

Group Briefing

March 2017

Resolving the Mortgage Arrears Crisis (Volume 1/2017)

In this briefing, we summarise recent cases, developments and trends relating to the ongoing efforts to resolve the mortgage arrears crisis. Mortgage arrears and repossessions are key areas of focus in the Programme for a Partnership Government.

RECENT CASES

Should the Courts consider whether mortgage terms are “unfair”, even if not asked to do so?

Barrett J delivered his judgment in Allied Irish Banks PLC v Coughlin on 21 December 2016 in which he stated that the Court has a general obligation to establish if any terms in a mortgage contract are unfair, even if the Court has not been specifically asked to do so. This was on the basis of the decision of the European Court of Justice in Aziz, in which the ECJ ruled that a national court should assess (even if not asked to do so) whether any term of a contract that is within the scope of the Unfair Contract Terms Directive is unfair.

While the Court did not find any term to be unfair in this particular case, it should be noted that if a contract term is found to be unfair, that term will not be binding on the consumer, although the contract will continue to exist if it is possible for it to do so without that term.

After the judgment was delivered, Minister of State Dara Murphy (on behalf of Minister for Justice Frances Fitzgerald and in response to a question raised in the Dáil) told TDs that the ruling is being examined by the Department of Justice, with the matter being “*kept under review in terms of any definitive additional obligations which may arise and in terms of how the Department and the House may deal with them.*”

Separately, the Master of the High Court also noted the scope of the Aziz case in an interview with the Irish Times and expressed his concern that, in repossession cases, there may not be sufficient experience at county registrar level to enable EU-based legislation, such as the Unfair Contract Terms Regulations, to be applied correctly.

Personal Insolvency: Court review of secured creditor’s rejection of PIA proposal

In three recent cases, the High Court was asked to exercise its power to overrule a secured creditor’s decision to reject a proposal for a Personal Insolvency Arrangement (PIA) under the Personal Insolvency Acts (for background information, read our Client Briefing: New Court Review Process available for rejected Personal Insolvency Proposals).

» ***What is an “alternative repayment arrangement”?***

In Hill and Personal Insolvency Acts, Baker J noted that the Court’s power applies where the proposed PIA includes a “*relevant debt*” i.e. a debt secured over the debtor’s principal private residence (PPR) and in respect of which (a) the debtor was in arrears on 1 January 2015 or (b) the debtor was in arrears before 1 January 2015 and had entered into an alternative repayment arrangement (ARA) with the secured creditor.

In this case, the debtor was not in arrears on 1 January 2015, but had been in arrears on various occasions before then. Baker J had to consider whether an ARA had been entered into prior to 1 January 2015 between Ms Hill and the secured creditor. The Personal Insolvency Acts do not define “*alternative repayment arrangement*” so Baker J looked at the Central Bank’s Code of Conduct on Mortgage Arrears (CCMA). While it also does not define “*alternative repayment arrangement*”, Baker J found that it contemplated an agreement to forbear, comprise or alter repayment terms (even on a somewhat informal basis) but that

“*a mere indulgence*” of a breach by a lender would not equate to an ARA. She noted that the Court’s ability to overturn a secured creditor’s decision was not a “*broad unfettered discretion*” as that could lead to a disproportionate response and lack of certainty; the Court should not be able to override the secured creditor just because the property involved is a PPR. In this particular case, Baker J held that the ad hoc arrangements between Ms Hill and her secured creditor were not enough to constitute an ARA, so the Court did not have the power to overturn the secured creditor’s decision to reject the PIA proposal.

» ***Time limit for appealing the rejection***

In Hickey and Personal Insolvency Acts, Baker J considered the time limit for bringing an application for a Court review of a PIA rejection. Under the Personal Insolvency Acts, the time limit for bringing the application is not later than 14 days after the creditors’ meeting. Baker J held, having regard to the Interpretation Act 2005, that the day of the creditors’ meeting should be included in the “14 days” calculation. In this case, that meant that the debtor’s application was out of time.

