THE HIGH COURT

CIRCUIT APPEAL

[2021] IEHC 568

[2019 555 CA]

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012-2015

AND

IN THE MATTER OF KAREN FITZPATRICK OF DRUMALEE, BELTURBET, COUNTY CAVAN ('A DEBTOR')

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012-2015

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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 27th day of August 2021.

Introduction

1. This judgment concerns applications by EBS DAC ('the objecting creditor" or 'the bank') to this Court to appeal the judgment and orders of the Circuit Court of 19th December, 2019 in each of the cases in the title above, which confirmed the coming into effect of the personal insolvency arrangement ('PIA') in each case in respect of Karen Fitzpatrick and Niall McKiernan ('the debtors').

2. The applications raise important issues as to whether the PIAs, in accordance with s.115A(9)(b)(ii), enable the creditors to recover the debts due to them to the extent that the means of the debtors reasonably permit, or whether, as the objecting creditor alleges, the terms of the PIAs are unfairly prejudicial to it as a creditor. A further issue is whether or not the provisions of s.51 of the Personal Insolvency Acts 2012-2015 (referred to hereafter collectively as 'the Act') require pension assets which are likely to accrue to the debtors in the future to be taken into account in assessing the resources available to creditors to discharge their liabilities.

Background

3. The debtors are a married couple, who reside at Drumalee, Belturbet, Co. Cavan. Ms. Fitzpatrick is described in her PIA as a "head teacher" in Cavan and Monaghan ETB. Mr. McKiernan is a garda sergeant. In his affidavit of 29th January, 2019 on behalf of both debtors, Mr. McKiernan refers to the principal private residence ('PPR') as having a value of €320,000, whereas the active loan balance owing to the bank consists of a live balance of €386,376 and a "warehoused" amount of €97,979. The debtors also own a property at 4 Church Hill, Clones, Co. Monaghan which was purchased as a buy-to-let investment. This property was acquired by a loan from the bank of €137,000 to Ms. Fitzpatrick. The

property is unoccupied, and is deeply in negative equity. The evidence of the bank is that no payments have been made on foot of the loan to Ms. Fitzpatrick in respect of the Clones property since October 2014.

4. The debtors accepted a home loan in the amount of €530,000 on 24th April, 2006 to construct the property at Drumalee. Various top-up loans were made to the debtors by the bank in the sum of €260,000 to allow them to complete the construction of the PPR. The debtors fell into arrears in 2011, and entered a mortgage arrears resolution process ('MARP') with the bank in May 2012. In 2014, the debtors and the bank agreed a restructure of the various loans ('the 2014 restructured loan') by which the debtors obtained a write-off of €286,000. In addition, a sum of €82,368.08 was warehoused for a period of 329 months, *i.e*. payment of this sum, to which interest would not be applied, would be deferred until the end of the mortgage term. It appears that this sum was subsequently revised to €97,979.07, the amount for which the bank proved for the purposes of the PIA. The live balance of the restructured loan, according to the facility letter of 3rd September, 2014, was to be €411,840.38, to which an interest rate of 4.58% would be applied over the restructured period of 329 months. The parties accept that the 2014 restructured home loan required payments to be made monthly of €1,995 per month, although the facility letter refers to a higher figure of €2,200.13. The bank accepts that the debtors have discharged these monthly payments in full since the restructured home loan was agreed.

5. However, the debtors now contend that the warehoused element "…will lead to an insolvent position between now and the end of the loan, and a homeless situation at the end of the loan…" [affidavit Niall McKiernan of 29th January, 2019, para. 24]. It is suggested by the debtors that they are "wholly insolvent" on a balance sheet basis, and insolvent on a cash flow basis in that they will be unable to meet the warehoused amount when it falls due.

The PIAs

6. The debtors consulted Mr. John Donnan of Kirk & Associates ('the PIP'), who formulated the debtors' PIAs after conducting a s.98 process with the creditors. The meeting of creditors was held on 25th January, 2018. The arrangement was rejected by the creditors – effectively, by the bank, as the only other creditor of the debtors present and voting was an unsecured creditor, ADL Tile & Stone Limited, which voted in favour of the arrangement. The bank subsequently in its submissions took issue with this creditor being relied upon by the debtors to constitute a class of creditors ('regular unsecured class of creditors') for the purpose of s.115A(17), on the basis that this creditor was in fact a "connected person" for the purpose of s.108(5), and thus prohibited from voting in favour of the PIA. However, no evidence was proffered in this regard, nor was this objection raised in the notices of objection filed on 7th February, 2018. As the matter was not pressed by the objecting creditor at the hearing before me, I do not propose to consider it further.

7. As of January 2018, Ms. Fitzpatrick and Mr. McKiernan were each 43 years of age. They had three children aged three, five and eight. The PPR was stated in the PIA to be valued

by the bank at €320,000. The debtors proposed that the mortgage balance be reduced to this figure and discharged over 289 months, or approximately 25 years, at existing mortgage rates. The estimated monthly mortgage payment under the PIA was stated to be €1,784.99, a reduction from the existing repayment of approximately €1,990 per month. The buy-to-let property in Clones, valued at €30,000 by the bank, would be sold with the proceeds going to the bank, and the residual balance on the loan in respect of this property treated as an unsecured debt. There would be a lump sum contribution of €40,000 from a relative of the debtors to provide for the PIP's fees and a dividend for the unsecured creditors. As Ms. Fitzpatrick's salary was higher than that of Mr. McKiernan, she would bear 60% of the reasonable living expenses ('RLEs'), with Mr. McKiernan bearing 40%. The duration of the PIA would be six months, primarily so that the benefit of the lump sum would be maximised for the creditors, and not dissipated through the larger PIP's fees which would be generated in a 72-month PIA.

