THE HIGH COURT
CIRCUIT APPEAL

[2021] IEHC 297
[Record No. 2019/529 CA]

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012-2015
AND IN THE MATTER OF ANN FENNELL OF 44 LYRADENE AVENUE, WOODVIEW PARK, LIMERICK (A DEBTOR)
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012-2015

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 29th day of April 2021.

Introduction

1. This matter concerns an appeal by Ann Fennell ('the debtor') from the judgment of the Circuit (Personal Insolvency) Court of 17th December, 2019 refusing the debtor's application pursuant to s.115A(9) of the Personal Insolvency Acts 2012-2015 (hereafter referred to collectively as 'the Act'). The appeal is opposed by the debtor's sole creditor, Ulster Bank Ireland DAC ('the bank' or 'the objecting creditor').

2. By the time the appeal was heard by this Court, the debtor was 69 years of age. She owns a principal private residence ('PPR') in Woodview Park, Limerick. As we shall see, the debtor has substantial positive equity in the PPR. She has a number of children, but they are all of age and none of them is dependent.

3. A notice pursuant to s.111A of the Act was sent to the creditor by Maurice Lenihan, the Personal Insolvency Practitioner ('PIP') appointed by the debtor, on 31st May, 2019. By a notice of the same day, the objecting creditor indicated its opposition to the PIP's proposed Personal Insolvency Arrangement ('PIA'). The PIP made a s.115A application on behalf of the debtor on 6th June, 2019, and after the dismissal of that application by the Circuit Court, the present application issued on 19th December, 2019.

4. At an early stage before this Court, the case was identified as one which might be suitable to be heard, not just to determine the issues in the present case, but to provide clarity on an issue which arises in a number of cases currently before the Circuit Court and this Court. The issue concerns arrangements which provide for an extension of the mortgage term to a point at which the debtor would either be certain or unlikely to be still alive, and whether such an arrangement is permissible under the Act.

5. The parties were given the opportunity to make detailed legal submissions, and the matter was listed for hearing on 16th November, 2020. However, the matter did not proceed on that date, as it was indicated by counsel for the debtor that it was hoped to procure an expert report for the debtor as to the implications of the arrangement for the bank, and in particular its provisioning obligations, in advance of the hearing. Professional bodies were approached by the PIP for advice and possible funding in this regard. Ultimately, the PIP accepted that he would not be in a position to proffer such a report without considerable expense and unacceptable delay, and agreed that the matter should be listed. The appeal was given a priority listing, and was heard by me on 16th March, 2021.

6. A detailed notice of objection of 20th June, 2019 was delivered by the objecting creditor. While I will deal with the objections and submissions of the objecting creditor in more detail below, it is appropriate to note that, among the grounds of objection was the complaint that the debtor, under the PIA, would be "…required to maintain mortgage payments until she is 98 years of age, which is plainly unsustainable…" [para. 2], and that the objecting creditor had:

> "…made a proposal to the Personal Insolvency Practitioner in accordance with sections 98 and 102 of the Act whereby the Debtor was given the option to consider a trade down or incentivised assisted surrender of the Property whereby the Debtor would be given €15,000 by the Objecting Creditor in return for an assisted voluntary surrender of the secured property. The said proposal was unreasonably rejected" [Paragraph 7].

The PIA

7. Notwithstanding that the debtor has substantial equity in the PPR, the PIA proposes a very substantial term extension to achieve a level of affordability which will enable her to deal with her indebtedness. The main features of the PIA as set out at Part IV of the PIA are as follows: -

- The agreed valuation of the PPR is €180,000;
- the debt of the bank, which is the sole creditor, is €72,593.48. This debt is secured on the PPR;
- the debtor therefore has equity in the PPR of €107,406.52;
- arrears are to be capitalised on the coming into effect of the PIA;
- the term of the mortgage is to be restructured to 348 months from the coming into effect of the PIA, 372 months in all;
- interest only payments of €57.47 will be made on the coming into effect of the PIA for the 24-month term of the PIA itself, based on a mortgage loan balance of €72,593.48 and tracker variable interest rate of 0.95%;
- capital and interest payments of €238.74 from month 25 to month 372 will be made on the same loan balance, and on the basis of the same tracker variable interest rate;
- the PIA does not provide for a write-down of the mortgage loan balances, and the repayments may vary based on any movements or changes in the ECB rate on which the tracker rate is based;
- "…2.3.1.9 Should the debtor not survive until the end of the restructured mortgage term, her estate will repay the remaining balance owing on the secured debts to Ulster Bank from the sale of the home, Ulster Bank DAC's security…".

8. The projected PIP fees in the PIA are €3,250.37 plus VAT, with projected costs of €500 plus VAT. These fees and outlays are payable to the PIP from the monthly contribution of the debtor under the PIA in priority to the amounts payable from time to time to the creditors. However, the PIP's written submissions state – commendably – that he has "undertaken to waive his fee in its entirety".

9. In Part III of the PIA, it is stated that "…[t]he debtor is seeking to restructure the mortgage loan in a manner which reflects her means. In devising this proposal the PIP has assessed her means and debt serving capacity based on the assessable social housing rent that would apply in the event that she sought and was granted social housing…[s]he is making this PIA proposal with the view to ensuring that her secured creditor is treated fairly and equitably, while protecting reasonable living expenses and retaining her principal private residence". [Para. 2 of Part III].

10. The PIA states that the PIP "…has considered mortgage to rent ('MTR') as a solution to enable the debtor to remain in her home. While she meets most of the eligibility criteria with regard to property valuation and means, the level of equity in the home would deem her ineligible to make an application" [Part III, Clause 2]. The PIP also provides a calculation of what the debtor's social housing rent would be. He estimates this at €241.19 per month, which is more than the monthly repayment suggested under the PIA. The PIP states that he has "…considered the payment history of the debtor. The debtor has made consistent payments of €245.00 per month on the loan and is satisfied that the restructured loan repayment is affordable and sustainable for her" [Part III, para. 3.6].

11. At para. 3.3(e) of Part III of the PIA, the PIP in summarising the "advantages of the proposed Arrangement", states as follows: -

> "(e) Should the debtor not survive until the end of the restructured mortgage term, her estate will repay the remaining balance owing on the secured debt to Ulster Bank from the sale of the home, Ulster Bank's security."

12. Significantly, in summarising the main features of the PIA in the summary at Part I, the PIP states that "…it is acknowledged that the term extension is to a time most likely beyond the life expectancy of the debtor…" The summary goes on to state that "…in the event that this PIA is approved the debtor will have secured continued occupation of her family loan [sic] and make a mortgage payment in line with the social housing rent payment which would apply in the event that she was eligible for social housing".

The affidavits

13. The PIP grounded his application pursuant to s.115A(9) to the Circuit Court on an affidavit of 10th June, 2019. In the course of that affidavit, he described the debtor's property as "…a modest 4-bedroom semi-detached house…in average condition…" [para. 25]. He averred that the average rent for a similar property in the area was €1,350, and exhibited evidence to that effect. He expressed the opinion that the costs of enabling the debtor to continue to reside in the PPR were not disproportionately large, having regard to the matters referred to in s.104(2) of the Act.

14. At para. 35 of his affidavit, the PIP averred as follows: -

> "I say that in the two years before the issuance of the Protective Certificate and continuing since the instigation of the insolvency process the Debtor has been making contributions towards the debts and trying to engage with creditors. The debtor is divorced and her financial situation was impacted by bouts of ill-health during that period and reductions in maintenance and child benefit payments during periods when her children resided with their father."

15. Gerry Tallon, a Litigation Manager with the objecting creditor, swore an affidavit on behalf of the bank on 23rd October, 2019 in opposition to the PIP's application. He referred to the notice of objection filed on behalf of the bank on 20th June, 2019, and summarised "the principal grounds of objection" as follows: -

"(a) The PIA is unsustainable. The proposed term extension from 3 months to 372 months would require the Debtor to continue making mortgage payments until she is 98 years of age;

(b) The costs of enabling the debtor to continue to reside in her principal private residence, which is a 4 bedroom-property which she occupies alone, are disproportionately large; and

(c) the Bank made a submission in accordance of [sic] section 98 of the Act which provided a fair and reasonable path to solvency for the Debtor." [Paragraph 4].

16. The deponent referred firstly to the bank's concerns about the sustainability of the PIA, and in particular its requirement that the debtor would continue making mortgage repayments until she was 98 years of age. Reference was made to the comment in the executive summary of the PIA that "the term extension is to a time most likely beyond the life expectancy of the debtor". The deponent referred to the Guidelines on Sustainable Mortgage Arrears Solutions ('the guidelines') issued by the Central Bank of Ireland, which state that an affordability assessment of a given borrower "needs to be based on both their current and prospective future servicing capacity for all borrowings". Specifically, the guidelines advised that for a term extension to be considered sustainable, the borrower's age must be taken into account, and that "…an overall ceiling of 70 years of age will apply for the Central Bank to consider a term extension sustainable unless there is firm evidence that an older age limit can apply" [Paragraph 14 of affidavit].

