

STEP Seminar
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Personal Insolvency Act 2013

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1 Legislation:

Personal Insolvency Act 2012 as amended by the Court and Civil Law (Miscellaneous Provisions) Act 2013

Bankruptcy Act 1988 – sections 57-59 fraudulent and voluntary conveyances

Land and Conveyancing Law Reform Act 2009 – Section 74 Any conveyance of *property* made with the intention of defrauding creditors or other person is voidable by any person thereby prejudiced, no time limit. See also Section 2(4) of *Personal Insolvency Act 2013* – transactions at an undervalue and preferences.

Finance Act 2013 – Section 100(3) payment of tax during arrangement
- Section 101(1) capital gains tax

Finance (Local Property Tax) (Amendment) Act 2013 – section 13 deferral during arrangement

Land and Conveyancing Law Reform Amendment Act 2013 – adjournment of proceedings for possession of principal private residence

2 Scope of the Act:

The Act applies to individuals to enable them to enter into an arrangement to resolve their indebtedness without recourse to bankruptcy.

There are three personal insolvency procedures:

Debt Relief Notice (DRN): This allows for the write off of debt up to €20,000 subject to a 3 year supervisory period.

Debt Settlement Arrangement: This provides for the agreed settlement of unsecured debts of any value. The debtor enters into an arrangement with his or her creditor for a repayment plan over a period of 5 or 6 years. If the repayment plan is successfully completed any remaining debt is written off.

Personal Insolvency Arrangement (PIA): This provides for the agreed settlement of secured debt up to €3million (can be above this amount if creditors agree) and unsecured debt. This enables a debtor to come to an arrangement with his or her creditors to repay an amount of debt over a period of 6 or 7 years. If repayment plan is successful the debtor will be

discharged from unsecured debt but will not be discharged from secured debts except to the extent provided for under the PIA.

Each relief is a once off relief.

A debtor who has availed of one procedure may after a period of time avail of a different procedure.

DRN – 3 years, DSA – 5 years, PIA – 5 years before applying for a PC.

3 Are all debts included in arrangements?

Excluded Debts:

Debts which are defined as excluded debts cannot be included in any of the arrangements.

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
- (d) 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;
- (e) debt or liability of the debtor arising by virtue of a court order made under the Proceeds of Crime Act 1996 and 2005 or by virtue of a fine ordered to be paid by a court in respect of a criminal offence.

Excludable Debts:

Excludable debts are debts that may be included in the arrangement procedures if the creditor consents to or is deemed to have consented to the inclusion in the arrangement.

Deemed consent occurs where a notice is served on a creditor and creditor does not respond within 21 days, the creditor is deemed to have consented to the inclusion of the excludable debt in the arrangement.

Excludable debt 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 (See Revenue Guidelines)
- (b) amount payable by the debtor under the Local Government (Charges) Act 2009 (See *Finance (Local Property Tax) (Amendment) Act 2013* – section 13 deferral during arrangement)
- (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 moneys advanced to the debtor by the HSE 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 Development Act 2011* or contributions due under section 19 of that Act (sinking fund contribution).
- (g) debt or liability of the debtor arising under the *Social Welfare Consolidation Act 2005*

Permitted Debt - means an excludable debt where the creditor has consented or deemed to have consented to the inclusion of the debt in an arrangement. It then becomes a permitted debt.

Preferential Debt (S.67(DSA)/S101(PIA) - A debt which, if the debtor concerned were a bankrupt would be a debt that by virtue of the Bankruptcy Act is to be paid in priority to all other debts or by virtue of any other statutory provision is to be included among such debts

- All local rates due, income tax assessed
- All wages or salary, accrued holiday remuneration, sick pay, superannuation

Unless the creditor otherwise agrees in writing and provision is so made in the DSA/PIA, a preferential debt (creditor must satisfy PIP that debt is preferential) shall be paid in priority by the debtor – shall rank equally between themselves.....