» ***PIA not unfairly prejudicial***

In Re JD (a debtor), JD succeeded in her appeal to the High Court to overturn a decision of EBS to reject her PIA proposal. While EBS had not objected to the general structure of the PIA, it asked for certain conditions to be met, including the consent of JD’s estranged husband (who had ceased contributing to the mortgage repayments) and evidence of his ability to make maintenance payments (he had not been making those payments). EBS argued that there was an inherent unfairness in the PIA proposal from the husband’s perspective (under the Personal Insolvency Acts, the Court must be satisfied that a PIA is not unfairly prejudicial before overturning a secured creditor’s decision to reject it). Baker J agreed that she had

to consider if the PIA was unfair having regard to all circumstances, and noted the public interest in the maintenance of the debtor’s occupation of a PPR. She also noted that a joint debtor (such as JD) is not prevented from appealing a secured creditor’s decision just because the debtor doesn’t own the entire interest in the property or isn’t the sole mortgagor.

Baker J compared the likely outcome under the PIA and the likely outcome if JD was to be adjudicated bankrupt, and formed the view that the outcome under the PIA would be more beneficial for both sides. She also held that JD had (by obtaining a court order and an attachment of earnings order) taken all rational steps to secure maintenance payments. As a result, Baker J overturned the rejection of the PIA by EBS because the PIA was not unfairly prejudicial, contained repayment provisions that were reasonably likely to be met by the debtor and preserved the entitlement of the debtor to continue to live in her PPR with her children.

OTHER DEVELOPMENTS

Central Bank Mortgage Regulations

The Central Bank announced the results of its review of its 2015 Mortgage Regulations on 23 November 2016. Further details are set out in our Client Briefing: Central Bank Mortgage Regulations: Results of review announced. The changes took effect on 1 January 2017.

Possession Proceedings

The provisions of the Courts Act 2016 which fix the issues identified by the Court of Appeal in Permanent TSB v Langan (for background, see our Client Briefing: Possession Proceedings for Residential Properties: Important Update) have come into effect. From now on, the Circuit Court’s jurisdiction will be assessed on the basis of a property’s market value rather than its rateable valuation: where the market value is less than €3,000,000, the Circuit

Court will have jurisdiction. Otherwise, the proceedings will be heard in the High Court.

Central Bank Report

The Department of Finance has published a Report on mortgage arrears provided to it by the Central Bank. The Minister for Finance had asked the Central Bank to address key points including:

- » the range of available sustainable restructure solutions offered by lenders to those in mortgage arrears;
- » how the options available to those in mortgage arrears might impact on their capacity to remain in their PPRs;
- » whether lenders are succeeding in addressing the requirements of their over-indebted borrowers; and
- » the extent to which lenders are exhausting all available options before taking legal action.

Key findings set out in the Report are as follows:

- » significant progress has been made in addressing the mortgage arrears crisis, with the emphasis being on restructuring, rather than on loss of ownership, but further work is needed;
- » the restructuring measures adopted by banks and non-banks differ; banks are using a wide range of solutions, including arrears capitalisations, split mortgages and term extensions. Non-banks are more focused on arrears capitalisations (most likely because they have purchased books of higher-risk or non-performing loans). There has been a move away from interest-only solutions and short-term forbearance arrangements;
- » the Central Bank intends to carry out further work with non-bank lenders to assess their progress;
- » meaningful engagement between lender and borrowers within the framework of the Mortgage Arrears Resolution Process (**MARP**) set out in the CCMA is key to agreeing a successful restructuring;
- » sometimes, loss of home ownership cannot be avoided. Up to 66% of

home repossessions result from voluntary surrender or abandonment, with the balance resulting from Court orders. While lenders should only begin repossession proceedings once the MARP process has finished, the Central Bank has noted that a lender's ability to lend on a secured basis depends on its ability to realise that security if something goes wrong; and

- » there is strong evidence that lenders are trying to exhaust available options before taking legal action against homeowners in arrears.

Key risks identified by the Central Bank in the Report are the lengthy enforcement process in Ireland, the number of borrowers that remain vulnerable to interest rate increases and economic shocks, the relatively low take-up of PIAs, the high number of borrowers in > 2 years arrears and the fact that, notwithstanding the regulation of credit servicers, some unregulated loan owners still do not come under the Central Bank's supervision.

Competition and Consumer Protection Commission

The Competition and Consumer Protection Commission (CCPC) has launched a [public consultation to gather views about the future of the Irish mortgage market](#). It is examining the market structure, legislation and regulation of the mortgage market in Ireland at the moment, and its intention is to set out options on how Ireland can develop a better-functioning, more sustainable mortgage market. The consultation closes on 20 March 2017 and the CCPC will publish its final report in May 2017.

