CPD Seminar 18th October 2013

Personal Insolvency/Bankruptcy

The Courthouse, Galway

**Brian Jennings B.L.**

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The topics I wish to cover today are as follows:

* The Personal Insolvency Legislation – the current position
* The Bankruptcy Option
* Personal Insolvency Arrangements (PIA) v Bankruptcy
* Creditor Applications pursuant to the Personal Insolvency Act, 2012 (Appendix 2)

**The Personal Insolvency Legislation – the current position**

This time last year I addressed you on what was then the Personal Insolvency Bill. Since that time the Bill has been significantly amended, passed by both Houses of the Oireachtas and signed by the President on the 26th December 2012. Most of the provisions of the Act have been commenced with the sole exception (as of the date of this presentation) of Part 4 which deals with the new amendments to bankruptcy. I have set out in Appendix 1 the statutory instruments relating to the Act. You will notice that numbers 10 and 11 have been highlighted in bold. These statutory instruments introduce the new Rules of Court for personal insolvency (High Court and Circuit Courts respectively) and both came into operation on the 9th August 2013.

The Personal Insolvency Act 2012 (“the 2012 Act”) has already been amended by Part 8 of the Courts and Civil Law (Miscellaneous Provisions) Act, 2013 (“the 2013 Act”). Part 8 came into operation on the 31st July 2013. Part 8 of the 2013 Act makes mainly technical amendments to the 2012 Act and rectifies errors. It also removes the requirement that certain court hearings be held otherwise than in public and it substitutes new sections for the sections on variation of Debt Settlement Arrangements (DSA) and Personal Insolvency Arrangements (PIA).

The Insolvency Service of Ireland (“ISI”) started accepting applications for the new debt arrangements on the 9th September 2013 and the first Protective Certificate (in respect of a DSA) was issued by a specialist judge in Monaghan Circuit Court on the 21st October last. The Department of Justice has indicated that it will commence the bankruptcy provisions shortly \*1

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\*1 *“A spokesman for the Department of Justice said this morning the section dealing with bankruptcy would be commenced in the next couple of weeks. The Department was waiting on new rules of court to be drafted before commencement…”* (Irish Times, 22nd October, 2013)

**The Bankruptcy Option**

Until now, that is all it has been; an ‘option’, a technical option not often exercised by debtors for many good and explicable reasons. It has been rightly regarded as penal in nature particularly having regard to the duration of the bankruptcy. On a more general level, Irish people regard bankruptcy as something akin to having committed a criminal offence and often associate it with fraud. There is a significant social stigma attached to bankruptcy. Perhaps this is due to how bankruptcy is represented in the media. If solicitors have to advise in relation to bankruptcy it is mainly in respect of creditors seeking to have a debtor adjudicated bankrupt (creditor’s petition) or defending such proceedings rather than a debtor seeking to have him/her adjudicated bankrupt (self-adjudication).

Bearing this negative background in mind, I wondered how I might set out to convince you that the new changes about to be introduced by Part 4 of the 2012 Act represent a good option for a significant number of debtors. However, the path was eased for me by the presentation by Mr Bolger, a Personal Insolvency Practitioner (“PIP”) with Grant Thornton who gave a fine, thorough and honest appraisal of his perspective of the personal insolvency process. You may have noted how much time of the presentation was devoted to the topic of bankruptcy. This was very interesting particularly having regard to the fact that PIPs are not in any way involved in the bankruptcy process. Their only interaction with bankruptcy or the bankruptcy process is to present it as an option to debtors when advising them in respect of their debts. I would suggest the prevalence of the topic of bankruptcy in the presentation is a recognition on the part of insolvency practitioners generally that, far from being an option of last resort as it has traditionally been seen, it is now considered a credible and indeed sensible alternative to the debt arrangements contained in the 2012 Act.

Bankruptcy in Context.

Bankruptcy is one of four main options for debtors.

