THE HIGH COURT ON CIRCUIT

[2016 No. 282 CA]

[C:IS:ESLH:2016:000463]

EASTERN CIRCUIT **COUNTY OF LOUTH**

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012-2015
AND IN THE MATTER OF PAULA CALLAGHAN OF 246 RATHMULLEN PARK, DROGHEDA, CO. LOUTH ("THE DEBTOR")
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015

JUDGMENT of Ms. Justice Baker delivered on the 22nd day of May, 2017.

1. This judgment is given in the appeal of KBC Bank Ireland plc ("KBC"), the objecting creditor, from an order of the specialist judge of the Circuit Court, Judge Mary O'Malley Costello, by which she confirmed the Personal Insolvency Arrangement ("PIA") of the debtor under s. 115A(9) of the Personal Insolvency Acts 2012 – 2015 ("the Act") and dismissed the objection of the objecting creditor. This judgment is also given in the appeal of an identical order made by the specialist judge in the interlocking application of Colm Callaghan, Record No. 2016 283 CA.

2. The primary ground of appeal is that the specialist judge of the Circuit Court erred in law and in fact in finding that the proposed PIA was not unfairly prejudicial to the interests of the objecting creditor, and that she erroneously came to the view that the proposed PIA enabled the creditor to recover the debts due to it to the extent that the means of the debtors reasonably permitted.

3. The appeal arises from a submission made by the objecting creditor under s. 98(1) and s. 102(1) of the Act by which the objecting creditor made an alternative proposal to deal with the mortgage debt on the principal private residence of the couple. Other less central grounds of appeal will appear in the course of this judgment.

4. One matter for determination is whether the Act permits the coming into force of a PIA which would involve deferring or "warehousing" the repayment of a portion of secured debt beyond the specified term of the Arrangement.

Relevant facts

5. The debtors are a married couple who reside with their three young children in a three bedroom semi-detached property in Drogheda held by them subject to a mortgage in favour of KBC, the term remaining whereof is 273 months. The secured amount was €285,647 at the date of the issue of the protective certificate on 20th April, 2016. The principal private residence of the couple has a value in accordance with s. 104 of the Act of €105,000.

6. The mortgage debt fell into arrears arising from the fact that both husband and wife were out of work. Mrs. Callaghan was unable to work due to ill health and only in recent months began to receive a weekly invalidity pension. Mr. Callaghan was out of work for approximately sixteen months, but has now obtained employment. In the period when both husband and wife were not working, the mortgage fell into significant arrears and the liabilities of the couple now far exceed their joint monthly incomes.

7. Interlocking PIAs were proposed by the Personal Insolvency Practitioner ("PIP"), Daragh Duffy, the material elements of which I now set out.

Proposed PIA

8. A six-year PIA is proposed. The estimated joint monthly income of the couple for the period of the PIA is €3,025, which after taking into account reasonable living expenses and other costs, leaves available during the currency of the PIA the sum of €474 per month to service mortgage repayments. The amount available will increase at the end of the PIA to €582 for the remainder of the mortgage term. It is proposed that for the period of the PIA the interest rate on the mortgage would be reduced to 2.5% and thereafter would revert to 4.5% for the balance of the term. The short term reduction in the interest rate is proposed in order to provide finance to deal with the unsecured liabilities and pay the fees of the PIP. The mortgage term is to be extended by six years until Mr. Callaghan is aged 70, to January, 2045. There was proposed a debt write-off, called a "negative equity write-off", of €165,647 leaving a live mortgage balance of €120,000. The amount written down will rank as unsecured and will receive a dividend within the Arrangement. The provision to deal with unsecured creditors is not the focus of this appeal.

9. The statutory meeting of creditors was held on 17th June, 2016, and the PIA was rejected by the majority of creditors present. The secured creditor voted against the proposal.

The section 115A application

10. Following the result of the meeting of creditors, the debtors brought an application pursuant to s. 115A(9) of the Act in the Circuit Court for an order confirming the coming into operation of the PIA notwithstanding that it had been rejected at the meeting of creditors. The statement of grounds in statutory form prepared for the purposes of the s. 115A(9) application stated that the PIA provided a

better return for creditors than in bankruptcy and had the consequence that the debtors retained ownership of their principal private residence with a sustainable mortgage.

11. KBC lodged a notice of objection in which it pleaded, in reliance on the statutory provisions, that the proposed PIA would not "enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit" (s. 115A(9)(b)(ii)), that the proposed arrangement was "not fair and equitable in relation to the interests of each class of creditors that has not approved the proposal and whose interests or claims would be impaired" (s. 115A(9)(e)), and was unfairly prejudicial to its interests (s. 115A(9)(f)).

