FROM PILLAR TO POST

A Series of Papers on issues arising in new and existing consumer debt cases in light of the Covid 19 pandemic

Paper Four:

A review of debt resolution mechanisms and debt support services:

with Final Recommendations for Reform

flac
promoting access to justice

A SERIES OF PAPERS

FROM PILLAR TO POST PAPER FOUR:

A REVIEW OF DEBT RESOLUTION MECHANISMS AND DEBT SUPPORT SERVICES:

WITH FINAL RECOMMENDATIONS FOR REFORM

A SERIES OF PAPERS ON ISSUES ARISING IN NEW AND EXISTING CONSUMER DEBT CASES IN LIGHT OF THE COVID 19 PANDEMIC

FREE LEGAL ADVICE CENTRES,
NOVEMBER 2022

TITLES OF THE SERIES OF PAPERS

—PAPER ONE—
SETTING THE CONTEXT: a critical examination of data relating to consumer debt, welfare, labour market and the economy

—PAPER TWO—
TEN YEARS AND COUNTING: Conclusions from a decade of attempting to resolve family home mortgage arrears in Ireland

—PAPER THREE—
ASSESSING CURRENT RESEARCH DATA on the payment breaks on credit agreements offered by credit institutions as a result of the Covid 19 pandemic

—PAPER FOUR—
A REVIEW OF DEBT RESOLUTION MECHANISMS AND THE DEBT SUPPORT SERVICES:
With final recommendations for reform

— About FLAC —

FLAC (Free Legal Advice Centres) was founded in 1969 and is one of Ireland's oldest civil society organisations. It is a voluntary, independent, legal and human rights organisation which for the last fifty years has been promoting access to justice. FLAC works in a number of ways, it:

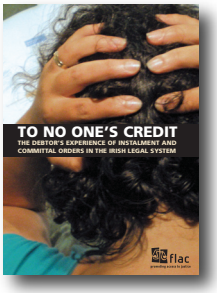
- Operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information.
- Runs a nationwide network of legal advice clinics in 71 locations around the country where volunteer lawyers provide basic free legal advice to approximately 12,000 people per annum.
- Is an independent law centre that takes cases in the public interest, mainly in the areas of homelessness, housing, discrimination and disability.
- Operates a legal clinic for members of the Roma Community.
- Has established a dedicated legal service for Travellers.
- Operates the public interest law project PILA that provides a pro bono referral scheme that facilitates social justice organisations receiving legal assistance from private practitioners acting pro bono.
- Engages in research and advocates for policy and law reform in areas of law that most affect the marginalised and disadvantaged.

FLAC's vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights. FLAC makes policy recommendations to a variety of bodies including international human rights bodies, drawing on its legal expertise and providing a social inclusion perspective.

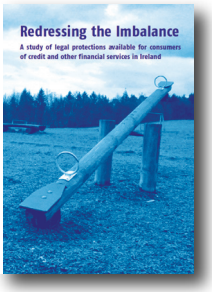
FLAC reports in the areas of debt and credit:

An End Based on Means
A Report on how the legal system in Ireland treats uncontested debt cases with an examination of alternatives and proposals for reform (May 2003)

To No One's Credit
The Debtor's experience of Instalment and Committal Orders in the Irish legal system (June 2009)



Redressing the Imbalance
A study of legal protections available for consumers of credit and other financial services in Ireland (March 2014)



For more of FLAC's work in the area of debt law reform visit https://www.flac.ie/priorityareas/debt-law-reform/

For more of FLAC's work in the area of consumer credit law reform visit https://www.flac.ie/priorityareas/consumer-credit-law-reform/

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Paper Four:
A review of debt resolution mechanisms and debt support services:
With final recommendations for reform

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LIST OF ACRONYMS

AHB:	Approved Housing Body
ARA:	Alternative Repayment Arrangement
AI:	Approved Intermediary
CBI:	Central Bank of Ireland
CCMA:	Code of Conduct on Mortgage Arrears
CCPC:	Competition and Consumer Protection Commission
CIB:	Citizens Information Board
CPC:	Consumer Protection Code
CSO:	Central Statistics Office
DMA:	Dedicated Mortgage Arrears Adviser
DRN:	Debt Relief Notice
DRO:	Debt Relief Order
DSA:	Debt Settlement Arrangement
DSP:	Department of Social Protection
EU:	European Union
FCA:	Financial Conduct Authority (UK)
FSPO:	Financial Services and Pensions Ombudsman
FLAC:	Free Legal Advice Centres
GFC:	Global Financial Crisis
ISI:	Insolvency Service of Ireland
LAB:	Legal Aid Board
LILA:	Low income, low asset
LRC:	Law Reform Commission
MABS:	Money Advice and Budgeting Service
MARP:	Mortgage Arrears Resolution Process
MTR:	Mortgage to Rent
NGO:	Non-Governmental Organisation
PC:	Protective Certificate
PCR:	Periodic Critical Review
PDH:	Principal Dwelling House
PIA:	Personal Insolvency Arrangement
PICRS:	Personal Insolvency Court Review Service
PIP:	Personal Insolvency Practitioner
PUP:	Pandemic Unemployment Payment
RLE:	Reasonable Living Expenses
SFS:	Standard Financial Statement
SI:	Statutory Instrument

A SUMMARY OF RECOMMENDATIONS

STATE-FUNDED SERVICES (SECTION 2)

A Statutory MABS (See Section 2.1.)

- Place MABS on a statutory footing with an independent clear consumer protection mandate, founded on rights based, empowering, non-judgmental principles which would embody preventative, curative and rehabilitative consumer dimensions.
- MABS should act as a one stop shop for those in debt and be able to provide a full range of services including information, advocacy, dedicated mortgage arrears advisers, accountancy and insolvency services, legal advice and other legal assistance including strategic litigation where appropriate and necessary.
- MABS should have an explicit function of documenting the experience of its client base and be empowered to carry out research and make policy recommendations across a wide range of societal issues that flow from the borrowing and repaying of credit and the provision of goods and services.
- MABS should be empowered to carry out pre legislative scrutiny on any legislation that comes within its remit.
- MABS should be provided with sufficient funding to carry out its remit and should be funded in part by contributions from the financial services sector.

Civil Legal Aid in unsecured debt cases (See Section 2.5.)

- The Legal Aid Board should clarify the extent to which legal services are available in unsecured debt cases, and the number of cases in which legal representation has been provided in recent years to borrowers seeking to challenge the enforceability of the debt in the courts.

Civil Legal Aid in repossession cases (see Section 2.7.)

Having regard to the case law of the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) and the provision of the EU Charter of Fundamental Rights, the Legal Aid Board should provide legal assistance including legal advice and legal representation in debt cases, having regard to:

- The importance of what is at stake, taking into account the vulnerability of the applicant,
- The emotional involvement of the applicant, which may impede the degree of objectivity required by advocacy in court,
- The complexity of the relevant law or procedure,
- The need to establish facts through expert evidence and the examination of witnesses,
- The applicant's capacity to represent him or herself effectively

and so far as such aid is necessary to ensure effective access to justice.

PRE-LITIGATION MECHANISMS (SECTION 3)

Code of Conduct on Mortgage Arrears/Mortgage Arrears Resolution Process (see Section 3.1.)

Provide that the CCMA (or a revised code) be issued as a statutory instrument under Central Bank legislation and that a clause in the Code provide that the terms of that statutory instrument shall be admissible in legal proceedings in the courts.

Ensure that a far more rigorous and regular inspection and enforcement regime is put in place to monitor lender compliance with the rules of the MARP, as new mortgage arrears cases may emerge as a result of Covid 19 and as

economic trends, including inflationary pressures, continue to ebb and flow.

Amend the existing MARP rules in the following respects:

- To provide that the lender's assessment of the borrower's full circumstances under Provision 37 must be in writing and must involve a detailed examination of each criterion and their cumulative effect in leading to a final written decision
- To provide under Provision 37 that the fourth circumstance—'the borrower's current repayment capacity' should be amended to read 'the borrower's current and future repayment capacity'
- To provide in Provision 39 that 'a lender must explore all of the options for alternative repayment arrangements' rather than 'all of the options for alternative repayment arrangements offered by that lender'
- To provide in Provision 40 that the lender's documented consideration of all the options examined, why they were or were not considered appropriate or sustainable for the borrower's individual circumstances or were or were not offered to the borrower, be explained in writing in full to the borrower
- To provide that the borrower's right of appeal against adverse decisions to an Appeals Board established by the lender in Provisions 49–55 be removed and replaced with the right of appeal to an independent third party established by statute to carry out this (and other) debt resolution functions.
- To provide that the MARP process reflect the requirements of the public sector duty provided by section 42 of the IHREC Act, 2014 so that circumstances like the age and disability of the debtor are factored into consideration.

A revised code covering all debt (See Section 3.3.)

A single CBI regulatory Code for regulated entities should be put in place encompassing early resolution procedures for both mortgage and non-mortgage debts. It should incorporate rules of engagement for the three standard scenarios that generally apply – a borrower with mortgage debt only, with non-mortgage debt only, and (the most problematic and common) with both mortgage debt and non-mortgage debt together. Such a Code should provide:

- General guidance on the relative priority of debts - MABS methodology provides a useful framework in this regard.
- Ensure as a first priority that essential services are paid so they are not cut off (subject to the latitude provided by the Energy Engage Code detailed below, which obliges energy suppliers to offer a range of payment options to customers in arrears, such as a debt repayment plan).
- In a mixed mortgage debt and non-mortgage debt scenario, the family home mortgage should be accorded payment priority but with a recognition that non-mortgage credit agreements in arrears must also be attended to.
- Where there is no mortgage and the debtor lives in rented accommodation, the payment of the rent in order to avoid potential eviction be prioritised before payments to non-mortgage creditors.

Data on utility and non-mortgage credit agreement arrears (See Section 3.4.)

- The figures on electricity and gas arrears published periodically by the Commission on the Regulation of Utilities (CRU) should be published on a routine basis (every six months).
- The CBI should publish data on a rolling basis setting out the extent of non-mortgage credit agreements in arrears so that the depth of any evolving problem can be monitored and effective solutions can be devised.

Priority rent and utility payments (See Section 3.5.)

The existing Consumer Protection Code or any such revised Code should specifically provide that a borrower who lives in rented accommodation is entitled to prioritise his/her rental payments and, to the extent that it is required, his/her utility payments, before making any payments on non-mortgage credit agreements. An exception to be considered here would be payments on a car loan or hire purchase agreement where the borrower requires the vehicle for work purposes.

Data on rent arrears (See Section 3.5.)

National data on the extent of rent arrears, in both private rented and public housing, should be collated and published on a periodical basis.

PERSONAL INSOLVENCY MECHANISMS (SECTION 4)

Insolvency Arrangement Applications (see Section 4.2.)

The Department of Justice, as part of the current review of the Personal Insolvency Act 2012 (as amended) and in advance of any subsequent Bill to reform the legislation, should enquire through the Insolvency Service of Ireland (ISI) and through the network of active Personal Insolvency Practitioners (PIPS), into the extent that formal applications for insolvency arrangements under the legislation (whether in the form of PIA or DSA applications) have resulted in voluntary payment arrangements being put in place, the reasons why and how these arrangements have worked out in practice in the longer run.

Debt for equity Personal Insolvency Arrangements (PIA) (see Section 4.4.)

A statutory review of the personal insolvency legislation, already much delayed, is currently being completed by the Department of Justice. This review must urgently consider the key issues facing the significant number of currently restructured family home mortgages or such mortgages in arrears facing a shortfall at the end of the term, where many of the borrowers concerned now face or may soon face a reduced earning capacity, and where debt for equity may provide a solution. Options such as providing in the legislation that the repossession versus arrangement comparison is not a mandatory requirement in framing a proposal for a Personal Insolvency Arrangement and that a lender's refusal to agree a debt for equity swap may be subject to review under s.115A of the Act should be considered. If necessary, the Department should consider establishing a working group to develop such proposals.

Data on positive/negative equity cases (See Section 4.4.)

Detailed information on the positive/negative equity position of households in mortgage arrears should be gathered to help formulate appropriate solutions for cases of positive equity with unsustainable arrears.

Information on and Circuit Court review in DSA cases (see Section 4.5.)

The ISI should provide more detailed information on both the applicant and debt profile in cases where DSA applications are rejected by creditors.

The Personal Insolvency (Amendment) Act 2015 should be amended to allow debtors seek a review/appeal in the Circuit Court against the rejection of their Debt Settlement Arrangement proposal.

Access to Personal Insolvency Practitioner (PIP) advice in unsecured debt cases (see Section 4.5.)

The Abhaile scheme should be expanded to allow an insolvent debtor with unsecured debts access to a PIP assessment or, alternatively, access to a network of public free to the user PIPs should be established within the MABS network.

Debt Settlement Arrangements (DSA) – Zero payment plans (see Section 4.5.)

The introduction of a DSA 'zero payments' plan option should be researched and considered. Such a plan could allow for inbuilt periodical reviews of the applicant's disposable income to monitor any improvements that might lead to a payment for creditors (a feature that already applies to a limited extent with Debt Relief Notices). This could help to resolve legacy cases of insolvency where the level of unsecured debt exceeds the DRN threshold, without the need for the debtor to petition for bankruptcy.

Public Personal Insolvency Practitioner (PIP) network in MABS (see Section 4.5.)

A free-to-access PIP service should be established within the already state-funded MABS structure, as suggested by the Waterford MABS pilot project research in 2016, for the purpose of proposing Debt Settlement Arrangements (DSA) for those of limited means. This would allow a potential applicant's income above Reasonable Living Expenses (RLE's) to be incorporated into a DSA proposal. It would also allow existing PIPs to continue under Abhaile to look at mortgage arrears cases and propose PIA's for clients where appropriate, in addition to continuing the more commercial side of their insolvency practices.

Debt Relief Notices (DRN) (See Section 4.6.)

The requirement for DRN proposals to be court-approved should be removed. Approved Intermediaries (AI's) should be responsible for verifying applications and the Insolvency Service for checking and approving them, with an avenue of appeal to the Circuit Court where there is a creditor objection or a contested issue of law or process.

The Supervision Period should be reduced from three years to one year. This would align with both the one year supervision period for Debt Relief Orders in the United Kingdom and the reduction in the basic discharge period for bankruptcy brought about by the Bankruptcy (Amendment) Act 2015.

The alleged exercise of a preference or a transaction at undervalue should be removed as criteria affecting eligibility and replaced with a right of objection for the ISI or for a creditor to raise before the Court. Payments made to protect the debtor's basic living standards should be excluded from the definition of making a preference.

ABHAILE (SECTION 5)

Reforming the Abhaile scheme

A statutory MABS could provide a hub for additional services that may from time to time be required to assist debtors to resolve particular financial difficulties arising out of wider economic and social problems that may arise in society. For example, a statutory MABS could become the central authority to administer the Abhaile scheme or similar schemes.

In the interim, a scheme along the lines of Abhaile seems very likely to continue to be needed when the current funding provision to the end of 2022 comes to an end. However, in advance of deciding whether and what should follow, Abhaile should be independently evaluated as a matter of urgency with a view to making recommendations to substantially improve its efficiency, the integration of its respective services and the delivery of formal legally binding solutions not only for those in long-term mortgage arrears, but also for those facing potential personal insolvency with unsecured debts – for example non-mortgage consumer credit agreements, utility debt and rent arrears.

Much more specific rolling data is required in order to assess the effectiveness of the constituent services of Abhaile and the extent to which they are delivering for borrowers in arrears. For example, the following matters should be researched:

PIP advice data

- How many Abhaile related Personal Insolvency Arrangements (PIA) saw occupation as opposed to ownership of the family home retained?
- How many Abhaile related bankruptcies saw ownership or occupation of the family home retained?
- What is the nature and breakdown of the 'informal solutions' that have resulted from PIP advice?

DMA advice data

- In cases with Alternative Repayment Arrangements (ARA) in place, what is the breakdown of these arrangements, their payment performance record and prospects of long term sustainability?
- In the 250 mortgage to rent cases, were these completed MTR's or were some still in the application process?
- In the cases of borrowers resuming (full) payments, what factors gave rise to the capacity to do so?
- In the cases of proceedings being struck out, why were they struck out and what payment arrangements were then arrived at?
- In the cases of surrender/sale/trading down, has residual mortgage debt been written off?
- In terms of the numbers that may still be in the advisory process, said to be in progress to a solution, what payments have been made and how long have they been waiting to get a solution, broken down into time categories?
- Are 'trial solutions' mainly arrears capitalisation or term extension cases?
- Is there any further information available on the reasons for borrower disengagement?

Legal advice data

- In terms of the outcomes of 'Consultation Solicitor' advice, there is next to no data available. At the least, a basic set of categories of advice provided is needed for these cases.
- In terms of the 'Duty Solicitor' service, some record of the outcomes of the Duty Solicitor intervention to assist borrowers in court is required.
- As a legal aid service available in principle in both the Circuit Court and onto the High Court where required, often involving the instruction of a Personal Insolvency Practitioner (PIP), a solicitor and counsel, the Personal Insolvency Court Review (PICR) Service is very likely the most costly of the Abhaile services and well over 2,000 such cases have been funded. To only be able to say that 'our indications show that 40% of the court review cases decided by the court were in favour of the borrower' and to have no information on settled cases is insufficient and this needs to be remedied.

MORTGAGE-TO-RENT (SECTION 6)

Regular review of criteria

MTR is a valuable resolution option in long term mortgage arrears cases where the relevant household meets the criteria that apply. Recent changes to the property valuation and positive equity thresholds, in particular, were long overdue. However, if MTR is to deliver the kind of numbers envisaged, these limits and other obstacles to MTR will require regular review.

DEBT AND THE COURTS (SECTION 7)

Debt claims and debt enforcement

The 2010 recommendations of the Law Reform Commission pertaining to debt claims and debt enforcement in the courts should be re-examined by the Department of Justice and the Courts Service with a view to introducing changes to facilitate debtors to examine their initial options and to make affordable payments in the event of accepting liability.

In particular, the following requirements should be introduced:

- Claimants/Plaintiffs should be required to sign off that relevant Codes, (for example the CBI's current Consumer Protection Code, or any improved version of it that might be introduced as recommended above) have been adhered to and that every effort has been made to avoid proceedings.
- Court forms should advise respondents / defendants of their options and where assistance can be sourced, including in particular the availability of the Money Advice and Budgeting Service (MABS) to help to conduct negotiations and to assess liability.
- A respondent/defendant should be permitted to acknowledge liability and to make an offer of instalment payments that are affordable relative to his/her budget, and thus avoid the cost and stress of further enforcement proceedings
- The potential sanction of imprisonment for non-payment of a civil debt should have no place in a civilised society. The relevant provisions of the Civil Debt (Procedures) Act 2015 should be commenced with a view to bringing this to an end.
- In the current recessionary climate, a moratorium on debt claims being brought in the courts against borrowers in financial difficulty should be discussed and considered.
- A Practice Direction should be introduced by the Courts Service obliging solicitors acting on behalf of creditors seeking money judgments to ensure that every effort has been made to engage with the borrower in arrears prior to issuing proceedings, including specifically referring that borrower for assistance to MABS, and to provide written evidence of such efforts for the relevant court.

A MORTGAGE ARREARS REVIEW OFFICE (SECTION 8)

Resolving legacy long term mortgage arrears cases

- Taking into account the existence of a prescriptive personal insolvency regime that the State would be very unlikely to wish to dismantle at this point, a Mortgage Arrears Review Office should be provided for in legislation. Such an Office would act as a 'clearing house' to resolve family home mortgage arrears cases to avoid repossessions, while simultaneously acting as a conduit to a potential increase in Personal Insolvency Arrangements.

Mortgage Arrears Review Office and early arrears accounts

- A revised, more balanced and transparent MARP/CCMA process, with a right of review/appeal to an independent third party, as recommended above, should be put in place. This right of review for borrowers should lie to the independent 'Mortgage Arrears Review Office'. Thus, where a lender declines to offer an ARA or restructure to a borrower, or offers one that the borrower (and/or his/her advisor/s) does not believe is fair or sustainable, the borrower may seek to have the file reviewed by the Review Office.

Mortgage Arrears Review Office and advanced arrears accounts

- A realistic appraisal of the borrower's financial capacity to service an arrangement should be the primary consideration in more advanced arrears cases. Any borrower in this category should be

entitled to resubmit (or submit as the case may be) their case for consideration to the lender under a reconstituted MARP/CCMA in order: 1) to seek to obtain an arrangement where one has not been put in place; or 2) to seek to put in place a different arrangement to the one that has been proposed and put in place. Again, access to MABS DMA's and PIPs working under the Abhaile scheme (or equivalent) should be available and promoted from the outset. If the borrower is not happy with the outcome of this review of the assessment (or assessment as the case may be), s/he should be entitled to seek a review through the Mortgage Arrears Review Office.

Mortgage Arrears Review Office and long-term arrears accounts in legal proceedings

- Where the parties are in agreement, an existing repossession case could be adjourned for the account to be run through a Mortgage Arrears Review Office to see whether a resolution can be achieved that could lead to a strike-out of those proceedings. Again, quick access to MABS DMA's and PIP's for the defendant borrower would be essential and the emphasis would need to be on identifying formal long term ARA's and accounts that may be suitable for a Personal Insolvency Arrangement (PIA). In terms of the latter, it should also be stressed that favourable changes to the Personal Insolvency Act 2012, following the completion of the review that is currently in progress, would be a helpful development.

Mortgage Arrears Review Office and long-term arrears accounts not in legal proceedings

- A Mortgage Arrears Review Office could oversee efforts to resolve such long term arrears cases, working in conjunction with the borrower's advisors (DMA's and PIP's for example) and the lender's staff and representatives, by modelling the application of resolution options to specific accounts in arrears.

Mortgage Arrears Review Office and Repossession Proceedings

- A potentially more pro-active application of the criteria set out in s.2A (3) of the Land and Conveyancing Law Reform (Amendment) Act 2019 might be to oblige all lenders in family home mortgage arrears cases to have to seek leave from the Mortgage Arrears Review Office to bring repossession proceedings in the Circuit Court, with that Office being empowered to apply these criteria (or similar criteria) in arriving at its decision. An appeal would be available to the Circuit Court should lenders wish to challenge the Review Office's decision, were it to decide to refuse to grant such leave.

Mortgage Arrears Review Office and Personal Insolvency Arrangements (PIA)

- Where a PIA proposal is made on behalf of the PDH borrower in arrears and is rejected by the PDH mortgage lender, the current right to seek a review in the Circuit Court under the Personal Insolvency Act 2012 would continue to apply. In this way, the integrity of the personal insolvency regime would remain unaffected.

— Paper Four —

A review of debt resolution mechanisms and debt support services:
With final recommendations for reform

—Paper One—

SETTING THE CONTEXT:

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Paper One, together with a Foreword and an Introduction to the series, was

published on June 30th, 2021.

Paper One can be accessed and downloaded from: –

https://www.flac.ie/publications/flac-pillar-to-post-paper-one/

—Paper Two—

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—Paper Three—

ASSESSING CURRENT RESEARCH DATA

ON THE PAYMENT BREAKS ON CREDIT AGREEMENTS

OFFERED BY CREDIT INSTITUTIONS AS A RESULT OF

THE COVID 19 PANDEMIC

Paper Three can be accessed and downloaded from: –

https://www.flac.ie/publications/flac-pillar-to-post-paper-three/

1

SECTION

INTRODUCTION

1.1 Overview

This is the final paper in the *Pillar to Post* series. It analyses in detail the debt resolution mechanisms available in the financial and legal system in Ireland and the services in place to access these mechanisms. It makes recommendations to improve the effectiveness of these structures, and sets out a road map for tackling what now has the appearance of another financial crisis for many consumers, in terms of the potential for consumer debt, over-indebtedness and personal insolvency arising out of inadequacy of income.

In the course of researching and writing these papers over an 18 month period, the context has shifted dramatically and policy responses to largely unforeseen events have, out of necessity, been introduced as circumstances have evolved. A global pandemic, receding but stubbornly, has been followed by a military invasion that threatens peace and security worldwide. Following in the wake of both is a cost of living crisis, fuelled by now rampant inflation, supply chain issues and energy wars. It is a salutary indication of the gravity of the situation that even the most critical issue of this or any other time - the climate crisis – has been somewhat sidelined.

As ever, the macro-economic environment quickly filters down into the everyday lives of people and apprehension becomes reality in a number of cases. In Paper One of this series, published in June 2021[1], we initially gauged the extent of that apprehension, in particular by charting the relevant data and the perception of financial difficulty and consumer debt in the period immediately before the pandemic hit and subsequent to its arrival. We tracked and analysed the Pandemic Unemployment Payment (PUP) in terms of recipients and sectors; employment wage subsidy scheme numbers; rates of unemployment and Covid adjusted unemployment; data on rates of utility debt; and fears for small business and personal insolvency. We observed the perceived phenomenon of the 'incubation of debt', by which we mean the tendency of some in financial difficulty to postpone seeking help, a trend which may be reflective of Covid 19 itself where, by necessity, people stayed at home and avoided the outside world and where remedial services themselves went online and face to face engagement was largely suspended.[2]

Paper Two, published in August 2021[3], focused in considerable detail on the efforts made over a decade between 2011 and 2020 to resolve the family home mortgage arrears problem arising out of the Global Financial Crisis (GFC) and beyond. The outcome of this exploration illustrated the caution inherent in the management and resolution of that problem over that decade, characterised by a regulatory approach that neither wished to allow the repossession of family homes in any significant manner nor the write-down of impaired mortgages, broadly speaking irreconcilable aspirations in the long term. The coming into operation of personal insolvency legislation in late 2013 saw the introduction of a statutory Personal Insolvency Arrangement (PIA), but one where a sufficient threshold of creditors could vote down a proposal and no right of review or appeal was available in the courts. Numbers of approved arrangements were therefore initially low, and even an early 2016 amendment finally allowing for a court review has not had the desired effect for a number of reasons, the most significant of which is currently the number of properties in arrears that are in positive equity.

Central Bank of Ireland (CBI) research papers reviewed in Paper Two do at least point to

[1] Free Legal Advice Centres (2021). *Setting the Context: a critical examination of data relating to consumer debt, welfare, labour market and the economy.* Dublin: Free Legal Advice Centres.

[2] Of concern perhaps is that the numbers seeking help from state-funded Money Advice and Budgeting Services (MABS) have not significantly increased according to the data available so far for 2022. The latest MABS client statistics tell us that MABS services nationally had 4,074 new clients in Q.1 2022, up from 3,488 new clients in Q.1 2021, an increase of 17%. Enquiries to the MABS telephone helpline actually decreased from 6,648 in Q.1 2021 to 6,171 in Q.1 2022, a reduction of 7%. However, balanced against this, the 6,171 calls in Q.1 2022 marked a 41% increase over the number of calls in Q.4 2021.
See: https://mabs.ie/wp-content/uploads/2022/06/statistics_Q1_2022.pdf, accessed 13th September 2022.

[3] Free Legal Advice Centres (2021). *Ten years and counting: Conclusions from a decade of attempting to resolve family home mortgage arrears in Ireland.* Dublin: Free Legal Advice Centres.

mistakes made but whether this equates to lessons learned remains to be seen. In that paper, we also noted the passing of the Land and Conveyancing Law Reform (Amendment) Act 2019, legislation that in theory allows the Circuit Court to refuse to grant a Possession Order to a lender where the borrower continues to be in arrears, broadly on the grounds that the lender has failed to properly engage with the borrower and considered all available options to avoid repossession. Over three years after coming into operation, this Act remains, to our knowledge, unused and unlitigated.

In Paper Three[4], published in November 2021, we moved on to examine the available data on the extent to which borrowers, in particular consumer borrowers, availed of the payment breaks offered by banks on credit agreements during the initial phase of the Covid 19 from the end of March 2020 to the end of 2020. This analysis was undertaken to examine the initial financial impact of Covid on loan repayments and its potential effect in terms of increased future vulnerability to over-indebtedness. In the course of this research, a number of significant facts came to light. For example, over half of the accounts where borrowers had a payment break in place on their family home mortgage at the end of May 2020 (almost 36,000 accounts) drew down their mortgage in the pre-Global Financial Crisis (GFC) period from 2004 to 2008. This suggests a vulnerability to recurring financial difficulty and an age profile that would give rise to significant concern[5].

It is notable that these payment break figures did not include mortgages owned by funds and their credit servicing companies, an omission that remains unexplained. In terms of payment breaks on unsecured (consumer credit) loans offered by banks, it was also significant that around 17,000 accounts had resumed payment 'on an extended term' following the break by the end of 2020, an indicator perhaps of future payment problems. It also became apparent during this research that there is no Central Bank data published on the numbers of unsecured (consumer credit) loans in arrears, an omission that as yet remains unexplained. This lack of comprehensive data continues to undermine attempts at resolution and is a theme that recurs throughout this series.

1.2 EXECUTIVE SUMMARY

This final paper, by looking back as well as looking forward, seeks to analyse attempts to put in place an effective debt resolution infrastructure in Ireland from a debtor perspective. It takes as it starting point the premise that consumer debt is and will continue to be a constant in our society and economy. Borrowing to fund the purchase of goods, services and property is an integral part of our economic model which itself is cyclical in nature, and ability to repay is significantly influenced by global events beyond our control. Current national and international events are an obvious manifestation of this and little further needs to be said in this regard at this point, beyond acknowledging the difficult juncture that we have now arrived at and the adverse impacts it is having on people's lives.

The aftermath of the Global Financial Crisis (GFC), and particularly the period 2010-2011, starkly demonstrated how ill prepared we were to deal with the previous downturn in terms of the services and processes required to facilitate debt resolution. This was compounded by a series of overly cautious initiatives to remedy these deficiencies. **Section 2** of this paper reviews the state-funded services put in place over recent years to assist over-indebted people and critiques the largely reactive rather than pro-active nature of these developments. It also notes the strong focus on mortgage arrears, which has served to underestimate problems faced by those with unsecured debt only, likely to be a growing cohort as the costs of privately rented accommodation, energy and food spiral.

In tandem and very much interwoven with this, **Section 3** examines in detail the pre-litigation

[4] Free Legal Advice Centres (2021). *Covid 19 Payment Breaks on Credit Agreements, An Assessment of Current Research Data*. Dublin: Free Legal Advice Centres.

[5] Concerns that are backed up by Central Bank research papers published in 2021. See in particular Kelly, J., Lyons, P., McCann, F. and O'Brien, E. (2021). 'Long term mortgage arrears: Analytical evidence for policy considerations', *Financial* Stability Notes, Vol. 2021 No.8. Dublin: Central Bank of Ireland, July 2021.

mechanisms put in place following the Crash, primarily 'soft' Central Bank Codes designed primarily to facilitate, but not to oblige, effective and affordable repayment arrangements to be put in place for borrowers in mortgage arrears. This section also examines the paucity of mechanisms to deal with other less recognised forms of debt, including unsecured consumer credit agreements, utility and rent arrears, and emphasises the need to look at all types of debt when devising rules to attempt to informally resolve over-indebtedness and avoid litigation.

We then document in **Section 4** the belated introduction of personal insolvency legislation and, again, note the caution that accompanied the insolvency regime, subsequently demonstrated by the low numbers of legally binding arrangements achieved. This section also reviews the belated amendments that have since attempted to expand the reach of the legislation, and the further obstacles to making progress in this regard that require to be remedied in the current review of the legislation being carried out by the Department of Justice.

Section 5 reviews the range of diverse services and solutions provided through the interventions of the national mortgage arrears resolution service (or 'Abhaile' Scheme) and notes both the length of time that it has taken to arrive at some of these arrangements and that many of them remain informal rather than legally binding. The number of borrowers who have yet to obtain a solution, either formal or informal, is also noted, in addition to those who have disengaged from the process.

Section 6 examines the rules and conditions attached to the Mortgage-to-Rent Scheme (MTR), a resolution arrangement that allows the borrower in mortgage arrears to surrender ownership of the property to the lender, who in turn sells it on to an Approved Housing Body (AHB), with the former borrower then becoming a tenant under the conditions that normally apply to social housing. Although numbers too are low in this area, it is clear that this option can work well for borrowers who are prepared to accept loss of ownership of the family home, albeit with a slim possibility of being able to repurchase that home in the future.

Section 7 notes the proposals currently being developed by the Courts Service to set up a 'digital debt platform' that deals with debt claims and enforcement. Such a platform will allow the initiation of proceedings to obtain 'money' judgments for unpaid debts electronically and, when such judgments are obtained, may also present creditors with an online enforcement option. Following Covid and a quieter time for the courts, we argue that this review presents a timely opportunity, particularly in the context of the current inflationary climate, to ensure fair and inclusive treatment for debtors based on an assessment of financial capacity.

As the final substantive section in the paper, **Section 8** reviews end of 2021 family home mortgage arrears data and, mindful of constitutional arguments previously put forward, proposes the establishment of a Review Office to attempt to finally resolve legacy mortgage arrears cases and to provide a model going forward to resolve as many future cases as possible, without resort to the courts.

Throughout these sections, following the relevant review and analysis, recommendations for change and reform are made and these are also summarised in the introduction above.

1.3 FOREWORD

The need for decisive debt settlement

FLAC argued as far back as its first major report on consumer debt in 2003,[6] apprehending that a personal debt crisis might be in the course of developing, for which our society was manifestly unprepared, that *'only debt settlement legislation with firmly established debtor release and protected earnings criteria can provide the framework necessary to resolve the conflict of interest between the right of the lender to recover as much as possible of the amount loaned and the right of the consumer and his/her dependants to live with dignity in a society that, through its vigorous promotion of*

[6] Joyce, P. (2003). *An End Based on Means.* Dublin: Free Legal Advice Centres.

credit consumption, has arguably contributed to their over-indebtedness'.

In the introduction and overview to Paper Two[7] of this series, we further suggested that *'consumer over-indebtedness in a market economy is now a kind of continuum, with the level of problem debt subject to the ebb and flow of economic trends and unforeseen events (Covid serving as the ultimate example of the latter').*

We also observed that *'personal debt difficulty seems destined to remain a feature of Irish society and we have to work decisively to resolve it. Thus, regardless of the degree of difficulty experienced, consistency of approach and a realistic assessment of what households in poor financial circumstances can afford to pay should be the cornerstone of the State's response'.*

There is a commonality of approach suggested in these respective comments, though the time interval between them is now over 18 years. Over the course of those years we have had a number of initiatives, including most notably various iterations of the Code of Conduct on Mortgage Arrears (CCMA), the Personal Insolvency Act 2012 (which commenced operation in reality in late 2013) and, most recently, a significant series of amendments to the Land and Conveyancing Law Reform Acts of 2009 and 2013.[8] The legislative and quasi-legislative developments over this period have, in our view, been characterised by a fear of change and undue caution, and most notably, the lack of a core underlying strategy and philosophy.

Thus, although policy makers, regulators and governments acquiesced in the bailout of the Banks and continued to encourage hard pressed citizens to avail of credit post-Global Financial Crisis (GFC), albeit in a more restrained manner, they largely shied away, at least initially, from effective mechanisms to write down debt where the borrower was manifestly insolvent. Indeed, in framing the personal insolvency legislation particularly, some evidence would suggest that policy makers listened far more carefully to the credit industry than to those advocating on behalf of the over-indebted,[9] even though the former played a significant role in creating the problem in the first place.[10]

Thus, with the exception of the Debt Relief Notice (DRN), a mechanism in the personal insolvency legislation to write off comparatively small levels of debt following a lengthy supervision period of three years, debt write down was initially dependent on majority creditor agreement with no appeal mechanism for debtors, though the Minister for Justice at the time continued to insist that there was no creditor veto in operation. With numbers of solutions low, the eventual introduction of a review mechanism to the Circuit Court in early 2016 in the case of Personal Insolvency Arrangements (PIA), albeit limited in some respects, has led to some increase in numbers and some significant case law, though the adverse outcomes for borrowers in some recent high profile PIA reviews would suggest that amendments to the legislation are urgently required.[11]

Also significant, and also in early 2016, came the further reform of the bankruptcy legislation, with a one year discharge period now the norm and acting as a backstop in the insolvency system.[12] As these legislative and quasi-legislative options developed, the range of services to assist borrowers, struggling not just with the debts themselves, but also with accessing assistance within the evolving infrastructure, also grew and became formalised in the mortgage arrears arena with the introduction of the Abhaile scheme[13]. Regrettably, it is hard to say that there was, at any point, a coherent and integrated plan and this remains largely the case.

[7] Ibid, see page 3 above.

[8] See the Land and Conveyancing Law Reform (Amendment) Act 2019.

[9] Spooner, J. (2018). "The Quiet-Loud-Quiet Politics of Post-Crisis Consumer Bankruptcy Law: The Case of Ireland and the Troika", *Modern Law Review*, (2018) 81(5) MLR790–824. This article presents evidence suggesting that the failure of policymakers to enact debt relief measures may lie in the superior influence of the coordinated and concentrated financial sector over legislative processes as compared to the diffuse and disorganised interests of consumer debtors.

[10] See: Houses of the Oireachtas (2016). *Report of the Joint Committee of Inquiry into the Banking Crisis, Volume 1: Report*. Dublin: Houses of the Oireachtas, January 2016.

[11] See Section 4.4. below for further detail.

[12] Note however that the person discharged from bankruptcy may be obliged to make payments to the Official Assignee under an Income Payments or Bankruptcy Payments Order for up to three years.

[13] Examined in detail in Sections 2 and 5 of this report.

The ongoing problem of housing debt

Throughout this time, the ongoing failures of housing policy in Ireland provide a troublesome backdrop and a substantial obstacle to the effective resolution of mortgage arrears in particular. In Paper Two of this series, we documented in some detail the longstanding and ongoing struggle of a significant number of households to remain in the family home, even in the face of prolonged litigation. Perhaps, if there had been greater alternative affordable housing options available, many borrowers might have saved themselves the trauma of defending their position. However, the reality is that these options did not, and still do not, exist.

All the while, the Personal Insolvency Arrangement (PIA) option under the insolvency legislation throws up increasingly difficult scenarios in positive equity cases where the value of the property exceeds the mortgage balance. Confined by the requirement to show that a proposal will lead to a better return for the secured creditor than bankruptcy (usually involving repossession of the dwelling), experienced personal insolvency practitioners and their legal counsel have proposed arrangements that would in theory see the borrower making mortgage payments way beyond normal retirement age and life expectancy. In reality, some of these proposals, if accepted, would result in the secured creditor/s mopping up what remains of the mortgage debt from what remains of the applicant's estate.[14]

As noted and reviewed in detail in Paper Two of this series,[15] the tone of analysis and commentary from the Central Bank of Ireland (CBI) in recent years seems increasingly tinged with regret that a more decisive approach was not adopted by or even perhaps imposed on financial institutions post-Global Financial Crisis (GFC), with many accounts initially mired in short-term repayment arrangements, comprised solely or mostly of interest for significant periods of time, leaving the principal largely untouched.[16]

The consequences of this trend has arguably become most apparent in a report published by the CBI in July 2021,[17] where the extent of the outstanding liability at the end of the term of close to 100,000 family home mortgage accounts is worryingly outlined, with particular concerns expressed for older borrowers. In a press release[18] to accompany a further paper also published in July 2021,[19] the CBI suggested that lenders need to do more to resolve long-term mortgage arrears and identified *'the inadequate use of existing tools to deliver sustainable restructures, inconsistencies in the approaches to personal insolvency arrangements, inadequate consideration of diverse borrower demographics and the need for greater collaboration in seeking system-wide solutions for those in the deepest levels of distress'.*

However, it is the statement in that press release that *'full resolution cannot be delivered solely within the financial system'* that intrigues. It would be important that the CBI fully articulate what it means by this, as further personal debt difficulties appear on the horizon.

The CBI calling for more action by lenders to resolve long-term mortgage arrears cases does not make it happen. In addition, as more and more loans have been sold to third party funds or

[14] In one of these recent cases – the Fennell case –the presiding High Court judge (Sanfey.J) suggested that a *"debate take place among all the relevant stakeholders as to whether it would be beneficial, in the sense of being in accordance with the scope and intendment of the Act, if the legislation were to permit a situation whereby a PIP (a Personal Insolvency Practitioner) could propose the reduction of the repayments by a debtor over a restructured term to a level of affordability, notwithstanding that the term was likely to be extended beyond the lifespan of the debtor, providing the PIP could establish by evidence that such payments were sustainable, and particularly where the debtor's mortgage is in positive equity, such that the PPR (Principal Private Residence) lender – as in the present case – would be likely to recover its debt in full on the demise of the debtor."* See further detailed discussion on these issues below in Section 4.4.

[15] See pages 39-42.

[16] See McCann, F. and O'Malley, T (2020). 'Resolving mortgage distress after Covid-19: some lessons from the last crisis', *Financial Stability Notes,* Vol. 2020, No 7, September 2020. Dublin: Central Bank of Ireland.

[17] Duignan, D. and Kearns, A. (2021). *Behind the Data: Mortgage borrowers facing end of term repayment shortfalls.* Dublin: Central Bank of Ireland, July 2021.

[18] "More action is needed by lenders to resolve long-term mortgage arrears, to support distressed borrowers and improve the functioning of the mortgage market for all", *Press release*, 13th July 2021, Central Bank of Ireland.

[19] Kelly, J., Lyons, P., McCann, F. and O'Brien, E. (2021). 'Long-term mortgage arrears: Analytical evidence for policy considerations', *Financial Stability Notes*, Vol. 2021 No.8. Dublin: Central Bank of Ireland, July 2021.

agents acting on their behalf,[20] the influence that may be brought to bear on the loan owner to find a solution may have diminished. A perception has developed in some quarters during Covid that the mortgage arrears problem is largely solved and this seems to have been influenced by the relative absence of new Possession Orders and the enforcement of such orders. The data, however, firmly indicates that long-term arrears cases remain problematic. This is summed up in the concerning statistic from the most recent figures available that 22,515 accounts (49% of the total of accounts in arrears) were deemed to be co-operating by their lender *but had no agreed restructure in place at end of Q.2 2022.*

Thus, while the problem may have been parked, it certainly remains to be resolved. In September 2022, it was reported that the European Central Bank (ECB) was contemplating further interest rate increases[21], and a significant rate increase of 0.75% in the main refinancing rate duly followed, to be quickly followed by a further rise of 0.75% on 27th October. Unfortunately, it is likely that as further predicted rate increases are introduced, reduced payment capacity will result in some existing arrears cases worsening and some new arrears cases developing. This prospect must see us redouble our efforts to initiate further legislative and regulatory reform, and we outline a number of detailed proposals below.[22]

The challenges of insolvency in unsecured debt cases

With all the discussion and speculation about mortgage arrears cases over the past decade, the challenges that they pose and how they might be resolved, there has been insufficient consideration of those *without* mortgages but experiencing difficulty meeting their financial commitments. However, the fallout from Covid 19 and other recent adverse events is unlikely to allow this to continue for long. We have seen in Paper One of this series,[23] that significant numbers of households were concerned about their position *before* Covid arrived and for many two years of the pandemic will not have alleviated this concern. These are not the households whose deposit accounts reportedly bulged with cash because successive lockdowns restricted their social lives. These are households where household members were laid off, put on short time, or lost their employment or business because of Covid restrictions and whose incomes were tight in the first place.

The financial supports associated with Covid - the Pandemic Unemployment Payment (PUP), the Wage Subsidy Scheme and the Covid Restrictions Business Support Scheme - have been wound down, some redundancies and business closures have followed and an increase in personal insolvency is threatened. Adding to the pressures has been a substantial inflation problem and the spiralling costs of food and services, particularly energy, fuel and accommodation, all exacerbated by the Russian invasion of Ukraine and supply chain issues. None of these factors appears to be going away any time soon.

A CBI 'Economic Letter'[24] confirms that annual inflation in Ireland averaged 6.2% in the first four months of 2022, rising to 7.3% in April alone, and attributed this broadly to the re-opening of the economy after the pandemic restrictions, supply chain disruptions, the impact of the Russian invasion of Ukraine and very high increases in energy costs. It also notes that a very significant majority (83%) of 'a nationally representative sample' of 5,000 individuals selected via algorithm by 'Ireland Thinks' '*expected prices to either increase more rapidly or at the same rate over the next year*'.[25]

The ramifications of such expectations on the sustainability of personal finances and the servicing of credit agreements, rental obligations and utility contracts are potentially considerable,

[20] Of the 25,898 family home mortgage accounts in arrears of over one year at end 2021, 67% are now owned by non-banks. At end 2020, the percentage figure owned by non-banks was 55%. In turn, of the 6,257 accounts that were the subject of repossession proceedings at end 2021, 4,225 (68%) are owned by non-banks. For further discussion, see Section 8 below.

[21] 'Is the ECB about to opt for a 0.75% hike in rates?' *RTÉ News*, 4th September 2022.

[22] See further at Section 8.

[23] Ibid, see Section 1.1.

[24] Cunningham, K. Garabedian., G. and Zekaite, Z. (2022). 'A snapshot into inflation and earnings expectations by Irish residents', *Economic Letter*, Vol. 2022, No. 2. Dublin: Central Bank of Ireland.

[25] Ibid, p.4

especially as it is likely that earnings and social welfare payments will not increase in comparative terms. It is also apparent that the ECB is responding to such inflationary pressures by increasing interest rates, with a corresponding increase likely in instalments in mortgage and other credit agreements. As with the post-GFC period, the general discourse is again more about how we should now respond to what has arrived, and less about how we should ready our debt-related services and systems for what is to come.

Data deficits

In this regard, throughout this series of papers we have frequently referenced the **data deficit** that exists in the personal debt sphere, a deficiency that inhibits informed policymaking, reflective thinking and independent analysis. Broadly speaking, there are three types of data deficit in the credit/debt domain, each of which is highlighted in this final paper of the series. The first is in relation to the absence of headline data on the *extent and nature* of personal/household over-indebtedness within society, an example being the lack of timely statistics on 'unsecured' arrears such as rent, utility and particularly non-mortgage credit. The second type of deficit relates more to a *lack of depth* in the data, particularly in terms of certain aspects of mortgage arrears and personal insolvency situations. The third and final deficiency concerns a widespread lack of detail on the *impacts of policy interventions* in the form of publicly-provided services, measures, schemes and systems, where user / consumer feedback appears to be rarely sought.

2

SECTION

A REVIEW OF STATE-FUNDED SERVICES IN PLACE TO ASSIST OVER-INDEBTED PEOPLE

The piecemeal approach to resolving the problem of both mortgage arrears and other problem debt in Ireland, since boom turned to bust, is mirrored in the network of services assembled to assist borrowers in difficulty. The result of this approach is the development of an incremental patchwork that has, like the regulatory and legislative measures introduced to seek to resolve such debt, largely been more reactive than pro-active, and though impactful has been insufficient to address the extent of those difficulties.

These two streams – the resolution mechanisms and the services to assist those in debt to access them – run together and are inextricably linked. In this section, we critique the services involved, as at least some of these pre-date the major spike in consumer debt that gave rise to a pressing need for new solutions, a need that we have argued in this series is still unmet in many respects. We begin with an examination of the development of state-funded Money Advice and Budgeting Services, and then turn to a review of how legal services have evolved for those in financial difficulty, including by way of Abhaile, the government-funded mortgage arrears resolution service. The section concludes with an examination of the Civil Legal Aid Scheme primarily as it relates to mortgage arrears problems.

2.1 MONEY/DEBT ADVICE – MONEY ADVICE AND BUDGETING SERVICES (MABS)

At the forefront of the state-funded response to problem debt for some thirty years now have been Money Advice and Budgeting Services (MABS). Although it is not intended here to go into any detailed historical review of MABS development, a brief synopsis of its evolution is required to make some independent assessment of its current position and situation. MABS began as five state funded pilot projects in 1992, initiated to provide assistance with the growing problems of debt as a result of moneylending,[26] a phenomenon identified by the Combat Poverty Agency in a 1988 study of credit and indebtedness among low income families.[27]

Development

As the 1990's unfolded and all forms of consumer credit grew in volume, so did the need to address the resulting issues of over-indebtedness that began to multiply. By the turn of the millennium, there were few major towns in Ireland without a MABS office. The structure of these services was relatively straightforward; each consisted of a company limited by guarantee with paid staff, managed by a Board formed locally to oversee its work. These Boards were composed of voluntary members largely involved in community service work – representing for example welfare services, health boards, credit unions and the Society of St Vincent de Paul - funded directly by the then Department of Social Welfare (now the Department of Social Protection).