17. The deponent expressed the view that the bank did not in any event consider that the debtor had the capacity to sustain the mortgage repayments into her retirement. It was pointed out that, as could be seen from the prescribed financial statement ('PFS'), the debtor's social income was €1,054.30 per month. With set costs of €1,050.48 per month and special circumstance costs of €122.48 per month, there was a shortfall of €118.66 per month before the monthly mortgage of €238.74 was taken into account. The debtor's total shortfall therefore was expressed to be €357.40. Reference is made to the statement at para. 1 of Part III of the PIA to the effect that "…two of her children have

committed to providing €40 per week each to their mother indefinitely to assist her deal with her financial commitments". In this regard, Mr. Tallon comments as follows: -

> "18. The Bank naturally has reservations in relation to the provision of assistance from third parties about whose own financial circumstances the bank has no concrete or verifiable information and against whom the Bank has no right of recourse. I have no doubt that the Debtor's children have every intention of assisting their mother financially but the Bank cannot be expected to implement a restructure on the basis of voluntary contributions of an indefinite duration from third parties who have no legally binding obligation towards the Bank in respect of those contributions".

18. The affidavit goes on to point out that, even if these voluntary contributions were to be made, "…the PIA would still require the Debtor to continue living at the standard prescribed by the Insolvency Service of Ireland's Guidelines on Reasonable Living Expenses…" and that it is inappropriate that a debtor should be confined to such expenses, which it is suggested are intended principally to apply during the currency of an arrangement. It is suggested that there would be no margin above reasonable living expenses for the debtor to make provision for future contingencies which may arise, particularly for "elderly debtors who will naturally incur higher expenses in relation to heating, electricity, healthcare and so forth". [Paragraph 20].

19. The deponent refers to the bank's proposal for "incentivised assisted surrender" of the property, in which the bank would provide the debtor with €15,000 to assist with relocation costs. The bank takes the view that the debtor should downsize to more affordable accommodation, and that "…there appears to be no objective reason why the Debtor would continue, at great cost, to reside in a 4-bedroom property for which she has no obvious need" [Paragraph 25].

20. The PIP swore an affidavit on 27th February, 2020 in reply to that of Mr. Tallon. In relation to sustainability, the PIP averred as follows: -

> "12 …I am not suggesting that the mortgage restructure is sustainable to age 98. I say, and will be clear below, that there was little difference between an extension to age 84, 94 or even 120 when the aim of the PIA was to provide a sustainable lifetime housing cost and residence. In effect, the 'sustainability' is to focus on the monthly sum rather than the term…[13…] the purpose of the PIA was to determine a sustainable mortgage payment by reference to the means of the debtor and the level of rent payable by her in the event that she was required to access social housing…it is illogical that Ulster Bank could argue that this restructured payment/cost is disproportionately large to enable the debtor to continue to reside in her family home when it is in line with social housing cost."

21. In relation to the age of the debtor throughout the restructured mortgage term, the PIP averred that "…in ease of all parties the mortality statistics in Ireland suggest that one can expect to live until their early eighties…the PIA is not designed to bestow eternal life on the debtor, it simply sought to restructure the loan on a viable and sustainable basis…"

[paras. 20 to 21]. Documentation from the Central Statistics Office was exhibited by the PIP in this regard, which stated that the relevant statistics show an average life expectancy at birth of 82.8 years for women in Ireland.

22. The PIP emphasised in his affidavit that "…the approach taken was a function of the need to lower the monthly repayments to an affordable level. Taking the three variables (Balance, Rate and Term) in any loan this was the only mathematical outcome available to return the debtor to solvency and retain her home". [Paragraph 24]. The PIP averred that the proposed solution "works in this case, and it is a rare case that it would work in…the fact that the repayment covers interest and capital makes the treatment sustainable for the debtor and workable and profitable for the creditor. I say that this approach does not eliminate unsustainability. If the loan balance and/or the interest rate was higher a term extension would not work if the repayment did not cover the interest on the loan" [Paragraph 25].

23. The PIP avers that the PIA provides for total repayments of the restructured term of €83,080, and that accordingly interest of €10,487 would be paid to the bank over the term. The PIP contends that this is "higher than the yield in bankruptcy or repossession. Being realistic, the outcome is likely to be performing and profitable interest paid until age 83 and then the balance of the capital being repaid from the sale of the asset. This would be a projected return of circa. €9,299.51 in interest on the mortgage loan" [Paragraph 27].

24. The debtor herself swore an affidavit on 7th July, 2020. She acknowledges that the PIA is dependent on assistance from her son and her daughter. She avers that her son "is employed as an aviation executive and is in a position to assist me, and continue to assist me for life, due to his high income…my daughter is employed as an Airline Stewardess and is in a position to assist me, and continue to assist me for life, due to her good income". [Paragraphs 9 and 10]. The debtor exhibits letters from her son and daughter in this regard. Other than where details of the personal economic circumstances of the son and daughter – Patrick Fennell and Amanda Fennell- are inserted, the letters are in identical terms. They acknowledge the payment of €40 from each of them by way of assistance to their mother, but notably they each refer to payment of the sum of €40 "each month". A reference to the payment being monthly rather than weekly is made on a number of occasions in each letter, and they each state that they "…will be in a position to contribute up to €100.00 per month to ensure the mortgage is paid in full". The letter is characterised "as an irrevocable undertaking to [the debtor] personally to provide such future financial assistance as may be required and sought of me".

25. The debtor outlines the steps taken by her to live within the means envisaged in the PIA. She describes the set costs in the PIA as "appropriate, adequate and realistic in the circumstances". She sets out details of her personal circumstances. The debtor suffers from a lung complaint, which is treated by her GP, but which necessitates her attendance at hospital nearby every three to six months. Her husband died two years previously, and she describes herself as "heartbroken and very lonely" since his passing. She refers

to a history of anxiety and depression, and her increased reliance on family and neighbours during the Covid-19 Pandemic. She describes the "overhang of debt" as having "a huge impact on my mental health as well as that of my family". She says however that "…the insolvency process and the interaction with my PIP has provided light at the end of the tunnel and I have started to progress with my life again". [Paragraph 31].

26. As regards alternatives to the PIA, the debtor avers that the cost of rent "would be far in excess of the mortgage payments and thus if I had to rent then this would push me below the ISI RLE…" [para. 33]. She avers that the level of equity which she has in the PPR "would not provide scope to downsize to a property which would meet my needs. I say that the said needs include the following: familiar surroundings and neighbours garden space for exercising and fresh air as sometimes I am too anxious to venture past my house" [Paragraph 35]. The debtor avers that it is not possible to purchase a property, even a one-bed property which she maintains is not in any event suitable, for €120,000. She avers that "I would need to rent a two-bed as my daughter and son who live abroad always stay with me when they are home and have no other Irish bases and in that regard rent would be €1,200.00 at least per month. The debtor avers that "…it is not possible to rent out rooms due to the fact that I need rooms for my children who both work in the travel industry and return often and also the house is small and I would have no privacy. I also suffer from anxiety and would not be comfortable with strangers or the increased possibility of infection". [Paragraph 42].

27. The debtor avers that the alternative options of trading down, social housing, or mortgage to rent are all inappropriate as either not being within her means, or her being ineligible for same. The debtor also avers that "…renting a room was not an appropriate, or the most appropriate, option for the reasons set out above and due to the fact that I suffer from anxiety and do not take easily to strangers as I am also introverted by my illness…" [Paragraph 49].

28. The debtor avers that the property is "roughly 1.5 miles from Limerick City centre", and that it is "in average condition". She avers that "average rent for a similar and/or suitable property in this area is €1,200 - €1,800…" and exhibits evidence to that effect.

29. An affidavit replying to the affidavits of the PIP and the debtor was sworn by Sarah Mulvey, who avers that she is employed as a "Supplier Manager" within the bank. She refers firstly in her affidavit to the assertion of the PIP that, while the term extension works on the facts of the present case, "…it is a rare case that it would work in…". In this regard, Ms. Mulvey avers as follows: -

> "6 …If a proposal to extend a term is simply a function of the need to lower the monthly repayments to an affordable level, then it is difficult to understand why that approach could not be taken in almost every personal insolvency case…paragraphs 12, 13, 14 and 24 of [the PIP's] affidavit make it clear that the proposal to extend the term to 372 months from the date of proposed confirmation of the PIA is based on the single fact which would actually apply in every case:

extending the term in the manner proposed would result in the monthly mortgage payments being reduced to what the practitioner considers to be 'an affordable level'."

30. The deponent states that "…[t]o allow the proposed term in this case would cause the bank significant prejudice, as it would in any and every other case in which a similar extension was sought, because it would require the Bank to sustain 'lifetime' and 'beyond lifetime' mortgages which the Bank's business simply cannot do." [Paragraph 8].

31. In this regard, Ms. Mulvey goes on to aver that: -

> "13 …the Bank does not, and cannot, offer lifetime mortgages. The PIA thus attempts to force on the Bank a product with which it is entirely unfamiliar and whose terms are not spelled out in any detail in the arrangement. For example, if it is the case that the Mortgage Loan is ultimately to be recovered from a sale of the Property, then presumably the Bank will be required to wait for a grant of probate to issue or, alternatively, it would have to issue its own repossession proceedings against the Debtor's estate. This would undoubtedly cause further expense and delay."

32. It is also averred that the bank cannot offer "lifetime" mortgages "…because of the effect that mortgages bearing such terms would have on the bank's balance sheet… [15] Despite the fact that the Property is in positive equity, the Bank would be required to classify the Mortgage Loan as a non-performing exposure for the remaining term of the mortgage. This is in accordance with the European banking authorities "Implementing Technical Standards on Supervisory reporting on forbearance and non-performing exposures" issued under Article 99(4) of Regulation (EU) No. 575/2013 (the 'EBA Technical Standards')". [Paragraphs 14 to 15].