The Revenue Commissioner has a dedicated Insolvency Unit and can be contacted by a secure mail personalinsolvency@revenue.ie The Revenue's **Guidelines for Approved Intermediaries (AIs) and Personal Insolvency Practitioners (PIPs) with regard to arrangements as laid down in the Personal Insolvency Act 2012** state:

The actual decisions regarding whether to 'opt in'/'opt out', or in due course whether to accept/reject any proposed arrangement will be made by the relevant caseworker in consultation with his/her management stream where necessary.

4 Insolvency Service:

The Insolvency Service is responsible for monitoring the operation of the personal insolvency system and authorising, supervising and regulating persons and individuals to act as Approved Intermediaries (for DRN) and for individuals to act as Personal Insolvency Practitioners (for DSAs and PIAs).

The IS has the function of maintaining a number of public Registers:

Register of Debt Relief Notices

Register of Protective Certificates

Register of Debt Settlement Arrangements

Register of Personal Insolvency Arrangements

These are all public Registers in electronic format and copies or extracts taken for a fee.

Information will be removed within a 3 month time limit.

Notwithstanding *Data Protection Act 1988* IS will maintain information necessary to perform its functions.

5 Court Jurisdiction:

The personal insolvency arrangements are non-judicial process but the court has a role in the supervision, issuing the DRN, the Protective Certificate, issuing the DSA and PIA (having been approved at a creditors meeting. All are referred to the court by the Insolvency Service.

Creditors may apply to the court in limited circumstances.

An application may be made to the court for termination of a DSA or PIA.

What is the 'Appropriate Court'?

Where application is made for DSA or PIA and total liabilities of debtor determined on basis of PFS are in excess of €2.5million – the High Court, in any other case it is the Circuit Court (Specialist judges). Most of the court processes will be done electronically.

6 Approved Intermediaries/Personal Insolvency Practitioners (PIP):

An approved intermediary will be a person or class of persons who will assist the debtor to obtain a DRN. An application for a DRN must be made through an approved intermediary who will assist the debtor in preparing the Prescribed Financial Statement, process the application and submit the application to the Insolvency Service.

A **Personal Insolvency Practitioner** enters into a contract with a debtor to act as an intermediary with a debtor in relation to either a DSA or a PIA.

The contract, once entered into, with the debtor can be terminated by the PIP or by the debtor at any time during the arrangement.

There is a statutory obligation on the PIP to notify the IS at the time of appointment as PIP (see Section 49(4) (b)) and there is also an obligation on either the debtor or the PIP (depending on who terminated the appointment) to notify the IS (see Section 49A (2) and Section 49B (2)) as inserted by the *Courts and Civil Law (Miscellaneous Provisions) Act 2013*

Appointment of replacement PIP must also be notified to IS.

Termination of contract will occur if PIP dies or becomes mentally incapable.

Accounts Regulations for PIP – SI 247 of 2013

Professional Indemnity Insurance: - See Practice Note of Law Society

Separate accounts for each debtor.

There are detailed requirements with regard to receipts and statements.

See *Accounts and related matter regulations 2013 S.I 247 of 2013*

Monitoring and Review by PIP during the term of arrangement

PIP has an obligation to review arrangement at least every 12 months.

Default position is that PIP receives monies and pays to creditors.

Death, Mental incapacity, Termination

Maintenance of Records by PIP

Records must be maintained in the State for a period of 6 years after completion of arrangement and available to the IS. At least once a year must verify the maintenance of records to IS.

Death, Mental incapacity, Termination

See Law Society's Practice Note: Solicitors acting as Personal Insolvency Practitioners

7 Taxes:

Section 100 of the *Finance Act 2013* makes a numbers of amendments with regard to taxation issues arising with respect to personal insolvency arrangements.