As the number of MABS offices grew, the administration of the services it provided through a network of over 50 companies seemingly became an increasingly labour-intensive task and its parent department started to look for alternative structures. A Bill to put MABS on a statutory basis was published in 2002 (The Money Advice and Budgeting Service Bill, No 13/2002).[28] Amongst other measures, it proposed to *'establish a National Money Advice and Budgeting Service Advisory Committee to consult with and advise the Minister on matters of policy relating to the service'.*[29] Ultimately, this

[26] Dillon, B. and Redmond, D. (1993). *Evaluation of Pilot Projects to Combat Moneylending and Indebtedness. Dublin*: NEXUS Research Cooperative.

[27] See Daly, M. and Walsh, J. (1988). *Moneylending and Low Income Families*. Dublin: Combat Poverty Agency.

[28] https://www.oireachtas.ie/en/bills/bill/2002/13/, accessed 13th September 2022.

[29] This Bill was advanced by then 'National Co-ordinator' of MABS, Liam Edwards, a now retired civil servant in the Department of Social Welfare, who oversaw the development of MABS nationally and developed important links across Europe for both MABS and a number of the bodies and individuals working in association with it, including FLAC. The direction of travel at this stage was towards a money advice service attuned to progressive developments in practice and law, in order to better deliver outcomes for its clients. The Bill followed an announcement by then Minister for Social Community and Family Affairs, Dermot Ahern TD at the 2000 MABS National Conference in Tralee, that the time had come to consider putting MABS on a statutory basis. Over a decade later, the Programme for Government (2011) contained a commitment (p.44) to "convert the Money Advice and Budgeting Service into a strengthened Personal Debt Management Agency with strong legal powers".
(See: https://www.socialjustice.ie/system/files/file-uploads/2021-09/2011-03-06-

Bill did not progress in the Houses of the Oireachtas and was subsequently overtaken by events in the form of the Global Financial Crisis (GFC). The fallout resulted in severe public spending cuts, which included the abolition - and in some cases the forced merger - of what were perceived to be 'quangos', with Ireland's equality infrastructure hit particularly hard.[30]

Against this backdrop, an alternative option transpired in late 2008, namely to place the Money Advice and Budgeting Service (MABS) under the umbrella of the Citizens Information Board (CIB).[31] In response to a parliamentary question of November 11th 2008 from Deputy Ruairi Quinn, concerning the projected savings arising from this proposal,[32] then Minister for Social and Family Affairs, Mary Hanafin replied that:

> ***However, it has been recognised for some time that the Service needs a proper legislative basis and structure. The Programme for Government envisaged that such a new structure for the MABS would involve strong national leadership and would maximise the current local voluntary involvement in the service.***
>
> ***The Government has decided that this can best be achieved by placing the MABS with the Citizens Information Board. The MABS and Citizens Information Centres complement each other well as both are involved in providing information, advice and advocacy services to the public. In addition, the Citizens Information Board has a long association with the MABS at both national and local level and was involved in establishing some of the original MABS pilot projects.***
>
> ***There will be no change in the status of the 53 independent MABS companies, nor in the employment status of their 240 employees that provide the service at local level. It is not envisaged that significant savings or additional costs will arise on the assignment of the provision of the MABS to the Citizens Information Board.***

MABS however, in our view, never got its own *'proper legislative basis and structure'* with *'strong national leadership'* and the *'status of the 53 independent MABS companies'* did eventually change as a result of a restructure to a regional basis in 2019.[33] It is a stark reflection that having presided over the glut of highly risky lending that was manifestly coming home to roost in 2008, government then failed, as the personal debt crisis deepened, to ensure that a robust money advice structure with a full suite of the necessary ancillary (including legal) services to assist over-indebted people to resolve their difficulties was put in place. Ostensibly, it would appear that the lack of public monies and the consequent need to dissolve or merge perceived 'quangos' was the principal reason for this,[34] which is somewhat ironic considering the vast financial bill to the taxpayer that ensued in the bank bailout.[35]

Backdrop to MABS development

In November 2010, the then Irish government entered into an "economic adjustment" programme with the Troika in the form of the European Commission (EC), European Central Bank (ECB) and the International Monetary Fund (IMF).[36] As part of this programme, the Govern-

programmeforgovernment2011-2016.pdf, accessed 30th October 2022).

[30] See: 'Equality As Rhetoric: The Careless State Of Ireland', Paper presented to the MacGill Summer School in 2013 by Professor Kathleen Lynch, Equality Studies Centre, UCD School of Social Justice. The Combat Poverty Agency for example was abolished in 2009.

[31] The Citizens Information Board is the statutory body which supports the provision of information, advice and advocacy on a broad range of public and social services. This was done through amendments contained in the Social Welfare (Miscellaneous Provisions) Act 2008. All MABS services including the MABS client offices, the National Helpline, and MABS National Development Limited ('NDL', the principal provider of technical support, training and other support to the offices) were thereby subsumed into the Citizens Information Board (CIB).

[32] PQ 39499, 2008.

[33] 'Money Advice and Budgeting Service', *Dáil Éireann Debate*, Tuesday 25th June 2019.
See: https://www.oireachtas.ie/en/debates/question/2019-06-25/702/, accessed 13th September 2022.

[34] As referenced above, this became especially apparent in the area of equality, where the infrastructure of the State was effectively dismantled. See: Lynch (2013), ibid.

[35] The final Bill is estimated to be in the region of €40 Billion. See: 'Bank bail-out estimated to have cost State €41.7bn, says Comptroller', *Irish Times*, 30th September 2019.

[36] European Commission (2011). *European Economy: The Economic Adjustment Programme for Ireland,* Occasional Papers 76, February 2011, Brussels: European Commission, Directorate-General for Economic and Financial Affairs.

ment agreed a Memorandum of Understanding (MOU) to restore financial sector viability following the Global Financial Crisis and its consequences. Within this MOU, a government commitment was given to reform Ireland's then outdated and inadequate personal insolvency architecture. This commitment, given in December 2010, read as follows:

> ***We will also reform the personal insolvency regime for financially responsible individuals (including sole traders), which will balance the interests of both creditors and debtors. The objectives will be to lower the cost and increase the speed and efficiency of proceedings, while at the same time mitigating moral hazard and maintaining credit discipline.***[37]

The conditions placed on the State by the Troika in terms of mitigating moral hazard and maintaining credit discipline, helped to ensure that there was no great appetite at this time to fostering an up-skilled, independent, statutory-based money advice sector and a strengthening of the debtor advocacy voice. Thus, even a comparatively mild recommendation such as that made by the Inter-Departmental group on (residential) Mortgage Arrears (or Keane Group) in 2011,[38] for the introduction of specialist financial, legal and accounting expertise in the form of 100 debt advisors with a financial, legal or accounting background to assist with the growing problem of mortgage arrears and related debt, was never implemented.[39] Pointed references such as above to 'the reform of the personal insolvency for financially responsible individuals' set the tone for the debate that followed in the media and the term 'debt forgiveness' came to be routinely used when discussing whether borrowers should or should not be allowed any form of write-down of unsustainable debt, even where loans had clearly been extended imprudently.

MABS structure today

A subsequent re-organisation - in the face of significant political opposition[40] - saw the CIB establish eight regional MABS services to replicate the structure employed for Citizens Information Services, each region with a separate company limited by guarantee (with a Board) and its own Regional Manager.[41] The former MABS National Development Limited ('NDL') became reconstituted as MABS Support CLG and continues to provide technical and other support to money advice staff. Responsibility for the National Helpline, which had previously been housed within the NDL Company, was assigned to one of the new regions, the North Dublin region.

According to the most recent data we could access, MABS funding from the State amounted to almost €24 million per annum in 2017 and 2018.[42] There is, however, no MABS-specific unit or team currently within the CIB[43] and in our view, the existing structure suggests lack of both a 'core' and leadership for MABS. As regards the funding source itself, in some countries such as the UK[44] and France,[45] financial institutions contribute to money advice services in line with the "polluter pays" principle. In Ireland, a levy on

[37] EU/IMF: Programme of Financial Support for Ireland 14/12/2010: Memorandum of Understanding between the European Commission and Ireland ("Restoring Financial Sector Viability", p.7, point 16).

[38] The Keane Group followed on from the Cooney 'Expert Group on Mortgage Arrears and Personal Debt' in 2010. See: Department of Finance (2011). *Inter-Departmental Mortgage Arrears Working Group, 30th September 2011*. Dublin: Department of Finance.

[39] It should be noted that MABS itself opposed the proposal, suggesting that it already provided independent mortgage advice, see https://www.irishtimes.com/business/financial-services/keane-says-report-did-not-pander-to-banks-1.627810, accessed 13th September 2022.

[40] This centred on concerns about the potential loss of a local, community focus. See: 'Proposed restructuring threatens future of MABS, TDs told', Volunteer ethos key to advice service, FF TD Willie O'Dea tells Oireachtas committee, *Irish Times,* 23rd February 2017.

[41] Comprising MABS services for Dublin North, South Dublin, North Connacht & Ulster, North Leinster, North Munster, South Connacht, South Leinster and South Munster.

[42] See: https://www.oireachtas.ie/en/debates/question/2018-11-15/209/, accessed 13th September 2022. Approximately €6 million of this each year related to Abhaile.

[43] See: https://www.citizensinformationboard.ie/en/about/our_structure/, accessed 13th September 2022.

[44] See: https://www.moneyadvicetrust.org/partnerships/our-funding/, accessed 17th October 2022.

[45] See: https://ec.europa.eu/info/sites/default/files/annex2_task2_good_practices_in_debt_advice_meeting_report.pdf.pdf, p32, accessed 13th September 2022.

financial service institutions helps fund the Financial Services and Pensions Ombudsman (FSPO).[46] The personal finance information and education functions of the Competition and Consumer Protection Commission (CPCC) are also funded by a levy on financial service firms.[47] We see no reason why such institutions should not also contribute towards money advice service funding in Ireland.

Periodic Critical Review (PCR) of the Citizens Information Board; potential implications for MABS services

A 'Periodic Critical Review of the Citizens Information Board',[48] conducted by a team of officials within the Department of Social Protection and published by that Department in May 2022, has recently raised some issues and made some recommendations concerning the operation of MABS services under the CIB remit. Three areas for review are referenced, namely: (i) the role and location of in-person MABS offices; (ii) the scope and legislative basis for representation and negotiation services, and; (iii) the impact and value for money of MABS services. The report's wording in each of these three respects, though not explicitly critical, may be read to have implications for the provision of money advice services to over-indebted people in Ireland into the future.

In terms of role and location for example, our sense is that there may be an emerging administrative/cost preference towards remote service provision (as practiced during the height of the pandemic when client numbers were reduced for various reasons), and away from MABS' traditional, community-based, in-person model of service delivery. There is strong evidence that such a move, were it to be contemplated, would be both regressive and heighten inequality in terms of access and service use for those most marginalised in particular,[49] and we are strongly in favour of the retention of local centres as part of the 'blended' in-person / remote approach which has developed over time. One-to-one, in person services are important to many clients in terms of developing trust and confidence in their money adviser, a bedrock for service delivery.[50]

As regards the scope and legislative basis for representation and negotiation services, the Review expresses concern that MABS services are exceeding their remit in three respects. First, by way of its service level agreement, which contains reference to negotiating affordable and sustainable debt management solutions.[51] Second by acting as Approved Intermediaries authorised by the Insolvency Service of Ireland to process Debt Relief Notices under the Personal Insolvency Act 2012. And third, in receiving referrals from the Residential Tenancies Board under the terms of Residential Tenancies Act 2020 to engage with the landlord on behalf of a tenant with a view to reaching an agreement in respect of rent arrears. It is suggested that either these services should be adjusted to align with current legislative mandate – i.e. to effectively cease providing these services, or that the legislation be amended to allow for their provision.

It may be that relatively simple amendments of the relevant legislation will correct this. However, it may also be implied that in providing these 'representation and negotiation services', MABS is engaging in work that the review group consider to be beyond its remit as a state funded money advice and budgeting service. In our view, this theoretical distinction between advocacy services on the one hand, and representation and negotiation services on the other, fails to fully appreciate the necessary, holistic nature of

[46] See: https://fspo.ie/documents/Understanding_the_Financial_Services_Industry_Levy_2022.pdf, p3, accessed 13th September 2022.

[47] See: https://www.ccpc.ie/business/about/finance-and-payments/levy-financial-services-firms/, accessed 13th September 2022.

[48] See: https://www.gov.ie/en/publication/0068e-periodic-critical-review-pcr-of-the-citizens-information-board-2022/# , accessed 17th October 2022. The Department of Public Expenditure and Reform (DPER) 2016 Code of Practice for the Governance of State Bodies requires that non-commercial public bodies be subject to a Periodic Critical Review (PCR) no later than every five years.

[49] See: Stamp, S. (2021). *Social Distancing on the Margins: COVID-19 & Associated Issues for Dublin Region MABS Clients.* Dublin: Dublin South MABS and North Dublin MABS; also, Frazer, H. (2020*) Covid-19: Lessons from disadvantaged communities for EU social policy*. OSE Working Paper Series, Opinion Paper No. 24, Brussels: European Social Observatory.

[50] Eurofound (2020). *Addressing household over-indebtedness*. Luxembourg: Publications Office of the European Union.

[51] See: https://www.mabs.ie/wp-content/uploads/2021/03/201810_MABS_Service_Agreement.pdf , accessed 17th October 2022.

money advice client work.[52] If this review is suggesting that negotiating affordable and sustainable solutions, arranging DRN's or negotiating rent arrears settlements is overstepping the boundaries of money advice work, it in our view insufficiently understands the very nature of that work.

Thirdly, in respect of impact and value, it is hard to argue with the Review's recommendation to invest in metrics to better measure the impact of the services and to demonstrate effectiveness, efficiency, and value for money. Over time, MABS has become a fixture within Irish social policy and society, and rightly so given the wide-ranging benefits its service interventions can and does bring.[53] What is striking about MABS development over the past 30 years, however, is how the policy driving it has been considerably more influenced by 'top down' reactivity than by 'from the ground up' reflection. Reporting is predominantly based on *throughputs*[54] but little is reported about its ongoing *impacts* and the effectiveness of its structures in maximizing these.[55] The limited evidence we have suggests that, in common with other debt advice services, MABS' interventions tend to have significant (positive) shorter-medium term effects on clients, frequently in relation to health, wellbeing and money management improvements, but are less effective over the longer-term due to persisting structural and socio-economic inequalities which disproportionately affect its (predominantly low income) client base.[56] Our sense is that consistency of approach and outcome may vary across regions, and there is in our view a strong case for ongoing impact assessment to be built in to the MABS structure using a multi-criteria model.[57]

Overall, as a new cohort of clients with personal debt difficulties as a result of Covid and other recent adverse events may be added to a substantial number of unresolved legacy cases, the fact that MABS has never been put on a statutory basis as an independent, rights-based, [58] advocacy service is regrettable in our view. As we have repeatedly argued in this series of papers, consumer debt is now an economic fact of life with an important wellbeing/welfare component. Money advice, given the range of its diverse and manifold components, must involve not just service provision but also lead on and inform policy development. A statutory footing would better enable MABS to fulfil both of these societal functions.

[52] As illustrated by a highly regarded and longstanding debt advice work manual in Europe, first published in 1993. (Child Poverty Action Group (2021). *Debt Advice Handbook, 14th Edition.* London: Child Poverty Action Group). The CPAG values, principally 'rights-based', 'empowering' and 'non-judgmental', are mirrored in a range of MABS training, accreditation and manual materials dating back to the first Money Advice Handbook published in Ireland that same year (1993). See: Stamp, S. (1993). *A Money Advice Handbook for Advisers in the Republic of Ireland*. Limerick: PAUL Partnership and the Department of Social Welfare.

[53] See: Stamp, S. (2011). 'The Impact of Debt Advice as a Response to Financial Difficulties in Ireland', *Social Policy and Society*, Volume 11 / Issue 01 / January 2012, pp 93-104. Also: McCarthy, O., Lane, C. and Byrne, N. (2014) *Cork MABS study: Clients' experiences, opinions and satisfaction levels.* Cork: Money Advice and Budgeting Service, Cork.

[54] See MABS statistics, various years. https://mabs.ie/about/about-mabs/statistics/, accessed 7th September 2022.

[55] A report by the Comptroller and Auditor General in 2009 for example concluded that "the audit results suggest a need to review the service in order to determine the extent to which (inter alia) it is meeting the needs of the target population". See: Comptroller and Auditor General (2009), *Report on the Accounts of the Public Services 2008*, VFM Report, Chapter 35, Department of Social and Family Affairs, the Money Advice and Budgeting Service. Dublin: Comptroller and Auditor General.

[56] See: Stamp, S. (2009). *Personal Debt, Poverty and Public Policy in Ireland.* PhD Thesis: NUI Maynooth. Similar findings have emerged from the UK; see: Orton, M. (2010). *The Long-Term Impact of Debt Advice on Low Income Households; The Year 3 Report.* Warwick: Warwick Institute for Employment Research and Friends Provident Foundation. A similar picture emerges in the context of MABS' role in terms of Debt Relief Notices, see: Boyle, M. (2019). *The Road to Financial Wellbeing: An examination of the Debt Relief Notice and its effectiveness in improving the financial wellbeing of over-indebted individuals.* Research Thesis: Technological University Dublin.

[57] See: McCaul, M. and Stamp, S. (2020). Justifying Existence or Making a Difference? Assessing the broader impact of debt advice services, *Briefing Paper BP13/2020*, Centre on Household Assets and Savings Management (CHASM), University of Birmingham.

[58] By this we mean that in a marketised economy dependent on the provision and use of financial services, there is a need to ensure that those availing of related products - and particularly credit - are properly protected, informed, supported and able to obtain redress where necessary, given that financial service providers have a considerable advantage over consumers in terms of power and resources. Entitlement to legal advice and, where necessary, representation is therefore a key component of a rights-based approach. A rights-based approach has two aims: firstly to assist individual clients through empowering them to make fully informed choices in relation to their options with respect to their money and their debts; and secondly, to highlight the underlying conditions that give rise to their situations.

RECOMMENDATIONS

- Place MABS on a statutory footing with an independent clear consumer protection mandate, founded on rights based, empowering, non-judgmental principles which would embody preventative, curative and rehabilitative consumer dimensions.
- MABS should act as a one stop shop for those in debt and be able to provide a full range of services including information, advocacy, dedicated mortgage arrears advisers, accountancy and insolvency services, legal advice and other legal assistance including strategic litigation where appropriate and necessary.
- MABS should have an explicit function of documenting the experience of its client base and be empowered to carry out research and make policy recommendations across a wide range of societal issues that flow from the borrowing and repaying of credit and the provision of goods and services.
- MABS should be empowered to carry out pre-legislative scrutiny on any legislation that comes within its remit.
- MABS should be provided with sufficient funding to carry out its remit and should be funded in part by contributions from the financial services sector.

2.2. DEBT ADVICE, REGULATION, EVALUATION AND RESEARCH INFRASTRUCTURE – AN IRELAND /UK COMPARISON

Unlike in Ireland, there is no directly state-funded national money/debt advice service in the UK. Debt advice is provided there through a number of organisations, including charities such as the Money Advice Trust and StepChange, through Citizens Advice services and by or through local authorities. The funding provided to these organisations comes from a variety of sources – including from government[59] and sometimes directly from credit institutions themselves by way of 'polluter pays' or 'fair share' principles.[60] These arrangements may appear on the face of it to be less advantageous than a state-funded national service model. Indeed, MABS in Ireland has been routinely held up as an exemplar in the debt advice community across Europe[61] and there is little doubt that many debt counselling services in other jurisdictions would appreciate the certainty that such state funding can bring.

However, having a national money/debt advice service funded by the taxpayer, even if such a service is put on a statutory basis, will not of itself necessarily lead to the level of dialogue and debate that might lead to substantive changes in our systems to benefit wider society and to ameliorate the cycle of debt. This is only likely to occur if the experiences and views of the money

[59] In June 2020, an extra £37.8 million support package was allocated to debt advice providers in the UK to continue to provide essential services to help more people who were struggling with their finances due to Coronavirus. The Money and Pensions Service (MaPS), oversaw the allocation of these funds, including to charities, for debt advice and other money guidance services. This support package brought the MaPS budget for debt advice to over £100 million for 2020-21. See https://www.gov.uk/government/news/almost-38-million-support-package-for-debt-advice-providers-helping-people-affected-by-coronavirus, accessed 17th October 2022.

[60] Collard, S. and Finney, A. (2013). "Country Report: United Kingdom". In *The Over-Indebtedness of European Households: Updated Mapping of the Situation, Nature and Causes, Effects and Initiatives for Alleviating its Impact', Final Report Part 2: Country reports*, CIVIC Consulting, p.495-518. Brussels: European Commission.

[61] See for example: European Commission. 2008a. *Towards a common operational European definition of over-indebtedness*. Brussels: European Commission, p.85.

advice sector are taken into account and where a meaningful and robust exchange, backed up where necessary by solid research, takes place on the direction of travel in terms of debt prevention and resolution. In terms of policy infrastructure, evaluation and research, the UK model appears more evolved and there is much to learn from this.

Policy infrastructure

Whereas in Ireland where we have a single Central Bank and regulator in the form of the Central Bank of Ireland (CBI) which deals with prudential, solvency, regulation and consumer protection issues, in the UK these functions are divided. The Bank of England acts as the Central Bank and expresses its role as *'promoting the good of the people of the United Kingdom by maintaining monetary and financial stability'.*[62] A **separate** body, the UK's Financial Conduct Authority (FCA)[63], specifically authorises and regulates the conduct of the 50,000 firms involved in the provision of financial services[64], and works alongside the Prudential Regulation Authority, which regulates around 1,500 banks, building societies, credit unions, insurers and major investment firms on behalf of the Bank of England.[65]

In terms specifically of its work protecting the interests of consumers, the FCA works in co-operation with a Financial Services Consumer Panel, which has its own secretariat, and which is described as *'an independent statutory body, set up to represent the interests of consumers in the development of policy for the regulation of financial services'* and which works *'to advise and challenge the FCA from the earliest stages of its policy development to ensure they take into account the consumer interest'.*[66] The sheer volume of 'Consultation Responses' issued by this panel in 2022 alone, some of them in direct response to FCA consultation documents and others to consultations by bodies such as the Treasury, the Digital Regulation Cooperation Forum or the UK Insolvency Service is indicative of an organisation whose work is both substantial and influential.[67] Our understanding is that the debt advice sector feeds directly and indirectly into these consultation responses.

The comparable body set up by the CBI in Ireland is a 'Consumer Advisory Group' (CAG). Its role is said to be advising the Central Bank on the performance of its functions and the exercise of its powers in relation to consumers of financial services including:

1. The effects of the Central Bank's Strategic Plans on consumers of financial services;
2. Initiatives aimed at further enhancing the protection of consumers of financial services; and
3. If the Central Bank so requests, documents, consultation papers or other materials prepared by the Central Bank.

A review of the CBI website in respect of the work of this group reveals little detail from what can be discerned.[68] Short profiles of the seven current members of the group are outlined. The only other information of significance are records of the minutes of quarterly meetings of this group which appear to be also attended by CBI staff and which suggest that group attendees are often outnumbered by such staff and other CBI officials, classed in the minutes as 'contributors'. In short, it is not clear from this information what influence the group may bring to bear on the deliberations of the CBI, in terms

[62] See: https://www.bankofengland.co.uk/, accessed 17th October 2022.

[63] The FCA was set up on 1st April 2013, and took over conduct and relevant prudential regulation from the former Financial Services Authority (FSA).

[64] The website of the FCA gives a clear initial indication of its priorities as follows: *'Our operational objectives are to:*

- *protect consumers from bad conduct*
- *protect the integrity of the UK financial system*
- *promote effective competition in the interests of consumers*

We're an independent public body funded entirely by the fees we charge regulated firms. Our role is defined by the Financial Services and Markets Act 2000 (FSMA) and we're accountable to the Treasury, which is responsible for the UK's financial system, and to Parliament. We work with consumer groups, trade associations and professional bodies, domestic regulators, international partners and a wide range of other stakeholders. We have a large and growing remit, and use a proportionate approach to regulation. We do this by prioritising the areas and firms that pose a higher risk to our objectives.'

[65] See: https://www.fca.org.uk/, accessed 18th October 2022.

[66] https://www.fs-cp.org.uk/consumer-panel/what-panel, accessed 5th October 2022.

[67] https://www.fs-cp.org.uk/fca-publications, accessed October 5th 2022.

[68] https://www.centralbank.ie/regulation/consumer-protection/advisory-groups, accessed October 5th 2022.

of exercising its consumer protection remit. It seems on the face of it to lack the resources, independence and reach of its FCA (UK) equivalent.

Evaluation from the consumer perspective

A further example to illustrate the nature of the dynamics and the respective influence between the consumer advocate sector and both regulators and credit institutions in each jurisdiction concerns the aftermath of the Covid payment breaks programme. As outlined in Paper Three of this series,[69] a swiftly organised payment break programme was put in place by the CBI and the Banking and Payments Federation of Ireland (BPFI) (the representative body for credit institutions in Ireland) following the outbreak of Covid in March 2020. In Paper Three of this series, we reviewed in some detail four datasets released by the CBI in 2020 concerning the levels of breaks and some features of those households availing of them. We also reviewed a BPFI dataset to the end of 2020 providing a statistical summary of outcomes of the payment breaks across the range of the consumer credit agreements affected.

We noted, however, with some concern both that the data trail came to an abrupt end at the end of 2020 with no further attempt to track developments since and that no consumers were interviewed at any point about their experience of payment breaks in the course of the compiling these data. And there the question of payment breaks as experienced in Ireland remained. With Covid 19 having receded and the payment break programme having appeared to do its job, there were no further enquiries made.

The UK evaluative approach, however, has been markedly different, with the debt advice sector playing a key role. Research carried out by StepChange, one of the leading UK debt advice charities, on the consumer's experience of payment breaks[70] has recently been completed. This consisted of an online survey of 550 clients drawn from a representative sample of debt advice clients who first contacted StepChange in 2021, of which nearly half (48%) responding to the survey had accessed one or more payment deferral. The response of clients to such deferrals was mixed, with both positive and negative reflections, emphasising the urgent and largely unplanned nature of payment deferral and the variable circumstances of the recipients.

The qualitative dimension to this enquiry showed immediate positives as regards ability to afford essential bills, reduced worry over debt repayments, respite and breathing space to think and plan. Consumer feedback also revealed several negatives such as short-term relief merely serving to prolong the problem, suggesting that availing of money advice at an earlier stage – and thereby coming to a more permanent, sustainable resolution - may have been on reflection a better step in the long term than taking the payment break. There was also a sense that payment holidays actually reduced motivation to seek advice and thereby not just prolonged the problem but also the anxiety associated with it. Finally, the non-suspension of interest charges commonly resulted in both a payment shock when repayments resumed and higher costs in the long run.

Thus, for example, respondents listed as positives that *"[The payment holiday] allowed me to afford essential bills without having to worry about debt repayments."* and that *"It gave some respite and breathing space to allow me to think and plan what I should do next."*

On the other hand, an example of a more negative assessment was that *"Payment holidays only stopped the anxiety for the length of the holiday. Once it had finished it was back to square one. If debt advice had been offered sooner, I could be six months further into paying my debts off."* suggesting that availing of money advice at an earlier stage may have been a better step in the long term than taking the payment break.

On a related theme, other respondents felt that a more permanent resolution rather than temporary fix might have been preferable in observing that *"[The payment holiday] merely*

[69] Ibid, page 5.

[70] 'How well did payment deferrals work? Evidence from Step Change advice clients'. Slides presented by Step Change at an Ireland/UK exchange symposium held on 30th September 2022 entitled 'Dealing with Debt during and after Covid-19' organised by the Department of Applied Social Studies at University College Cork.

made my anxiety worse, putting a plaster over something that needed a long-term resolution" and that *"It didn't help motivate me to seek support and just allowed me to stop thinking about it, therefore allowing [the situation] to get worse and increasing my anxiety, making it harder to seek support."*

The most common complaint from respondents was that interest charges were not suspended, resulting in a payment shock when repayments resumed and/or higher costs in the long run. Here, respondents variously observed that *"At the time [payment holidays] felt like a positive thing but I didn't realise I'd have to pay more in the longer term"* and that *"[Payment holidays] briefly helped until they were over and I found that [the firm] had increased my interest by more than 20%."*

Research of this nature to reflect back the consumer debtor experience of this and other financial services issues is a vital component both of future resolution planning and of understanding the dynamics of over-indebtedness. Indeed, it is worth noting that at the recent symposium at which a StepChange representative summarised the findings of its payment deferral research (referred to above), an analyst from the CBI (speaking in a private capacity) presented a review of the payment break programme in the context of the use of breaks as a potential macro-economic tool to cope with future solvency shocks. This is not to devalue such work, which is important from a prudential perspective, but it should be complemented by carrying out or commissioning research on the consumer experience and perspective, a task that might, for example, be assigned to the Competition and Consumer Protection Commission (CCPC).

Research and academia

More broadly, it is apparent that debt advice organisations in the UK clearly regard research on client perception and experience to be a core part of their work. In this regard, the website of the Money Advice Trust, for example, explains that:

> ***'We work with a range of leading researchers from highly respected academic institutions across the UK. The Trust's research has a strong reputation for breaking new ground whilst complimenting existing work. Our research strategy is managed by our Insight team, which is challenged with enhancing our services for the public and for advisers through research and analysis'.***[71]

The relationship referenced here between debt advice services and academic institutions in terms of research is crucial. It allows concepts and perspectives to be explored that go beyond issues of economics alone and into areas such as welfare theory, social policy and behavioural science. The most recent research publication referred to on the Money Advice Trust website is *'Collision Course': A snapshot of the challenges facing households on the cost of living'* This is described as a briefing *'based on a poll of more than 2,000 adults, that shines a spotlight on the financial challenges UK households are already facing and the difficulties that lie ahead for many more as the cost of living continues to rise'.*[72]

It is also important to note that the Financial Conduct Authority itself commissions research that involves dialogue not just with those who may be struggling but also with those who assist them. In a recent report published in June 2022, the Authority presented *'insights from our research into borrowers in financial difficulty. It shares the views and experiences collected in 7 expert interviews with representatives of consumer support and advice organisations, 48 in-depth interviews with borrowers in financial*

[71] See: https://www.moneyadvicetrust.org/research-policy/research-reports/, accessed 17th October 2022.

[72] See https://www.moneyadvicetrust.org/cost-of-living/. Accessed October 6th 2022. This briefing emphasises that the support provided to help households so far is welcome, but the Government and regulators need to go further to support people caught at the sharp end of rising costs. It goes on to recommend measures to:

- Ensure the benefits system provides enough support for people on low incomes, including significantly uprating benefit levels.
- Provide more support for people already in arrears, including pausing debt collection activity and setting repayments to zero or a token amount.
- Urgently introduce a social tariff to lower the cost of energy bills for low-income households.

difficulty, and the findings of a survey of 2,969 UK borrowers in financial difficulty. The fieldwork was undertaken between October 2021 and March 2022'.[73]

Financial difficulty was defined in this research as encompassing consumers who had *'one or more credit or mortgage products, provided by a firm regulated by the Financial Conduct Authority (FCA) and who have missed any payments, find bills a heavy burden, sought debt advice, or borrowed on one loan specifically to make payments on another'* in order to ensure *'that people who were on the cusp of missing their payments were included, to give a wider view of the perspectives of borrowers in financial difficulty'*.[74]

In summary then, it would seem that a more dynamic research response to the post-Covid cost of living crisis has been taking place in the UK, in terms of trying to assess and understand the potential for consumer insolvency. It is also apparent that the relationship between debt advice services, the regulator and credit institutions in the UK is already more evolved and robust than that which pertains in Ireland, and that this relationship lends itself to a more proactive policy approach. With the current discussion in Ireland in terms of the cost of living crisis dominated by very understandable concerns with the ongoing problem of housing supply as well as escalating utility costs, a proper debate on the consumer debt implications remains to take place. The comparatively less dynamic, evolved, robust policy infrastructure in Ireland is in our view a substantial contributor to this.

On 4th October, 2022, the CBI published a Discussion Paper[75] to announce a review of its Consumer Protection Code, which it described as the cornerstone of its consumer protection framework. At a briefing for 'Civil Society' representatives, the Bank committed itself to developing better channels of communication with consumer stakeholders, expressed in the Discussion Paper as *'strengthening our engagement with stakeholders through open dialogue and by deepening our relationships and partnerships'* and *'our understanding of the diverse perspectives of our stakeholders'*. Such engagement could be facilitated by drawing on the above lessons from the UK in terms of improving our policy, research and evaluation infrastructure.

2.3. THE EVOLUTION OF LEGAL ADVICE FOR THOSE IN DEBT

As the Global Financial Crisis (GFC) unfolded and the increased scale of consumer debt and its attendant problems – repossession of family homes, increased levels of litigation and more widespread personal insolvency – followed in its wake, legal advice for those in debt became a more pressing issue, in particular as those who have borrowed money and cannot now repay it in full are almost invariably on the wrong side of contract law.

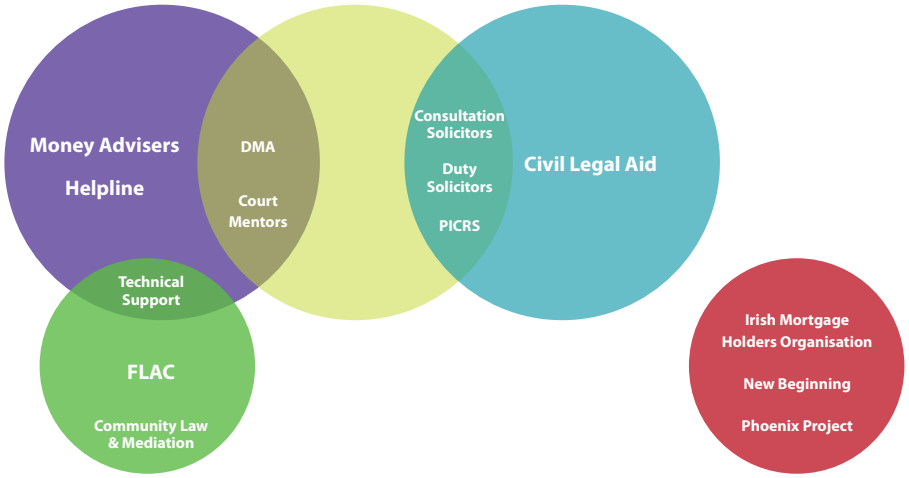
MABS itself did not have and still does not have a specific legal division though it has had, from time to time, the benefit of in-house legal expertise in the former National Development support company (now MABS Support CLG) and some money advice staff in individual services with legal qualifications. In addition, from as far back as the second half of the 1990's, training events for money advisors on legal issues of direct relevance to money advice work – debt related legal and enforcement proceedings, consumer credit legislation, social welfare and

[73] See https://www.fca.org.uk/publication/research/borrowers-in-financial-difficulty.pdf. Accessed 7th October 2022.

[74] Ibid, Executive Summary.

[75] https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/consumer-protection-code-review/consumer-protection-code-review-discussion-paper.pdf?sfvrsn=f75c951d_11, accessed 17th October 2022.

FIGURE ONE: ACCESS TO LEGAL ADVICE SERVICES FOR PEOPLE IN DEBT 2019



Source: Free Legal Advice Centres

community welfare and appeals being prime examples – were held on a regular basis.

Legal and welfare rights related training in turn led to requests to the providers of training for further informal advice from money advice staff, to assist with increasingly difficult client situations and, in the early years of the millennium, an 'external technical support' panel was formally assembled that could be accessed by money advice staff, in an attempt to respond to this growing need.[76] In time, the range of training sessions offered to money advice staff also expanded to cover the increasingly diverse and technical nature of money advice work; accredited training courses with a legal dimension have also been developed and implemented over time for money advice staff.[77]

The bottom line, however, is that MABS clients themselves very rarely had access to *their own* direct legal advice or representation, unless they could arrange to pay for it themselves, usually a remote prospect given their financial constraints. Thus, the technical support model involved and still involves 'advising the advisor', who in turn seeks to use that advice to attempt to assist their client to obtain some kind of resolution through what has sometimes been referred to as 'second tier' advice. As the boom turned to bust after 2008, and the applicable legal provisions and their limitations became increasingly important in the search for resolution, it is notable that a number of civil society initiatives also emerged, principally in the mortgage arrears domain, to offer assistance to borrowers in difficulty and to also campaign for reforms and further change.[78]

Thus, a person seeking or requiring advice on the legal aspects to their financial difficulties in the course of the decade following the Global Financial Crisis would have found a somewhat complex picture or patchwork confronting them, one that evolved, once again, in a reactive rather than a planned manner. Chart 1 above illustrates the legal dimensions to the various services provided or supported by the state sector within the period, principally through MABS, Abhaile and the Legal Aid Board in 2019 during the lead up to Covid.[79] The civil society groups mentioned

[76] Members of this panel included representatives of the Northside Community Law Centre (now Community Law and Mediation (CCLM), Free Legal Advice Centres (FLAC) and individual practitioners and specialists. The lead author of this paper, Paul Joyce, was a member of the technical support panel on behalf of FLAC for well over a decade; during this time, over 1,850 legal case queries were received by FLAC from money advice staff on a variety of credit and debt related files.

[77] Examples here are: The Advanced Diploma in Money Advice Practice (ADMAP), accredited by Ulster University (2012-2019), and the Diploma in Community Development/Money Advice, accredited by the University of Limerick (2002 to 2004).

[78] These included principally New Beginning and the Phoenix Project. In time New Beginning separated into two groups – Irish Mortgage Holders Organisation (IMHO) and New Beginning. At this point in time, to our knowledge, only IMHO is prominently involved in providing free support services to clients in mortgage arrears and campaigning and working on mortgage arrears issues, in addition to processing mortgage to rent arrangements (MTR) through its associated company, iCare Housing.

[79] To these may be added access under Abhaile to a voucher to obtain the view of a Personal Insolvency Practitioner (PIP) on a client's potential access to a debt resolution under the Personal Insolvency Act 2012 (as amended). Whilst not legal advice in itself, it is important advice concerning the client's legislative resolution options.

above are also included. As can be seen, by this point a most confusing landscape had emerged, a situation that policy theorists refer to as a "mixed economy of welfare".[80]

While the Chart gives a sense of the patchwork that emerged (specific state-supported legal advice channels for persons in debt are underlined), it is also again important to stress that the *type and degree* of legal advice available to people also varied considerably, and has generally fallen far short of full representative advocacy, except in the limited number of cases where a Legal Aid Board law centre represented a defendant borrower in repossession proceedings. Clients being assisted through the various arms of the **MABS** network (Money Advisers, Helpline Advisers, Dedicated Mortgage Arrears Advisers (DMA), and Court Mentors[81]) have *indirect* access to specialist legal technical support through Community Law and Mediation (CLM)[82] (and also formerly through FLAC[83]) on a range of credit and debt issues, should their adviser seek it on their behalf. As explained above, this 'second tier' support approach does not generally involve any formal contact between the MABS client concerned and the legal adviser.

2.4. ABHAILE – A NATIONAL MORTGAGE ARREARS RESOLUTION SERVICE

Abhaile[84] is a state-funded scheme of multiple components, which provides a general system of aid and advice for borrowers in family home mortgage arrears cases only, broadly intended to put in place solutions to arrears and, wherever possible, to enable the borrower to remain in the family home.[85] It is described as a national mortgage arrears resolution service and is provided free of charge to insolvent borrowers who are at risk of losing their home. It was commenced largely in July 2016,[86] several years after the effects of the GFC began to severely impact on mortgaged households and expose many to the risks of repossession. The Executive Summary of the Second Abhaile report provides an indication of the multiple agency involvement in this scheme in the following terms:

> *'Abhaile is jointly coordinated and funded by the Department of Justice and Equality and the Department of Employment Affairs and Social Protection. The Money Advice and Budgeting Service, the Insolvency Service of Ireland, the Legal Aid Board and the Citizens Information Board are working together to provide the Abhaile services.*[87]

Access to services under Abhaile is strictly limited to those *in mortgage arrears only* who must also satisfy a number of other core requirements including being 1) insolvent; 2) at risk of losing their home; and 3) reasonably accommodated in terms of cost; i.e. living in a home proportionate to reasonable living accommodation needs as set out in s.104 of the Personal Insolvency Act 2012.[88] Abhaile is now a

[80] Fanning, B. (1999). 'The Mixed Economy of Welfare' in, *Irish Social Policy in Context*, G. Kiely, A. O' Donnell, P. Kennedy and S. Quin (Eds), Dublin: University College Dublin Press, p.51-69.

[81] An important component of MABS involvement in Abhaile is a Court Mentor Service whereby - since 2015 – MABS advisers attend Circuit Court sittings to offer support both to un-represented borrowers attending hearings and to pre-existing MABS' clients.

[82] Formerly Northside Community Law Centre.

[83] FLAC opted at the end of 2020 not to tender for a revised contract to provide a legal technical support service to MABS, so as to refocus its work in the area of debt and credit more clearly on issues of policy and law reform.

[84] The word in the Irish language for 'home'.

[85] See: https://mabs.ie/abhaile/, accessed 7th September 2022.

[86] Note that the MABS 'dedicated mortgage arrears service', which is also part of Abhaile, commenced in July 2015 before the other elements of the service.

[87] Government of Ireland (2018). *Abhaile Aid and Advice for Borrowers in Home Mortgage Arrears, Second Annual Report.* Dublin: Government of Ireland.

[88] See: https://www.mabs.ie/en/abhaile/abhaile_qualify.html, accessed 13th September 2022.

multi-faceted service, composed of a number of different elements that may interlink as the client's situation evolves. In summary, it is currently comprised of the following components:

- **DMA service -** Access to a MABS dedicated mortgage arrears adviser (known as the DMA service). This service was introduced, somewhat hurriedly, in July 2015 and initially involved a number of existing MABS money advisors becoming specialist advisers and dealing exclusively with mortgage arrears cases, often referred on to the DMA by a general MABS money advisor.
- **Personal insolvency advice service -** Access to an assessment in writing by a Personal Insolvency Practitioner (PIP), part of a panel of duly qualified and authorised PIPs maintained by the Insolvency Service of Ireland (ISI), of the client's potential options under the Personal Insolvency Act 2012 (as amended), such as a Personal Insolvency Arrangement (PIA) and other legislative and resolution options, including bankruptcy.[89] This service was introduced in July 2016 and involves the issuing of an Abhaile 'PIP' voucher.
- **Court review service -** Access to the Personal Insolvency Court Review Service (PICRS), for borrowers who have worked with a Personal Insolvency Practitioner (PIP) to propose a Personal Insolvency Arrangement (PIA) and where their creditors have voted against the proposal, and who seek to have the Circuit Court review and overturn that rejection.[90]
- **Legal advice service -** Access to legal advice in writing concerning the borrower's arrears situation from a Consultation Solicitor, part of a panel of solicitors assembled and maintained by the Legal Aid Board (LAB).[91] This takes the form of a 'legal' voucher issued by MABS to the borrower and is generally a one-off facility.
- **Court Mentor service -** Access to assistance and guidance from a MABS Court mentor where the borrower in arrears is a defendant in repossession proceedings brought by their lender against them. This takes the form of the mentor being present outside the relevant courtroom on the day of hearings to provide information and answer basic questions, and to direct the borrower to other appropriate services.

What is striking here is the repetition of the word "service" in relation to each Abhaile strand (5 in total). Policy theory suggests that reliance on services is indicative of an approach that places primary responsibility on *the individual* (i.e. to access the relevant service), and tends to ignore *structural* factors that underlie these problems. Hence, no matter how good the service, it will by and large tend more to alleviate than resolve in the absence of underlying reform of such structural factors.[92]

A major interrelated structural deficiency is the effectiveness of the debt resolution mechanisms themselves which are examined in greater detail in the sections that follow. By way of examples, the Central Bank of Ireland's Code of Conduct on Mortgage Arrears (CCMA), which sets the rules of engagement for the assessment of clients in mortgage arrears is badly in need of a rebalancing of rights between borrower and lender. The personal insolvency legislation which provides

[89] The ISI website contains a full list of the names and addresses of PIPs participating in the Abhaile government-funded scheme.

[90] This is subject to meeting further criteria, for example at least one 'class' of creditor must have approved the proposal for the PIA. Representation is provided by a Legal Aid Board (LAB) panel solicitor who in turn briefs a (LAB panel) barrister. The PIP who proposed the PIA on behalf of the borrower must apply to the Legal Aid Board for legal representation on the debtor's behalf. If the Board is satisfied with the merits of the application, it may grant a Legal Aid Certificate.

[91] Abhaile Consultation Solicitors are private solicitors on a Legal Aid Board panel who provide once-off legal advice in relation to mortgage arrears through a voucher scheme administered through MABS. No ongoing solicitor/client relationship arises unless one is entered into separately.

[92] Whyte, G. (2002). *Social Inclusion and the Legal System: Public Interest Law in Ireland.* Dublin: Institute of Public Administration.

for the resolution of mortgage arrears cases through personal insolvency arrangements (PIA) continues to deliver disappointing numbers and requires further reform. In addition, legal representation in the form of civil legal aid continues to be largely absent for borrowers defending their position in repossession proceedings. Moreover, other inherent structural factors such as inadequacy of income and the repeated failure of housing policy to deliver affordable accommodation options increase the prospect of future personal insolvency.

2.5. THE LIMITED LEGAL AND INSOLVENCY ADVICE AND REPRESENTATION AVAILABLE IN UNSECURED DEBT CASES

The provision of targeted legal or insolvency advice services *only* to those who have family home mortgages and who are in arrears on those mortgages is a notable feature of the debt landscape in Ireland. As we have noted in the previous papers in this series, this emphasis on mortgage arrears as the primary focus of the State's efforts is echoed by parallel omissions in the data sphere, such as the apparent absence of any rolling Central Bank of Ireland (CBI) data publication of non-mortgage consumer credit accounts in arrears.

At present, a person living in rented accommodation who has debts totaling an overall balance *of over €35,000* – including debts such as rent arrears, utility arrears, personal loans, car finance agreements, credit cards, credit sales or overdrafts – and is insolvent, does not have access to state funded legal advice or personal insolvency advice to help them formulate a proposal for a Debt Settlement Arrangement (DSA)[93] under the Personal Insolvency Act, 2012 (as amended). That person may have a home, but it is not a home covered by the Abhaile scheme. It is perhaps unsurprising then that the number of successful DSA applications from 2014 to the end of Q.2 2022 amounts to only 1,204 from a total of 1,862 Protective Certificates granted. This amounts to a low average of just over 140 arrangements per year from an average of around 220 applications.[94]

Those who are insolvent but whose qualifying debts total *€35,000 or less* are not entitled to advice under 'Abhaile', but at least they can access a specialist 'Approved Intermediary' service set up within the MABS structure to advise on and process 'Debt Relief Notice' (DRN) applications under the personal insolvency legislation.[95] A

[93] See: https://www.isi.gov.ie/en/ISI/Pages/Debt_Settlement_Arrangement, accessed 7th September 2022.

[94] See: Insolvency Service of Ireland (2022). *ISI Statistics Quarter 2 2022*. Dublin: Insolvency Service of Ireland, p.11.

[95] See: https://mabs.ie/tackling-debt/personal-insolvency/debt-relief-notice/, accessed 7th September 2022.

further potential advantage for debtors in this situation who wish to avail of a DRN is that approved intermediaries themselves have access to external legal advice (through the MABS Technical Support Panel) to assist them through the numerous and sometimes difficult processes and mechanics involved in these applications. As with the DSA however, the numbers accessing DRN are also low, with less than 2,000 completed arrangements over an approximate eight-year period.[96]

It is likely that two years of Covid, with the adverse effects that this has had on people who are unemployed, employees on low incomes, and those working in sectors where restrictions and closures have particularly affected demand for goods and services, has created an incipient pool of insolvent debtors with unsecured debt in particular.[97] As ever, there is little concrete data available to act as a guide and the fact that many MABS services have not been seeing clients face-to-face until recently may also serve to disguise the potential scale of the problem.[98]

The comparative lack of complementary services – legal, insolvency and accounting – to support MABS in seeking formal solutions for those who do not have mortgages, but are insolvent nonetheless, is a theme that will be explored in greater detail below, particularly in light of the financial challenges that are likely to be posed to a number of households post-Covid and the current inflationary pressures and spiraling costs of energy and housing.[99]

[96] Insolvency Service of Ireland, ibid. A report commissioned by the Citizens Information Board and the eight MABS regions analysing DRN's from a debtor perspective was published in May 2022 and launched on June 23rd 2022. This report is also written by the authors of this Pilar to Post series. See: Stamp, S. and Joyce, P. (2022). *For the Few but not the Many? An analysis of Debt Relief Notices from a debtor perspective.* Dublin: Money Advice and Budgeting Service and the Citizens Information Board. See Section 4.6. below for further detail.

