Friel Stafford

Guide to Personal Insolvency in the Republic of Ireland

Disclaimer

This Publication contains general information about Personal Insolvency in the Republic of Ireland. It is based on our understanding of the law as of October 2013.

This Publication is not intended to provide, and does not constitute or comprise legal advice on any particular matter and is provided for general information purposes only.

You should not act, or refrain from acting, on the basis, of any material contained in this publication without seeking appropriate legal or other professional advice.

We are grateful to the Insolvency Service of Ireland for their permission to reproduce some of the content from their publications.

Published by
Friel Stafford
44 Fitzwilliam Place
Dublin 2
Tel: 01 661 4066
Fax: 01 661 4145
Email: info@frielstafford.ie
Web: www.frielstafford.ie

Contents

Friel Stafford

We are client, not product focused.
We generate effective solutions.
We have a high success rate.
We have a strong network of partners
which enable us to achieve national and
international solutions for our clients.

www.frielstafford.ie

FS

Glossary of Terms

Connected person – in relation to a person, shall be determined in accordance with the following provisions: -
a) A person is connected with an individual if that person is a relative of the individual;
b) A person in his or her capacity as a trustee of a trust, is connected with an individual who or any of whose children or as respects whom any body corporate which he or she controls is a beneficiary of the trust;
c) A person is connected with any person with whom he or she is in a partnership;
d) Any two or more persons acting together to secure or exercise control of a company shall be treated in relation to that company as connected with one another and with any person acting on the directions of any of them to secure or exercise control of the company.

Excludable debt – in relation to a debtor, means any:
a) Liability of the debtor arising out of any tax, duty, levy or other charge of a similar nature owed or payable to the State;
b) Amount payable by the debtor under the Local Government (Charges) Act 2009;
c) Amount payable by the debtor under the Local Government (Household Charge) Act 2011;
d) Liability of the debtor arising out of any rates due to the local authority (within the meaning of the Local Government Act 2001);
e) Debt or liability of the debtor in respect of monies advanced to the debtor by the Health Services Executive under the Nursing Homes Support Scheme Act 2009;
f) Debt due by the debtor to any owners' management company in respect of annual service charges under section 18 of the Multi-Unit Developments Act 2011 or contributions due under section 19 of that Act;
g) Debt or liability of the debtor arising under the Social Welfare Consolidation Act 2005.

Excluded debt – in relation to a debtor, means any:
a) Liability of the debtor arising out of a domestic support order;
b) Liability of the debtor arising out of damages awarded by a court (or another competent authority) in respect of personal injuries or wrongful death arising from the tort of the debtor;
c) Debt or liability of the debtor arising from a loan (or forbearance of a loan) obtained through fraud, misappropriation, embezzlement, or fraudulent breach of trust;
d) Debt or liability of the debtor arising by virtue of a court order made under the Proceeds of Crime Acts 1996 and 2005 or by virtue of a fine ordered to be paid by a court in respect of a criminal offence.

Insolvent – In relation to a debtor, shall be construed as meaning that the debtor is unable to pay his debts in full as they fall due.

Permitted debt – an excludable debt which shall be included in a proposal for a Debt Settlement Arrangement or a Personal Insolvency Arrangement. This occurs only where the creditor concerned has consented, or is deemed to have consented to the inclusion of that debt in such a proposal.

Qualifying debt – in relation to a debtor, means a debt other than an excluded debt and –
a) Includes the following:
- **i.** Credit card debt;
- **ii.** An overdraft or an unsecured loan from a bank or other entity regulated by the Central Bank of Ireland which carries on business in the State and is regulated by the Central Bank of Ireland;
- **iii.** Debt or payment of one or more than one bill in respect of rent, utilities or telephone;
- **iv.** Liquidated debts incurred by the debtor as surety for another person, such as a guarantee given by the debtor that has been called up that any amount guaranteed is due and payable by the debtor;

b) Subject to sections 35(9) and 46, may include a secured debt;
c) Does not include an excludable debt, unless it is a permitted debt.

Secured creditor – In relation to a debt, means a creditor of the debtor who holds, in respect of his or her debt, security (other than a guarantee of pledge referred to in section 35(8) of the Credit Union Act 1997) in or over property of the debtor.

Secured debt – means a debt the payment for which is secured by security on or over any asset or property of any kind.

Security – means, in relation to a debt, any means of securing payment of the debt and includes:
a) A mortgage, judgment mortgage (which has been registered against a debtor more than three months before the Insolvency Service's issue of the protective certificate), charge, lien, pledge, hypothecation or other security interest encumbrance or collateral in or over any property (whether real of personal and including choses-in-action);
b) An assignment by way of security;
c) An undertaking or agreement by any person (including a solicitor) to give or create a security interest in a property.

Introduction

December 2012 saw the enactment of the Personal Insolvency Act 2012 ("the Act"), which was signed into law on 26 December 2012. The Act reformed personal insolvency law and introduced three new non-judicial debt resolution processes, namely:

- Debt Relief Notice ("DRN") to allow for the write-off of qualifying debt up to €20,000 subject to a three-year supervision period;
- Debt Settlement Arrangement ("DSA") for the agreed settlement of unsecured debt;
- Personal Insolvency Arrangement ("PIA") for the agreed settlement of secured debt up to €3million and unsecured debt.

The Act also continued the reform of Personal Bankruptcy law in Ireland, including the introduction of automatic discharge from Bankruptcy, subject to certain conditions, after 3 years.

Furthermore, the Act established an independent Insolvency Service of Ireland ("ISI") to oversee and operate the new personal insolvency system. The ISI will authorise and regulate Approved Intermediaries ("AI's") for the purpose of the DRN procedure and Personal Insolvency Practitioners ("PIP's") for the purpose of DSA's and PIA's. The Act also provided for the establishment of a new category of Judge known as a "Specialist Judge of the Circuit Court". All applications concerned with liabilities under €2.5 million will be heard in the Circuit Court. Applications above €2.5 million will be dealt with in the High Court.

Throughout 2013, the infrastructure has been put in place for the implementation of the legislation. We will start to see individuals who are insolvent start a process which will ultimately help restore them to solvency in a fair, transparent and equitable way.

As one of Ireland's leading advisory practices, and one of the few who are specialists in the area of insolvency, Friel Stafford has been widely consulted during the drafting of the new legislation. Since enactment, we have been engaged by the 4 largest accounting bodies operating in the Republic of Ireland and the Law Society of Ireland to provide the necessary training to enable accountants become authorised Personal Insolvency Practitioners.

As such we are ideally placed to explain to individuals in financial difficulty and their advisors the options available to them in their specific circumstances. We provide practical support and advice to enable individuals identify a pathway to a sustainable future.

Under the Act, an individual is deemed insolvent when he is unable to pay his debts as they fall due. Accordingly, a person may be in negative equity on his home, but may not be allowed to enter an insolvency arrangement if he can pay his mortgage monthly.

Historically in Ireland, when an individual found themselves in these circumstances, their only formal option was Bankruptcy. Bankruptcy is a formal procedure for individuals where the Court declares that they are insolvent, and all of their assets are transferred to the Official Assignee, who will sell them. Once the Bankrupt's property is sold, the Official Assignee will pay costs, expenses, fees and certain priority debts (such as taxes) and distribute the remainder among the Bankrupt's creditors.

Following the passing of the new Act there are now more options available.

What options are open to an insolvent individual?

There are five options of procedures available to an insolvent individual.

1. Debt Relief Notices ("DRN's")
2. Debt Settlement Arrangements ("DSA's")
3. Personal Insolvency Arrangements ("PIA's")
4. Bankruptcy
5. Informal Schemes of Arrangement

Options 1, 2, 3 and 4 are implemented under the provisions of the Personal Insolvency Act 2012 whilst option 5 is an agreement made directly between an insolvent individual and some / all of their creditors.

	DRN	**DSA**	**PIA**	**Bankruptcy**
Type of debt covered	Unsecured (and secured in certain cases)	Unsecured	Unsecured and secured	Unsecured and secured
Value	Up to €20,000	No limit	No limit on unsecured. Up to €3m secured (though can increase by agreement of all secured creditors)	Petitioning creditor must be owed at least €20,000
Duration	3 years	5 years (+1)	6 years (+1)	3 years
Apply through	Approved Intermediary (AI)	Personal Insolvency Practitioner (PIP)	Personal Insolvency Practitioner (PIP)	High Court
Creditor Approval	N/A	65%	65% (including 50% of secured and 50% of unsecured)	N/A

General conditions applying to all formal schemes of arrangements (i.e. DRN, DSA, PIA)

1) Only a debtor can start the process of a DRN, DSA or a PIA

2) A debtor must be insolvent – i.e. unable to pay their debts as they fall due. Furthermore they must have no prospect of becoming solvent within 3 years (DRN) or 5 years (DSA/PIA).

