



The Light at the End of a Dark Tunnel: A Review of the Law on Personal Insolvency in Ireland

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Introduction

The *Celtic Tiger* years occurred in Ireland between 1995 and 2007. During this time-period the economy flourished, evidenced by an average annual rate of growth of 9.4% between 1995 and 2000, and an increase in GDP between 1987 and 2007 of 229%. As a consequence of this growth, consumers were actively encouraged to borrow money – whether it was for car loans, loans for holidays or home improvements, or to buy a home. In addition, large retailers offered customers store credit cards, to encourage them to shop in their stores. Similarly, banks were offering university and college graduates (often with no income stream) loans to take a gap year abroad on completion of their studies, and before the commencement of their careers. A large portion of this lending was reckless, as in many cases a consumer’s income was not sufficient to sustain this borrowing or (as outlined in relation to graduates) the consumer had no fixed income stream. Despite this fact, these consumers were encouraged to borrow on the basis that they were likely to have a high future income or on the basis that their current income was likely to increase. In particular, a number of the commercial banks were offering customers 110% mortgages, with the excess to be used for legal costs and furnishing the home. In addition, where a customer’s income did not meet the threshold to obtain a mortgage of a certain value, they were given the loan anyway and told to bring in a lodger or tenant to assist them in repaying the mortgage.

This did not cause any significant problems for customers until 2008, when the credit crunch hit, resulting in the bursting of the property bubble, leaving borrowers in negative equity. This all had the domino effect of causing a significant recession in the Irish economy. Consequently, personal solvency became a critical issue. Ramsay¹ recognises that the recession of 2008 marks a critical juncture in personal insolvency law as this was a period when:

*“... international financial institutions paid greater attention to the significance of household debt in contributing to financial instability and the role of individual insolvency law in providing a fresh start”.*²

Arising from this recession, unemployment rose dramatically, and many employees who retained their jobs during this period had no option but to take a pay cut. The resulting loss of income meant that a significant portion of borrowers were no longer in a position to be able to service their debt³. According to the figures released from the Central Bank in December 2012 86,146 (11.3%) of private

¹ Ramsay, I., *Personal Insolvency in the 21st Century: A Comparative Analysis of the US and Europe*, Oxford: Hart Publishing, 2017.

² Ibid at p. 2.

³ According to the CSO the average household debt was €108,400 per person in 2011 (compared to an average household debt in 2016 was €30,199 and €28,186 in the first quarter of 2019). Households Debt to Income in Ireland averaged 159.40% from 2002 until 2021, reaching an all-time high of 208.08% in 2009, when Ireland plummeted into recession. This debt level recorded an all-time low of 95.01% in 2021.

residential mortgage accounts for principal dwelling houses (PDH) were in arrears of over 90 days at end-September, up from 81,035 accounts (10.6%) at end-June 2012⁴. According to Bell⁵:

*"... 2009 was, economically, one of the harshest years in living memory for Ireland. The economy contracted by ten per cent, over 200,000 people joined the dole queues and countless businesses went into liquidation."*⁶

Unfortunately, at that time the only option available to defaulting and struggling borrowers/debtors was to have themselves adjudicated personally bankrupt by the High Court. This bankruptcy status could not be discharged for a period of twelve years, and imposed significant restrictions on the individual, such as restrictions on trading and on obtaining credit. This whole process was viewed as punitive, rather than rehabilitative. According to Bell:

*"The Bankruptcy Act of 1988 punishes bankrupts for their perceived imprudence and profligacy in an apparent attempt to dissuade society from viewing bankruptcy as an easy attempt to escape from poor financial decisions."*⁷

Former Government Minister Ivan Yates described Ireland's bankruptcy regime during this period as *purgatory* and Bell described it as a *catastrophe*. The dichotomy between bankruptcy law in Ireland and other jurisdictions had the direct result that many Irish citizens moved abroad to obtain foreign domicile and then had themselves declared bankrupt in these foreign jurisdictions, whose bankruptcy regimes were not as draconian or rigid as the Irish regime⁸. Arising from these issues the Irish government committed itself to the reform of personal insolvency law in a memorandum of understanding with the EU and the International Monetary Fund. This commitment eventually led to the enactment of the Personal Insolvency Act 2012, which introduced alternatives to bankruptcy, as well as bankruptcy reform. According to Glunn⁹:

*"[T]he Personal Insolvency Act 2012 has to be welcomed, as it will address one of the biggest problems in Irish society: the large and unsustainable debt burden hanging over many people who have no prospect of ever clearing their debt and being able to actively engage in the economic life of the nation. The ... Act will help these people re-engage in the economy, which will be to the benefit of all parties."*¹⁰

⁴ Central Bank of Ireland Information Release, "Residential Mortgage Arrears and Repossessions Statistics: Q3 2012" (December 13, 2012) at p.1, available at:

http://www.centralbank.ie/polstats/stats/mortgagearrears/documents2012q3_ie_mortgage_arrears_statistic_s.pdf

⁵ Bell, K., *Bankruptcy Reform: An Unlikely Kick-Start for the Economy*, Trinity College Law Review 2011, 14(1), 35-50.

