



**An Bille um Athchóiriú an Dlí Talún agus Tíolactha
(Leasú), 2019**
**Land and Conveyancing Law Reform (Amendment) Bill
2019**

Meabhrán Míitheach
Explanatory Memorandum



**AN BILLE UM ATHCHÓIRIÚ AN DLÍ TALÚN AGUS
TÍOLACTHA (LEASÚ), 2019
LAND AND CONVEYANCING LAW REFORM (AMENDMENT)
BILL 2019**

EXPLANATORY MEMORANDUM

Mortgages provide lenders with security for their loans. In the event of financial or other difficulties resulting in default by the borrower¹, the lender's claim on the secured property takes precedence over the claims of other creditors.

In the event of default by a borrower, repossession of the mortgaged property is one of the remedies available to lenders. However, the Government's clear policy objective has been that repossession of a defaulting borrower's principal private residence should remain an action of last resort when all other possible remedies have failed. That remains the case, and the provisions of this Bill are intended to give further support to that objective.

Background

The Land and Conveyancing Law Reform Act 2013 already provides that a court may, when considering whether to grant a repossession order to a lender in respect of a borrower's principal residence, adjourn the proceedings either of its own motion or on request of one of the parties to the proceedings. The purpose of such an adjournment will be to facilitate consultation with a personal insolvency practitioner (PIP) with a view to concluding a Personal Insolvency Arrangement (PIA) in respect of the borrower under the Personal Insolvency Act 2012. A successfully concluded PIA will act as an alternative to repossession and will permit the borrower to remain in his or her principal private residence.

In summary, the 2013 Act seeks actively to encourage the remedy of a PIA under the Personal Insolvency Act 2012 as an alternative to the repossession remedy, thereby allowing the borrower, and any dependents, to remain in his or her principal private residence.

Adjournment of the court proceedings under the 2013 Act to permit examination of a possible PIA as an alternative to repossession may not lead to a successful outcome in every case for a number of reasons. For example, prior to commencement of the court proceedings, the borrower may have engaged already in the PIA process but was unable to meet the solvency threshold, i.e. the requirement under the Personal Insolvency Act 2012 to

¹ The terms "borrower" and "lender" are used here instead of the legal terms "mortgagor" and "mortgagee" respectively that are used in the draft Bill.

achieve solvency within 5 years of entering a PIA. In such a case, a court may decide not to grant an adjournment under the 2013 Act because the PIA option had already been found not to be viable.

In other cases, progress may have been made towards agreement on a PIA but the lender's agreement is not forthcoming and the court has not made an order under section 115A(9) of the 2012 Act to confirm the coming into effect of the PIA notwithstanding such refusal.

Provisions of this Bill

The principal purpose of this Bill is to broaden the range of matters that a court must take into account when deciding whether to grant a possession order to a lender in respect of a borrower's principal private residence. The court may also take this broader range of matters into account where, for whatever reason, efforts to secure a PIA have failed or where despite the borrower's participation in a scheme designed to enable borrowers with mortgage arrears to remain in their principal private residence, the court proceedings have continued. In order to achieve this purpose, the draft Bill proposes to insert a new section 2A into the Land and Conveyancing Law Reform Act 2013.²

Section 1

This section contains a definition of the "Act of 2013", i.e. the Land and Conveyancing Law Reform Act 2013.

Section 2

This section contains technical amendments to section 2(5) and section 2(7) of the Act of 2013.

Section 3

This is the key section and it proposes to insert a new section 2A, containing nine subsections, into the Act of 2013.

Subsection (1)

This defines the scope of this new section. It will apply not only in cases in which the court has adjourned proceedings under section 2 of the 2013 Act, but also where—

- the borrower has previously engaged the services of a PIP to assist in the resolution of his or her mortgage arrears problem, or
- the borrower has participated in good faith in a scheme designed to enable indebted borrowers to remain in their principal private residences (see definition of "designated scheme" below).

This means that section 2A will apply in the following cases:

- (a) those in which the court had already adjourned proceedings of its own motion under section 2(2)(a) of the 2013 Act but notwithstanding such adjournment there is no resulting PIA;
- (b) those in which the court refused to adjourn proceedings in response to a request of one of the parties under section 2(2)(b) of the 2013 Act, or did adjourn them and notwithstanding such adjournment, there is no resulting PIA;
- (c) those in which proceedings have not been adjourned under section 2 of the 2013 Act but the borrower has, prior to the court hearing—

² For comprehension purposes, the attached working document outlines the content of the 2013 Act as amended by section 3 of the draft Bill.