3) The debtor must be ordinarily resident, domiciled or carrying on a business in the state for at least a year.

4) A debtor can only avail of each arrangement once in their lifetime.

5) A debtor cannot propose an arrangement if they

   a) Are an undischarged bankrupt
   b) Have been discharged from bankruptcy in the past 5 years
   c) Been subject of a protective certificate in the past 12 months
   d) Have participated in a DRN (in the past 3 years) or a DSA/PIA (in the past 5 years)

What is a DRN?

A Debt Relief Notice enables an eligible insolvent debtor with limited disposable income and assets to write off his or her qualifying debts of up to €20,000 in circumstances where he/she is insolvent and it is unlikely that his/her financial situation will improve in the next 3 years.

What type of debts are covered?

DRN can include some secured debts and unsecured debts (such as credit card loans, utility bills, store cards and personal loans).

Excludable debts can only be included with creditors consent.
Excluded debts will never form part of a DRN.

When is a DRN suitable / appropriate?

An individual will be eligible for a DRN if they have

- qualifying debts of €20,000 or less;
- a net monthly disposable income of €60 or less after provision for "reasonable" living expenses;

In order to be able to participate, debtors can only possess "household equipment" and "tools of trade" to the value of €6,000.

One vehicle up to value of €2,000 and one item of jewellery to a value of €750 are exempt from the asset test.

Who are the key parties involved?

- The Debtor
- An Approved Intermediary ("AI")
- The ISI
- The Circuit Court
- Creditors

An individual must apply for a DRN through an AI. A register of AIs is on the ISI website.

What is the effect of a DRN?

With the assistance of an AI the debtor may apply to the ISI to certify that the qualifying debts be frozen for three years following which if, the person still cannot pay, the ISI will certify that the debt is written off.

When the debt is frozen restrictions are placed on a creditor from petitioning / commencing legal action in relation to the debt.

However, if the debtor's circumstances change during the period of the DRN, their obligations will also vary. In this regard, if the debtor's income increases by at least €400 per month, then the debtor surrenders 50% of this to the creditors by way of the ISI. A debtor will have to hand over 50% of any gifts/inheritances received during the period.

If at any stage during the DRN - a debtor pays off 50% of his debt, he will be discharged from the full liability. A debtor's details (name, address, date of birth, and the date of the DRN) will appear on a public register.

What is the process for entering into a DRN?

When a debtor and their AI have both signed off on a DRN application, it will be transmitted to the ISI for checking and verification. The ISI can then request further information from the AI and can also enquire into the debtor's bank accounts and into any other matter that it considers relevant in verifying the application.

It will be able to request information about the debtor's financial circumstances from Government departments, the Revenue Commissioners and other State bodies.

When the ISI is satisfied that the application is in order, it will issue a certificate to that effect and notify the Circuit Court. If the court is also satisfied, it will issue a DRN and notify the ISI. The ISI will then notify the AI, the debtor and the relevant creditor(s).

When the DRN has been issued, the ISI will publish its details on a Register of Debt Relief Notices, which will be accessible to the public. The ISI will then take responsibility for the administration of the DRN for a 3-year supervision period. This can include handling any payments that the debtor is able to make; investigating any matters it considers relevant to the DRN; applying to the Circuit Court for variation or termination of the DRN; registering any amendments; and registering termination of the DRN. When the DRN is terminated, the ISI will remove all the information about it from the public Register and will issue a Debt Relief Certificate to the debtor, confirming that they have been discharged from the relevant debts. It will also write to all the creditors concerned, to tell them that the Debt Relief Notice has been removed from the Register.

DRN Pros

A DRN creates a 'moratorium' period of 3 years during which time creditors cannot take any action to try and recover their debts listed in the DRN.

A DRN does not impose any requirements on the debtor with respect to his home.

The debtor is entitled to keep a vehicle if it is not valued at more than €2,000.

Upon successful completion of the DRN or if the debtor makes a payment of 50% or more of the debts contained in the DRN his details will be removed from the Register.

After the 3 year period, provided the debtor has complied with the Act, the listed debts specified in the DRN will be written off in full.

A DRN creates a 'moratorium' period of 3 years during which time creditors cannot take any action to try and recover their debts listed in the DRN.

DRN Cons

The DRN is entered on a public register.

A DRN can only be obtained once in a lifetime.

A DRN can last up to 3 years.

The debtor's details will be placed on a public Register of Debt Relief Notices.

If the debtor's circumstances materially change during the 3 year period of his DRN he must inform the ISI. He may be obligated to submit 50% of this to the ISI for distribution to his creditors.

If he seeks to obtain credit of an amount of more than €650 during the 3 year period, he must inform the creditor that he is subject to a DRN.

He must not have had a DRN previously.

He must not be subject to a DSA or a PIA now or in the last 5 years.

Debt Settlement Arrangement (“DSA”)

What is a DSA?

Debt Settlement Arrangement (“DSA”) is a formal agreement between a debtor and one or more creditors to repay an amount of unsecured debt over a set period.

When the DSA has expired and the debtor has complied with it’s terms and obligations, he is discharged from the remainder of unsecured debt covered by the DSA i.e. the outstanding balance is written off.

What type of debts are covered?

A DSA is only for unsecured debts. There is no limit to the quantum of unsecured debt which can be covered by a DSA.These may include personal loans, credit cards, store cards, business loans and creditors of a sole trader. A DSA cannot include secured debts such as a mortgage.

When is a DSA suitable / appropriate?

A DSA is suitable when an individual has an amount of unsustainable unsecured debt due to one or more creditors.

Who are the key parties involved?

- The Debtor
- A Personal Insolvency Practitioner (“PIP”)
- The ISI
- The Circuit Court (or High Court for debts greater than €2.5m)
- Creditors

An individual must apply for a DSA through a PIP.

What is the effect of a DSA?

A DSA, with the agreement of a majority of your creditors, allows a debtor to pay off part of their unsecured debt over a specified period (normally 5 years – but can be extended to 6), with the remaining balance due written off at the end of that period.

There is no set minimum time period for a DSA. It may be possible to form a DSA with a single lump sum payment.

During the period that the DSA is in effect, no unsecured creditor named in the DSA can take any legal or debt collection action against the debtor.

However, if the debtor’s circumstances change during the period of the DSA, the terms of the DSA may be varied.

A debtor’s details (name, address, date of birth, and the date of the DSA) will appear on a public register.

What is the process for entering into a DSA?

With the required assistance of a PIP, the debtor may apply to the Insolvency Service for a Protective Certificate in respect of preparation of a DSA.

If granted, the Certificate and relevant documentation is given to the court who, if satisfied and subject to creditor’s right to appeal, will issue the Protective Certificate and notify the ISI.

Upon registration of the Protective Certificate, there is a standstill period of 70 days (which could be further extended by another 40 days) during which creditors may not take action against the debtor.

During this period the PIP will develop a proposal, to be agreed by the debtor. The PIP would then put forward the DSA to creditors for agreement at a meeting of creditors.

A DSA must be agreed by the debtor and approved at a creditor’s meeting by 65% of creditors (in value.)

If approved, the ISI would provide formal registration of the DSA. At the satisfactory conclusion of the DSA all debts covered by it would be discharged.

The fees and cost can be expected to form part of the DSA and creditors will have an opportunity to vote on them.

The ISI will charge a separate application fee of €250.

Debt Settlement Arrangement ("DSA")

DSA Pros

Creditors who vote against the debtor's proposal are bound by it if 65% of creditors vote in favour of it.

Creditors whose lending is unsecured can't take any further action.

A Protective Certificate is issued by the courts to protect the debtor from his creditors while the DSA is being formulated.

Upon successful completion of the DSA or if the debtor makes a payment of 50% or more of the debts contained in the DSA his details will be removed from the Register.

The PIP will help the debtor prepare his proposal, including agreeing the level of his household and personal spending based on the guidelines on Reasonable Living Expenses.

The PIP is responsible for administering and distributing the debtor's payments.

On completion of the DSA, the balance of what the debtor owes his creditors is written off.

The debtor may be able to continue running any business he has.

DSA Cons

The DSA is entered on a public register.

A DSA can only be obtained once in a lifetime.