Rental income

While **foreign property** does not come within the terms of an arrangement, foreign property may be transferred and held in trust during an arrangement. Section 71 of the TCA 1997 is amended by Section 100(1) (a) of the *Finance Act 2013* to provide that foreign rental income for which the debtor is chargeable to tax includes the rent from the property while held in trust.

Section 96 of the TCA 1997 as amended by Section 100(1) (b) to provide that a debtor who transfers **rental property in the State** under the terms of a DSA or PIA to a trustee is treated for tax purposes as remaining to be entitled to the rent while it is held in trust and will continue to be chargeable to tax on that rent.

Capital Gains Tax treatment of property vested in PIP

Assets can be transferred/vested in PIP who will hold as trustee for creditors.

Section 569 of the TCA (as substituted by section 101(1)(e) of the Finance Act 2013) provides that the holding of the assets of a debtor by a PIP or any retransfer of assets back to the debtor are to be disregarded for capital gains tax purposes.

It also provides that any chargeable gains accruing on disposals by the PIP are to be assessed on the PIP.

Where the debtor dies, the PIP is regarded as acquiring the assets as personal representative of the deceased.

Capital Acquisition Tax Treatment

Section 82(1) of the CAT Act 2003 is amended to provide that any benefit arising where a debt is relieved or reduced under any of the arrangements – DRN, DSA or a PIA will not be a gift or inheritance for the purposes of the Act.

Payment of taxes during arrangement

Section 100(3) inserts a new subsection 65(2)(e)(ia) for a DSA and subsection 99(2)(f)(ia) for a PIA which provides that the mandatory requirement in each arrangement must make provision for the payment of all tax liabilities incurred by the debtor or by the PIP during the administration of the arrangement. Such liabilities are payable in priority to any payment to creditors and any failure by failure by the debtor to comply with the terms of the provision shall be a breach of the arrangement and entitle the Collector General to withdraw agreement to have debts treated as excludable debts.

The tax liabilities of the PIP arise in relation to property held in trust under the terms of an arrangement.

Local Property Tax

A person who enters into a DSA or a PIA may apply for a deferral of Local Property Tax (LPT) for the periods for which the insolvency arrangement is in place. The deferred LPT plus interest (at the rate of 4% per annum) will become due when the particular insolvency

arrangement ceases to have effect. Deferral for the purposes of the personal insolvency arrangements is not restricted to owner-occupiers.

Before LPT can be deferred, the particular insolvency arrangement must be agreed between the debtor and the Insolvency Service of Ireland. The 'Insolvency Case Number' must be included in the application form.

8 Eligibility Criteria:

There are eligibility criteria for each arrangement.

DRN Includes

- Domiciled in the State or being living in or has a place of business in the State for at least one year.
- Has not during previous 2 years entered into transaction which contributed to inability to pay debts or given preference to a person which reduced amount available to pay debts.
- Has total assets of less than €400
- Has a net disposable income of €60 or less a month
- Has not in previous 2 years entered into a transaction with a person at a undervalue that has materially contributed to the debtor's inability to pay or
- Given preference to a person that has the effect of substantially reducing the amount available for payment of debts

Debtor will be ineligible if 25% of debts incurred in previous 6 months

DSA/PIA includes

- Domiciled in the State or being living in or has a place of business in the State for at least one year.
- Is insolvent (unable to pay debts as they fall due)
- Has completed a Prescribed Financial Statement and made a statutory declaration confirming that the statement is a complete and accurate statement of debtor's assets, liabilities, income and expenditure. (*See Guidelines on Reasonable Living Expenses S.I 312 of 2013*)
- Is not an undischarged bankrupt or currently availing of any other insolvency procedure.....

Personal Insolvency Practitioner is also required to complete a statement.....

A debtor is not eligible if 25% or more of debts incurred within 6 months ending on date on which application is made for a protective certificate.