- (i) participated in good faith in a scheme to assist borrowers in mortgage distress to remain in their principal private residence, or
- (ii) engaged the services of a PIP to assist him or her to resolve his or her mortgage arrears problem and despite such engagement, there is no resulting PIA.

Subsection (2)

This provides that when considering whether to make or refuse to make an order for possession in repossession proceedings, a court must take account of the matters referred to in subsection (3). It may also do so when considering whether to grant any other order it considers appropriate in the circumstances of the case, e.g. an adjournment of the proceedings.

Subsection (3)

The matters that the court must take account of when considering whether to make or refuse to make a possession order are the following:

- (a) whether the making of the order would be proportionate in all the circumstances of the case; application of this principle recognises the role of the court in balancing the interests of both the borrower and the lender when considering whether to make or refuse to make an order for possession;
- (b) the circumstances of the borrower and his or her dependents (if any);
- (c) whether the lender has made a statement to the borrower of the terms on which it would be prepared to settle the matter in such a way that the borrower and his or her dependents could remain in their principal private residence;
- (d) details of any proposal put forward by or on behalf of the borrower either—
 - (i) to enable him or her, and any dependents, to remain in the principal private residence, including any proposal for participation by the borrower in a scheme to assist persons in mortgage distress to remain in their principal private residence or,
 - (ii) to secure alternative accommodation;
- (e) the response, if any, of the lender to the borrower's proposal to remain in the principal private residence;
- (f) the conduct of the parties in any attempt to find a resolution to the borrower's mortgage arrears difficulties. This means that the court may take account of a lender's refusal or reluctance to engage in attempts to find a resolution of the arrears issue, and also of a borrower's refusal to engage in meaningful engagement with the lender in order to find such a resolution.

Subsection (4)

Additional matters to which the court may have regard when considering whether the making of an order for possession would be proportionate include those set out in this subsection:

- (a) the amount of debt outstanding on the mortgage concerned;
- (b) the amount of arrears outstanding on the mortgage concerned;

- (c) the advised market value of the principal private residence at the date on which the proceedings were commenced.

For the purposes of subsection (4)(c), a definition of “advised market value” (AMV) is set out in subsection (9). This is based on the corresponding definition in section 2 of the Property Services (Regulation) Act 2011. An AMV must be provided by the holder of a relevant licence issued by the Property Services Regulatory Authority under that Act.

Subsection (5)

This subsection, to which reference has already been made in subsection (1), clarifies that the fact that there is no resulting PIA may arise from the fact that a proposal for a PIA has not been made, or such a proposal has been made but the procedure has ended without success.

Subsection (6)

This subsection identifies the circumstances in which the PIA procedure is considered to have ended under the 2012 Act:

- where a PIP has prepared a proposal for a PIA and the debtor has consented to that proposal and the calling of a creditors’ meeting, but that meeting does not take place before the expiry of the protective certificate in accordance with section 106(3);
- where, under section 108(8)(b), at the taking of a vote at a creditors’ meeting in relation to a PIA proposal, the proposal is not approved by a majority of creditors in accordance with section 110 or deemed to be approved, and the PIA procedure has terminated;
- where, in a case under section 111A, there is only one creditor and the creditor does not approve the proposal under section 111A(8), or the PIP fails to give the creditor a written notice of the proposal before the expiry of the protective certificate under section 111A(9);
- where the court upholds an objection to the PIA under section 120 and the procedure is deemed to come to an end in accordance with section 114(3);
- where, under section 115A(9), the court refuses to make an order confirming the coming to effect of the proposed PIA following a court review under section 115A;
- where the debtor is in arrears with his or her payments for a period of 6 months of the PIA and it is deemed to have failed under section 123.

Subsection (7)

This subsection will permit the Minister for Justice and Equality to designate a scheme for the purposes of establishing eligibility to benefit under this section. Any such scheme must comply with the following conditions:

- the objective must be to provide those borrowers with arrears difficulties in respect of their principal private residence with assistance that is reasonably likely to enable them to address these difficulties and facilitate, as far as possible, their remaining in their principal private residence, and

- it is reasonably likely such assistance will be provided under the scheme.

Subsection (8)

This subsection provides that an AMV must be specified in a statement provided by a licensee under the Property Services (Regulation) Act 2011.

Subsection (9)

This subsection contains relevant definitions for the purposes of this new section.

Section 4

This section contains the short title, collective citation and commencement provisions.

An Roinn Dlí Cirt agus Comhionannais,

Feabhra, 2019.