33. The theme is developed further in Ms. Mulvey's affidavit, and was the subject of extensive legal submissions on the part of the bank, which I propose to deal with below. Central to the contentions on behalf of the bank was Ms. Mulvey's averment at para. 21 of her affidavit that "…prudential provisioning reduces the amount of capital which the Bank can deploy towards new lending. A bank can lend at a multiple of its capital and, thus, any reduction in the Bank's capital can have a significant knock-on effect on the Bank's operations". The deponent went on to aver as follows: -

> "22. The prudential provisioning requirement lasts as long as the exposure is classified as 'non-performing' which, if the PIA in this case is approved, would be for the extended term of the mortgage. The consequence of that classification is that the Bank would have to hold a 100% prudential provision for the remaining term with the effect that the Bank would be deprived of the use of that capital. Furthermore, if the practitioner's approach in this case is successful, it would likely be emulated across a large number of cases which could pose serious challenges for the Bank's operations".

34. This was contrasted with the fact that the bank would make a full recovery by relying on its security, whether in bankruptcy or otherwise, without any requirement to tie up its capital by making provision. It was also pointed out that repayment under the PIA was reliant on contributions from the debtor's two children, both of whom work in the aviation industry, for the remainder of the mortgage, and "…given the recent turmoil in that sector brought about by the Covid-19 restrictions, it is not clear whether either or both of the Debtor's children are still in a position to offer that support and if so, for how long this situation will obtain".

35. It was further suggested that there were in fact properties in the Limerick City area "which are roughly within the debtor's affordability". It was not accepted by the deponent that requiring the PPR so that her daughter and son could stay with her when they are home was a valid concern from the perspective of the personal insolvency process.

36. The PIP swore a lengthy affidavit on 24th February, 2021 in reply to Ms. Mulvey's affidavit. Much of the affidavit was taken up with rejecting the various points made by Mr. Tallon and Ms. Mulvey in particular in their respective affidavits, rather than adding new factual matter to the debate. As I deal in detail with the submissions made by the parties below, I propose only to briefly summarise the thrust of the PIP's affidavit in the following paragraphs.

37. In his affidavit, the PIP returns to his theme of intending to ensure, by extending the term of the mortgage, the affordability from the point of view of the debtor. The indebtedness of the bank could not be reduced, as it was already less than the agreed market value of the property, and could not be reduced further having regard to the provisions of s.103(2) of the Act. The interest rate, which was already very low, could not be reduced as to do so would be likely "to cause difficulty and unfair prejudice". The PIP contends that the only option available to him was to extend the term of the loan in a way that would give rise to affordable and sustainable repayments. He felt justified in doing so as "…the PPR is 'safe' in terms of value in this case and the creditor is fully protected by their first ranking charge and on the sale of the PPR at any point they will be repaid in full…". [Paragraph 19].

38. The PIP then refers to "some creditors offering 'lifetime tenure' in PIAs…", and to KBC as offering "…a warehousing counter-proposal to PIPs where they warehouse debt until the death of the debtor and then recover the debt from the sale of the asset…it is clear that KBC must have satisfied themselves (as a regulated lender) as to the provisioning and reporting of same…" [para. 21].

39. The PIP rejects the notion that the approach which he takes could "…be taken in almost every insolvency case". He contends that most debtors will not have affordability beyond the age of 70 – which the debtor in the present case does due to the support of her children – and that most debtors do not have positive equity. In the present case, the PIP considered a trade down, but came to the conclusion that the debtor did not have sufficient equity to support this option. The equity did mean however that, if the indebtedness did fall ultimately to be satisfied from a sale after the death of the debtor,

the proceeds of sale would be more than sufficient to satisfy the outstanding indebtedness.

40. The PIP also asserted that "…the rejection of the herein PIA must also be considered in light of the position of the creditor and I understand that the very existence of Ulster Bank in Ireland or at least all of the non-performing loans may soon be sold. I say therefore that the provisioning or reporting issues may just simply not arise for the Objector." [Paragraph 30]. The PIP went on to claim that "…the herein structure has been approved (both consensually and in 115A applications) in a vast number of cases…I say and it must follow that the issues are therefore limited to Ulster Bank or to this case, or just raised to win an objection in the teeth of a 115A…". [Paragraphs 31 to 32].

41. It is asserted by the PIP that he is not suggesting that the proposal is in effect a "lifetime mortgage". He makes the point that any mortgage term must be subject to the risk that the borrower will pass away before the term ends, and that this "…is a known risk factored into every loan and it is obvious that this would be governed by a clear process within the bank. It is not unique and is not a new risk". He contends that the Central Bank guidelines referred to above have effectively acknowledged that the principle that a loan would be deemed unsustainable if it could not be repaid by 70 has now been replaced with a case by case analysis and "…by expressly pointing to sustainable lifetime tenure arrangements". [Paragraph 43]. The PIP maintains that split mortgage solutions promoted by the Insolvency Service of Ireland ('ISI') also contemplate a loan being "fixed" by the PIA and returning to performing status "…and that a debtor/borrower would retain a lifetime tenure in their home". [Paragraph 45].

42. In this regard, the PIP refers to an appearance before the Finance Committee of the Dáil in 2014 by Mr. Jim Brown, the Chief Executive Officer of the bank, and Mr. Stephen Bell, the Chief Risk Officer. The transcript of the evidence given to the joint committee on 8th April, 2014 is exhibited to the PIP's affidavit. The introduction to the session by the chairman of the joint committee makes it clear that the witnesses were present "…to assist the committee in the examination of mortgage arrears and the progress in putting in place solutions aimed at resolving difficulties in that sector". The PIP draws attention to the opening remarks of Mr. Brown, in which he says, *inter alia*: -

> "We have been working on a variation of our split mortgage product which would allow customers to defer a portion of the debt to post-retirement, even if that involved deferring it to the point where their estate was brought to liquidation. Our focus is very much that it is completely inappropriate that somebody who could otherwise live in their home in a sensible and affordable way should be forced into the legal process."

43. The PIP also drew attention to Mr. Bell's comment that "…[t]he only criterion we would use is affordability. We work with the customer through his or her living expenses, part of which would involve examining any other debt he or she may be carrying…". In his oral submissions to the court, counsel for the PIP also drew attention to Mr. Bell's statement that "…there certainly has been no instigation on our part to go down a legal

route where the customer clearly has positive equity and is able to sustain a portion of the mortgage, with the remainder to be resolved later". At para. 50 of his affidavit, the PIP averred that he suspected that the bank were "correct in that they do not offer 'lifetime mortgages' as new lending however it does appear that the bank offers a 'lifetime' solution to borrowers in certain cases of mortgage arrears and in PIAs".

44. The PIP states that the bank "openly offers lending over a term of 35 years on their website" [para. 59]. He avers that the effect of the restructured loan on the bank balance sheet is positive and is profitable with an interest rate, and could not be classified as non-performing.

45. The PIP questioned whether Ms. Mulvey had "the qualifications, instructions or direction to deal with loan classification", and referred to his own difficulties in getting an expert report "as to the non-performing and IFRS [International Financial Reporting Standards] proposition…". He avers that "…it appears to me that the bank can just as easily choose to define this loan as performing and not invoke any of the supposed consequences…" [para. 64].

46. The PIP confirms that the contributions which were to be made by the debtor's son and daughter are still available, and in doing so refers to "…the €80 per week under the PIA…", suggesting that the €40 contributed by each child was to be a weekly amount, rather than monthly. He says that the debtor's children "are happy to provide their full financial information to the bank and to sign up to the loan and become fully liable for same…the debtor's children are also happy to re-finance the loan and remove the creditor once lending returns to normal post-Covid." [Paragraphs 82 to 83].

47. The remainder of the affidavit deals with a rebuttal of certain points made in the bank's affidavits. To the extent that these are relevant to my decision, I will deal with them below.

48. Two further affidavits were presented on behalf of the bank. John Kenny, a litigation team manager with the bank, swore an affidavit on 18th February, 2021. He did so to take issue with averments at paras. 53 and 54 of the PIP's second affidavit which refers to and exhibits an extract from a Personal Insolvency Arrangement in another case which the PIP contended included a "lifetime tenure clause". The deponent avers that there were "exceptional circumstances" present in that case, where both debtors suffered from acute medical difficulties". The bank "…in its sole prerogative and with some reluctance, voted in favour of the proposal given those very specific circumstances. To be clear, no such exceptional circumstances are present in this case" [Paragraph 4].

49. A further affidavit is sworn by Garret O'Brolchain, who describes himself as "Head of Provisions with Ulster Bank Ireland DAC, the objecting creditor…". The deponent swears that he has reviewed Ms. Mulvey's affidavit and confirms "…that her averments in relation to the Bank's provisioning requirements, as set out between paragraphs 15 and 23, are true and accurate. Ms. Mulvey's affidavit properly and accurately sets out the

provisioning that the Bank would have to make for the liabilities the subject of this case in the event that the proposed PIA was to be approved" [Paragraph 5].