8. After deduction from her monthly net income of her percentage of set costs, mortgage repayment and child care costs, Ms. Fitzpatrick had an amount of €750.70 available to contribute to the arrangement. For Mr. McKiernan, the equivalent figure in his PIA, including deduction of hire purchase repayments on a car, was €100.26. These were the figures applicable in January 2018; the PIP also included in the PIA a projection of the RLEs from 2019 to 2024, given the likely increasing educational costs for children aged three, five and eight over the following five years, during which the children would progress from pre-school, junior infants and second class respectively to second class, fourth class and first year of secondary school. Applying RLEs set by the Insolvency Service of Ireland ('ISI'), the PIP's calculations indicated that living expenses of €3,547.13 in January 2019 would rise to €3,900.77 by January 2024.

9. Each of the PIAs suggested that the arrangement offered a better outcome for the creditors than would be available in bankruptcy. While the warehoused amount under the 2014 arrangement would be written-off, and the mortgage reduced to €320,000 – the estimated value of the PPR – repayable over 295 months, this sum, together with interest, would be paid in full. A write-off for the secured lender of €253,690 would be required under the PIA, whereas an immediate realisation of the debtors' assets through bankruptcy would result in a write-off of €290,968.

10. The point was made during submissions on behalf of the bank that neither the reduction in monthly mortgage repayments of over €200 envisaged by the PIA, nor the combined available contribution of the debtors after RLEs of €850, were being applied either to an increased repayment of the mortgage, or in payment of the unsecured creditors. It was submitted by counsel for the debtors that this money would be needed by reason of the increasing costs of a young family; it could be assumed that the children would progress through school and on to college over the next twenty years, with increasing costs, perhaps involving the necessity to fund the children while they were living away from home. The family would also have to have some margin whereby it could provide for the many unforeseen expenses which would inevitably occur over a twenty-year period;

expenses caused by illness, unemployment, or the unavoidable need to replace or repair major assets or household appliances.

11. By way of example, Mr. McKiernan's net monthly income in January 2019 was €2,509.26 after deduction of the set costs and other expenses applicable in January 2019. This left him with a monthly contribution available of €100.26. If one calculated his available monthly contribution in 2024 by deducting from €2,509.26 his share of the 2024 set costs (€1,560.31), his share of the monthly mortgage (€714.00) and his car repayments (€276.15), he would be left with a deficit of €41.20 below the RLEs deemed appropriate by the ISI. Applying the same test to Ms. Fitzpatrick, and deducting from her net monthly income of €3,949.97, her share of the 2024 set costs (€2,340.46) and her share of the monthly mortgage (€1,071), a contribution of €538.51 would be available. By 2024 therefore, the couples' contribution available for application to the family's expenses, or to the debtor's creditors, had, according to the PIP's figures, decreased from approximately €850 in January 2019 to €497 in January 2024. It was submitted that it would be inevitable that the available contribution would further decrease as the children's educational and other expenses increased.

The present applications

12. Applications pursuant to s.115A(9) of the Act were issued by the PIP in respect of each of the debtors on 29th January, 2018, and the PIP grounded his applications on an affidavit of 6th February, 2018. A notice of objection was issued by the objecting creditor on 7th February, 2018. Essentially, the notice contended that the objecting creditor was unfairly prejudiced by the arrangement contrary to s.115A(9)(f) in a number of respects, the main grounds of which may be summarised as follows: -

    (i) The arrangement was contrary to s.115A(9)(d) in that the costs of enabling the debtors to continue to reside in the PPR on foot of the terms set out in the PIA were disproportionately large, and where the debtors had capacity to comply in full with the terms of the 2014 restructured loan;

    (ii) the creditors would achieve a better outcome under the 2014 restructured loan and/or a counter offer made by the objecting creditor on 23rd January, 2018;

    (iii) the terms of the PIA were unfair and inequitable in circumstances where the creditor had already granted a write-off in 2014 of €286,851;

    (iv) the arrangement did not provide for repayments to the creditors in accordance with the debtors' means;

    (v) the proposed write-off of the warehoused balance was unfairly prejudicial;

    (vi) the repayment history of the debtors in the two years prior to the issue of the protected certificate displayed a capacity to comply with the terms of the 2014 facility.

13. The counter offer to which the notice of objection refers was in the form of an email from the bank to the PIP on 23rd January, 2018, only two days before the creditors' meeting. This offer accepted that there should be a six-month PIA, with voluntary surrender of the Clones property, proceeds of sale of that property going to the bank, with the residual balance being treated as an unsecured creditor, and the €40,000 lump sum being treated as suggested in the PIA, *i.e.* to be used to discharge the PIP's fees and to pay a dividend to unsecured creditors. The existing split mortgage however was to be retained with no further write-off of either the live balance or the warehoused amount.

14. The PIP complained that receipt of this offer two days before the creditors' meeting did not represent a proper engagement with the PIP; the objecting creditor complained that the offer was not put before the meeting of creditors for a vote.

15. There then followed a somewhat leisurely exchange of affidavits by the parties. Affidavits were sworn on behalf of the bank on 19th July, 2018, 1st April, 2019 and 12th July, 2019; Mr. McKiernan swore an affidavit on behalf of both debtors on 29th January, 2019; and the PIP swore further affidavits on 29th January, 2019 and 30th May, 2019. As is the way of these things, much of the affidavits set out the respective arguments of the parties, and given that both sides made detailed written submissions to this Court, I do not propose to refer to the arguments set out in the affidavits in any detail. However, it is appropriate to refer to some factual matters to which Mr. McKiernan made reference in his affidavits.