⁶ *Ibid* at p. 35.

⁷ *Ibid*.

⁸ This became known as bankruptcy tourism, and often occurred between Ireland and the UK, where the term of bankruptcy was only one year (in comparison to Ireland's twelve years). It was reported in the Guardian newspaper in May 2012 that a solicitor in Leicester has helped Irish clients escape more than €1bn (£798m) debt by taking advantage of a booming trade in bankruptcy tourism in the UK. Steve Thatcher, who ran the advisory service www.irishbankruptcyuk.com, boasted that at least 55 clients were in the process of clearing some €1.2bn in debt by using UK Courts to wipe out loans taken out in the Republic of Ireland. One property speculator wrote off €150m during a 35-second court appearance. In other cases borrowers were millions of euro in debt, but owned no property or assets.

See: <https://www.theguardian.com/world/2012/may/27/irish-dodge-debts-uk-bankruptcy-tourism>

⁹ Glunn, B., *Insolvency: The Personal Insolvency Act 2012 - Part II*, Irish Law Times 2013, 31(12), 174-177.

¹⁰ *Ibid* at p. 177.

The aim of these procedures is to give a debtor the opportunity to restructure their debts and reach agreements with their creditors, and quite often avoid the bankruptcy process¹¹. It is these alternatives, as well as bankruptcy, that are the focus of this Article.

Personal Insolvency

The 2012 Act introduced three alternative arrangements to bankruptcy. These are debt relief notices (DRN), a debt settlement arrangement (DSA) and a personal insolvency arrangement (PIA). On successful completion of these arrangements, all unpaid unsecured debt encompassed in the arrangements are written off as a bad-debt.

According to Rooney and O'Neill¹²:

*"[Personal insolvency] is a mostly self-funded process as the debtor must be able to resolve his or her debts in an orderly fashion and continue to meet his or her ongoing financial commitments once the arrangement has concluded."*¹³

All three of these processes are conducted in a public, open and transparent manner. Rooney and O'Neill note that:

*"Insolvency processes, and particularly ones that result in the indebted person or company returning to their gainful economic activities, must be conducted in the open. They are fundamentally collaborative, bringing the company/debtor together with their creditors and the benefit of independent financial advice in order to reach the best possible outcome for the indebted and the creditors alike."*¹⁴

In determining which option is most appropriate for a defaulting debtor, the following factors are relevant:

- A. The value of the unpaid debt
- B. The type of unpaid debt
- C. The income of the borrower, and
- D. The assets of the borrower.

A **debt relief notice** is designed to meet the needs of people who are insolvent with small, but unsustainable, unsecured debts that they have no realistic prospect of clearing in the foreseeable future due to their low disposable income. This option is suitable for a debtor who has built up credit card debt, credit union debt, utility bills and other small unsecured debts. To avail of such an order, the debtor must have personal unsecured debt of less than €35,000 (and no secured debt) and not be in a position to repay this debt within the next three years. They must have income of less than €60 per month, after the deduction of reasonable cost of living expenses¹⁵ and payment of debts that are not included in the DRN, and they must have assets of less than €1,500 (subject to limited

¹¹ Foley, E and O'Sullivan, O., *PIAs and the Role of the Receiver*, The Bar Review 2018, 23(4), 105-107, at p. 105.

¹² Rooney, K and O'Neill, C., *Are Private Settlements Permissible within Examinership or a Personal Insolvency Process?*, Commercial Law Practitioner 2021, 28(6), 111-115.

¹³ At p. 113.

¹⁴ Ibid at p. 115.

¹⁵ <https://www.isi.gov.ie/en/ISI/Reasonable%20Standard%20of%20Living%20and%20Reasonable%20Living%20Expenses%20Guidelines%2024%20November%202022.pdf/Files/Reasonable%20Standard%20of%20Living%20and%20Reasonable%20Living%20Expenses%20Guidelines%2024%20November%202022.pdf>

exceptions¹⁶¹⁷. This option may be suitable for someone who has borrowed money, lost their job and is unable to secure another one and therefore they can no longer service their borrowing – or a borrower who has returned to education because employment in their current sector has declined.

To enter into a **debt settlement arrangement** the debtor must have unsecured debt only (with no financial limits on income or assets) and not be in a position to repay these debts as they fall due. For example, where a person has borrowed money and because of a change in circumstances (such as illness, divorce, death of a partner, loss of employment etc...) they are no longer in a position to service this debt. According to O’Sullivan¹⁸:

“A DSA may incentivise a debtor to successfully conclude the process, in order to benefit from some debt reduction, and appeal to unsecured creditors as they may receive a better return than would otherwise be the case under bankruptcy proceedings.”¹⁹

To enter into a **personal insolvency arrangement** the debtor can have secured debts (such as a mortgage) of up to €3m²⁰ as well as unsecured debts (with no financial limits on income or assets) and must not be in a position to repay these debts as they fall due. For example, where a person has personal borrowing and a mortgage and because of a change in circumstances they are no longer in a position to service this debt.