Submissions generally

50. Very extensive written submissions were delivered by both the PIP and the bank. At the hearing itself, the PIP was represented by Mr. Keith Farry BL, and the bank was represented by Mr. Andrew Fitzpatrick SC and Mr. Niall Ó hUiginn BL. Detailed oral submissions were made with a view to supplementing the written submissions. What is set out below is a brief synopsis of both written and oral submissions, and I should make it clear that, in doing so, I have attempted to set out in broad terms the arguments of both sides, with particular emphasis on the submissions which have influenced my decision. While I have not attempted to set out every submission made on behalf of the parties, I have considered all submissions made.

Submissions of the debtor

51. In his written submissions, the PIP addresses the application under the following headings: -

(1) The legality of the term extension;

(2) The affordability/sustainability of the term extension;

(3) The costs of enabling the Debtor to remain in the PPR;

(4) Prejudice and unfair prejudice;

(5) The counterproposal of the creditor.

52. As regards the legality of the PIA, the PIP asserts that, while "the herein treatment is not the usual type of application to come before this honourable Court", the solution which it proposes has found favour with certain institutional creditors, which have approved similar arrangements consensually.

53. The PIP cites s.102(6) (a)-(c) of the Act, which is as follows: -

"(6) 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; …"

54. It is submitted that an extension of the mortgage term is permitted by s.102(6)(c), which unlike sub-sections (a) and (b), is not restrained by a temporal limit, and that it follows that the legality of the term extension in the present case is established, notwithstanding that the PIA extends beyond the normal life expectancy age as recorded by the Central Statistics Office.

55. In relation to the sustainability of the arrangement, reference is made to s.115A(9), which is as follows: -

> "(9) 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 –
>
> (a) the terms of the proposed arrangement have been formulated in compliance with section 104,
>
> (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,
>
> (c) having regard to all relevant matters, including the financial circumstances of the debtor and the matters referred to in subsection (10)(a), the debtor is reasonably likely to be able to comply with the terms of the proposed arrangement,
>
> (d) where applicable, having regard to the matters referred to in section 104(2), the costs of enabling the debtor to continue to reside in the debtor's principal private residence are not disproportionality large,
>
> (e) the proposed Arrangement is fair and equitable in relation to each class of creditors that has not approved the proposal and whose interests or claims would be impaired by its coming into effect,
>
> (f) the proposed Arrangement is not unfairly prejudicial to the interests of any interested party, and
>
> (g) other than where the proposal is one to which section 11A applies, at least one class of creditor has accepted the proposed Arrangement by a majority of 50 per cent of the value of the debts owed to the class."

56. The PIP submits that the key phrase which the court must bear in mind is the "reasonable prospect" referred to in s.115A(9)(b). The court must be satisfied that there is a

"reasonable prospect" that the matters set out in that sub-section will be achieved, rather than a "guarantee" or an "absolute certainty".

57. The PIP acknowledges that s.104 of the Act requires the PIP, insofar as is reasonably practicable, to formulate the proposed arrangement on terms that will not require the debtor to dispose of the PPR or cease to occupy it, and in doing so, must have regard to the matters set out in s.104(2), which are as follows: -

"(2) The matters referred to in subsection (1) are –

(a) the costs likely to be incurred by the debtor by remaining in occupation of his or her principal private residence (including rent, mortgage loan repayments, insurance payments, owners' management company service charges and contributions, taxes or other charges relating to ownership or occupation of the property imposed by or under statute, and necessary maintenance in respect of the principal private residence),

(b) the debtor's income and other financial circumstances as disclosed in the Prescribed Financial Statement,

(c) the ability of other persons residing with the debtor in the principal private residence to contribute to the costs referred to in subsection (2), and

(d) the reasonable living accommodation needs of the debtor and his or her dependents and having regard to those needs the cost of alternative accommodation (including the costs which would necessarily be incurred in obtaining such accommodation)."

58. At para. 28 of the written submissions, the PIP asserts that the test of "reasonableness" – in determining whether or not it is "reasonably practicable" to retain the PPR – "…is to be conducted by the PIP". I should say here that, while it is certainly the case that the formulation of the PIA in accordance with the principles set out in s.104 is a matter for the PIP, the objecting creditor took exception to any suggestion that the PIP is the ultimate arbiter of what is reasonable under the circumstances; it was submitted that it is a matter for the court to assess whether or not the PIP has achieved the objective set out in the section.

59. This appears to be acknowledged to some degree in the PIP's written submissions, which suggest that "…[t]he test of reasonableness also follows into whether the PIA itself will work, and the PIP, the creditors and indeed the Court will only need to take a 'reasonable' view as to the PIA working as distinct to a 100% guarantee of working" [Paragraph 29]. The PIP cites dicta of Baker J in "*Re Hickey* [2018] IEHC 313, *Re Meeley* [2018] IEHC 38, and *Re Hayes* [2017] IEHC 657 which address the approach of the court in relation to determining, in particular, whether there is a "reasonable prospect" that confirmation of the PIA will enable the achievement of the objectives set out in s.115A(9)(b), and whether, as s.115A(9)(c) requires, the debtor is "reasonably likely to be able to comply with the terms of the proposed Arrangement".

60. In *Hayes*, Baker J referred to her rejection in *Re Dunne (A Debtor)* [2017] IEHC 59 of the argument that the legislation was to be viewed as requiring that a PIA ensured the continuing solvency of a debtor after the term of the PIA itself had been completed. Counsel for the PIP placed particular reliance on this principle, given the uncertainty as to whether the debtor will still be alive and in a position to make repayments until the end of the restructured term. It was submitted that

> "37. The debtor may not outlive the term of the loan and a PIA may fail and the legislation cannot protect against unpredicted events that give rise to the failure of a PIA in its currency, or thereafter. With that, based on the facts and figures of this case, and the purpose of the legislation which is to provide a means of orderly debt resolution, not to guarantee continued insolvency outside its timeframe, then the PIP has done as much as he could/can." [written submissions]

61. Counsel for the PIP also relied on the "margin of appreciation" afforded to a PIP in formulating the PIA as acknowledged by Baker J in *Re Callaghan (A Debtor)* [2018] 1 IR 335 and at para. 58 of the decision of the same judge in *Re Sweeney (A Debtor)* [2018] IEHC 456 as follows: -

> "58. This application engages a number of statutory factors and the starting point must be that the court hearing an application under s.115A(9) has no power to vary or modify the proposed PIA. Thus, while certain criticisms of EBS to elements of the proposed PIA in the present case may be attractive, a margin of appreciation to be given to the PIP as an independent intermediary who brings to the process financial specialist knowledge must be respected: see *In Re Nugent* [2016] IEHC 127, In Re Reilly [2017] IEHC 558, and *In Re Meeley* [2018] IEHC 38."

62. It was submitted on behalf of the PIP that the question of sustainability of the arrangement was linked to the issue of whether or not the PIA was unfairly prejudicial to the bank. The issue arises from s.115A(9)(f) as quoted at para. 55 above. The PIP's submissions refer to the judgment of McDonald J in *Re Tinkler* [2018] IEHC 682, and in particular – given that there is no definition in the Act of the term "unfairly prejudicial" – the court's survey in that case of the authorities in relation to examinership legislation dealing with the same concept, such as *Re Antigen Holdings Limited* [2001] 4 IR 600 (High Court, McCracken J), *Re McInerney Homes Limited* [2011] IESC 31 (Supreme Court, O'Donnell J) and *Re SIAC Construction Limited* [2014] IESC 25 (Supreme Court, Fennelly J). As McDonald J commented in *Tinkler*:

> "50. It is clear from the observations of O'Donnell J. [in McInerney] that the concept of 'unfair prejudice' is a flexible one and that, in assessing whether any prejudice is unfair, the concept of fairness should be considered in the round. It is also clear from the observations of Fennelly J. in the SIAC case, that the concept of unfairness is not confined to cases where a creditor will fare worse in an examinership (or in this case a PIA) as compared to a receivership or a bankruptcy. Inequality of treatment is also a facet of unfairness."

63. Counsel also relied on the dicta of Baker J in *Re JD* [2017] IEHC 119, in which the court commented that it was "…mindful of the fact that a court may approve a scheme in circumstances even where 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…" [para. 69].

64. The written submissions of the debtor also rely on the evidence placed before the court that "…the herein loan will be sold, presumably at a discount, and likely to an investment fund…" [para. 45]. In his affidavit sworn on 24th February, 2021, the PIP exhibited media reports which suggested that the bank is considering leaving the Irish market, and speculating that it would sell its loan book to a US investment fund. It was submitted that the reality of a likely imminent sale to an unregulated entity should have an influence on the way in which the court should regard the contentions on behalf of the bank as to how it will be affected by the PIA.

65. In *Re Hayes*, the objecting creditor was an investment fund that was not a regulated entity. It objected to the term in the PIA fixing interest at a rate of 3.65% for an extended mortgage term of 27 years, maintaining that this was "unfairly prejudicial". The objecting creditor in that case maintained that it would not be possible to borrow an equivalent sum to the restructured mortgage over a similar period and that, as no lender was offering a fixed rate "even close to the term proposed", the term was unfairly prejudicial.

66. In this regard, Baker J commented – in dicta on which the present PIP relies – as follows: -

"53. I am not satisfied that the test for which the objecting creditor contends is based on a correct assumption. The objecting creditor is not a bank but an investment fund, and while the affidavit evidence of Mr. Johnson refers to the risk that 'a lender' might suffer loss were interest rates to be set at a low level over a long period and not be fixed in relation to, or in some other way track, ECB base rates, the affidavit of Mr. Johnson does not say or suggest as a matter of fact that the objecting creditor will require to return to the market to meet its capital needs in the future or fund the investment. The terms on which the asset was purchased or how it was financed are not identified.