1. Direct negotiation with creditors.

This option is the option most favoured by the Central Bank and represents, it is submitted, with bankruptcy, the most preferred option for both debtor and creditor. It allows maximum freedom for agreed debt restructuring without the restrictions necessarily involved in the personal insolvency regime. Debtors have the possibility of keeping their PPRs (family homes) and avoiding the imposition of the harsh living expenses guidelines. Secured creditors avoid having losses crystallised, avoid having to conduct valuations of their securities in a depressed property market and still have available to them the panoply of options of enforcement at a later stage. The downside of this option can be found in the term the Central Bank attributes to this heading “Bilateral loan modification”. It is only a realistic option for debtors who have one main creditor or very few creditors. The more creditors involved the more difficult it will be to conclude an agreement.

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1. An arrangement pursuant to the Personal Insolvency Act 2012 (as amended) i.e. Debt Settlement Arrangements (DSA) or Personal Insolvency Arrangements (PIA). (*The third arrangement is known as a Debt Relief Notice but it is not discussed here as it is not an option for the vast amount of debtors due to the low level of maximum debt (€20,000) and strict eligibility criteria)*

DSA and PIA are the main vehicles for debt restructuring provided by the Oireachtas via the Personal Insolvency Act 2012. They are very similar to each other the main difference being that secured creditors are not involved in DSAs. DSAs involve the writing off of unsecured debt after the successful conclusion of the terms of a DSA. The secured debt remains unaltered.

PIAs on the other hand involved the restructuring of secured debt and the writing off of unsecured debt after the successful completion of the terms of the PIA. I use the word ‘restructuring’ in that a debtor is only released from his/her secured debt to the extent provided for in the terms of the PIA. In reality, secured creditors will not agree to full debt write-down though in theory it is possible. The advantage of a DSA is that it allows a debtor to come to an arrangement with his/her unsecured creditors and for those debts to be written off after the successful completion of its terms. The disadvantage is that if the debtor has secured creditors, the secured debt will remain after the completion of the DSA.

The advantage of PIAs is that it provides a structure for the re-organising/restructuring of multiple debts both secured and unsecured and provides for solvency at the end of the term of the PIA. Indeed, in theory the debtor is ‘solvent’ at the end of the PIA term. The disadvantages from the debtor’s perspective is that at the end of the term of the PIA, a mortgage (albeit restructured) will most likely remain. Any increase in assets/income (including any inheritances) during the course of the PIA will result in the terms of the PIA being varied and most, if not all, of that increase/gift being paid to his/her creditors.

1. Bankruptcy (Ireland)

Once the new changes are commenced, bankruptcy in Ireland will mean possible automatic discharge of debts after 3 years and a fresh start for the debtor. (Discussed in more detail below)

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1. Bankruptcy (UK)

I have listed this as an option, but for the majority of debtors in Ireland, going abroad to self-adjudicate in bankruptcy is not an option for a variety of different reasons. In order to apply for bankruptcy in the UK you must prove that your centre of main interest (COMI) is in the UK. The main attraction for UK bankruptcy is the prospect of discharge after just one year. There is also the issue of publicity in that in Ireland, there is only one place in which one can be adjudicated bankrupt namely the High Court in Dublin. In England and Wales, there are 35 such places in the form of County Courts and a debtor could until recently pass through the system with relative anonymity.

The disadvantages are mainly in the form of risks. If you move to the UK and are in the process of establishing your COMI (prior to applying for bankruptcy), there is the real risk that you could be served with a bankruptcy petition issued in Ireland and such proceedings will have priority over any proceedings later issued in the UK. Further, if a debtor is not forthright in his/her dealings with the UK process and its officials, there is a possibility of the debtor being caught in the UK bankruptcy system for up to 15 years. In Ireland under the new bankruptcy provisions, even in the event of non-co-operation by the debtor, the debtor must be discharged no later than 8 years post adjudication. Notwithstanding the above, bankruptcy in the UK will remain a logical option for many debtors.

Bankruptcy - the new provisions

In Ireland there are two ways in which a debtor can be adjudicated bankrupt. Firstly, a creditor can bring a petition to have a debtor adjudicated bankrupt (creditor’s petition) and secondly, a debtor can bring a petition to have himself/herself adjudicated bankrupt (self-adjudication). Creditor petitions are by far the most common method of adjudication. This is about to change.

Changes to bankruptcy procedure.

