

**THE HIGH COURT
CIRCUIT APPEAL**

[2022] IEHC 373

Record No: 2021/162 CA

Record number: C:IS:SEWD:2019:002021

SOUTH EASTERN CIRCUIT

COUNTY OF WATERFORD

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

**AND IN THE MATTER OF
PADDY O'REGAN OF MINAUN, CHECKPOINT, COUNTY WATERFORD
("THE DEBTOR")**

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

Judgment of Mr. Justice Cian Ferriter delivered this 20TH day of June 2022

Introduction

1. Ulster Bank Ireland DAC ("the objecting creditor") has brought an appeal to this Court against the making of an order by the Circuit Court on 14 October 2021 which approved the coming into effect of a Personal Insolvency Arrangement ("PIA") under s. 115A of the Personal Insolvency Act 2012 as inserted by the Personal Insolvency (Amendment) Act 2015 ("s. 115A") in respect of the debtor. (For ease, I will refer to the Personal Insolvency Acts 2012 to 2015 as "the Act".) This is my decision on a preliminary issue raised by the debtor's Personal Insolvency Practitioner ("PIP") to the effect that the appeal is moot and should no longer be entertained by the Court in circumstances where the period of the PIA has expired and a certificate of completion has been issued by the PIP in accordance with s.125 of the Act.

Background

2. The material background to the application is as follows. The debtor is a divorced man in his late 60s who lives on his own in a single bed house in Co. Waterford. The objecting creditor provided the debtor with a mortgage loan which was secured on that property. The debtor got into financial difficulties and sought to secure approval for a PIA under the Act. The objecting creditor had proved a total debt of just under €98,000 as due and owing to it by the debtor on foot of the secured mortgage loan. The market value of the principal private residence in 2019, as determined in accordance with s.105 of the Act, was €210,000. In addition to the debt owed to the objecting creditor, the debtor had two unsecured creditors. One of these debtors had proved a debt in an amount of just over €8,000. The objecting creditor voted against the proposed PIA at the relevant creditors

meeting under the Act and the PIA was not approved as a result. The PIP appealed to the Circuit Court and, notwithstanding the objecting creditor's opposition, the Circuit Court approved the PIA pursuant to s.115A.

3. The PIA in respect of the debtor had been formulated as a three-month arrangement. The central terms of the PIA involved capitalisation of the arrears on the mortgage loan (which amounted to some €25,000); no write-down on the amount of the loan owed; the term of the loan, which was due to be completed in 2024, to be extended for 360 months (30 years) meaning that the debtor would be 97 years of age if he lives to the end of the mortgage loan period; mortgage repayments of €93.70 per month for each of the three months of the PIA (representing interest only); mortgage payments of €93.70 per month for the remainder of the restructured mortgage term; the full mortgage loan balance to be repaid on the expiry of the restructured loan-term or on the death of the debtor whichever event occurred first. No PIP fees were included in the PIA. No dividend was proposed for the unsecured creditors.
4. While it appears that the objecting creditor sought a stay from the Circuit Court at the time of the making of the order of 14 October 2021 under s.115A, the stay application was refused. The parties were not aware, in practice, of the Circuit Court ever having granted a stay in circumstances where an objecting creditor was seeking to appeal the approval of a PIA by the Circuit Court under s.115A.
5. Following the Circuit Court decision, the PIA came into effect on 14 October 2021. The PIP notified the creditors in writing that the PIA had come into effect on 18 October 2021. The objecting creditor did not ask the PIP to extend or vary the PIA.

Basis of appeal

6. The Act makes no express provision for an appeal to the High Court from a Circuit Court decision approving a PIA under s.115A. However, the debtor accepts that the objecting creditor has a right of appeal in the ordinary way. The objecting creditor lodged its appeal on 21 October 2021 within ten days of the perfection of the Circuit Court order, as it was required to do under the relevant rules of court.
7. The objecting creditor seeks to contend in this appeal that the PIA should not have been approved and that the Circuit Court order should be overturned on the basis the debtor is not "*reasonably likely to be able to comply with the terms of the proposed arrangement*" within the meaning of s.115A(9). It relies on the judgment of the High Court in *Re Fennell* [2021] IEHC 297 in that regard. The objecting creditor also seeks to challenge the validity of a PIA which involves interest-only repayment terms for the full duration of the restructured mortgage.
8. The PIP for his part contends that the PIA as approved by the Circuit Court is perfectly valid, that the debtor's position is readily distinguishable from that of the debtor in *Re*

Fennell and that the PIA as approved by the Circuit Court should be affirmed by the High Court.