16. In his affidavit of 29th January, 2019, Mr. McKiernan avers that he and Ms. Fitzpatrick were "left with no choice but to accept the restructuring [in 2014] as proposed by the Objector…the current monthly repayments will in fact clear the active portion of the PPR loan by the end of the term with only the warehoused amount left." [Para. 9].

17. He goes on to aver that "third level special circumstance costs and college costs will in fact increase [`the debtors']expenditure going forward…", and points out that the Official Assignee, in a bankruptcy, "…allows €549.00 per month as special circumstance cost for third level education in bankruptcy" [para. 10].

18. As regards their income, Mr. McKiernan avers that the respective employments of himself and Ms. Fitzpatrick do not guarantee a future increase in income, and states that "…it is in fact likely that my wife Karen may have to take a prolonged career break as she has been suffering from anxiety since in or around September 2014 when the objector withdrew the agreement that we had made…since that date my wife has been attending with her General Practitioner for treatment in this regard who has now referred Karen to a clinical psychologist for her anxiety which is brought on by the stress related to her financial worries" [para. 11]. He goes on to aver that Ms. Fitzpatrick had to step down as principal of Virginia College "…and take up employment in a lesser role as a Head Teacher with Cavan & Monaghan Education and Training Board. I say that her insolvency continues to feed her anxiety and will continue to affect her health until such time as it has been resolved". [Paragraph 11].

19. Mr. McKiernan maintains that the warehousing proposed by the objector is unsustainable, and that the 2014 loan includes terms for a periodic review. This is correct: the facility letter of 3rd September, 2014, at clauses 15 to 20, provides for a review of the split loan facility if the debtors notify a material change in financial circumstances, and it is proposed that the lender would contact the debtors every five years in any event "to discuss any material changes in [their] personal circumstances". Mr. McKiernan avers that he has "…a legitimate fear that if the loans were to be sold, then the clauses would be used against me and I would be deemed to be non-cooperating or have unsustainable restructures forced by an investment fund in order to force the sale of my PPR family home". [Paragraph 23]. At para. 20 of his affidavit of 29th January, 2019, the PIP makes similar points about the debtors being insolvent as a result of their inability to repay the warehoused amount, and stressing their vulnerability in the event that the objecting creditor were to sell the debtors' loan to a fund.

20. Mr. Alan Desmond of the objecting creditor swore an affidavit on 1st April, 2019 in response to the foregoing affidavits of Mr. McKiernan and the PIP. At para. 12 of his affidavit, Mr. Desmond avers as follows: -

> "The PIP's averment at para. 20 of his affidavit to the extent that the Debtors 'can't meet the warehoused amount as and when it falls due' requires necessarily the PIP to operate on the basis that the Debtors will have no pay increases and will continue to have special circumstances costs at the extensive level set out in the Rejected Arrangement until the maturity of the Home Loan as well as an unwillingness to contribute nothing of their extensive pensions at that point [in] time. The Bank believes this approach is wholly unreasonable and not in keeping with the Act nor indeed is it in the common good. If this position were to be supported by the Bank it would see a manifestly unfair system develop whereby parties with extensive outgoings would be entitled to maintain that level of lifestyle into the long term future supported by extensive home loan write offs whilst parties with more modest lifestyle would neither have the benefit of such write offs or lifestyle of the former mentioned borrowers. Such a situation would set a very dangerous precedent it is submitted."

21. Mr. Desmond also responded to para. 25 of Mr. McKiernan's affidavit, in which Mr. McKiernan acknowledged that the PPR included 25 acres of adjoining land, but that this land was "…positioned at both sides of the PPR property and both essentially form part of the one package in that the land cannot be sold without the PPR property…". It is not accepted by the bank that no part whatsoever of the lands adjacent to the principal residence can be sold. The bank considers sale of at least some of these lands to be "…an additional avenue available to the Debtors to discharge their liabilities…", and Mr. Desmond comments that "…the response of the Debtor is telling and indicative of an approach adopted that the debtors despite the very significant write-offs already obtained by them, are wholly unreasonable in their approach with the bank" [para. 20].

22. This theme is developed by Mr. Desmond at para. 10 of his affidavit of 12th July, 2019, in which he states that "…the property at issue is not a regular four bed property but rather is of approximately 3.8k sq. ft. in size sitting on 25 acres of land. The extent of the property profile then, either by downsize or carve out, indicates additional capacity in attending to the warehoused loan, which is open to the debtors aside from the Pension aspect. It is important to note that the land folio is split by a public road indicating a capacity to sell independently aspects of the land in time. This could be done without comprising the integrity of the residential site, which appears as located to the eastern side of the lands…".

23. Ultimately, the debtors' applications came on for hearing before the Circuit Court, (Her Honour Judge Verona Lambe) on 19th December, 2019. The order of the court records that the court was satisfied to approve the application and refused the objection of the objecting creditor and confirmed the coming into effect of the personal insolvency arrangement in each case.

24. By notice of appeal dated 20th December, 2019, the orders of the Circuit Court were appealed to this Court. Unfortunately, due in large part due to delays caused by the Covid-19 Pandemic, the appeal was not heard by this Court until 30th November, 2020. On that date, in addition to detailed written submissions from both sides, extensive oral submissions were made on behalf of the debtor by Keith Farry BL, and by Andrew Fitzpatrick SC (with Eithne Corry BL) for the bank. On completion of the hearing I reserved judgment and I have had the benefit of listening again to the digital audio recording of the hearing so that all submissions might be considered afresh.