In order to be adjudicated bankrupt, a debtor must have committed an ‘act of bankruptcy’ within the 3 months prior to the presentation of the bankruptcy petition. Until now there were 8 such acts of bankruptcy, the most common being that a debtor failed to comply with a bankruptcy summons. Part 4 of the 2012 Act, once commenced, will add 4 more acts of bankruptcy to this list i.e.

* Where the individual has been subject as a debtor to a DSA which has been terminated under s.83 of the 2012 Act.
* Where the individual has been subject as a debtor to a DSA which under s.84 of the 2012 Act is deemed to have failed,

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* Where the individual has been subject as a debtor to a PIA which has been terminated under s.122 of the 2012 Act,
* Where the individual has been subject as a debtor to a PIA which under s.123 of the 2012 Act is deemed to have failed.

Creditor’s Petition (changes)

* The minimum debt upon which a creditor can seek to have a debtor adjudicated bankrupt has been increased from €1,900 to €20,000.
* A creditor must now give the debtor at least 14 days’ notice in the prescribed form to the debtor of his/her/its intention to apply for a bankruptcy summons. This notice must also state that the creditor requires payment of the debt within 14 days after the service thereof on the debtor.
* A creditor is not now automatically entitled to his/her/its costs. The court must have regard to whether the petitioning creditor unreasonably refused to accept proposals made in connection with a DSA or PIA.
* Prior to adjudication, the court must consider whether a DSA or a PIA is appropriate in the circumstances and may adjourn the hearing of the petition to facilitate the entering into a DSA or PIA.

Debtor’s Petition (changes)

All that is required (currently) from a debtor seeking to have him/herself adjudicated bankrupt is that he/she is insolvent and that his/her estate if realised would raise at least €1,900. The new changes are as follows:

* When the debtor submits his/her petition, it must be accompanied by:
  + An affidavit sworn by him/her that prior to presenting the petition, he/she has made reasonable efforts to reach an appropriate arrangement with his/her creditors relating to his/her debts by making a proposal for a DSA or PIA to the extent that the circumstances of the debtor would permit him/her to enter into such an arrangement, and
  + File a statement of affairs which discloses that the debts of the debtor exceed his assets by more than €20,000.
* Before adjudication, the court is obliged to consider whether the debtor’s circumstances would be more appropriately dealt with by means of a DSA or a PIA. If the court is of such an opinion, it may adjourn the hearing of the petition to allow the debtor an opportunity to enter into one of those arrangements.

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Changes to the administration of the bankrupt’s property

A new s.44A has been introduced into the Bankruptcy Act 1988 relating to pensions. This new section will mean that pensions (in general) will not now be claimed by the Official Assignee. A new s.44B deals with excessive pension contributions and will allow the Official Assignee to claim bank excessive contributions made by the debtor in advance of his/her adjudication in bankruptcy. The exempted articles (e.g. articles which are necessary for the bankrupt’s employment) which do not automatically vest in the Official Assignee on adjudication have been raised from €3,100 to €6,000.

The period in which certain transactions entered into by the bankrupt prior to his adjudication can be deemed void as against the Official Assignee has been raised.

**Fraudulent and Voluntary Conveyances**

S.57 – Avoidance of fraudulent preferences.

Certain transactions (conveyances, transfer of property, charges etc.) carried out within 3 years prior to adjudication may be deemed to be fraudulent and void as against the Official Assignee if they were carried out with a view to giving a creditor or any surety or guarantor for the debts due to such creditor, a preference over the other creditors.

S.58 – Avoidance of certain transactions

If within 3 years before he is adjudicated bankrupt, a debtor commits an act of bankruptcy and thereafter either:

* Sells any of his property at a price which, in the opinion of the Court, is substantially below its market value, or
* Enters into or is a party to any other transaction which, in the opinion of the Court, has the effect of substantially reducing the sum available for distribution to the creditors,

such transaction shall be void as against the Official Assignee, unless the transaction was bona fide entered into and the other party had not at the time of the transaction notice of any prior act of bankruptcy committed by the bankrupt.