If the debtor's circumstances change, and the PIP can't get creditors to accept amended terms, the DSA is likely to fail. The debtor will then still owe his creditors the full amount of what he owed them at the start, less whatever has been paid to them under the DSA.

If the DSA fails, the debtor can expect to be liable for all the debts covered by the DSA (including any arrears, charges and interest accrued). He will no longer be protected from any legal or other action taken by his creditors.

The ISI will record the failure of the DSA on the Register.

Personal Insolvency Arrangement ("PIA")

What is a PIA?

A Personal Insolvency Arrangement ("PIA") is a formal agreement between a debtor and one or more creditors to repay an amount of both secured and unsecured debt over a set period.

When the PIA has expired and the debtor has complied with its terms and obligations, he is discharged from the remainder of unsecured debt covered by the PIA i.e. the outstanding balance is written off. Secured debts can be either discharged at the end of the procedure or otherwise are restructured so that they are sustainable beyond the restructure.

Restructuring of the secured debt may include writing off of negative equity, split mortgages or change of interest rate / interest basis.

What type of debts are covered?

A PIA is for both secured debt (i.e. mortgages) and unsecured debts (these may include personal loans, credit cards, store cards, business loans, and creditors of a sole trader).

When is a PIA suitable/appropriate?

A PIA is suitable when an individual has an amount of unsustainable secured and unsecured debt due to 2 or more creditors.

The debtor must owe a debt to at least one secured creditor, holding security over an asset or property situated in Ireland. However, there is a limit of €3million on the value of secured debts to be included in a PIA. The exception to this is that there is no limit where every secured creditor agrees to waive the limit.

As with a DSA – there is no upper limit on the value of unsecured debt that can form part of a PIA.

Who are the key parties involved?

- The Debtor
- A Personal Insolvency Practitioner ("PIP")
- The ISI
- The Circuit Court (or High Court for debts greater than €2.5m)
- Creditors

An individual must apply for a PIA through a PIP.

What is the effect of a PIA?

A PIA, with the agreement of a majority of the debtor's creditors, allows a debtor to settle or restructure their debts over a specified period (normally 6 years – but can be extended to 7), with the remaining balance due on unsecured debt written off at the end of that period. Secured debts can be either discharged at the end of the procedure or otherwise are restructured so that they are sustainable beyond the restructure.

It is important to note that the Act gives a range of payment options that may be included in a PIA (e.g. just one lump sum payment may be made).

During the period that the PIA is in effect, no creditor named in the PIA can take any legal or debt collection action against the debtor.

However, if the debtor's circumstances change during the period of the PIA, the terms of the PIA may be varied.

A debtor's details (name, address, date of birth, and the date of the PIA) will appear on a public register.

What is the process for entering into a PIA?

With the required assistance of a PIP, the debtor may apply to the ISI for a Protective Certificate in respect of preparation of a PIA.

If granted, the Certificate and relevant documentation is given to the court who, if satisfied and subject to creditor's right to appeal, will issue the Protective Certificate and notify the ISI.

Upon registration of the Protective Certificate, there is a standstill period of 70 days (which could be further extended by another 40 days) during which creditors may not take action against the debtor.

During this period the PIP will develop a proposal, to be agreed by the debtor. The PIP would then put forward the PIA to creditors for agreement.

A PIA must be agreed by the debtor and approved at a creditor's meeting by 65% of the total creditors. In addition, 50% of both secured and unsecured creditors voting at the meeting must do so in favour of the arrangement.

If approved, the ISI would provide formal registration of the PIA. At the satisfactory conclusion of the PIA all unsecured debts covered by it would be discharged, whilst secured debts will be restructured to a sustainable level.

The fees and cost can be expected to form part of the PIA and creditors will have an opportunity to vote on them.

The ISI will charge a separate application fee of €500 for processing a PIA.

What is the effect on a principal private residence?

The PIP has a duty, where practical, to put together a proposal that will not require the debtor to vacate their principal private residence. This does not apply where there is debtor consent to the sale, or where costs to remaining in situ are disproportionately excessive.

In this regard, it is possible for the PIP to formulate a PIA, where the individual would remain in their principle private residence, with the mortgage debt restructured, and that restructuring involving some level of write down of the principal sum.

However, the Act includes protection for secured lenders in order to ensure fairness that a lender is not unfairly prejudiced, or unfairly deprived of the market value of the underlying security.

In this respect, any proposed write down on secured property cannot reduce principal below the value of the security or, the amount of the debt secured thereby.

It is envisaged that a debtor would only resort to applying for a PIA for mortgage debt of a principal private residence after having exhausted all reasonable dialogue with their lending institution. In this regard, the Act contains provisions which require the debtor to cooperate with the mortgage lenders mortgage arrears resolution process (MARP) for at least 6 months.

How are secured debts treated in a PIA?

Once a protective certificate is issued, the PIP will liaise with the secured creditor. The value of the underlying security will be agreed between the debtor, the secured creditor and the PIP.

If they fail to agree a valuation, an independent expert will be appointed to value the security. The costs of the independent expert will be borne equally by the debtor and the secured lender.

If one of the parties, for whatever reason, does not accept the valuation of the independent expert, they shall apply to the ISI to appoint an expert to value the property. The expert's valuation will be binding on all parties.

Can a PIA fail and what are the implications?

A PIA is deemed to have failed if the arrangement is breached or a debtor defaults on payments for 6 months.

If a PIA fails, a debtor can expect to be liable in full for all the debts covered by the PIA (including any arrears, charges and interest that have accrued, less any amounts that a debtor has paid to his creditors during the PIA) unless the PIA provides or the Court orders otherwise . A debtor will no longer be protected from any legal or other action taken by their creditors. Furthermore, the ISI will record the failure of the PIA on the Register of PIAs.

Personal Insolvency Arrangement ("PIA")

PIA Pros

A PIA will protect the debtor and his assets from legal proceedings, which otherwise could be taken by creditors covered by the PIA provided the debtor continues to meet his obligations under the PIA.

The PIP will help the debtor prepare his plan, including agreeing the level of his household and personal spending based on guidelines, which can then be used to put his case to the creditors.

The PIP will negotiate with creditors on the debtor's behalf, so offers are more likely to be accepted and interest frozen than if the debtor tried to do it himself.

The debtor may be able to vary his payments if his circumstances change.

The debtor may make single payments each month or quarter to the PIP, who is responsible for administering all payments to his creditors.

A PIA which is successfully completed will discharge the debtor from unsecured debts which are subject to the PIA.

PIA Cons

The debtor has a duty not to obtain credit either on his own or with another person for an amount of more than €650 from any person, without informing that person that he is subject to a PIA.

The debtor has a duty not to transfer, lease, grant security over, or dispose of any interest in a property above a value of €650 other than in accordance with the PIA.