12. A number of affidavits have been filed in the application. The grounding affidavit on behalf of KBC by Garret Gately was sworn on 19th August, 2016. The replying affidavits of each of the debtors were sworn on 20th October, 2016. A supplemental affidavit of Garret Gately was sworn on 7th November, 2016, and the affidavit of Daragh Duffy was sworn on 19th October, 2016. All of this evidence was before the Circuit Court.

A counterproposal or submission by a secured creditor

13. KBC argues that it made a submission for an alternative approach to the secured debt which would have enabled the debtors to continue to reside in their principal private residence, and would have resulted in a better return for KBC in the long term. That proposal was made pursuant to the statutory power contained in s. 98 of the Act by which a PIP is obliged to invite such submissions regarding the debts concerned and the manner in which the debts might be dealt with as part of a PIA. A PIP is obliged under s. 98(1)(b) to consider any submissions made by creditors.

14. Section 98 of the Act permits a secured creditor to make a proposal or a counterproposal for the treatment of its debt. No equivalent provision is found with

regard to unsecured liabilities. A PIP is required to have regard to such preferences in formulating a proposal for a PIA. The requirement is not that the PIP should incorporate such express proposals, but s.102(2)(b) mandates that a PIIP have regard to such preferences to the extent that it is reasonable to so do:

> (2) In formulating the proposal for a Personal Insolvency Arrangement the personal insolvency practitioner shall—
>
> (a) have regard to subsection (3) and sections 103 to 105, and
>
> (b) to the extent that he or she considers it reasonable to do so, have regard to the preference of the secured creditor furnished under subsection (1) as to the treatment of the security and the secured debt.

15. A PIP therefore may not without some reason ignore such proposals entirely.

16. A submission may form the basis of an assertion by a secured creditor that the proposal in a PIA amounts to an unfair prejudice, and s. 115A(10)(b)(i) requires the court to consider any submission made by a creditor under s. 98(1) or "any alternative option available to the creditor for the recovery of the debt concerned" (s.115A(10)(b)(ii)). Fairness to creditors therefore can be linked to the reasonableness of rejecting some or all of any counterproposals or submissions.

17. A PIP is required under s.102(2) to have regard to the preferred approach of a secured creditor, and s. 102(1) provides that a secured creditor who has been notified by a PIP of the issue of a protective certificate may "indicate a preference as to how, having regard to subsection (3) and subsections 103 to 105, that creditor wishes to have the security and secured debt treated under the Personal Insolvency Arrangement".

18. The combined effect of the statutory provisions is that a secured creditor has a right to make submissions and the PIP is mandated to consider any such submissions

in formulating a PIA. That this is so arises from the nature of the secured debt as a contractual right which is afforded special protection in the legislation by reason of the existence of security. The legislation envisages different treatment for secured and unsecured debts, an approach also found in the bankruptcy legislation and in corporate insolvency.

19. The affidavit of Garret Gately says that he first made a proposal for the alternative treatment of the mortgage debt in a phone call with the PIP on 13th June, 2016, which was rejected in an email later that day. Some dispute exists between the parties as to whether KBC had made its counterproposal on time, but this did not become an issue at the hearing. For the present, I will focus on the terms of the counterproposal and the specific objection by the PIP to the means by which part of the debt was proposed to be warehoused.

The proposal to warehouse

20. The alternative proposal made by KBC to deal with the secured debt was to write off part of the mortgage debt such that it was reduced to €270,000 (a write-down of approximately €15,000) and thereafter for the split of the secured debt into two moieties of €135,000 each. It was proposed that the term of the PIA would be twelve months and that during that twelve month period the active part of the mortgage would be paid at €350 per month, and thereafter for the balance of the existing term at standard variable interest rates. It was the proposal to deal with the inactive part that was rejected by the PIP and has been the focus of the hearing before me.

21. KBC proposed that the amount of €135,000 would be treated as inactive and would be placed in a "warehouse" account carrying 0% interest. The debtors would be given "lifetime tenure" in their principal private residence and the security would not be enforceable until after the survivor of them died. It was accepted in the course

of the hearing before me that the KBC proposal would permit the debtors, if their means allowed, to repay some or all of the warehoused amount during their lives, whether during the period of the active mortgage, or thereafter. The particular advantage of the counterproposal identified by KBC was that the debtors would be permitted to occupy their principal private residence for their respective lives, that the mortgage payments in the meantime would be sustainable and affordable by them, but that KBC would still, in time, recover the balance of the loan amount.