[97] As discussed in Paper Three of this series on 'payment breaks'.

[98] There is some evidence that adverse financial consequences of the pandemic have impacted disproportionately on those who were marginalised to begin with. See: Stamp, S. (2021). *Social Distancing on the Margins: COVID-19 & Associated Issues for Dublin Region MABS Clients.* Dublin: Dublin South MABS and North Dublin MABS.

[99] See below Sections 4.5 and 4.6.

It should also be noted here that a borrower might wish to challenge the validity of an individual unsecured debt claim being brought by a creditor in the courts, for example where the debt is alleged to be statute-barred or incorrectly calculated or where the debtor alleges there has been a material breach of relevant consumer credit legislation. Civil legal aid on a merits tested basis should be available in such cases but there is scant information to indicate that it is provided. The Legal Aid's Board 2020 Annual Report suggests that legal 'services' were provided in 147 debt cases that year.[100] However, there is no further information to clarify the nature of the services provided, for example, how many of these cases merely involved advice and how many resulted in legal representation.

RECOMMENDATION

- The Legal Aid Board should clarify the extent to which legal services are available in unsecured debt cases, and the number of cases in which legal representation has been provided in recent years to borrowers seeking to challenge the enforceability of such debts in the courts.

2.6. ABHAILE - LEGAL ADVICE FOR DEFENDANT BORROWERS DURING REPOSSESSION PROCEEDINGS

A person facing legal proceedings concerning the potential repossession of their family home may also seek to avail of a further limited legal advice service under the terms of the Abhaile Scheme. We have seen above that a borrower can access general legal advice under Abhaile from a Consultation Solicitor on their mortgage arrears situation. In effect, the same panel of solicitors assembled and maintained by the Legal Aid Board (LAB) to

[100] See: https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/legal-aid-board-annual-report-2020.pdf, p.20, accessed 17th October 2022.

offer legal advice as Consultation Solicitors may also act as Duty Solicitors. This involves those solicitors attending at repossession lists in Circuit Courts across the country and providing basic assistance to defendant borrowers at such hearings without legally representing them. The caveats and limitations to this service are well illustrated in the public information provided with respect to it immediately below (our italics for emphasis):

Duty solicitor service

"If you are facing Circuit Court repossession proceedings, you ***may*** be able to get some help at court from the duty solicitor. This is a solicitor from the solicitor panel who is present at a Circuit Court on repossession hearing dates (on duty). You ***cannot choose*** the duty solicitor. The duty solicitor service is a ***limited*** service. It provides advice to borrowers who do not have a solicitor at court. Your consultation solicitor or DMA adviser will explain this in more detail. By the time your case goes to the Circuit Court, you should already have received written financial and legal advice under Abhaile, including advice from the consultation solicitor on any repossession proceedings. If you have not applied in time to get advice from the consultation solicitor, the duty solicitor ***may*** be able to help, but only if you have already applied to MABS. If your mortgage lender has already started repossession proceedings on your home, and you have not yet applied for Abhaile, contact MABS as soon as possible. The duty solicitor ***may*** be *able to:*

- *Speak for you in court and explain what steps you are taking to try and deal with your mortgage arrears*
- *Apply for the proceedings to be adjourned (short break of a few weeks) if you are trying to put a solution in place*
- *Explain to you what is happening in the proceedings*

The duty solicitor ***cannot act*** as your legal aid solicitor or defend you in the repossession proceedings. Abhaile does not cover legal aid for defending repossession proceedings. You may need to agree fees with a solicitor separately or apply to the Legal Aid Board".

Source: MABS website: https://www.mabs.ie/en/abhaile/abhaile_legal_services.html (accessed 16th November 2021).

2.7. CIVIL LEGAL AID IN REPOSSESSION CASES

The provision of civil legal aid from the State funded Legal Aid Board to defend the borrower in repossession cases has been and continues to be largely unavailable to borrowers for two specific reasons; first the income means test and, secondly the merits test, both set out in the Civil Legal Aid Act 1995 and associated regulations.

The first of these barriers is what we would consider to be a very strict means test.[101] Indeed, given the amount of money that a borrower/s now needs to earn to obtain a mortgage loan to purchase a dwelling in many parts of Ireland, particularly in urban areas, many applicants seeking to defend their position in repossession proceedings are destined to fail the civil legal aid means test. This is compounded by what is now a totally unrealistic maximum allowance of €8,000 per annum that is allowed for accommodation costs (equivalent to €667 per month) before arriving at the applicant's net disposable income. It might also be noted that this limited allowance similarly impacts on those living in now very expensive rented accommodation, when applying for civil legal aid in other areas of law covered by the Scheme.

For those borrowers who do manage to satisfy the means test, a merits test that has often been strictly interpreted and applied by the Legal Aid Board must also be met.[102] In the case of

[101] To obtain civil legal aid, an applicant must have an annual disposable income of less than €18,000 (and disposable assets of less than €100,000, with the value of the family home not counted as an asset). Disposable income is calculated after the deduction of a limited number of allowances including universal social charge, tax and social insurance contributions, liability for spouse, child and adult dependants, costs of childcare and accommodation.

[102] What can be described as a three pronged 'merits test' is provided for under Section 28 of the Civil Legal Aid Act 1995. First, S. 28 (2) (b) provides that legal aid is available where ***'the applicant has as a matter of law reasonable grounds for instituting, defending, or, as may be the case, being a party to, the proceedings the subject matter of the application'.*** Second, S. 28 (2) (c) provides that if the Board is of the opinion that ***'the applicant is reasonably likely to be successful in the proceedings, assuming that the facts put forward by him or her in relation to the proceedings are proved before the court or tribunal concerned',*** legal aid should be granted. Thirdly, s.28 (2) (e) allows a final overarching financial aspect to the merits test to be taken into account in that the Board must form the opinion that

mortgage arrears, the merits test can have a particularly negative impact if applied in a strict manner, as the defendant borrower is technically in breach of contract, albeit usually for reasons outside his/her financial control, and identifying a legal defence to the proceedings is difficult.

Nonetheless, despite these hurdles, it appears to be the case from some figures provided by (former) Minister for Justice and Equality, Charles Flanagan, TD in answer to a parliamentary question in late 2019 that such applications *can* be approved.[103] However, it is also clear from this response that the number of financially eligible applications may be low to begin with, due to the tightness of the means test, as observed above. Thus, the number of successful applications over an approximate six year period covered by this reply is 43 out of 329 applications deemed to be eligible (13% or one in eight), and this low ratio is likely to be attributable to the strictness of the merits test. Anecdotally, from years of monitoring civil legal aid trends in Ireland, we also know that many people are not aware of their right to apply for civil legal aid and some potential applicants may be informally discouraged from applying at the first point of contact with a Legal Aid Board law centre. The response to the PQ stated as follows:

> *'As requested by the Deputy, the following table contains the number of financially eligible applications for legal services received by the Legal Aid Board where the applicant was in potential danger of losing their family home, and the number of cases where legal aid was granted in connection with the defence of possession proceedings, in each of the years in the period 2014-2018 and to date in 2019 (as at 1st October 2019)'.*

TABLE 1: APPLICATIONS FOR LEGAL AID IN CASES INVOLVING POTENTIAL LOSS OF THE FAMILY HOME

	Number of applications received	Number of applications where legal aid granted
2019 to date	24	8
2018	37	7
2017	35	6
2016	66	6
2015	108	9
2014	59	7

Source: Department of Justice and Equality

The outcome of this, as outlined in detail in Paper Two of this series, is that the significant majority of borrowers are not legally represented in repossession cases. It is arguable, that as a result, the legal system has adapted to this lack of representation and clear 'inequality of arms' in devising what might be described as an 'Irish solution to an Irish problem'. Thus, although technically a borrower who wishes to defend his or her position in a repossession case is required to enter an affidavit setting out and disclosing a defence[104], this seldom occurs in practice but this does not seem to affect the borrower's right to continue to argue against the granting of a Possession Order. The County Registrar for the relevant Circuit has charge of the case file and, generally speaking, as long as the borrower is engaging with the relevant state-funded assistance – MABS Dedicated Mortgage Arrears Advisors (DMA) or money advisors, MABS court mentors and/or Abhaile services - will generally allow a significant number of adjournments to 'see how things go' in the hope that payments will increase over time and that the case might be settled or withdrawn on mutually acceptable terms.

As we have also seen in Paper Two, there is some evidence that this does eventually occur in a

'having regard to all the circumstances of the case (including the probable cost to the Board, measured against the likely benefit to the applicant) it is reasonable to grant' legal aid.

[103] From Róisín Shortall TD, PQ No 101, 3rd October 2019.

[104] See S.I. 264/2009 – Circuit Court Rules (Actions for Possession and Well-Charging Relief 2009 (as amended).

number of cases, although better and more detailed statistics are required, as recommended in that paper. The price to be paid though is ongoing worry, stress and anxiety for defendant borrowers, which can lead to long-term adverse consequences for both them and their dependents, frustration and increasing cost for the lender, pressure on the courts system, and a strain on the public purse, before a solution may be eventually found or a Possession Order is granted. An attempt to evaluate the social and financial costs of all of this, in its various manifestations, over a protracted period of over a decade at this point, would be a worthwhile though perhaps chastening experience.

2.8. THE REVIEW OF THE SCHEME OF CIVIL LEGAL AID AND ADVICE

The recent Review Group report on the review of the Administration of Civil Justice in Ireland,[105] has expressed considerable concern about the situation of lay litigants or 'litigants in person', appearing in court without legal representation. In the specific case of family home repossession proceedings, the review noted, for example, research conducted into mortgage possession proceedings in the Circuit Court by the Centre for Housing Law, Rights and Policy at NUI Galway, which examined a sample of 99 Circuit Court, County Registrar and Call-over Lists in December 2017 and January 2018. In the 2,396 cases examined, the home loan debtor had no recorded legal representation in 70% of cases.[106]

In response to FLAC's submission[107] that access to civil legal aid is a fundamental part of the administration of justice, the Review Group suggested that its provision be adequately resourced and, as a matter of urgency, that a root and branch review of the civil legal aid and advice scheme be undertaken. However, it also went on to state that:[108]

> *The Review Group is not best equipped to evaluate the extent to which the civil legal aid scheme may be failing to meet legitimate demand for civil legal aid, whether through shortcomings in the range of legal services it provides, the resourcing of such services or deficiencies in the eligibility criteria and income or assets thresholds for accessing civil legal aid. However, based on the comparison made above[109], a case would appear to exist for reviewing whether the annual disposable income level operating as a "cut off" for entitlement to civil legal aid requires to be increased – if not also the disposable assets level. The Review Group recommends that the Department of Justice and Equality give consideration to initiating a review of the criteria governing access to civil legal aid and the likely resourcing implications of any modification of those criteria.*

The Review group repeated this observation with a similarly worded recommendation:

> *The Review Group does not consider itself best equipped to evaluate the extent to which the civil legal aid scheme may be failing to meet legitimate demand for civil legal aid, whether through shortcomings in the range of legal services it provides, the resourcing of such services or deficiencies in the eligibility criteria and income or assets thresholds for accessing civil legal aid. However, having regard to European comparators, a case would appear to exist for reviewing whether the annual disposable income level operating as a "cut off" for entitlement to civil legal aid requires to be increased.[110]*

[105] See: https://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf, accessed 6th September 2022.

[106] Ibid, page 346. The report referenced is: Centre for Housing Law, Rights and Policy (2020). *A Lost Decade- Study on Mortgage Possession Court Lists in Ireland.* Galway: Centre for Housing Law, Rights and Policy, NUI Galway.

[107] https://www.flac.ie/assets/files/pdf/flac_submission_on_the_review_of_the_admin_of_civil_justice.pdf

[108] Ibid, page 348.

[109] This comparison related to comparable income means tests for civil legal aid in other equivalent jurisdictions.

[110] Ibid, Recommendation 6.11, page 369.

It also proposed that:

> *'the Review Group acknowledges the need for co-ordinated planning of measures by the public sector, voluntary advice sector and branches of the legal profession to facilitate impecunious litigants in need of legal advice and assistance and recommends that the Department of Justice and Equality, as an initial step, establish a Steering Group comprised of the various agencies and bodies concerned – which should include the Courts Service, the Legal Aid Board, Citizens Information, FLAC, MABS/Abhaile, the Law Society and the Bar Council'.*[111]

In early June 2022, the Minister for Justice and Equality, Helen McEntee, TD, formally announced the first formal review to be undertaken in the 40 year history of the Civil Legal Aid Scheme[112] with the appointment of a Group to review the scheme chaired by recently retired Chief Justice, Frank Clarke, with membership drawn from those who work with marginalised groups (including FLAC), legal practitioners, academics, Department officials and representatives from the Legal Aid Board, which administers the current Scheme. At the time of writing, this group has already held a number of substantive meetings and its work is duly progressing.

Article 6 (1) of the European Convention of Human Rights and Fundamental Freedoms 1950 (the right to a fair trial) provides that *'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.*

Article 6 (3) in turn provides that everyone charged with a criminal offence has a minimum set of rights including *'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'*.

Despite the specific reference in Article 6 (3) only to criminal offences, the Court of Human Rights subsequently found in the Airey case that there may be circumstances [113] in which, without the assistance of a legally qualified representative, a litigant might be denied her right to be able to present her case properly under Article 6. The Court found that Ireland was in breach of Article 6 because it was not realistic to expect that in the family law proceedings concerned, Ms Airey could effectively conduct her own case.

Article 8 (1) (right to respect for private and family life) goes on to state that *'everyone has the right to respect for his private and family life, his home and his correspondence'.*

These provisions in the Convention are further developed in the Charter of Fundamental Rights of the European Union.[114] Specifically, Article 47 on the right to an effective remedy and to a fair trial provides that: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.

■ RECOMMENDATIONS

Having regard to the case law of the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) and the provision of the EU Charter of Fundamental Rights, the Legal Aid Board should provide legal assistance including legal advice and legal representation in debt cases, having regard to:

[111] Ibid, Recommendation 6.15, page 370.

[112] June 2nd 2022. See: https://www.justice.ie/en/JELR/Pages/PR22000107, accessed 7th September 2022.

[113] Airey v Ireland 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 30.

[114] (2000/C 364/01).

" The importance of what is at stake, taking into account the vulnerability of the applicant,

The emotional involvement of the applicant, which may impede the degree of objectivity required by advocacy in court,

The complexity of the relevant law or procedure,

The need to establish facts through expert evidence and the examination of witnesses,

The applicant's capacity to represent him or herself effectively" [115]

And

So far as such aid is necessary to ensure effective access to justice.

2.9. COMMENTARY

The indebted mortgage borrower is almost always on the wrong side of contract law, although the passing of the Land and Conveyancing Law Reform (Amendment) Act 2019 should in theory have softened this somewhat.[116] Thus the relevant amendments in that Act allow the Circuit Court, notwithstanding the ongoing occurrence of mortgage arrears, to also focus on the conduct of the lender in terms of seeking solutions to the arrears problem and to refuse to grant a Possession Order where it does not consider it to be appropriate. However, as noted in Paper Two of this series, the amendment Act has neither been developed nor litigated since its introduction and this issue is discussed in further detail below.[117]

It is evident that the widespread repossession of family homes and general litigation against over-indebted borrowers is something any administration should want to avoid. Firstly, it resonates badly from a historical perspective. Secondly, governments rely upon consumer borrowing to drive economic growth and the creation of jobs. Consumers are actively encouraged in a market economy to draw down credit, and sometimes excessively, as boom/ bust cycles have demonstrated. In the act of borrowing, the consumer is at risk, should adverse economic trends and events subsequently conspire to affect his/her individual financial situation. Covid 19 and recent international events are a very pertinent example. In addition, as already emphasised, individual circumstances often beyond the borrower's control – relationship breakdown, disability, illness, unemployment or business failure - may also intervene, even in times of prosperity, and cause his/her financial situation to deteriorate. If borrowers whose capacity to repay is impaired are sued as a matter of course, confidence in borrowing may be undermined.

A just and pragmatic lending system should thus protect the borrower and his or her dependants and the broader damage to an economy caused by over-indebtedness, and will refine and evolve

[115] See Siofra O' Leary, Judge, President of Section V, European Court of Human Rights, 'Reflecting on Access to Justice from ECHR and EU Perspectives' Report of Chief Justice's Working Group on Access to Justice.

See further 'The Legacy of Airey V Ireland and the potential of European law in Relation to Legal Aid', DULJ 2019-2022, p.93.

[116] See 8.1. below.

[117] Again, see 8.1. below.

its laws, practices and services as it goes along, to allow for a balancing of rights between lender and borrower. A rights based approach does not advocate 'rights without responsibilities' or write-off of debt for those who have the clear capacity to pay but choose not to do so. It does, however, emphasise that it is not in the long term interests of society, either morally or financially, to allow debtors to be harassed or punished when their financial circumstances deteriorate, and that seeking engagement from indebted people without fair treatment and fair procedures is often an exercise in futility. Fair treatment and fair procedures must also necessitate providing advocacy services to the borrower in difficulty in terms of money/debt advice, insolvency advice, legal advice and legal representation when interacting with the debt enforcement, insolvency and legal systems.

The mortgage arrears crisis in Ireland that followed in the years after the Global Financial Crisis (GFC) in 2008 provides a good illustration of a significance imbalance of rights. The apex of the mortgage arrears problem, occurred in June 2013 when the number of family home mortgage accounts in arrears reached a peak of 142,892, close to *one in every five* of family home mortgages in the country.[118] At that stage, a revision of the existing MARP (Mortgage Arrears Resolution Process) via the Central Bank of Ireland's Code of Conduct on Mortgage Arrears 2013 had just been introduced. Money advisors throughout the country found themselves grappling with its terms and with the not so subtle imbalances within it that gave lenders considerable power to dictate outcomes.[119]

In Paper Two of this series,[120] we observed that a combination of codes and legislative developments around this time – a revised CCMA/MARP process with effect from 1st July 2013; the Personal Insolvency Act 2012 commenced on 31st July 2013; and the Land and Conveyancing Law Reform (Amendment) Act 2013, also commenced on 31st July 2013 –collectively ushered in a 'choreographed caution' in attempting to tackle the resolution of the critical problem of mortgage arrears. Even as the country reeled from the enormous bill that it faced from the bailout of financial institutions following the crash and many borrowers faced sudden and catastrophic insolvency, the measures introduced to tackle that crisis ensured that a mortgage lender's right to enforce its security would not be diluted.

In September 2013, FLAC published a detailed guide to the Code of Conduct on Mortgage Arrears (CCMA), which was the subject of numerous queries to our information and referral line from members of the public in the years that followed.[121] The term "unsustainability" had by then become a common theme in mortgage arrears queries, implying that loss of ownership was deemed inevitable from the lender, and many mortgage queries to FLAC during 2013 involved borrowers at considerable risk of housing exclusion.

Many borrowers in arrears and their MABS advisors were left to confront the crisis largely on their own without access to ongoing legal advice and representation during this critical phase. Indeed, it seemed that borrowers in arrears were sometimes the subject more of mistrust than sympathy, despite having nothing wrong apart from attempting to get on the housing ladder when properties were very expensive and subsidised housing was scarce, in advance of the Crash and collapse of the property market. Terms like 'strategic default' and 'moral hazard' figured prominently in the debate in the media, where debtor advocates routinely called for more decisive and sympathetic action.

Vital time was lost during this critical period. The opportunity to put in place a comprehensive suite of integrated advice services for borrowers, particularly those in the more difficult arrears situations, and a fair and balanced process for assessing resolution options, was missed.

[118] Central Bank of Ireland (2013). *Residential Mortgage Arrears and Repossessions Statistics: Q3 2013.* Dublin: Central Bank of Ireland.

[119] These problems are discussed in detail in Section 3.1. below.

[120] See: 'Ten Years and Counting, Conclusions from a decade of attempting to resolve family home mortgage arears in Ireland', for detail and commentary, Section 3.1. Page 47.

[121] Free Legal Advice Centres (2013). *Moving out of Mortgage Arrears and Personal Debt, Part 1: A guide to the Code of Conduct on Mortgage Arrears 2013*. Dublin: Free Legal Advice Centres.

Instead, lenders were allowed to decide what, if anything, they would offer. Some borrowers, aware that the system did not and was not going to treat them fairly, retreated into the shadows and a number are still there. Some entered into a suite of payments arrangements which ultimately resolved a number of the less serious cases. However, writedown of the principal mortgage debt was not on the menu of options, copper fastened by a Personal Insolvency Act 2012, which at that time enshrined a creditor veto.

By June 2016 close to the time of Abhaile's establishment, a Central Bank of Ireland (CBI) report to government, commissioned by the Minister for Finance, stated that *'since the June 2013 peak, considerable progress has been made in addressing mortgage arrears, primarily through the use of restructures, rather than loss of ownership. Primary Dwelling Home (PDH) mortgage arrears have declined by 43 per cent since the end of June 2013. Over 120,000 PDH residential mortgages have been restructured in Ireland, 88 per cent of these loans are meeting the terms of the restructuring agreement. Notwithstanding the considerable progress, further work is required and momentum needs to be maintained.*[122]

The comparative optimism of these comments can be seen in a different light some five years later, on the basis of recent commentary, also from the CBI. Although the number of accounts officially classified as being in arrears has continued to decline,[123] the long term sustainability of many of the restructures that have been put in place to address those arrears is now being actively questioned even by the CBI itself, and many of these restructures will have preceded the establishment of Abhaile.

Thus, as we have noted in Paper Two of this series,[124] and in the overview above, a variety of figures were released by the CBI in research papers in the course of 2021 that are very concerning. For example, it was suggested that 95,000 family home mortgage accounts, equating to 13% (or one in eight) of all Principal Dwelling House loans and representing €14.5 billion in total balance due, are assessed by the CBI to be facing a payment shortfall at the end of the mortgage term. Some 32,000 of these accounts face a balance shortfall of 10% or less of the balance owed; the remainder of 63,000 accounts face a balance shortfall of greater than 10%. Over half of these accounts are classified as being restructured.[125] In addition, over a quarter of long term mortgage arrears borrowers (those in arrears of over one year's payments) engaging with their lender are over 60 years of age and the CBI suggests that *'for these borrowers, future income generation capacity is minimal, and solutions that retain homeownership while clearing debt balances may need to rely on the value of the property in the future'.*[126]

The publication of these figures is a welcome alert but what remains surprising about these comments is that they have been made as if the CBI were a bystander observing the scene, rather than the regulator of the mortgage lending arena in which it is occurring. Thus, these figures do not come with any proposals for how it intends to tackle these problems or any call to action on government, or other relevant stakeholders, for dialogue, discussion and a plan of action. Perversely, there may be a certain consistency in this, in that putting off dealing with a problem until it fully materialises has long been a feature of public policy in the credit and debt domain.

Ultimately, what effect has the introduction of the additional suite of services that belatedly materialised with Abhaile in 2015 and 2016 had? And does it make a significant difference to have additional services if the resolution mechanisms

[122] Central Bank of Ireland (2016). *Report on Mortgage Arrears.* Dublin: Central Bank of Ireland, p.5.

[123] According to mortgage arrears statistics published by the Central Bank of Ireland, at the end of Q.4 2021, 47,062 family home mortgage were in arrears, 25,898 of them in arrears of over one year's payments.
See: https://www.centralbank.ie/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears accessed 5th September 2022.

[124] Ibid, see Section 2.15, pages 39-42.

[125] See Duignan, D. and Kearns, A. (2021). *Behind the data: Mortgage borrowers facing end of term repayment shortfalls*. Dublin: Central Bank of Ireland, July 2021.

[126] See Kelly, J., Lyons, P., McCann, F. and O'Brien, E. (2021). 'Long term mortgage arrears: Analytical evidence for policy considerations', *Financial Stability Notes,* Vol. 2021 No.8. Dublin: Central Bank of Ireland, July 2021.

themselves are still insufficiently robust? A review and assessment of Abhaile outcomes, based on the statistical data provided by the bodies responsible in its 2020 report, will focus in detail on these questions below.[127] For the moment, it should be said that the wide range of diverse actors now funded by the taxpayer under this scheme to perform varying aspects of what is essentially the same job – finding a sustainable solution to a borrower's mortgage arrears problem in order to avoid repossession – is indicative of a somewhat unwieldy structure. Abhaile is overseen by two government departments – the Department of Justice and Equality and the Department of Social Protection - and three statutory bodies - the Citizens Information Board (CIB) (incorporating MABS), the Legal Aid Board (LAB) and the Insolvency Service of Ireland (ISI) who work together to provide the service.

Returning to a point made above, had MABS been put on a statutory basis, and had it been provided with the type of budget that Abhaile has had[128] to put in place the necessary legal and insolvency services, we might be further along the road of resolution than we now appear to be, especially had a law reforming element been integrated into the mix. There is certainly a case for housing all of these services under the one roof and a properly resourced and funded statutory MABS organisation as recommended above, would be the logical fit.

[127] See Section 5 below - An assessment of the impact and outcomes of the Abhaile Scheme.

[128] We estimate this to be in the region of €38 million.

3

SECTION

Regulatory pre-litigation mechanisms to resolve cases of over-indebtedness in Ireland

In this section, we examine debt related pre-litigation resolution mechanisms. We begin with an analysis of the Central Bank of Ireland's Code of Conduct on Mortgage Arrears (CCMA) and associated Mortgage Arrears Resolution Process (MARP). We then critique another Central Bank Code, the Consumer Protection Code and the relationship between these two Codes. We conclude this section with an examination of emerging issues in terms of rent and utility arrears.

3.1. FAMILY HOME MORTGAGE ARREARS CASES – THE CODE OF CONDUCT ON MORTGAGE ARREARS (CCMA) 2013 AND ITS MORTGAGE ARREARS RESOLUTION PROCESS (MARP)

The status in law of the CCMA/MARP

The CCMA started off as a set of rules voluntarily adopted by member institutions of the Banking and Payments Federation of Ireland (BPFI) to attempt to deal with the growing problem of family home mortgage arrears in the wake of the Global Financial Crisis (GFC) in 2008. In February 2009, the CBI adapted this set of rules into a regulatory Code issued under Section 117 of the Central Bank Act 1989.[129] The preliminary page to the (first) CBI Code of 2009 specifically stated as follows:

- This Code applies only to mortgage lending activities to consumers in respect of their principal private residence in this State.
- To assist with the rectification of a mortgage arrears problem it is important that the borrower promptly advise the lender of any problems with repayments.
- Lenders are reminded that they are required to comply with this Code as a matter of law.
- Lenders must be able to demonstrate that they are in compliance with this Code.
- This Code should be read as one with the Financial Regulator's Consumer Protection Code. All terms appearing in this Code shall have the same meaning as in the Consumer Protection Code.

The 2010 version of the Code (effective from 1st January 2011) introduced for the first time an obligation on each lender to ensure that it has a Mortgage Arrears Resolution Process (MARP) in place to process arrears cases and set out the basic rules that each lender's 'MARP' must adhere to. Following a review, the 2013 version of the Code (effective from 1st July 2013) updated the MARP rules and introduced a number of controversial changes, a matter discussed in more detail below.

Despite reminding lenders in the initial Code that they were *required to comply with the Code as a matter of law* there was no explicit reference in the code to the admissibility of these regulatory rules in a court of law as such – for example, in any repossession proceedings that might be brought by the lender against the borrower. The subsequent iterations of the CCMA in 2010 and 2013 retained the same wording and similarly failed to address this omission.

Inevitably, the status of the Code in legal proceedings therefore fell to be decided upon by the courts. Some early High Court decisions in 2012 and 2013 looked encouraging from the consumer debtor perspective in terms of the admissibility of the Code in repossession cases.[130] However, the Supreme Court, firmly closed the door on any such interpretation in May 2015 in the decision of **Irish Permanent PLC and Dunne and Irish**

[129] Section 117 (1) provides that *'The Bank may, after consultation with the Minister, from time to time draw up, amend or revoke, in relation to any class or classes of licence holders or other persons supervised by the Bank under this or any other enactment, one or more than one code of practice concerning dealings with any class or classes of persons and every such code shall be observed by the licence holders, or other persons so supervised, to whom they relate'.*

[130] See for example 1) Stepstone Mortgages Funding Limited v Fitzell and 2) Irish Life and Permanent v Duff, both discussed in a FLAC 2014 report: Joyce, P. and Stamp, S. (2014). *Redressing the Imbalance: A study of legal protections available for consumers of credit and other financial services in Ireland.* Dublin: Free Legal Advice Centres, p.59-61.

Permanent PLC and Dunphy in the following terms:[131]

> *'In the absence of there being some legal basis on which it can be said that the right to possession has not been established or does not arise, then the only role which the Court may have is, occasionally, to adjourn a case to afford an opportunity for some accommodation to be reached'.*

It went on to rule that only in circumstances of non-compliance with the time moratorium on a lender taking legal action against a borrower following his or her exit from the mortgage arrears resolution process,[132] should a lender's right to obtain an order for possession be affected. The Court also emphasised that it was not its responsibility to make laws where the Oireachtas had declined to do so, in the following terms:

> *'If it is to be regarded, as a matter of policy, that the law governing the circumstances in which financial institutions may be entitled to possession is too heavily weighted in favour of those financial institutions then it is, in accordance with the separation of powers, a matter for the Oireachtas to recalibrate those laws. No such formal calibration has yet taken place'.*

These careful observations may nonetheless provide some clue as to the Court's thinking. Firstly, in pointing out that in the absence of legislation to redress such a situation, all the (Circuit) Court can do is to occasionally adjourn to facilitate accommodations to be reached, the Supreme Court was clearly conscious of the administrative mediation type role played in many repossession cases by Circuit Court County Registrars, described in detail in Paper Two of this series.[133] Secondly, in alluding to the possibility that entitlement to repossession might be too heavily weighted in favour of financial institutions, it may be inferred that the Court might be concerned about an inequality of arms here.

At this stage, after well over a decade of various versions of the CCMA, it is evident that the CBI never intended (and perhaps never conceived) that the wording *'Lenders are reminded that they are required to comply with this Code as a matter of law'* might be construed and argued by debtor advocates to allow a defendant borrower a right to question a lender's arrears resolution procedures in subsequent repossession proceedings and, accordingly, its right to repossess a family home. What the CBI was providing for here was its power, as the regulator of mortgage lenders, to hold a given lender to account in terms of the use of those resolution procedures, should it choose to do so.

Notably then, in terms of lenders having to be able to demonstrate that they are in compliance with this Code, Rule 62 of the CCMA 2013 states that '*a lender must maintain full records of all the steps taken, and all of the considerations and assessments required by this Code, and must produce all such records to the Central Bank of Ireland upon request* (our emphasis). As we shall see below in more detail, the borrower, however, has no such explicit rights to the details of the lender's deliberations under the rules of the CCMA/MARP process, a major procedural deficiency especially when loss of the family home is a possible outcome.

In terms of its legal basis, the CCMA, like the CBI's other codes of conduct, has up to now been issued under a given section under a Central Bank Act that allows supervisory Codes to be introduced at the Bank's discretion.[134] The only apparent fettering of the Bank's discretion under this section is to 'consult the Minister' (for Finance). What form this consultation takes is unclear, although it is generally understood that the Department of Finance and the CBI are mutually respectful of each other's mandates and boundaries. It is our understanding that such Codes are developed and written internally and that the office of the Attorney General is not consulted in relation to them.

What is clear and ultimately confirmed by the Supreme Court is that, with one limited exception, the CCMA itself does not set legally

[131] [2015] IESC 46.

[132] See Rules 45 d) and 47 d).

[133] Ibid, p.20-23.

[134] See above Section 117, Central Bank Act 1989, also discussed further below.

enforceable standards upon lenders that the borrower can rely upon in a court of law, though, conversely, the failure of borrowers to comply with the standards set for them in the CCMA may well have adverse legal consequences.

Perceived flaws in the Mortgage Arrears Resolution Process of the CCMA

Introduction

As explained above, rules to provide for a specific Mortgage Arrears Resolution Process (MARP) were introduced in the CCMA 2010 (effective from 1st January 2011). This development followed on from recommendations made in the final report of the 'Cooney' group in late 2010, in which FLAC was represented.[135] FLAC proposed that borrowers should be entitled to appeal decisions made by lenders under the new MARP process to an independent third party set up for that purpose, a proposal that was not accepted by the group, despite some support in principle from some other members. Accordingly, FLAC insisted that the final report at least reflect its insistence on this particular point and this is recorded in a footnote.[136] A right of appeal to an independent third party has still not been introduced over a decade later.[137]

In 2013, the CBI published a 'Consultation Paper' (CP 63) seeking submissions to a review of the CCMA 2010. FLAC and other debtor advocate groupings made detailed submissions in response.[138] A briefing was subsequently held by the CBI to introduce the new Code that was presented to those attending as the already decided outcome of the process. Some adverse changes to the MARP from the debtor perspective, particularly a new right for a lender to unilaterally decide which of an expanded suite of alternative repayment arrangements (ARA's) it might choose to offer borrowers, caused considerable disquiet among debtor advocates in the room. Ultimately, the 2013 revision proceeded nonetheless as ordained.

Both these instances are illustrative of an important point; that although views may be sought and may be taken into account, the ultimate decision making power appears to reside with the CBI itself to act as it sees fit.

Issues concerning lender compliance

It is notable that the CBI itself expressed some reservations about the approach of some lenders to MARP compliance, some two years after the CCMA 2013 was introduced. In an information release detailing some of its findings arising out of a themed inspection of lenders' compliance with the CCMA in 2015,[139] it identified, for instance, practices where a lender:

> *'had an internal policy that permitted the lender to remove borrowers from the MARP solely because the borrower had not agreed to an ARA[140] over the telephone' (when ARAs offered to borrowers as part of the MARP are specifically required under the Code to be detailed in writing or another durable medium under Provision 42).*

It also identified:

> *'issues regarding adherence to some of the specific timeframes set out in the CCMA, in particular timelines between warning and classifying borrowers as not co-operating*

[135] Department of Finance (2010). *Mortgage Arrears and Personal Debt Group Final Report 16th November 2010.* Dublin: Department of Finance. FLAC was represented in this government appointed group by the lead author of this paper, Paul Joyce.

[136] Ibid, p.17. The relevant footnote (6) reads as follows: *"The Group acknowledges that the member representing Free Legal Advice Centres would have preferred to see a new appeals body set up to deal with the full range of potential appeals arising out of the MARP".*

[137] Note that in Section 8 below, we propose the establishment of a Mortgage Arrears Review Office and we suggest that one of its roles should be to deal with appeals from borrowers unhappy with their lender's assessment of their case under the MARP/CCMA process.

[138] See for example: Free Legal Advice Centres (2013). *Submission on the review of the Code of Conduct on Mortgage Arrears, Consultation Paper (CP 63).* Dublin: Free Legal Advice Centres, April 2013.

[139] Central Bank of Ireland (2015). *Code of Conduct on Mortgage Arrears Themed Inspection – CBI Letter to the Industry*. Dublin: Central Bank of Ireland, 24th June 2015.

[140] Short for 'Alternative Repayment Arrangement'.

(our emphasis) and timelines to notify borrowers in advance of carrying out unsolicited personal visits'.

However, by its own admission, not a single mortgage lender had been sanctioned by that point for failure to comply with any of these rules, a fact described as 'simply inexplicable' in November 2015.[141] This is further evidence of 'a non-intrusive approach to regulation'.[142] It also puts the issue of so called lack of co-operation of a number of borrowers under the MARP in context. Borrowers who are alleged to have not co-operated *do* suffer consequences. They are exited from the resolution process and may face repossession proceedings from three months later which can culminate in a Possession Order and eviction. Lenders proceed unhindered despite acknowledged breaches of regulatory standards.

■ Issues concerning the lender's assessment and fairness of procedures

The essentials of the assessment the lender must carry out of the borrower's financial and other circumstances, as set out in the mandatory Standard Financial Statement (SFS) that the borrower must fill out and return to the lender's Arrears Support Unit (ASU), are contained in Provision 37 as follows:

> *37. A lender's ASU must base its assessment of the borrower's case on the full circumstances of the borrower including:*
>
> *a) the personal circumstances of the borrower;*
>
> *b) the overall indebtedness of the borrower;*
>
> *c) the information provided in the standard financial statement;*
>
> *d) the borrower's current repayment capacity; and*
>
> *e) the borrower's previous repayment history.*

This looks in principle to be a comprehensive exercise that each lender is obliged to undertake in every arrears case. In particular the reference to an assessment based on 'the full circumstances of the borrower' is noted. It is clear that this necessitates that an examination of these five specific factors must be thorough and detailed. This assessment is carried out by the lender's Arrears Support Unit (ASU) with a view to deciding whether to offer the borrower/s an Alternative Repayment Arrangement (ARA) out of a list of such arrangements set out in Provision 39 of the Code. The lender *'must explore all of the options for alternative repayment arrangements offered by that lender'* (our emphasis), a revised formula of words introduced under the 2013 version of the Code and one of the principal causes of the disquiet expressed by debtor advocacy groups referred to above.

Provision 33 of the 2010 Code had simply read that *'a lender must explore all options for alternative repayment arrangements, when considering a MARP case, in order to determine which options are viable for each particular case'.* The introduction of the words 'offered by that lender' amounted to a particularly adverse change in language from the borrower's perspective. Thus, although the suite of potential ARA's that might be offered to borrowers in arrears was considerably expanded in the 2013 version, this 'improvement' was undermined by allowing lenders to unilaterally decide what ARA's they might and might not choose in principle to offer.

[141] See https://www.fiannafail.ie/news/banks-being-let-off-the-hook-over-breaches-of-mortgage-arrears-code-mcgrath, 30th November 2015 (accessed 5th September 2022). In this media release, then Fianna Fáil Finance spokesperson Michael McGrath TD said that he was extremely disappointed with confirmation to him that no fines or other financial penalties have been imposed on banks found in breach of the Code of Conduct on Mortgage Arrears. Deputy McGrath commented that *"The Code of Conduct on Mortgage Arrears (CCMA) is far from perfect following the dilution of it in recent times. However it does afford a level of protection to borrowers who fall into difficulty with their mortgage and should be followed in full by all banks and financial institutions which fall within its remit"* and *"In my view it is simply inexplicable that no monetary sanctions have been imposed for breaches of the CCMA. This weak approach will only encourage the banks to engage in further underhand tactics against their customers. With nearly 100,000 family home mortgages currently in arrears, it is vital that mortgage holders have confidence that the Central Bank will act to vindicate their rights under the CCMA".*

[142] See Houses of the Oireachtas (2016), ibid, p.4.

Provision 40 then obliges a lender to *'document its considerations of each option examined under Provision 39 including the reasons why the option(s) offered to the borrower is/are appropriate and sustainable for his/her individual circumstances and why the option(s) considered and not offered to the borrower is/are not appropriate and not sustainable for the borrower's individual circumstances'.*

Any reasonable standard of fair procedures would demand that such 'considerations' would have to be provided in writing to the relevant borrower. However, it is also apparent from the wording of Provision 40 that there is no such stated explicit obligation imposed on the lender and no such specific entitlement for the borrower. Subsequent enquiries with the CBI at that time confirmed that this was the case, and that lenders were only required to furnish this information, if requested, to the CBI itself as their regulator.[143]

In summary, we have frequently criticised this process as a 'fair procedures nightmare'.[144] This has resulted in the following typical scenario in a number of cases. The borrower's Standard Financial Statement (SFS), containing all the relevant information in relation to that borrower's debts, income, and other financial information is received and assessed by the lender's Arrears Support Unit (ASU). The borrower subsequently receives a letter from their lender's ASU, returning the wording of Provision 37, and stating something along the following lines:

> **We have assessed:**
>
> *a) your personal circumstances*
>
> *b) your overall indebtedness*
>
> *c) the information provided in your standard financial statement;*
>
> *d) your current repayment capacity; and*
>
> *e) your previous repayment history*
>
> **and we have determined that there is no alternative repayment arrangement that we offer that is appropriate in your case. We have thus concluded that your mortgage is not sustainable'**

In many instances, no further information would be provided, for example, the lender's consideration of each option offered and why it was not considered appropriate and sustainable in terms of the five criteria that provide the framework for the assessment. The borrower would then be informed of his/her right of appeal to the lender's Appeals Board, but would have little or no relevant information of the lender's assessment as a basis to ground that appeal.

Provision 49 obliges each lender to have an appeals process whereby a borrower can challenge lender decisions under the MARP process including:

- ***where an alternative repayment arrangement is offered by a lender and the borrower is not willing to enter into that alternative repayment arrangement and seeks an alternative;***
- ***where a lender declines to offer an alternative repayment arrangement to a borrower;***
- ***where a lender classifies a borrower as not co-operating and proposes to exit him/her from the process***

Each lender has the right to appoint its own Appeals Board which must be comprised of three of the lender's senior personnel, who have not been involved in the borrower's case previously,

[143] See Provision 62.

[144] See for example: Free Legal Advice Centres (2016). *Submission to the Oireachtas Committee on Housing and Homelessness*. Dublin: Free Legal Advice Centres, May 2016, p.5.

at least one of which *'must be independent of the lender's management team and must not be involved in lending matters, for example, an independent member of the lender's Audit Committee or an external professional such as a solicitor, barrister, accountant or other experienced professional'.*

In the years that followed the 2013 update of the Code, the consequences of not allowing for an independent appeal for borrowers became compounded by such procedural deficiencies. Regrettably, the CBI took no action to rectify these omissions. The closest it has come to taking any remedial action was to issue an 'expectation' letter sent to all regulated mortgage lenders in March 2019 that emphasised the necessity for greater compliance with the rules on communicating assessments.[145] By that point thousands of borrowers in arrears had been put through and exited from the MARP process and some of these are still mired in proceedings. A relevant section of that letter states as follows:

> *'With respect to the specific requirements relating to communications with borrowers where an alternative repayment arrangement (ARA) is offered or not offered, the Central Bank expects regulated firms to provide the following additional information to borrowers:*
>
> 1. *A copy of the firm's assessment of the borrower's case carried out in accordance with Provision 37 and as documented by the firm in compliance with Provision 40; and*
> 2. *The reasons why ARAs considered by the firm, but not offered to the borrower, are not appropriate and not sustainable for the borrower's individual circumstances, as documented by the firm in compliance with Provision 40.*
>
> *The provision of this information will enhance transparency for borrowers about the reasons why they have, or have not been, offered particular ARAs. It will also assist borrowers with understanding how their case has been assessed and equip them to make a more informed decision on whether they wish to avail of the internal appeals process'.*

While this letter may have served as some kind of marker for future lender behaviour, there is still no formal revision proposed by the CBI to the text of the CCMA/MARP itself, neither in terms of the imbalanced provisions concerning the assessment of options for the borrower nor to the wholly inadequate appeals mechanism. A belated and inadequate recognition, some six years after the introduction of the 2013 version of the Code, that lenders may have been short changing borrowers from a procedural perspective under the terms of the MARP is of little use to them now. How many borrowers between 2013 and 2019 had this experience and never got the benefit of a fair process and a fair assessment of their case?[146]

Equally, a letter alone from a regulator that has, thus far, failed to effectively supervise lenders is unlikely to change lender behaviour.[147] A far more rigorous and regular inspection and enforcement regime is required, as new mortgage arrears cases may have emerged as a result of Covid 19 and as economic trends, including inflationary pressures, continue to put pressure on borrowers. Ultimately, the CCMA itself should be amended to ensure that there is a more meaningful and balanced engagement where borrowers have concrete rights as well as defined obligations.

[145] Letter issued to regulated entities by the CBI Director of Consumer Protection re Obligations under the Code of Conduct on Mortgage Arrears. Dublin: Central Bank of Ireland, 22nd March 2019.
See: https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/letter-issued-to-regulated-entities-re-code-of-conduct-on-mortgage-arrears-22-march-2019.pdf?sfvrsn=6 , accessed 5th September 2022.

[146] See, for example, Paper Two of this series at Section 2.11, pages 31-32, where we quote numbers drawn from a dataset published by the CBI in May 2016, concerning MARP outcomes in 2014-2015. This suggests 1) that in almost 20,000 arrears cases, the relevant borrower was not offered an ARA following the MARP engagement and 2) in close to 50,000 cases, borrowers were said to have been warned on not co-operating with the process and over 30,000 were declared as not co-operating, with only about 5% of these appealing that declaration.

[147] A salient question here perhaps is how many inspections have taken place in the three plus years since this letter was issued to lenders and what sanctions, if any, have been imposed?

Finally, despite the legal obligation imposed on bodies such as the Central Bank to adhere to s.42 of the Irish Human Rights and Equality Act,[148] it is also notable that the text of the CCMA/MARP fails to make any reference to the necessity to prevent and combat potential discriminatory treatment in terms of how the processes under the Code are implemented by lenders.

Commentary

A broader question occurs here. How wide should the remit of the Central Bank be in such a fundamentally important arena of social and economic life? There is of course every reason to have a Central Bank, and for it to be independent from government in the performance of its functions. However, the remit of its powers and how it exercises them should be subject to assessment and review.

The stated mission of the Central Bank of Ireland is to *'serve the public interest by maintaining monetary and financial stability while ensuring that the financial system operates in the best interests of consumers and the wider economy'.* In framing the MARP/CCMA 2013 and in its administration of that Code since, a key question is to what extent has this mission been adhered to?

Our analysis of the CCMA, particularly in terms of how it has operated in practice for many borrowers in mortgage arrears, suggests that it has not always operated in their best interests. In the 'Themed Inspection' in 2015, the CBI itself identified a number of incidences where lenders had not adhered to the terms of the Code but all that has been done to seek to remedy this is to issue an 'Expectation Letter' to lenders four years after this discovery. We would question the extent to which this 'serves the public interest'.

The CCMA subjects the borrower to an obligatory assessment process to determine his/her capacity to service an 'alternative repayment arrangement' but the borrower is not legally entitled to access the full detail of the determination of that assessment by the lender. There is an 'appeal' but it is to an Appeals Board set up and controlled by the lender, and with no further access to a review by a third party. Without access to the lender's detailed consideration of his/her case (if indeed there was one), how is such an appeal to have proper meaning and effect?

The CCMA clearly contains major deficits from a fair procedures perspective. Thus, a further key question is whether it is acceptable in a democracy to empower the CBI to issue quasi-legislative instruments containing such deficits, which can profoundly affect the welfare of over-indebted households, without any apparent oversight by the Houses of the Oireachtas.[149]

In this regard, it is also notable that the CBI's choice of method thus far in introducing this and other parallel codes, has been to utilise S.117 of the Central Bank Act 1989, rather than to issue a statutory instrument (SI) in the form of a regulation which must be laid before the Houses of the Oireachtas, which it is empowered to do under an array of legislative provisions[150].

S.117 of the 1989 Act, entitled 'Codes of Practice', reads as follows:

[148] **42.** (1) A public body shall, in the performance of its functions, have regard to the need to—
(a) eliminate discrimination,
(b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and
(c) protect the human rights of its members, staff and the persons to whom it provides services.
(2) For the purposes of giving effect to subsection (1), a public body shall, having regard to the functions and purpose of the body and to its size and the resources available to it—
(a) set out in a manner that is accessible to the public in its strategic plan (howsoever described) an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues, and
(b) report in a manner that is accessible to the public on developments and achievements in that regard in its annual report (howsoever described).

[149] See FLAC's 2014 report, 'Redressing the Imbalance' (Joyce and Stamp 2014, ibid), for a more detailed discussion of this question, at pages 57-62.

[150] In 2020 to 2022 alone, the CBI issued 348 SI's. See, for example, the Central Bank (Supervision and Enforcement Act 2013 (Section 48 (1)) (Investment Firms) (Amendments) Regulations 2022.

> *(1) The Bank may, after consultation with the Minister, from time to time draw up, amend or revoke, in relation to any class or classes of licence holders or other persons supervised by the Bank*
>
> *under this or any other enactment, one or more than one code of practice concerning dealings with any class or classes of persons and every such code shall be observed by the licence holders, or other persons so supervised, to whom they relate.*
>
> *(2) In drawing up codes of practice the Bank shall have regard to—*
> *(a) the interest of customers and the general public, and*
> *(b) the promotion of fair competition in financial markets in the State…*

The only condition attached to issuing such a Code of Practice is to first consult the Minister for Finance. As we have already noted above, the nature and extent of such consultation is unknown and it is our understanding that the proposed content of the Code is not subject to any review by the Office of the Attorney General. It is also notable that this section is addressed only to '*any class or classes of licence holders or other persons supervised by the Bank*'. Thus, it is a matter of the regulator – the Central Bank – issuing instructions to the regulated – in this case licensed mortgage lending institutions.