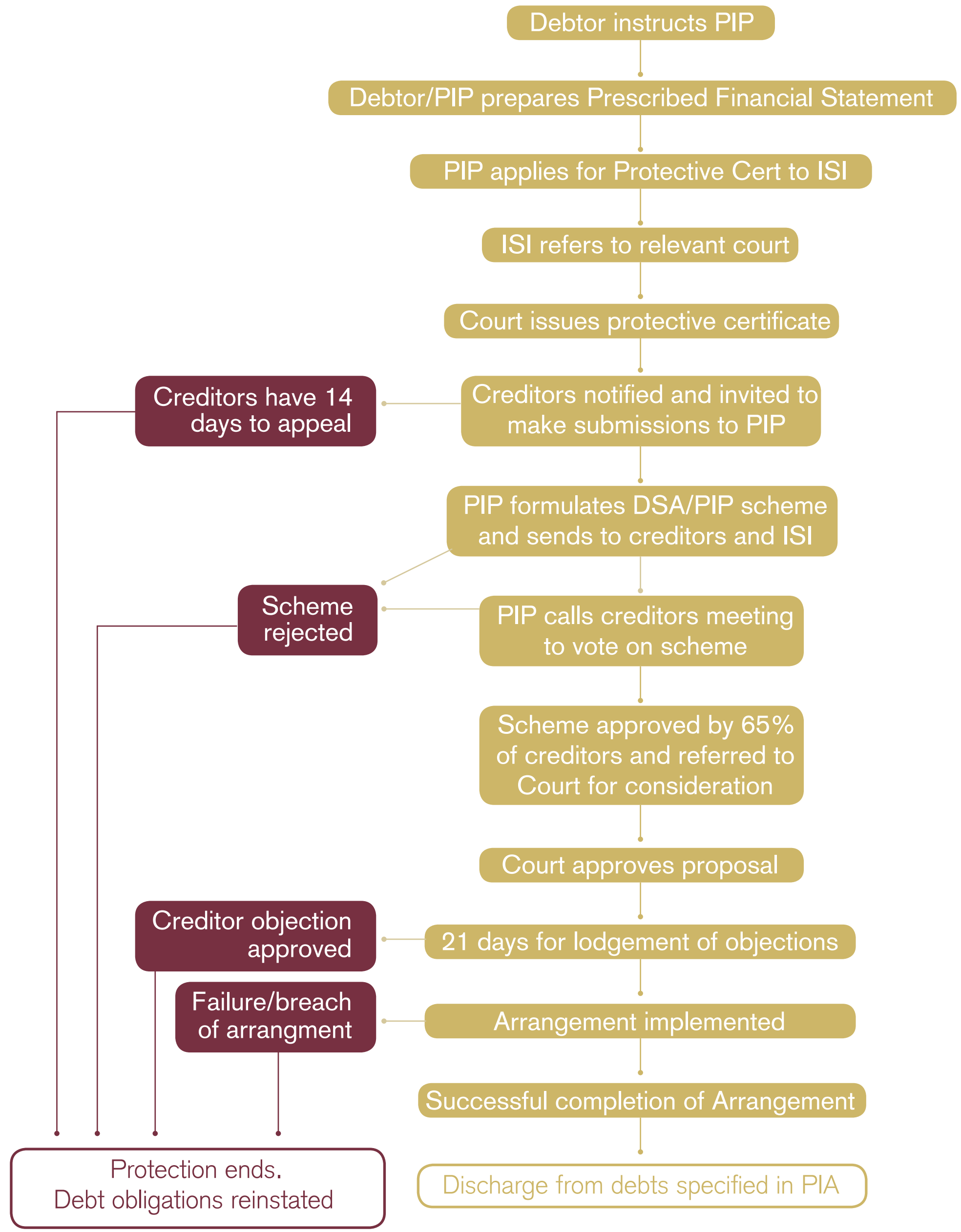
Details of the PIA are registered in a public register maintained by the ISI.

A PIA can only be obtained once in a lifetime.

A PIA can last up to 6 years with a possible 12 month extension.

If a PIA fails the debtor can expect to be liable in full for all the debts covered by the PIA (including any arrears, charges and interest that have accrued, less any amounts that the debtor has paid to his creditors during the PIA) unless the PIA provides or the Court orders otherwise. The debtor will no longer be protected from any legal or other action taken by his creditors. The ISI will record the failure of the PIA on the Register of PIA.

PIA and DSA Procedures at a Glance



DSA/PIA Stages

Review / consultation stage

- PIP shall hold a meeting with the debtor.

- Full disclosure is made so that PIP can advise debtor.

- PIP advises debtor on options, and confirms advice in writing. Debtors may not understand issues of personal guarantees to, say, Homebond etc. May not understand basic terms such as "judgment". Accordingly, the PIP will ensure that the debtors understand everything that the PIP is advising.

- PIP shall provide a written schedule of proposed fees and charges.

- PIP will provide debtor with information on the procedures involved and the likely costs, and details of any other conditions of appointment.

- Upon appointment, the PIP shall confirm in writing to the debtor that he has consented to act and also notify the ISI.

Application stage

- PIP will assist debtor in filling out a detailed financial statement known as a Prescribed Financial Statement (PFS). This is a detailed electronic form that is designed to capture all key financial information about the debtor. As part of the process the debtor will have to provide supporting documentation e.g. bank statements, bills, pay slips, receipts etc.

- Debtor under obligation to make a full and honest disclosure of his affairs and to ensure that the PFS is true, accurate and complete. However, debtor's ability to provide accurate information will depend on educational level, business experience, level of stress/anxiety, issues of dyslexia, embarrassment issues etc.

- On completion of the PFS the PIP will further advise the debtor on his options. The advice shall include advice relating to:

  Whether the debtor is likely to be able to meet the financial commitment;
  The general effect of making any proposal including the effect on the debtor's credit rating;
  The consequences if the debtor does not comply with the terms of the arrangement;
  Other options such as negotiation with a creditor or bankruptcy.

- The PIP will then give his written opinion as to whether a DSA or PIA is appropriate. In framing his advice the PIP shall have regard to:

  The value of the unsecured debts to the secured debts;
  If the debtor has communicated with his secured creditors;
  Whether the debtor has co-operated in good faith with secured creditors in respect of his PPR;
  Whether any of the secured creditors have indicated to the debtor or the PIP their willingness to vary the terms of the secured debt;
  Whether the debtor has already proposed a DSA/PIA.

- If the PIP's advice is that the debtor should not make a proposal, then the PIP shall notify the ISI, and his appointment will come to an end.

- Where a debtor receives advice that he should make a proposal, then he shall instruct the PIP, in writing, to formulate such a proposal.

- On receipt of a debtor's instructions, the PIP shall complete a statement confirming that he is of the opinion that;
- The information on the PFS is complete and accurate;
- The debtor is eligible to make a proposal for a DSA or a PIA as the case may be;
- There is no likelihood of the debtor becoming solvent within 5 years;
- That it is appropriate for the debtor to do either a DSA or a PIA.

- Debtor will be asked to complete and sign some documents to accompany the application. The application must be accompanied by:
- a copy of the statement made by the PIP;
- a document signed by the debtor confirming that debtor satisfies the eligibility criteria for a DSA/PIA;
- a completed PFS form and statutory declaration;
- a schedule of debtors, creditors and amount owed to each; whether the creditor is a secured creditor or not (if so, the debtor must provide details of any security);
- Debtors written consent to enable : the PIP to disclose their personal data to the ISI; the ISI to process their application; the ISI to make any necessary enquiries about them; the ISI to disclose their personal data to the creditors concerned, as required.

Protective certificate stage

- The PIP will then submit completed application to the ISI for consideration. If all the information is in order, the ISI will then forward the debtor's application to the appropriate Court.

- If the Court approves the application the Court will issue a Protective Certificate and the PIP will inform the debtor of same.
- Debtor's name, address, date of birth and the date of issue of the Protective Certificate will be added to the Register of Protective Certificates on the ISI website.

Proposal stage

- Once the Court has issued the Protective Certificate the PIP will prepare a proposal for a DSA or PIA. The Debtor will be required to provide an honest and accurate account of his living expenses, life plans and any circumstances that may have a bearing on the extent to which he can pay his current and future debts.

- The PIP will also liaise with the creditors when drawing up the proposal for a DSA or PIA and, where relevant, will have regard to their preferences regarding the terms of the DSA/PIA.

- Any DSA or PIA should not include an "Excludable Debt" unless the creditor concerned has consented, or deemed to have consented, to its inclusion (see Glossary).

- Where a PIP proposes to include "Excludable Debts" he shall, without delay, notify the creditor. The notification shall be accompanied by such information about the debtor's affairs as may be prescribed. (A PIP will probably make such a notification to the creditor once the Protective Certificate has been issued.)

- The PIP shall request the creditor to confirm whether the creditor consents. If the creditor does not reply within 21 days he is deemed to have given consent.

- Upon notifying the creditors of his appointment he shall invite creditors to make submissions on how the debts should be dealt with.

- In a PIA, when a secured creditor has been notified by the PIP that a protective certificate has been issued, it shall furnish to the PIP an estimate, made in good faith, of the market value of the security.

- A judgment mortgage registered more than 3 months before the issue of the Protective Certificate is a secured creditor.

- Where requested to do so, a secured creditor shall provide proof of the existence of any security, in default of providing proof the PIP may treat the debt as unsecured.

- The PIP will then provide the debtor with a draft proposal.

- If the debtor approves the proposal he should sign and return it to the PIP and give his consent to the calling of the creditors to a meeting to approve the DSA/PIA.

- The PIP will then issue a number of documents to the creditors that will include details of the proposed DSA/PIA and the completed PFS.

- Debtors should make themselves available for the PIP to contact them with queries in relation to the DSA/PIA proposal.

- When convening the creditors meeting (14 days notice required) to approve the DSA or PIA, a key document to be given to the creditors is a report of the PIP which:
    - Describes the outcome for creditors Whether or not the DSA or PIA represents a fair outcome for the creditors
    - Indicates how the DSA or PIA is better than a bankruptcy
    - Gives his opinion as to whether the debtor will be able to comply with the DSA or PIA

- "Connected creditors" of the debtor may not vote in favour of an arrangement at the creditors' meeting.(They may vote against).(See Glossary for definition of Connected creditor).