54. In that context, I bear in mind the fact that what is proposed by the PIA is not that the mortgage debt will be refinanced, but that it be restructured. The test that the court engages therefore in considering the reasonableness of a proposed long-term interest rate, whether fixed, variable or linked in some way to the ECB rate or other rate, is not always to test the rate against the projected future borrowing needs of a mortgage lender, and in the present case the fairness of the rate is to be tested in the light of the actual circumstances of the objecting creditor. The loan is an asset of the objecting creditor, secured over real property, and the proposal offers a fixed, albeit long term, return on the investment, with the repayments proposed at an amount certain over the term…

56. A court may take various factors into account including the fact that the benefit of the secured loan is owned by an investment vehicle and not a commercial bank, that the loan remains secured, and that should the real property on which the loan is secured come to be sold in the future at a price greater than that on which a proposal is predicated that there exists a statutory provision for clawback contained in s.103(3), (4) and (13).

57. In those circumstances, I am not satisfied that the objecting creditor has shown me sufficient evidence that the proposed fixing of interest would, over the balance of the extended term of 27 years, be unfairly prejudicial to it merely on account of the interest rate, and the evidence adduced on the part of the objecting creditor, while it is clear and complete is predicated on a treatment of the objecting creditor as a lending bank, and not as an investment fund. I have insufficient evidence on which I could conclude that the proposal to fix the interest rates for the proposed extended term is unfairly prejudicial to the objecting creditor having regard to its status".

67. The PIP submitted that there was no evidence in the present case "as to any actual cost or loss that any provisioning would cause", and it was further submitted that "…the creditor could, on foot of a High Court Order, deem that this is not to be categorised as a non-performing loan and thus none of the [provisioning] requirements would apply…" [para. 47 written submissions]. It was suggested that the cost of provisioning of such a small debt was in any event so small that any such cost would not justify rejection of the PIA. It was submitted that the foregoing considerations, "have been rendered moot" on the basis that the provisioning requirements "will no longer matter since the creditor will no longer be trading in this jurisdiction".

68. Counsel made a number of submissions to which the affidavits made reference. It was emphasised that the bankruptcy comparison shows a 100% return of capital to the objecting creditor whether under bankruptcy or under the PIA, and that under the latter arrangement, interest will be paid over the restructured term at the current rate of commercial interest. It was submitted that the bank's constitutional rights were being respected, with no write-down of secured debt.

Submissions of the objecting creditor

69. Substantial written submissions were also delivered by the objecting creditor. As with the submissions on behalf of the PIP, much of them is spent traversing ground already covered in the affidavits, and will be relatively briefly summarised here. I should say however that I found the submissions on behalf of both the PIP and the bank, both written and oral, to be very clear, comprehensive, and of considerable assistance in clarifying the issues.

70. In relation to the sustainability of the PIA, the objecting creditor relies on s.115A(9)(b)(i) as quoted above, which requires the court to be satisfied that there is "a reasonable prospect" that confirmation of the proposed arrangement will enable the debtor to resolve her indebtedness without recourse to bankruptcy, and on s.115A(9)(c), which requires

the court to be satisfied that the debtor is "reasonably likely" to be able to comply with the terms of the proposed arrangement.

71. The bank submits that there is no reasonable likelihood that the court could be so satisfied in circumstances where it is accepted that the statistics show that the average life expectancy for a woman in Ireland is 82.8 years. It is suggested that the PIP, while acknowledging in the PIA itself that "…the term extension is to a time most likely beyond the life expectancy of the debtor…", subsequently resiled from this assertion, contending in the written submissions that there was "…no evidence before the Court that Ms. Fennell will be dead before the end of the term" [para. 34].

72. The bank also points to what it says are inconsistencies in the PIP's attitude to whether or not the PIA is in effect a "lifetime mortgage", averring in his second affidavit at para. 21 that "…the net or practical effect of the PIA is a lifetime mortgage…", while averring in his third affidavit at para. 32 that "…this was not to be a lifetime mortgage or a restructure of indefinite duration…", at para. 30 that "…the bank is not being asked to offer a lifetime product…", and at para. 65 that "…I believe that this loan will be repaid without the realisation of collateral".

73. The bank also questions the sustainability of the arrangement due to its dependence on third party support. As the PIA assumes that the debtor's children will contribute €80 per week, i.e. €347 per month, the fact that this exceeds the monthly capital and interest payments of €238.74 envisaged under the arrangement "…means that it will effectively be the Debtor's children who will be repaying the mortgage" [para. 29 written submissions]. Trenchant criticisms are made by the bank of the practitioner's evidence in relation to the proposed contributions from the debtor's children. In particular, the objecting creditor is critical of the letters exhibited from the debtor's children, Amanda Fennell and Patrick Fennell, in which they confirm in almost identical terms their willingness to continue paying amounts in support of their mother. As I have pointed out above, these letters in fact each refer to a contribution of €40 per month, rather than €40 per week. It is suggested that the letters are "evidentially worthless" and "manufactured hearsay evidence", and the bank draws attention to the fact that the children are employed in the aviation industry "which has ground to a halt for reasons which do not require explanation". It is certainly the case that there is no affidavit on behalf of either of the debtor's children, nor do the letters give any meaningful information as to the financial circumstances of the children, or of their ability to maintain payments of the level suggested in the PIA for a period of over 30 years.

74. The objecting creditor also refers to an inconsistency in which the PIP seems to suggest in his third affidavit that the debtor might be able to supplement her income by renting rooms to students, although the debtor in her own affidavit averred that it was "not possible to rent out rooms due to the fact that I need rooms for my children who both work in the travel industry and return often and also the house is small and I would have no privacy. I also suffer from anxiety and would not be comfortable with strangers or the increased possibility of infection…" [para. 42].

75. The objecting creditor emphasises the fact that the debtor has very substantial equity in what is a four-bedroom house, and draws attention to the averments of Ms. Mulvey to the effect that there are a number of properties for sale in Limerick City which are "roughly within the debtor's affordability", and further draws attention to the fact that €15,000 had been offered by the bank to the debtor to assist her with the purchase of a new property, which offer was rejected.

76. The bank addresses in its written submissions the contention that unfair prejudice arises due to the regulatory and accounting requirements which would be imposed on it by virtue of the loan being classified as "non-performing". The bank also addresses the contention that those requirements are "moot" by reason of what is alleged is an imminent exit by the bank from the Irish market, with the resultant sale of its loan book as follows: -

> "44. At one level, it would be silly to ignore the fact that circumstances have since moved on with the announcement that the bank is to close its operations. At another level, neither the bank, the practitioner nor the court can make any assumptions at this juncture as to what will happen to the bank's business generally or to the debtor's mortgage specifically." [Written Submissions]

77. It was submitted by the bank that it is not in a position to "choose" which loans to classify as performing and which to classify as non-performing, as the PIP suggested at para. 64 of his third affidavit. It is suggested that a "vast body of regulation…was introduced in the wake of the global financial crisis which saw credit institutions making catastrophic losses on subprime mortgages…", [para. 45], and that the bank is required to observe the requirements of this regulation.

78. The bank's written submissions summarised the evidence given by Ms. Mulvey – and confirmed by Mr. O'Brolchain – as follows:

> "(a) Under the EBA Technical Standards, the Bank is required to classify as a 'non-performing exposure' any exposure where 'the debtor is assessed as unlikely to pay its credit obligations in full without realisation of collateral, regardless of the existence of any past-due amount or the number of days past-due'.
>
> (b) The classification of a loan as non-performing requires the Bank, under the relevant accounting standard (IFRS9), to make a provision commensurate with the risk profile of the exposure. The Bank is also required to observe a minimum prudential provisioning requirement based on the length of time alone as being classified as being non-performing.
>
> (c) In this case, the provisioning requirement would increase year-on-year from 50% of the loan balance in December 2020 to 100% of the loan balance from 2025 onwards.

(d) The effect of provisioning is to deprive the Bank of the use of its capital which would have a negative impact on the Bank's ability to write new business." [Para. 46, written submissions]

79. It is submitted that the PIP did not engage with any of Ms. Mulvey's evidence, or explain the basis for his suggestion that the bank was in a position to decide whether or not to classify the loan as performing in the event that the PIA came into effect.

80. It was submitted that there could be no comparison between the "lifetime products" which the PIP alleged were now being offered by certain lenders in the Irish market who are authorised and regulated by the Central Bank, and the arrangement set out in the PIA. It was submitted that

> "…there is a fundamental difference between originating a lifetime mortgage and converting an existing annuity mortgage into a lifetime mortgage. Those lenders which offer lifetime mortgages have structured their business in such a way as to accommodate the fact that they will not receive any return on their investment until the death of the borrower and have established their funding requirements and predicted cash flow on that basis…" [para. 50].