S.59 – Avoidance of certain settlements

Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith for valuable consideration, shall-

1. If the settlor is adjudicated bankrupt within three years after the date of the settlement, be void as against the Official Assignee, and
2. If the settlor is adjudicated bankrupt at any subsequent time within five years after the date of the settlement, be void as against the Official Assignee unless the parties claiming under the settlement prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.

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Discharge and Annulment (changes)

* S.85 provides for automatic discharge from bankruptcy after 3 years.
* S.85A provides for an objection to be made by the Official Assignee/Trustee in bankruptcy/creditor to the automatic discharge of the bankrupt on certain grounds i.e. that the bankrupt failed to co-operate with the Official Assignee in the realisation of the bankrupt’s assets or that he/she failed to disclose income/assets.
* S.85B provides for an entitlement to discharge from bankruptcy provided certain conditions are met i.e. provided all the debtor’s debts are paid or where the creditors consent to discharge.
* S.85C deals with annulment of the adjudication in bankruptcy i.e. where the bankrupt has shown cause or in any other case where in the opinion of the court the debtor ought not have been adjudicated bankrupt.
* S.85D concerns bankruptcy payment orders. These are likely to prove controversial. This section allows the court on application to it by the Official Assignee/Trustee in bankruptcy, to make an order requiring a bankrupt to make payments to the Official Assignee/Trustee in bankruptcy from his/her income or other assets for the benefit of his/her creditors.

The order is not automatic in that the court has a discretion as to whether or not to grant it. The application must be made before the bankrupt is charged from bankruptcy. What this means in practice is that despite being discharged from bankruptcy, an individual may still be obliged to make payments to the Official Assignee for up to 5 years post discharge.

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Personal Insolvency Arrangement v Bankruptcy

The debtor’s position in a PIA and his/her respective position in bankruptcy can be compared under the following headings:

* Secured Creditors
* Family Home
* Debts
* Privacy/Publicity
* Discharge

Secured Creditors

The 2012 Act accords to secured creditors many protections and advantages. For example, the secured creditor may give a preference as to how it wishes its security to be treated in the PIA, it enjoys protections depending on the option it chooses with respect to the dealing with the security (sale/retention/surrender of its security – see below) and a guarantee that when the PIA is completed that the debtor will only stand discharged from the secured debts *“…except to the extent provided for under the terms of the personal insolvency arrangement”*(s.99(2)(c)). However, there are disadvantages to secured creditors also such as the obligation to participate in the process itself and forgo remedies against debtors whilst the process is in being but perhaps the most significant disadvantages/risks from the secured creditors perspective (apart from the inevitable debt write-down) is that it is required to value its security in a depressed property market and the prospect of being out-voted by other secured creditors at the creditors meeting and consequently being forced to accept and abide by the terms of a PIA it would not have otherwise approved.

The legislation envisages secured creditors choosing one or other of three options in respect of the manner in which they wish to have their security treated in a PIA:

1. The sale/disposal of the property/asset the subject of the security;
2. The surrender of the security to the debtor; or
3. The retention by the secured creditor of the security.

The protections afforded to the secured creditor depend on which option he/she/it chooses.

Sale/disposition of the property/asset the subject of the security

If a secured creditor chooses the sale/disposition of the property/asset the subject of the security, the PIA must contain a term providing that the amount to be paid to that secured creditor shall amount at least to the lesser of:

1. The value of the security as submitted to the PIP on the granting of the protective certificate, or
2. The amount of the debt secured by the security as of the date of the issue of the protective certificate.

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The retention by the secured creditor of the security

If a secured creditor chooses to retain its security and to reduce the principal sum due in respect of the secured debt to a specified amount, then the terms of the PIA must provide that:

* that reduced specified amount cannot be less than the value of the security unless the secured creditor agrees otherwise, and
* the reduction of the principal sum is subject to the condition that if the property the subject of the security is sold/disposed of for an amount greater than its valuation pursuant to the PIA within a prescribed period\*2, that the debtor shall pay to the secured creditor an “additional amount” to the reduced principal sum or such greater amount as is provided for under the terms of the PIA.

The “additional amount” referred to will be the lesser of:

1. the difference between the sale price of the property/asset and the attributed value of the property for the purposes of the PIA, and
2. the amount of the reduction of the principal sum.