Enforcement stage

- Where the DSA or PIA has been approved at the creditors' meeting by 65% of creditors in value (and 50% of secured and 50% of unsecured in a PIA), the PIP will notify the creditors and the ISI. The ISI will notify the Court and the Court will consider approving the DSA/PIA subject to any creditor's objection.

- The PIP will inform the Debtor whether the Court has approved the DSA/PIA.

- Where the DSA or PIA is approved, the debtor's name, address, date of birth and the date of the coming into effect of the DSA / PIA will be entered on the Register on the ISI website.

- Any DSA or PIA should not affect an "Excluded Debt" (see Glossary).

- At least every 12 months the debtor will prepare a new PFS, which the PIP shall send to each creditor together with a statement as to whether he considers the PFS to be complete and accurate.

We set out below some of the other issues that a debtor should consider when contemplating a PIA.

Direct settlement with the banks

As some banks are starting to do "full and final" settlements with debtors, it follows that the debtor should firstly try and reach such an agreement with the banks.

Stress levels

A key issue to consider is how stressed the debtor is by his financial circumstances, and how soon does he need a resolution. If he is highly stressed, and the stress levels are affecting his health, then he may decide to bite the bullet early, and seek a PIA as quickly as possible. If the debtor's stress levels are manageable, he may be better advised to wait several months until the Banks become more accepting of PIAs.

Validity of personal guarantees ("PG")

Whilst there may be little "wriggle room" in defending a straightforward cash loan advanced to the debtor in a personal capacity, there may be "wriggle room" in defending a bank's call on a personal guarantee, due to "technical" defences. Accordingly, it is advisable to obtain expert legal advice (from an experienced solicitor/counsel) as to whether the PG is valid.

A particular area of contention can be "Joint & Several" guarantees. There are many situations that if all parties contributed their share towards a call on a Joint & Several guarantee, that all parties could remain solvent. However, some of the joint guarantors may be already insolvent themselves, and thus the burden falls on the remaining guarantors, which might trigger their own insolvency.

A critical issue in respect of Joint & Several guarantees is that if another guarantor pays more than his pro-rata share, then he would be entitled to sue his co-guarantors for their relevant contribution.

Review employment contract

The debtor should carefully review his employment contract and/or (if relevant) the regulations of his profession or regulatory body and assess what impact, if any, an application for a PIA would have on his job/profession. Some employers may use the application for a PIA as an opportunity to dismiss an employee.

Is the debtor multi-banked?

If the debtor only owes money to one Bank, then he will not be able to enter a PIA. The Banks have clearly indicated that they will not deal with the costly and cumbersome procedure of a PIA when they can negotiate directly with a debtor. If the debtor is multi-banked, i.e. that he has loans with several Banks, then he is a much better candidate for a PIA.

Do nothing

An issue for a debtor to consider is what would happen if he only continued paying his house mortgage, but ignored all of his other creditors. For example, if a debtor owed €500,000 on his own home, which had a market value of €200,000, but the house mortgage was on interest only for the next 20 years, and if he owed €2 million to his other creditors, what would happen? The likelihood is that the other creditors would obtain judgment against him and register judgment mortgages against his interest in the family home. However, the judgment mortgages would fall away after 12 years, and the debtor would no longer have a liability to the creditors. In the meantime, he could

Issues to Consider when contemplating a PIA

pay interest on his house mortgage, and hopefully at the end of twenty years the house would be back in positive equity with the help of inflation.

We have a number of clients who have adopted a strategy of "doing nothing" on the basis that their family home is so "protected" by negative equity that other creditors are unable to enforce any judgments that they might obtain against them.

Statute of Limitations

It is possible that some of the debts are statute barred and not recoverable by the creditors. The normal statute of limitations for "normal" debt is 6 years i.e. the creditor has 6 years from default to issue proceedings; otherwise they are prohibited from issuing proceedings. The Statute of Limitations on contracts relating to lands is normally 12 years. There are some "tricky" rules over what constitutes default.

Use of third party monies?

Sometimes, in order to get a deal over the line, it might be necessary to introduce "third party" monies to the settlement pot. Such monies can come from family or friends. If such monies are used, then careful consideration needs to be given to any Capital Acquisition Tax issues arising.

Have legal proceedings being issued by a bank?

If a debtor is multi-banked, then he must carefully assess the impact of one bank issuing proceedings against him, and seeking judgment mortgages against all of his un-encumbered property.
One of the key ingredients in reaching a settlement with a bank can be the ability to provide them with a lump sum of cash from the sale of unencumbered assets and/or the sale of assets with positive equity. Obviously, if a debtor allows one bank to obtain judgment and register judgment mortgages on his unencumbered properties, he will then have fewer chips to negotiate with. One way to block legal proceedings would be to commence the PIA process, as the bank would be prohibited for at least 70 days from progressing its proceedings. However, the debtor may strategically decide to allow one bank to register judgment mortgages on all of his properties, so that the other banks are "squeezed" out. The debtor might then be able to do a deal, in due course, with that particular bank (on the basis that it is very expensive for creditors to actually enforce judgment mortgages, and the bank might do a full and final settlement in return for voluntary sales of some of the properties.)

In some cases it might suit a multi-banked debtor to "force" a smaller creditor to issue proceedings against him, and just prior to judgment being obtained approach the larger banks and advise them that unless they support a PIA that the smaller creditor will effectively take all his remaining unencumbered assets, thereby depriving the larger banks of valuable assets.

A judgment mortgage can be "lifted" from properties provided a Protective Certificate is issued within 3 months of the judgment mortgage being registered. The judgment mortgages will remain lifted if the PIA is successful.

Impact on credit rating

It is probable that the debtor's credit rating is already in tatters with the Irish Credit Bureau. However, the rating maintained by the Irish Credit Bureau is only accessible to the Financial Institutions who subscribe to it, and it is not available to other creditors such as utility companies, trade suppliers, credit unions, etc.

If a debtor applies for a Protective Certificate, then his name, address and date of birth will be shown on the public registers maintained by the Insolvency Service of Ireland on their website, therefore damaging his "public" credit rating. Even if the debtor's application for a PIA is rejected, and his name is removed from the ISI website, the likelihood is that the fact that he applied for a Protective Certificate will be recorded on other credit reference databases, such as Dun & Bradstreet.

Interest rates

Some debtors tend to grasp short term solutions, when they should really be looking at a 20 year business plan for themselves.

If a debtor is aged 57, he really needs to ask himself if he will be able to pay off a mortgage of, say, €700,000 by his retirement, or is he better off trading down now to a smaller house. In addressing this issue, the debtor will have to make assumptions about interest rates. Interest rates are currently at a historic low, but how long will they remain at that level?

Claw backs by the banks

A PIA is a negotiated contract between a debtor and the Banks. If the PIA is silent as to what happens when a secured asset, such as a family home, is sold, then the provisions of the Personal Insolvency Act 2012 kick in. Under the legislation, the Bank may claw back any loan that was written off and that was subsequently recovered through a sale of the property for a period of up to twenty years. In reality, a debtor may attempt to negotiate a reduced claw back period with the Bank. A key issue for the debtor is whether he is better off going Bankrupt today, discharging himself from Bankruptcy in due course, and then buying the property back, and obtaining the full benefit of any future rises in property.

The legislation also provides that if a debtor improves his house, say by building an extension, that the Bank may get the benefit of that improved value if the house is sold within twenty years, unless the debtor had obtained the Bank's consent to building the extension. If a debtor does make a request to build an extension to his property, then the Bank can not unreasonably withhold consent.

Expected inheritances

If the debtor is expecting a large inheritance, he needs to consider if he should go bankrupt now, [preferably in the UK with its shorter discharge period] so as to protect the inheritance from the clutches of a longer term PIA.

Pensions

A major issue for some debtors will be whether their pension income can be captured by a PIA for distribution to creditors. Under the legislation, it is expected that anyone entering a PIA whose pension commences within seven years and six months within the application date of the PIA, that their pension income will be caught and incorporated into the PIA. In particular, the tax free lump sum of 25% that is normally available to pensioners upon commencing a pension may be caught.

Another timeline to watch out for is that if the debtor made "excessive" payments into his pension plan within three years of the application date, that those payments may be reversed.

Reasonable living expenses

Essentially, there will be two types of PIAs: "Lump Sum PIAs and "Income Type PIAs". A Lump Sum

PIA is where the debtor realises his unencumbered assets and the Bank accepts the proceeds in full and final settlement. An Income PIA is where the Banks accept payments of surplus income earned by the debtor over a period of six/seven years.