81. In relation to the comparison with bankruptcy, the objecting creditor is critical of the suggestion that the PIA is more beneficial to the bank because interest of €10,487 would be paid to the bank over the term, a yield which the PIP maintains would not be available in bankruptcy or repossession of the PPR. The bank criticises this analysis as ignoring "…the time value of money and the necessity to apply a discount to future returns to reflect the fact that monies received in the future are not…as valuable as monies received in the present…" [para. 55 written submissions]. The objecting creditor cites dicta of Clarke J (as he then was) in *Re McInerney Homes* [2011] IEHC 4 in relation to the discounting of future income streams, and the fact that "…a discount rate is also used to reflect the risk of the income stream actually materialising. Put another way, someone investing money in a risky venture is obviously more likely to require a better rate of return to compensate for that risk than someone investing in an extremely safe project…" [para. 6.1 to 6.3.] It is suggested that, without applying an appropriate discount rate, the comparison of the immediate return in bankruptcy with the interest-bearing return under the PIA is "…utterly meaningless. It is the practitioner who bears the onus of showing the return under the PIA is better than the return in bankruptcy, an onus which he has signally failed to discharge." [Paragraph 57].

82. The objecting creditor sets out, at paras. 69 to 93 of its written submissions, its conclusions in relation to the sustainability of the PIA. It is submitted that the PIA is plainly unsustainable and cannot be performed according to its terms, which are that the mortgage would be repaid over a 372-month term. There is no "reasonable likelihood" that the debtor will be able to comply with the terms of the arrangement.

83. It is submitted that the Central Bank guidelines suggest that a term extension beyond 70 will not be sustainable unless there is "firm evidence" that an older age limit can apply,

and that in cases such as *Re Hayes, Re McNamara* [2019] IEHC 622 and *Re Nuzum* [2020] IEHC 164 the individual circumstances of the debtors were carefully scrutinised by the court to see whether such "firm evidence" existed. In *Hayes* and *McNamara*, the court set out the reasons why it was prepared to approve a term extension in circumstances where the debtors were more than 70 years old, McDonald J in McNamara emphasising the "very particular circumstances" that applied in the context of the professions of the debtors. The court held in that case that it was not inappropriate "…that the mortgage term should continue until age 78 in the case of Mr. McNamara and until aged 75 in the case of Ms. McNamara".

84. In *Re Nuzum*, McDonald J held that the proposed term extension to age 78 for both debtors was unsustainable due to a dearth of information available to the court "…which would enable me to form a view that Mr. Nuzum and Ms. Nuzum will be in a position to afford the monthly mortgage payments up to age 78 or 79. The bare assertion by the practitioner and by Ms. Nuzum that they will be in a position to do so falls far short of the evidence that would be required in a case of this kind" [Paragraph 82].

85. It is submitted that "…the evidence supplied in respect of [the contributions of third parties] is lamentably inadequate. Any sustainable restructure of a mortgage must be based primarily on the borrower's own income. Here, however, all of the repayments are to be covered by third parties who are not party to the arrangement and whose financial means have not been fully disclosed" [para. 86].

86. The objecting creditor also criticised the approach of the PIP in fashioning the PIA with a view to lowering the monthly repayments to an affordable level. The point is made that, if the extension of a term is permissible in all cases in order to lower the monthly repayments to an affordable level, such an approach could be taken in almost every single Personal Insolvency case, and certainly in all cases where the property is in positive equity. There would be no reason why terms could not be extended to dates which are indisputably beyond the life expectancy of the debtor. It is submitted that it cannot be permissible for a PIP to simply formulate a PIA which reduces the extent of the debtor's obligations to a manageable repayment level, notwithstanding that the arrangement itself is unsustainable and cannot be performed according to its terms.

87. It is submitted by the objecting creditor that the costs of enabling the debtor to continue residing in the debtor's PPR are disproportionately large, given the substantial equity, and what the bank considers is the availability of accommodation for purchase – with or without the assistance of the bank – in Limerick City. It is suggested that "…the Practitioner has conspicuously failed to provide cogent evidence to discharge the burden of demonstrating that the cost of enabling the Debtor to continue to reside in the principal private residence are not disproportionately large…" [para. 98]. While the proximity of family in the locality and a general practitioner with whom she has had a long relationship would clearly favour her remaining in the PPR, it is submitted by the bank that these factors "…cannot justify retention of a four-bedroom property on the terms proposed

when the evidence is that there are other properties in the area which are within her affordability". [Paragraph 98].

88. As regards whether the PIA is unfairly prejudicial, the objecting creditor places emphasis on the analysis as to whether the return for the bank under the PIA is better than the return in bankruptcy. The bank's position is that it would make a full and immediate return in bankruptcy while, under the PIA, "…the Bank (or its successor) would be locked into a highly speculative arrangement which, in all likelihood, will still require the bank to rely on its security to make recovery". [Paragraph 101]. *Re Nuzum* is advanced as a case in which the court accepted "…that an immediate return in bankruptcy was preferable to an interest-inclusive return under a speculative PIA…" [para. 103].

Discussion

89. While there is clearly a broad issue of principle which arises from the facts of the case, the PIA must be considered on its own terms as to its compliance with the requirements of the Act and accompanying jurisprudence, and thus whether the court should confirm its coming into effect.

90. As we have seen, the restructured term of 372 months – 31 years – set out in the PIA was intended to end when the debtor would be 98 years of age. As the PIA was formulated in May 2019, an order made at this stage by the Court for the coming into effect of the PIA would mean that the debtor would be over 100 years of age if she were to survive until the end of the restructured term.

91. It is clear from the terms of s.115A(9), set out at para. 55 above, that the court may make an order for the coming into effect of a PIA "only where it is satisfied" that there has been compliance with matters set out at parts (a) to (g) of that subsection. For ease of reference, and given its importance to the present application, s.115A(9)(c) is set out again as follows: -

> "9. 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 –
>
> …(c) having regard to all relevant matters, including the financial circumstances of the debtor and the matters referred to in subsection 10(a), the debtor is reasonably likely to be able to comply with the terms of the proposed Arrangement…".

92. On reading s.115A(9), one might think that sub-section 9(c) above is directed primarily to the financial aspects of affordability and sustainability, particularly given its explicit reference to "the financial circumstances of the debtor", and to the matters referred to in sub-section 10(a), which requires the court to have regard to the conduct, within two years prior to the issue of the protective certificate, of "the debtor in seeking to pay the debts concerned, and a creditor in seeking to recover the debts due to the creditor". While this may be so, it seems clear that the requirement of the court to have regard "to all relevant matters" obliges the court to consider any matter which is relevant to the

issue of whether the debtor is "reasonably likely to be able to comply with the terms of the proposed arrangement", and that this consideration is not intended to be limited to the debtor's financial circumstances or the matters set out in sub-section 10(a).

93. The bank bluntly submits that the court cannot be satisfied that the debtor is "reasonably likely" to comply with the terms of the PIA, in circumstances where the PIA itself acknowledges that "…the term extension is to a time most likely beyond the life expectancy of the debtor…", and where the PIP exhibits documentation from the Central Statistics Office suggesting that the average life expectancy from birth for a woman in Ireland is 82.8 years. The bank also makes reference to the health difficulties being experienced by the debtor, for which she is under the regular care of her general practitioner, and which necessitates occasional attendance at hospital.

94. The PIP's position, as expressed in his affidavits and submissions, is that there is no evidence before the court to suggest that the debtor will not live to the end of the restructured term, and counsel makes the obvious and self-evident point that no debtor is ever assured of living until the end of a mortgage term; debtors do on occasion pass away unexpectedly before their debt secured by the mortgage has been repaid, and the mortgagee creditor must then either resolve matters by negotiation with the debtor's estate, or take whatever action is required at law to realise its security or otherwise recover the debt. It is submitted that there is no difference between such a scenario and the present scenario, and the fact that the debtor has substantial equity in the property means that the bank is certain ultimately to recover the mortgage debt even if the debtor does not survive until the end of the mortgage term.

95. It is uncomfortable – and perhaps distressing for the debtor herself – for the court to be required to consider and discuss at some length the implications of the demise of the debtor, and in particular whether or not that demise is "reasonably likely" to occur prior to the debtor becoming a centenarian. The PIP's position is that a term extension beyond normal lifespan is permitted by the Act, and relies on the arguments in relation to the provisions of s.102(6) of the Act summarised at paras. 53-54 above; specifically, he argues that the possibility of term extension in relation to secured debt in s.102(6)(c) is not temporally limited, as the options at (a) and (b) are, so that the Act implicitly leaves the PIP, in formulating the PIA, at large in relation to the length of the "specified period of time" by which the mortgage term is to be extended. The PIP's position is that he has proposed an extension of sufficient length to assure the affordability and sustainability of the mortgage, and that the Act permits him to do so, notwithstanding the PIA's statement that the term extension "is to a time most likely beyond the life expectancy of the debtor".

96. It is certainly the case that s.102(6)(c) does not impose a specific limit on a proposed extension of the mortgage term. However, does it follow that the term can in theory be extended beyond the lifetime of the debtor?

97. In construing s.102(6), it is perhaps somewhat misleading to look only at parts (a) to (c) of the subsection. It is necessary to consider the subsection as a whole in order to

consider properly its scope and intent, and for that reason, the somewhat lengthy text of the subsection is set out below: -

> "6. 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 creditors 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."

98. Section 102(6) sets out options which the PIP may deploy in relation to the secured debt when formulating the PIA in order to produce a sustainable arrangement. Options (e) to (i) relate to "once-off" options: changing the nature of the interest rate, reducing the principal sum on the basis that the secured creditor gets a share of the equity, and so on. Options (a) to (d) on the other hand relate to terms which concern payment "for a specified time", i.e. ongoing obligations. Parts (a) (b) and (d) relate to payments of secured debt, and accommodations in relation thereto which may be made in the short

term but are not to exceed the duration of the PIA; part (c) makes a more general point, which is that the period over which the secured debt is to be paid may be extended.