However, it is also clear that the processes provided for under a given Code such as the CCMA, may have profound effects on the lives of borrowers for whom these processes are deemed obligatory in practice, though they are clearly not regulated entities. It is both anti-democratic and anti-consumer in our view that these rules are decided upon and reviewed by the CBI without any apparent due process and external review.

It is our understanding from research enquiries that, in future, revisions of CBI codes will be issued under s.48 of the Central Bank (Supervision and Enforcement) Act 2013 rather than under s.117 of the Central Bank Act 1989. The 2013 Act goes on to provide at Section 51 (2) that 'Regulations made under section 48 shall be laid before each House of the Oireachtas as soon as may be after they are made'. Whether this will make any practical difference to a wider consideration of the content of such Codes is unclear.

■ RECOMMENDATIONS

Code of Conduct on Mortgage Arrears/ Mortgage Arrears Resolution Process

Provide that the CCMA (or any revised code) be reissued as a statutory instrument under s.48 of the Central Bank (Supervision and Enforcement) Act 2013, that a clause in the Code provide that the terms of that statutory instrument shall be admissible in legal proceedings in the courts and that the CBI consult with MABS in relation to any revised CCMA or other relevant Code.

Ensure that a far more rigorous and regular inspection and enforcement regime is put in place to monitor lender compliance with the rules of the MARP, as new mortgage arrears cases may emerge as a result of Covid 19 and as economic trends, including inflationary pressures, continue to ebb and flow.

Amend the existing MARP rules in the following respects:

- To provide that the lender's assessment of the borrower's full circumstances under Provision 37 must be in writing and must involve a detailed examination of each criterion and their cumulative effect in leading to a final written decision
- To provide under Provision 37 that the fourth circumstance – 'the borrower's current repayment capacity' should be amended to read 'the borrower's current and future repayment capacity'[151]
- To provide in Provision 39 that 'a lender must explore all of the options for alter-

[151] The failure to explicitly provide that the borrower's future repayment capacity be assessed seems like a clear oversight. His/her current repayment capacity is clearly impaired, otherwise why would there be arrears. Surely future prospects should be a key part of the assessment.

native repayment arrangements' rather than 'all of the options for alternative repayment arrangements offered by that lender'

- To provide in Provision 40 that the lender's documented consideration of all the options examined, why they were or were not considered appropriate or sustainable for the borrower's individual circumstances or were or were not offered to the borrower, be explained in writing in full to the borrower
- To provide that the borrower's right of appeal against adverse decisions to an Appeals Board established by the lender in Provisions 49–55 be removed and replaced with the right of appeal to an independent third party established by statute to carry out this (and other) debt resolution functions.[152]
- To provide that the MARP process reflect the requirements of the public sector duty provided by section 42 of the IHREC Act, 2014 so that circumstances like the age and disability of the debtor would be factored into consideration.

3.2. ARREARS PROCEDURES IN CASES OF UNSECURED DEBT – THE CONSUMER PROTECTION CODE (CPC) 2012 (AS CONSOLIDATED).

The first edition of the Central Bank's Consumer Protection Code (CPC) was introduced in August 2006. A number of significant amendments were made to it in the years that followed,[153] and a further revised edition was put in place in 2012. Over the intervening years, further numerous changes have been made to the Code by the CBI in the form of 'addenda',[154] and as a result, what is described as an Unofficial Consolidation of the Consumer Protection Code 2012 (revised from 1 January 2015 onwards) was published in March 2020. At the time of writing, the CBI has just published a detailed Discussion Paper on the 'Consumer Protection Code Review' as a prelude to a potential overhaul of the Code, as referenced in section 2.2 above.[155]

It was not until the 2012 draft of the Code was issued that a specific chapter was put in place on the handling of arrears by regulated lenders in non-mortgage loans cases. The current Chapter 8 of the Code therefore applies in respect of loans (including credit card facilities) held by a 'personal consumer'. A personal consumer means a consumer who is a natural person acting outside his or her business, trade or profession (according to the Definitions Section of the Code).

It is also provided that Chapter 8 does not apply to the extent that the relevant loan is a mortgage loan to which the Code of Conduct for Mortgage Arrears (CCMA) 2013 applies. Thus, a consumer

[152] In Section 8 of this paper below, we propose the creation of a Mortgage Arrears Review Office by statute to act as 'a clearing house' to resolve family home mortgage arrears cases and avoid repossessions, while simultaneously acting as a conduit to a potential increase in Personal Insolvency Arrangements'.

[153] See in particular the Addendum to the Consumer Protection Code of May 2008, which applied the Code to newly authorised Retail Credit Firms and Home Reversion Firms, and retrospectively clarified that the CPC did not apply to regulated entities when carrying on the business of entering into hire purchase agreements or consumer hire agreements.

[154] In July 2015, July 2016, August 2017, December 2017, May 2018, June 2018, September 2019 and July 2021.

[155] Ibid. Launched by the CBI on October 3rd 2022.

borrower with a family home mortgage in arrears and a personal loan in arrears is subject to rules under two different codes to attempt to resolve those arrears.

Thereafter, the provisions provided for within this chapter are relatively straightforward. Regulated lenders must have in place written procedures for the handling of arrears and must inform personal consumers of the relevant processes, including through a dedicated section of any website it operates, which must be easily accessible from a prominent link on the homepage.

A wide array of obligations on lenders under this chapter of the Code include:

- *seeking to agree an approach with the personal consumer or a third party nominated by the personal consumer to act on his or her behalf in relation to the arrears situation [156] (such as a MABS money advisor, for example);*
- *providing details on the charges that may be imposed on personal consumers in arrears;*
- *providing a link to the Money Advice and Budgeting Service (MABS) website;*
- *where an account remains in arrears 31 calendar days after the arrears first arose, informing the personal consumer (and any guarantor of the loan), within three business days, on paper or on another durable medium, of the status of the account including the number of payments missed, the amount of arrears, the interest rate applicable to the arrears, details of any charges that apply and the consequences of continued non-payment;*
- *informing the personal consumer of any payment protection insurance (PPI) that applies to the loan account or credit card account, as the case may be, and the details of that policy.*
- *Where the arrears persist, providing an updated version of the information in relation to the arrears to the personal consumer, on paper or on another durable medium, every three months.*
- *Informing the personal consumer, on paper or on another durable medium, when the lender intends to appoint a third party to engage with the personal consumer in relation to arrears and explaining the role of that third party.*
- *Where a revised repayment arrangement is agreed with a personal consumer, providing that consumer, within five business days, on paper or on another durable medium, with a clear explanation of the revised repayment arrangement and clarification on what data relating to the consumer's arrears will be shared with any other relevant credit reference agency.*
- *Where a personal consumer makes an offer of a revised repayment arrangement that is rejected by the regulated entity, formally documenting its reasons for rejecting the offer and communicating these to the personal consumer, on paper or on another durable medium.*

Source: Central Bank of Ireland, Consumer Protection Code 2012.

156 Note that the Code also provides here that 'this does not prevent the regulated entity from contacting the personal consumer directly in relation to other matters'.

3.3. ONE DEBTOR, TWO CODES, MULTIPLE DEBTS

Essentially, the arrears procedures set out in the Consumer Protection Code amount to a watered down and less prescriptive version of the MARP. However, Chapter 8 of the CPC is presented as if the borrower has only one non-mortgage loan in arrears when we know that this is often not the case, just as the MARP is written as if the borrower has a mortgage in arrears and no non-mortgage debts.

It is very common, however, for a borrower to present to MABS with more than one debt in arrears.[157] Typically if a person has a family home mortgage in arrears, there may be other debts related to borrowings such as arrears on instalments to repay a personal loan or a car loan or an unpaid credit card balance. In addition, many who live in rented accommodation may have the same kinds of multiple financial problems as mortgage borrowers in terms of unsecured debts, particularly as rents in many places are now higher than typical mortgage payments and access to public housing remains very limited.

A key point then is that this infrastructure of Codes designed to resolve problems of over-indebtedness and to thereby avoid litigation, does not adequately reflect the reality of living in Ireland today. The CBI Codes (the CCMA and the CPC) provide unrelated procedures to attempt to resolve debtor's diverse difficulties, but even these do not cover all debts. For example, neither of these codes explicitly refer to non-credit agreement debts such as rent arrears or utility arrears, both very significant problems at the time of writing[158] and likely to remain so for quite some time. Of course, it may be argued that there is a logical reason for this. Central Bank codes only apply to entities regulated by the CBI, and this clearly does not include landlords or utility providers.

In terms of a universal financial information tool to assess payment capacity, there is no specific reference in the text of Chapter 8 of the CPC to a requirement to use the Standard Financial Statement (SFS), which is mandatory (by virtue of Provisions 30-34 of the CCMA) in MARP cases. However, a copy of that SFS is included in Appendix E of the 2015 unofficial consolidation of the CPC. Thus in practice the SFS has been the common document used by creditors and debtors and their respective representatives in assessing and negotiating repayments in both secured and unsecured debt cases.

This document has recently been firmed up, following a consultation exercise by the Central Bank in March 2021,[159] which led to the introduction of a new and somewhat simplified Standard Financial Statement (SFS) for use not just in the MARP but in debt cases generally. Thus, the CBI website confirmed in yet another of multiple 'Addendums' to its CPC, dated July 2021, that it has introduced a new Standard Financial Statement document as Appendix E of the Consumer Protection Code 2012. In turn, it further issued a new (Mortgage Arrears) Consumer Guide to Completing the Standard Financial Statement (SFS) in January 2022.[160] This

[157] See Stamp (2009) ibid.

[158] Almost a quarter of a million domestic electricity accounts were reported by the Commission for Regulation of Utilities to be in arrears at the end of April 2021. See: Commission for Regulation of Utilities (2021). Covid-19: Arrears and NPA Disconnections, April 2021 Update. Dublin: Commission for Regulation of Utilities. In terms of rent arrears, according to the most recently published data we could identify, a total of €85,367,683 was outstanding to local authorities as of December 2019.
See: https://www.gov.ie/en/collection/35601-local-authority-rented-sector-activity/#overall-local-authority-rent-arrears , accessed 7th September 2022.

[159] See Consultation Paper 139 (CP139) on the Review of the Standard Financial Statement ('SFS'), March 2021. A revised version of the SFS to be used by regulated lenders to assess the borrower's case has been put in place and applies to new mortgage arrears cases from 1st January 2022. The Central Bank reported on January 5th 2022 to the effect that its review found that the SFS was a complex document for borrowers to complete, with some borrowers struggling with the length of the document and having difficulty understanding and gathering the information required. It further stated that the revised SFS is easier to understand and navigate and is 38% shorter in length than the previous version. Finally, in order to assist borrowers in completing the SFS, the Central Bank also stated its intent to publish a new consumer guide on the completion of the SFS and other guidance material, aimed at enhancing borrower understanding of the SFS and how it should be completed. See: Central Bank of Ireland (2022). Revised Standard Financial Statement to assist borrowers in financial distress introduced, Press Release, 5th January 2022.

[160] See: https://www.centralbank.ie/docs/default-source/Regulation/consumer-protection/other-codes-of-conduct/35-gns-4-2-7-mortgage-arrears---sfs.pdf, accessed 7th September 2022

guide stipulates that an SFS is also required to be used by debt management firms under the Consumer Protection Code 2012, as amended.

One simplified SFS for all debt cases is progress. Ultimately, however, it is hard not to conclude that the architecture intended to pro-actively deal with arrears on credit agreements is flawed, since the provisions of the CCMA/MARP and Chapter 8 of the CPC seem to otherwise operate in something of a parallel universe, failing to properly acknowledge that potential personal insolvency is a problem that must be approached and resolved in a collective manner. Thus, although the SFS ensures that all the consumer's debts are listed for information purposes at least, the procedures prescribed in the CCMA/MARP set out detailed rules for dealing with family home mortgage debt only, suggesting that this debt is the only priority debt. Simultaneously, a non-mortgage debt creditor is obliged to apply Chapter 8 of the CPC, but no guidance is provided as to how this is to be done when that creditor becomes aware that there are also family home mortgage arrears involved in the same case.

A further factor is that Chapter 8 of the CPC takes the approach of addressing each non-mortgage creditor individually and sets out the same process that each non-mortgage creditor must follow, but fails to even acknowledge, let alone provide for, a situation where the borrower has arrears on other non-mortgage credit agreements. Thus, while these rules can work effectively for one credit agreement in arrears, their application to a borrower in difficulty with more than one unsecured debt is problematic.

It is generally asserted that it is in the interests of all parties to address debt and financial problems quickly and decisively. Consumers are routinely advised that it is important to engage early before their situation worsens. With the multiplicity of codes and provisions, it can be difficult for borrowers to identify what the incentive is. A person with a number of debts but without the financial wherewithal to repay them will want to know what the rules of engagement are, which debts will have to be prioritised, and which might be addressed at a later stage, for example.

Despite a lack of comprehensive guidance from the Codes, MABS money advisors have evolved a way of working on priorities. For example, the MABS website currently states that '*A priority debt is one where due to the contract, your creditor can take back property or a car, or cut you off from their service*'[161] and it goes on to cite mortgage, rent, essential services such as electricity, gas and broadband, and a vehicle that may be necessary for work, as examples. The critical wellbeing role that MABS plays here in explaining processes and taking the weight off the debtor should not be underestimated. However, a debtor who is not working with MABS, or is negotiating alone or through a debt management firm, will not necessarily know how to approach this.

Given that the broad objective of these processes is to assess the debtor's financial situation and payment capacity and to avoid litigation against him/her, consideration should be given to adopting a 'One Code' approach.

■ RECOMMENDATIONS

A revised code covering all debt

A single CBI regulatory Code for regulated entities should be put in place encompassing early resolution procedures for both mortgage and non-mortgage debts. It should incorporate rules of engagement for the three standard scenarios that generally apply – a borrower with mortgage debt only, with non-mortgage debt only, and (the most problematic and common) with both mortgage debt and non-mortgage debt together. Such a Code should provide:

- General guidance on the relative priority of debts - MABS methodology provides a useful framework in this regard.
- Ensure as a first priority that essential services are paid so they are not cut off (subject to the latitude provided by the

[161] See: https://mabs.ie/tackling-debt/five-steps/deal-with-urgent-priority-debts/ accessed 7th September 2022.

Energy Engage Code detailed below, which obliges energy suppliers to offer a range of payment options to customers in arrears, such as a debt repayment plan).

- In a mixed mortgage debt and non-mortgage debt scenario, the family home mortgage should be accorded payment priority but with a recognition that non-mortgage credit agreements in arrears must also be attended to.[162]
- Where there is no mortgage and the debtor lives in rented accommodation, the payment of the rent in order to avoid potential eviction should be prioritised before payments to non-mortgage creditors.

3.4. UTILITY ARREARS CASES

TABLE 2: UTILITY ARREARS COMPARISON — DECEMBER 2019 AND APRIL 2021

Accounts in arrears	December 2019	April 2021
Electricity (domestic)	244,733	249,880
Electricity (non-domestic)	33,290	39,118
Gas (domestic)	94,580	117,354
Gas (non-domestic)	3,419	6,910

Source: Commission for Regulation of Utilities.

A concrete set of data that served as a salutary warning of financial pressure as Covid receded are the utility arrears figures reported in 2021 by the Commission on the Regulation of Utilities (CRU) set out in the table above.[163] In summary, these statistics published on June 17th 2021 revealed the following:

- *As of April 2021, **249,880** domestic electricity accounts were in arrears, amounting to **12%** (or one in eight) of the total number of such accounts. 39,118 non-domestic (or commercial) accounts were in arrears, amounting to 13% of such accounts, again one in eight.*
- *In relation to gas, a total of **117,354** domestic accounts were in arrears at the end of the same period, amounting to **17%** of such accounts (or one in six). 6,910 non-domestic (or commercial) accounts were in arrears, amounting to 26% of such accounts, or one in four.*

Compared to the pre-Covid position, each of these arrears figures rose, more so in the case of gas than electricity, although a slight reduction in each category was identifiable between March and April 2021.

The period of Covid is said to have seen a marked increase in the deposit of savings into bank accounts for many, as opportunities to spend for social and leisure purposes were curtailed by rolling restrictions. Given that trend, one might expect that the number of accounts in utility arrears might have decreased over this period, rendering the increases outlined above perhaps more worrying, particularly in the current context of significant energy price rises.

These figures published by Commission at the end-April 2021 are now over 18 months old. An update would be useful at this point. However, research enquiries to the CRU early this year would suggest that we are not likely to see updated figures anytime soon.[164]

However, we do know that over this interval, the rising rate of inflation has put much greater pressure on the capacity of households on low and middle incomes to meet their financial

[162] Even if the unsecured creditor only receives a token payment (or indeed no payment) for a time while mortgage arrears are being worked on, inclusion in the process and being kept in the loop is important. Where unsecured creditors are ignored, the knock-on effects on an already fragile debtor can be significant in terms of pressurised communication and threats of litigation from those creditors.

[163] Commission for Regulation of Utilities (2021), ibid.

[164] An email request for information to the CRU as to when an update would be available received the following emailed reply on February 2nd, 2022 – 'Owing to resource issues, the CRU is currently reviewing the publication of its monitoring reports and is not in a position to continue to provide a number of these reports including arrears data for the time being. We will continue to keep the situation under review and hope to re-commence publishing these reports later in 2022'

commitments.[165] At the time of writing, it is also apparent that the Russian invasion of Ukraine continues to have a marked impact on the cost of energy (and food) internationally.[166]

If household utility arrears have continued to endure to such an extensive degree or, more likely, to have worsened, this must be having an impact on the levels of payment performance on unsecured credit agreements for a number of households. Most households faced with a choice of keeping the lights and the heat on, as opposed to paying off a credit card balance or the instalments on a personal loan, would likely favour the former. However, the ongoing absence of data in the unsecured debt arrears space makes it very difficult to assess the extent of the potential problem.

We know, however, from our analysis of 2020 Banking and Payments Federation of Ireland (BPFI) data reviewed in Paper Three of this series concerning payment breaks,[167] that:

- **35,800 payment breaks were approved by BPFI members in 2020 on 'consumer credit' agreements. Of these, 1,200 were still active at the end of 2020.**
- **About 17,100 resumed full payments; a further 17,000 resumed 'paying on an extended term' and 500 were in receipt of 'other forms of lender support'.**
- **There is, to our knowledge, no further data publicly available on the current position of these accounts in 2022 and no further data on payment breaks was released in 2021.**

The protections available to consumers who encounter payment difficulties with their utility accounts are particularly important in the current inflationary climate. These are debts, just like arrears on secured or unsecured credit agreements, and are an important part of any debtor's Standard Financial Statement as discussed above. Indeed, it is worth noting here that one of the insolvency arrangements under the Personal Insolvency Act 2012, the Debt Relief Notice (DRN), specifically names utility arrears as a 'relevant debt' that may be written off at the conclusion of a three year supervision period for qualifying applicants.[168]

A supplier led Energy Engage Code[169] was launched in May 2014. This is a voluntary code where all Irish energy suppliers have pledged to ensure that they will take a number of actions to ensure that customers in arrears and/or at risk of disconnection remain connected to their energy supply. The CRU website summarise the principles of the Code as follows:

'The supplier led Energy Engage Code provides a further level of security for domestic electricity and gas customers. This code encourages customers, who are having difficulty in paying a bill, to engage with their supplier regarding the management of debt.

Under the Energy Engage Code:

- ***Suppliers will not disconnect a customer who is engaging with them***
- ***Suppliers must provide every opportunity to customers to avoid disconnection***
- ***Suppliers must identify customers at risk of disconnection and encourage them to talk to them as early as possible***
- ***Suppliers must offer a range of payment options, such as a debt-repayment plan for a customer in arrears***

[165] See: https://www.cso.ie/en/statistics/prices/consumerpriceindex/ accessed 7th September 2022.

[166] See for example: https://www.rte.ie/news/business/2022/0901/1320041-electric-ireland-price-hike/, accessed 7th September 2022.

[167] Ibid, p.46-49.

[168] See Section 25 (as amended) a relevant debt includes 'a debt for payment of one or more than one bill in respect of rent, utilities or telephone'.

[169] See: https://www.cru.ie/customer-protection-measures/#energy-engage-code, accessed 7th September 2022.

In terms of disconnections, the CRU states that *'as the designated network operators, ESB Networks and Gas Networks Ireland are the only bodies that can undertake electricity and gas disconnections under the direction of suppliers for a non-payment of a debt'.* These protections are reflected perhaps in the relatively low rate of disconnections for customers in arrears provided by the CRU.[170] Nonetheless, it is still of concern that 991 domestic electricity accounts and 438 domestic gas accounts were disconnected in 2020, the first year of Covid. Over 40% of these disconnections took place during August to October 2020 inclusive, a period when public health restrictions were eased.

■ RECOMMENDATIONS

Data on utility arrears

The figures on electricity and gas arrears published periodically by the Commission on the Regulation of Utilities (CRU) should be published on a routine basis (every six months).

Data on non-mortgage credit agreement arrears

The CBI should publish data setting out the extent of non-mortgage credit agreements in arrears on a rolling basis so that the depth of any evolving problem can be monitored and effective solutions devised.

3.5. RENT ARREARS CASES

As we have observed at various points in this series of papers, housing policy and housing supply continues to provide a troublesome backdrop to the problem of consumer debt in Ireland. For many borrowers in financial difficulty, the restricted range of affordable housing options may be or may become the principal reason for their over-indebtedness. This is the case not just for mortgages in arrears, where the amount that has to be borrowed to be able to purchase a standard dwelling in many parts of the country creates automatic financial pressures, but also increasingly in the private rented market where the acquisition of an increasing number of dwellings and apartment blocks by funds and portfolio landlords pushes rents out to unprecedented levels for tenants whose earnings do not match.[171] There may also be a knock on effect in terms of difficulty servicing non-mortgage consumer credit agreements when a high percentage of income is spent on rent payments.

Late 2021 data from the Central Statistics Office showed that residential property prices increased by 13.5 per cent nationally in the year to October 2021.[172] The mean price in Dublin was the highest in any region or county at €494,917. Data from daft.ie in 2021 on the private rental sector also contains similarly worrying trends. It shows that rents nationally rose at an annual rate of just over 10% in the last three months of 2021. A cross section of data from the Daft report, provided by RTÉ,[173] suggests, for example, that:

[170] Commission for Regulation of Utilities (2021), ibid, p.5. Both the Electric Ireland Hardship Fund (operated in conjunction with the Society of St Vincent de Paul/MABS), and the similar Bord Gáis 'Energy Support Fund' may have been influential in preventing further disconnections.

[171] See for example: 'Rents increase sharply as number of properties available falls', *Irish Times*, 9th February 2022.

[172] As reported in the *Irish Times*. See: 'House price inflation surges to pandemic high of 13.5% – Figures for October represent strongest level of growth seen in market since 2015, *Irish Times*, 15th December 2021.

[173] 'Rents up over 10% in final quarter of last year, Daft report reveals', RTÉ News, February 9th 2022.

[174] Published on 2nd September 2021. See: https://www.gov.ie/en/publication/ef5ec-housing-for-all-a-new-housing-plan-for-ireland/ , accessed 7th September 2022.

- Average monthly rents across Dublin varied from €1,996, up 7.2% on an annual basis in the city centre to €1,897, up 13.9% annually in the north of the city.
- Average Cork city rents rose by 6.3% on an annual basis to €1,539 per month in 2021.
- Other parts of the country have seen double-digit increases in rents over the past year. For example, in Mayo, average rents increased by 20.1% to €915 per month with rents in Wexford having increased by 15.7% to €1,050.

While house prices and rents have risen in 2021, a trend likely to have been replicated in 2022, available accommodation appears to be at an all-time low, indicating a supply and demand scenario that can only lead to further rent increases while we wait for housing units to emerge from the Department of Housing's Housing Plan for Ireland – Housing for All.[174] Average rents are now beyond comparable mortgage payment levels in many places and real estate investment trusts (REIT), cuckoo and pension funds have begun to exert more control over the market. A recent media report for example noted that large investors paid €2.27bn for almost 4,900 private rented sector (PRS) properties in 2021, an average of almost €430,000 per unit, €104,206 more than the average price of €325,502 paid by households who bought homes in the 11 months to the end of November 2021.[175]

According to the Residential Tenancies Board (RTB), there were almost 300,000 (297,837) residential tenancies registered with it at the end of 2020, together with 36,417 'Approved Housing Body' tenancies.[176] However, its research and data hub does not appear to provide any specific data on how many of these tenancies are in arrears on rental payments at any given time. This may in fairness be difficult to do given that private landlords are not regulated by the RTB to the extent that mortgage and other lenders are regulated by the Central Bank.

Two points are worth noting however, in terms of rent arrears cases from its 2020 Annual Report. First, where a landlord is proposing to terminate a tenancy of over six months duration because of rent arrears, s/he must, in theory, follow a detailed six step process provided for under the Residential Tenancies and Valuation Act 2020. Second, rent arrears remained the highest dispute type in 2020 with 1,599 such cases (31% of the total) taken through the 'Dispute Resolution Applications' process of the RTB in 2020.[177] Figures provided by the Residential Tenancies Board (RTB) in August 2022 to Sinn Féin spokesperson on Housing, Eoin O'Broin, TD, show that 1,781 tenants were served with eviction notices between April and June of 2022 and this is more than double the amount in the same timeframe in 2021 (841).[178]

In any assessment of the problems that we face in the post-Covid environment from the consumer debt perspective, rising rents and the increasing numbers of rent arrears cases that may result, are a significant marker. It is also conceivable that new cases of over-indebtedness may involve renters in the private sector prioritising the payment of their rent and simultaneously struggling to meet any credit agreement commitments that they may have entered into. As ever, better data are needed here.[179]

[175] 'Families being massively outbid on new homes by funds, meanwhile rents soar', *Irish Independent,* February 9th 2022. This article reports that figures compiled by BNP Paribas Real Estate show institutional buyers paid as much as 32 percent more for each residence that they bought last year compared with the average price paid by household buyers in Ireland.

[176] See: https://www.rtb.ie/data-hub, accessed 2nd March 2022.

[177] See: https://www.rtb.ie/images/uploads/general/Key_Annual_Report_Figures_for_2020.pdf, accessed 2nd March 2022.

[178] 'Urgent action' required to tackle rental crisis as number of evictions double, says Sinn Féin's Eoin Ó Broin, *Irish Independent*, 8th August 2022.

[179] MABS statistics hint at an incipient debt problem in the rented sector. According to MABS 2021 published data, the number of newly presenting clients in rented accommodation increased from 1,031 (Q1-2021) to 1,216 (Q3-2021), an increase of almost 18%. In the local authority/social housing category, the increase was almost 30%, while there was a 7% increase in the private rented category.
See: https://mabs.ie/wp-content/uploads/2021/10/Statistics_Q3_2021.pdf, accessed 2nd March 2022.

Crucially, as already referred to above, it would be important at this point in any revision or amendment of the CBI code/s on procedures for handling consumer debt, that payment of the rent on the dwelling where the borrower resides, in line with payment of the mortgage, be classified as a priority payment.

■ RECOMMENDATIONS

Priority rent and utility payments

The existing Consumer Protection Code or any such revised Code should specifically provide that a borrower who lives in rented accommodation is entitled to prioritise his/her rental payments and, to the extent that it is required, his/her utility payments, before making any payments on non-mortgage credit agreements. An exception to be considered here would be payments on a car loan or hire purchase agreement where the borrower requires the vehicle for work purposes.

Data on rent arrears

National data on the extent on rent arrears, in both private rented and public housing, should be collated and published on a periodical basis.

4 SECTION

Statutory mechanisms to resolve cases of over-indebtedness in Ireland - Personal Insolvency Act 2012 (as amended)

In this section, the longest and most legally complex of this Paper, we focus on a critique of the Personal Insolvency Act 2012 (as amended), and the outcomes, issues and challenges that have arisen since its enactment around a decade ago. We begin by giving a brief background to the legislation, the new concepts it introduced and the statistics that have emerged thus far. We then turn to the legal issues that have arisen in this context in terms of mortgage arrears and the family home, particularly against the backdrop of increasing property prices and associated 'positive equity'. We conclude by critiquing two insolvency measures designed to address "unsecured debt', namely Debt Settlement Arrangements and Debt Relief Notices, and discuss possible improvements[180] such as the introduction of zero payment plans and public insolvency practitioners in the context of an ongoing statutory review of the legislation.

4.1. INTRODUCTION

The Personal Insolvency Act 2012 was a long time in preparation at a critical juncture in the evolution of the personal debt crisis that followed the Global Financial Crisis. The preparatory work for the introduction of this legislation was primarily conducted by the Law Reform Commission (the Commission). In September 2009, the Commission published a 'Consultation Paper on Personal Debt Management and Debt Enforcement' as part of its proposed third Programme of Law Reform 2008-2014.[181] This lengthy and meticulously researched report made no less than 122 provisional recommendations for reform of Ireland's out of date and unfit for purpose laws in this area. In a media release[182] to accompany the publication of this initial report, it stated as follows:

> *'As is clear from the length of this Consultation Paper, the range of issues that need to be addressed are exceptionally wide and varied. They include:*
>
> - *preventative measures to address personal indebtedness at an early stage,*
> - *interventions to resolve debt problems in an efficient way;*
> - *the need to the bring debt enforcement processes into line with international best standards;*
> - *to question the utility of imprisonment as a means of enforcement; and*
> - *to place this in the context of relevant changes to the financial services regulatory framework.*
>
> *The Commission recommends that a number of areas could be considered by other bodies, such as the Irish Financial Services Regulatory Authority (IFSRA)[183] and the Government's Review Group on Financial Services Law, with the Commission concentrating on final recommendations (in its final Report to be published next year) for the law on personal insolvency law and court-related enforcement procedures'.*

Following this consultation, the Commission published its 'Report on Personal Debt Management and Debt Enforcement' in December 2010.[184] This 440 page Report made 200 recommendations for reform, and also included a draft Personal Insolvency Bill for the guidance of legislators and interested parties. Amongst the broad headings of recommendations in its final report were:

[180] An amendment to Abhaile is also suggested in respect of DSAs.

[181] Law Reform Commission (2009). Consultation Paper on Personal Debt Management and Debt Enforcement, LRC CP 56 – 2009, September 2009. Dublin: Law Reform Commission.

[182] See: https://www.lawreform.ie/news/consultation-paper-on-personal-debt-managment.133.html, accessed 8th September 2022.

[183] It should be noted that during this period, the regulation of financial services and the protection of consumers of such services had been designated to IFSRA, which was created by the Central Bank and Financial Services Authority of Ireland Act 2003 (CBFSAI Act). IFSRA was reintegrated into the CBI on 1st October 2010.

[184] Law Reform Commission (2010). Report on Personal Debt Management and Debt Enforcement, LRC 100 – 2010, December 2010. Dublin: Law Reform Commission.

- *A Debt Enforcement Office to oversee a non-judicial debt settlement system*
- *Proportionate and holistic debt enforcement mechanisms*
- *Two new processes: Debt Settlement Arrangement and Debt Relief Order*
- *Replacing outdated processes and abolishing imprisonment for debt*
- *Judicial personal insolvency law: reform of the Bankruptcy Act 1988*
- *Regulation of debt collection undertakings*

Almost 12 years later, a significant number of the detailed recommendations made in this report have yet to be acted upon.[185] The personal insolvency legislation that eventually resulted was developed with an abundance of caution and complexity, characteristics that have diluted its subsequent effect, and was enacted by the President on December 26th 2012. It ran to 199 sections and three schedules and has been amended with considerable frequency since, including a lengthy amendment Act of 2015 and a further more recent amendment Act of 2021. FLAC had consistently lobbied since 2003 for such debt settlement legislation to be introduced,[186] made lengthy submissions in the course of 2012 on the Bill's content and evolution,[187] and held a public conference on the draft legislation with contributions from expert international speakers.[188]

[185] For more detail, see in particular Section 7 below on debt claims and debt enforcement in the courts.

[186] See, for example, Joyce, P. (2003), ibid.

[187] See: Free Legal Advice Centres (2012). *Essential principles of debt adjustment/settlement schemes across Europe, A summary of the Kilborn paper with an emphasis on how those principles can be incorporated into the forthcoming Irish Personal Insolvency Bill.* Dublin: Free Legal Advice Centres, January 2012. See also, FLAC's submissions on the draft personal insolvency scheme (March 2012) and on the Personal Insolvency Bill (for Committee Stage deliberations (September 2012) respectively.
See https://www.flac.ie/priorityareas/debt-law-reform/ for details of these and other related policy submissions.

[188] 'Legislating for personal insolvency in Ireland', conference held on April 19th 2012 at the Radisson Blue Hotel, Dublin. See: https://www.flac.ie/news/events/2012/04/19/conference-legislating-for-personal-insolvency-in-ireland/ , accessed 13th September 2022.

There is a degree of irony perhaps in the press release ultimately announcing the enactment of the legislation, which noted that *'the passage of the Personal Insolvency Bill fulfils a key commitment in the Programme for Government. It was also required by the terms of the EU-IMF-ECB Programme of Financial Support for Ireland.'* [189] In other words, one of the conditions of the bailout was that the Irish government now introduce personal insolvency legislation, the kind of legislation that would have prevented and mitigated some of the effects of the personal debt crisis, had it been introduced in a timely manner before that crisis materialised.

A current working version of the Act, which can be found on the 'Revised Acts' section of its website,[190] is a good example of the huge service the Law Reform Commission has also done both the legal community and the public interest in terms of improving the accessibility of legislation,[191] frequently rendered inaccessible by bewildering numbers of changes. It shows a very lengthy text peppered with amendments and their origins in a wide range of random pieces of legislation, some of which are 'miscellaneous provisions' Acts which bear little or no relationship to the subject of personal insolvency itself.

The provisions of this Act were commenced in a series of statutory instruments in the course of 2013, with the critical Part 3 of the Act, which contains the provisions concerning the three insolvency arrangements available under the legislation, being commenced on 31st July 2013. The Insolvency Service of Ireland (ISI), which administers and oversees the Act, did not properly commence effective operations under the legislation until late 2013 and into 2014. Thus, at the time of writing, we have eight years plus of the Act in operation to review. The Act introduced a number of new concepts, helpfully summarised by the ISI as follows[192]:

[189] Personal Insolvency Bill passed by Houses of Oireachtas', Press release, Department of Justice, 19th December 2012.

[190] https://revisedacts.lawreform.ie/eli/2012/act/44/front/revised/en/html, accessed 13th September 2022.

[191] Via its Statute Law Restatement Programme.

[192] See: https://www.isi.gov.ie/EN/ISI/PAGES/DEBT_SOLUTIONS, accessed 8th September 2022.

- *Debt Relief Notice (DRN): an insolvency solution for people who have a low income, few assets and debts of less than €35,000. It is a formal agreement that allows for the write off of debts up to €35,000 where it is unlikely that a person will be in a position to repay them and it is unlikely their financial situation will improve in the next 3 years. Debts such as personal loans, credit card loans, store cards, credit union loans and overdrafts could be included in a DRN. However, it is not a suitable solution for people with a mortgage.*
- *Debt Settlement Arrangement (DSA): an insolvency solution for people who have unsecured debts - credit cards, loans, overdrafts etc. For mortgage-related debt please see Personal Insolvency Arrangement. A Debt Settlement Arrangement is a formal agreement with creditors that allows for some write off of debt. With this solution a person agrees to pay a percentage of their overall debt over a specified period of time. At the end of that period of time they will be solvent.*
- *Personal Insolvency Arrangement (PIA): an insolvency solution for people with unsecured and secured debts. Secured debt is a debt backed or secured by an asset (e.g. a housing loan where a house is mortgaged to secure the loan debt). A PIA is a formal agreement with creditors that will write off some unsecured debt and restructure any remaining secured debt, while keeping the person in their home where possible.*
- *Protective Certificate (PC): a document issued by the Court which offers the debtor and their assets protection from legal proceedings by creditors while they are applying for a DSA or PIA. In general, a Protective Certificate remains in force for 70 days but it may be extended in limited circumstances.*
- *Reasonable Living Expenses (RLE): the expenses a person necessarily incurs in achieving a reasonable standard of living, this being one which meets a person's physical, psychological and social needs. The ISI issues guidelines, as required by s.23 of the Personal Insolvency Act 2012, which allow for expenses such as food, clothing, health, household goods and services, communications, socialising, education, transport, household energy, childcare, insurance and modest allowances for savings and contingencies.*

4.2. INSOLVENCY STATISTICS

Published figures from the ISI (covering the period from late 2013 up to end Q.2 2022) are as follows:[193]

- ***6,582** Personal Insolvency Arrangements (PIA), involving the resolution of qualifying secured and unsecured debt, have been approved from a total of **12,181** applications where a Protective Certificate had been granted.*
- ***1,204** Debt Settlement Arrangements (DSA), involving the resolution of qualifying unsecured debt over €35,000, have been approved from a total of **1,862** applications where a Protective Certificate had been granted.*
- ***2,025** applications for Debt Relief Notices (DRN), involving the resolution of qualifying unsecured debt under €35,000, made by Approved Intermediaries (AI) on behalf of debtors to the ISI, have been approved by the Circuit Court.*

[193] Insolvency Service of Ireland (2022). Statistics Report, Quarter Two 2022. Dublin: Insolvency Service of Ireland, p.11.

In addition, from 2014 to end Q.2 2022, a total of **2,992** bankruptcy[194] applications have been approved by the High Court. Although, bankruptcies are not insolvency arrangements under the Personal Insolvency Act 2012 as such, the office of the Official Assignee which administers bankruptcies is now part of the office of the ISI. It should be noted here that the legislation provides that:

> *'A debtor may not present a petition for adjudication unless the petition is accompanied by an affidavit sworn by the debtor that he has, prior to presenting the petition, made reasonable efforts to reach an appropriate arrangement with his creditors relating to his debts by making a proposal for a Debt Settlement Arrangement or a Personal Insolvency Arrangement to the extent that the circumstances of the debtor would permit him to enter into such an arrangement'.*[195]

Thus, a debtor must show that s/he has sought advice from an authorised personal insolvency practitioner (PIP) and checked out his/her options under the Personal Insolvency Act 2012 without success before filing a 'debtor's petition' for bankruptcy.[196]

Although the relative success or failure of the Act is not all about numbers, in terms of PIA's and DSA's combined, 7,786 approved arrangements from 14,043 protective certificates granted over eight and a half years is a low return, given the scale of the problem the long awaited legislation was designed to address and the amount of public expenditure disbursed.[197] A total of 2,025 approved Debt Relief Notices (DRN) is similarly disappointing, and recent research we have also compiled indicates that many more 'limited income, limited assets' (LILA) debtors explore the DRN option but ultimately either decline to proceed or find themselves excluded by what are very detailed provisions that are tricky to navigate and difficult to predict in terms of outcome.[198]

Two months after the first elements of the legislation were enacted, and not long before it was due to come into effective operation, then Minister for Justice, Alan Shatter TD stated on March 1st 2013:[199]

> *'It is difficult to ascertain the likely demand in regard to the new debt resolution processes. However, in our planning for the first full year of operation of the Insolvency Service, we have used the tentative estimate of applications for the two main debt resolution processes - the Debt Settlement Arrangement and Personal Insolvency Arrangement – of roughly 15,000 applications. There could be a further 3,000 to 4,000 applications for Debt Relief Notices'.*[200]

It is a salutary reflection on the effectiveness of the legislation that the number of applications for PIA's and DSA's over an eight year plus period falls short of the number tentatively predicted *for the first year of its operation* made by the Minister, with DSA's hardly featuring in any significant way. Similarly, the number of approved DRN's in total over eight years is 50% to 66% of the number of the predicted applications in the first year alone.

This is certainly not because a sizeable problem of over-indebtedness did not exist at the point the legislation was commenced and in the years that

[194] Bankruptcy is a formal High Court insolvency solution for people in debt over €20,000. During the bankruptcy process, the ownership of the person's property and possessions transfer to the Official Assignee in Bankruptcy to be sold for the benefit of those to whom the individual owes debts (creditors). When the person's property is sold, the Official Assignee will make sure that the proceeds are shared out among creditors and any outstanding debt will be written off. See: https://www.isi.gov.ie/EN/ISI/PAGES/WP16000027 accessed 8th September 2022.

[195] Section 11 of the Bankruptcy Act 1988 as amended by S.145 of the Personal Insolvency Act 2012.

[196] Note that Section 11 of the Bankruptcy Act 1988 also allows for a creditor to petition for a debtor's bankruptcy.

[197] For example, the ISI was allocated €6.271 million in 2018 and €6.239 million in 2019 from the Department of Justice to finance its operations. Its budget is also funded by income from its bankruptcy administration activities and its regulation of practitioners. In 2018, for example, these amounted to €684,000. See: Insolvency Service of Ireland, Annual Reports, various years.

[198] Stamp, S. and Joyce, P. (2022) *'For the Few but not the Many?' An analysis of Debt Relief Notices from a debtor perspective.* Dublin: Money Advice and Budgeting Service and the Citizens Information Board.

[199] Speaking at an Association of Certified Accountants (ACCA) annual dinner.

[200] http://merrionstreet.ie/en/news-room/speeches/speech-by-minister-for-justice-equality-and-defence-alan-shatter-td-at-association-of-certified-chartered-accountants-acca-ireland-presidents-annual-dinner.html, accessed 13th September 2022.

followed. For example, as already noted above, a total of 142,892 family home mortgage accounts alone were in arrears as of end June 2013, close to one in every five of family home mortgages in the country, and 57,163 of these were in arrears of over one year. If ever a clear and urgent demand was demonstrated, this was it. Notwithstanding, it may be suggested by some in defence of the legislation that significant numbers of so called 'voluntary arrangements' may also have resulted from debtors proposing or seeking to propose arrangements under the legislation, and that these may have resulted in informal solutions being put in place. On this question, it is clear in the case of mortgage arrears cases from the latest Abhaile report that is reviewed in detail below[201] that so called 'informal solutions' are still numerous, arising from the range of services provided through Abhaile.[202]

This begs an important question: Is this 'informality' not what we were supposed to be getting away from by having a statutory scheme that would allow for legally binding arrangements to be put in place? As also outlined below, a completion of the statutory review of the legislation is due this year, expected to be followed by a further amendment Bill to the existing legislation, and this informality dimension is one of a number of issues into which it would be instructive to enquire. Ultimately, it is hard not to conclude, despite the former Minister's optimistic initial soundings that the numbers of arrangements put in place so far reflect an overly cautious statute, and the nuance apparent in his reference to the number of anticipated *applications*, as opposed to the number of approved *arrangements*, is perhaps telling.

Subsequently, it became clear that the numbers of approved arrangements were very low simply because creditors (particularly secured mortgage creditors in the context of the Personal Insolvency Arrangements) could vote down proposals with no further recourse for the applicant borrower. Here the legislation provided and continues to provide that at least 65% of the debtor's creditors in overall value who vote must vote in favour of a PIA proposal, comprising at least 50% of the secured creditor/s and at least 50% of unsecured creditors.[203]

Thus, in the significant majority of consumer debt cases, the family home mortgage lender's vote or threatened vote against the proposal was really the only one that mattered. This came to be described as the 'creditor veto' although the Minister initially insisted that this was not a veto as such. However, a briefing note provided in April 2014 to Frances Fitzgerald, his successor as Justice Minister, reportedly informed her of an urgent need to amend the Personal Insolvency Act 2012 and this led to significant legislative changes.[204] It is important to reiterate that the voting rules as enacted remain in place. The key reform that was introduced in the 2015 amendment Act allows the applicant to seek a review before the Circuit Court of the rejection of the PIA proposal incorporating his/her family home, with the further option of an appeal to the High Court.[205]

■ **RECOMMENDATION**

Insolvency Arrangement Applications

The Department of Justice, as part of current review of the Personal Insolvency Act 2012 (as amended) and in advance of any subsequent Bill to reform the legislation, should enquire through the Insolvency Service of Ireland (ISI) and through the network of active Personal Insolvency Practitioners (PIPS), into the extent that formal applications for insolvency arrangements under the legislation (whether in the form of PIA or DSA applications) have resulted in voluntary payment arrangements being put in place, the reasons why and how these arrangements have worked out in practice in the longer run.

[201] See Section 5.

[202] More informal than formal (statutory) solutions had been put in place under Abhaile between July 2018 and end-December 2019, while three times more informal than formal solutions were as of then "in progress". See: Government of Ireland (2020). *Abhaile Aid and Advice for Borrowers in Home Mortgage Arrears. Third Report, July 2018-December 2019*. Dublin: Department of Justice and Equality and Department of Employment Affairs and Social Protection, p.22.

[203] Personal Insolvency Act 2012, section 110.

[204] See 'Dáil will rush to fix defect in insolvency legislation', *Irish Independent*, July 21st 2014.

[205] 8th February 2015, See https://www.gov.ie/en/publication/28b4c-personal-insolvency-amendment-act-2015/ , accessed 13th September 2022.

4.3. Right to Seek a Review in the Circuit Court in Mortgage Arrears Cases – The 2015 and 2021 Amendment Acts

An information release on the Department of Justice website summarised the provisions of the Personal Insolvency (Amendment) Act 2015 as follows:[206]

> *The 2015 Act allows a borrower to seek a review by the courts (in most cases, the Circuit Court) where creditors, such as a mortgage lender, refuse the borrower's proposal for a Personal Insolvency Arrangement to deal with unsustainable debts that include a mortgage on the borrower's home. In such cases, the court will consider the proposal, using a range of criteria laid down in the Act, and has power to impose the proposal on creditors if the court considers it appropriate.*
>
> *The Act increases the amount of debt which may be covered by a Debt Relief Notice under the Personal Insolvency Act 2012, from €20,000 to €35,000. Further provisions of the Act clarify the detailed procedures under the 2012 Act for approval by creditors, and notification to the courts and the Insolvency Service, of debt resolution proposals.*
> *The Act also strengthens the powers and functions of the Insolvency Service of Ireland (ISI) regarding awareness-raising, information and communication with the public on personal insolvency and bankruptcy matters, and provides more detailed supervisory powers for the ISI as the regulatory body for Personal Insolvency Practitioners under the Personal Insolvency Act 2012.*

The key provision of this 2015 amendment Act, commenced on 20th November 2015, allowed for a review in the Circuit Court to be conducted by a specialist (insolvency) judge, where a debtor's application for a PIA arrangement had been rejected by a vote of creditors.[207] This option is now sometimes referred to as a Section 115A appeal, as it involved a new section 115A being tacked on to the existing Section 115.

Significant conditions applied to this right of review/appeal. First, the rejected PIA had to include a 'relevant debt '. This is defined as *'a debt the payment for which is secured by security in or over the debtor's principal private residence, and in respect of which the debtor is in arrears with his or her payments, or having been in arrears with his or her payments, has entered into an alternative repayment arrangement with the secured creditor concerned'*, i.e. a family home mortgage.

Second, the right to seek a review was confined to a proposed PIA where the applicant was in arrears or in an alternative repayment arrangement on the 'relevant debt' on 1st January 2015. This left the anomalous situation where a borrower could have gone into arrears on his/her mortgage for the first time *after* 1st January 2015, may have accumulated significant arrears thereafter, but had no right to seek a review if any subsequent PIA proposal was rejected. In this regard, in 2017, the High Court concluded that an application to review a rejection of the PIA proposal by a mortgage lender could not proceed because this criterion was not met.[208]

This restriction continued for almost six years, despite being clearly identified as an obstacle to

[206] 8th February 2015, See: https://www.gov.ie/en/publication/28b4c-personal-insolvency-amendment-act-2015/ , accessed 13th September 2022.

[207] Part Six of the Personal Insolvency Act 2012 had already provided for the amendment of the Courts Acts to create six Specialist Judges of the Circuit Court to facilitate the speedy consideration of insolvency applications by that Court. When the 2015 amendments were enacted, these specialist judges were also given jurisdiction for the purposes of hearing PIA reviews.