Many of our clients have advised us that they would find it impossible to live on the monies which have been set out by the Insolvency Service of Ireland. While the reasonable living expense guidelines are only guidelines, it is expected that the Banks would expect debtors to take significant pain. Some debtors might be reluctant to take such pain for an extended period of time.

Will the PIA complete?

Income type PIA's depend on secure employment. If a debtor loses his job in, say, 4 years' time, his PIA will collapse, and he will be back to square one. One of the variables as to whether a PIA will complete is whether the tax payer remains tax compliant or not. If the tax payer does not remain tax compliant, then the PIA will collapse.

Do not be a guinea pig!

Having reviewed all of the above, if the debtor would be suitable for a PIA, the next issue is to consider timing. Human nature is that if we do not understand something, we reject it. In our view, some of the Banks have not yet been fully trained up to understand the possible benefits of PIAs for them, and thus there is a risk of some of the initial batch of PIAs being rejected by the Banks. Certainly, the UK experience in the 1980's, when they introduced a similar process, was that it took the Banks eighteen months to get used to the idea. Accordingly, some debtors might be advised to wait until early 2014 before they initiate a PIA.

Conclusion

Obviously, the more complex a debtor's affairs are, there will be more complex issues to consider and more opportunities to develop advanced strategies for debt resolution. As we are expert at such strategies, we would be happy to discuss such strategies at a consultation.

Bankruptcy

What is Bankruptcy?

Bankruptcy is a formal procedure for individuals where the Court declares that they are insolvent, and all of their assets are transferred to the Official Assignee, who administers and realises them for the benefit of all creditors.

Once the Bankrupt's property is sold, the Official Assignee will pay costs, expenses, fees and certain priority debts (such as taxes) and distribute the remainder among his creditors.

The purpose is to release the bankrupt from an unsustainable debt burden and to distribute his assets amongst all creditors equally (although certain types of creditors enjoy priorities). The bankrupt person is subject to restrictions on trading and on obtaining credit.

What type of debts are covered?

All debts of an individual are included.

When is a Bankruptcy suitable / appropriate?

Bankruptcy may be suitable if the debtor is insolvent and unlikely to return to solvency.

A debtor when presenting a petition for bankruptcy must swear an affidavit that they have made reasonable efforts to make use of other insolvency alternatives e.g. DSA or PIA and present a statement of affairs showing that their debts are in excess of their assets by more than €20,000.

It is envisaged that it would be a last resort in dealing with personal debt, and an individual would only be able to become bankrupt if they did not meet the criteria for entering into a formal or informal scheme of arrangement with their creditors.

A court will not adjudicate a debtor bankrupt, unless they have considered a DSA or a PIA with an authorised PIP, and the PIP has established that they are not a suitable candidate.

It may be the situation that the Debtor will have entered into a DSA/PIA and that DSA/PIA has failed.

Who are the key parties involved?

- The Debtor
- The Official Assignee
- A Personal Insolvency Practitioner ("PIP")
- The High Court
- Creditors
- The Debtor's Solicitor

What is the effect of a Bankruptcy?

All the debtor's assets and property vest automatically in the Official Assignee.

A person who has been declared bankrupt is excluded from carrying out a number of roles. It is an offence for the bankrupt to act as an officer of or directly or indirectly take part or be concerned in the promotion, formation or management of any Irish company or even of any foreign company which has an established place of business in Ireland.

These restrictions also include being an auditor, liquidator, or receiver of a company. Bankruptcy also imposes restrictions on certain professions from practicing and also could have an impact on the employment of those who have to pass "fitness and probity" tests as part of their employment.

They also cannot hold any position in the Dail or Seanad.

The bankrupt must disclose to the Official Assignee any property acquired after being adjudicated bankrupt i.e. any inheritances or other property wins that the Bankrupt receives before he is discharged from Bankruptcy can be taken by the Official Assignee and distributed to the creditors.

Any payment or any transfer of property by the bankrupt to a creditor in preference over other creditors that took place in the period prior to being adjudicated bankrupt shall be deemed to have been fraudulently done and may be undone or otherwise dealt with by the Court (subject to certain exceptions for bona fide recipients or transferees).

Any sale of property at an under value that the bankrupt carried out in the three year period prior to being adjudicated bankrupt may be voided and undone by the Official Assignee (subject to certain exceptions for sales to bona fide purchasers).

The bankrupt's post may be re-directed to the Official Assignee.

The bankrupt cannot obtain credit over €650 without disclosing his status as a Bankrupt.

When a person is made bankrupt their name and address is recorded on the bankruptcy register.

An individual will be automatically discharged from Bankruptcy three years after the date of adjudication. However the discharge from bankruptcy could be delayed by the court, up to a maximum of 8 years, for non-compliance, fraudulent or dishonest behaviour by the bankrupt during the process.

A Bankruptcy Payments Order ("BPO") may be made against the debtor, meaning that they will have to contribute a portion of their income toward their liabilities. An income payments order can be made for periods of up to 5 years. In assessing whether a BPO will be made, the Official Assignee will consider the debtors' level of income against the Reasonable Standards of Living published by the ISI.

What is the process for entering into Bankruptcy?

The High Court makes a debtor bankrupt either at the request of a creditor or at his own request. In either case, this request is made in a document called a petition. This must be filed in the Office of the Examiner of the High Court.

When the petition is filed, the petitioning creditor or debtor undertakes to the court to advertise notice of the bankruptcy in various newspapers. The advertisement must also contain details of the place, date and time it is before the court (called the statutory court sitting). The petitioner must also lodge €650 towards the costs and outlays of the bankruptcy in the Official Assignee's Office and give an undertaking to the Official Assignee as to the further costs and outlays which may be incurred.

A debtor may bring a petition for his/her own bankruptcy where he/she is unable to pay debts to creditors and where his/her available estate (for example assets and property) is sufficient to produce at least €20,000.

A creditor may petition for bankruptcy against a debtor where the debtor has committed an act of bankruptcy within the previous three months. The most common acts of bankruptcy relied upon by a creditor are:

a. failure by the debtor to comply with a bankruptcy summons requesting payment of a specific sum due, within fourteen days from service of the summons on the debtor, and
b. the making of a return of no goods in respect of the debtor, by the sheriff or county registrar.

For a creditor to be entitled to petition the court to make a debtor bankrupt, a number of conditions must be met. These include:

a. the petition must be presented within three months of the act of bankruptcy,
b. the amount of debt owed must be set out in an affidavit,
c. the debt owed must be at least €20,000
d. the debtor must be either resident in the State or within a year prior to presentation of the petition, have ordinarily resided, had a dwelling house or place of business, or carried on business within the State.

The creditor's petition must state whether any security (for example a mortgage or a charge) is held by them in respect of the debt. If so, the creditor must indicate whether he/she intends to give up the security for the benefit of other creditors or put a value on their security.

What is the effect on a principal private residence?

All property held by a debtor when they are made bankrupt vests in the Official Assignee for the benefit of the creditors. The role of the Official Assignee is to sell or otherwise dispose of this property and distribute the proceeds to the creditors.

A vesting certificate is lodged in the Office of the Examiner of the High Court and with the Property Registration Authority. This document records the interest of the Official Assignee in any property held by a debtor at the date of adjudication. It means that the debtor cannot sell or use this interest in the property as security to take out a loan.

The bankrupt's interest in the family home vests in the Official Assignee as with all other property. However the Official Assignee may not sell the family home without obtaining permission from the High Court. Where the Official Assignee seeks permission, the High Court may postpone the sale of the family home having regard to the interests of the creditors and of any spouse and dependants of the bankrupt.

If there is no equity in the family home, i.e. there is a large outstanding mortgage which is greater than the market value; the official assignee will have no interest in the asset. In this regard, the mortgage holder may then take repossession proceedings.

The Land and Conveyancing Law Reform Act 2013

The Act, which was signed in to law In July 2013, makes provision that where a mortgage lender wishes to take proceedings for the possession of a principle private residence, the Court may adjourn proceedings for up to 2 months to allow the debtor consult with a PIP and if suitable make a proposal for a PIA.

ISI has published its guidelines as to what constitutes a reasonable standard of living and reasonable living expenses. The guidelines will be updated yearly in accordance with inflation.

These guidelines are intended to give direction to AI's and guidance to PIP's in assessing, for relevant provisions of the Act, what may be considered 'reasonable' in the context of a standard of living and living expenses.

