company. It is certainly the case that, as Mr Waters points out, a form B1 for the period up to 19th December, 2019 submitted on behalf of the company contains the same details as regards shareholding as that submitted for the period to 19th December, 2018, in which the debtor is noted as the holder of ninety-nine of the one-hundred ordinary shares in the company. The earlier B1 form is certified as to its correctness by Mr Doyle and the debtor; the more recent form is certified by Mr Doyle and Zoe Doyle, who by that stage is recorded as the secretary of the company.

33. Both B1 forms were presented by Mr Niall O'Carroll of N. O'Carroll & Co, Chartered Accountants and registered auditors. Both the PIP and the debtor exhibit Mr O'Carroll's letter of 6th May, 2019 in relation to the earlier form, which is addressed "To Whom it May Concern" and refers to the company, stating that the firm "…can confirm that the share transfer form dated 1st March, 2016 transferring 98 shares from Ms Jane Moran Doyle to Ms Zoe Doyle is correct and properly executed…It was not

updated onto the B1 for the CRO submission due to an oversight on the part of this office".

34. Unfortunately, the error was not corrected in the later form, and was compounded by the fact that Zoe Doyle, the company's secretary, along with Mr Brian Doyle certified the correctness of details which, according to the PIP, the debtor and Mr O'Carroll, are incorrect.

35. While it is careless in the extreme for Mr O'Carroll to have presented the later B1 form with details which he had previously acknowledged in writing were incorrect, to conclude that the later B1 form records the correct state of affairs would require me to conclude that Mr O'Carroll's letter of 6th May, 2019 was itself incorrect and most likely written with a view to misleading the reader. I have no basis for inferring any such motivation or intention on Mr O'Carroll's part, and consider that it is more likely that the later form is simply a continuation of the "oversight on the part of this office" acknowledged by Mr O'Carroll in his letter. While I do not condone the slipshod manner of presenting incorrect information (in the case of Mr O'Carroll) or certifying its correctness (in the case of the debtor, Mr Doyle and Ms Zoe Doyle), neither do I consider that the documentation suggests an elaborate scheme by which the debtor retains her shareholding in the company, notwithstanding the clear requirement of the maintenance agreement that she transfer all of her shareholding to Zoe Doyle, particularly where the maintenance agreement provides that the exertion by the debtor of any influence on Ms Doyle to transfer the shareholding back to her is a breach of the agreement which would release Mr Doyle from his obligation to pay to the debtor the sum of €12,000 a year after Zoe and Eva had completed their fulltime education.

36. In the circumstances, I do not consider that the debtor is in breach of her disclosure obligations under the Act in respect of her former shareholding in the company.

Orders

37. For the reasons set out above, I am of the view that this is an appropriate case in which to grant the relief claimed under s.115A(9) of the Act.

38. I will therefore make an order setting aside the order made by the learned Circuit Court judge on 5th May, 2021 and will confirm the coming into effect of the proposed PIA in accordance with its terms.