[208] See In Hill and the Personal Insolvency Acts [2017] IEHC 18 High Court, January 2017. In this case arrears on the applicant's mortgage did not first occur until March 2015. Nonetheless, it was clear that by the time the proposal for the PIA was made to a creditor's meeting in June 2016, she had encountered serious difficulties meeting the payments on her mortgage. By that point, the total amount owed on the mortgage was almost €151,000 and the property was estimated to be worth only €55,000. The net result of this ruling was that a suggested arrangement to write down the mortgage to the current market value of the property (amongst other features of the proposed PIA) could not be examined by the court to determine if it was a reasonable proposal.

increasing the numbers of PIA applications and solutions. It was only addressed via the **Personal Insolvency (Amendment) Act 2021,** with effect from 25th June 2021, when s.115A (18) was amended to simply allow a debtor in arrears with his or her payments or in an alternative repayment arrangement on a family home mortgage, to seek a review of a rejection of his/her PIA application, regardless of when those arrears began. On May 13th, 2021, James Browne TD, Minister of State at the Department of Justice moved that the 2021 amendment Bill be read a second time and stated that:

> *'I am pleased to have this opportunity to move second stage of the Personal Insolvency (Amendment) Bill 2021. The main purpose of the Bill is to make a number of urgent (our emphasis) amendments to the Personal Insolvency Act 2012 which will make it easier for insolvent persons, including those in financial difficulties arising from the economic impact of the Covid-19 pandemic, to avail of the legislation effectively'.*[209]

The suggestion that the much needed amendment to S.115A was "urgent", at a remove of almost six years, says a lot about the relativity of priorities and the slow moving legislative machinery of the State to make changes in the personal insolvency domain. This excessive delay in reaction time is echoed in the time that it is currently taking to conduct and finalise the statutory review of the Act, an issue discussed in more detail below.

A third condition in the exercise of the review option is that one 'class of creditors' must be shown to have voted in favour of the proposal and the PIP must, in the statement of the grounds of the application, identify the class of creditors concerned, for example unsecured creditors. However, this condition does not apply where there is only one creditor. In addition, an application for a review must be made not later than 28 days after the creditors meeting which rejects the PIA proposal. On this issue, the Personal Insolvency (Amendment) Act 2021 amended the original time frame set by the 2015 amendment Act here, increasing it from a tight 14 days.

To uphold the review, the Court must determine that there is a reasonable prospect that the proposed Arrangement will:[210]

- enable the debtor to resolve his or her indebtedness without recourse to bankruptcy;
- enable creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit;
- enable the debtor not to dispose of an interest in, or not to cease to occupy, all or a part of his or her principal private residence;
- be reasonably likely to allow the debtor to comply with the terms of the arrangement;
- ensure that the costs of remaining in the family home are not disproportionately large taking into his or her income, contributions from other family members and number of dependants;
- be fair and equitable in relation to each class of creditor who has not approved the proposal;
- not be 'unfairly prejudicial' to any interested party.

The introduction of the PIA court review necessitated, in turn, the introduction of a new legal aid service which is part of the Abhaile scheme and is administered by the Legal Aid Board (LAB). This allows the PIP working on behalf of the applicant debtor to instruct a solicitor on the Abhaile solicitor's panel, who in turn may seek to brief counsel to represent the applicant debtor at the Circuit Court review. In theory, access to these legal services is subject

[209] See: https://www.oireachtas.ie/en/debates/debate/dail/2021-05-13/32/#spk_270, accessed 13th September 2022.

[210] Ibid, Section 115A (9).

to the application of the LAB's merits test,[211] which, amongst other criteria, involve an assessment of the prospects of the applicant being successful in the proceedings. In a number of cases, the decision of the Circuit Court on review is appealed to the High Court, either by the secured creditor or the applicant debtor and this has given rise to a significant amount of case law.

The addition of a right of review in the Circuit Court for an insolvent debtor whose proposal for a PIA (incorporating a mortgage on a family home) has been rejected made an appreciable initial difference in 2018 and 2019 to both the numbers of Protective Certificates issued by the ISI and the numbers of PIA's approved by the Circuit Court, as is apparent from the Table below, although the increase has not been perhaps as substantial as might have been envisaged.

TABLE 3: APPROVED PERSONAL INSOLVENCY ARRANGEMENT COMPARISON

Year	Protective Certificates Granted	Personal Insolvency Arrangements Approved
2014	511	126
2015	1,037	619
2016	1,289	697
2017	1,115	733
2018	1,720	959
2019	1,791	1,055
2020	1,194	1,020
2021	1,076	925

[211] See Section 2.3. above for further detail of the Board's merits test. The 2020 Legal Aid Board Annual Report (ibid) suggests that of 589 legal aid applications for PIA reviews in the Circuit Court, only 27 (less than 5%) were rejected. See: https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/legal-aid-board-annual-report-2020.pdf, p.62, accessed September 22nd 2022. This issue is discussed in more detail in Section 5 on the Abhaile scheme below.

It is notable that the numbers of PC's granted seemed to have declined in 2020 and 2021. However, the approval rate of such PIA proposals rose to 85% in 2020 and 86% in 2021. This success rate may suggest on the face of it that there has never been a better time to propose a PIA and that the availability of a review in the Circuit Court against a refusal may have had an impact on the voting patterns of secured creditors.

A number of factors may explain the reduction in overall PIA numbers. To begin with, Covid 19 is likely to have had an effect on the numbers of recent applications. In addition, it may be that there are insufficient numbers of PIP's who have the required experience and expertise to work the legislation to the optimum effect to deliver results for insolvent debtors. Another factor may be the ongoing inherent limitations of the legislation itself, which have arguably become exposed by the increasing number of properties upon which there are substantial arrears that are now in *positive equity*, thereby limiting the Court's capacity to approve rejected arrangements upon review. This increasingly important issue is explored in greater detail immediately below.

4.4. THE CHALLENGES OF POSITIVE EQUITY CASES

A further helpful effect of the 'Personal Insolvency Arrangement Court Review' process is that it has allowed the High Court to explore the parameters of the legislation on appeal and this has given rise to a significant amount of jurisprudence exploring the core objectives of the Act, the limitations of the PIA itself, the interpretation of the review/appeal provisions, and the balancing of debtor and creditor rights under the legislation. A comprehensive review of the wide range of High Court decisions that has resulted is beyond the scope of this paper. However, a key issue that appears to limit the use of the PIA at this point as a means of resolving long term mortgage arrears cases – namely its limited application in positive equity cases – does require some reference to recent case law.

To summarise, the key feature of any PIA proposal is that it must be formulated so as not

to require the insolvent debtor to dispose of his/her interest or to cease to occupy [212] the family home unless he or she is considered to be 'over-accommodated' in that home.[213] This is the core purpose of the PIA – to keep the debtor/s and dependants in the family home. The PIP acting on the applicant's behalf must also form the view that there is a reasonable prospect that the PIA will allow the debtor to make the relevant payments, and that it will return the debtor to solvency (thereby avoiding bankruptcy), whilst observing Reasonable Living Expenses (RLE) guidelines so that the applicant may have a minimum standard of living during the course of the arrangement.[214]

Arrangement versus bankruptcy comparison

From the creditor side, the PIP must formulate the proposal on the basis that it is an acceptable alternative to bankruptcy for a majority of creditors. Thus the comparison between the payments creditors will receive in the proposed PIA, and the return they might obtain in bankruptcy, is in practice an important factor for the Court to weigh up. In the early High Court appeal case of In Re JD,[215] Baker.J put it as follows:

> *'That a court is mandated, in the context of the personal insolvency legislation to have regard to the comparison between the likely return to creditors in bankruptcy and that available under a PIA, is evident from the objective of the legislation, to provide a means of debt resolution by which a debtor may avoid bankruptcy: see Re Nugent and the Personal Insolvency Acts [2016] IEHC 127. The statutory forms require that the PIA should make detailed comparisons between the PIA and the likely return on Bankruptcy. Clause 3 of the standard form requires that the PIP identify the details of how it is said the Arrangement would be better for creditors than bankruptcy'.*

Baker.J went on to liken this PIA return/Bankruptcy return comparison to the Examinership process, whereby companies may be potentially rescued and restructured (including debt write-down) by the appointment of an Examiner by the High Court (or Circuit Court) and where the choice is between the liquidation of the company and the Examinership. She reviewed case law on Examinership and noted that the courts have consistently held that an objection of unfair prejudice by a creditor against a proposal must show not just that there is prejudice (which is a given) but that the prejudice is unfair.

For unsecured creditors, it is generally difficult to show that a PIA proposal involves unfair prejudice as bankruptcy will generally involve a lower return for them, especially as RLE's broadly apply during the limited period in which unsecured creditors might hope to get some payment. In terms of secured creditors and particularly the family home, where the property is in negative equity (i.e. worth less than the amount owed on it), it may be similarly difficult to establish unfair prejudice. Thus, for example, in one of the first successful PIA Circuit Court reviews, the Court confirmed a PIA which had proposed a €150,000 write-down on the family home mortgage of the applicants. This proposal had been rejected by the secured creditor but, ultimately, the Court determined that the return for that creditor would be inferior were the couple in question to be forced into bankruptcy resulting in the repossession and sale of their family home.

Thus, as long as the total amount owed on the mortgage is equal to or greater than the current market value of the property at the time of the proposal, it is more difficult for the secured creditor to argue against the proposed PIA, particularly as the costs of sale for that creditor must also be factored into the calculation. By

[212] It is notable here that under Section 104 (1) of the Act, the right to reside does not necessarily have to involve continuing rights of ownership. Thus, it would appear that PIA's incorporating a mortgage to rent arrangement (MTR) are permissible.

[213] On this question, Section 104 (3) (b) allows the PIP in consultation with the debtor to determine that the costs of continuing to reside in the debtor's principal private residence are disproportionately large and to formulate the PIA proposal accordingly.

[214] It should be noted that the RLE guidelines are not strictly speaking legally binding. Thus, in terms of PIA applications, Section 99 (4) provides that *'regard* (our emphasis) shall be had to any (RLE) guidelines issued under section 23'.

[215] In Re JD [2017] IEHC 119.

contrast, the equation for the applicant debtor becomes more difficult in a *positive equity* scenario. Under a strict comparison of a bankruptcy-versus-arrangement return, a PIA proposing a write-down may be rejected by the secured creditor, where it will recover more of the money owed to it by the repossession and sale of the property now. Any review that might follow to the Circuit Court may be unlikely to succeed if the repossession-versus-arrangement comparison is the key matrix guiding the Court's decision.

As substantial numbers of properties have moved out of negative into positive equity in recent years, especially in urban areas, a window of write-down resolution that had opened up by the introduction of the Circuit Court review process in 2015, began to close for a number of households. Again, it is hard not to conclude that undue caution on the part of the State has given rise to this impasse through a combination of: (i) a failure to allow for the review of a rejection of a proposed arrangement in the original Act; (ii) a substantial delay in redressing that state of affairs and, (iii) an ongoing failure to amend quickly and decisively when further obstacles to effective debt resolution arise.

The salient question in our view is therefore currently as follows: Where does this leave mortgage holders who are in positive equity but also in considerable and unmanageable arrears? And since the Central Bank of Ireland (CBI) has noted in quite stark terms the balance shortfalls likely to be faced by a substantial number of households at the end of their mortgage term, many comprised of older borrowers with diminishing earning capacity,[216] can the personal insolvency legislation be the potential vehicle to resolve this?

It is worth noting that 'In Re JD', Baker.J saw fit to examine the scheme of the Act to determine its broad purpose and objectives. Here, she stated that:

> *'The Act is a considered and nuanced approach to the financial crisis and reflects a legislative choice to offer a less blunt and more flexible approach to the resolution of personal debt than was available heretofore in bankruptcy. Section 115A adds another element to the approach required to be taken by a court and the benefit of a debtor remaining in his or her private residence is a benefit to which regard is expressly to be had. The rational resolution of debt is in the legislative scheme envisaged as permitting the orderly write-down of debt, with the inevitable loss to creditors, both secured and unsecured'.*

It is also worth noting that in the same case, Ms Justice Baker clarified that the bankruptcy-versus-arrangement comparison is not necessarily a mandatory requirement. Specifically, she stated:

> *'I am mindful of the fact that a court may approve a scheme in circumstances even when a creditor is likely to do worse under the scheme than in bankruptcy, and there is no mandatory condition that the court be satisfied that the return on bankruptcy would be less favourable'.* [217]

Ms Justice Baker again drew on previous case law in the area of examinership for comparative purposes in suggesting that such circumstances would normally require 'weighty justification'. Might the prevention of the repossession of a number of family homes in positive equity provide the kind of weighty justification required, particularly in the context of the enormous financial bailout provided for many financial institutions by the taxpayer?

Bringing us closer to the present day, in the course of his judgment in the **'Fennell'** case of April 2021,[218] Sanfey.J posed a direct question for all involved in the attempt to resolve long term mortgage arrears, particularly in light of the CBI's recent forecast that a significant number of borrowers are on their way to a substantial shortfall in their mortgage at the end of term (or restructured term).[219]

[216] See Kelly et al (2021), ibid.

[217] Ibid, page 19 of the judgment.

[218] [2021] IEHC 297.

[219] Duignan and Kearns, ibid.

In this case, the applicant debtor appealed the Circuit Court's decision to refuse to affirm her proposed PIA on review to the High Court. There was only one debt in this instance – the family home mortgage with Ulster Bank DAC. The outstanding amount on this loan at the time of the application was around €73,000 and the property the subject of the mortgage was valued at around €180,000. Thus, it typified the positive equity scenario outlined above, where it was crystal clear that the secured creditor would be paid in full by bankruptcy/repossession now and could therefore argue that it would be unfairly prejudiced by the PIA proposal.

That PIA proposal was to extend the term of the mortgage term from the remaining 3 months to 372 months, an extension that would conceivably bring the debtor to 98 years of age. Thus, by the time the appeal was heard, the debtor was already 69 years old and of pension age, and with little by way of other income, so that only limited payments were available. The key proposals were that the PIA did not provide for any write-down of the mortgage loan balance and should the debtor not survive until the end of the restructured mortgage term, her estate would repay the remaining balance owing on the secured debts to Ulster Bank from the sale of the home. In support of the application, it was also submitted that contributions from the debtor's adult children would assist in making the proposed limited repayments under the PIA until that point.

This case is identified early in the judgment as something of a test case in that it concerns arrangements which provide for an extension of the mortgage term to a point at which the debtor would be unlikely, by the law of averages, to be still living. Thus, it gave an opportunity to provide clarity on an issue which was said to have arisen in a number of cases currently before the courts as to whether such arrangements are permissible under the Act.[220] Again, it is beyond the scope of this paper to go into further detail on the respective legal submissions made by the parties to this case. However, it is worth noting the overall conclusions reached by Mr Justice Sanfey in dismissing the appeal as follows:[221]

> *'My primary conclusion is that the debtor is not "reasonably likely to be able to comply with the terms of the proposed arrangement". In particular, it is my view that, where the restructured term over which payments are to be made is of such duration that the court, having regard to the age and circumstances of the debtor, is not satisfied that the debtor is "reasonably likely to be able to comply with the terms of the proposed arrangement…", the court cannot entertain an application pursuant to s.115A (9) in respect of such arrangement. Neither am I satisfied that the debtor has demonstrated that the repayments under the PIA are in any event affordable or sustainable.*

Notwithstanding, it is clear that the presiding judge appreciated the difficulties to which his judgment gave rise, and the wider implications for similar older borrowers facing similar intractable problems, in suggesting as follows:

> *'It does seem to me that it would be worthwhile for a debate to take place among all the relevant stakeholders as to whether it would be beneficial, in the sense of being in accordance with the scope and intendment of the Act, if the legislation were to permit a situation whereby a PIP could propose the reduction of the repayments by a debtor over a restructured term to a level of affordability, notwithstanding that the term was likely to be extended beyond the lifespan of the debtor, providing the PIP could establish by evidence that such payments were sustainable, and particularly where the debtor's mortgage is in positive equity, such that the PPR lender – as in the present case – would be likely to recover its debt in full on the demise of the debtor. Careful consideration would have to be given to the implications of such an arrangement for the affected secured creditor, which would no doubt raise numerous concerns, such as those raised by the objecting creditor in the present case.*

[220] Ibid, See Paragraph 4 of the judgment.

[221] Ibid, See Paragraphs 129-130.

As this judgment makes clear, such an arrangement is not permissible, as the court cannot be satisfied, where the term of the restructured loan is likely to exceed the life-span of the debtor that the debtor is "reasonably likely to be able to comply with the terms of the proposed arrangement". An amendment to the Act would in my view be required in order to permit the possibility of such an arrangement, and to set out the terms upon which such an arrangement could be effected. (our emphasis) However, the primary aim of the restructure of a mortgage term beyond the lifetime of the debtor is to ensure the affordability of the repayments, and to secure the continued residence of the debtor in the PPR. As such, a discussion among affected parties would be welcome to examine whether such a solution along these lines to the intractable problems faced by debtors could be achieved, and if so, on what terms.

The implication perhaps is that such an amendment might allow members of the debtor's family to somehow become party to the PIA so that the likelihood of being '*reasonably likely to be able to comply with the terms of the proposed arrangement*' would be improved, but this would presumably have to involve concrete evidence of income capacity and a commitment to contribute to repayments.[222] Presumably, undertakings would also have to be given by family members, in terms of agreeing to the sale of the family home upon the debtor's demise, which might also have to be reflected in the relevant instructions in the debtor's will. There is also the potential danger that the positive equity status of the property might revert to negative equity over the lifetime of the arrangement. Attention would also have to be paid to ensuring that the secured creditor would not be able to excessively profit from the arrangement at its conclusion. All in all, this is clearly a very complex scenario to address.

[222] It is noteworthy on this question that the court separately expressed the hope that goodwill from the children of the debtor towards their mother could be used to generate concrete, evidence based proposals which would enable the debtor to stay in her home.

Debt for equity PIA's

In the Fennell case, the income of the applicant in her own right was very limited and the likelihood of it improving in the future was highly improbable due to her age. This will not be the case in every 'positive equity' situation and it is conceivable that by the secured creditor taking a share of the debtor's equity, the monthly instalment payable by the debtor may become reduced to an amount that is affordable. There is a further option provided for in the Act as it stands which might be at least be partially suitable, in tandem with other strategies, for cases of positive equity with unsustainable arrears. Specifically, s.102 (6) (f) of the Act suggests that a PIA may include a term that:

'the principal sum due on the secured debt be reduced provided that the secured creditor be granted a share in the debtor's equity in the property the subject of the security'.

In 2020, the High Court in the **Lowe** case[223] considered, on appeal from the Circuit Court, an application to approve a PIA that proposed a 'debt for equity' swap which the secured creditor had voted against. The amount due on the applicant's mortgage in this case was approximately €358,000 and her family home was valued at €300,000, i.e. the property was in 'negative equity'. Since, under s. 103 (2) of the 2012 Act, a PIA proposal that would reduce the amount owed to the bank to below the value of the family home required the secured creditor's agreement, the PIA first proposed a write-off of €58,000 that would reduce the balance owed on that home down to its agreed market value of €300,000.

It then proposed that the remaining €300,000 would be divided into an active part of €170,000 upon which mortgage payments would be made in full and an inactive part of €130,000 which was described as 'a debt for equity' swap. The secured creditor would only be able to realise this equity share vis a vis a sale of the property following the death of the applicant debtor.

[223] In re Lowe & Personal Insolvency Acts [2020] IEHC 104, March 2020.

In support of the proposal, Counsel for the PIP/applicant argued that the 'debt for equity' element of the proposed arrangement was a sensible and practical way to deal with the difficulty that arises where, on the basis of a debtor's current financial circumstances, repayment of the mortgage loan (even where it is reduced to the value of the underlying security) is unaffordable to the debtor. This proposal was offered as a viable alternative to 'split mortgage' arrangements where the mortgage debt is split between a serviced portion of the mortgage debt and a warehoused balance. With split mortgages, it was suggested, payment of the warehoused amount is only postponed until the expiry of the term of the mortgage, an arrangement that, it was argued, *'can be extremely problematic in practice in circumstances where the debtor may not have the means, at the end of the mortgage term, to pay the warehoused amount'* and which *'has the potential to leave the debtor insolvent at the end of the mortgage term'.*

Counsel for the secured lender argued in response, *inter alia*, that 1) a "debt for equity" swap could only take place under the legislation with the consent of the relevant secured creditor; 2) that a "debt for equity" swap could only take place where the debtor has some equity (i.e. positive equity) in the secured property 3) that the proposed arrangement was contrary to s. 103 (2) of the 2012 Act in that, in substance, the arrangement proposes a reduction of the principal sum due on foot of the mortgage to less than the value of the family home over which the bank holds security and 4) were the value of property to fall, the bank could receive considerably less than €130,000 and would have no recourse to the applicant or her estate for the balance.

Ultimately, McDonald.J dismissed the appeal on the basis that the legislation explicitly provided that any proposal which involved a reduction of the principal sum to a figure less than the market value of the family home would require the consent of the secured creditor which was not forthcoming. In passing, it was also observed that the applicant may not have had in reality any equity in the property to offer in the first place.

However, as in the Fennell case outlined above, the Court alluded to the possibility of legislative amendments altering this position, as follows:[224]

> *'All of that said, I fully appreciate the force of the submission made by counsel for the practitioner (recorded in paras. 12-14) above that an arrangement of the kind proposed here might, for the reasons which he described, work significantly better in practice than most forms of warehousing. Depending on the circumstances of an individual case, the latter can give rise to unwelcome insolvency at the end of the mortgage term at a time when the debtor may, depending upon his or her age, have very limited finances available to discharge the warehoused element of the debt. An arrangement of the kind proposed here has the capacity to avoid that difficulty. However, if arrangements of that kind are to be available, it seems to me that significant amendments would need to be made to the 2012-2015 Acts. It is not for the court to suggest what form any such amendments should or might take. That is a matter entirely for the Oireachtas. However, if any such amendments are to be made, I would strongly urge that any such statutory provisions introducing new debt resolution solutions should be set out in sufficient detail to enable practitioners, debtors and creditors to identify and fully understand the precise scope and boundaries of any such solutions'.*

It is important to clarify here, before continuing, that the Lowe judgment only specifically applied to 'negative equity cases', leaving the question open as to whether in a 'positive equity' case, the secured creditor's consent is also required to a debt for equity swap. The recent judgment of Sanfey.J in the **McEvoy case**[225] (22nd June 2022) has now clarified the position and, again, this is not good news for those seeking to expand the range of PIA options. It is also important to point out that in both the Lowe and McEvoy cases, the secured lender was also being asked in the PIA

[224] Ibid see Paragraph 48.

[225] In the Matter of the Personal Insolvency Acts and John and Sheralyn McEvoy [2022] IEHC 380.

proposal to accept a significant writedown in the outstanding capital balance, in addition to the debt for equity swap.

The opening paragraphs 1 and 2 of the McEvoy judgment concisely set out the core issues as follows:

> *'This matter concerns an important point of principle in relation to whether or not a personal insolvency arrangement ('PIA') which proposes what is known colloquially as a 'debt for equity' swap is lawful in the sense that it could be the subject of an order of the court pursuant to s.115A (9) of the Personal Insolvency Acts 2012/2015 (referred to collectively as 'the Act') confirming its coming into effect.*
>
> *The lawfulness of a debt for equity swap was the subject of a comprehensive review by McDonald J in Re Denise Lowe, a Debtor [2020] IEHC 104. In that case, the court took the view that the proposed debt for equity swap could not be approved unless the secured creditor – in that case, Bank of Ireland – consented to the proposal, or to put it another way, that the swap could not be imposed by the court on the creditor against its will'.*

Paragraph 7 went on to explain that the court in this case:

> *'was informed by counsel for the PIP that there was a number of debt for equity cases which involved positive equity and would therefore possibly not be bound by the ratio decidendi of Lowe, but that there was a widely held view that a definitive ruling was required as to whether PIAs proposing debt for equity solutions involving positive equity were in principle lawful or not. I was further informed that the present case was regarded among personal insolvency practitioners as the "lead" case, in which it was hoped that the issue might be clarified by the court. Counsel suggested that a preliminary issue be tried as to whether such an arrangement was permissible in principle.*

The Court accepted the proposal to examine this preliminary issue and went on to review in detail the interplay between s.102 (6) (f) of the Act (see above) which clearly envisages, at least in theory, 'debt for equity' swaps in a PIA proposal and s.103 (2) which provides that, where a PIA proposes a reduction of the principal sum due in respect of the secured debt to a specified amount, that amount shall not, unless the relevant secured creditor agrees otherwise, be less than the value of the security agreed by the parties under s.105.

Accordingly, the court went on to frame the question, that since s.102 (6) of the Act is expressed to be subject to sections 103 to 105, whether a reduction of the principal sum below the value of the security could ever be effective without the agreement of the secured creditor, notwithstanding that a share of the debtors' equity in the property would also be conferred on the creditor.

Counsel for the debtor submitted that s.102 (6) (f) expressly enables the principal sum to be reduced once an equity share is given, and that it cannot have been intended that one section would conflict with the other and inhibit the working of debt for equity swaps. It was further submitted that '*in the debt for equity swap scenario the Act, to achieve a logical purpose, must be read that section 102(6) (f) is an exception to the rule in 103(2). It was also suggested that otherwise 'section 103(2) is an unintended de facto veto of every debt for equity case, and inhibits any 115A (review) for any debt for equity case.*'

Counsel for the lender broadly maintained that the core issue contemplated by the PIP's appeal (a debt for equity proposal absent the creditor's consent) had already been determined in Lowe. In that case, summarised above, McDonald J, under the heading "Is the consent of the secured creditor required?" reviewed the terms of s.103 and concluded that the protection afforded to secured creditors by ss. 103(1) and (2) was mandatory rather than directory:

The court went on to conclude (paragraph 28) in this case that:

It follows therefore that it does not matter whether the equity being offered by the PIP is positive or negative. The subsections are not in any way obscure or ambiguous. On the contrary, they suggest an intention to provide assurance to a secured creditor that its security cannot be reduced below market value without its consent. The only inference to be drawn is that a PIP is perfectly entitled to propose a debt for equity solution in accordance with s.102(6)(f) which envisages the value of security being reduced below the agreed or s.105 value; however, she cannot do so without the agreement of the secured creditor. There is nothing in the wording of the subsections to indicate that the Oireachtas intended s.102(6)(f) to be an exception to the rule in s.103(2), or that s.103(2) "is not a true reduction". The literal interpretation of ss. 102 and 103 is not absurd; neither does it appear to me that their terms fail to reflect the plain intention of the Oireachtas. On the contrary, it seems to me that s.103 sets out a measure of protection for the secured creditor which the PIP's proposal, in the absence of agreement, clearly contravenes.

Ultimately, these conclusions also have fatal consequences for the debtor's right to seek a review in the event of the secured lender's rejection of a debt for equity PIA proposal, notwithstanding the fact, as pointed out by counsel for the debtor, that the right to seek a review under s.115A was enacted in the Personal Insolvency (Amendment) Act 2015, i.e. some three years after the enactment in the parent Act of s.102 and s.103. On this point, the Court observed that:

'The Act simply states that, in the absence of an agreement, this particular solution cannot be imposed by the court on the creditor pursuant to s.115A (9). If this state of affairs is to change, in my view amending legislation will be required, and I echo and endorse the words of McDonald J at para. 48 of Lowe (quoted directly above).

On reflection, it is perhaps difficult to see how any other conclusion could have been legitimately arrived at, leaving the court in McEvoy, as in Lowe, to state the obvious – that *'if this state of affairs is to change, amending legislation will be required'.*

In the foreword to this paper[226] and in Paper Two of this series, we noted comments made by the CBI in July 2021, upon the release of research suggesting that a large number of borrowers face potentially substantial payment shortfalls at the conclusion of their mortgage term and that lenders need to do more to resolve long-term mortgage arrears. The relevant press release[227] went on to identify *'the inadequate use of existing tools to deliver sustainable restructures, inconsistencies in the approaches to personal insolvency arrangements, inadequate consideration of diverse borrower demographics and the need for greater collaboration in seeking system-wide solutions for those in the deepest levels of distress'* as obstacles to resolution. It also suggested that *'full resolution cannot be delivered solely within the financial system'* but fell short of elaborating upon what it meant by this.

Perhaps, targeted reform of the personal insolvency legislation is one important element of what it had in mind.[228]

■ **RECOMMENDATION**

Debt for equity Personal Insolvency Arrangements (PIA)

A statutory review of the personal insolvency legislation, already much delayed, is currently being completed by

[226] See Section 1.3. above.

[227] 'More action is needed by lenders to resolve long-term mortgage arrears, to support distressed borrowers and improve the functioning of the mortgage market for all - Deputy Governor Ed Sibley', Press Release, Central Bank of Ireland, 13th July 2021.

[228] Examples occur of cases where the secured lender has voluntarily agreed to a debt for equity PIA proposal. See, for example, July 30th, 2021 https://www.independent.ie/irish-news/courts/mortgage-extended-until-wife-is-115-in-debt-deal-that-saves-family-home-from-repossession-40705304.html. Counsel for the applicant in this case is reported to have told the Court that "Permanent TSB appeared to have heard the comments from the deputy governor of the Central Bank encouraging more proactive solutions in terms of older debtors where long-term arrears need to be fixed with more creative solutions."

the Department of Justice.[229] This review must urgently consider the key issues facing the significant number of currently restructured family home mortgages or such mortgages in arrears facing a shortfall at the end of the term, where many of the borrowers concerned now face or may soon face a reduced earning capacity, and where debt for equity may provide a solution. Options such as providing in the legislation that the repossession versus arrangement comparison is not a mandatory requirement in framing a proposal for a Personal Insolvency Arrangement and that a secured lender's refusal to agree a debt for equity swap may be subject to review under s.115A of the Act should be considered. If necessary, the Department should consider establishing a working group to develop such proposals.

As we have frequently encountered in researching and writing this series of papers, there is often an absence of reliable data upon which to assess the directions that law reform might take to assist in the resolution of consumer debt problems. In Paper Two, we set out a number of data deficits concerning mortgages in arrears and proceedings related to them. An information deficit also seems to occur on this question of positive equity/negative equity. The most recent information from the CBI quarterly statistics suggest that 46,088 accounts were in arrears at the end of June 2022, with 24,904 of these in arrears of over one year.[230]

These figures beg the following question: What is the profile of these mortgage arrears cases in terms of their (positive and negative) equity status both generally and within the various different arrears categories? Information on this question might help to inform the gravity of the positive equity problem in terms of debtors in arrears potentially accessing PIA's, and might help in turn to determine what reforms might be required to the legislation to improve such access.

[229] See further Section 4.7. below.

[230] Central Bank of Ireland (2022). 'Residential Mortgage Arrears & Repossession Statistics – Q.2 2022', Statistical Release, Dublin: Central Bank of Ireland.

■ RECOMMENDATION

Data on positive/negative equity cases

Detailed information on the positive/negative equity position of households in mortgage arrears should be gathered to help formulate appropriate solutions for cases of positive equity with unsustainable arrears.

4.5. REMEDIES FOR THOSE WITH UNSECURED DEBT ONLY – THE DEBT SETTLEMENT ARRANGEMENT (DSA)

■ Introduction

The principal focus of the insolvency legislation since its adoption has been the attempt to simultaneously resolve both the family home mortgage arrears and non-mortgage debt of insolvent borrowers through the PIA. Notwithstanding, specific potential remedies for those with unsecured debt only have been largely underused and this is reflected in the quarterly figures published by the ISI summarised above. The arrangements in question are the Debt Settlement Arrangement (DSA)[231] and Debt Relief Notice (DRN)[232] respectively. To briefly recap, the former involves the attempted resolution of unsecured debts of over €35,000, with a Personal Insolvency Practitioner (PIP) having to apply for a Protective Certificate (PC) from the ISI (which must be confirmed by the appropriate court) as a prelude to proposing a DSA in much the same manner as the PIA. Creditors vote to approve or reject the proposal which may last in theory for up to five years (with a possible one year extension) and if the proposal is approved, the PIP must inform the ISI who in turn must

[231] Personal Insolvency Act 2012, Part 3, Chapter 3.

[232] Personal Insolvency Act 2012, Part 3, Chapter 1.

inform the Court. Critically, however, there is no review/appeal process available in the Circuit Court if the 65% creditor in value voting threshold is not reached.

Lack of a review/appeal mechanism

As alluded to earlier, the latest available ISI figures concerning Debt Settlement Arrangements show that:

- A total of 1,862 Protective Certificates were granted to facilitate applications to propose a DSA from 2013 to the end of Q.2 2022, and;
- 1,204 DSA arrangements were approved following these Protective Certificates; thus 65% of Protective Certificates granted by the ISI have resulted in an approved DSA.[233]

In effect, therefore, more than one in every three potential DSA applications does not succeed, either because the 70 day period of the Protective Certificate lapses without an arrangement being proposed or because a proposal is made but is rejected by a sufficient threshold of creditors.

Further ISI figures indicate that from Q.4 2013 to Q.2 2022, 26.64% of Protective Certificates granted for the purposes of DSA's expired, 3.41% result in a 'No' vote and the remaining 69.95% result in a 'Yes' vote.[234] Thus, only a very small number of formal DSA proposals result in a 'No' vote. These numbers strongly suggest - given that the PIP is in contact and discussion with creditors in advance of making applications - that a number of DSA PC's are allowed to lapse without a proposal being made, in the knowledge that the proposal would be rejected and that no review/appeal to the court is available. It is worth noting that the pattern with PIA applications is significantly different. Over the same period, while a similar percentage (25.60%) of Protective Certificates granted for the purposes of PIA's expired without an arrangement being proposed, 23.27% resulted in a 'No' vote and the remaining 51.13% resulted in a 'Yes' vote.[235] Thus, over three in every ten formal PIA proposals are rejected but at least these can be reviewed in the Circuit Court.

For the purpose of considering reforms, much more detailed information on both the applicant and debt profile in cases where DSA applications are rejected by creditors should be researched by the ISI and made available. For example, it would be useful to have a breakdown of the following:

- How many rejected proposals feature a residual mortgage debt where the family home has already been repossessed or surrendered?
- In how many applications is a proposal made for ongoing payment of the applicant's mortgage outside the terms of the DSA as allowed for in s.68 (4) of the legislation?[236]
- In how many cases is the proposal rejected due to a lack of adequate surplus income to pay a sufficient dividend to unsecured creditors?

The Personal Insolvency (Amendment) Act 2015 only introduced a review mechanism in the Circuit Court where a proposal for a Personal Insolvency Arrangement (PIA), incorporating a secured debt in arrears on a family home, is rejected by a majority of relevant creditors. There is no such review option available where a proposed Debt Settlement Arrangement is rejected by unsecured creditors. While the initial

[233] Insolvency Service of Ireland (2022). Statistics report Quarter 1 2022. Dublin: Insolvency Service of Ireland. See: https://www.isi.gov.ie/en/ISI/ISI%20Statistics%202022%20Quarter%201.pdf/Files/ISI%20Statistics%202022%20Quarter%201.pdf , accessed 8th September 2022.

[234] Ibid, p.7.

[235] Ibid, p.7.

[236] S.68 (4) (read together with s.52 (3) d)) seems to allow a PIP to propose an arrangement with a mortgage lender to vary (presumably downwards) the debtor's payment on the mortgage. A DSA proposal may then be made that could provide a dividend for unsecured creditors, whilst the payment arrangement on the mortgage remains outside the terms of the DSA. When the DSA comes to an end and unsecured debt is written off, the payment to the mortgage lender may then correspondingly increase. Anecdotally at least, it does not appear that this option has been explored to any significant extent to date.

focus of the State in introducing this appeal mechanism was on preventing the loss of mortgaged family homes, we do not see a continuing justification for an insolvent debtor who does not own, or no longer owns, his or her family home being treated less favourably in terms of access to a review/appeal mechanism.

In our view, debtors should in future be permitted to seek a review/appeal of the rejection of their DSA proposal to the Circuit Court. This is particularly the case in light of current inflationary pressures, high rents, spikes in energy costs and general cost of living increases that may see a future increase in insolvency due to unsecured over-indebtedness that exceeds the DSA access threshold of over €35,000.

■ RECOMMENDATION

Information on and Circuit Court review in DSA cases

The ISI should provide more detailed information on both the applicant and debt profile in cases where DSA applications lapse or are rejected by creditors.

The Personal Insolvency (Amendment) Act 2015 should be amended to allow debtors seek a review/appeal in the Circuit Court against the rejection of their Debt Settlement Arrangement proposal.

■ Lack of access to the Abhaile scheme for those with unsecured debt only

A person who does not have, or no longer has, a mortgage on a family home is similarly disadvantaged by not being entitled to access free insolvency advice under the Abhaile scheme. It is likely that this has had an impact on the comparatively low number of approved Debt Settlement Arrangements, relative to Personal Insolvency Arrangements. Again, although the focus on attempting to protect the debtor's interest or occupation in the family home was understandable following the mortgage arrears crisis, it is manifestly unfair that those who rent their home are not entitled to access the state advice scheme that would enable them to resolve their unsecured debts.

It is also important to note that lack of access to Abhaile may also have a potential knock-on effect on an unsecured debtor's potential access to petition for bankruptcy. In this regard, Section 145 of the Personal Insolvency Act 2012 amends Section 11 of the Bankruptcy Act 1988 by providing an additional subsection (4) as follows:

> *'A debtor may not present a petition for adjudication (for bankruptcy) unless the petition is accompanied by an affidavit sworn by the debtor that he has, prior to presenting the petition, made reasonable efforts to reach an appropriate arrangement with his creditors relating to his debts by making a proposal for a Debt Settlement Arrangement (our emphasis) or a Personal Insolvency Arrangement to the extent that the circumstances of the debtor would permit him to enter into such an arrangement'.*

High Court Bankruptcy List Practice Direction (HC 100) on Bankruptcy (introduced with effect from 3rd December 2020 and replacing Practice Direction HC 66) in turn supplements the requirements of s.11 of the Bankruptcy Act 1988 in terms of petitions by debtors as follows:

> *13. Every Petition submitted by a debtor seeking an order of adjudication in bankruptcy must be accompanied by an affidavit of the debtor exhibiting a letter from a Personal Insolvency Practitioner registered with the Insolvency Service of Ireland certifying that:*
>
> *(I) the Personal Insolvency Practitioner ("Practitioner") has met the debtor and obtained information in relation to his or her assets, liabilities and income;*
>
> *(II) from the information provided by the debtor, the Practitioner has assessed the income and expenditure of the debtor based on his or her household composition in accordance with the Reasonable Living Expenses and taking*

into account the net monthly income, sets costs, housing, childcare (if applicable) and any special circumstances as described in the Reasonable Living Expenses has determined that the debtor has a monthly surplus or deficit of a particular amount;

(iii) having regard to the Practitioner's meeting with the debtor, and his or her assessment of the debtor's assets, liabilities and income, the Practitioner believes that the debtor's inability to meet his/her engagements cannot be more appropriately dealt with by means of a Debt Settlement Arrangement or a Personal Insolvency Arrangement for a reason stated; and

(iv) the debtor has confirmed to the Practitioner that the information provided and inserted on the Statement of Affairs (in Form 23 Appendix O of the Rules of the Superior Courts) is an accurate and true reflection of the debtor's financial position, and the Practitioner has satisfied himself/herself that the Statement of Affairs is in the prescribed form and is complete and consistent with the information provided to the Practitioner by the debtor and nothing in the meeting with the debtor would give the Practitioner any reason to doubt same (this confirmation should be given to the Practitioner by the debtor, even when the Practitioner has prepared the Statement of Affairs on behalf of the debtor, so that the Practitioner can certify as required to the court).

Thus, any person who wishes to petition for his or her own bankruptcy must swear an affidavit exhibiting the appropriate letter from a Personal Insolvency Practitioner to support his or her application. A debtor who is not in mortgage arrears, but has levels of unsecured debt that preclude him or her seeking a Debt Relief Notice under the legislation, is unable to access a free consultation with a PIP. S/he must bear the cost of any such PIP consultation, thus potentially blocking access to a DSA application or bankruptcy petition even where he or she may be clearly insolvent. This is a matter in need of remedy.

■ RECOMMENDATION

Access to Personal Insolvency Practitioner (PIP) advice in unsecured debt cases

The Abhaile scheme should be expanded to allow an insolvent debtor with unsecured debts access to a PIP assessment or, alternatively, a network of public free to the user PIPs should be established within the MABS network (see further below).

■ 'Zero payment' plans

FLAC published a paper in January 2012, in advance of the publication of the anticipated heads of the personal insolvency bill, which examined some trends noted by international insolvency expert Professor Jason Kilborn[237] in an in-depth examination carried out of debt settlement / adjustment schemes across Europe. [238]

In that paper, we suggested how these schemes might be applied in an Irish context.[239] Prof. Kilborn subsequently spoke at the FLAC conference on personal insolvency held in April 2012,[240] where he delivered a detailed critique of Ireland's draft personal insolvency framework.

The FLAC paper noted in relation to the question of surplus income available to fund insolvency arrangements, that *'the experience in Europe is that many applicants for debt settlement do not have the capacity to make any payments at all, when minimum income is taken into account'* and it was also noted in this context the difficulty that some applicants have in paying initial costs and fees in order to access an arrangement. The

[237] Then a Professor of Law at the John Marshall School of Law, Chicago.

[238] Kilborn, J. *Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010* (August 21, 2010). Available at SSRN: https://ssrn.com/abstract=1663108 or http://dx.doi.org/10.2139/ssrn.1663108, accessed 13th September 2022.

[239] Free Legal Advice Centres (2012), ibid.

[240] Ibid.

paper also observed that according to Kilborn, 'zero payment plans' had constituted a 'significant portion' of all payments plans in a number of the older legislative systems from the outset, for example in Denmark, Sweden, the Netherlands and Germany.

Thus, Kilborn suggested that these should be called debt adjustment or rehabilitation plans rather than payment plans to reflect their real focus.[241] FLAC's paper in turn speculated that in the Irish model as proposed by the Law Reform Commission (LRC) at the time, *'a debt settlement arrangement may yield very little if anything over its lifetime for creditors, particularly in a very poor economic environment such as pertains in Ireland'* and we speculated that *'the creditor approval threshold may then become a problem'.*[242]

It appears to us that a decade later, the Personal Insolvency Act 2012 continues to fail to address this fundamental question, at a time when rented accommodation is very expensive and the cost of living is rapidly escalating out of control. If an insolvent debtor qualifies for a Debt Relief Notice (where the maximum threshold of qualified debts is now set at €35,000, and other restrictive qualifying conditions apply), there is a potential resolution *that involves no payments being made*, though as we shall see below, there are potential exceptions to this general rule and access to the DRN option comes with a very wide array of qualifying conditions and restrictions.

If the debtor does not qualify for a DRN, i.e. his/her unsecured debts total over €35,000 and a DSA is proposed, the creditor's meeting decides by a required threshold of 65% of voting creditors in value, with no right of review/appeal in the event of a rejection. Unless there is some dividend available in the proposal for creditors, a favourable vote is very unlikely. The legislation also requires that any arrangement (whether a PIA, DSA, DRN or bankruptcy) must allow the debtor and dependants to maintain a reasonable standard of living. This is very clearly stated in Section 23 of the Act which provides that:

> *'The Insolvency Service shall, for the purposes of sections 26 , 65(4) and 99(4) and section 85D (as inserted by section 157) of the Bankruptcy Act 1988, prepare and issue guidelines as to what constitutes a reasonable standard of living and reasonable living expenses'.*

This is reflected in considerable detail in guidelines on the ISI website which contains a specific 'Reasonable Living Expenses (RLE) Calculator' section that enables any applicant for an arrangement to calculate the household's monthly reasonable living expenses based on factors such as the number of dependants, housing and childcare costs, and special circumstances.[243] RLE guidelines are based on a 'budget standard approach', pioneered in Ireland by the Vincentian Partnership for Social Justice whose work heavily influenced the ISI in terms of their approach to calculating reasonable living expenses.[244]

In terms of DSA's specifically, S.65 (2) (d) of the Act provides that:

> *'A Debt Settlement Arrangement 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 or her dependants'.*

In turn, S.65 (4) states that:

[241] The FLAC/Kilborn paper then went on to compare systems where a zero payments plan is put in place, but is subsequently abandoned where there is ongoing incapacity to pay, with systems where the State may insist on 'the plan running its course for pedagogical purposes', even though little or nothing may be paid over its course and the debtor would have to be monitored for improvements in income capacity. Here, for example, Kilborn quoted Belgian governmental and parliamentary views that 'no payment plans' have a 'symbolic character'. The downside, as pointed out in the paper by debtor advocate organisations such as the IFF (Institut fur Finanzdienstleistungen) in Hamburg, is the substantial administrative expense on the State 'to achieve moral educational goals', p.15.

[242] Ibid, p.15.

[243] https://backontrack.ie/RLE-CALCULATOR, accessed 13th September 2022.

[244] See: Collins, M., McMahon, B., Weld, G. & Thornton, R. (2012) *A Minimum Income Standard for Ireland: A Consensual Budget Standard Study Examining Household Types Across the Lifecycle*. Dublin: The Policy Institute, Trinity College Dublin. Also: Insolvency Service of Ireland (2013). *Guidelines on a reasonable standard of living and reasonable living expenses*. Dublin: Insolvency Service of Ireland.

> *'For the purposes of subsection (2)(d), and without prejudice to subsection (3), in determining whether a debtor would have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants under the Debt Settlement Arrangement, regard shall be had (our emphasis) to any guidelines issued under Section 23 .'*

Thus, any potential applicant for a DSA is entitled to maintain a reasonable standard of living for his/her household and may use the ISI website to work out what that minimum income should be based on the household's characteristics. However, that calculation may lead to the conclusion that the applicant has no surplus income to make payments to creditors, let alone to pay the costs of the PIP in framing the proposal.

Anecdotally, this has led to some proposals being made that involve making some minimum payments to creditors that would see the household having to survive on an income below the applicable reasonable living expenses for the duration of the arrangement. Does this infringe the letter of the legislation or at least its spirit? This depends on how the words 'regard shall be had to' are interpreted. This is certainly not mandatory language and it is notable that the ISI RLE's are referred to as 'guidelines'. It is also apparent that many households would prefer to survive below RLE's for a limited time in the current system, if it means that a write-off of unsecured debt will occur at the end of that limited period.

It is also worth noting that in some cases, the proposed DSA goes nowhere near the notional maximum period of five years and that some DSA's have been proposed and accepted that are described as 'accelerated', i.e. of a much shorter duration, and in some of these, only one lump sum payment is made, sometimes we understand on the basis of a "gift" from family or friends. It would be useful in terms of reviewing the legislation and proposing reforms if more data were available from the ISI on how common this actually is.

The statistical evidence from the ISI referenced above signifies an approach in need of reform. It is notable that the preamble to the Act clearly states that one of its key objectives is '*the need to enable creditors to recover debts due to them by insolvent borrowers to the extent that the means of those debtors reasonably permits* (our emphasis)*, in an orderly and rational manner'.* If an applicant debtor has no surplus income over and above RLE's, should recovery of debt be considered feasible or 'reasonably permitted' as long as the debtor's circumstances have not improved? In turn, if an applicant debtor has no surplus income over and above RLE's, should that preclude him/her accessing an arrangement?

At the very least, these questions and the issues they raise merit further research. For example, the following information should be enquired into by the ISI with insolvency practitioners:

- How common is it that insolvent debtors (whose debts are beyond the DRN threshold) have been unable to apply for a DSA due to a lack of surplus income to provide a dividend to creditors?
- In how many cases was any limited surplus income likely to be dissipated by the proposed PIP fees in the arrangement which led to the rejection of a DSA proposal?
- How many debtors with comparatively high levels of unsecured debt still languish, too indebted for a Debt Relief Notice and with too little income for a Debt Settlement Arrangement?
- How many DSA's that were approved were 'accelerated' i.e. of short duration and/or involving one lump sum payment distributed between creditors?

RECOMMENDATION

Debt Settlement Arrangements (DSA) – Zero payment plans

The introduction of a DSA 'zero payments' plan option should be researched and considered. Such a plan could allow for inbuilt periodical reviews of the applicant's

disposable income to monitor any improvements that might lead to a payment for creditors (a feature that already applies to a limited extent with Debt Relief Notices). This could help to resolve legacy cases of insolvency where the level of unsecured debt exceeds the DRN threshold, without the need for the debtor to petition for bankruptcy.

Costs and fees in insolvency – The case for public PIPs

By allowing for a state-funded consultation with a Personal Insolvency Practitioner (PIP), the Abhaile scheme is intended to enable insolvent debtors with serious home mortgage arrears to look at framing a PIA proposal. Thereafter, if the proposal is accepted by a majority of creditors and is confirmed, the PIP's fees are paid out of the money available from the insolvent debtor's income (and possibly from saleable assets). It is clear that the PIP is running a business and must be paid for his or her work, as well as being compensated for the costs involved in becoming a practitioner and maintaining a practice. However, it is also clear that the need to incorporate PIP fees into the agreement reduces the dividend available to creditors.