99. Effectively, the debtor argues for an application of the *maxim expressio unius exclusio alterius:* that the inclusion of a temporal limit in Clauses (a) and (b) implies that the omission of a temporal limit in Clause (c) is deliberate, and that therefore the PIP is at large in selecting the "specified period of time", even one which would extend beyond the natural lifetime of the debtor.

100. In "Statutory Interpretation in Ireland" (2008), Dodd, Tottel Publishing, there is the following helpful passage in relation to drawing inferences from omissions in a statutory text:

> "A court may on occasion draw inferences as to legislative intention not only from the text but from omissions from the text. The drafter is presumed to be competent and it is presumed that words are used in a statute deliberately. A corollary of this presumption is that where the legislature does not include something, a court may on occasion find that the omission is deliberate and supports a particular interpretation. Where an interpretation of an ambiguous provision could have been expressed in a certain manner by the legislature by the inclusion of a particular word or phrase, the omission of that word or phrase may be used to infer that that interpretation is not the intended one. Reasoning from omission is to be treated with caution – it is rarely decisive but can support an interpretation reached by other means. The limits or bounds of the use of the legislature's omissions have rarely been expressly formulated outside of the *expressio unius maxim*. The *expressio unius maxim*…also involves reasoning from a combination of what is said and what is omitted." [p. 141, para. 5.78]

101. It does not seem to me that the inference that s.102(6)(c) implicitly authorises an extension of the mortgage term beyond the debtor's lifetime is warranted. Firstly, parts (a), (b) and (d) relate to significant alterations to the debtor's repayments which may be proposed in the arrangement, but only for a period of time which cannot exceed the duration of the arrangement itself, the maximum duration of which, pursuant to s.99(2)(b), is 72 months, which period "may be extended for a further period of not more than twelve months…". Section 102(6)(c) is a more general provision: it does not relate to the composition of the payments to be made for a specified period of time not to exceed the duration of the arrangement, but rather to the general power of the PIP, in formulating the PIA, to extend the term for payment of the secured debt by a specified period of time. Part (c) does not relate to what may or may not be done by the PIP in formulating terms as to the repayment of the debt during the period of the PIA itself. As such, the purpose of part (c) of the subsection is quite different to that of parts (a), (b) or (d), and I do not think the inference contended for by the PIP from the absence of a temporal limit is warranted.

102. Secondly, s.102(6)(c) permits the possibility of the extension of "the period over which the secured debt was to be paid…". In my view, this means that the period can only be

extended to allow repayments to take place over a longer period. It follows that the period cannot be extended to a point where the debtor would no longer be making payments because she had passed away.

103. Thirdly, s.102(6)(c) must in any event be construed in the light of s.115A(9)(c), which requires that the debtor be "reasonably likely to be able to comply with the terms of the proposed arrangement…". In construing s.115A(9)(c), the issue arises as to whether it is necessary to have regard to s.5(1) of the Interpretation Act 2005, which is as follows: -

> "In construing a provision of any Act, (other than a provision that relates to the imposition of a penal or other sanction) –
>
> (a) that is obscure or ambiguous, or
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –
>
> > (i) in the case of an act to which paragraph (a) of the definition of 'Act' in section 2(1) relates, the Oireachtas, or
> > (ii) in the case of an act to which para. (b) of that definition relates, the parliament concerned.
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole".

104. Section 115A(9)(c) is not obscure or ambiguous. A literal interpretation of the section is not absurd, and in my view does not fail to reflect the plain intention of the Oireachtas. The sub-section simply requires the court to be satisfied that "the debtor is likely to be able to comply with the terms of the proposed arrangement". The arrangement in the present case requires, in essence, that a reduced sum be paid monthly by the debtor to the secured creditor for a period of 31 years. If it is the case that the court is not satisfied that the debtor is "reasonably likely" to comply with this obligation, the court cannot make an order confirming the coming into effect of the arrangement.

105. The bank placed heavy reliance on the Central Bank guidelines and the contention that a term extension beyond 70 will not be sustainable unless there is "firm evidence" that an older age limit can apply. It is fair to say that every PIA requires "firm evidence" to establish its sustainability, and the court in every case scrutinises the evidence offered by the PIP to ensure that this standard is met. The decisions in *Hayes*, *McNamara* and *Nuzum* all involved such scrutiny, and the court in each case interrogated the circumstances of the debtor and set out its reasons why an extension beyond the age of 70 was or was not approved.

106. In fairness to the PIP, it is clear from his evidence that his intention, in extending the term, was to bring about a sustainable monthly payment which the debtor could afford. The averments at para. 12 of his affidavit of 27th February, 2020, quoted at para. 20 above, make that clear. As he put it, "…there was little difference between an extension

to age 84, 94 or even 120 when the aim of the PIA was to provide a sustainable lifetime housing cost and residence".

107. However, s.115A(9)(c) requires the court to consider whether it is "reasonably likely" that the debtor is able to comply with the terms of the PIA. I regret to say that there is no evidence before me to suggest that it is "reasonably likely" that the debtor will be making payments in accordance with the terms of the PIA at age 98 or beyond. The circumstances of the case, and the statistical evidence which the PIP himself provided, suggest that this would be unlikely and, as we have seen, the PIA itself acknowledges this.

108. The PIP however does not accept that the court must conduct an assessment of whether or not the debtor is "reasonably likely" to be able to comply with the terms of the PIA. He submits as follows: -

> "36. Insofar as the court is obliged to inquire 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 and in this case evidence is given where the debtor hopes to outlive the restructure". [Written submissions].

109. In making this submission, the PIP appears to call in aid the decision of Baker J in *Re Dunne (A Debtor)* [2017] IEHC 59, in which the court stated at para. 46 as follows: -

> "…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…".

110. A similar argument was made by the PIP in *Re Hayes (A Debtor)* [2017] IEHC 657. In that case, Baker J, in referring to the passage quoted in *Dunne* above, stated that those dicta "…cannot be understood outside the context in which it was given and does not mean that a court will not examine the sustainability of a proposal in the light of known future circumstances. The further away one moves from the present and from the 6-year term of the PIA, the less scrutiny is possible or desirable as the court ought not to engage in conjecture and prediction" [para. 31].

111. The court however went on to say as follows: -

> "33. *Re Dunne (A Debtor)* is not authority for the proposition that a court examination of the sustainability of a proposed PIA may not examine likely future circumstances, but reflects the practical difficulty of predicting events far into the future and derives from the nature of the jurisdiction of the court under the Act to assess the

sustainability of the PIA in the light of the stated objective to ensure a return to solvency, not guarantee continued solvency in all eventualities.

34. The degree of scrutiny of future events will depend on the factual matrix, and there will be many cases along the spectrum between cases where the future financial circumstances are more or less predictable…"

112. It is clear from the dicta in *Re Dunne* and *Re Hayes* that Baker J was concerned with whether or not an assessment as to whether it was "reasonably likely" that the debtor would comply with terms of the proposed arrangement could be carried out, in circumstances where an assessment of the sustainability of the arrangement far into the future might be difficult. In the present case, there are issues as to whether, even if the extended term were permissible, the proposed monthly payment is sustainable, having regard to the resources of the debtor. However, the more pressing point is as to whether an assessment can be made of whether it is "reasonably likely" that the debtor will still be in a position to make payments up to the end of the extended term. Regrettably, it seems to me that the court is entitled to make a judgment, on the basis of the evidence before the court, that it is not "reasonably likely" that the debtor will still be performing the terms of the PIA up to the end of the extended term due to the likelihood of her demise before the end of the term.

113. As set out at para. 7 above, Clause 2.3.1.9 does expressly provide that, if the debtor does not survive until the end of the restructured mortgage term, "…her estate will repay the remaining balance owing on the secured debts to Ulster Bank from the sale of the home". However, I do not think that this can be regarded as a legally enforceable commitment which is an integral part of the terms of the arrangement. As counsel for the bank pointed out, the clause "does no more than state the existing position at law". It imposes no obligation on those who will administer the debtor's estate after her demise, and it confers no benefit on the objecting creditor, simply leaving the bank in the position it would have been in if the debtor at any point became unable to perform her obligations under the arrangement.

114. Even leaving aside the issue of whether an extension of the mortgage term beyond the lifetime of the debtor is permissible, it does not seem to me that there is sufficient evidence to satisfy the court that the restructured payments are sustainable. It is clear that the arrangement is entirely dependent on two of the debtor's adult children paying €40 each per week to enable the debtor to make the mortgage repayments and meet her other commitments. No affidavit is proffered by these parties. While the debtor exhibits letters in virtually identical terms from each of them, these letters refer to payment of €40 "each month", rather than weekly payments. That this is what was intended by them, and not inadvertence or a typographical error, is indicated by the statement later in each of the letters that "…I will be in a position to contribute up to €100 per month to ensure the mortgage is paid in full". The letters do not give sufficient information, or any corroborating documentation, in relation to the assets and liabilities of the parties which would enable the court to make a reasoned assessment of whether they could in fact

afford to make payments sufficient to enable the debtor to discharge the restructured payments.