In calculating this “additional amount”, if the value of the property increases and a portion of that increase is attributable to significant improvements made to the secured property after the PIA valuation is carried out, that increase in value due to improvements made will be disregarded in calculating the addition amount payable by the debtor but only if the secured creditor has given his/her/it’s written consent to the improvements. This consent cannot be unreasonably withheld.

Any costs borne by the debtor in relation to the payment or transfer of assets to the secured creditor pursuant to the PIA and expenses and costs in connection with the sale/other disposal of the property shall be deducted from this “additional amount”.

The obligation to pay this “additional amount” only applies where the value of the property on its sale/disposal is greater than the amount of the debt secured by the security immediately prior to the sale/disposition of the property. The “additional amount” will stand secured in the same manner and with the same priority as the principal sum.

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\*2 The ‘prescribed period’ is the expiry of the period of 20 years commencing on the date on which the PIA comes into effect, or the day on which the debtor is scheduled or permitted to fully discharge the amount secured by the security (or such later date as may be specified for doing so in the PIA) and does so discharge his/her indebtedness, whichever first occurs.(s.103(11))

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In bankruptcy, the secured creditor must choose one of three options:

1. Remain outside the bankruptcy, realise its security and prove for the unsatisfied portion of the debt in the bankruptcy, or
2. Abandon its security and claim for the full amount of the debt as an unsecured creditor, or
3. Value\*3 its security and claim for the balance of the debt as an unsecured creditor.

Family Home (Principal Private Residence (“PPR”)

Section 104 of the 2012 Act requires that when a PIP when formulating his/her proposal for a PIA he/she must to do so on terms that will not require the debtor to either dispose of his/her interest in or cease to occupy all or part of his/her family home and the PIP must consider any appropriate alternatives. However, this apparent protection is subject to two caveats:

1. The requirement to formulate a proposal on those terms is only to the extent *“insofar as reasonably practicable”*, and
2. By “*having regard to the matters referred to in subsection (2)”*, which are:
3. the costs likely to be incurred by the debtor by remaining in occupation of his PPR (including, inter alia, mortgage loan repayments)
4. the debtor’s income and other financial circumstances as disclosed in the Prescribed Financial Statement (PFS),
5. the ability of other persons residing in the PPR to contribute to the costs of continuing to reside in the family home, and
6. the reasonable living accommodation needs of the debtor and his/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).

Therefore, the legislation provides many grounds for a PIP to easily justify him/her not formulating such a proposal on terms that do not require the debtor to dispose of an interest/cease to occupy his/her family home.

The PIA can only contain terms providing for the disposal of the debtor’s interest in the family home provided that:

* the debtor has obtained independent legal advice in relation to such disposal, or,
* having been advised by the PIP to obtain such advice has declined to do so, and
* all relevant provisions of the Family Home Protection Act 1976 or the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 as they apply to the property, have been complied with.

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\*3 Secured creditors need to be careful in relation to carrying out valuations in the bankruptcy process. While there is provision for amending valuations and proof of debt, it can only be so amended on showing to the satisfaction of the Official Assignee, or the Court, that the valuation and proof were made bona fide on a mistaken estimate. See the comments of Gilligan J. in **Re Mullee [2012] IEHC 275** in relation to valuations and a declining property market.

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Subsection (3) allows the PIP to formulate the proposal for a PIA on terms that the debtor ceases to occupy his/her family home where either:

1. the debtor confirms in writing to the PIP that he/she does not wish to remain in occupation of the family home, or
2. the PIP has, having discussed the issue with the debtor, formed the opinion that taking account of the matters set out in subsection (2) (set out above), that the costs of continuing to reside in the family home are disproportionately large.

It is important to note that this power relates to cessation of occupation only and not a disposal of an interest in the family home.