It is considered that the guidelines on a reasonable standard of living and reasonable living expenses are essential to the process of moving towards long-term restructuring measures in that they enable the debt servicing capacity of a distressed debtor to be calculated in a fair and consistent manner so that the sustainability of repayments can be established.

The guidelines set a base level for a reasonable standard of living and reasonable living expenses. Ultimately, where either a DSA or a PIA is proposed, the decision on the reasonableness or otherwise of living expenses will be a matter for the creditors to determine on a case-by-case basis in accordance with the voting thresholds set out in section 73 or, as applicable, section 110 of the Act. (In the case of a DRN and Bankruptcy the standards are prescriptive.)

There is a provision that the debtor will not be required to make payments of such an amount that he or she would not have sufficient income to maintain a reasonable standard of living. In other words, the guidelines safeguard a minimum standard of living so as to protect debtors while facilitating creditors in recovering all, or at least a portion, of the debts due to them, and as such will see that some individuals who wish to enter in one of the new formal arrangements prescribed under the Act will not be able to do so as their income is not sufficient.

If you take the example of John and Jane, a two adult household, with two primary school children, and one private car living in a suburban location with rent / mortgage of €1,000 per month and childcare costs of €400. The PIP will reference the Guidelines on a reasonable standard of living and reasonable living expenses. The guidelines prescribe the couple's set expenses as €1,689.09. ("Two adult household, one or more children, vehicle" of the Guide (Two adults €1,359.67 + Two Primary school children €164.71+164.71 = €1,689.09)

The PIP will then assess the reasonableness of mortgage, rent and/or childcare payments and any special circumstances. If we assume that the mortgage and childcare costs of €1,400 are reasonable, then John and Jane need net income of €3,089.09 per month to maintain a reasonable standard of living before making a contribution to their unsecured creditors.

Claw Back Provisions: Section 103 of the Personal Insolvency Act 2012

A key issue for debtors will be the implication of Section 103 of the Personal Insolvency Act 2012.

Section 103 deals with protections for secured creditors in a PIA. If the PIA is silent on what happens upon the sale of a secured asset, then Section 103 applies.

Section 103 (3) states that a PIA which includes terms involving:

a. retention by a secured creditor of the security held by that secured creditor, *and*
b. a reduction of the principal sum due in respect of the secured debt due to that secured creditor to a specified amount, shall, unless the relevant secured creditor agrees otherwise, also include terms providing that any such reduction of the principal sum is subject to the condition that, where the property the subject of the security is sold or otherwise disposed of for an amount or at a value greater than the value attributed to the security, the debtor shall pay to the secured creditor an amount additional to the reduced principal sum calculated. In other words a debtor who has had the liability on their property reduced, may face the prospect upon going to sell it a number of years later, of having to pay an additional sum out of the increase in value.

The amount payable is defined as
a. the entire of the difference between the value of the property on disposition and the value attributed to the security, *and*
b. the amount of the reduction in the principal sum due in respect of the secured debt under the PIA.

It should be noted that any uplift deriving from significant improvements to the property are disregarded in calculating the additional amount payable by the debtor if the secured creditor has given his or her consent in writing to the improvements or other measures concerned.

The obligation to pay an additional amount arising by virtue of this section shall cease:

a. on the expiry of the period of 20 years commencing on the date on which the PIA comes into effect, *or*
b. on 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 so doing in the PIA) and does so discharge his or her indebtedness, whichever first occurs.

In this regard, at the outset, it is not impossible to imagine financial institutions that are prepared to support the scheme and not use their "veto" insisting on an uplift clause of up to 20 years in any agreement. This reduces in some cases the attractiveness of entering into a PIA for many individuals.

The treatment of pensions of individuals as a result of the Personal Insolvency Act is an area of concern for many debtors and advisors.

The Act applies to what it defines are "relevant pension arrangements". The Act specifies these as

- Occupation Pension Schemes
- Small Self Administered Schemes
- Personal Retirement Bonds
- Retirement Annuity Contracts
- PRSA's
- Overseas Schemes
- Public Sector Schemes

An obvious exclusion from the above list is Approved Retirement Funds (ARF's).

What is defined as a relevant pension arrangement is crucial as one of the key effects of the legislation is that Pension Assets are disregarded when calculating a debtors /bankrupts estate. In this respect ARF's must be considered when assessing the estate of a debtor or a bankrupt.

The Act has two additional key effects, namely:

a. If a debtor made excessive contributions in the three year period up to their insolvency, those excessive contributions can be clawed back;

b. Pension benefits which a debtor is entitled to, if he has not drawn them down, can be made available to the creditors, trustee in bankruptcy and assignees.

DRN's

Applying these rules - under a DRN, an AI is obliged when calculating a debtor's income to take into account an income they are entitled to receive from a pension.

Despite being able to count pension income towards debtor's income when considering eligibility for a scheme, a pension pot will not be counted when calculating a debtor's asset exemption limit. There is an exception which will be a) an ARF and b) where if an interest or entitlement under a relevant pension arrangement is likely to arise within the first 6 months of the supervision period, an AI can then take this in account in calculating the necessary assets.

In this regard any such potential interest could have a negative impact on a DRN application.

Pensions

DSA/PIA's

With respect to a DSA and PIA arrangement a debtor is not required to hand over a pension pot or draw down any benefits early – however if the debtor would be entitled to benefits if he performed an act or exercised an option he would be considered as being in receipt of such income or money.

Furthermore, a PIP can treat a pension interest or entitlement as income of the debtor if it becomes available to the debtor either before applying for a protective certificate, at the date of applying for a protective certificate or within 6 years and 6 months of the date of making of the application of a protective certificate for a DSA or within 7 years and 6 months of the date of making of the application of a protective certificate for a PIA.

What this means, in fact, is that a key difference between the treatment of a DRN and a DSA/PIA is that the vesting of an interest or an entitlement at any period (not just the first 6 months) can have an impact on the shape and form of the DSA/PIA.

In plain language, pension benefits being paid out, or benefits deferred by the pensioner cannot be excluded from a settlement arrangement i.e. a pension income received or receivable is at risk.

In particular a DSA/PIA could include a provision where a pension income or lump sum benefit can be made available for creditors.

Excessive contributions

A PIP (or also a creditor) can apply to Court to recover excessive contributions made with 3 years prior to the issuing of the protective certificate.

Bankruptcy

The provisions applying to Bankruptcy are very similar in that the Official Assignee cannot take the assets of a relevant pension arrangement into account, but that income which is currently being paid to a pensioner from a pension scheme can be claimed.

Furthermore the Official Assignee can also claim any pension income which would come into play at any time within 5 years of the debtor being made a bankrupt.

Personal Guarantees

Unless specifically provided for under a contract of guarantee, the release of a principal debtor from his obligations will have the effect of discharging from liability any guarantor of the principal debt.

However, practice has been that many of the standard forms of guarantees precludes this, and preserve a creditors right against a guarantor in the event of the release or discharge of the principal debtor.

This raises the question of what impact does the new Personal Insolvency Act have on individuals who have given guarantees to creditors on behalf of debtors, who have subsequently had their debts compromised through one of the new formal schemes of arrangements.

DRN

When an individual has entered into a DRN, a specified creditor is prohibited from issuing proceedings or taking enforcement steps against a debtor without leave of Court during the supervision period (3 years).

However, this does not prevent the creditor from taking enforcement action against another person who has guaranteed a debt of the debtor. This includes someone who is jointly contracted with, or is jointly liable with the debtor to the creditor. Such an individual can be sued in respect of the contract.

If the debtor has had their exposure to the liability compromised / written off as a result of a DRN, the Personal Insolvency Act specifically notes that the discharge of a debtor from specified qualifying debts does not release any other person from any liability (whether as partner or co trustee of the specified debtor or otherwise) or any liability as surety for the specified debtor.

DSA / PIA

When a debtor is granted a protective certificate, a creditor who is given notice of that protective certificate in respect of a specified debt, cannot, whilst the protective certificate is in place, initiate proceedings or take enforcement action against the debtor without leave of court.

The period of the protective certificate is 70 days which can be extended by a further 40 days. In effect – the debt is frozen and the creditor cannot:

- Initiate or continue existing legal proceedings;
- Take any steps to recover or secure payment;
- Execute or enforce a judgment;
- Take any steps to recover goods in possession of debtor;
- Contact the debtor about a specified debt;
- Terminate or amend an agreement with a debtor;
- Apply for a bankruptcy petition relating to a debtor;
- However, the Act does not prevent the creditor from taking action against another individual who has guaranteed the debts of a debtor who is subject to a protective certificate.