Abhaile initiative

The Department of Justice has [announced results of research](#) that indicates that two-thirds of homeowners in mortgage arrears are unaware of resources available to them. In light of that, the Department has launched a new national information campaign to further raise awareness of the Abhaile advice service. Further details on the Abhaile service were set out in [Resolving the Mortgage Arrears Crisis Vol 3/2016](#).

Insolvency Service of Ireland

The ISI has published its [Statistical Report for Q4 2016](#). In that period, it received 935 PIA applications, 526 protective certificates were granted in respect of proposed PIAs, and 173 PIAs were finalised. That Report, together with the ISI's [Annual Report 2015](#), shows that bankruptcies increased from 448 in 2014 to 479 in 2015 and to 526 in 2016. The Statistical Report also confirms that, for 2016 as a whole, 66.6% of all proposed PIAs were approved by secured creditors.

Rent Pressure Zones; Part 4 Tenancies

The [Planning and Development \(Housing\) and Residential Tenancies Act 2016](#) was signed on 23 December 2016. It contained provisions in relation to rent pressure zones (which came into force on 24 December 2016) in response to pressure to control rent rises in parts of the country where rents are highest. If an area is designated as a rent pressure zone then, subject to certain exceptions, rent increases are being capped at 4% per annum. Updated information on areas designated as rent pressure zones from time to time can be found [here](#).

From 17 January 2017, the new Act also extended occupation rights under 'Part 4 tenancies' from 4 years to 6 years. Further, in response to the issues that arose in 2016 when a loan purchaser sought vacant possession of various properties in a development in Tyrellstown with a view to selling those properties, the new Act provides that a landlord who wishes to sell 10 or more properties in a development and who wishes to terminate Part 4 tenancies to facilitate the sale must, in addition to a termination notice:

- » give the relevant Part 4 tenants a statutory declaration of its intention to sell the property; and
- » confirm that leaving the tenancies in place would lead to the sale price for the properties being at least 20% below market value, and that the application of the new Act would be unduly onerous on, or cause undue hardship to, the landlord.

STATISTICS

The statistics on residential mortgage arrears and repossession relating to the third quarter of 2016 have been released by the Central Bank. In terms of the key trends, these are as follows:

» ***Arrears***

11% of all residential mortgage accounts continued to be in arrears at the end of September 2016, marking the thirteenth consecutive quarter of decline. A total of 79,562 of residential mortgage accounts were in arrears at the end of September 2016, a decline of 3.1% relative to the previous quarter. The rate at which residential mortgage accounts in arrears are declining has decreased slightly relative to the decline of 4.5% recorded in Q2 2016.

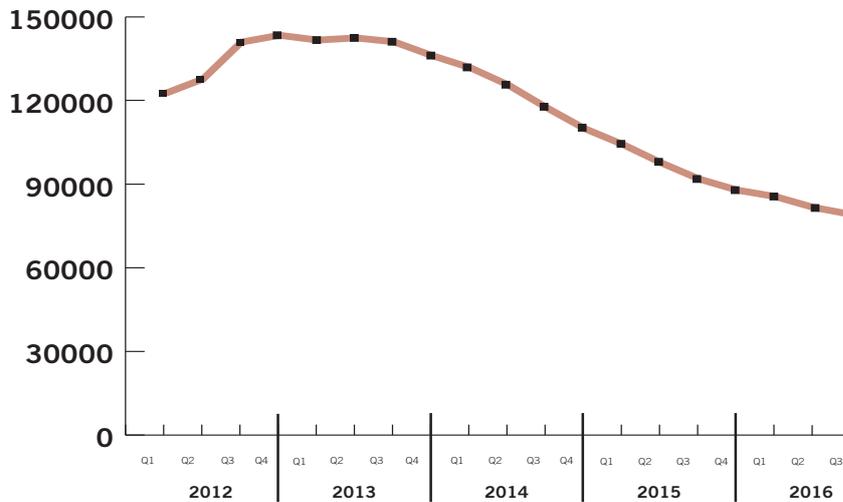
» ***Proceedings Issued***

Q3 2016 saw 1,210 legal proceedings issued in the Irish Courts for the enforcement of security in respect of PDHs; a decrease on the 1,243 proceedings issued in Q2 2016. The 1,210 proceedings issued marks a 28% decrease in the number of proceedings issued as against the same period in 2015, when 1,687 proceedings were issued.