22. The specialist judge of the Circuit Court rejected the objection of the secured creditor in an *ex tempore* judgment, and the only note I have of her reasoning is that she considered that the proposal of KBC was "kicking the can down the road". It is not clear whether she regarded the proposal as impermissible or that she took the view that the PIA sufficiently dealt with the statutory provisions and did not require reformulation in the light of the contract proposal. I make no criticism of her for this, and the argument engaged in the appeal was longer and the debtors and KBC were each represented by senior and junior counsel.

Warehousing within the statutory scheme

23. The first question for determination is whether the legislation permits of the long term "warehousing" of part of a mortgage debt, or whether the legislative scheme envisages that any amount not immediately repayable would have to be either addressed or reintroduced before the end of an arrangement.

24. The term "warehouse" does not appear in the legislation, but is one familiar to insolvency practitioners, in debt settlement arrangements and in modern banking generally. Warehousing provides for the separation of some or all of a debt in an inactive account for an identified period or until the happening of a specific event. It involves an alteration of agreed contractual repayment terms and the deferral of a

portion of a debt to be dealt with later, either on terms to be agreed at the expiry of the inactive term or at the time the deferral itself is agreed.

25. The debtors argue that the counterproposal of KBC involves a type of warehousing not contemplated or permissible in the statutory scheme, and contend that a proposal to warehouse a debt must bring the warehoused or inactive element into account in the currency of a PIA, and that the deferral proposed in the present case is impermissible as going far outside the six-year proposed term of the PIA. The creditor argues that the legislative provisions permit the deferral of a portion of a mortgage debt, as in the present case, until the expiration of the existing agreed mortgage term.

26. My first consideration therefore will be to examine the statutory provisions for the treatment of secured debt and to assess the argument of the debtor that only limited warehousing of secured debt is permissible. Before I deal with the statutory scheme I will briefly note the treatment of warehousing in guidelines issued to lenders by the Central Bank of Ireland on which the debtors place emphasis.

Warehousing generally

27. The debtors point to a number of observations made in the Central Bank Internal Guidelines on sustainable mortgage arrears of 24th September, 2013 and updated on 13th June, 2014 in support of an argument that the personal insolvency legislation does not permit of a deferral or warehousing of part of a mortgage debt outside the term of a PIA. The Central Bank has expressed concern that any splitting of a mortgage debt by which part of the debt is warehoused must not have the effect that a temporary arrangement will leave a mortgage debtor with an unsustainable mortgage once the original contractual repayments are resumed at the conclusion of a period of forbearance. The Central Bank envisages a sustainable split mortgage

solution when there is a reasonable prospect of a borrower's circumstances improving over a longer term. The preferred approach is to prevent short-term warehousing of a loan which might lead to circumstances that when the original contractual repayments are resumed, the mortgage once again becomes unsustainable.

28. Counsel points to a concern expressed in the Central Bank document that:

> "Sustainability of a split mortgage will be assessed by the Central Bank, *inter alia*, with regard to the affordability of the unwarehoused debt payment schedule and to the treatment of the warehoused loan maturity." (Central Bank Guidelines, p. 9)

29. The Bank has also required lenders:

> "Lenders, therefore, need to be able to satisfy themselves – and demonstrate to the Central Bank – that any temporary term arrangement is part of the solution because the borrower would have a sufficiently improved capacity to service the debt at the end of the temporary arrangement." (Central Bank Guidelines, p. 4)

30. A number of observations are to be made with regard to the Central Bank guidelines. It is obvious that the guidelines are to lenders not borrowers. The Central Bank's approach requires lenders to engage with the borrowers to such an extent that the individual debt problem of the borrower is dealt with in a sustainable way, and regarded warehousing as a solution when there is a reasonable prospect that a debtor's circumstances will improve. Sustainability in the medium and identifiable term was regarded by the Central Bank as desirable.

31. Further, the interplay between the Central Bank guidelines to lenders, or indeed the broad approach of the Central Bank or of government to the debt crisis and the specific and real problems caused by mortgage arrears, while it undoubtedly was

one of the factors that led to the introduction of the Personal Insolvency Act in 2012, and the amendment by the insertion of s. 115A by the Act of 2015, is not one that may guide my reading of the Act. The starting point for the interpretation of legislation must be the words of the legislation or the purpose of a statute. I turn now to examine the statutory scheme for the making of a PIA.