A number of questions follow from this aspect of the Irish insolvency scheme:

- To what extent has this resulted in creditors discouraging debtors from seeking accommodations under the legislation and instead encouraging 'voluntary settlements' which are not legally binding?
- To what extent might this discourage PIPs from making proposals under the legislation?
- To what extent might this adversely affect the approval of arrangements that are proposed under the legislation?

A research report published by Waterford Money Advice and Budgeting Service (MABS) in 2016 provides some interesting findings relevant to these important questions.[245] This study was motivated by the realisation by that service that many clients of MABS are locked out of a statutory remedy ostensibly designed to assist them and others in a similar situation, by virtue of the fact that they do not have enough disposable income to sustain an arrangement, while also paying a PIP's fees. The project was thus put together to assess whether the provision of a free-to-access PIP in MABS would have a material impact on outcomes for clients. The MABS PIP in question was authorised by the Insolvency Service, was an employee of that MABS service at that time and a qualified accountant.

An overview of the key findings of the research reported as follows:

- In 32 out of the 122 cases handled, clients had already had a prior consultation with a commercial PIP. In 19 of these 32, no potential arrangement under the legislation had been offered by that PIP. In the remaining 13 cases, bankruptcy was proposed. By contrast, the Waterford MABS PIP managed to secure 10 DSAs among these 32 clients.
- In a further 27 cases, alternative arrangement/case progression routes other than a DSA or PIA had to be found. The report pertinently remarked in this context that given the level of intensive support required for low income debtors to achieve a resolution to their difficulties outside of the legislation, it was unlikely that it could be provided by a PIP acting on a commercial basis.
- Of a total of 66 cases (out of the 122) progressed through the ISI system, 61 were DSA applications and only 5 were for PIAs. Of these, 30 DSAs were approved, 10 rejected, 2 withdrawn, 5 ended in

[244] Waterford MABS (2016). *Waterford MABS Personal Insolvency Practitioner Research Report*, August 2016. Waterford: Waterford MABS and the Citizens Information Board. We would like to clarify that the lead author of this paper, Paul Joyce, acted on FLAC's behalf as a member of the Steering Group established to oversee this piece of work. The project was also independently evaluated by the co-author of this paper, Dr. Stuart Stamp.

voluntary arrangements and 14 were pending at the conclusion of the project.[246] Of the 5 PIAs, one was withdrawn, one ended in a voluntary arrangement and 3 were pending at the conclusion of the project.

- Of the 30 approved DSAs, it is important to note that 13 involved cases where the debtors continued to service a mortgage and these DSA arrangements had the impact of making the mortgage sustainable in the long run. This was a very valuable finding in that it illustrates that the DSA can be used to resolve unsecured debt without the mortgaged family home necessarily being repossessed.

Ultimately the report concluded that the project had provided a window into the potential for insolvency arrangements for debtors on a low income and demonstrated that effective solutions can sometimes be found even in the more challenging cases. On this basis the research concluded with a strong recommendation that a business case had been made to expand and maintain this service within MABS. Our understanding is that this case has subsequently been reiterated, but it has not been acted upon.

A number of organisations including MABS and FLAC were critical of the decision to focus on a commercial insolvency practitioner system alone in the legislation back in 2012 and forecasted (correctly with hindsight) that this would disadvantage debtors on low incomes with little disposable income to fund arrangements. It is important to again emphasise that this is not a criticism of existing insolvency practitioners who have a living to earn. It is apparent, however, even from a limited sample in this research project, that a free-to-access PIP is able to deliver results for low income clients that a commercial PIP may not; moreover, it illustrates the former is likely to be working in most cases with a very different – and much lower resourced - client base.

[246] Our understanding is that cases have continued to be processed by another MABS-based PIP in the relevant service since the conclusion of the pilot project.

Whilst it may be suggested that the Abhaile scheme overcomes this, this is at best only partially true. First, as already noted, Abhaile only currently applies to family home mortgage arrears cases where that family home is in danger of repossession. Second, even if (as we recommend above), Abhaile advice were to be expanded to insolvency cases concerning unsecured debt, that will only at best allow the costs of investigating and framing the proposal to be met, and not the PIPs fees in the arrangement. With a MABS (public) PIP, all of the insolvent debtor's surplus income (if there is any) is available for creditors.

RECOMMENDATION

Public Personal Insolvency Practitioner (PIP) network in MABS

A free-to-access PIP service should be established within the already state-funded MABS structure, as suggested by the Waterford MABS pilot project research in 2016, for the purposes of proposing Debt Settlement Arrangements (DSA) for those of limited means. This would allow a potential applicant's income above Reasonable Living Expenses (RLE's) to be potentially incorporated into a DSA proposal. It would also allow existing PIPs to continue under Abhaile to look at mortgage arrears cases and propose PIA's for clients where appropriate, in addition to continuing the more commercial side of their insolvency practices.

4.6. REMEDIES FOR THOSE WITH UNSECURED DEBT ONLY – THE DEBT RELIEF NOTICE (DRN)

The Debt Relief Notice (DRN), provided for in Part 3, Chapter One (Sections 25-47) of the 2012 Act is broadly modelled on its UK equivalent, called a Debt Relief Order (DRO).[247] Both are targeted at consumers on low incomes and with few assets and provide in principle for a full write-off of qualifying debt at the conclusion of a 'Supervision Period'. A critical difference between the two systems is the length of that period, which stands at one year in the UK and three years in Ireland. The undue length of the wait for discharge in Ireland is thought to be a major factor in, once again, the low numbers of arrangements that have been achieved here.[248]

It is important to note that the three year DRN supervision period in Ireland initially coincided with the then standard three year period before discharge under the Bankruptcy Act 1988. However, the Bankruptcy (Amendment) Act 2015 reduced the basic discharge period in bankruptcy to one year (subject to exceptions), leaving these two processes out of kilter with each other. It should, however, be added here that although the discharge period for bankruptcy is now one year, a discharged bankrupt may continue to make payments to creditors under the terms of a Bankruptcy Payments Order or Income Payments Order for up to three years from the date that the payment arrangement comes into operation.

Like PIA's and DSA's, applications are made directly to the ISI and there are a number of detailed rules of process and engagement. These applications are processed by authorised Approved Intermediaries (AI) who are, with limited exceptions, MABS staff spread throughout the eight MABS regions across the country.[249] There is no requirement for a Protective Certificate to be granted in a DRN case, but as with DSAs and PIAs, the legislative rules on Debt Relief Notices (DRNs) require the Circuit Court to confirm the coming into operation of an arrangement. Given that the vast majority of DRN applications have been processed through a staff member of the Money Advice and Budgeting Service (MABS) acting as the 'approved intermediary', this has led to the somewhat strange situation where three separate state-funded services – MABS, the Insolvency Service of Ireland and the Courts Service - are involved in the processing of and decision making on applications *before* a DRN may be confirmed.

The basic process is as follows:

1. Under s.27 of the Act, the (MABS) approved intermediary meets the potential applicant and carries out the relevant assessments and checks before submitting an application under s.29 to the ISI.

2. The ISI then considers the application under the terms of s.30 and 31 and, if satisfied that the application is in order, issues a Certificate and in turn furnishes that certificate to the appropriate Circuit Court.

3. The court in turn again considers whether the necessary criteria have been satisfied before issuing a Debt Relief Notice. In terms of potential objections, under s.42, a specified creditor may apply to the court if aggrieved by any act, omission or decision of the ISI in connection with the DRN concerned. Under s.43, a specified creditor may apply to the court at any time during the (3-year) supervision period to object to the inclusion in the DRN of the debt due to it.

The DRN was introduced to deal with small and manifestly unsustainable levels of 'qualifying' debt, initially of up to a threshold of €20,000, and has often been characterised as a 'no income, no

[247] Debt Relief Orders (DROs) came into force in the UK on 6 April 2009, introduced under the Tribunals, Courts and Enforcement Act 2007.

[248] See: Stamp and Joyce (2022), ibid.

[249] Two private companies - IRS Ireland and Creative Insolvency Solutions – are also registered to act as approved intermediaries. See: https://isi.jahs.ie/public/users , accessed 3rd March 2022.

assets' arrangement.[250] The qualifying debt level was increased to €35,000 in the Personal Insolvency (Amendment) Act 2015, with effect from September 2015, when it had become clear (as many had pointed out would be the case from the beginning) that the level of qualifying debt was too low and numbers of approved DRNs had been accordingly disappointing.

The ISI figures[251] show that the two years when approved DRN's were at their zenith were the year the threshold amendment was introduced, 2015, with a total of 347 approvals and the year following the amendment, 2016, with a total of 357. However, numbers in subsequent years have continued to disappoint, suggesting that the qualifying debt threshold is not the only problem with this resolution option. In total, 2,025 DRN's have been approved from late 2013 to the end of Q.2 2022 and, again, when compared with early predictions, falls way short of what had been expected.

DRNs are given a unique position under the legislation as the only form of resolution that does not require creditor approval in the form of a voting mechanism at a creditor's meeting, and where write-off of all qualifying debt is generally automatic at the conclusion of the supervision period. However, in return, this concession comes with a wide array of rules and restrictions that arguably disincentivise many to apply. Recently published research on DRN's by the authors of these papers, suggests that they can have transformative impacts on those who avail of them; however, the findings also suggest the associated rules, limitations and length to be considerably limiting access.[252]

In brief summary, a review of the legislative provisions concerning DRN's[253] would indicate that the following restrictions have an impact on participation:

- Apart from having qualifying debt that may not exceed €35,000, the applicant must meet a number of diverse means tests including: (i) having a net disposable income limit of no more than €60 per month after reasonable living expenses are deducted (RLE's); (ii) an asset value limit of €1,500 after a permitted allowance of €6,000 for household equipment and appliances and books, tools and equipment necessary for employment, business or vocation; (iii) one personal jewellery item only not exceeding €750 in value, and; (iv) owning one 'necessary' motor vehicle worth €5,000 or less, or a motor vehicle designed / adapted for a disability.
- In effect, the applicant may not include a vehicle that is the subject of a loan in his/her application, and may be forced to sell or surrender that vehicle in order to be allowed to apply for a DRN. It might then be potentially suggested that s/he arranged his or her financial affairs primarily with a view to being or becoming eligible for the issue of a DRN by selling that vehicle; or that by selling it, s/he exercised a preference that had the effect of substantially reducing the amount available for the payment of his or her debts, and thus could be excluded from applying from a DRN.
- A potential applicant may fall foul, without intending it or realising it, of some quite complex provisions in relation to exercising a preference or entering into a transaction at an undervalue that may affect the application. This could conceivably include, for example, accepting financial support from relatives to clear rent or utility arrears or prioritising repayments to one's only potential source of credit.
- The procedural steps to a DRN are onerous incorporating: the Approved Intermediary's (AI) role in the process; the need for an initial written statement by the applicant; a subsequent meeting

[250] See for example: Law Reform Commission (2010). *Personal Debt Management and Debt Enforcement*. Dublin: Law Reform Commission, p.112.

[251] Insolvency Service of Ireland (2022), ibid, p.11.

[252] Stamp and Joyce (2022), ibid.

[253] See: Personal Insolvency Act 2012 (as amended), Part 3, Chapter 1, Debt Relief Notices.

between the AI and potential applicant; the provision of supporting documentation by the applicant; the need for the applicant to complete a formal financial statement in the format prescribed; an application form, which is to be completed and forwarded to the ISI by the AI along with certain documentation, and; the wide range of powers and responsibilities of the ISI and the Courts.

- A specified debtor is also obliged during the supervision period to provide notification to the ISI as soon as practicable of: (i) any material change in circumstances, particularly in relation to an increase or decrease in terms of assets, liabilities or income, and (ii) any inaccuracy or omission as regards any information or documentation provided by or for him/her to the ISI. The Act provides for offences should such breaches of "good faith" occur, either in this instance through intentional failure to comply or knowingly providing false or misleading information to the ISI in a material respect.
- In the event of a favourable change in the debtor's financial circumstances during the course of the Supervision Period, a range of provisions apply as follows:

1. If a debtor receives a gift or payment worth €500 or more, s/he must surrender to the Insolvency Service 50 per cent of the value of that gift or payment for the benefit of creditors.
2. If the income of the debtor increases by €400 or more per month during the supervision period, s/he must surrender to the ISI 50% of that increase.
3. A debtor may, at any time during the supervision period concerned, pay a sum to the Insolvency Service that is not less than 50 per cent of the total value of the specified qualifying debts. In this event, the Debt Relief Notice comes to an end and the debtor is discharged from all of the specified qualifying debts.

The recent research indicates that a typical profile of a person who follows through on a DRN application is someone in middle age who is a long term social welfare recipient, whose income and assets are not generally subject to much change, and for whom therefore, the lengthy three year supervision period to be served before write-off and the provisions in relation to paying over a percentage of any improvement in income or any windfall during that period, may be largely immaterial.

The findings, however, also suggest that a cross section of interviewees who completed the DRN were extremely relieved to be debt free at the end of the process, and very grateful both that such a potentially life-changing option is in place and for the services provided by Approved Intermediaries to realise it. Nevertheless, the complexity of the rules, the strict limitations that apply and the length of the supervision period, all emerged as factors that are combining to limit access.

■ RECOMMENDATIONS

Debt Relief Notices (DRN)

The requirement for DRN proposals to be court-approved should be removed. Approved Intermediaries (AI's) should be responsible for verifying applications and the Insolvency Service for checking and approving them, with an avenue of appeal to the Circuit Court where there is a creditor objection or a contested issue of law or process.

The Supervision Period should be reduced from three years to one year. This would align with both the one year supervision period for Debt Relief Orders in the United Kingdom and the reduction in the basic discharge period for bankruptcy brought about by the Bankruptcy (Amendment) Act 2015.

The alleged exercise of a preference or a transaction at undervalue should be removed as criteria affecting eligibility and replaced with a right of objection for the ISI or for a creditor to raise before the Court. Payments made to protect the debtor's basic living standards should be excluded from the definition of making a preference. [254]

[254] See Stamp and Joyce, Ibid, for further detailed recommendations.

4.7. Reforming and Amending the Personal Insolvency Act 2012

Statutory review of the Act

Section 141 of the Personal Insolvency Act 2012 provides as follows:

> 1 *The Minister shall, in consultation with the Minister for Finance, not later than 3 years after the commencement of this Part, commence a review of its operation.*
>
> 2 *A review under subsection (1) shall be completed not later than one year after its commencement.*
>
> 3 *Having completed the review the Minister in consultation with the Minister for Finance shall prepare a report setting out the assessment arrived at and the reasons for that assessment.*
>
> 4 *The Minister shall lay a copy of a report prepared under subsection (3) before each House of the Oireachtas as soon as reasonably practicable after it has been completed.*

The relevant part referred to – Part 3 containing the bulk of the substantive provisions – was commenced at the end of July 2013. According to the letter of the section therefore, the review should therefore have *begun* by the end of July 2016 and should have been *completed* by the end of July 2017. A report should then have set out the 'assessment' arrived at and a copy of that report should have been made available to the Dáil and Seanad for the attention of the elected members of the Oireachtas. At the time of writing, it is October 2022. **The completion of the review is said to be due in the second half of this year, some five years therefore after the notional target date.**

In early 2017, FLAC, in its capacity as a member of the ISI's then Consultative Forum, participated in a series of meetings in the ISI which discussed and reviewed some of the administrative bottlenecks under the legislation which had led to significant delays in the processing of arrangements. This led to an agreed joint submission from the members of the forum (including creditor representatives) to amend the legislation in terms of procedures to speed up the delivery of applications and arrangements, in particular by providing the ISI with stronger decision making powers under the Act. In turn, in the summer of 2017, FLAC prepared its own detailed submission on more substantive issues concerning the review of the legislation and submitted this to the Department in August 2017.[255] This submission was discussed at length with departmental officials in January 2018.

In June 2018, Michael McGrath, TD (Fianna Fáil), then opposition spokesperson on Finance, now Minister for Public Expenditure in the current administration, asked then Minister for Justice and Equality, Charles Flanagan TD for detail of *'his plans to act on the recommendations made by the Insolvency Service of Ireland as part of its section 141 consultation submission made in June 2017; and if he will make a statement on the matter'*.[256]

In summary, the former Minister provided a number of apparent assurances in his written reply as follows:[257]

- The review was being finalised at that point (now over four years ago);
- A range of detailed submissions had been received and had been carefully analysed;
- Discussions had taken place with the Insolvency Service of Ireland on possible changes to the legislation;
- The submission from the Consultative Forum (referred to above) in relation to streamlining insolvency processes had been noted;

[255] Free Legal Advice Centres (2017). *Analysing current developments in the resolution of mortgage arrears and related issues and the review of the Personal Insolvency Act 2012*. Dublin: Free Legal Advice Centres, August 2017.

[256] Parliamentary Question No 27200/2018, June 21st 2018

[257] See: https://www.oireachtas.ie/en/debates/question/2018-06-21/106/#pq_106 , accessed 13th September 2022.

- Other measures to extend access and accelerate agreements were under consideration.

With all this in mind, the Minister's reply concluded with some commitments, albeit ones based on 'expectations'. The Minister expected to receive a report on the review *'within weeks'* and expected *'shortly afterwards to bring proposals to Government to address the review's recommendations, including proposals for legislative change'.*

No doubt resources will be cited as an issue here to explain this excessive delay. It is, it seems, a matter more of political will and competing priorities, and it may be that consumer over-indebtedness and personal insolvency is not a sufficient priority.

The delayed review of the Personal Insolvency Act is further confirmation of the complacency that lies at the heart of addressing the financial problems of consumers in a society that not only expects, but also relies upon, people to borrow. The failure to carry out what was provided for in law according to the schedule, and the lack of explanation or accountability for that failure, is a cause for major concern.

5

SECTION

An assessment of the impact and outcomes of the Abhaile Scheme

In this section, we focus on the government's principal response to mortgage arrears, namely Abhaile, the state-funded service provided free of charge to insolvent borrowers in danger of losing their family home on account of associated mortgage arrears.[258] We have already outlined the structure of this service in Sections 2.4 and 2.6, and critiqued that structure in 2.9 above. Here, we focus on an assessment of its impact and outcomes in the round. We begin with an analysis of published statistics overall and then turn to an examination of Dedicated Mortgage Arrears Adviser (DMA) outcomes. The age profile of Abhaile users is then explored, and we further critique the data on the legal services associated with the Scheme. We conclude this section with an analysis of the societal role for Abhaile going forward and make a series of recommendations.

The most up-to-date data on the Abhaile scheme is presented in the fourth and latest Abhaile report published in October 2021,[259] covering the period July 2016 to end December 2020, which helpfully summarises related outcomes in one detailed chart below (Figure 2).

[258] See https://www.oireachtas.ie/en/debates/question/2018-06-21/106/#pq_106, accessed 13th September 2022.

[259] Government of Ireland (2021). ABHAILE, *The National State-Funded Mortgage Arrears Resolution Service, Fourth Report, January – December 2020.* Dublin: Government of Ireland, p.26.

FIGURE 2: ABHAILE OUTCOMES, JULY 2016 TO END DECEMBER 2020

Outcomes	Received DMA advice	Received PIP advice	Total at December 2020	Total at December 2019	Change 2020 v 2019
	8,962 Borrower households	11,723 est. borrowers	20,685 borrowers	17,640 borrowers	3,045
Solution in place:					
– Personal Insolvency (PIA)	N/A	2,851	2,851	2,357	494
– Informal Solution (ARA, MTR)	1,860	1,180	3,040	2,981	59
– Bankruptcy	N/A	219	219	236	-17
Trial solution in place	735	N/A	735	567	168
Total solutions/trial solutions in place	**2,595 (29%)**	**4,250 36%**	**6,845 (33%)**	**6,141 (35%)**	**704**
In progress to formal solution	N/A	2,696	2,696	2,015	681
In progress to informal solution	4,945	2,110	7,055	6,302	753
Total in progress to solution	**4,945 (55%)**	**4,806 (41%)**	**9,751 (47%)**	**8,317 (47%)**	**1,434**
Surrender/ repossession	**309 (3%)**	**234 (2%)**	**543 (3%)**	**450 (2%)**	**93**
Not engaging after financil advice	**1,113 (13%)**	**2,433 (21%)**	**3,546 (17%)**	**2,732 (16%)**	**814**
TOTAL	**8,962 (100%)**	**11,723 (100%)**	**20,685 (100%)**	**17,640 (100%)**	**3,045**

Source: Government of Ireland

5.1. A SUMMARY OF ABHAILE STATISTICS

This latest available data indicates that from July 2016 to the end of December 2020 (a period of four and a half years), a total of 20,685 borrowers in mortgage arrears have availed of the advice services provided by publicly-funded MABS Dedicated Mortgage Arrears advisers (DMA) and commercial Personal Insolvency Practitioners (PIPS) under the scheme. A total of 8,962 borrowers received DMA advice and 11,723 received PIP advice.[260]

Formal solutions

- 2,851 users (14%) have a personal insolvency solution i.e. a Personal Insolvency Arrangement (PIA) in place (also described as a formal solution). It is notable for comparison purposes that from 2016 to 2020, a total of 4,464 PIA's overall were put in place, according to ISI figures. Thus, it would appear that roughly two out of every three PIA's approved over that period ultimately stemmed from an Abhaile PIP consultation.

- Almost as many again - 2,696 (13%) - are said to be 'in progress' to a formal solution. It is suggested in the report that these cases may be variously *'in the PIA court review process, considering or applying for a personal insolvency arrangement, or a (very small group) considering bankruptcy'.*[261]

Together therefore 5,547 borrowers (27% of the total or just over one in four) are in, or said to be on the way to, a formal solution, i.e. a PIA.

A further 219 (1%) are in bankruptcy which is separately categorised as a formal solution, presumably because it is also a legislative debt resolution process that a borrower can invoke. However, it is not recorded how many of these borrowers retained their residence of the family home post-bankruptcy discharge, a core requirement of the PIA.

Informal solutions

- 3,040 users (15% - 1,860 through a DMA, and 1,180 through a PIP) have an 'informal' solution in place. In brackets in Figure 2 above, ARA (alternative repayment arrangement, a term drawn from the MARP/CCMA Code) and MTR (mortgage-to-rent) [262] are mentioned as examples of 'informal' solutions. The latter reference is somewhat curious. A mortgage-to-rent arrangement if completed is hardly informal, as it means the borrower has lost ownership of the property and become a social tenant (albeit with a theoretical right to become an owner again in the future with at least some MTR providers).[263]
- 7,055 (34% of the total, 4,945 through a DMA, and 2,110 through a PIP) are 'in progress' to an informal solution. This would appear to suggest that they are in the MARP process in some shape or form but do not yet have an ARA in place. It is notable that this is by some distance the largest category, amounting to one in every three Abhaile users.
- 735 (4%) have a trial solution in place through a DMA. It is not stated, but it appears that these trial solutions are informal solutions rather than formal solutions.

Together this amounts to 10,830 borrowers (or over half, 52% of the total) in, or said to be on the way to, an *informal* solution. These informal solutions and potential informal solutions therefore are almost double the formal ones. The significant majority of these (7,540 or 70%) are reported to result from DMA advice with the

[260] There may also be some overlap here, in that it is likely that some referrals to PIPs will have come from DMA's who provided initial mortgage arrears advice.

[261] Ibid, see page 31.

[262] See: The Housing Agency (2022). A Guide to the Mortgage to Rent Scheme. Dublin: The Housing Agency, February 2022.

[263] See Section 6 below for further detail on the Mortgage to Rent scheme.

remainder credited to PIP advice. In practice, there may again be some overlap here where a PIP and a DMA may work together to try to get an outcome.

Number of surrenders/borrowers not engaging

- 543 (3%) have surrendered their family home or have had it repossessed. Given that MTR arrangements seem to be categorised as informal solutions, this number does not appear to include them, but this might usefully be clarified.
- 3,546 (17%) were not engaging after having received financial advice and, understandably, there is no further information on outcomes for this cohort.

- **Commentary**

These outcomes clearly amount to progress, albeit arguably somewhat limited over a period of four and a half years and, as we have suggested in previous work, related interventions have had a considerable, positive, social impact in terms of housing security and the prevention of homelessness.[264] It should also be borne in mind that the tools available to advisors to achieve solutions on behalf of clients are, as set out in detail above, themselves limited in a number of respects. In very broad terms, the figures indicate that:

- Just over one in every four of Abhaile users (27%) are in or said to be on the way to a formal solution (i.e. a PIA) that should see the family home retained in the long term. Note, however, that only slightly more than half of these actually had such arrangements in place by the end of 2020.
- Just over one in every two (52%) are in or on their way to an informal solution that involves remaining in the family home, but it is unclear for how long it may be retained, as these solutions are 'informal' and lack the status of a legally binding arrangement. Indeed, it may be argued that the words 'informal' and 'solution' in the mortgage arrears space can be somewhat contradictory. For example, as we have already seen in Paper Two of this series and further above, there are a number of borrowers currently in agreed restructures where there will be a substantial shortfall at the end of the term and in some of these cases, occupation of the family home in the long term may be in jeopardy. Thus, informal solutions achieved under Abhaile do not necessarily equate to long-term housing security.
- One in five have either lost their home or have disengaged from the process.

Of note too is a statistical caveat that comes with these figures, specifically in relation to PIP advice, expressed as follows:

> *'Due to the large numbers of borrowers involved and different data collection possibilities, the ISI outcome data used here for borrowers who took up PIP advice over the whole period July 1 2016 – December 31, 2020, is a projection. This projection is based on outcome and progression trends identified in 4 extensive and detailed sample surveys undertaken by ISI. After further statistical analysis and cross-checks with other related data, ISI is satisfied that the results of these samples are highly comparable and that they appear to be representative of the intervening quarters and a likely predictor of the following quarters.*[265]

Thus, the outcomes from PIP advice services in the general table above, including all the *formal solutions*, both completed and 'in progress', are data projections extrapolated from figures in one quarter of each year only (the third quarter of each relevant year). Whilst this certainly does not invalidate the projections, it does slightly under-

[264] The authors completed an internal review of the Dedicated Mortgage Arrears (DMA) Service for the Citizens Information Board in December 2018.

[265] Ibid, page 27

mine their potential accuracy, particularly given the fact that in addition to being based on projections from one quarter of the year only, some of the suggested outcomes themselves are also predictions of solutions that have yet to be achieved, i.e. arrangements that are in progress but are not finalised.

5.2. A COMPARISON OF THE 2019 AND 2020 FIGURES

Figure 2 above also records that an additional 3,045 borrowers availed of Abhaile services between the end of 2019 and the end of 2020 (taking the total from 17,640 to 20,685 cases). The breakdown of the additional outcomes at the end of 2020, compared to the end of 2019, is as follows:

- 494 additional PIA's were in place and 681 more borrowers were said to be in progress to a formal solution, likely in the large majority of cases - as we have seen - to be a PIA, a total of 1,175.
- An additional 59 are in an informal solution, 168 have a trial solution in place and 753 more borrowers are in progress to an informal solution, a total of 980.
- There were 17 fewer borrowers in bankruptcy, indicating that more Abhaile borrowers exited than entered bankruptcy in 2020.
- There were an additional 93 surrenders / repossessions and 814 additional borrowers were not engaging following the services provided, a total of 907.

Thus, it would appear that in 2020 the ratio of actual to potential formal solutions *increased* during the year; the ratio of informal solutions *decreased*; and the number of borrowers disengaging *increased*, which taken together amounts to something of a mixed picture in terms of progress.

The effect of Covid-19 on access and delivery

In terms of the January to December 2020 period, it is also worth noting that the report makes a number of observations on the effect that Covid had on the delivery of services during that time.[266] Due to public health measures and restrictions, many aspects of the legal infrastructure for processing repossession cases were curtailed, and the availability of many of the services normally in place to assist borrowers in difficulty was also affected. For example, there was a 60% reduction in the number of sittings in County Registrar's Courts, which had a knock-on effect in terms of the suspension of Court Mentor and Duty Solicitor services and the delivery of DMA and PIP services. The impact of Covid comes across strongly in the report:

> *During the period covering the first round of public health restrictions, new DMA cases reduced to 27% of typical expected activity. However, over the summer months as the country reopened following the restrictions due to public health measures, activity levels returned to around 60% of pre-COVID-19 levels… (further) in 2020 the number of PIP vouchers redeemed was 82% of those redeemed in 2019 – a decrease of 18%… (and) 'it was noted that there was an increase in borrowers disengaging after the consultation with a PIP of roughly 16%'.*[267]

The effect of Covid may thus have resulted in borrowers in difficulty becoming less familiar - and less inclined to engage - with the suite of services available under Abhaile. A timely publication of the 2021 report would be helpful to explore this further.

[266] Ibid, see pages 17-19

[267] Ibid, page 18

5.3. DEDICATED MORTGAGE ADVISOR (DMA) OUTCOMES

A further section in the report provides more detail on the outcomes achieved by the MABS DMA service since Abhaile came into being.[268] As explained above, the MABS DMA service was the first to operate under Abhaile and began, albeit in a gradual way, to provide services in July 2015 a year before the rest of the scheme began to operate. The report states that a total of 9,831 borrowers have received DMA advice between July 2015 and the end of 2020, and as we have seen above, 8,962 borrowers received DMA advice and support between July 2016 and the end of 2020.

Outcomes for these 8,962 borrowers are reported as follows:

1 ***21%** (1,860 borrowers) have long term solutions in place: This means a solution to the borrower's mortgage arrears is now in place, such as an arrears capitalisation, term extensions, split mortgage, or write downs.*

2 ***55%** (4,945 borrowers) are in advisory process, in progress to solution. These borrowers are supported and advised by DMA's in exploring all options and negotiating solutions.*

3 ***8%** (735 borrowers) have trial solutions in place: Many lenders require a borrower to complete a test period in a proposed restructure arrangement before it is agreed. A trial period can be from 6 to 12 months or longer in some instances. A DMA adviser works closely with the borrower to assist them in managing the arrangement.*

4 ***3%** (309 borrowers) have no solution: This means that the borrower consented to an order for possession. The possession order was granted, or the DMA adviser considers the arrangement unsustainable in the long term.*

5 ***13%** (1,113 borrowers) are not engaging: These borrowers have stopped actively engaging with the DMA Adviser. Non-engagement can be for several reasons, for example, a change in personal circumstances or an ARA not sustainable in the long term. The DMA Adviser will reach out to such borrowers periodically, offering support and encouragement to re-engage with their lender.* [269]

Taking each of these five sets of outcome in turn, we note the following:

Re 1. In terms of the first category, what had been referred to as 1,860 informal solutions in the statistical snapshot in Figure 2 above are now described in this section as long term solutions, with a further breakdown provided as follows:

- An ARA (alternative repayment arrangement) in place with the lender – **1,017** (55%)
- Mortgage to Rent - **250** (13%)
- Were able to resume making mortgage repayments - **149** (8%)
- Had repossessions proceedings on their home struck out - **176** (10%)
- Surrender/sale of the home, including trading down - **268** (14%)

The ARA's mentioned in the entry on this category above include arrears capitalisation, term extensions, split mortgages, and write downs but no breakdown is provided, for example, as to how many write downs were actually achieved. As we have noted in detail in Paper Two of this series when reviewing the CBI 2020 quarterly mortgage arrears figures, arrears capitalisation, term extensions and split mortgages are each long term repayment arrangements that: 1) can carry a significant failure

[268] Ibid, pages 28-29.

[269] Page 29

rate[270] and/or 2) may carry a significant risk of a shortfall at the end of the restructure.[271]

On the other hand, a MTR arrangement - or resuming (presumably full) repayments, or having proceedings struck out - may actually resolve the arrears problem in the long term, albeit MTR does involve loss of ownership, with a possible option at some point in the future to repurchase the dwelling.[272] In terms of the last category, the relative success of voluntary surrender/sale is clearly dependent on a write off of any shortfall balance and having access to alternative accommodation in which to live following the loss of the family home. Lastly, trading down is a facility that few in mortgage arrears will be able to avail of and it is unlikely that the numbers in this category are significant.

Re 2. Well over half (55%) are described as still being *'in advisory process, in progress to solution'.* After four and a half years of Abhaile (and five and a half years in the case of the DMA service), this is a somewhat worrying statistic. Some attempt to break down how long these borrowers have been working with DMA's to attempt to get a 'solution' would be worth providing, i.e. is this group primarily composed of borrowers who are relatively recent users of the service, or does it also contain a number of users of the service who have been 'in progress to a solution' for quite some time? One way or another, these numbers appear to be indicative of a MARP process that, despite the efforts of the DMA's, is simply not dynamic or balanced enough.[273]

Re 3. The 735 trial solutions in place are not broken down further. However, by referring to a 6 to 12 months trial period here, it would appear that these cases are more likely to be arrears capitalisation or term extensions cases and carry the associated risks of repayment failure described above. Further clarification of the nature of these trial solutions would be useful.

Re 4. These clearly involve the loss or imminent loss of the family home.

Re 5. The outcome with these cases is unknown but a borrower ceasing to engage does not generally bode well.

In summary, these data seem incomplete in some respects and questions occur in terms of their ongoing status. For example:

- In the cases with ARA's in place, what is the current payment performance record with respect to them?
- In the 250 mortgage to rent cases, how many of these are completed and how many are in the application process?
- In the cases of resuming payments, what factors gave rise to the capacity to do so?
- In the cases of proceedings being struck out, why were they struck out and what payment arrangements were then arrived at?
- In the cases of surrender/sale/trading down, has any residual mortgage debt been written off?
- In terms of the large number still in the advisory process, said to be in progress to a solution, what are the borrowers currently paying and how long have they been waiting to get a solution, broken down into time categories?
- Are the trial solutions referred to mainly arrears capitalisation or term extension cases?
- Is there any more detailed information on the reasons for disengagement?

[270] See discussion in Paper Two, Section 2.8., pages 26 -29. At the end of 2020, the CBI recorded that 20.7% of arrears capitalisations, 8.9% of term extensions and 7.2% of split mortgages were not meeting the terms of the restructure arrangement.

[271] See discussion in Paper Two, Section 2.15, pages 39-42. For example, in *'Behind the Data: Mortgage borrowers facing end of term repayment shortfalls',* (ibid), the CBI suggested that almost 30,000 restructured mortgage accounts face a balance shortfall of greater than 10% at the end of the term.

[272] See discussion on Mortgage-to-Rent in Section 6 immediately below.

[273] See discussion in Section 3.1. above.

5.4. THE AGE PROFILE OF BORROWERS AVAILING OF ABHAILE SERVICES

We have noted repeatedly in this series of papers, comments from the CBI in 2020 and 2021 expressing concerns about the age profile of borrowers facing shortfalls in the payment of their mortgage.[274] Equally, it is also clear from other data published by the CBI in 2020 that a significant number of those who availed of Covid related payment breaks at the beginning of the pandemic drew down their mortgages between 2004 and 2008 before the boom turned to bust. This is evidence that many still have recurring payment problems, and some are likely to be in or moving towards the 50-60 year old cohort.[275] These concerns are corroborated by the age profile of borrowers seeking assistance under Abhaile.

In terms of the dedicated mortgage arrears (DMA) service, the following data is recorded:

- 16% of borrowers are in the 26-40 years age bracket
- 76% (three in every four) are in the 41-65 years age bracket
- 7% are said to be over 65
- It is also noted that the age demographic is getting older with each annual Abhaile report published.

In terms of those borrowers who obtained financial and insolvency advice from a PIP, the age profile is recorded differently (with a wider set of categories) and is slightly younger overall, though a significant percentage of 77% (over three in every four) is still nonetheless over 45 years old.

- 1% were aged 18-34
- 22% were aged from 35-44
- 38% were aged from 45-54
- 28% were aged from 55-64
- 11% were aged over 65

It might be suggested that the slightly younger age profile of the PIP cohort could reflect the possibility that the younger a borrower is on average, the better his/her chance of successfully applying for and negotiating a PIA, in terms of having more working years left to make payments, whereas the older the borrower is, the less likely this becomes. This is, of course, speculation but given the repeated concerns that have been aired by the CBI on this issue, it is a matter that should be further researched by the Abhaile bodies. On this question, it should be possible, for example, to age profile the 2,851 borrowers who have successfully obtained a PIA arrangement following a PIP consultation against the 3,040 borrowers who are in an 'informal solution' following their engagement with the DMA service.

5.5. ABHAILE LEGAL SERVICES

The Consultation Solicitor Service

The MABS website offers the following guidance on the Consultation Solicitor service:

> *'Suppose your DMA or PIP thinks you need legal advice relating to your mortgage arrears. An example of this could be that your lender has written to you to begin legal proceedings to repossess your home. In that case, they will help you apply for a voucher for a free consultation with a solicitor.*

[274] See discussion in Paper Two, Section 2.15 at page 42. For example, in *'Long-term mortgage arrears: Analytical evidence for policy considerations'* (ibid), the CBI suggested that one in four of borrowers in arrears of over one year engaging with their lender are over 60 years of age.

[275] See discussion in Paper Three, Section 5 at pages 26-35. For example, Gaffney and Greaney suggest that some 36,000 borrowers who drew down their mortgages between 2004 and 2008 availed of payment breaks from pillar banks in 2020 (i.e. between 12 and 16 years after the mortgage was drawn down). Note too that any payment breaks offered by Non-Bank owners of loans are not included in these figures. See: Gaffney, E. and Greaney, D. (2020). 'Covid-19 payment breaks on residential mortgages', *Financial Stability Notes*, Vol. 20, No.5, September 2020. Dublin: Central Bank of Ireland'.

Once you've obtained a voucher, you can choose a consultation solicitor from the Abhaile Panel, subject to availability. When you meet with your chosen solicitor (either online or in-person), they will ask for up-to-date documents such as your SFS/PFS and any other written financial advice you've received.

They will then assess and explain your legal situation and advise you on any legal proceedings. They will also confirm the advice in writing, so don't forget to ask for it.'[276]

The guidance notes on the Legal Aid Board's website further suggest that an enhanced form of advice and support may subsequently be offered by the Consultation Solicitor in the following terms:[277]

'During the course of the consultation, the solicitor may form a view that the borrower could benefit from the solicitor's assistance in negotiating terms of settlement to the repossession proceedings (if any are in being). Where that is the case the solicitor may apply to the Board's Private Practitioner Service by email to: solicitorspanels@legalaidboard.ie for an authorisation to conduct negotiations (an authorisation). An authorisation, if granted, shall be the solicitor's authority to continue to provide legal advice to the borrower in the form of negotiations with the mortgage lender and, following the conclusion of negotiations, a final consultation with the borrower with the advice confirmed in writing. An additional fee will be payable when an authorisation is issued and negotiations have been concluded on foot of that negotiation. A copy of the authorisation shall be attached to the Claim Form when the fee for the case is being claimed.'

No information is provided in the Abhaile report on this further aspect of the Consultation Solicitor service, which at least has the potential to allow the borrower to benefit from a greater degree of advocacy that might conceivably result in the discontinuation of repossession proceedings.

The report notes generally[278] that a total of 4,715 Consultation Solicitor 'legal vouchers' were issued between July 2016 and the end of 2020. Of these, 2,294 (49%) had been redeemed. In 2020 itself, 674 vouchers were issued by the 'MABS voucher desk' and 346 (51%) of these were redeemed. No explanation is offered for the low take-up (around half of the vouchers issued), either over the four and a half year period or in 2020. It is further noted under the heading of '*Outcomes* (our emphasis) of legal and court-based Abhaile services' that:

'The service supports the borrower by providing legal advice concerning options that the borrower may be considering. The main topics on which borrowers sought legal advice under the Consultation Solicitor service were personal insolvency, the MTR scheme and alternative payment arrangements. By the end of December 2020, 2,294 borrowers had benefitted from the service of a Consultation Solicitor. This legal advice is an important support to borrowers in ensuring that they are aware of the consequences of the avenue chosen.[279]

Despite the heading, there is no evidence provided of outcomes in this regard and, indeed, the main topics described - personal insolvency, the MTR scheme and alternative payment arrangements – seem to come more under the remit of the PIP and DMA aspects of the Abhaile service. In summary, the general absence of information here together with the lack of any evaluation, is noteworthy. In addition, the fact that over a period of almost five years, only every second voucher was redeemed raises questions as to the impact of this service and its value to borrowers in arrears. Ultimately, there are concerns about the limited benefits of a one off advice consultation with a private solicitor, particularly in the marked absence of any

[276] See: https://mabs.ie/blogs/what-is-the-consultation-solicitor-service/ , accessed 8th September 2022.

[277] See: https://www.legalaidboard.ie/en/Lawyers-and-Experts/Legal-professionals-in-civil-cases/Abhaile/Abhaile-Terms-and-Conditions-16th-November-2017.pdf , accessed 8th September 2022.

[278] Ibid, p.22

[279] Ibid, p.32

subsequent legal representation in the form of civil legal aid in the vast majority of cases. The experience and the views of some recipients of this service might usefully be canvassed in order to further examine its effectiveness.

The Duty Solicitor Service

Excerpts from the website of the Legal Aid Board provide the following information about the Duty Solicitor Service. [280]

> *When the Duty Solicitor arrives in the Courthouse they shall base themselves at the MABS Information Desk, to which persons who have applied (or who wish to apply) for legal advice under the Scheme will be directed. A person who has been advised by a Consultation Solicitor pursuant to a legal advice voucher issued to him or her under paragraph 23 of these Terms and Conditions, and who has been served with a Civil Bill for Possession in respect of his or her PPR which is listed for hearing before the County Registrar, may avail of a Duty Solicitor Service on the return date. Such a person is referred to as a "Scheme-advised defendant" in these Terms and Conditions and the Consultation Solicitor will forward a copy of their file to the Duty Solicitor rostered for that date.*
>
> *The Duty Solicitor:*
>
> *will provide advice and assistance to a Scheme-advised defendant in the Courthouse based on the file provided by the consultation solicitor including the following:*
>
> - *explaining clearly to the borrower their legal position regarding the repossession proceedings and answering his or her questions,*
> - *speaking on the borrower's behalf in Court (without coming on record),*
> - *seeking an adjournment and/or settlement of the proceedings,* ***and*** *may, in so far as practicable:*
> - *check the borrower's legal position, and provide supplementary advice to the borrower, in the light of any new information emerging in the course of the Court sitting.*

The Abhaile 2020 report notes that the Duty Solicitor service provided assistance to a total of 8,899 unrepresented borrowers at 1,931 possession hearing lists before a County Registrar between July 2016 and the end of 2020. In 2020 itself, 924 such consultations were provided at 180 such hearings.[281] However, there are again no tangible data provided here that gives any indication of *outcomes,* and it would be helpful if some attempt was made to measure the effect of advice provided to, or interventions made on behalf of, defendant borrowers in these cases, taking into account the fast moving nature of these lists.

For example, if the Duty Solicitor, though not the defendant borrower's solicitor, is allowed to speak on a borrower's behalf, to what extent has this helped to obtain further adjournments or other concessions? Have such interventions led to proceedings being settled or struck out? Again, the reporting here manifestly fails to focus on impacts. Further, the website of the Legal Aid Board appears to provide no statistical information of any kind on the operation of Abhaile, let alone any data on potential outcomes arising from the delivery of these services, notwithstanding that it is the body responsible for this aspect of the Abhaile service.

In the course of its submission to the 'Review of the Administration of Civil Justice in Ireland'[282], the Law Society of Ireland (the regulatory body of the solicitor's profession) commented in terms of the Abhaile scheme *'that concerns have arisen about its effectiveness in providing the appropriate level of legal representation and advice that is required in complex possession cases, particularly in light of recent concerns about the handling of tracker mortgages'.* It

[280] See: https://www.legalaidboard.ie/en/lawyers-and-experts/legal-professionals-in-civil-cases/abhaile/terms-and-conditions/the-duty-solicitor-service.html , accessed 8th September 2022.

[281] Ibid, p.22

[282] Ibid, p.348

further particularised its concerns as follows:

- the scheme did not extend far enough in its scope;
- control over disbursement of funds under the scheme rested with MABS and PIPs, but not with lawyers;
- funding of legal representation is confined to personal insolvency appeals, with much of the budget for this being directed to PIPs, not lawyers;
- outlay and town agents fees are not provided and the scheme rules prohibit collecting of these items from the debtor, requiring that solicitors must pay the items from the scale fee;
- administration of the payment of the legal fees is, in the Society's view, very frustrating and the forms contradictory.

As a result, the Law Society contended that most solicitors are reluctant to take Abhaile-related work, to the prejudice of the debtors concerned.

In its preliminary recommendations, the Civil Justice review group itself noted:

> *'the concerns expressed concerning the Abhaile scheme, while also acknowledging the procedural safeguards now provided for in mortgage possession cases, which concerns and safeguards are described at Section 3.2.2 of Chapter 10. It recommends that the Steering Board of the Abhaile Mortgage Arrears Resolution Service examine both the concerns expressed by the Law Society concerning the scheme and the potential to improve linkages between Abhaile, citizens' information centres nationwide and the Legal Aid Board to ensure that eligible mortgage holders are afforded adequate opportunity to access the services of Abhaile or, as appropriate, the Legal Aid Board.'*[283]

The concerns expressed by both the Law Society and the Civil Justice review group are both worthy of note and attention, albeit the concerns of the Law Society seem to focus largely on issues of finance. In recommending that the potential to improve the linkages between the service providers under Abhaile should be explored by the Steering Board of Abhaile, the review group may be identifying a core weakness in the Abhaile scheme itself – the multiplicity of service providers and services provided, without an apparent hub to coordinate, streamline and further develop them, and provide a comprehensive account and analysis of outcomes.

5.6. PERSONAL INSOLVENCY COURT REVIEW SERVICE (PICRS)

As reviewed above in Section 4.3., the introduction in 2015 of a right for a debtor whose application for a PIA has been rejected by his/her creditors to seek a review in the Circuit Court, subject to specific qualifying criteria, necessitated the introduction of a new legal aid service, so that the applicant debtor would be properly represented. Thus, between July 2016 and the end of 2020, a total of 2,284 legal aid certificates were granted by the Legal Aid Board for personal insolvency reviews. A total of 562 of these were granted in 2020 alone and the Fourth Abhaile report states that *'PIA reviews increased slightly in 2020 when compared to 2019. Although other services were subject to restrictions and closures, the Insolvency Court successfully adapted to online proceedings with limited impact on service delivery'.*[284]

The Legal Aid Board website provides the following headline information in relation to the PICR Service:

> *'The borrower will only need this service if they have already worked with a PIP, have proposed a Personal Insolvency Arrangement ('PIA') to their creditors, and the creditors have refused that proposal although the borrower's PIP considers it fair and reasonable to all concerned.*
>
> *Under the change made to the Personal Insolvency Acts in 2015, a borrower in this*

[283] Ibid, p.417

[284] Ibid, p23.

situation can ask the Courts to review the PIA proposal. If the Court agrees that the proposal is overall fair and reasonable, using the criteria set out in section 115A of the Personal Insolvency Acts, it has power to impose the proposal on the creditors. Under the Personal Insolvency Court Review Service, the Legal Aid Board can provide the borrower with legal representation by a solicitor and barrister to make the Court review application, as part of their Civil Legal Aid service.

For this service, the borrower's PIP applies on their behalf to the Legal Aid Board, using a Scheme reference number for the borrower provided by MABS. The PIP must also certify to the Legal Aid Board 'that the borrower has reasonable grounds for seeking the court review and satisfies the other conditions for review laid down by the Personal Insolvency Acts.'

If the Legal Aid Board is satisfied with the application, it can then issue a Legal Aid Certificate for the borrower. The Legal Aid Board is aware of the time limits under the Personal Insolvency Acts for seeking the Court review, and will decide quickly on any fully completed application for legal aid. If the Legal Aid Board grants a Certificate, the borrower and their PIP can select a solicitor from the Scheme solicitors' panel to act on their behalf. (Under the Personal Insolvency Acts, it is the borrower's PIP who must apply to Court on their behalf for the review.) [285]

From these extracts, it is clear that this is a comprehensive advocacy service, with access for the applicant to no less than three separate professionals subsidised by the State – the debtor's insolvency practitioner, a solicitor from the Board's Scheme solicitors' panel and in many, if not almost all cases, counsel to present the applicant's case to best effect. In addition, a significant number of these review outcomes may be appealed by either party to the High Court, which in turn involves significant additional cost implications.[286] This service is subject to *'the Legal Aid Board being satisfied with the application',* i.e. the application is subject, in theory at least, to a merits test and, in addition, access to a barrister may also be subject to justifying the necessity for this extra layer of representation in light of the complexity of the case being argued. The extent to which the merits test is rigidly applied in such cases is questionable.