» ***PDHs actually repossessed***

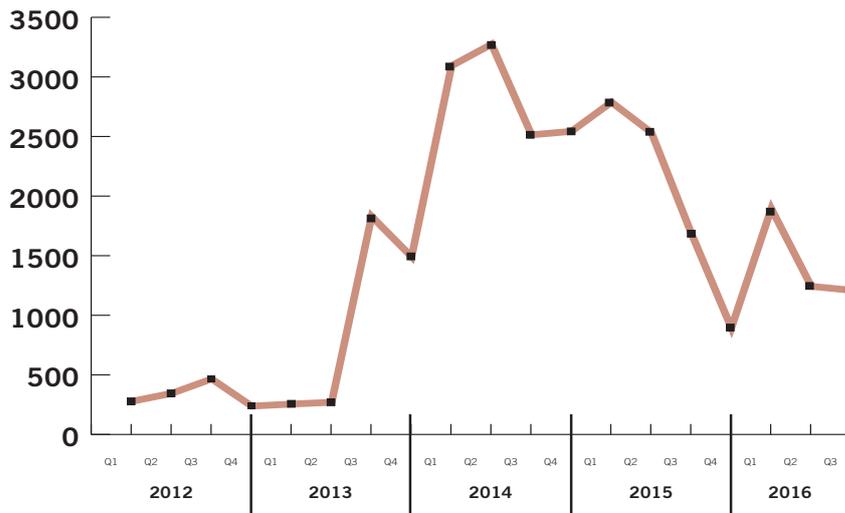
The total number of PDHs ultimately repossessed on foot of Court orders made in the High Court and Circuit Court in Q3 2016 came to 141. This represents a 39% increase on Q2 2016.

NUMBER OF PDH MORTGAGE ACCOUNTS IN ARREARS



Source: Central Bank of Ireland - Residential Mortgage Arrears and Repossession Statistics

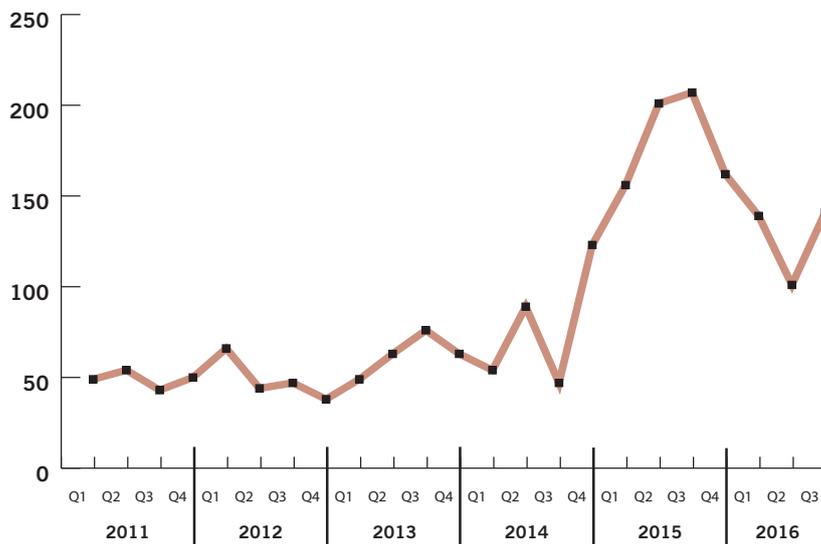
NUMBER OF PROCEEDINGS ISSUED IN THE IRISH COURTS FOR ENFORCEMENT OF SECURITY IN RELATION TO PDHS



Total number of proceedings:
 2013: 3,845
 2014: 11,424
 2015: 7,902
 2016: 4,348 (Q1, Q2 & Q3 only)

Source: Central Bank of Ireland - Residential Mortgage Arrears and Repossession Statistics

PDHS ACTUALLY REPOSSESSED ON FOOT OF A COURT ORDER



Source: Central Bank of Ireland - Residential Mortgage Arrears and Repossession Statistics

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