Making proposal for a Personal Insolvency Arrangement

32. Section 99 of the Act sets out a list of mandatory requirement with regard to matters that must be dealt with in a PIA, and provisions which prohibit certain types of proposals. The maximum duration of a PIA is 72 months, with a provision for an extension of no more than 12 months in certain circumstances. Section 99(2)(e) requires that a PIA should contain proposals that are sustainable and capable of being met by a debtor:

> "A Personal Insolvency 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;"

33. Section 99(2)(h) provides part of a suite of measures designed to protect the continued ownership or occupation by the debtor of his or her principal private residence:

> "A Personal Insolvency Arrangement shall not require that the debtor dispose of his or her interest in the debtor's principal private residence or to cease to occupy such residence unless the provisions of section 104(3) apply."

34. Section 115A(9) of the Act was inserted by the Personal Insolvency (Amendment) Act 2015 and created the power in the relevant court to confirm the

coming into effect of a PIA notwithstanding that it had been rejected by the creditors at a creditors' meeting at which a vote was taken on the arrangement.

35. The proposal by KBC that the debtors would have the right to continue to occupy their principal private residence for the respective lives of each of them does protect their continued occupation of the premises, and also indeed their continued ownership, albeit their ownership is proposed to be encumbered with a mortgage that is capable of surviving against their respective estates.

36. In *Re J.D. (A Debtor)* [2017] IEHC 119, I considered that the provisions of s. 99 did not of themselves envisage that a PIA was required to ensure the continued ownership of a principal private residence, and that the court was entitled to have regard to whether an arrangement could secure the continued occupancy by the debtor of such premises:

> "Thus the court will engage its jurisdiction to enable a person to continue to occupy or not dispose of an interest in his or her family home, provided the costs of continued occupation are not excessive or disproportionate. I consider it relevant too, that s. 115A does not have as its focus the continued ownership by a debtor of his or her family home, but rather the continued occupation of that premises, and the section is concerned with enabling a debtor not to dispose of an interest in a property, rather than positively stated as enabling the debtor to continue to own the property. Thus, the perceived public interest in the continued occupation of a premises is not a focus on the acquisition of a capital asset, but rather the preservation of a right to live in a premises" (para. 34)

The statutory treatment of debt

37. Section 100 of the Act contains a list of possible types of provisions that may be incorporated into a proposal for a PIA to deal with payment to creditors, whether secured or unsecured. It is clear from the language of the section that the broad and general examples given in s. 100(2) are not exhaustive and must be treated as permissive:

> "The terms of a proposal for a Personal Insolvency Arrangement may include any one or more of the following:
>
> (a) a lump sum payment to creditors, whether provided from the debtor's own resources or from the resources of other persons;
>
> (b) a payment arrangement with creditors;
>
> (c) an agreement by the debtor to transfer some or all of the debtor's property to a person (who may be the personal insolvency practitioner) to hold the property in trust for the benefit of the creditors;
>
> (d) a transfer of specified assets of the debtor to creditors generally or to a specified creditor;
>
> (e) a sale of specified assets of the debtor by or under the supervision of the personal insolvency practitioner and the payment of the proceeds of such sale to creditors; or
>
> (f) in respect of secured debts, subject to sections 102 to 105, an arrangement for the treatment of the security and the satisfaction or restructuring of the secured debt."

38. A PIA, therefore, may include proposals for a "payment arrangement" for the treatment of security and the satisfaction or restructuring of secured debt.

39. There are no limitations in the statutory provisions as to the conditions that may be included in a restructure of a secured debt, and what is envisaged is any agreed alteration to the repayment terms, including, it seems to me, an arrangement by which the term of the mortgage may be extended for many years, including to a time after the death of the debtor. There is in my view nothing in ss. 99 or 100 of the Act which precludes the splitting of the mortgage debt and the warehousing of part of the debt.

Provisions specific to treatment of secured debt

40. Secured debts must be expressly dealt with under a proposed PIA and cannot be dealt with as part of the debts in general. Secured debt is given special statutory protection in a number of respects. Section 102 is of particular relevance and s. 102(6) makes provision for the type of terms which may be included in a PIA to deal with secured debts. It is convenient to set out the entire subsection:

> "Without prejudice to the generality of section 100 or subsections (1) to (3) and subject to sections 103 to 105 , a Personal Insolvency Arrangement may include one or more of the following terms in relation to the secured debt:
>
> (a) that the debtor pay interest and only part of the capital amount of the secured debt to the secured creditor for a specified period of time which shall not exceed the duration of the Personal Insolvency Arrangement;
>
> (b) that the debtor make interest-only payments on the secured debt for a specified period of time which shall not exceed the duration of the Personal Insolvency Arrangement;

(c) that the period over which the secured debt was to be paid or the time or times at which the secured debt was to be repaid be extended by a specified period of time;