In terms of success rates where this legal aid service has been provided, the Fourth Abhaile report suggests that *'our indications show that 40% of the court review cases decided by the court were in favour of the borrower. This figure does not include court review cases settled by agreement between the borrower and the creditors in favour of the borrower'.*[287] The words 'our indications show' in the above extract are somewhat concerning. How difficult can it be to gather data on Circuit Court PIA review outcomes (and on further appeals to the High Court where applicable)? Quite apart from obtaining definite figures on the outcomes of decided cases, it would also be useful for a figure to be provided on how many of these review cases settled, particularly in terms of how many more approved PIA's resulted from these settlements.

According to the text of a 2021 reply from then acting Minister for Justice, Heather Humphreys, TD, to a parliamentary question put by Catherine Murphy TD, a total of almost €8.462 million was spent between PIP, Solicitor and Barristers' fees on the PICR service between July 2016 and the end of 2020 alone, and further significant costs have been incurred in 2021 and 2022.[288] It would not seem unreasonable therefore to specify that professional service providers should be required to provide specific information on outcomes (suitably anonymised) as a condition before payment can be approved.

The funds disbursed on this aspect of the Abhaile scheme are significant and the 40% success rate

[285] See: https://www.legalaidboard.ie/en/our-services/legal-aid-services/abhaile-scheme/overview.html. Accessed September 22nd, 2022.

[286] The Legal Aid Board Annual Report 2020 (Ibid), at page 33, shows that Legal Aid was granted for 197 onward High Court appeals in 2019 and 148 in 2020.

[287] Ibid, p.32

[288] PQ 1148, Catherine Murphy, TD (Social Democrats), 15th June 2021.

in cases said to have been 'decided by the court' (thus presumably excluding settled cases) is arguably low. However, it should also be said that this aspect of the Abhaile scheme, provided for in light of the introduction of the s.115A right to seek a court review when a PIA proposal has been rejected, has been necessary to tease out a number of aspects of the legislation. The jurisprudence that it has given rise to has also arguably served to expose some of the limitations of the 2012 Act, in terms of providing legally binding resolutions for borrowers with long-term mortgage arrears.[289]

However, viewed from the position of an over-indebted consumer *without* a mortgage, who has rent and utility arrears and arrears on consumer credit agreements, but who cannot access an insolvency practitioner for a free consultation with a view to proposing a Debt Settlement Arrangement (DSA), there is a considerable imbalance compared to PIAs in terms of rights, associated resources and related jurisprudence. As we have emphasised many times in this series of papers, consumer debt is about much more than mortgages.

5.7. REVIEW OF THE ABHAILE SCHEME

On January 28th 2019, the Government announced the approval of an extension to the Abhaile Scheme for the period from 2020-2022 *'with a view to reaching remaining households at risk of losing their homes due to mortgage arrears'*. The press release accompanying this announcement added that *'2022 is expected to be on a 'wind-down' basis, focused on completing any outstanding solutions for borrowers who have been advised under Abhaile: this is subject to Government review in 2021'*.[290] Then Minister for Justice, Charles Flanagan TD further stated that:

> *'This is a scheme which has helped many already and which we intend will continue, and help many more over the next three years. It is a scheme which is working. To date 82% of those advised are either on the road to getting a solution, or already have one in place. Accordingly, we were delighted to get the backing of our Cabinet colleagues today for this extension'.*

There is a strong sense from this 2019 announcement that it was considered at that point that the job was almost done; that the large number of borrowers 'on the road to getting a solution' would actually get one; that when they did, that solution would be sustainable; and thus the extension provided for would be for the purpose of reaching the 'remaining households at risk' with a wind-down of the scheme envisaged in 2022.

In the interim, the Covid 19 pandemic has intervened and this has undoubtedly had an impact on the numbers. Notwithstanding the effect of Covid however, the statistical evidence provided in Figure 2 above summarising the outcomes of Abhaile interventions at end 2020 also belies any such unduly optimistic assessment. Abhaile has of course delivered results, thanks to the hard work of DMAs, PIPs and other professionals and the willingness of borrowers in arrears to engage with their lenders and vice versa.

However, the inherent limitations of the mortgage arrears resolution architecture outlined in earlier sections – an imbalanced MARP and a cautious and slow to reform personal insolvency statute – have served to limit the progress achieved, not to mention the somewhat disparate nature of the Abhaile structure itself. In broad terms, two years later, the data provided for the end of 2020 in the Fourth Abhaile report do not justify the contention made by the former Minister in January 2019.

A further detailed table in the above report itemises the monies disbursed on Abhaile in the four years from the beginning of 2017 to the end of 2020, with a total of €28.77 million already spent. It was projected that a further €15.87 million would be spent in 2021 and 2022, bringing the total overall to €44.64 million over a six year

[289] See Fennell, Lowe and McEvoy cases reviewed in Section 4.4 above.

[290] See: https://www.justice.ie/en/JELR/Pages/PR19000224 , accessed 8th September 2022.

period.[291] This is a considerable amount of public expenditure. It is unclear at the time of writing whether the Government review of Abhaile, suggested in the press release above to be due to take place in 2021, has as yet been completed. A further parliamentary question to then acting Justice Minister, Heather Humphreys TD, in June 2021 elicited the following response:

> *The Government is currently conducting an external governance review of Abhaile, which will be followed later this year by a comprehensive review of the Scheme as part of a previous government decision to extend Abhaile until the end of 2022. A further commitment has been made under the Programme for Government to continue to resource Abhaile. It is the intention that these reviews will, in their respective findings, inform the delivery of Abhaile into the future, including as a key support for citizens during the period of COVID recovery.*[292]

The 2022 work plan published by the Department of Justice,[293] under 'Goal 2: Improve access to justice and modernise the courts system', assigns the following task under the Civil Justice Governance heading:

> *73. Review Abhaile Scheme to ensure that it is ready to deal with changed economic circumstances and in line with the commitment to future resourcing under the Programme for Government.*
>
> *73.1. Assess, in conjunction with the Department of Social Protection, the Joint Working Group and Steering Board of Abhaile, the findings stemming from the governance review of Abhaile conducted in 2021 – Quarter 2 (2022).*
>
> *73.2 In conjunction with the Department of Social Protection, contribute to a comprehensive Strategic Review of the Abhaile Scheme - Quarter 3 (2022).*

The combined effect of these pieces of information suggests that an 'external governance review' of Abhaile has been undertaken and was presumably completed in 2021. The further intended 'comprehensive review' of the Scheme to follow in 2021 suggested by the Minister's reply to the PQ has not yet occurred to our knowledge. Rather, it appears that the findings of the governance review were first to be assessed by the Department of Justice and the Department of Social Protection in Quarter Two 2022 (which has passed at the time of writing) and both departments are then to contribute to a 'comprehensive strategic review' of the Abhaile Scheme in Quarter Three 2022 (which has also passed at the time of writing).

It would appear that the 2021 'external governance review' of Abhaile is not a published document available to interested parties to analyse and evaluate, and a search for a document of that name has failed to return any results.[294] An important question that occurs is whether the subsequent 'comprehensive strategic review' that follows will be publicly conducted and, for example, whether it will seek submissions and proposals from interested parties on the future of Abhaile services. If so, time will be tight, as the current Abhaile stream of funding only extends to the end of 2022. In any event, timely publication of Abhaile outcomes to the end of 2021 would certainly be needed to provide any realistic assessment of what should happen next and it is conceivable that positive outcomes may have accelerated over this period, though this may be limited as a result of Covid 19 restrictions.

In summary, three broad observations can be made as regards the information provided in the Fourth Abhaile report, the latest available at the time of writing:

- First, it provides strong evidence that the Abhaile Scheme is a very long way from resolving the mortgage arrears problem.

[291] Ibid, see pages 35 and 36.

[292] PQ 1154 from Catherine Murphy, TD (Social Democrats), 15th June 2021.

[293] See: https://www.justice.ie/en/JELR/DOJ_Justice_Plan_2022.pdf/Files/DOJ_Justice_Plan_2022.pdf, accessed 12th March 2022.

[294] Conducted August 11th 2022.

- Second, the data reported lack the kind of depth and detail that might enable us to properly assess what the most pressing issues and problems currently are, and how they might be addressed.
- Third, the report is disturbingly uncritical and fails to even consider that improvements might be needed, let alone how those improvements might be delivered.

Finally, it should be noted that the recent announcements above seem to now portray Abhaile as a scheme not about to be wound up but one that may have to deal, not just with the legacy mortgage arrears cases, but with further mortgage arrears problems that may arise out of Covid 19 and recent inflationary trends and world events. Thus, it is intended that the scheme will act as '*a key support for citizens during the period of COVID recovery* 'and that it must be '*ready to deal with changed economic circumstances'.*

If these intentions are to be properly acted upon, more widespread advice and assistance will be required including for those who do not have mortgages, but who nonetheless face situations of personal insolvency. This should extend not just to formal or informal arrangements that are not legally binding, but also to the two other forms of legally binding arrangement that are available under the personal insolvency legislation – the Debt Settlement Arrangement (DSA) and the Debt Relief Notice (DRN).

The long awaited statutory review of the personal insolvency legislation is also an integral part of the 2022 work plan recently published by the Department of Justice,[295] with Action 79 undertaking to *'Complete (the) statutory review of (the) Personal Insolvency Acts 2012-2015'* and '*Following completion of statutory review of Personal Insolvency Acts, (to) prepare General Scheme of Personal Insolvency (Amendment) ('no. 2') Bill'*. In theory at least, it is clear that these two pieces of work – reviewing the legislation and reviewing Abhaile - are very much interlinked.

[295] Ibid

5.8. COMMENTARY AND RECOMMENDATIONS

In Section 2 above, we suggested that a statutory MABS organisation should act as a one stop shop for those in debt and be able to provide a full range of services including information, advocacy, dedicated mortgage arrears advisers, accountancy and insolvency services, legal advice and other legal assistance including strategic litigation where appropriate and necessary.

We also commented in detail in that section on the patchwork nature of the services available under Abhaile and the fragmented approach taken to the resolution of the debtor's situation. In our view, the client in difficulty should be at the heart of the services provided which should revolve around his/her situation as it evolves. Instead, it seems at present that the mortgage arrears client revolves around the Abhaile services, which are not integrated, which are too diverse and which lack a defining ethos.

It is likely given the nature of our economy and society that unsustainable debt will continue to be a problem requiring resolution for many decades to come. With that in mind, we reiterate our recommendation that a MABS type organisation should be established by statute. Through harnessing the considerable levels of experience and knowhow currently in its ranks, in addition to obtaining, either through direct recruitment or through contracts for services, the requisite legal, insolvency, accounting and welfare expertise, MABS could offer the client a 'one stop shop'.

In this way, a full range of services, both locally and remotely provided, from information to advocacy to insolvency and legal services, could be sourced, without a person in financial difficulty being directed from pillar to post. Critically, an integrated organisation of this nature, through the development of policy and research functions, could also reflect back its experience to its parent department, government and relevant statutory bodies on issues of concern and areas where reform is considered necessary.

RECOMMENDATIONS

Related to Abhaile

A statutory MABS could provide a hub for additional services that may from time to time be required to assist debtors to resolve particular financial difficulties arising out of wider economic and social problems that may arise in society. For example, a statutory MABS could become the central authority to administer the Abhaile scheme or similar schemes.

In the interim, a scheme along the lines of Abhaile seems very likely to continue to be needed when the current funding provision to the end of 2022 comes to an end. However, in advance of deciding whether and what should follow, Abhaile should be independently evaluated as a matter of urgency with a view to making recommendations to substantially improve its efficiency, the integration of its respective services and the delivery of formal legally binding solutions not only for those in long-term mortgage arrears, but also for those facing potential personal insolvency with unsecured debts – for example non-mortgage consumer credit agreements, utility debt and rent arrears.

Much more specific rolling data is required in order to assess the effectiveness of the constituent services of Abhaile and the extent to which they are delivering for borrowers in arrears. For example, the following matters should be researched:

PIP advice data

- How many Abhaile related Personal Insolvency Arrangements (PIA) saw occupation as opposed to ownership of the family home retained?
- How many Abhaile related bankruptcies saw ownership or occupation of the family home retained?
- What is the nature and breakdown of the 'informal solutions' that have resulted from PIP advice?

DMA advice data

- In cases with Alternative Repayment Arrangements (ARA) in place, what is the breakdown of these arrangements, their payment performance record and prospects of long term sustainability?
- In the 250 mortgage to rent cases, were these completed MTR's or were some still in the application process?
- In the cases of borrowers resuming (full) payments, what factors gave rise to the capacity to do so?
- In the cases of proceedings being struck out, why were they struck out and what payment arrangements were then arrived at?
- In the cases of surrender/sale/trading down, has residual mortgage debt been written off?
- In terms of the numbers that may still be in the advisory process, said to be in progress to a solution, what payments have been made and how long have they been waiting to get a solution, broken down into time categories?
- Are 'trial solutions' mainly arrears capitalisation or term extension cases?
- Is there any further information available on the reasons for borrower disengagement?

Legal advice data

- In terms of the outcomes of 'Consultation Solicitor' advice, there is next to no data available. At the least, a basic set of categories of advice provided is needed for these cases.
- In terms of the 'Duty Solicitor' service, some record of the outcomes of the Duty Solicitor intervention to assist borrowers in court is required.

- As a legal aid service available in principle in both the Circuit Court and onto the High Court where required, often involving the instruction of a Personal Insolvency Practitioner (PIP), a solicitor and counsel, the Personal Insolvency Court Review (PICR) Service is very likely the most costly of the Abhaile services and well over 2,000 such cases have been funded. To only be able to say that 'our indications show that 40% of the court review cases decided by the court were in favour of the borrower' and to have no information on settled cases is insufficient and this needs to be remedied.

6

SECTION

The Mortgage-to Rent Scheme

6.1. INTRODUCTION

The Mortgage-to Rent Scheme[296] facilitates borrowers who have mortgages with commercial private lending institutions and who are at risk of losing their family homes due to unmanageable mortgage arrears, to surrender ownership of the mortgaged property and remain in the property as a tenant, with the additional benefit of writing off any mortgage balance shortfall, should one apply. For this purpose, the property is surrendered by the borrower, then sold by the mortgage lender to a third party 'Approved Housing Body' (AHB) or a private investor. It is then rented back to the original borrower as a social housing tenant under the same basic rules that apply to public housing stock, in terms of passing an income means test and calculating the applicable rent under the differential rent system for the band in which the relevant local authority area falls.[297]

In common with the diverse landscape that attempts to provide varying solutions to the ongoing problem of housing related debt, the mortgage-to-rent scheme also has its own particular infrastructure. A household is initially identified as one that might be suitable for this option by a MABS dedicated mortgage arrears advisor (or MABS money advisor), a charity such as the Irish Mortgage Holders Organisation (IMHO) or a Personal Insolvency Practitioner (PIP). The scheme is administered by the Housing Agency and overseen by the Department of Housing, and implemented through a range of housing authorities and AHB's but, in recent years, it has also featured a more commercial element with a private entity becoming involved in investing in some of the relevant properties. The most up-to-date figures on MTR to the end of Q.2 2022 are as follows: [298]

- A total of 6,517 cases have been submitted for consideration under the scheme since it began in 2012.
- 2,030 MTR arrangements have been completed and a further 556 are said to be in active progression.
- 3,931 were ineligible or terminated during the process. Of these, 339 cases were not progressed because the household in question was deemed to be over or under accommodated. Agreement on the sale could not be agreed in a further 251 of these cases.
- A total of 5,910 individuals are benefitting from the scheme; 3,249 adults and 2,661 children.

6.2. REVIEW OF THE SCHEME

The Scheme was reviewed in 2021 '*to reflect current housing market conditions and most up-to-date research on those in long term mortgage arrears*',[299] and a set of rule changes intended to help to deliver an increase in qualifying numbers was announced in January 2022 by the Minister for Housing, Local Government and Heritage, Darragh O'Brien, TD. The report resulting from the review summarises the position of the Department as follows:

'Both the Programme for Government and Housing for All commits to strengthening the MTR scheme and ensuring that it is helping those who need it. Building on the significant amendments already made to the scheme in 2017, this Review examined the impact of these changes and what further changes would benefit those in need of the scheme. This Review concludes that the implementation of the 2017 Review actions has enabled the scheme to begin operating at scale which is clearly

[296] See: https://www.housingagency.ie/housing-information/mortgage-rent-scheme, accessed 9th September 2022.

[297] See for example, the rules applying to South Dublin City Council at: https://www.sdcc.ie/en/services/housing/paying-your-rent/differential-rent-scheme-2021.pdf, accessed 9th September 2022.

[298] See: https://www.housingagency.ie/housing-information/mortgage-rent-statistics, accessed 9th September 2022.

[299] See: Department of Housing, Local Government and Heritage (2022). *2021 Review of the Mortgage to Rent Scheme for Borrowers of Commercial Private Lending Institutions*. Dublin: Government of Ireland, 24th January 2022.

evidenced by the increasing numbers of both MTR applications and successfully completed MTR cases. Also, in preparing this Review, developments in the Personal Insolvency regime were monitored and consideration given to information that became available in the Central Bank's report Long-term mortgage arrears: Analytical Evidence for Policy Considerations'. [300]

This last reference to the 2021 Central Bank paper on long term mortgage arrears may also be intended to note and recognise the concerns expressed by the Bank about *'the need for greater collaboration in seeking system wide solutions for those in the deepest levels of distress'* [301] If so, it is encouraging that the Department of Housing has conducted its review with a broader eye on wider developments to which it can contribute. There is little doubt in this regard that MTR is one of the suite of potential solutions to long-term chronic mortgage arrears for those who can and who wish to avail of it; hence, trying to improve access to it is a positive development. The resulting changes to the Scheme, which applied from 14th February 2022, are as follows:

- an increase to the *positive equity limits*, which are being adjusted by region to align with the range of house prices and market conditions across the regions
- *purchase price thresholds* updated to take account of current market conditions
- *additional flexibility* in the number of allowable bedrooms in a dwelling applying for borrowers aged 65 and above, and borrowers who have a disability, or where a dependant has a disability

[300] Ibid, p2.

[301] Speech by Deputy Governor Ed Sibley, 'A long shadow – the need for continued focus on resolving long term mortgage arrears', 13th July 2021. These remarks were delivered at a Banking and Payments Federation Ireland (BPFI) Breakfast Briefing.

Positive equity limits

The Review notes that:

'When the MTR scheme was originally introduced, it was a requirement that the borrower's property was in negative equity. This rule was relaxed somewhat in 2015 in that while the criterion of the property being in negative equity was still the underlying principle, marginal positive equity of up to 10% of the Open Market Value (OMV) up to a maximum of €15,000 was allowed on a case by case basis. This positive equity limit applied nationally and did not take into account the location of the property. No change was made to this criterion in the 2017 review.

There have been many requests to review and consider an increase to the positive equity threshold in view of house prices increasing in recent years. While it should be the case that where property values are increasing borrowers have more options available to deal with their mortgage debt, for some borrowers their ability to repay their mortgage has not improved and that position is unlikely to significantly change.[302]

Consequently, a series of new limits was introduced across local authority areas divided into three regions as follows:

- Band 1 – Including Cork City, Dublin City, Dún Laoghaire Rathdown, Fingal, Galway City, Meath, South Dublin, Kildare, Wicklow – Permitted positive equity amount, €35,000.
- Band 2 – Including Cork County, Kerry, Kilkenny, Limerick City and County, Louth, Wexford, Waterford City and County - Permitted positive equity amount, €30,000.
- Band 3 - Including Carlow, Cavan, Clare, Donegal, Galway County, Laois, Leitrim, Longford, Mayo, Monaghan, Offaly, Roscommon, Sligo, Tipperary, Westmeath - Permitted positive equity amount, €25,000.

[302] Ibid, p.17.

According to our research enquiries, these permitted levels of positive equity are mainly relevant as a criterion in terms of determining and limiting qualification for MTR. In practice, the relevant borrower/tenant is not paid a cash lump sum in these kind of amounts, following the purchase of the property by an approved housing body, particularly when the cost of repairs is taken into account.[303] It also appears that should any cash lump sum be received by the borrower/tenant, this does not generally impact on the calculation of the differential rent for the dwelling, as savings are relevant to the income assessment for the purposes of differential rent only insofar as they generate an income for applicants, by way of dividend or interest.

Whilst the increases in levels of positive equity are certainly an improvement - and may allow previously rejected applicants to reapply and new applications to be made by borrowers who may have previously considered an application to be pointless - it remains to be seen what kind of boost in numbers will result.[304] The key considerations here should be that the borrower/s have engaged and sought to resolve the issue; that the mortgage is manifestly unpayable in the long term; that the property is otherwise likely to be repossessed by the lender; and, that the borrowers qualify for social housing.

Purchase price thresholds

The price threshold limits for dwellings were previously last reviewed and updated in July 2019.[305] The outcome of the 2021 review on this issue divides the country into two broad categories as follows:

- Higher Threshold Areas (Cork, Dublin, Galway, Kildare, Louth, Meath and Wicklow). House maximum price - €450,000, Apartment/Townhouse maximum price - €345,000.
- Normal Threshold Areas (includes the rest of the country). House maximum price - €335,000, Apartment/Townhouse maximum price - €230,000.

These changes amount to a 14% and 13% increase respectively for houses and an 8% and 4.5% increase respectively for apartments / townhouses. Again, while these adjustments are constructive, it is likely that following an interval of close to two and a half years since the last review, they will not have kept pace with house price inflation, reported by the Central Statistics Office (CSO) to have increased by *14.8 per cent nationally in the year to January 2022* alone.[306] With house price inflation showing little sign of abating, the commitment from the Department to keep these limits under review will need to be acted upon quickly.

Additional flexibility on the relevant accommodation

Since 2017, a household seeking to avail of MTR can be allowed a maximum of two spare bedrooms above the current needs of that household. However, this is subject to the relevant local authority reserving the right to accommodate the household in more appropriate accommodation, if such is available, and where the MTR property may be more appropriately used by another household.

However, in order to take account of cases where there are vulnerable borrowers who qualify on all other grounds, other than the fact that they are over accommodated in their property, it is proposed that some additional flexibility should be provided in the following cases:

- where the borrower or one of the borrowers is aged 65 and over,

[303] Our understanding is that within the new thresholds, the tenant may retain some of any positive equity sum, in that when the property is sold, the homeowner gets the balance left over after closing the mortgage account and covering the bank's costs and the cost of repairs. Any amount due to the former homeowner is also based on the agreed valuation of the house – not necessarily the Open Market Value (OMV) – so in reality the full positive equity threshold is not received.

[304] It would seem from the figures that only 127 new applications were made in the second quarter of 2022 and 157 applications in Quarter Three. These are disappointing numbers perhaps in the wake of the rule changes brought about by the review.

[305] The valuation of properties for the purpose of the MTR process is commissioned by the Housing Agency. Our understanding is that both the Approved Housing Body (AHB) and the relevant bank may make observations and seek reviews, but both are bound by the Agency's valuation.

[306] See: https://www.cso.ie/en/releasesandpublications/ep/p-rppi/residentialpropertypriceindexjanuary2022/, accessed 9th September 2022.

- where the borrower or one of the borrowers has a disability and where the property has been significantly and permanently adapted,
- where the borrower or one of the borrowers has a disability and the property has not been adapted but is specifically suitable to their particular needs.

In the second and third cases, this is subject to a condition that the relevant household must also qualify for Social Housing Support on disability, medical or compassionate grounds in line with the local authority's allocation policy. The local authority or AHB (as appropriate) may also reserve the right in the future to accommodate the household in more appropriate accommodation, if available.

6.3. How the Scheme Works from a Financial and Numbers Perspective

The Review provides a general summary of how the Scheme functions from a financial perspective and the potential for ramping up numbers under it as follows:[307]

'AHBs fund the cost of purchasing these units and undertaking repairs to the units acquired from a combination of low interest borrowings under a Payment and Availability Agreement with Capital Advance Leasing Facility (CALF) administered by the Department, and private finance or other borrowings. The AHBs make the unit available to the Local Authority for social housing under a Payment and Availability agreement receiving monthly payments from the Local Authority for the duration of the agreement. This income finances the private debt and the maintenance and management of the unit. In the initial years of the scheme, the scheme relied solely on AHBs to purchase from lenders, properties that have been voluntarily surrendered by borrowers. However, in the 2017 Review it was acknowledged that consideration needed to be given to the capacity of AHBs to intensify their involvement in the MTR scheme given the ambitious targets for the AHB sector around delivering new social housing supply'.

The desire to increase the delivery of numbers has also led to the involvement of private investment in the scheme, summed up in the Review in the following extracts:

The 2017 Review committed to exploring the potential of private institutional investment in MTR in order to allow the MTR scheme to deliver at scale. The capital outlay to purchase these properties could be provided through private finance to avoid competing for upfront exchequer capital resources within the overall funding available for social housing…

The concept of MTR using the long-term lease arrangement is that a participant from the private sector purchases a property or properties from lenders subsequent to their voluntary surrender by borrowers that meet the MTR eligibility criteria. The participant then enters into a long-term lease arrangement with the local authority in whose area the property is situated, for a defined term at an agreed rent. This enables the borrower to remain living in his or her own home as a social housing tenant…

It was critical that the entity (or entities selected) were capable of purchasing the required number of MTR cases, demonstrated the appropriate understanding of the MTR process and the position of borrowers in long-term mortgage arrears, as well as the capacity to undertake the management and structural maintenance of properties over the lifetime of the lease agreement…

The outcome of the Expressions of Interest process is that since 2018, a private entity

[307] Ibid, p.10.

is participating in the MTR scheme. The inclusion of a private entity in addition to the existing AHBs who continue to be an integral part of the MTR scheme, gives opportunities to achieve greater scale and assist a greater number of borrowers who have unsustainable mortgage arrears.[308]

Somewhat controversially therefore, the Department ultimately decided in 2018 to admit a private investment concern to the scheme as a provider to add to the already existing AHB's in order to boost numbers.[309] This led to suggestions on the part of the most prominent AHB [310] that the scheme was being undermined *'by the entry of a commercial player, which is outbidding the not-for-profit agencies for the properties involved'* since it *'can potentially sell the properties for a profit after leasing the home to the local council for a 25-year period'* and *'it can pay higher prices than the approved housing bodies at the outset'.* It was claimed in turn that *'this is leading to prices being driven up and approved housing bodies don't have the commercial opportunity being gifted to the private companies to sell an attractive portfolio with State aid for a profit'*. In response, it was argued that the *'private funding model costs the State less, we don't require up to 40 per cent of the purchase price upfront from the State and any rent collected from the occupants of properties goes back to the State, not to Home for Life'.* [311]

Time will tell how this will play out in practice. And without purporting to have a detailed understanding of the workings of the MTR scheme, one important question does occur in terms of value for money and future access to housing – how many of these properties will ultimately become part of the State's social housing stock and how many will be sold at the conclusion of the relevant leases? And in cases where houses are sold on privately after these 25 year leases come to an end, where will the State source further properties to rehouse the households affected?

What is abundantly clear is that in addition to boosting numbers through the avenue of private investment, the Department is also intent on retaining Approved Housing Body participation. On this question, the review report states as follows:

'Since the introduction of the MTR scheme in 2012, AHBs have been an integral part of the scheme and have significantly contributed to its success. To the end of 2021, AHBs have enabled the delivery of long-term housing solutions to 1,010 households. In order to ensure that demand for the scheme can be met, and that there is a range of providers active within the scheme, it is essential that the AHB sector continues to engage with the MTR scheme and both the Department and Housing Agency are committed to ensuring that AHBs remain active in the MTR scheme…

Action 2.4: Increase AHB participation in the MTR scheme Continue to work with AHBs, both within the Cross-Sectoral Working Group and bilaterally to assist in improving their capacity and involvement with the eventual aim that this sector would complete 50% of all cases in the MTR scheme'.[312]

The review document further contains an assessment of future numbers:

'Anticipated scale: Having regard to all factors, and subject to annual funding being agreed in the annual Estimates process, it is considered that the scheme could be well placed to cater for an annual

[308] Ibid, p.10.

[309] See: https://www.independent.ie/regionals/wicklowpeople/home-for-life-buys-housing-38816202.html, accessed 9th September 2022. This private investment company is called 'Home for Life' and was reported to have worked with LCM Capital Partners to raise €75m in equity with the remaining €175m debt being provided by Irish pillar banks, with a view to purchasing 1,500 social houses from 2019.

[310] iCare Ltd.

[311] See: 'Mortgage-to-rent scheme 'undermined' by commercial entity, claims David Hall', *Irish Times*, 12th January 2021.

[312] Ibid, p.21.

case completion rate of 1,000 cases from the year 2022. This represents a prospective 48% increase on completed cases in 2021 and a five-fold increase on the average number of cases completed between 2017 and 2020. The funding and the demand for the scheme will be kept under ongoing review. Recognising the integral role that AHBs play in the scheme, the Housing Agency will work closely with the AHB sector to help build their capacity and further strengthen their role to enable them to complete a higher percentage of cases in the MTR scheme. The eventual aim would be that this sector would complete 50% of all cases in the MTR scheme'.[313]

6.4. COMMENTARY

The changes in access conditions brought about by the review are welcome, though their extent in terms of purchase price thresholds and positive equity limits are limited, and may in reality only keep pace with recent house price inflation and associated levels of positive equity for borrowers in deep mortgage arrears. Thus, the available evidence so far suggests that applications in the first three quarters of 2022 show an increase on comparable 2021 figures but not a significant one. It is also welcome to see from the review an awareness that MTR is part of the wider suite of solutions that are needed to prevent evictions as a result of those arrears, and that these efforts are a work in progress. In this regard, the review suggests that:

The Department will closely monitor any implications around personal insolvency legislation, in terms of both emerging case law and the current review by the Department of Justice, to see if they provide wider options for borrowers and have any impact on demand for State supports such as the MTR scheme;

and

The Department will work to identify any new measures in addition to the State supports already in place (including MTR), aimed at ensuring people stay in their homes where that is a sustainable option.[314]

There are, nonetheless, limitations to what can be achieved by MTR. First, the borrower ceases to be the owner of the property and becomes a tenant. For many, this is not a palatable option after many years of struggling to hold on to the mortgaged property as owner/occupier. However, it should also be said that there are circumstances in which the now tenant/former borrower can repurchase the dwelling but it very much remains to be seen whether this will pan out in any significant way in practice.[315]

Second, a household will not qualify for MTR unless it meets the means test for social housing and it is hard to see how such a fundamental requirement could justifiably be altered.[316] Notwithstanding, the income limits may still be met in principle by many households who have suffered persistent mortgage arrears as a result of an adverse change to financial circumstances due common debt triggers such as job or business loss, illness or separation.

The upside is that if the former borrower/s do qualify, the rent is controlled and calculated according to the net income coming into the household and thus likely, in most cases, to be significantly lower than the mortgage instalments that may have contributed to the accrual of arrears in the first place. In addition, the AHB or private entity is responsible for the main-

[313] Ibid, p.16.

[314] Ibid, p.3.

[315] It is worth noting here that the principal AHB, iCare Housing, currently has four MTR cases on its books where the former borrowers are said to be in the course of arranging to repurchase the dwelling, either through arranging mortgage finance or through funds provided by family members.

[316] See https://www.irishstatutebook.ie/eli/2011/si/84/made/en/print, accessed 17th October 2022.
The Social Housing Assessment Regulations, 2011, S.I. No. 84/2011, as amended in 19th April 2021, provide that *'A household with an income in excess of the income threshold set by a housing authority shall be ineligible for social housing support in the functional area of that authority'.* Three different income bands currently exist across the country depending on the location of the dwelling. For example, the maximum net income threshold for a household of two adults and three children living in Cork, Galway or Dublin city is €39,375 per annum.

tenance of and repairs to the property, in the same manner as local authorities are for conventional social housing tenancies.

Previous research carried out by a MABS service in 2017 in conjunction with the authors of these papers[317] and already referred to in detail in Paper Three of this series,[318] found that those borrowers finding it most difficult to get a permanent or semi-permanent resolution of their mortgage arrears situation in the period from 2016 to 2017 were those whose mortgages were drawn down between 2004 and 2008, closest in time to the 'Crash'. The data further suggested that at drawdown of the loan, these borrowers were, by and large, part of a cohort with lower than average net incomes and a larger than average number of dependants and therefore paying higher percentages of their net incomes on housing costs. The MABS research report concluded that *'it is a cohort perhaps emblematic of those who might not have got a mortgage prior to 2005, but who were forced into the private housing market by institutional and/or societal pressures coupled with a then lack of social housing options'.*[319]

Access to social housing was in scarce supply at the end of the boom, as it continues to be to this day, leaving many households at that time with a choice to rent privately with the associated lack of ownership and security of tenure issues, or to become owner occupiers with heavy mortgages, with the risks that brought in terms of affordability, repossession and negative equity. While the desire to own one's own home is understandable, it brings its own innate pressures and for many it has carried a high price that goes way beyond monetary terms, in particular the stress and pressure associated with battling to hold onto that home.[320] There is perhaps some semblance of justice then that the MTR scheme is enabling a number of households to recover after what has been a nightmare journey, though some will still inevitably regret their change of status from owner occupier to social tenant. MTR may not be everybody's ideal option, but it can certainly serve as a solution for some.

■ **RECOMMENDATION**

Mortgage-to-Rent

MTR is a valuable resolution option in long term mortgage arrears cases where the relevant household meets the criteria that apply. Recent changes to the property valuation and positive equity thresholds, in particular, were long overdue, and if MTR is to deliver the kind of numbers that are envisaged, it is recommended that these limits and other obstacles to MTR will require regular review.

[317] South Mayo MABS (2017). *Mortgage Arrears among South Mayo MABS' Clients: April 2016 v September 2017 'Substantive engagement but for what return?'* Castlebar: South Mayo Money Advice and Budgeting Service, in conjunction with Dr. Stuart Stamp and Paul Joyce.

[318] 'Covid 19 payment breaks on credit agreements: An assessment of current research data', see Section 5, p.32.

[319] Ibid, p.30.

[320] See for example: Norris, M. and Brooke, S. (2011*). Lifting the Load: Help for people with mortgage arrears*. Dublin: Waterford MABS, the Citizens Information Board, and MABS NDL.

7

SECTION

Debt claims and debt enforcement processes in the courts

7.1. INTRODUCTION

As explained in some detail above,[321] the preparatory research work for the initiation of the personal insolvency legislation in Ireland was carried out by the Law Reform Commission (the Commission). Thus, in September 2009, the Commission published a 'Consultation Paper on Personal Debt Management and Debt Enforcement' as part of its proposed third Programme of Law Reform 2008-2014,[322] which it followed some 15 months later with a 'Report on Personal Debt Management and Debt Enforcement' in December 2010.[323] While its recommendations for the introduction of debt settlement legislation, which included a draft Personal Insolvency Bill for the guidance of legislators, were implemented, albeit not perhaps in the manner exactly envisaged, many other recommendations made in relation to debt claims and, in particular, the process of debt enforcement in the courts, remain on the shelf.

Prominent amongst these was the proposal to set up a Debt Enforcement Office to ensure that the enforcement of judgment debts obtained in the courts would be carried out in a proportionate and holistic manner.[324] In the course of these recommendations, the Commission made frequent reference to research work carried out by FLAC in the first decade of the millennium, in reports that were critical of the outmoded, inefficient and inhumane system of debt enforcement in Ireland.[325] It is beyond the scope of this paper to reprise the proposals on debt enforcement previously made by FLAC that were both detailed and based on an examination of options utilised in other jurisdictions on these islands.[326] However, a brief selection of some of the powers and principles suggested by the Law Reform Commission for a new Debt Enforcement Office included:

- *that it would be responsible for the centralised oversight and management of the entire debt enforcement system nationwide,*[327]
- *that it should communicate with the debtor, indicating that an enforcement application has been made, and requiring the debtor to complete a Standard Financial Statement within a specified period'.*[328]
- *that the choice of enforcement method should be allocated to the Debt Enforcement Office and that an enforcement officer should include his or her opinion as to the appropriate method of enforcement.*[329]
- *that a debtor who receives notice of impending legal proceedings for the recovery of a debt may admit the claim and make an offer to pay the amount owed by instalments, with such offer capable of being made into a consensual court order on the agreement of the creditor.*[330]
- *that when deciding on the appropriate method of enforcement, regard should be had to the principle of proportionality and the need to ensure that the enforcement method chosen is the mechanism that is least restrictive of the debtor's rights in the given case.*
- *that suspended execution orders against goods, garnishee orders and attachment of earnings orders could come into effect automatically in the case of a failure to comply with an instalment order.*
- *that an attachment of earnings order mechanism be introduced for the enforcement of all judgment debts against individuals receiving regular income and that the amount of a debtor's income that may be subject to*

[322] See Section 4.1.

[322] Law Reform Commission (2009), ibid.

[323] Law Reform Commission (2010), ibid.

[324] Ibid, p.5.

[325] See Joyce (2003), ibid. Also: Free Legal Advice Centres (2009). *To No One's Credit - A study of the debtor's experience of Instalment and Committal Orders in the Irish legal system.* Dublin: Free Legal Advice Centres.

[326] In this regard, particular emphasis was put on the Enforcement of Judgments Office (EJO) in Northern Ireland (NI), a centralised unit for enforcing civil judgments related to the recovery of money, goods and property of the courts.

[327] Ibid, page 321.

[328] Ibid, p.322.

[329] Ibid, p.323.

[330] Ibid, p.325

attachment should be limited in order to ensure that the debtor has sufficient means to maintain a reasonable standard of living.[331]

- *that guidelines should be prepared indicating the types of circumstances in which the use of execution against goods would be appropriate and proportionate. including whether other more appropriate and/or less restrictive methods of enforcement are likely to be successful in recovering a reasonable amount of the judgment debt owed within a reasonable time and that a Code of Practice should be introduced to regulate the conduct of enforcement officers when carrying out the process of execution against goods* [332]

In summary, it is apparent that these proposals developed from a nuanced and considered review of existing debt enforcement procedures. The invasive and often fruitless process of entering the judgment debtor's home and seeking to seize and sell goods belonging to him/her was to be relegated to a less prominent position in the hierarchy of enforcement options, with a greater emphasis placed on Instalment Orders, whereby payments in money form would be made periodically to satisfy the debt on terms that would be affordable to the judgment debtor.

Critically, a third party in the form of a Debt Enforcement Officer attached to an Enforcement Office would have the basic function of deciding on the most appropriate method of enforcement rather than the judgment creditor, with a working principle of proportionality to guide that choice. A Standard Financial Statement[333] would be the common instrument used to make this assessment. In the event of a default in the payment of instalments, more radical enforcement options – such as attachment of earnings orders or execution orders against goods – would come into play. Notably, it was also proposed that a debtor served with legal proceedings claiming a debt could admit the claim, make an offer of instalment payment, and seek to have it made an Instalment Order with the consent of the relevant creditor; this would thereby prevent the need for any enforcement process to be invoked and save time and further costs for all concerned.

More than a decade later, as a combination of adverse events now present households across the length and breadth of the country with serious financial and related challenges, the bulk of the recommendations on debt enforcement made by the Commission remain just that. As the prospect of an increase in levels of debt-related litigation conceivably looms, it is in our view time, once again, to review the relevant core mechanisms here and how they might be reformed.

7.2. SOME RECENT DATA FOR 2020 AND 2021

In terms of the volume of debt-related proceedings in the courts, the information available from the Courts Service Annual Report 2020,[334] suggests that there was a significant *decrease* in debt cases in 2020, the first year of the Covid pandemic. In summary, the report observes that:[335]

'In the High Court in 2020 there was a 48% decrease in Incoming Matters and an 80% decrease in matters resolved by court/out of court linked to the temporary ban on evictions and rent increases introduced for the duration of the Coronavirus crisis. In the Circuit Court there was a 76% decrease in incoming cases.

In 2021, there was a 32% increase in incoming debt matters in the High Court and an 86% decrease in matters resolved by the court said to be 'primarily due to the effects of temporary payment breaks by financial institutions'[336]

[331] Ibid, p.326.
[332] Ibid, p 327-328.
[333] Based on that used by MABS, ibid, p.372.

[334] Courts Service (2021). *Courts Service Annual Report 2020.* Dublin: Courts Service. See: https://www.courts.ie/content/annual-report-2020, accessed 9th September 2022.

[335] Ibid, p.46.

[336] See page 52, Courts Service (2022). *Courts Service Annual Report 2021.* Dublin: Courts Service. https://www.courts.ie/news/courts-service-annual-report-

Further data is provided in the 2020 and 2021 Courts Service annual reports on levels of debt related proceedings as follows:

Recovery of debt (liquidated sums) [337]

- 13,890 new District Court claims for money judgments were brought in 2020, down from 23,759 in 2019; in 2021 the number further decreased to 12,405 new cases.
- 1,638 new such Circuit Court cases were initiated in 2020, down from 3,130 in 2019; in 2021 the number further decreased to 1,371 new cases.
- Finally, new High Court proceedings numbered 585, down from 1,744 in 2019.[338] Unlike the District and Circuit cases, however, the number of new High Court debt cases actually increased in 2021 to 773 new cases.

Overall, between the three courts where such cases originate, the decrease on the pre-Covid 2019 figures was of the order of 44% in 2020 and 49% in 2021, not far off a reduction of a half.

Repossession cases

- New cases where the (re)possession of land or premises, including family homes, was sought, decreased in the Circuit Court from 1,112 in 2019 pre-pandemic, to 272 in 2020 and 477 in 2021, and in the High Court from 105 in 2019 pre-pandemic, to 55 cases in 2020 and 71 in 2021.
- In terms of Circuit Court (re)possession cases concluded, 1,345 were resolved by the Court in 2019, 480 were resolved in 2020 and 435 in 2021.
- In 2019, the Circuit Court granted 443 Possession Orders and did not grant such orders in 902 such cases. In 2020, 125 orders were granted and 335 were not.[339] In 2021, 82 Orders were granted and 353 were not. Thus, taking the 2021 figures, of the 435 sets of possession proceedings said to have been resolved (i.e. concluded) last year, 81% (4 in every 5) did not result in a Possession Order being granted, a significantly high percentage.[340]

Debt enforcement – Applications for Instalment Orders and Committal Orders

- Post-judgment summons applications to enforce money judgments by seeking an Instalment Order in the District Court, whereby the judgment debtor may be ordered to pay a set sum of money periodically to satisfy the terms of a judgment, decreased from 1,954 applications in 2019 to 1,240 in 2020 and 1,243 in 2021, a reduction of 37%; the number of Instalment Orders granted on foot of such summonses reduced by 41% from 1,750 (2019) to 1,023 (2020) but increased markedly to 1,593 in 2021.[341]
- Notably, 15 Committal Orders were granted in 2020 compared to 5 in 2019, where debtors did not meet the payment terms of the Instalment Order granted and the judgment creditors issued a Committal Summons and obtained an Order to have the judgment debtor imprisoned for 'wilful refusal or culpable neglect' in complying with the order. Only 2 Committal Orders were granted in 2021.[342]

These figures suggests that the practice of seeking to have a debtor imprisoned in a debt case for his/her failure to meet the terms of an Instalment Order has not entirely gone away, despite the decision of the High Court in the McCann case in 2009 which brought an end to the arbitrary imprisonment of judgment debtors for failure to meet the terms of a court Instalment Order. [343] This case also resulted in subsequent amendments to the Enforcement of Court Orders (Amendment) Act 2009, which were designed to ensure that a debtor could not be

2021, accessed 9th September 2022.

[337] Note these figures are claims for specific sums of money said to be owed, as opposed to actions for damages or breach of contract.

[338] Ibid, p.47.

[339] Ibid, p.46.

[340] Ibid. p.51.

[341] This number would appear to include some applications initiated in 2020 but not heard until 2021.

[342] Ibid, p.74.

[343] See McCann -v- Monaghan District Court & Ors [2009] IEHC 276. The applicant in this case, a MABS client, was represented by Northside Community Law Centre, now Community Law and Mediation (CLM).

imprisoned in such cases without due process. Thus, the debtor can be brought before the court, by arrest if necessary, to explain why the terms of the Instalment Order have not been met. S/he is entitled to legal aid to defend his/her position and, for a committal to take place, the onus is firmly on the judgment creditor to show beyond reasonable doubt that the debtor, by reason of wilful refusal or culpable neglect, failed to meet the terms of the Instalment Order.

This is the theory. However, the practice can unfortunately deviate from the intended process, albeit this is likely to be extremely rare. In one case in which FLAC acted in 2017, the judgment debtor had appeared in the District Court in response to the issue of the Committal Summons. Before he knew what was happening, he found himself arrested and brought to Mountjoy jail to serve a week in prison. FLAC successfully argued in *habeas corpus* proceedings in the High Court that the warrant for his imprisonment signed by the District Court judge was incorrect, as it had recorded that the two relevant procedural safeguards provided for in the 2009 amendments – access to criminal legal aid for the accused and the onus of proof placed on the judgment creditor to show the debtor's wilful refusal or culpable neglect - were adhered to, when an audio recording of the proceedings confirmed that they had not. In fact, the hearing in the District Court, resulting in the imprisonment of the debtor, took no more than three minutes.[344]

A further postscript to this case is that by the time these events took place, imprisonment related to civil debt should have been brought to an end by the provisions of the Civil Debt (Procedures) Act 2015.[345] This Act was signed into law in July 2015 and the government of the day claimed considerable credit at the time that it had brought imprisonment for civil debt to an end. However, the relevant Commencement Order to give this Act legal effect had not been issued by the Minister for Justice by 2017 and this remains the case in 2022.

It is clear from the data provided above that the levels of debt related proceedings notably declined in 2020 and 2021 due to Covid and related formal and informal restrictions on litigation that applied over the period. However, such reprieves may be short lived. With revised public health advice and the apparent reduction in the potency of the Covid threat, levels of litigation in debt cases may increase over the remainder of 2022 and beyond. In such cases, the defendant/respondent borrower almost invariably does not have legal representation. In family home repossession cases, as we have observed in detail in Paper Two of this series, this inequality of arms is to some extent rebalanced by the mediating role that County Registrars may play in facilitating payment proposals and granting adjournments to see how matters progress. It is also impacted by the work of MABS staff including DMA's and other Abhaile professionals in supporting defendant borrowers, although, as we have seen, this does not always necessarily lead in the long run to a successful conclusion.

7.3. PROCEEDINGS FOR A LIQUIDATED SUM – SOME POTENTIAL REFORMS

In legal proceedings seeking judgment for a liquidated sum (or money judgments to put it simply) where the family home of the borrower is not at immediate and direct risk, the process is much less inclusive than the Circuit Court repossession procedure briefly described above. In a typical District Court case[346], for example, where debts of up to €15,000 may be claimed (the most common form of debt proceeding as outlined in the figures above), the respondent debtor is served with a Claim Notice which comes with two options:

- to dispute the claim, by giving or sending by post an appearance and defence within 28 days of service;

[344] See: https://www.flac.ie/news/2017/03/30/flac-man-unlawfully-jailed-for-failure-to-pay-debt/. Free Legal Advice Centres (2017), *Press release*, 30th March 2017.

[345] See: https://www.irishstatutebook.ie/eli/2015/act/28/enacted/en/html, accessed 17th October 2022

[346] See https://www.courts.ie/content/forms-civil-proceedings. Schedule C, Forms in Civil Proceedings Claim notice: debt claim not exceeding €15,000, No. 40.02, accessed 9th September 2022.

- to pay the amount claimed within 10 days without filing and serving an appearance and defence in order to avoid further costs.

If the respondent debtor does neither, s/he is held to have admitted the claim and judgment will be given in default against him/her. This binary option does not encourage engagement by a financially impoverished debtor in the process and, in many such instances, judgment is given in default of any response and the case proceeds to a separate enforcement procedure, a feature that is likely to further drive many debtors into the shadows. In our view, the District Court claim form (and parallel Circuit Court and High Court forms) should seek to actively engage the respondent debtor in the process, instead of potentially alienating him/her from it.

Solicitors specialising in bringing debt claims generally make the point that in most instances, such proceedings are a last resort, and often argue that the respondent debtor has been regularly contacted and may have entered into agreed instalment payment arrangements and not delivered on them, sometimes on more than one occasion. This frustration is understandable from their perspective and that of their clients. However, it is also easy to underestimate the range of difficulties often facing those in debt, grappling with competing financial demands on an inadequate income and frequently suffering a deterioration in personal as well as financial circumstances.