The pension issue

25. An issue which was canvassed in the affidavits, and which was a bone of particular contention at the hearing, related to the pension entitlements of each of the debtors. In his prescribed financial statement ('PFS'), completed on 15th September, 2017, Mr. McKiernan, in accordance with his obligation under s.51(4) of the Act, disclosed that he will become entitled, on 3rd December, 2027, to an estimated pension lump sum of €94,168.42. Likewise, in her PFS of 15th September, 2017, Ms. Fitzpatrick disclosed that she is to receive a pension lump sum, on 12th November, 2035, of €117,476.93. As the 2014 arrangement envisaged a scheme term of 329 months – approximately 27 years – it does not appear that repayment of the warehoused amount will arise until 2041.

26. At the outset of his submissions, counsel for the debtors candidly and fairly conceded that, in the event that the court is of the view that these sums should be taken into account in its assessment of whether or not the debtors will be in a positon to discharge the warehoused amount when it falls due, the bank's appeals must succeed. The debtors' position is that they are insolvent by virtue of their inability to discharge the warehoused amount; prior to that amount falling due, if they receive over €200,000 from their pensions, and are not entitled to maintain that such sums should not be considered applicable to the bank's debts, the bank must succeed in its contention that the debtors have more than sufficient assets to discharge the warehoused sum.

27. The debtors' position is that, by virtue of the provisions of s.51 of the Act, any lump sum received by way of pension entitlement cannot be treated as an asset of the debtor, other than in certain circumstances, which do not apply in the present case. The bank takes the opposite view, and urges the court that the lump sums should be taken into account in assessing the solvency or otherwise of the debtors as regards the warehoused amount.

28. If I accept the bank's submissions on this issue, counsel for the debtor accepts that the appeals must succeed. It therefore makes sense to consider this issue first, and proceed to consider the bank's other objections only if I am of the view that the debtors' submissions on this issue are correct.

29. Given the detailed submissions of counsel for both parties in relation to the import of s.51, it will be necessary to consider its terms in some detail: -

"51(1) Subject to subsection (4) in relation to Debt Settlement Arrangements and Personal Insolvency Arrangements, where a debtor has an interest in or entitlement under a relevant pension arrangement, such interest or entitlement of the debtor shall not be treated as an asset of the debtor unless subsection (2) applies.

(2) Where this section applies and a debtor has an interest in or entitlement under a relevant pension arrangement which would, if a debtor performed an act or exercised an option, cause that debtor to receive from or at the request of the person administering that relevant pension arrangement –

(a) an income, or
(b) an amount of money other than income,

in accordance with the relevant provisions of the Taxes Consolidation Act 1997, that debtor shall be considered as being in receipt of such income or amount of money.

(3) Subsection (2) applies where the debtor –

(a) is entitled at the date of the making of the application for a protective certificate,
(b) was entitled at any time before the date of the making of the application for a protective certificate, or
(c) will become entitled within 6 years and 6 months of the date of the making of the application for a protective certificate in relation to a Debt Settlement Arrangement or within 7 years and 6 months of the date of the making of the application for a protective certificate in relation to a Personal Insolvency Arrangement,

to perform the act or exercise the option referred to in subsection (2).

(4) Nothing in subsections (1) to (3) shall remove the obligation of a debtor making an application for a protective certificate to make disclosure of any interest in or entitlement under a relevant pension arrangement in completing the Prescribed Financial Statement."

30. There was little evidence placed before the court as to the terms upon which the lump sums, payable in December 2027 and November 2035 in the cases of Mr. McKiernan and Ms. Fitzpatrick respectively, will be due and owing. The question of whether or not the lump sums could be considered available to assist in the discharge of the warehoused amount was however canvassed at some length in the affidavits. At para. 12 of his affidavit of 1st April, 2019, Mr. Desmond on behalf of the bank commented on what he saw as the unwillingness of the debtors to contribute any of "their extensive pensions" to the discharge of the warehoused amount, an approach which he characterised as "wholly unreasonable and not in keeping with the Act nor indeed is it in the common good". At para. 19 of that affidavit, he refers again to the ability of the debtors to discharge the warehoused sum, and offers some speculation as to the sort of pension entitlements which a teacher and a garda might expect.

31. The PIP replies to these averments at paras. 16 to 25 of his affidavit of 30th May, 2019 in reply. He expresses the view that the assertion that the lump sums can be used to discharge the warehoused debt "…is based on hypothesis and conjecture which speculates on unknown future events…pensions by their very nature are designed to fund the Debtors [sic] retirements and are not for the purpose of servicing warehoused debt…" [para. 16]. The pensions are "contingent on continued employment and contribution, both of which are accrued over a significant period of time…" [para. 19]. A PIA "is predicated on known factors, and based on current 'means'. A pension falls into neither category" [para. 23]. Mr. Desmond, in his affidavit of 12th July, 2019, replies as follows: -

> "13 the Bank notes that there is an increasing prevalence in personal insolvency applications for home loan restructures to be reliant…upon state pension payments into the future. The Bank accepts that this is not ideal and indeed it challenges this position in terms of sustainability in appropriate cases. The position of the Debtors however is very different where they will have sufficient opportunity to address the warehoused element of the Restructured Home Loan during their ordinary working years and where they have recourse to extensive lands which can be sold if necessary in future to address the warehoused balance. Whilst also a possibility the Debtors might consider, although it should be noted that it would not appear necessary, downsizing having regard to the extent of the Principal Residence".