The benefit of these agreements is that the debtor will have a fixed amount of debt to repay during their tenure (and based on their disposable income) and on the expiry of the agreement any outstanding amount of unsecured debt will be written off, with the aim of restoring the borrower to a position of solvency. In the context of a PIA, the secured debts may be restructured under the terms of the arrangement. In this regard restructuring may include extending the term of repayment of the secured debt, interest-only payments for an agreed time-period or the write-down of some or all of the negative equity in relation to the secured asset.

All three options place the debtor under these agreements for prescribed periods of time, as follows:

Debt Relief Notices	3 years
Debt Settlement Arrangements	5 years
Personal Insolvency Arrangements	6 years

All of these agreements may be extended by one year in certain prescribed situations.

Eligibility

Excluding the eligibility criteria outlined above the following are the general eligibility criteria to avail of these alternative personal insolvency options:

- A. The borrower must normally be domiciled in the Republic of Ireland
- B. The borrower can only avail of each option once in their lifetime

¹⁶ These exceptions allow the borrower to retain one item of jewellery (whose value does not exceed €750), one motor vehicle (with a maximum value of €5,000), as well as reasonably necessary household equipment/tools (whose combined value cannot exceed €6,000).

¹⁷ Section 26, Personal Insolvency Act 2012, as amended.

¹⁸ O’Sullivan, P., *Debt Settlement Arrangements: A Step-by-Step Analysis—Part 2*, Commercial Law Practitioner 2013, 20(4), 75-80.

¹⁹ Ibid at p.80

²⁰ This may be higher where the creditors consent to the inclusion.

- C. In relation to a DRN, the borrower cannot be subject to a DSA or PIA at present or in the last five years
- D. In relation to a DSA, the borrower cannot be subject to a DRN at present or in the last three years, or a PIA at present or in the last five years
- E. In relation to a PIA, the borrower cannot be subject to a DRN at present or in the last three years, or a DSA at present or in the last five years
- F. The borrower cannot be the recipient of a Protective Certificate issued in respect of a DSA or a PIA within the past year²¹
- G. The borrower must not have entered into certain transactions at less than market value in the past two years
- H. The borrower cannot have incurred 25% or more of their debt in the six months prior to their application²²
- I. In relation to a PIA, the borrower must have co-operated with their mortgage lender by undertaking a mortgage arrears process (such as the Central Bank of Ireland's Code of Conduct on Mortgage Arrears) for a period of 6 months with the result was that no alternative repayment arrangement was agreed or the secured creditor confirmed it would not put in place such an arrangement
- J. The borrower cannot have given certain preferential treatment to one creditor over another in the past two years (e.g. paying off a family member before your bank or credit union)
- K. The borrower cannot be the subject of a bankruptcy order or have been adjudicated bankrupt in the past five years

Excluded and Excludable Debt

Certain debts are excluded from all three of these arrangements. These include:

- A. Debts arising from family maintenance payments under Court orders
- B. Debts arising from Court fines in respect of criminal offences
- C. Debts arising from Court orders made under the Proceeds of Crime Acts
- D. Liabilities arising out of personal injury or wrongful death claims awarded by the Court
- E. Liabilities arising from loans obtained by fraud

Other prescribed debts are classed as excludable debts²³, and do not become part of these agreements unless the relevant creditor consents to their inclusion. Where such a request is made to the creditor and the creditor fails to respond to it within 21 days, then the creditor will be deemed to have consented to the inclusion of the debt in the relevant insolvency arrangement²⁴. In the context of excludable debt and a PIA Justice Sanfey in *the Matter of Part 3, Chapter 4 of the Personal Insolvency Acts 2012-2015 and In the Matter of Lyle Chambers of Ardraccon, Kilmessan, County Meath and In the Matter of an Application Pursuant to Section 115A(9) of the Personal Insolvency Acts 2012-2015*²⁵ pointed out that:

²¹ According to Justice Sanfey in *Re Barry* [2021] IEHC 144 this rule represents a balance between the interests of debtors and creditors.

²² According to Murphy, T., *DSAs and PIAs from a Creditor's Perspective: the Protections Available to Creditors and the Scope for Challenges under the Personal Insolvency Act 2012*, Commercial Law Practitioner 2013, 20(9), 201-205, at p. 203: "This is clearly to prevent debtors illegitimately incurring debts in a short space of time (which the debtor cannot realistically expect to repay) and then seek to purge themselves from their debts by applying for a DSA or PIA."

²³ These debts are typically debts due by a debtor to preferential creditors such as Revenue.

²⁴ Section 28(4), Section 58(3) and Section 92(4), Personal Insolvency Act 2012.