As 2022 rolls out with increasingly worrying indicators for borrower financial well-being, it is important to put the emphasis on maximising constructive engagement and minimising litigation. The availability of MABS staff to assist borrowers in difficulty to make realistic payment proposals on a financial statement basis has undoubtedly helped to reduce and resolve levels of debt related litigation in recent decades. It is therefore surprising that the court form referred to above (nor related court forms) does not make any explicit reference to MABS as a source of assistance for defendants in debt cases.

These (and other such court) notices should inform the respondent debtor where s/he might seek advice and assistance to discuss his/her options in terms of a response to the claim. Clearly MABS should be the first logical point of reference here. For example, in some cases, the borrower may accept that there is a debt but may not be clear or satisfied that the amount being claimed is correct (and sometimes it is not). In limited instances, the alleged debt may not be payable at all, for example, it may be statute-barred by the passage of time or the lender may have breached a statutory requirement that renders the debt unenforceable.[347]

In our view, an option should be included in these court forms that would allow the respondent debtor to acknowledge the debt, to consent to judgment and to make an offer of payment by instalment, based on financial information set out in a standard financial statement. This would potentially save both the time spent and the costs incurred in the claimant creditor having to invoke a separate enforcement process, subsequent to having obtained a judgment. As we have explained above, this was one of the core recommendations made in the Law Reform Commission's 2009 report *'that a procedure should be introduced whereby a debtor who receives notice of impending legal proceedings for the recovery of a debt may admit the claim and make an offer to pay the amount owed by instalments, with such offer capable of being made into a consensual court order on the agreement of the creditor'.*[348]

At the time of writing, the Civil Law Reform division of the Courts Service has been working since 2021 on developing a Pilot 'digital debt' system that is intended to allow creditors to initiate debt claims online, and this is also likely to eventually allow for the potential enforcement of judgment debts online. Quite how the concerns of debtors will be incorporated into this proposed system in terms of their engagement with the process is as yet unclear. However, it does seem clear that any such system will not (and indeed presumably cannot) compel debtors to respond digitally. Welcome savings in terms of the costs of initiating and pursuing debt claims

[347] See the limitation periods in contract debt cases set out in s.11 of the Statute of Limitations Act 1957, for example, or the enforceability rules in s.59 of the Consumer Credit Act 1995.

[348] Ibid, p.325.

are envisaged for creditors, their representatives and the State from this exercise, but how these changes might also impact on respondent debtors remains unexplored as of yet.

In our view, this pilot must also look at how the challenges being encountered by respondent borrowers can be alleviated, and what changes the Courts Service can make to try to ensure that the reality of the impaired finances of debtors can be recognised and facilitated within the debt claim and debt enforcement system, digital or otherwise. The recommendations made by the Law Reform Commission in 2010 in this area are practical and based on an analysis and review of enforcement procedures in other jurisdictions. While it is unlikely at this juncture, primarily for resource reasons, that a separate Debt Enforcement Office will be set up anytime soon, we can see no credible operational reason why the availability of advice services should not be brought to the attention of respondents to debt claims, in order to enable them to properly assess their options.

As the pressure on households ramps up resulting from the cost of living crisis and issues of legacy debt, every effort must be made to ensure that debt related litigation is a last resort. Government should therefore examine whether a moratorium on debt claims is justified in the current economic environment. At a minimum, all respondents in consumer debt cases should be advised with the relevant paperwork that the help of MABS is available to negotiate affordable payments based on an assessment of the borrower's circumstances. A Practice Direction should be introduced by the Courts Service obliging solicitors acting on behalf of creditors seeking money judgments to ensure that every effort has been made to engage with the borrower in arrears prior to issuing proceedings, including specifically referring that borrower for assistance to MABS, and to provide written evidence of such efforts for the relevant court.

7.4. RECOMMENDATIONS

Below, we set out a series of recommendations as regards debt claims and enforcement.

RECOMMENDATIONS

Debt claims and debt enforcement

The 2010 recommendations of the Law Reform Commission pertaining to debt claims and debt enforcement in the courts should be re-examined by the Department of Justice and the Courts Service with a view to introducing changes to facilitate debtors to examine their initial options and to make affordable payments in the event of accepting liability.

In particular, the following requirements should be put in place:

- Claimants/Plaintiffs should be required to show that relevant Codes, (for example the CBI's current Consumer Protection Code, or any improved version of it that might be introduced as recommended above) have been adhered to and that every effort has been made to avoid proceedings.
- Court forms should advise respondents / defendants of their options and where assistance can be sourced, including in particular the potential availability of the Money Advice and Budgeting Service (MABS) to help to conduct negotiations and to assess liability.
- A respondent / defendant should be permitted to acknowledge liability and to make an offer of instalment payments that are affordable relative to his/her budget, and thus avoid the cost and stress of further enforcement proceedings.
- The potential sanction of imprisonment for non-payment of a civil debt should have no place in a civilised society. The relevant provisions of the Civil Debt (Procedures) Act 2015 (or equivalent)

should be commenced with a view to bringing this anachronism to an end.

- In the current recessionary climate, a moratorium on debt claims being brought in the courts against borrowers in financial difficulty should be considered.
- A Practice Direction should be introduced by the Courts Service obliging solicitors acting on behalf of creditors seeking money judgments to ensure that every effort has been made to engage with the borrower in arrears prior to issuing proceedings, including specifically referring that borrower for assistance to MABS, and to provide written evidence of such efforts for the relevant court.

8

SECTION

Resolving legacy long term mortgage arrears cases

In this final substantive section, we examine the issue of persisting, long-term mortgage arrears situations and explore how these might best be addressed going forward. We begin by outlining the provisions of the Land and Conveyancing Law Reform (Amendment) Act (LCLRA) 2019 and describe how little used these provisions have been in practice. We then examine mortgage arrears statistics as of end 2021 as they relate to those in longer-term difficulty, and recap on the associated barriers to resolution. We conclude by proposing the establishment of a Mortgage Arrears Review Office, which would operate in synch with existing (and hopefully improved) structures and services such as the Code of Conduct on Mortgage Arrears, the LCLRA, Personal Insolvency Arrangements, MABS and Abhaile.

8.1. THE PROVISIONS OF THE LAND AND CONVEYANCING LAW REFORM (AMENDMENT) ACT 2019

In Paper Two of this series,[349] we reviewed the amendments made in the Land and Conveyancing Law Reform (Amendment) Act 2019, which added a Section 2A (1) – (9) to the existing Section 2 of the Land and Conveyancing Law Reform Act 2013. In the course of observing that they added a potentially substantial further hurdle for lenders before a Possession Order may be granted, we questioned the timing in terms of the infrastructure governing debt resolution in the context of the repossession of family homes. Thus, we suggested that the assessment by the court of the conduct of lender and borrower, and their respective efforts to resolve arrears that these amendments provide for, may be mistimed since it appears to come at the potential *conclusion* of repossession proceedings, after the case will generally have been explored in some detail in the County Registrar's court.

We noted too that this assessment is obliged to be invoked where there is likely to be no dispute that arrears persist and where it is usually clear that the borrower cannot afford to make the required contractual payments, and is therefore technically in breach of the loan contract, albeit for reasons beyond his/her control. We also observed that these provisions appeared to have been unused since its enactment in August 2019, now over three years since it was commenced.

In the interim, one published decision was brought to our attention where the Act was briefly referred to. In this case, it was in fact counsel for the plaintiff lender who brought the Act and its terms to the notice of the Court. However, there was no legal argument or analysis of the legislation, given that one of the two defendant borrowers did not appear and the other attended but without legal representation. The presiding judge, in granting the Possession Order in the proceedings, simply observed on this aspect of the case that:

> *'In coming to this decision, I have taken account of all the matters referred to in sub. (3) in light the evidence and/or submissions put before me during the hearing, touching on the matters in the aforesaid statutory provision. I am satisfied that the making of the order for possession sought by the plaintiff would be proportionate in all the circumstances'.*[350]

The six designated matters in S.2A (3) to which the presiding judge referred and of which the Court is obliged to take account, in addition to '*such additional matters as it considers appropriate*', are:

1. whether the making of the order would be 'proportionate' in all the circumstances (broken down into further criteria in s. 2A (4))
2. the circumstances of the borrower and dependants residing in the PPR (Principal Private Residence)
3. whether the lender has made a statement to the borrower of the terms it would be prepared to settle the matter in such a way that the borrower/s and dependants could remain in the PPR

[349] Ibid, Section 3.2, pages 48-50.

[350] See paragraph 42, KBC Bank Ireland PLC and McCormack and McCormack [2020] IEHC 175.

4 the details of any proposal made (before or after the issue of the proceedings) by or on behalf of the borrower 1) to remain in the PPR, including participation by the borrower in a designated scheme, or 2) to secure alternative accommodation

5 the response, if any, of the lender to any proposal made by the borrower to remain in the PPR

6 the conduct of the parties to the mortgage in any attempt to find a resolution to the issue of dealing with arrears of payments due on foot of the mortgage.

Section 2A (4) in turn provides that for the purpose of deciding the first criterion - whether granting the order would be proportionate - the Court may have regard to:

- the total amount that remains to be paid on the mortgage or any associated loan agreement
- the amount of the arrears of payments
- the 'advised market value' of the PPR on the date the proceedings were commenced.

The provisions of the Land and Conveyancing Law Reform (Amendment) Act 2019 set out important potential benchmarks that a lender seeking to obtain a Possession Order must attempt to meet. Equally, the conduct of borrowers looking to oppose a Possession Order being made is also under examination. It is perhaps surprising then that it remains, to our knowledge, judicially unexplored.

It may be that both parties to a repossession case may have reason to avoid the use of the 2019 amendment. For the defendant debtor, almost invariably without legal representation, it is a big risk to potentially escalate the case to a Circuit Court judge for a pronouncement to be made that might be an adverse one, leading to a Possession Order. A further obstacle for borrowers is the absence of any statutory regulations from the Courts Service to help to guide and inform the defendant in how to invoke the process.[351] In practice, therefore, most borrowers and their MABS advisors may prefer to take their chances in the County Registrar's Possession List, working on trying to improve the payment offer through a series of adjournments.

For lenders, one precedent from a court refusing to grant a Possession Order having carried out the relevant assessments under Section 2A (3) may well result in concern that it could become a trend. Were this to happen, it seems likely that a constitutional challenge to the terms of the section would quickly follow, in order to seek to have it declared an impermissible interference with property rights.

This standoff may be seen to be working in some strange sense in that the rate of repossession of family homes continues to be comparatively low. For example, of the 435 sets of repossession proceedings said to have been resolved (i.e. concluded) in 2021, over 80% did not result in a Possession Order being granted, a significantly high percentage.[352] Nonetheless, the attrition that results and the distress, suffering and economic loss that lengthy repossession cases cause and have caused is regrettable. It is past time that a concerted attempt was made to resolve the long term legacy mortgage arrears cases. Below, we propose how a more pro-active use of the 2019 amendment criteria in the context of a Mortgage Arrears Review Office could be facilitated.

[351] Note therefore that as far as we can establish, no regulations have as yet been passed to set out the procedures that might apply in terms of matters such as filing and exchanging affidavits and listing hearings.

[352] See: Courts Service Annual Report 2021, p.51 (ibid), referenced in Section 7.2 above.

8.2. STATISTICAL BACKDROP

In this sub-section the family home mortgage arrears figures published by the Central Bank of Ireland (CBI) to the end of 2021[353] are contrasted in brief with the equivalent figures at the end of 2020, which we reviewed, analysed and explored in considerable detail in Paper Two of this series.

As this paper was being finalised, the Central Bank of Ireland published mortgage arrears figures for both Q.1 and Q.2 2022 in one set[354], in effect altering its practice up to now of publishing separate discrete figures for each quarter. The data provided in this latest CBI release do not, in our view, substantively affect the statistical analysis we provide and the recommendations we go on to make later in this section.

The 2020/2021 data we analysed suggested as follows:

Arrears

- The number of PDH accounts in arrears overall at end 2021 was 47,062, *down* by 7,924 (14%) from 54,986 at end 2020.
- The total number of accounts in the arrears of over one year category at end 2020, deemed by the CBI to constitute long-term arrears, was 25,898, *down* by 4,150 (also 14%) from 30,048 at the end 2020.

Non-Bank ownership of accounts

- Of the 25,898 accounts in arrears of over one year at end 2021, 17,383 (67%) were now owned by non-banks. At end 2020, the percentage figure owned by non-banks was 55%.
- Of the 6,257 accounts that were the subject of repossession proceedings at end 2021, 4,225 (68%) were owned by non-banks. At end 2020, the equivalent figure owned by non-banks was 46%.

Repossessions

- The number of repossession cases in legal proceedings *declined* overall from 7,301 at end 2020 to 6,257 at end 2021, a reduction of 14%. Using the CBI estimate that there are, on average, 1.2 PDH mortgage accounts per household, this suggests there was in the region of 5,214 repossession cases in progress.
- The number of accounts that were the subject of repossession cases that have concluded (but where arrears remain outstanding) *declined* overall from 6,992 at end 2020 to 6,341 at end 2021, a reduction of 9%.

Restructures

- 11,468 accounts (24% of the 47,062 total in arrears) were in an agreed restructure with their lender at end 2021. The comparable figure for end 2020 was 13,952 accounts (25% of the then total)
- 21,234 accounts (45% of the total in arrears) were deemed to be co-operating but had no restructure in place at end 2021. The comparable figure for end 2020 was 26,104 accounts (48% of the then total)

The 14% reductions (one in every seven) in both the overall number of accounts in arrears and the accounts in arrears of over one year between the end of 2020 and 2021 are quite significant, and indicative of some progress in the resolution of the problem. The reasons for this improvement were not, however, explored by the CBI in this statistical release. For example, it may be the case that the second year of Covid, in particular, allowed some households, whose incomes were unaffected by the pandemic, but whose expenditure, especially of the discretionary kind, may have been significantly reduced, to take the opportunity to remedy their arrears problem. By contrast, the post-Covid landscape in terms of how rising inflation is posing substantial challenges to household finances, is less likely to continue to present such opportunities.

2021 also saw a substantial acceleration both in banks divesting themselves of troubled

[353] See: https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/2021q4_ie_mortgage_arrears_statistics.pdf?sfvrsn=df0f901d_7, published in March 2022, accessed 9th September 2022.

[354] Published 19th September 2022.

mortgages and in investment funds acquiring them. Funds now owned over 2 out of every 3 PDH mortgages that were in arrears of over one year. Coincidentally they were also the plaintiff in 2 out of every 3 such accounts that were the subject of legal proceedings. It seems likely that this trend will continue.[355]

The number of repossession cases in progress in the courts also reduced over the year, with a decrease of 14% (one in every seven), and this may be partially explained at least by an informal moratorium on bringing new proceedings during the pandemic and by the difficulty in obtaining Possession Orders. Further detailed data, as ever, is needed here, but it is also conceivable that some of these cases were settled due to Personal Insolvency Arrangements (PIA) and/or revised alternative payment arrangements (ARA) being put in place, again possibly due to an improved net income position.

Simultaneously, the number of concluded repossession cases where arrears remained outstanding also decreased by one in every 11. Again, there is an absence of explanatory data, but in light of the fact that this category includes strike-outs, dismissals, settlements, and adjournments generally of the proceedings, as well as the granting of orders, it may be reasonable to infer that at least some of this reduction in cases is permanent.

The levels of co-operating borrowers in arrears who had an agreed restructure in place changed little, however, in percentage terms (24% as opposed to 25% of those in arrears). Similarly, those who were in arrears and who were deemed to be co-operating with their lender but who were still without a restructure had also changed little (at 45% as opposed to 48% of those in arrears). **At over 21,000 accounts, this has been the deep core of the problem, those who are engaging but seem to receive little return for their engagement.**

Legal proceedings

With reference to legal proceedings, in terms of the **47,062** total accounts in arrears at the end of 2021:

- **11,468** were 'co-operating and in a restructure'. These accounts were presumably not the subject of legal proceedings.
- **21,234** were 'co-operating and not in a restructure' (the vast majority of these would appear also not to be in legal proceedings). As suggested above, this is in many ways the key cohort, borrowers who are co-operating but who are either not being offered a restructure or who perhaps have been offered a restructure that is not sustainable for their financial circumstances. An as yet unanswered question posed in Paper Two of this series is as follows: 'what payments are being made on these accounts'?
- **5,943** were 'not co-operating, not in a restructure and were in legal proceedings'. Of these **5,699** (96%) were in arrears of over one year.
- **8,417** were 'not co-operating, not in a restructure and were not in legal proceedings'. This heading is a little misleading perhaps, as many of these accounts have been in legal proceedings that have concluded but where arrears remain outstanding.

According to the CBI, **6,257** accounts in total were in legal proceedings and as stated above, **5,943** of these were accounts that were 'not co-operating and not in a restructure'. This leaves **314** other accounts that were in legal proceedings, likely, by a process of elimination, to be from the 'co-operating and not in a restructure' cohort.

Finally, at the end of 2021, there were **6,341** accounts where legal proceedings had concluded and arrears remained outstanding. Again, by a process of elimination, given that a total of **8,417** accounts in arrears were 'not co-operating, not in a restructure and were not in legal proceedings', this would appear to leave **2,076** accounts that are 'not co-operating', 'not in a restructure' and have never been in legal proceedings.

[355] Note that this prediction has come to pass in the recently published Q.2 2022 figures. Funds now own almost 3 in every 4 accounts in arrears of over one year and 70% of the accounts the subject of legal proceedings.

8.3. BARRIERS AND PATHS TO RESOLUTION

Our analysis in Paper Two of this series on ten years of attempting to resolve mortgage arrears concluded that:

> *'The mortgage arrears resolution processes put in place following the Global Financial Crisis (GFC) and the legislative developments subsequently introduced to improve those attempts at resolution, are indicative of an ambivalent attitude to the repossession of family homes amongst policy makers, including government, public servants and regulators. This ambivalence may stem from a mentality that tries to simultaneously hold two irreconcilable positions, namely that: (i) banks should not be compelled to write down debt and incur losses if at all possible and; (ii) borrowers should not be forcibly evicted from their homes in any significant number'.*[356]

We went on to suggest that:

> *'the delay and uncertainty is frustrating for lenders of course but more pertinently, fundamentally distressing for the borrower and his or her dependants and arguably in breach of human rights standards, in addition to being costly for society as a whole on a wide array of levels' and that 'the current system of repossession is not working effectively for borrowers, lenders, or indeed the taxpayer'.*[357]

We further suggested that the global pandemic might provide *'an opportunity to re-examine the legacy cases in a more open and systematic way and to reach resolutions in as many cases as possible for once and for all'.*[358] There are no ready-made solutions available here of course. However, at the present rate of progress, we may well still be grappling with the legacy family home mortgage arrears cases in a decade unless a radical attempt is made to substantially reduce their numbers now. The available options and the range of experienced service providers at our disposal are perhaps more formidable than is realised and if they were deployed in a co-ordinated manner, might yield more results than the less integrated approach that has prevailed up to now.

A further important contextual factor as noted above is that investment funds are acquiring more and more of the PDH mortgage accounts in arrears of over one year and loan sales to such entities show no signs of stopping. It is clear that portfolios of such impaired loans have generally been sold to funds at a reduced rate, perhaps of a sizeable scale in some cases, but neither the relevant borrowers nor (presumably) the State is aware of the detail of these 'commercially sensitive' agreements, though they fundamentally affect both public policy and housing policy. The reality is, nonetheless, that funds have more scope for writedown than the original lenders because they purchased such loans at a discount.

In addition, it is perhaps not unreasonable to suggest that the State might also contribute financially to assist in permanently restructuring or clearing debt, when the costs that have been incurred on behalf of the taxpayer in trying (and in many cases failing) to resolve many of these legacy cases over a decade are considered. For example, an assessment of the financial costs of processing and reviewing repossession cases over lengthy periods of time in the Circuit Court might be instructive, let alone the wider healthcare and missed opportunity costs for borrowers and their dependants. By way of further context, the end 2021 CBI data suggested that of the 6,257 accounts that were the subject of repossession proceedings at the end of 2021, in 2,308 (37%) it was *between two and five years* since the *first* hearing of the case, and in a further 2,148 (34%), it was *over five years* since the first hearing. These periods constitute a war of attrition for everyone involved, but most of all for the borrowers and their family members on whom the burden falls most acutely.

Proposals to attempt to resolve debt cases in a systematic manner, in a specialist forum outside the courts, have been put forward sporadically for over a decade now. As early as 2009 when the

[356] Ibid, Section 5, p.58.

[357] Ibid, p.58.

[358] Ibid. p.59

effects of the Global Financial Crisis (GFC) were starting to seriously impact on households, FLAC itself proposed that a Debt Rescheduling and Mediation Service might be created.[359] In terms of addressing family home mortgage arrears specifically, in June 2017, then opposition spokesperson on Finance, now Minister for Public Expenditure, Michael McGrath TD (Fianna Fáil), tabled a Private Members Bill (PMB) in the form of the Mortgage Arrears Resolution (Family Home) Bill 2017. This Bill bore a strong resemblance to a previous PMB he had proposed back in 2014, then called the Family Home Mortgage Settlement Arrangement Bill. That Bill had resumed at second stage in the Dáil in March 2015 but fell when the government parties voted against it.

In brief summary, the subsequent 2017 Bill proposed:[360]

- The establishment of a Mortgage Resolution Office with powers to make Mortgage Resolution Orders on family homes occupied by 'financially restricted' borrowers as defined.
- These borrowers would have access to MABS, PIPS and the services generally available under the Abhaile scheme to assist with preparing their application.
- Submissions from the lending institution would be sought and the effect of any order, if granted, would be to amend the terms of the mortgage to make it affordable for the borrower and to prevent any repossession proceedings being initiated or continued against him or her.
- A lender unhappy with the terms of an order would be entitled to appeal to an Appeals Officer who would have discretion to hold an oral hearing of the appeal, and points of law that might arise could be appealed to the High Court.

Deputy McGrath introduced this Bill in the Dáil on 28th June 2017 and it proceeded to second stage on 12th July 2017. It was immediately opposed at that point by then Minister for Justice, Charles Flanagan TD, who outlined the grounds for the Government's objections.[361]

In summary, he suggested that the PMB *'appears to be incompatible with the Constitution and at a very high risk of constitutional challenge, following advice received from the Attorney General'.* The crux of the problem here, he suggested, was that not only was a quasi-judicial body proposed to be set up that would have extremely far-reaching powers but also that *'the only appeal provided under the Bill is effectively to a second newly established quasi-judicial body, an Appeals Officer'.* Thus two bodies would be created that would have *'extremely wide-ranging powers to intervene in and change the vested constitutional and contractual legal rights and obligations of private parties'.* He stated that *'such powers are exclusively reserved to the Courts, under Article 34 of the Constitution, as part of the administration of justice'.*

The Minister went on to suggest that *'even if the Bill were fundamentally revised, to provide for the proposed Mortgage Resolution Orders to be made by a Court rather than a quasi-judicial body, it would remain at high risk of constitutional challenge'*. This was, he suggested, because *'such Orders would intervene in the bank's legal right to be repaid under a mortgage contract validly entered into with private parties'* and *'these are constitutionally protected vested property rights, under Article 40 of the Constitution'.*

Finally, the Minister informed the house that *'the constitutionality of proposals to impose mortgage resolution solutions has been very extensively discussed between Government Departments and the Office of the Attorney General in recent years'.* The outcome of these discussions appears to be encapsulated in the Minister's final comment on this issue that *'any legislative interference with private property rights in this area, seeking to achieve an objective of the common good, still has to demonstrate clearly that it is a carefully*

[359] Free Legal Advice Centres (2009), ibid, p.163-165.

[360] See: https://data.oireachtas.ie/ie/oireachtas/bill/2017/88/eng/initiated/b8817d.pdf, accessed 9th September 2022.

[361] See: Dáil Éireann debate, Wednesday, 12th July 2017, Vol. 958 No. 1, Mortgage Arrears Resolution (Family Home) Bill 2017: Second Stage [Private Members].

balanced and strictly proportionate intervention which has taken full account of the respective rights and obligations of both parties'. He concluded that *'the very cursory provision in this Bill falls far short of that standard'.*

Ultimately, the Bill proceeded no further and lapsed with the dissolution of the Dáil and Seanad on January 14th 2020, prior to the general election on 8th February, 2020, an election which saw the principal government and principal opposition party subsequently form a coalition, together with the Green Party. And there it remained, with over 47,000 family home mortgage accounts recorded as in arrears at end 2021, with almost 26,000 of these in arrears of over one year (i.e. arrears of over 12 full instalments), a period deemed by the CBI itself to constitute 'long-term' arrears.

At the time of writing, economic storm clouds have gathered through 2022 that may threaten a worsening of this situation. As the gravity of Covid, despite its persistent reappearances, ebbs away, other threats – energy, food and fuel price inflation, the Russian invasion of Ukraine, the threat of recession and increases in interest rates – have loomed. It seems as opportune a time as there will ever be to focus in a systematic way on the legacy mortgage arrears cases and attempt to resolve as many of them as possible, as quickly as possible.

In pursuit of debt resolution options in cases where liability is generally not an issue but capacity to pay most certainly is, our view is that we should not be forever tied up in the strings of private property rights that, it might be suggested, are not always applied consistently. What, for example, was '*carefully balanced and strictly proportionate*' about the massive bailout of financial institutions imposed upon the taxpayer after the Crash and the generous tax treatment of investment funds who were subsequently facilitated to purchase their impaired loans to build a major stake in the Irish economy?

Moreover, suggesting that a proposed legislative approach may be unconstitutional does not make it so, and the Constitution itself provides a ready mechanism for the constitutionality of a proposed legislative measure to be tested in the Supreme Court.[362] In addition, the Constitution makes it clear that private property rights are not absolute and that the exercise of such rights may be delimited by law to reconcile their exercise with the exigencies of the common good.[363] Finally, the Constitution provides that the Constitution itself may be amended by a vote of the people in a Referendum.[364] Thus, for example, it is worth noting on this last issue that the current Minister for Housing is recently reported as suggesting that a referendum on inserting a right to housing into the Constitution could be held next year.[365]

Apart from perceived constitutional obstacles, a further and equally pressing problem posed by an alternative dispute resolution body to resolve

[362] Article 26 of Bunreacht na hÉireann provides, inter alia, that:

1 1° The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.

2 1° The Supreme Court consisting of not less than five judges shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.

[363] Article 43 of Bunreacht na hEireann provides that:

1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

[364] Article 43 of Bunreacht na hÉireann provides that:

1 Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.

[365] See https://www.thejournal.ie/housing-referendum-5697261-Mar2022/ , accessed 13th September 2022.

mortgage arrears at this point is that it could undermine the existing personal insolvency regime that has taken a long and troubled decade to get as far as it has. Thus, at present, after a very slow amendment process, a Personal Insolvency Arrangement (PIA) may now be proposed by a PIP on behalf of a borrower in arrears following a free Abhaile consultation. If that proposal is rejected, a review may be sought before an insolvency judge in the Circuit Court (and on to the High Court) and the PIA may be approved, against the secured lender's wishes. It is hard to conceive that another legally binding mechanism covering the same subject matter could successfully run parallel or alongside this.

The problem with the PIA mechanism first and foremost, however, remains its scale. As noted above, this amounts to just 6,582 PIA's approved in over eight years with no appreciable spike in numbers following significant legislative changes in late 2015 and late 2021. At this rate of turnover, it is not likely that the PIA will be the salvation of the legacy family home mortgage arrears problem in Ireland. Unless the review of the Act that is currently taking place leads to significant legislative amendments that improve delivery from the borrower's perspective, it would appear that we are otherwise destined to continue the compromise approach of the last decade.

■ **RECOMMENDATION**

A Mortgage Arrears Review Office

Taking into account the existence of a prescriptive personal insolvency regime that the State would be very unlikely to wish to dismantle at this point, a Mortgage Arrears Review Office should be provided for in legislation. Such an Office would act as a 'clearing house' to resolve family home mortgage arrears cases to avoid repossessions, while simultaneously acting as a conduit to a potential increase in Personal Insolvency Arrangements.

8.4. HOW A 'MORTGAGE ARREARS REVIEW OFFICE' MIGHT FUNCTION IN PRINCIPLE

By way of further context, the end 2021 figures broke down accounts in terms of the extent of mortgage arrears into the following categories:

TABLE 4: MORTGAGE ARREARS BY DURATION

Amount of Arrears	Number of accounts
1-90 days	14,504
91-180 days	3,284
181-365 days	3,376
1-2 years	4,223
2-5 years	7,308
5-10 years	8,961
Over 10 years	5,406
TOTAL	47,062

Source: Central Bank of Ireland, Mortgage Arrears Statistics, Q4-2021.

These arrears cases broadly divide into **21,000** accounts in arrears of under one year and **26,000** of over one year (the latter again being the CBI's definition of long term arrears). The vast majority of the accounts in arrears that are in legal proceedings at present are in arrears of over one year.

For early arrears accounts

14,504 (31% or close to one in three of the accounts in arrears) are in comparatively light arrears of less than three months. **8,970** of these (62% or almost two in every three) are said to be co-operating but are not in a restructure arrangement.[366] It is imperative that these accounts are not allowed to drift into a worse arrears situation and that alternative repayment arrangements (ARA) that are realistic and sus-

[366] See CBI moa excel data tables, Table 5, Borrower engagement - https://www.centralbank.ie/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears, accessed 9th September 2022.

tainable are proposed and agreed as a matter of urgency. MABS DMA's and PIPs working under the Abhaile scheme should be made available as soon as possible to help to negotiate agreements. Mortgage lenders must also play their part in ensuring that borrowers in arrears are encouraged to avail of this assistance.

Short-term arrangements such as interest-only should be avoided, and only used if they are appropriate in the circumstances. The emphasis should be placed on formal and sustainable long term ARA's from the beginning, unless the problem is clearly likely to be a short term one, and accounts that might be suitable for a Personal Insolvency Arrangement (PIA) should also be identified at an early stage.

■ **RECOMMENDATION**

Mortgage Arrears Review Office and early arrears accounts

A revised, more balanced and transparent CCMA/MARP process, with a right of review/appeal to an independent third party, as recommended above, should be put in place.[367] This right of review for borrowers should lie to the independent 'Mortgage Arrears Review Office'. Thus, where a lender declines to offer an ARA or restructure to a borrower, or offers one that the borrower (and/or his/her advisor/s) does not believe is fair or sustainable, the borrower may seek to have the file reviewed by the Review Office.

For more advanced arrears accounts

A further **6,660** accounts were in arrears of between three months and one year at end 2021. These borrowers should at this point have been processed by their lender through the existing MARP/CCMA process. Some will not have received an offer of an ARA and others may be unhappy with the ARA they have been offered. Thus, for example, a total of **2,489** of these accounts (37% of the total) were said to be co-operating but were not on a restructure arrangement at the end of 2021.[368]

It is not clear whether this number solely comprised accounts that have not been offered a restructure or also comprises accounts that have been offered a restructure and have rejected it, possibly because it is perceived by the borrower(s) to be too restrictive in their financial circumstances. It seems unlikely in principle that the latter number would be included, since the definition of co-operation in the CCMA/MARP would allow the lender to declare a rejection of the ARA within three months as a failure to co-operate.[369] If this assumption is correct, this is a very significant number of accounts, i.e. 2,489, in comparatively early arrears who have not been offered a restructure arrangement by their lender.

■ **RECOMMENDATION**

Mortgage Arrears Review Office and advanced arrears accounts

A realistic appraisal of the borrower's financial capacity to service an arrangement should be the primary consideration in more advanced arrears cases. Any borrower in this category should be entitled to resubmit (or submit as the case may be) their case for consideration to the lender under a reconstituted MARP/CCMA in order: 1) to seek to obtain an arrangement where one has not been put in place; or 2) to seek to put in place a different arrangement to the one that has been proposed and put in place. Again, access to MABS DMA's and PIPs working under the Abhaile scheme (or equivalent) should be available and promoted from the outset. If the borrower is not happy with the

[367] See Section 3.1. above.

[368] Ibid, see CBI moa excel data tables, Table 5, Borrower engagement.

[369] One of the definitions of a very complex and multi-faceted definition of 'not co-operating' at page 4 of the Code of Conduct on Mortgage Arrears 2013 reads: *'A borrower can only be considered as not co-operating with the lender when a three month period elapses: i) (A) where the borrower has not entered into an alternative repayment arrangement, and during which the borrower: (i) has failed to meet his/her mortgage repayments in full in accordance with the mortgage contract ; or (ii) meets his/her mortgage repayments in full in accordance with the mortgage contract but has an arrears balance remaining on the mortgage'.*

outcome of this review of the assessment (or assessment as the case may be), s/he should be entitled to seek a review through the Mortgage Arrears Review Office.

Long-term arrears accounts

Thereafter, the remainder of the accounts in arrears, **25,898** in total, involve those in arrears of over one year at end 2021, the CBI's working definition of long term arrears. For the purposes of potential resolution, these accounts can be divided into:

- accounts in existing legal proceedings or in legal proceedings that have concluded (and where arrears remain outstanding)
- accounts where no legal proceedings have as yet been brought.

In terms of accounts in the legal process, we can see from the CBI figures that **5,699** out of the total of **5,943** accounts in legal proceedings at end 2021 were in arrears of over one year.[370] In the case of a further **6,341** accounts, legal proceedings had concluded (and arrears remain outstanding) but there is no breakdown given of the length of time these accounts have been in arrears.[371] It is likely however that the significant, if not the vast, majority of these 6,341 accounts are in arrears of over one year.

By a rough estimate therefore, there may be close to **12,000** accounts in arrears of over one year that either are, or have been, the subject of legal proceedings. This would leave close to **14,000** accounts in arrears of over one year that are not, and have never been, the subject of legal proceedings.

Long-term arrears accounts in proceedings or where proceedings have concluded

The reason for trying to divide these accounts in this manner is that once legal proceedings are in progress in an arrears case, there is little that can be done to resolve the account, unless the plaintiff lender (in particular) and the defendant borrower, in consultation with the relevant Circuit Court County Registrar, can come to an accommodation and choose to do so. This is not to suggest that this is a rare occurrence. Indeed, we know from the CBI figures that a number of cases where legal proceedings have concluded but arrears remain outstanding do not result either in a Possession Order being granted or the execution of a Possession Order that has been granted.[372]

As we have speculated in Paper Two of this series, there are indeed likely to be instances where lenders regret that they served legal proceedings at all and there is evidence that some cases have been variously settled or adjourned generally on agreed payment terms.

RECOMMENDATION

Mortgage Arrears Review Office and long-term arrears accounts in legal proceedings

Where the parties are in agreement, an existing repossession case could be adjourned for the account to be run through a Mortgage Arrears Review Office to see whether a resolution can be achieved that could lead to a strike-out of those proceedings. Again, quick access to MABS DMA's and PIP's for the defendant borrower would be essential and the emphasis would need to be on identifying formal long term ARA's and accounts that may be suitable for

[370] Ibid, see CBI moa excel data tables, Table 5, Borrower engagement.

[371] Ibid, see CBI moa excel data tables, Table 1, PDH overview.

[372] According to CBI guidance notes, this includes cases where court proceedings have concluded because:

- Proceedings have been struck out;
- Settlement agreement has been entered on the record;
- Proceedings have been adjourned generally (i.e. proceedings may have been settled, but the settlement remains a matter of agreement between the parties and does not form part of the court record. In such cases the lender will be able to recommence proceedings if the borrower does not comply with the agreement);
- Proceedings have been dismissed;
- Judgement has been entered in favour of the lender, including where an order for possession or sale has been granted by a court (includes orders obtained with a stay of execution).

See: https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/credit-and-banking-statistics/mortgage-arrears/mortgage-arrears-data/residential-mortgage-arrears-and-repossessions-statistics-explanatory-notes.pdf?sfvrsn=12, accessed 13th September 2022.

a Personal Insolvency Arrangement (PIA). In terms of the latter, it should also be stressed that favourable changes to the Personal Insolvency Act 2012, following the completion of the review that is currently in progress, would be a helpful development. [373]

Long term arrears accounts where no proceedings have been brought

There then remains an estimated close to **14,000** accounts in arrears of over one year that are not, and have never been, the subject of proceedings (again the CBI should be in a position to provide an exact figure here). There is every reason in our view to: 1) avoid repossession proceedings being brought on such accounts and 2) to seek to find a resolution to these accounts through a concerted approach by a Mortgage Arrears Review Office.

There is evidence from the CBI figures to suggest that attempts at resolution of these cases by mortgage lenders have not been as thorough as might have been. For example, only **3,738** of these accounts were said to be on a restructure at end 2021 while **9,955** (or roughly two in every three) were stated to be **'co-operating with their lender' but *not* on a restructure arrangement.**[374] From these almost 10,000 cases, it is clear that the borrower has filed the Standard Financial Statement (SFS) and engaged with the MARP process, otherwise, s/he would have been deemed to be 'not co-operating', but an agreed restructure has not resulted. Again, as posed in Paper Two of this series, an important question is what kind of payments are being made in these cases?

An objective detailed assessment by a third party as to what is happening in these cases is surely overdue at this point. Up to now, in the current system, this may only occur when repossession proceedings are brought and the matter comes before a County Registrar.[375] When this happens, our experience is that a more objective assessment of the situation is sometimes made, often motivated by a desire to avoid the unnecessary repossession of family homes**.** It seems to us that, in principle, there is a range of potential options open to settling some of these more difficult long term mortgage arrears cases in order to avoid repossession proceedings being served on the borrower. The following options are intended to reflect some of the suggestions for reform already made in the course of this paper, in particular in the area of personal insolvency, and might include:

- Long term alternative repayment arrangements (ARA's) which are potentially sustainable but into which neither the borrower nor the lender, or both, has been willing to enter into up to now.
- Long term sustainable alternative repayment arrangements (ARA's) that could be assisted by a writedown of some capital by the lender/loan owner and (perhaps) a capital writedown contribution by the State.
- Personal Insolvency Arrangements (PIA's) which could be assisted by a writedown of some capital by the lender/loan owner and a capital writedown contribution by the State.
- Personal Insolvency Arrangements (PIA's) which, with some legislative changes concerning mortgages in positive equity, might facilitate older borrowers to have a lifetime right of residence in their homes on substantially reduced payments, and upon death, enable the lender to recover the outstanding balance.[376]
- Personal Insolvency Arrangements (PIA's) which, with some legislative changes concerning mortgages in positive equity, might enable a debt for equity swap to be put in place that would allow for more affordable payments on the mortgage and would either: 1) pay off the mortgage over

[373] See further Section 4.4. and 4.7. above.

[374] Ibid, CBI Table 5, Borrower engagement.

[375] Under Rules 49-55 of the CCMA, a borrower can appeal an adverse decision under the MARP process to an Appeals Board appointed by the lender, which must be comprised of three of the lender's senior personnel, who have not been involved in the borrower's case previously. In practice, there is very little confidence in this option from the borrower perspective and little evidence, at least anecdotally, that it alters the outcome.

[376] See Section 4.4. above for more discussion on this issue.

a longer period or 2) or upon death, enable the lender to recover the outstanding balance.[377]

- Debt Settlement Arrangements (DSA's) which might enable an arrangement to be put in place to pay a dividend to unsecured creditors over a defined period while a reduced or no payment is made on the mortgage, followed by a much larger payment on the mortgage when unsecured credit claims are extinguished.
- Mortgage to Rent (MTR) arrangements which, with greater tweaking of the property price thresholds and the permitted positive equity limits, would allow a larger number of borrowers to remain in their current family home as social tenants with a potential buy back option in the future.[378]

■ **RECOMMENDATION**

Mortgage Arrears Review Office and long-term arrears accounts not in legal proceedings

Mortgage Arrears Review Office and long-term arrears accounts not in legal proceedings

A Mortgage Arrears Review Office could oversee efforts to resolve such long term arrears cases, working in conjunction with the borrower's advisors (DMA's and PIP's for example) and the lender's staff and representatives, by modelling the application of resolution options to specific accounts in arrears.

8.5. A MORE PROACTIVE APPROACH

At the beginning of this section, we provided a brief summary of the key provisions of the Land and Conveyancing Law Reform (Amendment) Act 2019. We noted that it has failed, despite its intentions, to make any demonstrable impact in terms of the resolution of mortgage arrears cases. We suggested that this was because these provisions can only be realistically deployed at present towards (or at) the conclusion of legal proceedings, where the fact of ongoing arrears is established but the court is nonetheless being asked to refuse to grant a Possession Order.

In essence, the six criteria set out at the beginning of this Section (8.1 above) oblige the court to investigate the circumstances of the borrower and to assess the conduct of the borrower and the lender respectively in terms of how they have sought to resolve the arrears problem. Although these criteria have not as yet been judicially explored to our knowledge, what is being gauged here, theoretically at least, seems to be whether there was a viable alternative or alternatives to repossession and the extent to which these were explored. From a public policy perspective, there is every reason in our view to provide for this. It is not, for example, in the public interest for family homes to be repossessed in a jurisdiction that currently has an acknowledged shortage of both private and public housing options, a shortage that is unlikely to be remedied in the short term.

■ **RECOMMENDATION**

Mortgage Arrears Review Office and Repossession Proceedings

A potentially more pro-active application of the criteria set out in s.2A (3) of the Land and Conveyancing Law Reform (Amendment) Act 2019 might be to oblige all lenders in family home mortgage arrears cases to have to seek leave from the Mortgage Arrears Review Office to bring repossession proceedings in the Circuit

[377] See also Section 4.4. above.

[378] See Section 6 above.

Court, with that Office being empowered to apply these criteria (or similar criteria) in arriving at its decision. An appeal would be available to the Circuit Court should lenders wish to challenge the Review Office's decision, were it to decide to refuse to grant such leave.

It is likely, were such a measure to be introduced, that it would also be open to challenge by a lender/loan owner on constitutional grounds as outlined above. In particular, it might be argued that it would be an impermissible interference with the right of a party to a contract to bring legal action in the courts seeking a remedy for breach of that contract. However, it might be presented in counter-argument that should the Review Office refuse to grant leave to bring repossession proceedings against a borrower in arrears, an appeal would be immediately available to the Circuit Court for the lender in question. Thus, it might be suggested that such a measure is a carefully balanced and strictly proportionate intervention, which has taken full account of the respective rights and obligations of both lender and borrower.

The key objective of any such measure would be to place an important onus on a lender/loan owner to show that it fully complied with all codes and processes designed to avoid the repossession of family homes; further, that it fully adhered to the legislative criteria and acted reasonably and with due regard to the public interest. Thus, the onus would be on the lender/loan owner to demonstrate that any legal action would be an absolute last resort and that all avenues towards resolution had been fairly and thoroughly explored. Analysis of the CBI PDH mortgage arrears data set out in some detail above would suggest that this is not happening in many instances at present.

■ **RECOMMENDATION**

Mortgage Arrears Review Office and Personal Insolvency Arrangements (PIA)

Where a PIA proposal is made on behalf of the Principal Dwelling House (PDH) borrower in arrears and is rejected by the PDH mortgage lender, the current right to seek a review in the Circuit Court under the Personal Insolvency Act 2012 would continue to apply. Thus, the integrity of the personal insolvency regime would remain unaffected.

9

SECTION

Conclusion

The world of consumer credit and consumer debt can change rapidly in response to diverse influences ranging from developments in technology, to the ebb and flow of economic cycles, to unforeseen events outside our control. The post-Covid era that we have entered into has already brought rapid and unexpected change, with major challenges emerging particularly for consumers on low to middle incomes in terms of capacity to service loans and other financial obligations.

Despite the proposals in the current administration's 'Housing for All' policy, it is apparent that the State has insufficient control of the housing market at present and it will take time, a lot of public monies, and a refined strategy, to restore some equilibrium. We have lurched from a 'free for all' property boom in the noughties that has proved to be very expensive for many, to a tightly controlled mortgage market at present, with access to public housing options also continuing to be very limited. Current CBI lending controls, together with low levels of supply, have served to ensure that an affordable mortgage is way beyond the capacity of most. Private housing rent levels are very high, leaving many younger people with jobs, and what might once have been considered to be decent earnings, unable to find an affordable place to live. Even the ludicrously termed 'bank of Mum and Dad' is largely powerless to influence events, except for the relatively wealthy.

There is still a deep legacy mortgage arrears problem which appears from tracking the CBI arrears figures to be of slowly declining proportions. A radical programme of action should be put in place to attempt to resolve this particular societal problem once and for all, and although this would be both difficult and potentially costly, it is past time that it is comprehensively tackled and we have made a number of proposals to this effect above. Any increase in new family home mortgage arrears cases due to the effects of Covid and recent economic events needs to be carefully watched, but it seems unlikely to have occurred to any significant extent at this point. In this regard, we would suggest again that the CBI ensures that in each reporting quarter, lenders separately identify cases of *new* arrears, on the one hand, and accounts that have *exited* arrears, on the other, rather than the net position, so that a clearer picture of the evolving situation is provided. Those new cases of arrears that do occur can be tackled fairly and decisively by a more pro-active and better regulated use of a more balanced MARP/CCMA process or overarching 'Code on Personal Debt'. The days of 'interest only' as a lender's default response should be long gone at this point.

Thereafter, for as long as the inherent restrictions of accessing mortgage credit continue, it seems likely that the incidence of mortgage arrears should not worsen to post 2008 levels, since there are likely to be fewer family home mortgages and those that have been drawn down in recent years are less likely to develop an arrears problem. However, recent evidence concerning house price inflation gives plenty of pause for thought, and further, given current post-Covid inflationary trends right across the Member States of the European Union and the arrival of recession, significant ECB interest rates increases will eventually push up the cost of repayments for those that do have a family home mortgage. The arrears incidence may thus rise.

The greater challenge in all of this from the personal debt perspective may be the potential for increased payment difficulties and potential insolvency in terms of *unsecured* debt, across non-mortgage credit agreements such as personal loans, hire purchase and personal contract plans (PCP), credit card, credit sale and overdraft agreements, together with rent arrears and utility arrears. In comparative terms, renting property is now more expensive, in many instances, than purchasing and the current rate of inflation, incorporating escalating costs of energy, fuel, services and food, shows little sign of abating in the short term.

The four papers in this series have demonstrated that household debt problems in a market-based economy such as Ireland's are likely to continue to arise as a result of a complex and interconnecting set of factors. Some of these are structural and socio-economic, others are more to do with institutions and systems, while a third set involve things that happen at individual and

cultural levels, commonly as a result of force majeure events.

The upshot of these myriad causes is a set of consequences that play out in different ways for the various parties involved. While this series is written from a debtor advocacy perspective, and we are most concerned with addressing the associated financial, health and wellbeing effects at the personal and household level, we also acknowledge that there are burdens too on creditors and statutory institutions, particularly in terms of financial costs and demands on related services and systems.

In conclusion, there are a number of lessons to be drawn from our analysis in this "Pillar to Post" series.

The first is that we need to adopt a much more planned, cohesive, and proactive approach to policy in the personal debt domain. In support of this, we recommend a more reflective, data-driven, evidence-based response than that which has pertained heretofore. The aim here is to ensure that policymakers - and those involved in system/service delivery - have relevant and timely information upon which to draw, and that this intelligence includes the perspective of those carrying the largest burden, namely the debtor households themselves.

A second lesson is that "interim", "holding" and "last ditch" responses do not work in the medium/longer term for any of the three key stakeholder parties involved (debtor, creditor and state), and that new, resolution based thinking is needed as we enter into difficult economic waters due to external events.

A third lesson is that incremental policy change, while arguably well intentioned, leads to complex service and systemic patchworks, which are hard to fathom, difficult to navigate, and often unwittingly marginalise and exclude.

The final and most important lesson perhaps is that we need to need to reflect much more as a society on what we are doing in the personal debt domain, why we are doing it, and who we are thinking or not thinking of when we contemplate related policy actions and make associated amendments. The thread that links these four papers together is rooted in human rights and equality-based theory. It may be articulated thus: if we are encouraging people to take on debt burdens in pursuance of a marketised, economic growth model, we need to make sure that they are treated humanely, equitably and with dignity if and when things go wrong and, as far as possible, to prevent people from getting into difficulty in the first place. Further, we need to ensure that the model is an inclusive one which does not marginalise, either deliberately or unwittingly.

We hope that this series of papers contributes towards bringing about such an inclusive model.

Thank you for reading this material.

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