9. The appeal came before this Court on 22 November 2021 on its first return date. It appears that there were a number of adjournments on consent, at the request of the objecting creditor, in circumstances where the objecting creditor was awaiting the outcome of a separate "Re Fennell"-type appeal.
10. The PIA completed on 14 January 2021. In accordance with the requirements of the Act, the PIP issued the s. 125 notice on 19 January 2021.
11. The PIP subsequently brought this application, by way of preliminary issue in the appeal to the effect that the appeal is rendered moot by virtue of the service of the completion certificate and/or the completion of the PIA itself ("the mootness application").

The parties' positions on the mootness application

12. The PIP's position is straightforward: the PIA has expired, the debtor has complied with his obligations under the PIA and the PIP has notified the debtor, creditors and the insolvency service; accordingly, the PIP maintains that the PIA "*has fully completed and cannot be revived*", both on its own terms and pursuant to the provisions of the Act. The PIP contends that it follows that the appeal is moot. As he puts it: "*the PIA is over. The issues between the parties are redundant. The appeal is against the coming into effect of the PIA which has now come into effect, has been performed, and has completed. The PIA cannot now be reopened and thus the appeal cannot unwind the effect of the PIA.*"
13. In his written submissions, the PIP expresses his position in the following way:

"In effect, the Court is being asked to unwind a completed PIA. The Court is being asked to revive a PIA that has expired. The Court is being asked to un-write-off debt to two unsecured creditors (who agreed to the write-off). The Court is being asked to re-create a relationship between the Debtor and two creditors who have now closed their relationship with the Debtor. The Court is being asked to re-create a relationship between the Debtor and the PIP that has ended. The Court is being asked to create a situation where the ISI Register, that previously showed a valid PIA, be amended (if this is even possible – which is a matter for the creditor). The Court is being asked to, in effect, amend the ISI Register that now records a successful completion of the PIA (it is assumed that the EU insolvency register would also be impacted). Further, as a matter of logic, the Central Credit Register (and/or Irish Credit Bureau reports) may need to be amended."
14. The objecting creditor's position, in summary, is equally straightforward: the appeal cannot be said to be moot as, by virtue of the appeal, a live controversy continues to exist between the parties in relation to the debtor's payment obligations. To paraphrase the analysis of McKechnie J. in *Lofinmakin v Minister for Justice, Equality and Law Reform* [2013] 4 IR 274 ("*Lofinmakin*"), there remain real and definite issues in the outcome of which the parties retain a legal interest. Similarly, the dispute between the parties has

not been rendered hypothetical or reduced to “*one based on conjecture*”. The objecting creditor says that regardless of the expiry of the three-month period specified in the PIA, it continues to be in a relationship with the debtor whereby the debt owed at the date of the initiation of the personal insolvency process remains due and has not been written down. If the approval of the PIA is not overturned, the creditor-debtor relationship may continue for a further 30 years in accordance with the PIA’s terms. If the PIA is overturned on appeal, the parties will be restored to their pre-PIA position with the original loan terms and conditions applying. Accordingly, it submits, the appeal could not be further from moot.

Relevant provisions of the Act

15. It is useful to refer briefly to some of the more salient provisions of the Act.

16. S.115A of the Act provides:

“Where—

(a.) *a proposal for a Personal Insolvency Arrangement is not approved in accordance with this Chapter, and*

(b.) *the debts that would be covered by the proposed Personal Insolvency Arrangement include a relevant debt,*

the personal insolvency practitioner may, where he or she considers that there are reasonable grounds for the making of such an application and if the Debtor so instructs him or her in writing, make an application on behalf of the Debtor to the appropriate court for an order under subsection (9).”

17. Section 115A(9) of the Act provides that the Court “*may make an order confirming the coming into effect of the proposed Personal Insolvency Arrangement only where it is satisfied*” of certain matters as set out in paragraphs (a) to (g) of that section including that the debtor is reasonably likely to be able to comply with the terms of the proposed PIA.

18. It is clear that the PIA comes into effect upon the making by the Circuit Court of an order under s.115A(9). Once the ISI is notified (under s. 115A(11)) of the making of the order, the ISI is then obliged to enter the PIA in the register of PIAs. Section 115A(13) provides that the PIA “*shall come into effect upon being registered in the register of personal insolvency arrangements*”.

19. S.116 of the Act (which, it might be noted, was in the 2012 Act prior to the insertion of s.115A by the 2015 Act) provides that on registration of the PIA, “*it shall have effect according to its terms and remain in effect until (a.) it is completed in accordance with its terms or the terms of any variation made.*” In light of the provisions of s.115A, it follows under s.116 that where a PIA is approved under s.115A(9) and is registered in accordance with s.115A(12), the debtor’s repayment obligations to his or her creditors is determined by reference to the terms of the PIA and not by reference to the terms of the

underlying loan agreements. This is made clear by s.117(1) of the Act which provides that:

"Subject to the provisions of this section, a Personal Insolvency Arrangement shall operate according to its terms and the debtor and creditors concerned shall perform their obligations in accordance with the Arrangement."