32. It is accepted by the parties that the lump sums in the case of each of the debtors fall outside the timelines set out in s.51(3)(c) above, i.e. they will each become payable more than seven years and six months after the making of the applications for protective certificates for the debtors' respective PIAs. Counsel for the debtors submits that the lump sums cannot therefore be treated as assets of the debtors, as s.51(2) does not apply to the debtors and they cannot be considered to be "in receipt of such income or amount of money". In the words of counsel, the lump sums are either "in" or "out", and as these lump sums fall outside the statutory timeline, they cannot be considered as an asset which should be applied to the discharge of the warehoused amount in assessing

whether or not the PIA enables the creditor "to recover the debts due to them to the extent that the means of the debtor reasonably permit" [S. 115A(9)(b)(ii)].

33. Counsel relied heavily on certain dicta of McDonald J in re *Lisa Parkin, (A Debtor)* [2019] IEHC 56. In that case, the objecting creditor PTSB asserted that the debtor clearly had pension rights by virtue of her employment with the Health Service Executive, and complained that neither the debtor nor the PIP had placed any details of those entitlements before the court. PTSB argued that the Circuit Court was incorrect in taking the view that Ms. Parkin's pension was "for the purpose of providing her with an income on her retirement", and specifically argued that, notwithstanding the provisions of s.51, it was appropriate for the court to have regard to pension entitlements for the purposes of considering whether the debtor could afford to discharge a warehoused balance in the future. The court accepted that any pension arrangement which would accrue to the debtor as a result of her employment with the HSE would be "a relevant pension arrangement" as defined in s.2(1) of the Act, and that s.51 thus applied to Ms. Parkin's pension entitlements. In this regard, I should say that there was no issue between the parties in the present case that the pension entitlements of Ms. Fitzpatrick and Mr. McKiernan would be other than "a relevant pension arrangement" in accordance with s.51.

34. Having considered the terms of s.51, McDonald J expressed the question at issue to be "…whether, having regard to the provisions of s.51, there is any scope to take the view that, when assessing the issue of affordability (and the related question of the extent of a writedown of secured debt), regard can be had to future pension entitlements (*i.e.* entitlements that will arise more than seven years and six months from the date of application for the protective certificate) …" [para. 84]. McDonald J went on to state as follows: -

> "86. In the written submissions delivered on behalf of PTSB, the case is made that s.51 should be read as confined to the period of the PIA itself. PTSB submits that, for the purposes of assessing affordability, s.51 was not intended to exclude pension payments payable in the future long after the PIA has come to an end. PTSB argues that s.51 does not affect the issue as to whether discharging a warehoused balance in the future would be affordable. Its case is that a future pension pot is only excluded in relation to payments which are to be made during the course of the PIA. I have to say that, while this argument was advanced by PTSB, it was not supported by any detailed analysis of the Acts or of the provisions of s.51. Nor did it address how those provisions should be construed against the backdrop of the scheme of the Acts as a whole. It is crucially important to consider the Act as a whole. For example, it would be necessary to hear submissions in relation to the interplay between s.51 on the one hand and s.121 on the other. Under s 121, the court is given power in certain circumstances, to reverse excessive payments made into a pension fund in the three-year period prior to the grant of a protective certificate. At first sight, it is difficult to see why that provision would have been

considered to be necessary if proposals for a PIA were required to take into account the value of future pension payments payable long after the term of the PIA."

35. McDonald J stated that there had been "no significant engagement" on the part of PTSB with the argument advanced by counsel for the practitioner that the language of s.51(1) contained a clear prohibition on any attempt to treat a pension entitlement as an asset of a debtor. As a result, McDonald J stated that this caused him "…concern particularly in circumstances where, as noted above, the words 'in relation to' as used in s.51(1) are on their face of wide import. On their face, those words tend to suggest that, even in the context of the affordability requirement contained in s.115A(9)(b)(ii), Ms Parkin's future pension entitlements are not to be treated as her assets. After all, the question of affordability is an issue that must be considered in relation to a PIA" [para. 88].

36. The court indicated that it had come to the conclusion that, on the basis of the language of s.51(1), a pension arrangement is excluded from the court's consideration under s.115A unless s.51(2) applies. McDonald J made it clear that he had come to this conclusion "on the basis of the limited arguments heard by me…" stating that "…if a different view is to be taken, it would be necessary to have more extensive and detailed argument addressed to this issue than I have heard in this case". McDonald J stated his wish "to make it very clear that I do not rule out the prospect that the court could be persuaded to take a different view…If no regard whatsoever can be had to pension entitlements payable in the future…there could, conceivably, be grotesque consequences in a particular case. For example, it would mean that no regard could be had to a very large pension pot (for example, one predicted to reach, by retirement age, the maximum value permitted for tax purposes by Revenue)." [Paragraph 89].

37. Counsel conceded that it could be that the application of s.51 in the present case would result in a situation where confirmation of the PIA would involve a write-off of the warehoused sum, in circumstances where the debtors jointly would be in receipt, prior to the point at which the warehoused sum would have become due, of sums of over twice the amount of the warehoused amount being written-off. Counsel contended however that s.51 was clear, and that its proper construction meant that the pension sums payable to the debtors could not be taken into account by the court in assessing affordability.