On adjudication in bankruptcy, all the assets/property of the debtor vests automatically in the Official Assignee. Accordingly, if the debtor has an interest in the family home, that interest is vested in the Official Assignee. If the family home is held jointly with the debtor’s spouse, the debtor’s adjudication has the effect of converting the joint tenancy into a tenancy-in-common with the result that the debtor’s spouse and the Official Assignee hold equal shares in the house. In order for the Official Assignee to realise his share of the family home, he must apply to the court for an order for sale of the family home. This process can be expensive and time-consuming and once the order is eventually obtained, the court may put a stay on the order for sale for a number of months e.g. to allow the spouse and family secure alternative accommodation. In order to avoid this additional expense and time, the Official Assignee will offer his share of the family home to the bankrupt’s spouse at a discounted rate. If the spouse is in a position to purchase the share, he/she will own the family home outright. This ought to be a significant consideration for debtors when choosing between the various debt settlement options.

Debts

Debts in a PIA are to be paid in accordance with the terms of the PIA. Preferential debts are to be paid in priority to unsecured debts unless provision is otherwise made in the PIA or if the preferential creditor fails to prove that his/her/it’s debts is a preferential debt. In bankruptcy, there is a statutory procedure set out (s.81 of the Bankruptcy Act 1988) which provides for the distribution of debts.

1. Expenses/fees in the bankruptcy process and costs of the Official Assignee and Petitioning Creditor are discharged first (the new changes provide that petitioning creditors are will not be automatically entitled to their costs – see above)
2. Preferential payments (these rank equally among themselves and are to be paid in full unless the bankrupt’s property is insufficient to meet them and in such case, they will abate in equal proportion as between themselves)
3. Unsecured creditors are paid last (provided there are sufficient funds available after priority and preferential debts are discharged).

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Privacy/Publicity

Registers

In a PIA, once a protective certificate has been issued by the appropriate court, the ISI will enter the debtor’s name on a register known as the Register of Protective Certificates. This Register will be open to the public and will contain the debtor’s name, address, date of issue of the protective certificate, any extension of the period the protective certificate has effect, the making of an order by the court under s.97 that the protective certificate does not apply to a particular creditor and will name the creditor in respect of whom the order has been made, the date on which the protective certificate ceases to be in force. These details must be removed from this Register within 3 months from the date on which the protective certificate ceases to be in force.

Once the PIA has been approved by the court, the court registrar will notify the ISI of the coming into effect of the PIA and it (ISI) must register the PIA in the Register of Personal Insolvency Arrangements. Only on registration does the PIA take effect. On successful completion of the PIA, the ISI must register such completion in the Register and within 3 months of such receipt remove all information recorded in it in respect of the PIA.

On adjudication in bankruptcy, the bankrupt’s name will be entered in the Bankruptcy Register which is maintained in the Office of the Examiner of the High Court. Searches can be made against this Register by attending the Examiner’s Office in person and by paying the appropriate fee. This Register is a record of all bankruptcies including bankruptcies which have been discharged. Any person conducting a search against the Register is only told of the status of the bankrupt e.g. ‘discharged’ and the date on which he/she was discharged.

In bankruptcy there is also a requirement to publish a notice of the bankrupt’s adjudication in one national and one local newspaper. This notice will contain information relating to the ‘statutory sitting’. The statutory sitting is the date on which creditors can appear before the court and prove their debts. There are other publishing requirements at different stages of the bankruptcy process i.e. notice of discharge of bankruptcy.

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Reviews

Once a PIA comes into effect, the PIP is obliged to maintain regular contact with the debtor and request such reports and conduct such reviews as may be required but such review shall in any event be carried out at least once in every period of 12 months (s.117(4)) The requirement of review(s) is a mandatory term of the PIA (s.99(2)(i)). Such reviews will also involve the preparation by the debtor of a new Prescribed Financial Statement (PFS), a copy of which together with a statement of the PIP as to whether he/she considers that statement to be complete and accurate, shall be sent by the PIP to each creditor. There is linked to this requirement a continuing obligation on the part of the debtor to co-operate fully and in particular to comply with any reasonable request from the PIP to provide assistance, documents and information necessary for the carrying out of the PIP’s functions. There is also an obligation on the debtor to inform the PIP as soon as reasonably practicable of any material change in the debtor’s circumstances, particularly an increase or decrease in the level of the debtor’s assets, liabilities or income which would affect the debtor’s ability to make repayments under the PIA.

Discharge

On completion of a PIA, the debtor is discharged from all the unsecured debts and is discharged from his/her secured debts only to the extent provided for in the terms of the PIA. Therefore, although there may be significant debt write-down by secured creditors, there will remain a mortgage albeit a restructured/rehabilitated one at the end of the PIA.