20. S.122 allows for a PIP or creditor to apply to the Court to terminate the PIA (on various specified grounds) at any time during which the PIA is in effect i.e. in this case, during the 3 month period. Under s.116(1), a PIA once registered shall remain in effect until it is completed in accordance with its terms.

21. S. 125 of the Act provides:

"(1) Upon the expiration of the Personal Insolvency Arrangement, and where the debtor concerned has complied with his or her obligations under the Personal Insolvency Arrangement, the personal insolvency practitioner shall notify the debtor, creditors and the Insolvency Service.

(2) Where the debtor has complied with his or her obligations under the Personal Insolvency Arrangement, subject to the provisions of section 99(2), and 102(3) and (7) the debtor stands discharged from the unsecured debts specified in the Personal Insolvency Arrangement.

(3) Where the debtor has complied with his or her obligations under the Personal Insolvency Arrangement, the debtor shall not stand discharged from the secured debts covered by the Arrangement except to the extent specified in the Personal Insolvency Arrangement.

(4) Where the Insolvency Service receives the notice referred to in subsection (1), it shall record the successful completion of the Personal Insolvency Arrangement in the Register of Personal Insolvency Arrangements."

Discussion

22. The PIP relies on the well-established jurisprudence on mootness. He contends that, in accordance with the dictum of Hardiman J. in *Gould v. Collins* [2005] 1 ILRM 1 that the case has become moot as *"the passage of time has caused it completely to lose its character as a present, live controversy of the kind that must exist if the court is to avoid advisory opinions and abstract propositions of law"*.

23. The PIP relies on authorities such as *JW v. Health Service Executive* [2014] IESC 8 (where the Supreme Court held that a *habeas corpus* application for the release of a party from custody was moot in circumstances where the party was no longer in custody by the time of the appeal) and *Lofinmakin* where the Supreme Court considered moot an appeal against the making of a deportation order where the deportation order had been withdrawn by the time the matter came before the Supreme Court.

24. In my view, the PIP's arguments on mootness are misconceived. Those arguments are centred on the premise that once the PIA as approved by the Circuit Court has completed its specified duration, the PIA cannot be undone. However, this would be to empty the objecting creditor's constitutional right of appeal of any utility where the PIA is for such a short period that it is not feasible for the appeal to be heard and determined before the specified period expires. This is not a situation where it is not possible to reverse the consequences of the PIA having come into effect. As pointed out by the objecting creditor, correctly in my view, in the event that it is successful on its appeal and the PIA is not upheld by this Court, it is simply the case that (a) for the period of the 3 month term, the debtor will be liable for the balance of the payments calculated in accordance with the terms of the underlying loan agreement rather than the PIA, with credit being given for the payments of interest made pursuant to the PIA during that period; and (b) for the period after the expiration of the 3 month term, the debtor's repayment obligations are to be reckoned in accordance with the terms of the underlying loan agreement. No step will have occurred by virtue of the expiry of the 3 month term of the PIA that cannot be undone in compliance with any order made by this Court upholding the appeal and overturning the Circuit Court's order.
25. This is not a situation where the parties' relationship has been irreversibly brought to an end before the appeal is determined. There is an ongoing relationship of debtor and creditor in being as a result of the PIA; indeed, the effect of the PIA, if upheld, is to extend the term of the mortgage loan by a further 25 years. I do not see how it can be said that there is no live controversy or issue between the parties in the circumstances. The issue on the appeal is whether or not the PIA is a valid one which was lawfully approved under the Act. If the objecting creditor wins its appeal, the PIA will be treated as never having validly come into effect and such steps as were taken on foot of the PIA can be undone. There are accordingly real and definite issues on this appeal in which the parties retain a legal interest. It follows that the appeal is not moot.
26. It is necessary to deal with two further arguments advanced by the PIP in support of his position on this application. The first argument was to the effect that the appropriate course of action in the event that an objecting creditor wishes to avoid its appeal becoming moot by the expiry of the PIA period before the appeal is heard by the High Court, is for the creditor to apply to the PIP to extend the PIA period.
27. There is no dispute on the facts here but that the arrangement term for the PIA was three months and that this three-month period expired on 14 January 2021. In principle, the term of the PIA can be extended. The relevant clause of the PIA provided that the duration of the PIA is three months from the effective date "*and can be extended in line with the standard terms and conditions*". S.119 of the Act also permits a PIA to be varied in accordance with its terms, subject to certain conditions laid down in that section and s.119A.
28. The standard terms of the PIA allow the PIP to seek to extend the duration of the PIA, but not the creditor. Clause 2.3 of the standard terms provides that the "Personal Insolvency