Creditors can challenge coming into effect of DSA/PIA on a number of grounds to include:

- Within the previous 2 years of issue of PC, debtor had arranged financial affairs primarily with a view of being or becoming eligible to apply for a DSA/PIA
- Debtor had entered into a transaction with a person at an undervalue within the preceding 3 years that has materially contributed to debtor's inability to pay debts

- The debtor had given a preference to a person within the preceding 3 years that had the effect of substantially reducing the amount available for payment of debts.

9 Summary outline of process for a DSA and PIA:

Appointment of PIP

PIP is appointed by debtor and advises debtor as to which arrangement to enter into. PIP enters into contract with debtor to act for debtor.

Application for a Protective Certificate

PIP applies to IS for a protective certificate for debtor to allow debtor to prepare proposal for the approval of creditor to enter into an arrangement. (The purpose of a protective certificate is to impose a moratorium on creditors from commencing or prosecuting the debtor for a period of 70 days).

Application for PC (with detailed documentation) made to Insolvency Service who in turn forwards it to the Court for approval.

Court issues Protective Certificate.

Issue of PC recorded in Register of Protective Certificates.

Once protective certificate issues time lines are extremely important and while an extension for a period not to exceed 40 days is possible the criteria for extension are limited. An extension of 40 days is also possible where it is necessary to appoint a replacement PIP and court satisfied that extension is necessary.

If PC issues but a proposal for an arrangement does not proceed, it is not possible for debtor to apply for a further Protective Certificate for a period of 12 months.

Preparation of a Proposal

Following issue of PC by the court, PIP will notify creditors of appointment, invite submissions from **creditors** as to how they wish the debts to be dealt with in the DSA/PIA and give creditors a copy of PFS.

PIP will work with debtor in preparing proposal for an arrangement and will consider submission received.

Subject to certain mandatory requirements the terms of the DSA/PIA will be that as agreed at a creditors' meeting.

If proposal is not made to creditors within the 70 days (or extended period) i.e. if creditors' meeting is not held within period then DSA or PIA shall be deemed to come to an end.

Creditors' meeting

Creditors must vote on the proposal and if proposal is approved then copy of approved DSA or PIA (with documentation and certificate of result of voting) sent to IS who will forward it to the court.

A proposal for a DSA shall be considered as having been approved by a creditors' meeting where a majority of creditors representing not less than 65% in value of the total of the debts due to the creditors participating in the meeting and voting have voted in favour of the proposal.

A proposal for a PIA shall be considered as having been approved by a creditors' meeting where:

- A majority of creditors representing not less than 65% in value of the total of the debts due to the creditors participating in the meeting and voting have voted in favour of the proposal
- Creditors representing more than 50% of the secured creditors have voted in favour of the proposal
- Creditors representing more than 50% of the unsecured creditors have voted in favour of the proposal

(Connected person – relative, trustee, beneficiary of trust, partnership, controlling interest in company, any two or more persons acting together to secure or exercise control of a company. A creditor who is connected with a debtor may not vote in favour of a DSA/PIA proposal at creditors' meeting).

Coming into effect of DSA/PIA

If the court is satisfied that eligibility criteria have been met, all mandatory requirements are complied with it will approve the coming into effect of DSA or PIA.

DSA/PIA will come into effect when registered in the Register DSA/PIA

Where DSA/PIA is not approved at creditors' meeting is deemed to come to an end and PC will cease to have effect.

A DSA/PIA having been registered shall have effect according to its terms and remain in effect until completed in accordance with its terms or the terms as varied or it is terminated

Variation:

Without variation the DSA/PIA can set out alternative options – foresee issues.

A DSA/PIA may be varied in accordance with its terms.

Change in circumstance of debtor.

A PIP on own initiative or on a request from debtor or creditor shall propose a variation of a DSA

- Where it appears to PIP that there has been a material change in debtor's and
- The PIP is satisfied that there is a reasonable prospect that a variation that addresses such circumstances would be approved.