(d) that the secured debt payments due to be made by the debtor be deferred for a specified period of time which shall not exceed the duration of the Personal Insolvency Arrangement;

(e) that the basis on which the interest rate relating to the secured debt be changed to one that is fixed, variable or at a margin above or below a reference rate;

(f) 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;

(g) that the principal sum due on the secured debt be reduced but subject to a condition that where the property the subject of the security is subsequently sold for an amount greater than the value attributed to that property for the purposes of the Personal Insolvency Arrangement, the secured creditor's security will continue to cover such part of the difference between the attributed value and the amount for which the property is sold as is specified in the terms of the Personal Insolvency Arrangement;

(h) that arrears of payments existing at the inception of the Personal Insolvency Arrangement and payments falling due during a specified period thereafter be added to the principal amount due in respect of the secured debt; and

(i) that the principal sum due in respect of the secured debt be reduced to a specified amount." (Emphasis added)

41. The list of nine options is expressly made without prejudice to the generality of s. 100 or ss. 102(1) to (3) and subject to ss. 103 to 105.

42. The debtors argue that as a result of s. 102(6)(d) repayment of a secured debt may not be deferred outside the period of the PIA, or as was put by the PIP in his email in response to the KBC proposal, "the proposed warehoused amount would have to be addressed within the arrangement", or that forbearance of payment of interest and part only of the capital may not outlive the terms of the PIA.

43. The Act permits a broad number of solutions to the treatment of secured debt. If the principal sum due on the secured debt is to be reduced by a proposed PIA, s. 102(6)(g) provides for a claw back if the property is subsequently sold for an amount greater than the value attributed to it in the course of the process.

44. Section 102(11)(a) provides, without prejudice to s. 103, that where a proposed PIA includes terms providing for the reduction of a secured debt, the amount of the reduction is to be treated as an unsecured debt and is to rank equally and in place in equal proportion to other unsecured debt. This particular treatment of the proposed amount to be written off of €166,000 is expressly dealt with in the proposed PIA in the present case.

45. I agree with the argument of KBC that the list contained in s.102(6) is not intended to be exhaustive. The section is permissive and does not mandate the means by which a secured debt may be restructured, and neither s.100 nor s.102(6)(d) preclude a proposal by which a warehoused amount becomes payable after the expiration of the term of a PIA.

46. Further, the provisions of s. 100, especially ss. 100(2)(b) and s. 100(2)(f) permit in general an arrangement for the restructuring of debt, and s. 102(6) is expressly made without prejudice to the generality of that provision. Therefore, the fact that warehousing of the type and for the time proposed is not found in the list of options outlined in s. 102(6)(d) does not mean that the proposal is not permitted by statute.

47. A number of the provisions regarding the treatment of secured debt fortify me in this conclusion, as I outline.

48. Section 102(3) expressly permits the retention by the secured creditor of the security, or that the security be surrendered, and the means by which this may be achieved are not constrained by any statutory provision. Section 99(2)(c) provides that secured debt stands discharged only to the extent provided therein.

49. There is an express requirement in s. 103(2) that a reduction of a secured debt shall not be to an amount less than the value of the property in respect of the security is held.

50. A more concrete protection is afforded by s.103(3) by which the secured creditor is entitled to a claw back on a sale within 20 years, or at the end of the mortgage terms, whichever first occurs, should a sale or disposal achieve a higher figure than that in an agreed s.105 valuation:

> "A Personal Insolvency Arangement which includes terms involving —
>
> (a) retention by a secured creditor of the security held by that secured creditor, and
>
> (b) a reduction of the principal sum due in respect of the secured debt due to that secured creditor to a specified amount,

shall, unless the relevant secured creditor agrees otherwise, also include terms providing that any such reduction of the principal sum is subject to the condition that, subject to subsections (4) to (13), where the property the subject of the security is sold or otherwise disposed of for an amount or at a value greater than the value attributed to the security in accordance with section 105, the debtor shall pay to the secured creditor an amount additional to the reduced principal sum calculated in accordance with subsection (4) or such greater amount as is provided for under the terms of the Personal Insolvency Arrangement."

51. Section 103(11) stipulates the temporal limit to the claw back:

"The obligation to pay an additional amount arising by virtue of this section shall cease—

(a) on the expiry of the period of 20 years commencing on the date on which the Personal Insolvency Arrangement comes into effect, or

(b) on the day on which the debtor is scheduled or permitted to fully discharge the amount secured by the security (or such later date as may be specified for so doing in the Personal Insolvency Arrangement) and does so discharge his or her indebtedness,

whichever first occurs.

52. Protection of this nature over a long period affords a considerable degree of comfort to a secured creditor following the write down of its debt.