Under the new changes in bankruptcy, a bankrupt is entitled to automatic discharge after 3 years. However, the discharged bankrupt may be made subject to a bankruptcy payment order for a further (maximum) period of 5 years.

Conclusion

For the vast majority of debtors, it will come down to a choice between three main options outlined above, none of which will be easy. Do I try and reach an arrangement with my creditors outside of both the personal insolvency process and bankruptcy, do I try to enter a DSA/PIA or alternatively am I better off self-adjudicating in bankruptcy. The answer to each of those questions will differ from debtor to debtor as their financial circumstances and relationships with their creditors will each differ. Both debtors and creditors will analyse their respective positions under each of the three headings and will choose to pursue the option best suited to their particular circumstances. The default option for both debtors and creditors is bankruptcy.

The linchpin in the PIA for both debtors and creditors is the family home but for completely different reasons. The debtor will see the PIA as offering an opportunity of remaining in the family home thus avoiding disruption to family life, the negative publicity that moving house will necessarily attract and the knowledge that all the effort and investment (financial and emotional) in the family home throughout his/her time in the house will not have been in vain.

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Secured creditors on the other hand know that the best chance recovering the maximum amount of debt from the debtor and keeping the debtor (and themselves!) out of the clutches

of the Official Assignee in bankruptcy is to offer him/her the prospect of remaining in the family home. The secured creditor knows that debtors will do everything in their power to hold on to the family home and will go to extraordinary lengths in order to do so. The creditor, cognisant of this fact,(and of the debtor’s financial circumstances having received the debtor’s Prescribed Financial Statement) will therefore tailor (if possible and practical) it’s submission to the PIP as to how it wishes it security to be treated accordingly, offering continued occupation of the family home in the hope and expectation that it will be enough to entice the debtor into concluding a PIA and away from bankruptcy.

The question therefore arises; how far will a debtor go in order to keep the family home? It is only natural for debtors to try and hold on to the family home particularly so where homes have been in families for generations. However, very many houses were purchased in the last 20 years and so the same emotional attachment ought not to apply. There will come a point when it will just not be practical or possible for financial, health and family reasons to continue to make extraordinary financial sacrifices in order to keep the family home. If debtors could come to see their houses as bricks and mortar rather than sacred family temples that must be protected at all costs, they will begin to view their debts in a different light and see that bankruptcy may the best long-term solution for themselves and their families.

**Brian Jennings B.L**.

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**Appendix 1**

**Personal Insolvency Act 2012 – Statutory Instruments** (as of 18th October, 2013)

1. Personal Insolvency Act 2012 (Part 6) (Commencement) Order 2013 (14/2013)
2. Personal Insolvency Act 2012 (Commencement) (No.2) Order 2013 (63/2013)
3. Personal Insolvency Act 2012 (Establishment Day) Order 2013 (64/2013)
4. Personal Insolvency Act 2012 (Authorisation & Supervision of Personal Insolvency Practitioners) Regulations 2013 (209/2013)
5. Personal Insolvency Act 2012 (Authorisation of Approved Intermediaries) Regulations 2013 (216/2013)
6. Personal Insolvency Act 2012 (Personal Insolvency Practitioner Authorisation and Renewal of Authorisation Prescribed Fees) Regulations 2013 (246/2013)
7. Personal Insolvency Act 2012 (Accounts and Related Matters) Regulations 2013
8. Personal Insolvency Act 2012 (Commencement) (No.3) Order 2013 (285/2013)
9. Personal Insolvency Act 2012 (Written statement disclosing all of the debtor’s financial affairs) Regulations 2013 (312/2013)
10. **Rules of the Superior Courts (Personal Insolvency) 2013 (316/2013)**
11. **Circuit Court Rules (Personal Insolvency) 2013 (317/2013)**
12. Personal Insolvency Act 2012 (Prescribed Financial Statement) Regulations 2013 (326/2013)
13. Personal Insolvency Act 2012 (Prescribed Fees) Regulations 2013 (329/2013)
14. Personal Insolvency Act 2012 (Value above which a debtor must not transfer, lease, grant security over or otherwise dispose of any interest in property) Regulations 2013 (330/2013)
15. Personal Insolvency Act 2012 (Prescribed Protective Certificate Personal Insolvency Arrangement Application Form) Regulations 2013 (331/2013)
16. Personal Insolvency Act, 2012 (Prescribed Protective Certificate Debt Settlement Arrangement Application Form) Regulations 2013 (332/2013)
17. Personal Insolvency Act 2012 (Prescribed Protective Certificate Debt Relief Notice Application Form) Regulations 2013 (333/2013)
18. Personal Insolvency Act 2012 (Schedule of Creditors) Regulations 2013 (334/2013)
19. Personal Insolvency Act 2012 (Procedure for the Conduct of Creditor’s Meetings) Regulations 2013 (335/2013)
20. Personal Insolvency Act 2012 (Notification in relation to Excludable Debt) Regulations (337/2013)