Procedure at meeting and voting arrangements similar to initial, voting rights proportionate to amount of debt due **on date on which vote taken**

Termination:

Can be prematurely terminated either by the court or by default (deemed termination where debtor in arrears for 6 months).

Consequences of premature termination:

Where DSA/PIA deemed to have failed or terminated the debtor shall be liable in full for all debts covered by DSA/PIA, including any arrears, charges and interest that have accrued,

but excluding any amounts paid during the continuance of the DSA/PIA unless the terms of DSA/PIA provide otherwise or court has made an order otherwise.
Debtor has committed an act of bankruptcy.

10 Mandatory requirements:

Debt Settlement Arrangement

- Maximum duration of a DSA shall be 60 months but DSA may provide that this period may be extended for a further period of not more than 12 months.
- Where debtor performs all obligations in a DSA, debtor will stand discharged from the remainder of the debts covered by the DSA.
- DSA will not require debtor to sell any assets that are reasonably necessary for the debtor's employment, business or vocation unless the debtor consents to such sale
- DSA shall not contain any terms which would require the debtor to make payments of such an amount that the debtor would not have sufficient income to maintain a reasonable standard of living for the debtor and his/her dependants.
- Make provision for costs and outlays of PIP and indicate the likely amount of fees, costs and outlays to be incurred and specify the person/s to whom payable and the manner in which they have been or are to be paid
- Make provision for the payment of all tax liabilities incurred by the debtor or PIP during the administration of the DSA (*Finance Act 2013*)
- **Make provision as to how the debts are to be treated in the event of the mental incapacity or death of the testator.**
- DSA shall not require the debtor to dispose of his interest in PPR or to cease to occupy such residence unless.....
- DSA shall provide for review at least every 12 months and completion of new PFS
- The terms of the DSA shall set out the circumstances where the PIP shall be obliged to propose a variation of the DSA

Personal Insolvency Arrangement

- **Shall specify which debts are secured debts and which are unsecured**
- Maximum duration of a PIA shall be 72 months but PIA may provide that this period may be extended for a further period of not more than 12 months
- Where debtor performs all obligations in a PIA debtor shall not stand discharged from secured debts except to the extent provided for under the terms of the PIA
- PIA will not require debtor to sell any assets that are reasonably necessary for the debtor's employment, business or vocation unless the debtor consents to such sale
- PIA shall not contain any terms which would require the debtor to make payments of such an amount that the debtor would not have sufficient income to maintain a reasonable standard of living for the debtor and his/her dependants.
- Make provision for costs and outlays of PIP and indicate the likely amount of fees, costs and outlays to be incurred and specify the person/s to whom payable and the manner in which they have been or are to be paid
- Make provision for the payment of all tax liabilities incurred by the debtor or PIP during the administration of the PIA (*Finance Act 2013*)

- **Make provision as to how the debts are to be treated in the event of the mental incapacity or death of the testator.**
- PIA shall not require the debtor to dispose of his interest in PPR or to cease to occupy such residence unless.....
- PIA shall provide for review at least every 12 months and completion of new PFS
- Shall make provision for the manner in which security held by secured creditor is to be treated
- The terms of the PIA shall set out the circumstances where the PIP shall be obliged to propose a variation of the PIA

Principal Private Residence

In formulating proposal for a DSA/PIA, the PIP is obliged not to require the debtor to dispose of or cease to occupy the debtor's PPR unless certain conditions apply.

A proposal for a DSA procedure is to deal with unsecured debts and the interests of secured creditors are not prejudiced. However, in the case of a PIA it may be that the secured asset is the PPR which gives rise to the debtor's financial difficulties so it is necessary to look at the options.

Family law issues in this regard – family law legislation must be complied with. Independent legal advice or having been advised to obtain advice and declined.

Paying Arrangements

DSA pari passu for creditors unless otherwise provided.

PIA pari passu for creditors of the same class unless otherwise provided.

Mental Incapacity of debtor

When debtor is entering into an arrangement must make provision for the eventuality of mental incapacity.