Conclusion on warehousing generally

53. I consider that the scheme of the personal insolvency legislation affords a very broad discretion in a PIP to formulate a proposal for a PIA as the financial circumstances of each debtor will be different, and the proposal for a PIA must

respect and make provision for such difference and do so in the light of the express objective in the Act that insofar as this can be achieved in a manner that is not unfairly prejudicial to an impaired creditor, a debtor should continue to own or occupy his or her principal private residence.

54. Because of s. 115A, a PIA must deal with any debts secured on the principal private residence of a debtor, and such is required also by virtue of ss. 104 and 99(2)(h) of the Act. A proposal for the restructuring of a debt secured on a principal private residence may be made provided the security over that property is dealt with in such a way that ownership or occupation are protected insofar as this may fairly and reasonably be achieved. The counterproposal made by KBC may not be one that many lenders would be prepared to offer, as the prospect for the recovery of the warehoused amount is pushed far into the future, and the prospect of taking action on the security to a future unknown time, and reasonable banking practices or corporate requirements may not find such proposal attractive. It is not however in itself impermissible.

55. For these reasons I reject the argument of the debtors that the statutory scheme precludes a PIA that makes provision for warehousing part of a debt to be treated outside the period of the PIA. In an individual case, whether a proposal by a creditor for long-term warehousing is one that may reasonably be rejected without risk of being characterised as unfairly prejudicial will depend on all of the circumstances, including whether the proposal provides a better return for creditors than the proposed PIA, or on bankruptcy, and makes provision for the repayment of debt in the light of the means of a debtor.

56. I turn now to consider the circumstances of the present case and the counterproposals of KBC in the light of the statutory tests.

The statutory test:115A(9)

57. Section 115A(9) provides that a court may make an order confirming the coming into effect of a PIA notwithstanding that it had been rejected at a meeting of creditors, but only when it is satisfied that the criteria set out in the section have been met. Section 115A(9)(b) contains an imperative that the means of a debtor be fully brought to bear in a proposed PIA and the court is to be satisfied that:

> "The court, following a hearing under this section, may make an order confirming the coming into effect of the proposed Personal Insolvency Arrangement only where it is satisfied that —
>
> ...
>
> (b) having regard to all relevant matters, including the terms on which the proposed Arrangement is formulated, there is a reasonable prospect that confirmation of the proposed Arrangement will —
>
> (i) enable the debtor to resolve his or her indebtedness without recourse to bankruptcy,
>
> (ii) enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit, and
>
> (iii) enable the debtor —
>
> (I) not to dispose of an interest in, or
>
> (II) not to cease to occupy,
>
> all or a part of his or her principal private residence." (Emphasis added)

58. Section 115A(9) is mandatory and the court may make an order only where it is satisfied that the criteria are met. No provision exists, such as is found in the

examinership jurisdiction, by which the court may modify a PIA on an application before it, whether under s. 115A or otherwise.

59. Section 115A(9)(b)(ii) constrains a court by considerations of reasonableness, that there be a reasonable prospect that confirmation of a proposed PIA will enable the debtor to resolve his or her indebtedness, and enable the creditors to recover their debts to the extent that the means of the debtor "reasonably permits". The inclusion of a requirement of reasonableness supports the argument that a margin of appreciation will be afforded to a PIP in formulating a PIA, that the court will not interfere unduly with a proposal even if another and possibly equally reasonable proposal could be formulated, and the objection of a creditor will not be upheld merely on account of the fact that it can offer an alternative proposal. Reasonableness is assessed in the context of the means of the debtor, the likely return to the creditor of a proposal, the likely return on bankruptcy as an alternative, and the reasonableness of the proposed scheme taken as a whole, and in the light of the objective of the legislation that a debtor be facilitated in a return to solvency.

A matter of proportionality

60. A creditor who makes an alternative proposal does not thereby displace a proposal made by a PIP. A creditor may not defeat an application by merely on account of an argument that a better outcome can be achieved by another means.

61. The requirement that the court approach the question by reference to principles of proportionality was identified by me in my judgment in *Re Hill and Personal Insolvency Acts* [2017] IEHC 18 at para. 37:

> "The statutory factors relate to the proportionality of the arrangement, the likely differences between the PIA and an arrangement on bankruptcy, and whether the PIA is fair to all classes of creditors. While the intention of the

Oireachtas was to offer a unique and special protection to the principal private residence, that protection did not enable the court to override the vote of a creditor holding security over such property merely on account of the fact that the property was a principal private residence, and other factors resonant of an attempt to achieve a degree of balance of each of them is found in the legislation."