²⁵ [2022] IEHC 180.

“[i]f the excludable debt creditor, as in the present case, opts to stay out of the PIA, the debt may not be the “subject of” the PIA, and the PIA cannot make provision for payment of that debt, whether as a special circumstances cost or otherwise. The non-permitted debt creditor must pursue recovery of the debt independently.”²⁶

Excludable debts include²⁷:

- A. Any outstanding taxes, duties, levies owed or payable to the State
- B. Debts arising from local government charges
- C. Any amounts due to the Health Service Executive under the Nursing Home Support Scheme
- D. Any annual service charges to owner’s management companies (in respect of serviced apartments or housing estates)
- E. Any liabilities arising under the Social Welfare Consolidation Act 2005
- F. Debts arising from local authority rates
- G. Any debts relating to household charges

Application Process

Debt Relief Notice

Applications for a **Debt Relief Notice** must be made through an approved intermediary²⁸ to the Insolvency Service of Ireland²⁹. The debtor must disclose all of their debt to the approved intermediary, who should then advise them in writing as to whether they are eligible to obtain a DRN³⁰. If they are deemed eligible to obtain a DRN the debtor must consent in writing to undertake this process and be made subject to such an order. The approved intermediary (AI) will then require that the debtor complete a prescribed statement of financial position, providing full details of their financial position. In this regard, the debtor must act in good faith when completing this application and honestly disclose all relevant and material facts. Non-compliance with this obligation is an offence and may result in the DRN being revoked or amended. The debtor must also consent to the AI contacting their creditors to ascertain and verify details of the outstanding debt. Once completed, the debtor must swear a statutory declaration or a confirmation of truth³¹ confirming the accuracy of the details contained in the prescribed statement of financial position. If the AI is of the opinion that the information contained in the debtor’s Prescribed Financial Statement is true and accurate, and that the debtor satisfies the eligibility criteria³² he must prepare a statement to that effect³³. The AI will then send an application to the Insolvency Service of Ireland (ISI) to have this application for a DRN approved. The application should include³⁴:

²⁶ Ibid at para 37.

²⁷ Section 2, Personal Insolvency Act 2012.

²⁸ The main approved intermediary in Ireland is the Money Advice and Budgeting Service (MABS).

²⁹ Section 27, Personal Insolvency Act 2012.

³⁰ The Personal Insolvency (Amendment) Act 2021 allows for any such meetings to take place in person, electronically or remotely.

³¹ The distinction between a statutory declaration and a confirmation of truth is that a statutory declaration must be signed in the presence of a person authorised by law (such as a solicitor or a commissioner for oaths), whereas a confirmation of truth can be signed and transmitted electronically. It is an offence to make either without an honest belief as to its truth.

³² Section 26(2), Personal Insolvency Act 2012.

³³ Ibid at Section 27(6).

³⁴ Ibid at Section 29(2).

- A. A document signed by the debtor confirming he or she satisfies the eligibility criteria
- B. The Prescribed Financial Statement and a statutory declaration/confirmation of truth as to its accuracy
- C. A copy of the approved intermediary's statement re the statement and declaration
- D. A schedule of the creditors of the debtor and the debts concerned, stating the amount of debt due to each creditor, and if it is an excludable debt whether it is a permitted debt
- E. The written consent of the debtor to disclosure and processing of their personal data to the ISI and the debtor's consent to this information being disclosed by the ISI to creditors of the debtor and to further enquiries being made by the ISI to the approved intermediary relating to the debtor's affairs
- F. Details of the debtor's knowledge of any court orders or judgments against them relating to a debt which is a qualifying debt, and
- G. Any such other further information about the debtor's affairs as may be prescribed

Where the ISI is satisfied that the application is in order, it will issue a certificate to that effect and furnish it to the Circuit Court. If the court is satisfied that all is in order, it will issue a DRN³⁵, which will remain in place for three years (which may be extended by one year in certain circumstances³⁶). The Court will notify the ISI, the AI, the debtor and the relevant creditor(s) of the DRN. The ISI will publish details of the DRN on the Register of Debt Relief Notices, which is accessible to the public.

Debt Settlement Arrangement

Applications for a **Debt Settlement Arrangement** must be made through a Personal Insolvency Practitioner (PIP) to the Insolvency Service of Ireland³⁷.