Important to execute an EPA - appoint an attorney limited to DSA/PIA

Continuing payments during incapacity for the remainder of term.

If PIA – issue of continuing debt at end of term.

If secured creditor facilitated DSA what arrangements in the event of incapacity?

Death of debtor

What should arrangement provide?

11 PIA

There are many different options for dealing with secured debt to include the satisfaction or restructuring of the secured debt.

One of the provisions include that the - Principal sum be reduced but subject to a condition that where property is subsequently sold for amount greater than value attributed in PIA, the security will continue to cover part of the difference between attributed value and sale price. The obligation to pay this additional amount shall cease on

- The expiry of the period of 20 years commencing on date PIA comes into effect
- On day which the debtor is scheduled or permitted to fully discharge the amount secured by the security (or such later date specified in PIA) and does so discharge indebtedness

whichever first occurs.

Q>If debtor dies:

Was debtor a party to either a DSA or PIA immediately before his/her death?

Was debtor a party to a PIA in the past where there was a write down of secured debt?

12 Joint Liability/Joint Arrangement:

Where two or more debtors (S.55 (DSA) + S.89 (PIA)) are jointly party to all of debts to be covered by a DSA/PIA and each satisfies eligibility criteria, those debtors may jointly propose a DSA/PIA – joint debtors.

Q> if one dies or becomes mentally incapable?

A PIA may be proposed by a debtor on the basis that it will be administered in common by a PIP with one or more other PIA provided in the opinion of PIP

- PIAs can reasonably be administered in common because of the financial relationship of the debtors concerned
- the terms of each PIA specify in sufficient detail how such administration will operate including treatment of joint + individual assets, whether approval of one PIA is contingent on approval of any other PIA, effect of early termination, how payments are to be apportioned to each PIA.

If there is joint liability but not a joint arrangement - nothing shall operate to prevent a creditor taking action as respects a person who has jointly contracted with debtor or is jointly liable with debtor to creditor and that other person may sue or be sued in respect of that contract without joining the debtor (provided not joint DSA/PIA)

Q> joint ownership of assets – family law, administration of estate.

13 Guarantor:

Nothing shall prevent a creditor taking action against a person who has guaranteed the specified debts concerned.

Q> was the deceased a guarantor of any debts?

14 Limitation Periods:

While DSA is in effect, a creditor shall not initiate or continue any proceedings or take any steps to secure or recover debt.

No bankruptcy petition may be presented or proceeded with.

In reckoning period of time for purpose of any applicable limitation period in relation to any proceedings, the period in which the DSA/PIA is in effect shall be disregarded.

The period for which any judgment against debtor in relation to a debt which is the subject of a DSA/PIA has effect shall be extended by period that DSA/PIA is in effect.

15 Pension issues:

Excessive contributions

A creditor or a PIP, who considers that a debtor has made excessive pension contributions to a relevant pension arrangement, can make an application to the appropriate court for relief. The alleged excessive contributions must have been made within 3 years prior to the issue of the protective certificate.

If court finds contributions were excessive it can direct that such part of the contributions concerned (less any tax required to be deducted) be paid by the person administering the pension fund to the PIP for distribution among creditors.

Interest in or entitlement to Pension Fund:

Where a debtor has an interest in or an entitlement under a pension arrangement, such interest or entitlement of the debtor shall not be treated as an asset of the debtor unless the debtor *performed an act or exercised an option* (took retirement and opted to take a lump sum payment) which caused the debtor to receive an income or an amount of money other than income, then that debtor will be regarded as being in receipt of such income or amount of money.

The above applies where the debtor

- is entitled at the date of making the application for a protective certificate
- was entitled at any time before the date of making the application for a protective certificate or
- will become entitled within 6 years and 6 months of the date of making of the application for a protective certificate in relation to a DSA or 7 years and 6 months of the date of making of the application for a protective certificate in relation to a PIA.