38. Counsel for the bank in reply submitted that it was established in decisions of this Court that warehousing was an accepted method of dealing with mortgage arrears, and referred to the dicta of Baker J in *re Paula Callaghan (A Debtor)* [2018] 1 IR 335, in which the court expressed the view that proposals for a PIA could include a proposal to warehouse part of a mortgage debt. These dicta were expressly approved in *Parkin* by McDonald J, who pointed out that, as the decision in *Callaghan* demonstrates, warehousing may not work in practice, as it may leave a debtor in a position where he or she is insolvent at a future date by virtue of not having the resources to discharge the warehoused amount. Counsel referred in particular to the objection to the objecting creditor's proposal of a warehoused amount in *Callaghan* raised by the court, in a passage quoted at para. 39 of the judgment in *Parkin*, that "…neither of the debtors has the benefit of a pension which

might provide a lump sum on retirement to deal with the warehoused amount". It should be said however that s.51, and its implications for the proposed use of a pension sum to discharge liabilities under a PIA, was not addressed in the course of the *Callaghan* judgment.

39. Counsel submitted that s.51 must be seen in context: it is contained in part 3, chapter 2 of the Act, which concerns matters relating to "appointment of personal insolvency practitioner for purposes of chapter 3 [debt settlement arrangements] or chapter 4 [personal insolvency arrangements] …". Chapter 2, in addition to s.51, deals with matters relating to the appointment and role in the insolvency process of the PIP, the completion of the PFS, the statement to be prepared by the PIP on receipt of an instruction from the debtor, and the termination of the PIP's appointment in certain circumstances. It was submitted that the chapter generally, and s.51 in particular, was "wholly forward-looking", in the sense that it concerns matters which bear on the role of the PIP and the formulation of the PIA, and whether or not pension assets should be included in the PFS and ultimately in the proposals contained in the PIA as an asset available to discharge the liabilities of the debtor in a restructured arrangement. Counsel submitted that it could not have been intended that s.51 would apply to a sum of money which accrued long after the formulation of the PIA and, as in the present case, the term of the PIA itself, and which would manifestly enable the debtors comfortably to discharge the warehoused amount.

40. Counsel laid some emphasis on what he maintained was the unfairness of such a scenario: the debtors had secured a very substantial write-off in 2014, which specifically contemplated in the facility letter of 3rd September, 2014 which constituted the agreement of the parties to the restructured home loan, a repayment of the warehoused sum by the pension:

> "13. In the event that you [*i.e.*, the debtors] are entitled to a lump sum payment from your pension arrangement[s] on retirement/surrender, you will be required to obtain independent pension and tax advice with a view to achieving an appropriate income from your pension arrangement[s]. If, following the receipt of independent pension and tax advice you will receive a lump sum payment from your pension arrangement[s], you agree to apply this lump sum firstly against the Split Loan Account [*i.e.,* the account providing for the warehoused amount] (and not, for the avoidance of doubt, against the Base Loan Account(s))."

41. It was submitted that s.51, in circumstances where warehousing was acknowledged by the case law to be permissible, could not prevent a lump sum which accrued long after the expiry of the PIA from comprising part of the means brought by the debtor to bear on the repayment of his debts, and that it would be unfairly prejudicial to the bank if such sums should be excluded.

The effect of s.51 on the PIA

42. In the present case, both parties accept that the lump sums which are expected to accrue to the debtors constitute an "interest in or an entitlement under a relevant pension

arrangement", the latter term being extensively defined in s.2 of the Act. The parties also accept that s.51(2) does not apply to the debtors, as they will not become entitled under their respective relevant pension arrangements within seven years and six months of the date of the making of the application for a protected certificate in relation to their PIAs. The court therefore has to decide what is meant by s.51(1) when it states that "…in relation to…personal insolvency arrangements…such interest or entitlement [under the relevant pension arrangements] of the debtor shall not be treated as an asset of the debtor…".

43. In para. 77 of *Parkin*, McDonald J pointed out that the words "in relation to" "…appear, on their face to be capable of wide application. That was the view of the Supreme Court in an arbitration context in *Gulliver v. Brady* [2003] IESC 68. Murphy J took a similar view of the somewhat similar words "in connection with" in the context of s.60 of the Companies Act 1963 in *Eccles Hall v. Bank of Nova Scotia* (High Court, Unreported, 3 February, 1995)."

44. In *Leo Laboratories Limited v. Crompton BV* [2005] 2 IR 225, the Supreme Court considered an appeal from an order of the High Court that it decline jurisdiction, pursuant to a number of provisions of the Brussels Regulation of 2001 (Council Regulation EC No. 44/2001 of 22nd December 2000). At issue was a clause in conditions of sale which purported to reserve jurisdiction to a Dutch Court in respect of "any disputes arising out of or on account of a contract including those which are only considered as such by one of the parties…". It fell to be decided whether this clause came within the terms of Article 23 of the Brussels Regulation, which applies to agreements "…that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship…".

45. In the course of his judgment, Fennelly J cited with approval the approach of the Supreme Court in *Gulliver v. Brady*, in which case the relevant clause was "arising out of or in relation to this Agreement". As Fennelly J comments, the Supreme Court in that case gave the clause "a broad purposeful and practical interpretation". The court went on to comment, in relation to the facts of *Leo Laboratories*:

> "All of this relates to a contractual relationship. One then poses the question: what is the dispute about? It is about the alleged delivery by the Appellant of defective product. How did that product come to be delivered? Answer: It arose out of a contract*. If we are to understand words in their common sense and ordinary meaning rather than some meaning contrived for the purpose of avoiding the obvious, the dispute arises out of a contract".* [Emphasis supplied].

46. Of course, neither of these cases dealt with the interpretation of a statute. However, it seems to me – without embarking upon a treatise in relation to the law of statutory interpretation – that the approach of the Supreme Court in both cases is consistent with the statement by Kelly J (as he then was) in *Ni Eili v. The Environmental Protection Agency and Roche (Ireland) Limited* [1997] 2 ILRM 458 that "all statutory construction has as its object the discernment of the intention of the legislature…".