Stage 1 of this process is the Review Stage – where the debtor meets with the PIP³⁸, who explains the nature of the DSA, the eligibility criteria and the relevant fees and conditions to undertake it. Where appropriate the debtor must consent in writing to the appointment of the PIP to act on their behalf. Stage 2 is the Application Stage, where the PIP and debtor prepare a Prescribed Financial Statement, which will determine suitability for DSA, and if it is determined that the debtor is eligible the debtor must then instruct the PIP, in writing, to obtain a DSA on their behalf. Thereafter, the PIP prepares a statement of accuracy, truth and suitability for the debtor to obtain the DSA and confirms that there is no likelihood that the debtor will become solvent within the next five years. Stage 3 is the Protective Certificate Stage, wherein the PIP submits the completed application form to the ISI for consideration³⁹. In this regard, the PIP has a duty of frankness and full disclosure, and must present all material facts that are relevant to the issues under consideration. The ISI will then forward the application to the Court⁴⁰, if all is in order the Court may approve it and grant a Protective Certificate to the debtor. Where granted, the PIP notifies the debtor of this fact and it is also recorded on ISI register. This Certificate provides the debtor will immunity from legal action in respect of the debts included in the application for the DSA – and lasts for a period of 70 days⁴¹. Stage 4 is the Proposal

³⁵ Ibid at Section 31 and 33.

³⁶ Ibid at Section 34(2).

³⁷ Ibid at Section 55(2).

³⁸ The Personal Insolvency (Amendment) Act 2021 allows for any such meetings to take place in person, electronically or remotely.

³⁹ The content of this application is relatively identical to the content of the application for a DRN – details are contained in Section 59 of the Personal Insolvency Act 2012.

⁴⁰ The Circuit Court, where the debt does not exceed €2.5 million and the High Court where the debt exceeds €2.5m.

⁴¹ Section 61, Personal Insolvency Act 2012. This protective certificate may be extended by an additional 40 days in limited prescribed situations, in accordance with sub-sections 6 and 7, and in particular where the Court is satisfied that the extension is necessary to enable the PIP to perform their functions under the Act, or where

Stage. At this stage, the PIP formulates a DSA proposal, by engaging with the debtor regarding their reasonable living expenses, and the creditors impacted by this proposal and seeks their submissions. The debtor must then be provided with a copy of this proposal and confirm agreement in writing and agreement for the PIP to engage with their creditors. The PIP then meets with the creditors for the purpose of negotiating with them and attempting to obtain their agreement to the DSA – the creditors are then required to vote on the proposal⁴². Approval is required of not less than 65% in value of the total debt/creditors who are attending and voting at the meeting⁴³. If this approval is obtained the ISI must be notified and will also be required to consent to the DSA (subject to any creditor’s objection). The importance of obtaining creditor approval was highlighted by Justice McDonald in *Re O’Hara (A Debtor) (2019)* who stated:

“I agree that such a requirement, in a multi-creditor case, is an important checking mechanism. ... If the proposed arrangement has been approved by at least one class of creditor, it provides a measure of re-assurance to the court that the proposals make business sense and are capable of being considered to be reasonable in all the circumstances.”⁴⁴

Stage 5 is the Enforcement Stage. At this stage, the ISI must notify the Court that the creditors have consented to the arrangement, and the Court must also approve the arrangement. In determining whether or not to approve the arrangement the Court is not just concerned with the accuracy of the figures and calculations, but with the fairness of the proposal having regard to the circumstances of the creditors and the debtor⁴⁵. If the Court consents the PIP notifies the debtor and the DSA comes in effect. Details of the arrangement and the debtor are then entered onto a public Register⁴⁶. However, if they refuse consent then the DSA has no legal effect⁴⁷.

Personal Insolvency Arrangement

Applications for a **Personal Insolvency Arrangement** must be made through a Personal Insolvency Practitioner (PIP) to the Insolvency Service of Ireland⁴⁸. The procedure to obtain a PIA is the same as the procedure to obtain a DSA⁴⁹ (as are the notification and registration obligations), except in relation to creditor agreement. In this regard, as the PIA encompasses both secured and unsecured debts

there are exceptional circumstances or other factors which are substantially outside the control of the debtor and the PIP that would necessitate the granting of the extension (as per Section 10 of the Personal Insolvency (Amendment) Act 2021). In *the Matter of James Nugent* [2016] IEHC 127 the Court concluded that where an application for extension is not made with candour on the part of the applicant, the extension order can be set aside.

⁴² The concept of consent remains a cornerstone of the insolvency process.

⁴³ Section 73(6), Personal Insolvency Act 2012.

⁴⁴ [2019] IEHC 96 at paras 59.

⁴⁵ As per Justice Baker in *the Matter of Part 3, Chapter 4 of the Personal Insolvency Acts, 2012-2015, In the Matter of JD of County Wexford (“The Debtor”) and in the Matter of an Application Pursuant to s.115A(9) of the Personal Insolvency Acts 2012-2015* .[2017] IEHC 119.

⁴⁶ Section 76(1), Personal Insolvency Act 2012.

⁴⁷ The Court may refuse the request for a variety of reasons. In *the Matter of Part 3, Chapter 4 of the Personal Insolvency Acts 2012-2015 and in the Matter of Ann Fennell (a debtor) and in the Matter of an Application Pursuant to s.115A(9) of the Personal Insolvency Acts 2012-2015* [2021] IEHC 297, the Court refused a PIA as the PIP had not established that the debtor was “reasonably likely to be able to comply with the terms of the proposed arrangement” as the term of the restructured loan was likely to exceed the lifespan of the debtor and the evidence before the court did not establish that the restructured payments were affordable or sustainable (Irish Law Times 2022, 40(11), 160-161).