62. The provisions of s. 115A give the court a broad discretion to offer to a debtor a means by which he or she may continue to own or occupy his or her principal private residence. However, as I said in *Re Hill and Personal Insolvency Acts*, the mere fact that a property is a principal private residence of a debtor does not enable the court to approve a proposed PIA against the objections of a creditor holding security over that premises, and the court must engage all of the statutory factors which taken together must be seen as indices of how a court is to proportionately balance the respective rights of the parties.

63. Therefore it is not merely on account of the fact that an alternative arrangement is possible that a court will reject an application under s. 115A, or indeed that a court would refuse to approve a proposed PIA following a vote at a meeting of creditors. In balancing the respective rights of the parties, a court must look at any proposed PIA in the context of s. 115A, having regard not just to whether the statutory criteria are met regarding the protection of occupancy or ownership of the principal private residence, but also having regard to a reasonable, coherent and complete argument proposed by an objecting creditor which will achieve a result sufficiently protective of the interests of the debtor.

64. I also note that s. 115A(9)(b)(ii) does not require the court to weight the substance of a counterproposal made by an objecting creditor and the court may engage the exercise envisaged by the Act even in the absence of a counterproposal.

Unfair prejudice

65. An order may not be made if it results in unfair prejudice to a creditor, and while the legislation does not expressly stipulate that the terms of a PIA be fair to a debtor, the provisions of s. 115A by importing a test of reasonableness does require the court to look to questions of fairness or proportionality to all concerned parties. Further because of s.102(2)(b) a PIP is required to have regard to a stated preference for the treatment of debt only to the extent that the PIP considers "reasonable". Reasonableness and fairness are broadly equivalent for this purpose.

66. Of particular note in the present case is not merely that the split inactive element of the mortgage is to be warehoused interest-free for 23 years, but that the proposal by KBC is coupled with an offer that the couple may continue to occupy the premises for the balance of their respective lives. The expression used is that the debtors would be given "lifetime tenure" in the house. Because the proposal was never explored, it is not clear if what is intended is a right of residence, or some form of joint life estate. Whatever legal effects are to be contained in the proposal, the protection of the right to reside and occupy the house is sufficiently clear to deal to an extent with the imperative contained in section 115A. But this of itself does not deal fully with the circumstances of the debtors or fairness to the creditors as is required under the Act.

67. I examine now the elements of the proposed PIA which the creditor says are unfairly prejudicial.

The means of a debtor are not brought to account

68. A court must be satisfied taking all matters into account that the proposed PIA enables the creditors to recover the debts due to them to the extent of the means of the debtor. The "means" engaged are present income and capital assets and not the projected means at a time so far into the future that the test is based on hypotheses or conjecture. There may on the other hand be circumstances where future certain or ascertainable means are to be brought into account.

69. KBC argues that the PIA does not enable it to recover its debt to the extent that the means of the debtors reasonably permit. It is argued that a greater return will be achieved in a number of respects under its counterproposal by the long term bringing into account of the capital value of the residence: the write-down would be €15,000, far less that €166,000 proposed in the PIA, and KBC will continue to have the benefit of the warehoused debt, albeit its power to enforce that debt will be constrained by the right of occupancy.

70. The difference in the amount proposed to be written down between the counterproposal of KBC, which involves a write-down of €15,000 only, and that in the proposed PIA of €166,000 or thereabout, is argued to offer a much better return to that creditor, albeit the recovery of half of the debt is stayed without interest for a period of 30 years, and security stayed for the lifetime of the debtor. I am not satisfied that the objecting creditor has shown by evidence that the proposal offers it a better return, albeit superficially the counterproposal provides a greater monetary return than the immediate write-down of more than half of the secured debt. The inactive account that does not bear interest for 30 years, may produce a result, if there is significant inflation in some or all of the period, that the warehoused amount has no real value when payment fall due. I do not consider that a superficial comparison of

the financial elements of the proposal is a correct approach, and I have no evidence that supports the argument beyond a mere arithmetic calculation.

71. The principal private residence of the debtor and his wife has on any reckoning a low value and the house is the smallest unit suitable for the reasonable needs of a family. Section 104(2)(d) is relevant, and the premises could not be described as disproportionately costly or unsuitable.

72. The Act requires a proposal to bring to reasonable account the means of a debtor. The proposal to warehouse an amount that at current figures is more than 125% of the value of the dwelling is not proportionate to, or reasonably derived from, that current income and capital assets, or any future ascertainable means. I am not satisfied that the PIA is unfairly prejudicial on account of failing to fully bring into account hypothetical or future means, for which there exists no present expectation.