47. In *Gulliver,* Geoghegan J commented that, in the relatively narrow contractual context in which the Supreme Court had to decide the meaning of the phrase "in relation to", the phrase should be given "a broad meaning". Indeed, common sense would suggest that the phrase, by its nature, is a very general one, the use of which is intended to indicate a connection with a general topic, unless that topic is itself restricted or qualified. In s.51, there is no such qualification or restriction: it is simply stated that, "…in relation to…Personal Insolvency Arrangements…" … "such interest or entitlement of the debtor shall not be treated as an asset of the debtor". It is not suggested that there is any limitation, in the context of personal insolvency arrangements, on the circumstances in which the interest or entitlement of the debtor is not to be treated as an asset of the debtor, other than the qualification "unless subsection (2) applies".

48. On the face of s.51 therefore, there is no suggestion that the statement that the interest or entitlement of the debtor "shall not be treated as an asset of the debtor" is to be limited to any particular aspect or phase of personal insolvency arrangements. If the section is viewed on its own, it would appear that the legislature's intent was that the section should apply to all aspects of personal insolvency arrangements.

49. One cannot however consider s.51 in isolation. It can only be correctly interpreted in the context in which it finds itself, *i.e*. as an integral part of the personal insolvency code as set out in the Act. One must look to its relationship with other sections in order to determine its true meaning.

50. In this regard, pension contributions which are excessive according to the criteria in s.121(4) of the Act may be subject to the relief envisaged in sub. (3) of that section. However, the power of the court in s.121(3) to direct that the portion of the contribution deemed excessive "be paid by the person administering the relevant pension arrangement to the personal insolvency practitioner for distribution amongst the creditors of the debtor" reinforces the point made by McDonald J in *Parkin* at para. 34 above, i.e. that s.121 would not be necessary if the value of pension entitlements payable long after the PIA term had expired were to be taken into account for the purpose of the PIA. Section 121 therefore reinforces the interpretation contended for by the debtors; pension entitlements, other than entitlements derived as a result of contributions deemed to be excessive under s.121, are not to be treated as an asset of the debtor "in relation to…personal insolvency arrangements…".

51. It is necessary also to consider the relationship between s.51 and s.115A. Under the Personal Insolvency Act 2012, the court had no power to review a rejection by the creditors of the PIA proffered on behalf of the debtor. Although a debtor could assert that s.51 allowed him to adopt the position that his future pension entitlements were not to be treated as an asset for the purposes of the PIA, the creditors could simply vote against the PIA, whether for that reason or any other, and the debtor typically would either seek to negotiate an alternative scheme with his creditors, or apply to adjudicate himself bankrupt.

52. However, s.115A, which was enacted by the Personal Insolvency (Amendment) Act 2015, gave the right to a debtor to ask the Circuit Court to review the rejection by the creditors of the PIA, and to confirm its coming into effect if satisfied of the various criteria in s.115A (9). Section 115A (9) makes no reference to s.51. The debtor could therefore apply for relief under that section, yet argue that, in accordance with s.51, his future pension entitlements "not be treated as an asset" for this purpose. This is what the debtors have done in the present case.

53. Section 115A (9)(ii) permits the court to confirm the coming into effect of the PIA "only where it is satisfied that…there is a reasonable prospect that confirmation of the proposed Arrangement will…enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit…".

54. In the present case, counsel for the debtor accepts that, if the lump sums are taken into account, the objecting creditor's appeal must succeed as the debtors will have the means to discharge the warehoused amount. Counsel's submission is that s.51 is clear and unequivocal, and precludes any treatment of the pension lump sums as an asset of the debtors and thereby available to meet their liabilities.

55. However, could it be argued that there is a conflict between the requirements of s.51 that eligible future pension entitlements "shall not be treated as an asset of the debtor", and those of s.115A (9)(b)(ii), which permits a confirmation of the coming into effect of the PIA "only where [the court] is satisfied" that the creditors have a reasonable prospect of recovering the debts due to them "to the extent that the means of the debtor reasonably permit"? The present case, if the lump sums duly accrue to the debtors as and when expected, would appear to be one in which the "means" – in its usually accepted meaning of "resources" – of the debtors would reasonably permit the discharge of the warehoused amount under the existing 2014 restructured loan, so that the PIA proffered by the debtors, which requires the write-off of the warehoused amount and a reduction of the live balance of the mortgage, does not in fact, "enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit".

56. In relation to the arguments regarding context made by counsel for the bank, it is certainly arguable that the placement of s.51 in chapter 2 of part 3 suggests that it was directed towards the matters which must be considered in formulation of the PIA. However, it is difficult to understand why, if this were the intention of the legislature, the section could not simply have said so, rather than using a very general phrase such as "in relation to…". There does not seem to me to be any qualification of that phrase which would suggest that s.51 is applicable only to a consideration of the assets which could be deployed in the PIA to generate repayments of creditors.

57. Also, s.102 of the Act – and in particular, subsection (6) of that section – lays down very specific provisions as to the terms which may be included in a PIA. That section contains no reference to s.51, nor indeed to pension entitlements at all. There does not seem to me to be anything in the section which would contradict an interpretation that s.51

applies generally to all aspects of personal insolvency arrangements, and not just the formulation of proposals in the PIA.