⁴⁸ Section 89(2), Personal Insolvency Act 2012.

⁴⁹ Ibid at Sections 94-110.

there are different creditor thresholds to be met for the PIA proposal to be approved at the creditors' meeting, as follows⁵⁰:

- A. **Total Debt Creditors**, representing 65% or more of the total amount of debts due, participating and voting at the meeting, must vote in favour of the proposal
- B. **Secured Debt Creditors**, representing more than 50% of the value of secured debts, participating and voting at the meeting, must vote in favour of the proposal
- C. **Unsecured Debt Creditors**, representing more than 50% of the amount of unsecured debts, participating and voting at the meeting, must vote in favour of the proposal⁵¹

In addition, where the Court is assessing whether to approve a PIA the legislation does not expressly require them to examine the likely circumstances of a debtor after the six-year term of a proposed PIA (especially in the context of the repayment of the outstanding balance of their secured debt). However, a Court may not disregard the likely or reasonably likely circumstances that will exist at the end of the six-year period of the PIA or the reasonably foreseeable future thereafter, if it has relevant reliable evidence before it⁵².

Material Change in Circumstances

Where there is a material change in a debtor's circumstances during the tenure of any of these agreements (increase/decrease in income) they are required to notify the AI/PIP/ISI. A variation order may be made and creditor approval may be required to be obtained in the context of the variation. In relation to the receipt by the debtor of an inheritance/gift, wind-fall etc they may be required to pay up to 50% of this additional income towards their outstanding debts.

Effect of the Agreements

Once these agreements are discharged any outstanding amounts due on foot of unsecured debts included in these agreements are written-off and the debtor is returned to solvency. In addition, during the tenure of these agreements, unsecured creditors are prohibited from suing on foot of any debts included in these agreements, and in this regard the debtor is immune from legal action. The agreements have no general impact on employment, although certain professional bodies require their members to be solvent in order to holding a practising certificate. The agreements do impact the debtors ability to obtain credit or the sale of assets. A debtor subject to these agreements has a duty not to obtain credit either on their own or with any other person for an amount of more than €650 from any person without informing them that they are the subject of a DRN, DSA or PIA. The debtor is also prohibited from transferring, leasing, granting security over, or otherwise disposing of any interest in property, above a prescribed value, other than in accordance with the terms of the DRN, DSA or PIA.

On completion of the agreements, details of the debtor will be removed from the public register.

⁵⁰ Ibid at Section 110.

⁵¹ Under the terms of the principal Act, the question of the reasonableness or unreasonableness of a creditor in refusing to vote for a PIA was not a matter for consideration by the court (as per Justice Costello in *the Matter of Eric O'Callaghan, a Petitioning Debtor* [2015] IEHC 185). However, the Personal Insolvency (Amendment) Act 2015 provides for a courts-based review system of unreasonably rejected PIAs in certain circumstances, using criteria set out in s.115A. To avail of such a review the Court must first consider that the PIA proposal is fair and reasonable to all concerned. In the first two years since the enactment of the Amendment Act, the courts have overturned 78 decisions by creditors to refuse PIAs for those who are in severe debt and at risk of losing their homes. (See: <http://www.justice.ie/en/JELR/Pages/PQ-27-02-2018-299>).

⁵² As per Justice Baker in *Re: Hayes (A Debtor)* [2017] IEHC 657.

In relation to a PIA, individual solutions can be designed by a PIP on a case-by-case basis according to the particular circumstances and needs of each debtor in relation to the secured debt owed on foot of the family home. The PIP must, as far as is practical, formulate the arrangement on terms that avoid the debtor being required to sell or vacate his or her principal private residence⁵³. Consequently, the agreement will not require the debtor to dispose of their principal private residence or to cease to occupy it unless specific conditions are met. These conditions include a desire to vacate the property by the debtor or an agreement by the debtor to vacate where the PIP believes that the costs associated with staying in the property are excessive. Any such disposition will be subject to the debtor obtaining independent legal advice and compliance with the provisions of the Family Home Protection Act 1976 or the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. According to O'Brien⁵⁴:

*"The central objective in regard to the PIA is that it enables people to reside in and retain ownership of their family homes when the arrangement is successfully completed over the agreed period."*⁵⁵

At the end of the PIA any monies due to respect of a secured debt (such as a mortgage on the family home) are still payable, but given that the debtor has now written off their unsecured debts, they should now be solvent and in a position to continue payment of their outstanding secured debts.

Bankruptcy

Where a debtor is unable to obtain a DRN, DSA or PIA, or is ineligible to enter such agreements, the only option available to them is to apply to the High Court to be adjudicated bankrupt. According to Justice Joseph Story of the US Supreme Court bankruptcy is:

*"... a law for the benefit and relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts."*⁵⁶

In effect, this is a process whereby the ownership of an insolvent person's property transfers to an Official Assignee in bankruptcy, to be sold by him for the benefit of those to whom the individual owes debts (creditors). The Official Assignee is based in the Bankruptcy Division of the ISI.