In effect a creditor can take action against someone who:

- Has jointly contracted with the debtor or who is jointly liable with the debtor in the capacity as a co-borrower;
- Has guaranteed the specified debts concerned.

Valuation of Secured Assets

When a PIP is appointed in a PIA, the value of underlying security on secured assets will be agreed between the PIP acting on the debtor's behalf and the secured creditors.

In practice, the secured creditors will submit their estimated valuation to the PIP. Ideally, the Debtor, the creditor and the PIP will all agree on the valuation.

All three parties must endeavor in good faith to agree a valuation. If there is an impasse – and in the absence of agreement – the valuation will be performed by an independent person. The cost of the independent valuation will be shared by the debtor and the creditor. In this case the PIP will ask the ISI to nominate a valuer from the ISI panel. The valuation performed by the valuer will be binding on all parties.

All secured debt (PPR, BTL, 2nd Charges, judgment mortgages) are given the same treatment.

Comparison of U.K. Bankruptcy with Irish Bankruptcy

The advantages of debtors moving to the U.K. and utilising the Bankruptcy procedure in the U.K. are obvious. Firstly, the U.K. has a tried and tested system of Individual Voluntary Arrangements ("IVA") which allow debtors to do deals with their creditors on a low cost basis. The U.K. does approximately 50,000 IVA's every year. If the IVA is not successful, then the debtor is placed into bankruptcy, but at least he is discharged after a bankruptcy period of just 12 months, which compares favourably with the three years discharge period in Ireland.

Another key difference is that in the U.K. the Official Assignee has the initial 12 month month period to make a Bankruptcy Payments Order to attach the debtors' income for 2 years, whilst in Ireland the Official Assignee has the initial 3 year period to make in Income Payments Order which would last 5 years.

One of the key planks of the new Irish regime is a PIA which is effectively modelled on the U.K. IVA system.

The reason why IVA's are so successful in the U.K. is that creditors receive more money back than they do under a Bankruptcy. Similarly, it is expected that under a PIA, creditors would receive more money back than under bankruptcy.

While the Irish PIA is closely modelled on the U.K. IVA system, there will still be substantial differences between the actual bankruptcy regimes of each Country. In the U.K., when a debtor is declared bankrupt, the Official Receiver is initially appointed. The Official Receiver is a Government Official whose costs are effectively financed by a levy on all realisations in a bankruptcy. In practice, if the bankrupt estate has realisable assets, the Official Receiver will hand it over to a private sector Insolvency Practitioner who will charge fees on a time cost basis. In Ireland, the Official Assignee, also a Government Official, is initially appointed, and he tends to complete the bankruptcy. The Official Assignee does not charge fees himself, but Court Duty is levied on asset realisations.

A major difference between the Irish bankruptcy regime and the U.K. bankruptcy regime is the involvement of the court system. In Ireland, there is a constant interface with the Court system, which is costly in terms of solicitor and counsel fees. The best way to illustrate the differences between the Irish and U.K. systems is to show a comparison of an estimated outcome on a typical case. If you assume a Mr. Murphy who has five investment properties with a market value of €1 million and mortgages of €3 million, and an unencumbered property with a market value of €500,000, then a comparison of the different outcomes (on the basis of a "lump sum" IVA or PIA) is shown in the accompanying table. For ease of comparison purposes, the exchange rate is assumed to be €1 to £1.

Comparison of U.K. Bankruptcy with Irish Bankruptcy

	€ Irish Bankruptcy	€ Irish PIA	£ U.K. Bankruptcy	£ U.K. IVA
Assets Available (After realisation costs)	475,000	500,000	475,000	500,000
Less: Costs				
Petitioner Costs	(10,000)	-	(2,000)	-
Official Receiver's Fees	-	-	(1,715)	-
Court Duty / Secretary of State	(71,700)	-	(63,250)	-
Trustee Fees	-	-	(40,000)	-
Disbursements/Legal	(50,000)	(5,000)	(5,000)	(5,000)
Nominee Fees / Personal Insolvency Trustee	-	(12,300)	-	(10,000)
Supervisors Fees / Personal Insolvency Trustee	-	(12,300)	-	(10,000)
Bordereau	-	-	-	(116)
Total Costs	(131,700)	(29,600)	(111,965)	(25,116)
Net Assets available	343,300	470,400	363,035	474,884
Unsecured Creditors	2,000,000	2,000,000	2,000,000	2,000,000
Dividend Available	17.16%	23.52%	18.15%	23.74%

The preceding table clearly shows that the creditors receive more either under the Irish PIA or the U.K. IVA. The reasons for the differences are apparent from the table. Firstly, the unencumbered property would realise more in an orderly sale (particularly if the property is located in a different jurisdiction) as opposed to a distressed sale, and secondly the Court Duty/Secretary of State fees (which can get as high as 15% of realisations) would be significant in both types of bankruptcies. The reason for the differences in the cost of the professional fees under the PIA and the IVA is that VAT is no longer charged by insolvency practitioners in the U.K. following the Paymex Limited case.

It is also clear from the table that the high costs associated with bankruptcy actually make it easier for debtors to persuade their creditors to accept a scheme of arrangement.

The majority of IVA's done in the U.K. are 5 year arrangements which mainly feature the debtor also making contributions from his personal income towards his creditors. Such "income" IVA's can produce good dividends for creditors where the debts are consumer type debts such as credit card debts. However, where the debts are in the millions, any dividends available from income tends to be immaterial.

UK Personal and Corporate Insolvency Services

Friel Stafford can offer individuals, financial advisors and financial institutions access to one of the UK's leading corporate and personal insolvency firms through its association with FRP Advisory.

FRP Advisory offers services to businesses and individuals who are facing financial or operational uncertainty. This includes turnaround management, debt rescheduling advice, operational change management support, refinancing and fund raising, interim management, insolvency and recovery, plus a range of acquisition support tools for clients purchasing distressed businesses.

You can contact any of our three insolvency practitioners or Charles Turner of FRP (see page 45) who can help with any query in relation to UK insolvency including:

- Personal Insolvency
  - Individual Voluntary Arrangements
  - Advice on UK bankruptcy procedures
  - Acting as trustee in bankruptcy
- Liquidations
  - Creditors Voluntary Liquidations
  - High Court Liquidations
- Receiverships
  - Trading Receiverships
  - LRP Receiverships
- Forensic Services including asset tracing

Contact

For all of your Insolvency queries - contact Friel Stafford, Ireland's leading independent specialist insolvency firm.

As a leading firm we provide expert advice of the highest professional and ethical standards. We have a long standing reputation for providing a professional service of the highest quality combining technical expertise and commercial awareness.

Our services are:
- Partner led
- Relationship driven
- Focused on the long term needs of our clients
- Solution driven with a flexible approach
- High quality

We are well known for our ability to manage large and complex assignments from beginning to end and deliver reports and solutions on time.

Friel Stafford has a formal alliance with FRP Advisory in the U.K.. FRP are one of the U.K.'s largest Corporate and Insolvency Firms with 30 partners and 200 staff operating in 9 locations throughout the U.K..

An increasing number of assignments have an Irish and U.K. perspective, particulary property based connections. Whether it is general advice, formal insolvency appointments or complex restructuring solutions we have the skill sets and resources.

Friel Stafford and FRP Advisory are separate legal entitites.

Services are provided soley by each firm in their respective geographic areas.

Our Team

Ireland

Jim Stafford
Managing Partner
Personal Insolvency Practitioner
087 251 6664
jim.stafford@frielstafford.ie

Tom Murray
Partner
Personal Insolvency Practitioner
087 834 9495
tom.murray@frielstafford.ie

Alan Geraghty
Director
Personal Insolvency Practitioner
087 641 1315
alan.geraghty@frielstafford.ie

United Kingdom

Charles Turner
Partner FRP
Licensed Insolvency Practitioner
0044 117 203 3671
charles.turner@frpadvisory.com

Free Confidential Hotline - (01) 661 4066

At Friel Stafford we have a dedicated team of specialists who understand the financial difficulties that individuals can face, and who have the experience to help find a solution to put these debt related problems behind them. If you or your clients are experiencing personal financial difficulties please feel free to contact us. After obtaining details of your financial situation, our specialists will be able to advise on a range of options and find an appropriate debt solution.

Friel Stafford
44 Fitzwilliam Place
Dublin 2, Ireland

T: +353 1 661 4066
F: +353 1 661 4145
E: info@frielstafford.ie

www.frielstafford.ie