S.I. No 286/2013- Courts and Civil Law (Miscellaneous Provisions) Act 2013 (Part 8) (Commencement) Order 2013 – came into operation on the 31st July 2013.

**Appendix 2**

**Creditor Applications under the Personal Insolvency Act, 2012**

Creditors can make objections/challenges at three different stages of the DSA/PIA process:

**Once the Protective Certificate has issued by the Court** (S.63 & S.97)

* If a creditor is aggrieved by the issue of a Protective Certificate, the creditor has 14 days (from the giving of notice of the issue of the Protective Certificate to that creditor) in which to apply to the court for an order directing that the Protective Certificate shall not apply to him/her/it.

However, there is a presumption against granting the relief sought. The legislation provides that the Court “…shall not make the order sought unless it is satisfied that:

1. Not making the order would cause irreparable loss to the creditor which would not otherwise occur, and
2. No other creditor to whom notice of the Protective Certificate has been given would be unfairly prejudiced.”

**Once the DSA/PIA has been approved at a creditors meeting** (S.75 & S.114)

* A creditor may lodge an objection with the court to the coming into effect of a DSA/PIA. The creditor has 14 days in which to lodge the objection and the objection is limited to the following grounds:

1. That the debtor has by his or her conduct within the 2 years prior to the issue of the protective certificate under section 61 [or section 95 in the case of PIA] arranged his or her financial affairs primarily with a view to being or becoming eligible to apply for a Debt Settlement Arrangement/Personal Insolvency Arrangement,
2. The procedural requirements specified in the Act were not complied with,
3. A material inaccuracy or omission exists in the debtor’s statement of affairs (based on the Prescribed Financial Statement) which causes a material detriment to the creditor,
4. The debtor, when the DSA/PIA was proposed, did not satisfy the eligibility criteria for a DSA/PIA,
5. The DSA/PIA unfairly prejudices the interests of a creditor,
6. The debtor has committed an offence under this Act which causes a material detriment to the creditor,
7. The debtor has entered into a transaction with a person at an undervalue within the preceding 3 years that has materially contributed to the debtor’s inability to pay his/her debts (other than any debts due to the person with whom the debtor entered the transaction at an undervalue),
8. The debtor had given a preference to a person within the preceding 3 years that had the effect of substantially reducing the amount available to the debtor for the payment of his/her debts (other than a debt due to the person who received the preference.

**At any time during which the DSA/PIA is in effect, a creditor can apply to the court to have the DSA/PIA terminated** (S.83 & S.122).

However, the creditor is limited to the following grounds:

1. A material inaccuracy or omission exists in the debtor’s Prescribed Financial Statement, which causes a material detriment to the creditor,
2. The debtor, when the DSA/PIA was proposed, did not satisfy the eligibility criteria for a DSA/PIA,
3. The debtor did not comply with the duties and obligations imposed on him/her under the DSA/PIA process,
4. The debtor has since the coming into effect of the DSA/PIA committed an offence under the Act,
5. The debtor is in arrears with his/her payments for a period of not less than 3 months,
6. The debtor has failed to carry out any action necessary to enable a term of the DSA/PIA to have effect,
7. The debtor has unreasonably refused to consent to a variation of the DSA/PIA.