The current term of a bankruptcy order in Ireland is one year, but this may be extended by the Court in certain circumstances. In *Lehane (Official Assignee in Bankruptcy) v Hoey (2021)*⁵⁷, the Court of Appeal upheld the extension of a 10-year bankruptcy order for an additional period of 10 years as the bankrupt had: (a) failed to cooperate with the Official Assignee in realising the bankrupt's assets; and (b) hidden from or failed to disclose to the Official Assignee income or assets, which could be realised for the benefit of the bankrupt's creditors. The Court stated that, when considering what was an appropriate period of extension, the High Court was required to have regard to the desirability of deterring misconduct and so maintaining the integrity of the bankruptcy system.

⁵³ Glunn, B., *Insolvency - The Personal Insolvency Act 2012 - Part II*, Irish Law Times 2013, 31(12), 174-177.

⁵⁴ O'Brien, K., *Overview of the Irish Personal Insolvency Regime in 2018*, Commercial Law Practitioner 2018, 25(4), 94-99.

⁵⁵ Ibid at p. 96.

⁵⁶ Cited by Hammond R., *Insolvency Solution*, Law Society Gazette, November 2014, 32-35, at p. 32.

⁵⁷ [2021] IECA 158.

Despite the fact that the term of the bankruptcy order is one year, the debtor has a legal obligation to use its surplus income towards the payment of its debts for a period of up to three years. This is known as an income payment order⁵⁸.

According to the Bankruptcy Law Committee Report⁵⁹ the objectives of a bankruptcy order are:

- (1) *“securing equality of distribution and to prevent any one creditor obtaining an unfair advantage over the others;*
- (2) *protecting bankrupts from vindictive creditors by freeing them from the balance of their debts where they are unable to pay them in full, and to help to rehabilitate them;*
- (3) *protecting creditors, not alone from debtors who, prior to bankruptcy, prefer one of more creditors to others, and from the actions of fraudulent bankrupts; and*
- (4) *punishing fraudulent debtors.”*

To apply for a bankruptcy order⁶⁰ the following eligibility requirements must be met:

- A. The debtor must be insolvent and their debts must exceed their assets by more than €20,000, as evidenced in a Statement of Affairs
- B. The debtor must lodge €650 with the Bankruptcy Division of the Insolvency Service of Ireland (ISI), and
- C. The debtor must swear an Affidavit stating that they have made reasonable efforts to make use of the alternative arrangements to bankruptcy such as debt settlement arrangement (DSA) or personal insolvency arrangement (PIA)

Being declared bankrupt is not to be undertaken lightly, as there are significant restrictions imposed upon the bankrupt person, including the following:

- A. **Assets:** All the debtor’s assets and property (both inside and outside the State), as of the date that they were adjudicated bankrupt, will vest automatically in the Official Assignee, who has the authority to sell them. This excludes the private residential property/family home of the bankrupt person in certain situations⁶¹, and any necessities up to a value of €6,000 (including clothing, furniture, tools and equipment, as well as any other relevant necessities). Any assets acquired by the bankrupt person thereafter (such as a gift, lottery win or inheritance) must be disclosed to the Official Assignee and may also be claimed by them and sold for the benefit of the creditors.
- B. **Income:** A person adjudicated bankrupt will be required to pay their excess income, after the deduction of reasonable living expenses based on the ISI Guidelines, to the Official Assignee for a period of up to three years. Pension income is also eligible to be claimed by the Official Assignee

⁵⁸ Certain debts are not included in the bankruptcy order, such as debts due in respect of Court fines or any fines pursuant to the terms of the Proceeds of Crime Act.

⁵⁹ Budd, J. (1972), *Bankruptcy Law Committee Report*, Dublin: The Stationery Office, p. 45, Prl 2714.

⁶⁰ The procedure to be declared bankrupt can be found in pages 17 to 21 of the following publication: https://www.isi.gov.ie/en/ISI/Bankruptcy_June_2016.docx.pdf/Files/Bankruptcy_June_2016.docx.pdf

⁶¹ The Official Assignee may only sell a family home of a bankrupt person with the prior permission of the Court in accordance with Section 61(5) of the Bankruptcy Act 1988. In making this decision the Courts will balance the interests of the bankrupt’s creditors against the interests of the bankrupt and their family. Where the family home is in negative equity, it is unlikely to be sold. In some circumstances, the decision to sell the family home may be deferred to a later date. If the Official Assignee does not sell the family home within 3 years of the bankruptcy adjudication, ownership may automatically transfer back to the debtor, unless otherwise agreed. Where the bankrupt person remains in the family home, they should agree a schedule of mortgage payments with their bank and the Official Assignee, and encompass this into their reasonable cost of living expenses.

for the benefit of the bankruptcy estate. However, no deductions will be made from social welfare payments.