115. At para. 82 of his affidavit of 24th February, 2021, the PIP avers that he is advised "…that all of the Debtor's children are happy to provide their full financial information to the bank and to sign up to the loan and become fully liable for same. I say that this would appear to cure any age issues as then the loan would be attaching to a much younger borrower…the Debtor's children are also happy to re-finance the loan and remove the creditor once lending returns to normal post COVID" [paras. 82 to 83].

116. While I have no reason to doubt the good faith and genuine desire of the debtor's children to support her in discharging the mortgage, an indication relayed through the PIP that they are willing in general terms to "sign up to the loan" and become jointly liable for it at some time in the future falls far short of the sort of evidence that would be required to establish to the satisfaction of the court that the proposed repayments are sustainable. The PIA must be judged on its own merits and on the basis of the evidence put forward to support its viability. Unfortunately for the debtor, I am of the view that the PIP has not established that the debtor is "reasonably likely to be able to comply with the terms of the proposed arrangement", and that the evidence before the court does not establish that the restructured payments are affordable or sustainable.

117. As regards the vexed question of whether the approval of the PIA would cause unfair prejudice to the bank by obliging it to provision for the loan, thereby depriving the bank of the use of its capital – see the summary of the bank's submissions at para. 78 above in this regard – the bank's position was rejected by the PIP, whose counsel argued that, firstly, no evidence had been adduced by the bank as to any actual loss or cost that any provisioning might cause. Secondly, it was suggested that the bank was choosing to characterise the facility as "non-performing"; as the PIP remarked, "…it appears to me that the bank can just as easily choose to define this loan as performing and not invoke any of the supposed consequences…" [para. 64, affidavit of 24th February, 2021]. Thirdly, it was suggested that, even if the objecting creditor were correct that provisioning would be required, the cost to the bank was not sufficient to warrant the refusal of the coming into effect of the PIA, with the debtor losing her home as a result.

118. The PIP argued in any event that the foregoing considerations were rendered moot as "…this 'provisioning' requirement will no longer matter since the creditor will no longer be trading in this jurisdiction". [Paragraph 47 written submissions]. In this regard, see the PIP's averments quoted at para. 40 above, which were accompanied by exhibits of media reports. It should be said that these reports go no further than to suggest that the bank's parent was "actively considering" exiting the Irish market, with the possible sale of Ulster Bank's loan book. A named US investment firm was said to be "considering an approach" for this loan book.

119. There is no evidence before the court that the bank has publicly expressed any position on whether it proposes to withdraw from the Irish market, although this does appear to be implicitly admitted in the statement in the written submissions referenced at para. 76

above. However, there is nothing in the affidavits or submissions to indicate what is to happen to the bank's loan book, even if it is to exit the Irish market. I have not taken this aspect of the matter, or the PIP's submissions in this regard into account, as the court cannot come to its conclusions on the basis of speculation as to the future business plans of the bank.

120. It is not quite true to say that the bank does not adduce any evidence of the actual loss or cost of provisioning which it maintains it will incur. At para. 20 of Ms. Mulvey's affidavit, she sets out the basis of calculation of the "prudential provision coverage requirement" which indicates that, within five years, coverage on the loan balance would increase from 50% to 100%. Ms. Mulvey then avers as to the effect of this on the bank's operations, as summarised at para. 33 above. Although calculations or projections would have been helpful, it is possible for the court to get a general idea of the effect of provisioning, if it is in fact necessary.

121. As I am of the view, as set out above, that the debtor cannot be said to be "reasonably likely to comply with the terms of the proposed arrangement…", I do not have to decide whether there is an obligation on the bank to provision in respect of the proposed arrangement, or whether the cost of doing so would be unfairly prejudicial to its interests. In any event, it is difficult to see how the issue arises. If I do not approve the coming into effect of the arrangement, that is the end of the present application. However, if I were to approve the arrangement, which could only be on the basis that the debtor were in fact reasonably likely to comply with its terms, i.e. that she had established to the satisfaction of the court that she would make the payments due under the arrangement for its full term, it does not appear to me that there should be any need for provisioning, as the reconstituted loan would not be a "non-performing exposure" according to the "EBA technical standards" exhibited to Ms. Mulvey's affidavit (which were in any event in dispute between the parties at the hearing before me as to their validity and applicability), as the debtor could hardly, in view of the court's finding, be assessed as "unlikely to pay its credit obligations in full without realisation of collateral…" [para. 16, Mulvey affidavit].

122. It was also argued by the bank, as set out at para. 81 above, that the suggestion by the PIP that the PIA was more beneficial to the bank because interest of €10,487 would be paid to the bank over the term of the loan was insupportable, as a discount rate would have to be applied to the interest income stream – as Clarke J put it in *McInerney Homes*, "…to reflect the risk of the income stream actually materialising…". However, while the bank is correct in submitting that the PIP "bears the onus of showing the return under the PIA is better than the return in bankruptcy…", that is not to say that the PIP is obliged to embark upon a sophisticated analysis comparing the interest rate which would accrue to the secured creditor over the lifetime of the restructured loan to a notional use to which the proceeds of sale of the secured asset would be put after realisation in a bankruptcy.

123. If the bank requires to demonstrate that payment of interest over the course of a restructured term is unfairly prejudicial when compared to an immediate and full

realisation in bankruptcy, it should adduce some evidence, with appropriate projections, as to why this is so. In the present case, no evidence was presented to the court in this regard, and I am not prepared to assume – as invited to do by the objecting creditor – that the modest interest income payable under the arrangement must necessarily be less valuable to the bank than income generated from the proceeds of sale of the secured asset.

124. At para. 27 of the PIP's affidavit of 24th February, 2021, he made reference in very general terms to a number of instances involving other secured creditors who would, it is contended, have approved the present PIA, or who have in the past approved PIAs with extensions beyond the average lifespan of the debtors involved. The PIP used these examples to "…emphasise the point that many creditors are happy to engage and to approve more burdensome PIAs than the herein PIA…" [para. 28]. While that may or may not be so, I cannot take into account such an assertion, or cases to which vague reference is made without any intimation of the details involved. Each case must be judged on its own merits, and only when the court is in full possession of all the facts.

125. The bank considers that the PIA, if approved by the court, would require the bank to sustain a "lifetime mortgage". I refer to Ms. Mulvey's averments in this regard at that paras. 30-32 above. Ms. Mulvey avers that the bank "…does not, and cannot offer lifetime mortgages…", and gives a number of reasons for this, which include the alleged necessity, under EC regulations, to provision for such a loan. The bank submits that "…there is a fundamental difference between originating a lifetime mortgage and converting an existing annuity mortgage into a lifetime mortgage…" [para. 50 written submissions].

126. As I have not been satisfied in the present case that the debtor is "reasonably likely to be able to comply with the terms of the proposed arrangement", I am not in a position to confirm the coming into force of the arrangement, and do not require to consider the question of whether a "lifetime mortgage" is ever permissible in a PIA. In any case in which such a solution is proposed by a PIP, I would expect that the implications for the debtor and creditors would be set out in evidence by the parties so that a full assessment could be made by the court as to whether such an arrangement is in accordance with the Act. In particular, I would expect that an objecting creditor asserting that an arrangement involving a "lifetime mortgage" was unfairly prejudicial to its interests would seek to demonstrate this by means of evidence showing the effect of such an arrangement on matters such as the provisioning, if any, necessitated by such an arrangement, the likely effect on the creditor's balance sheet, and the alternative use to which the proceeds of an immediate realisation of the security could be put.

127. As we have seen, the objecting creditor proposed an "incentivised assisted surrender" of the property, in which it would provide the debtor with €15,000 towards relocation costs: see para. 19 above. Section 115A(9)(d) provides that the court must be satisfied, having regard to the matters set out in s.104(2) of the Act, the terms of which are set out at para. 57 above, that the costs of enabling the debtor to continue to reside in the debtor's

principal private residence are not disproportionately large. The bank objects to the PIA on the basis *inter alia* that the court cannot be satisfied in this regard, given that the PPR is a four-bedroom property "which [the debtor] occupies alone", although para. 96 of the PIP's affidavit of 24th February, 2021 suggests that some of the children "now reside in the PPR (or use it as a base) with the Debtor".

128. In view of the conclusion which I have reached in relation to the PIP's application, and with a view to encouraging further negotiation between the parties, I think it is better if I do not express any conclusions as to whether the costs of the debtor continuing to reside in the PPR are disproportionately large. Each case turns on its own very specific facts, and it may be that the parties may be able to agree a change in the debtor's circumstances which would address the concerns of the bank in this regard.

Conclusion

129. As will be clear from the foregoing, 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.

130. 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.

131. 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 lifespan 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. 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.

132. As regards the present case, at paras. 98 and 99 of his affidavit of 24th February, 2021, the PIP emphasises the steps which the debtor's children may be prepared to take to deal with the outstanding balance of the mortgage were the debtor to pass away prior to the end of the restructured term. As we have seen at para. 114 above, the PIP also conveys the children's avowed willingness to assume responsibility for their mother's indebtedness. While these steps are not expressed in other than aspirational terms, and while the PIP does acknowledge at para. 100 of that affidavit that "…pure homelessness is not [an] immediate worry…", one would hope that the undoubted 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 where she is settled, happy and which holds so many memories for her.

133. I would certainly encourage the parties to continue to seek a workable resolution which could achieve this end. However, I must dismiss the PIP's application. I will adjourn the matter for mention to the first hearing of the Personal Insolvency List after delivery of this judgment to give the parties an opportunity to consider it, and the orders to be made.