73. At current valuation, the value of the property is less than the amount proposed to be warehoused, but it is impossible at this juncture to know whether the property would increase in value or whether the debtors, on the death of the survivor of them, would have other assets which could meet any shortfall on the debt, should one exist.

74. Further, I do not consider it is appropriate to consider the question raised in the present case on the basis that the estate of the last surviving debtor is likely to be insolvent of the date of the death of the last surviving debtor, particularly having regard to the fact that the debtors of both are in their early forties, and because it is impossible at this juncture to predict how property prices will evolve in their respective lifetimes.

75. In these circumstances I consider that the PIP did not unreasonably fail to adopt the counterproposal, and in my view the means of the debtors have been reasonably and adequately brought to bear on the proposed PIA

Provision for future solvency

76. KBC relies on my judgment in *Re Dunne (A Debtor)* [2017] IEHC 59, in which I held that the court was not concerned with the question of whether a PIA would guarantee the solvency of a debtor after the term of an arrangement came to an end. At para. 46, I said the following:

> "The mortgage on the principal private residence of the debtor and the interlocking debtor will by agreement with PTSB outlive the PIA by more than 20 years, but that does not in my view mean that the court must be vigilant to ensure that the debtor is reasonably likely to be able to meet the obligations under the mortgage for the balance of the mortgage term. While the court is obliged to enquire as to whether it is reasonably likely that a debtor will meet the terms of the PIA, the court is not required to engage the broader question as to whether the debtor is reasonably likely to be able to perform the obligations as reformulated in the PIA with regard to the repayment of a secured debt over the length of the repayment term."

77. The PIA in *Re Dunne (A Debtor)* included a provision for the splitting of a mortgage loan into active and warehoused elements, the warehoused account to be inactive until the expiration of the mortgage term and in regard to which the term of the PIA provided that "options would be explored regarding the payment of the warehoused amount, whether by way of refinancing, making a lump sum payment or sale". (para. 13)

78. The PIA in that case did involve the splitting of the mortgage into active and inactive elements but both parties accepted that the proposed warehousing outside the term of the PIA was a permissible approach to the secured debt. However, the broad principle enunciated in that case, that the court is not obliged to look to the unknown future and whether a debtor is reasonably likely to be able to perform the obligations as reformulated in a PIA with regard to the payment of the secured debt over a long mortgage term, are relevant. The purpose of the legislation was to afford a breathing space in which a debtor may achieve a return to solvency, not to ensure that such solvency was guaranteed over the entire term of a mortgage, even if the length of that term was identifiable and agreed between borrower and lender.

79. However, the fact that a court will not require that a PIA would guarantee solvency into the future has the corollary that a court will equally not make assumptions regarding the likely financial or other circumstances of a debtor far into the future. In the present case whilst the counterproposal does make provision for the continued occupancy by the debtors of their principal private residence for their respective lives, it is predicated on assumptions and conjecture regarding the living arrangements of the debtors far into the unknown future to a time at the expiration of the mortgage term, when Mr. Callaghan will be 62 years of age and his wife close to that age.

80. In addition I am not satisfied that the reasonableness of the counterproposal is to be tested in the light of an assumption that the couple will wish to remain living in their present home for the rest of their lives, or even for the rest of their working lives. Many life events could mean that they will wish or need to live elsewhere.

81. It is crucial in this context that s. 90 precludes a debtor entering into more than one personal insolvency arrangement in his or her lifetime. This means that the

legislation envisages an arrangement which will deal with all present insolvency of the debtors or at least the achieving of solvency within five years. While the counterproposal made by KBC may seem attractive and to some extent benevolent, it is capable of creating circumstances amounting to insolvency at the end of the mortgage term in approximately 23 years' time. Because a PIA is a once in a lifetime solution it would be wrong to test the reasonableness of a proposal in the light of a preferred solution or counterproposal that could on its terms result in insolvency at a future date. The discussion above with regard to speculative proposals is also relevant in regard to this proposition. A warehousing solution should on present or known figures offer a solution to indebtedness that is likely to be achieved. Neither of the debtors has the benefit of a pension which might provide a lump sum on retirement to deal with the warehoused amount. The repayment of the inactive account therefore is not predicated on any anticipated ability to pay in the future, and is entirely on the hazard. This results in unfairness at a level which I consider material.

Conclusion

82. For all of these reasons, I do not consider that the proposed PIA unfairly prejudices the objecting creditor. The PIP correctly took the view that the counterproposal was not reasonable or fair to the debtors.

83. In those circumstances, I propose affirming the order of the Circuit Court under s.115A of the Act.