- C. **Monies held on Account:** All monies held in a bank account become the property of the Official Assignee on the day the applicant is adjudicated bankrupt – with the exception of up to €1,000 held in one working current account, to allow for reasonable living expenses.
- D. **Employment:** A bankrupt person is prohibited from holding certain employment positions, such as holding the position of a company officer (without Court approval). Furthermore, certain professions bodies impose requirements in relation to members' personal finances in order to maintain membership. A partnership is also automatically dissolved upon an individual partners bankruptcy. In addition, historically, a bankrupt person was restricted from holding office as an elected representative in local authorities, Dáil Éireann or Seanad Éireann, but this position was altered by the passing of the Electoral (Amendment) Act 2014, which now allows a bankrupt person to hold certain elected positions.
- E. **Credit:** Similar to insolvency arrangements, a bankrupt person is prohibited from obtaining credit of more than €650 without disclosing their bankruptcy status – this status will also impact a person's credit rating and ability to obtain credit finance in the future. Non-compliance with this obligation is a criminal offence.
- F. **Effect on transactions prior to bankruptcy:** Any payment or any transfer of property by the bankrupt to a creditor in preference over other creditors that took place in the one year period prior to being adjudicated bankrupt may be deemed a fraudulent preference and may be undone or otherwise dealt with by the Court. Similarly, any sale of property at an *under value* that the bankrupt carried out in the one year period prior to being adjudicated bankrupt may also be avoided and undone by the Official Assignee⁶².
- G. **Travel:** A bankrupt person is only allowed to travel outside the State, subject to notifying the Official Assignee – the bankrupt person may be arrested if the High Court believes that they are leaving the State in order to avoid the consequences of the Bankruptcy Order.
- H. **Power of Attorney:** Where a bankrupt person holds a general power of attorney on behalf of someone else, it is automatically revoked upon the declaration of bankruptcy.
- I. **Post:** Certain items of the bankrupt persons post (bank statements or similar) may be re-directed to the Official Assignee.
- J. **Publication:** Details of the person adjudicated bankrupt will be maintained on a bankruptcy register in the Office of the Examiner of the High Court, for the entire tenure of the Bankruptcy Order (this is for a period of 1 year (subject to extension)).

During the tenure of the bankruptcy order, the debtor is immune from legal action by his creditors and does not have to deal with them or correspond with them – this is done by the official assignee on their behalf. At the end of the agreement, all unpaid unsecured debts are written off, and the debtor returns to a position of solvency.

⁶² A number of members of the Quinn family, including Sean Quinn Jr and Peter Darragh Quinn, were found guilty of contempt of court in 2012, arising from the fact that they helped the Quinn family to move their €500m global property portfolio beyond the reach of creditors, before the company (the Quinn Group) was placed into receivership – and some members of the family sought to have themselves adjudicated bankrupt.

Thankfully, as a consequence of alternative options to bankruptcy, the number of people being adjudicated bankrupt in Ireland has been steadily declining, as evidenced in the following table:



This is a positive outcome, and hopefully is set to continue.

Summary

The following table summarises the distinction between the various insolvency options⁶³:

Solution	Level / Type of Debt	Income	Assets	Required Intermediary
Debt Relief Notice	Under €35,000	Under €60 per month*	Max. €1,500**	Approved Intermediaries
Debt Settlement Arrangement	Unsecured only	No Max	No Max	Personal Insolvency Practitioner
Personal Insolvency Arrangement	Secured*** and unsecured	No Max	No Max	Personal Insolvency Practitioner
Bankruptcy	Over € 20,000 / Secured and unsecured	No Max	No Max	None****

* after Reasonable Living Expenses are deducted

** Subject to certain exemptions

*** Subject to a cap of €3 million, unless creditors consent to a higher level

****Whilst it is possible to apply for bankruptcy yourself, it is advisable to seek professional advice to assist you in the process.

Overall, it can be concluded that these schemes have been a success, and by 2019 nearly 8,000 debtors were returned to solvency, accounting for almost €10 billion of debt. According to Cormac Keating⁶⁴:

*“[T]he very existence of prescribed legislative solutions for personal insolvency has acted as a catalyst for credit institutions to directly enter into over 120,000 informal alternative repayment arrangements with debtors.”*⁶⁵

Similarly, Murray⁶⁶ noted that: “... the process can bring a huge amount of clarity and peace of mind. The participants see that life does go on.”

⁶³ Source: https://www.isi.gov.ie/EN/ISI/PAGES/DEBT_SOLUTIONS

⁶⁴ Keating, C., *A second bite at the cherry*, G.L.S.I. 2019, 113(8), 44-47.

⁶⁵ Ibid at p. 44.

⁶⁶ See: <http://www.accaqglobal.com/lk/en/member/member/accounting-business/2016/01/interviews/tom-murray.html>