

complaint

Mr M complains that Bank of Ireland (UK) Plc won't accept that it is bound by his Individual Voluntary Arrangement ("IVA") and is pursuing him for the mortgage shortfall following the sale of a property. Mr M wants BOI to accept that it is bound by the IVA, update his credit file and pay him compensation.

background

Mr M was in financial difficulties and owned a number of properties. One of the properties he owned with his wife was subject to a BOI mortgage and in negative equity. Mr M entered into an IVA in 2016. Mr M's formal IVA Proposal was based on this property along with others being subject to receivership action within the next couple of weeks. The receivership would crystallise the shortfalls and they would be treated as contingent liabilities to receive a dividend as part of the arrangement.

BOI as secured creditor didn't participate in the IVA and didn't submit a proof of debt form when asked to do so by the Supervisor. So, it didn't receive a dividend. The IVA completed on the 20 April 2017. BOI sold the mortgaged property in January 2018 leaving a shortfall of more than £22,000. The bank says that it's not bound by the IVA and should be able to collect its debt. Mr M says that as BOI was entitled to vote at the creditors meeting it's bound by the terms of the IVA.

Our investigator's view was that as a secured creditor BOI couldn't be affected by the IVA unless it specifically consents. In this case it decided to rely on its security rather than take part in the IVA. So, our investigator didn't recommend that this complaint should be upheld. Mr M disagreed and asked for a review.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

In this complaint Mr M says that BOI is bound by the IVA and shouldn't be able to pursue him for the mortgage shortfall after a property was sold. In 2016 Mr M was in financial difficulties and proposed an IVA. BOI at that stage had an unsecured debt valued in the Statement of Affairs for £7440. I noted that BOI on the basis of that debt took part in the IVA and voted against the arrangement. The proxy form it submitted didn't refer to a proxy-holder although I presume it was intended to be the Chairman of the creditor's meeting but the Chairman ruled BOI's vote invalid because of that omission. I believe it's not unusual in those circumstances for the Chairman of the meeting to clarify who the proxy-holder was to be. If BOI's vote had been accepted the Debtor's Proposal wouldn't have been carried. But it was disallowed and the Proposal passed.

Besides this unsecured debt, BOI also had security for its debt. Mr M also owned three properties with others that were subject to BOI mortgages that Mr M excluded from the IVA. But Mr M believes that the unsecured part of BOI's loan of another property was to be included.

BOI makes several submissions to say why this debt isn't covered by the IVA. Firstly it says that it didn't participate in the IVA and that so the mortgage shortfall wasn't included in the terms of the arrangement. It says that *"It is the creditor's decision to agree that a debt can be included in the IVA"* and in this case BOI chose not to do so. Mr M says that that is not the case and that *"BOI had the opportunity to vote in the IVA and chose not to do so"*.

BOI's second objection is that the debtor's proposal affected its rights to enforce its security contrary to Article 232 of the Order. The relevant section is:

"232 Decisions of creditor's meeting.

{5)The meeting shall not approve any proposal or modification which affects the right of a secured creditor of the debtor to enforce his security, except with the concurrence of the creditor concerned "

It's not clear to me that the proposal affected BOI's rights to enforce its security as BOI subsequently sold the property and enforced its security.

But I don't consider that the Proposal was clear as to how it would affect BOI, as secured creditor. Firstly I noted that in his letter calling the meeting of 26 February 2016 the Nominee says that he is writing to *" unsecured creditors"* and that the meeting is being called *"In order that unsecured creditors might consider the proposal "*. No mention is made of this being an invitation also to secured creditors to consider the Proposal. As mentioned, BOI voted for its unsecured debt against the proposal but didn't vote as a secured creditor. A common-sense reading of that letter is that only unsecured creditors were being asked to vote on the debtor's proposal.

That may indeed be what other secured creditors concluded as none of the secured creditors voted on the Proposal. Only three of the unsecured creditors voted on the Proposal - one of whom was BOI who voted against - and none of the secured creditors. I note that this is despite the Nominee saying that he had regular dealings with the main voters. It would seem unfair that BOI's secured debt should be bound by a Proposal that was not invited to consider as a secured creditor.

BOI also makes a further submission. It says that the Proposal as drafted was to deal with a situation where as Paragraph 15 says *"all the Properties within the portfolio are or are likely to be under Receivership control within the next few weeks. As the shortfall will be crystallised by Receiver action I would propose treating them as contingent liabilities."* BOI says that given that legal proceedings for possession had already commenced there was no prospect of this property being put under receivership control or a shortfall crystallising because of that, as a receiver wasn't appointed. That indeed seems to be the case.

BOI says that there was a High Court hearing on 25 November 2015 prior to the Proposal and then several adjournments to give the borrowers the opportunity to sell the property so Mr M would have been aware of these legal proceedings before he made his Proposal. I have seen a Court Order dated 3 October 2016 ordering delivery of possession of the property to BOI. There is no reference in the Proposal to those legal proceedings. So, it would seem that the proposal was intended to cover a circumstance - the crystallisation of a debt after the appointment of a receiver - that wasn't relevant to the BOI debt. Mr M is asking me to agree with him that in those circumstances that BOI has agreed to waive its ability to pursue for the mortgage shortfall which resulted from those legal proceedings and not from the appointment of a receiver. But that doesn't appear to me to be set out in the Proposal.

My role is to come to a decision based on what's fair and reasonable in all the circumstances. Mr M is inviting me to accept that BOI can't require him to repay the mortgage shortfall. BOI clearly didn't approve of the arrangement but its vote was considered invalid. Although Mr M says that BOI had the opportunity to vote in the IVA but chose not to do so, that's not correct. BOI voted against, but the Chairman considered the vote invalid. It's not clear to me that as a secured creditor that an invitation was extended to it to vote or even consider the IVA given that the Proposal was addressed to unsecured creditors .

It's also not clear that the Proposal covered the circumstances where BOI had issued proceedings to obtain possession of the property, wasn't intending to appoint a Receiver and in fact didn't do so. In my view the IVA didn't cover the specific circumstances that applied to the BOI debt and there is no evidence that BOI agreed to it. So I can't fairly agree with Mr M that this debt fell within the IVA. For the above reasons I don't uphold this complaint.

my decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 15 December 2019.

Gerard McManus
ombudsman