Practitioner may extend the Specified Duration by such period of time as the Personal Insolvency Practitioner considers reasonable in the circumstances ...". Clause 3 permits "the Debtor" to request a temporary stop in payments; and Clause 4 of the Standard Terms permits the "Personal Insolvency Practitioner" to propose a variation of the PIA. None of these clauses permits a creditor to extend the term of the PIA although s.119(3) does allow a creditor who is bound by the PIA to request the PIP to propose a variation of the PIA, where, *inter alia*, there has been a material change in the debtor's circumstances.

29. The PIP points out that in *Re McKiernan* [2021] IEHC 568, in circumstances where a PIA had been approved by the Circuit Court and while awaiting a decision of the High Court on an appeal against the Circuit Court decision, the PIP extended the PIA (twice) pending delivery of the High Court's judgment. It is said that this evidences the fact that the appropriate course of action, in order to avoid an appeal becoming moot by the expiry of the PIA period before the appeal is heard and determined by the High Court, is for the creditor to apply to the PIP to extend the PIA period.
30. In my view, the objecting creditor is correct in its submission that the fact that an extension of the term of the PIA was sought and granted in *Re McKiernan* does not advance the PIP's case in this appeal; the High Court did not, in *Re McKiernan*, determine that it was necessary for the PIP to extend the term of the PIA in order to avoid the appeal becoming moot. I do not see how it can be right in principle that in order to give effect to a constitutional right of appeal, where the specified duration of a PIA may be such as to expire before an appeal comes on for hearing, it is necessary for the objecting creditor/appellant to apply to the PIP to extend the term of the PIA and for the PIP to accede to that application and thereby vary the PIA under appeal in order for the appeal to proceed. I do not see how it could be correct in principle that the very instrument under appeal would have to be the subject of a variation by the respondent to the appeal in order for the appeal against the original instrument to validly take place at all.
31. The second argument advanced by the PIP is that mootness could have been avoided by the objecting creditor applying to this Court for a stay on the coming into effect of the PIA. It was emphasised that the circumstances revealed by this application were most unusual in that the duration of the PIA period was very short (only three months) and an objecting creditor was seeking to appeal the PIA approved by the Circuit Court (the usual position is that a debtor is appealing from a Circuit Court's refusal to approve the PIA). In those circumstances, it was said that a stay should have been sought in the High Court to prevent the PIA completing before the appeal was heard.
32. In my view, the objecting creditor's arguments are well made that the fact that a stay was not sought or placed on the coming into effect of the PIA is irrelevant to the question of whether or not the appeal is moot. A stay operates as a form of mechanism to preserve the balance of justice between the parties pending the determination of an appeal. Given that there is nothing that stood to be done under the PIA which could not be reversed in the event that the objecting creditor was successful on appeal, I do not see

why it can be said that the objecting creditor was obliged to apply for a stay to avoid the appeal becoming moot. The absence of a stay did not render the issues between the parties any less live or real. The fundamental issue remains as to whether or not the PIA was validly approved.

Conclusion

33. In my view, the answer to the question posed on the hearing of this preliminary issue is ultimately a straightforward one: the fact that a PIA has come into effect, and its specified duration has expired, does not render the appeal against that PIA moot. A live controversy remains i.e. whether the PIA should have been approved. There are real and definite issues in which the parties retain a legal interest i.e. should they remain bound by the terms of the PIA (including, in this case, the restructuring of the loan term to involve another 25 years at interest only) or should the PIA be set aside, and the parties restored to their prior contractual mortgage loan relationship. In the event that the objecting creditor is successful, there is no step which has been taken to date which cannot be undone. The amounts paid to the objecting creditor pursuant to the PIA will be credited against the amounts otherwise owing in the event that the original terms of the mortgage loan are restored. The debt of the unsecured creditors will be restored. In the event the objecting creditor is successful on appeal, this Court will make an order overturning the Circuit Court's decision to approve the PIA. Any affected parties, including the debtor and the objecting creditor, will be bound by the consequences of that order. In the event the objecting creditor is unsuccessful on the appeal, the post-PIA sanctioned arrangements will remain in place.

34. For the reasons outlined above, I will dismiss the preliminary objection to the appeal, and direct that the appeal now proceed to hearing in the ordinary way.