58. It seems to me that the wording of s.51 is tolerably clear, and that its intention is to exclude certain pension entitlements from being treated as an asset of the debtor in the circumstances set out in the section. The fact that s.51 prohibits any such entitlements from being "treated as an asset of the debtor" suggests to me that the legislative intent is that the entitlements are not to be regarded as part of the "means" of the debtor for the purpose of s.115A (9)(b)(ii). If that subsection were to be deemed to be an exception to the general principle set out in s.51, this could have been explicitly stated in the subsection. The assessment of affordability of the arrangement by the debtor is an essential part of the s.115A process. In my view, the effect of s.51 is to exempt pension interests and entitlements such as those in the present case from an assessment of affordability under s.115A.

59. As McDonald J aptly points out at para. 89 of *Parkin*, this could give rise to "grotesque consequences" whereby a debtor might not be obliged to make any contribution to his debts from a very large "pension pot", simply by virtue of its having accrued more than seven years and six months after the application for the protective certificate.

60. This situation would be unlikely to have occurred under the 2012 Act, as s.51(4) obliges the debtor to disclose his pension entitlements. The creditors would be likely simply to reject the PIA of a creditor who sought a write-down of his debts in circumstances where substantial pension assets would be likely to accrue to him at a later stage. The introduction in the 2015 Act of a means to persuade the court to override the rejection by the creditors of the PIA would appear to enable debtors such as in the present case to argue for a restructure of their indebtedness, while maintaining that their pension assets cannot be taken into account for this purpose.

61. It may be that the view of the legislature was that a beleaguered debtor, who may have to endure straitened circumstances and a significant reduction in his standard of living for the period of the PIA and perhaps beyond in order to restore himself to solvency, was entitled to look forward to the security which entitlements under a pension would provide, usually at retirement age, for him and his dependents. These would usually be entitlements for which the debtor had made contributions, often over a period of many years.

62. However, the palpable sense of grievance in the affidavits sworn on behalf of the objecting creditor in the present case is perhaps understandable. The debtors' situation does not fall into the "grotesque" worst-case scenario posited by McDonald J. On the other hand, the objecting creditor facilitated the debtors in 2014 with a very substantial write-off of debt at that time, and entered into a facility involving a live balance and a warehoused amount. The debtors agreed to this arrangement, and have creditably discharged all payments under this arrangement since 2014 as they fall due. Notwithstanding this, they now want further substantial amounts written-off, and put forward as the basis for this arrangement the contention that they will be unable to

discharge an amount at the end of the restructured term which is less than half of the sum of the amounts likely to be due to them by way of lump sum pension payments.

63. Nonetheless, it seems to me that the interpretation of s.51 contended for by the debtors is correct, and that pension interests and entitlements which comply with the requirements of s.51 such as in the present case cannot be treated as an asset of the debtor "in relation to…personal insolvency arrangements…", and thus cannot be taken into account in assessing the debtors' means or the affordability of their proposals.

Whether the coming into effect of the PIA should be approved

64. However, a finding for the debtors in this regard only gets them over the first hurdle. As we have seen, the bank has a number of other reasons which it contends should not dispose the court to approve the coming into effect of the arrangements. Chief of these are the contentions that, firstly, the reduction in the existing live balance is not justified having regard to the incomes of the debtors and the fact that they are currently discharging higher payments pursuant to the 2014 restructured loan than are proposed in the PIAs. Secondly, it is submitted that the debtors could readily dispose of at least some of the 25 acres which surround their home in order to generate funds which could be used to discharge the warehoused amount.

65. In this latter regard, there was no expert evidence adduced before me as to the value of the land by either side. Also, it is clear, from a rough map made available to the court, that approximately one-third of the land is not physically connected to the PPR in that it is situated on the opposite side of the public roadway. There was no evidence from the debtors as to the use, if any, to which the land is currently put. On the other hand, counsel for the debtors makes the point that, if the debtors discharge capital and interest under the PIA for its duration, they can hardly be expected to then sell that land at the end of the term to satisfy the warehoused amount.

66. As the summary of the grounds of objection at para. 12 above indicate, the objecting creditor is particularly exercised that a restructure is sought in circumstances where the debtors have already had the benefit of a very substantial write-off in 2014, and where it maintains that it would achieve a better outcome under the 2014 agreement or its current counter proposal.

67. In my view, it is of particular significance that the debtors have been able to satisfy, since 2014, monthly repayments of a higher level than they now propose under the PIAs. The debtors maintain that they require a lower level of monthly repayment due to what they see as the likelihood of increasing school and college expenses into the future, and that these, together with their other expenses, will consume all of their income such that they will not be in a position to discharge the warehoused amount of €97,979.07 at the end of the term. However, given that they have a current ability to contribute €850.00 per month over and above their expenses – albeit that this level of contribution is likely to decline in the future – counsel fairly concedes that, if the court accepts that the debtors are likely to be able to discharge the warehoused amount at the end of the term, the bank's appeals must succeed.

68. The basis of the debtors' applications, then, is the contention that, although they are currently able to discharge monthly amounts due under the 2014 agreement, they are insolvent as they will not have the resources to discharge the warehoused amount when it falls due in 20 years or so. They say that the warehoused amount should therefore be written off, and the outstanding balance of the loan further reduced.

69. In arguing that the reduction of monthly payments envisaged by the PIA is warranted, counsel for the debtors argues that some "margin of appreciation" is required in order for the debtors to be able to deal with unexpected events which might derail the most meticulous budgeting. However, I find it very difficult to see how any debtor can know with any degree of certainty what their financial position will be in 20 years' time. In *Callaghan*, Baker J criticised the counterproposal made by the objecting creditor, which provided for a warehoused amount: -

> "79 …. the fact that a court will not require that a PIA would guarantee solvency into the future has the corollary that a court will equally not make assumptions regarding the likely financial or other circumstances of a debtor far into the future. In the present case whilst the counterproposal does make provision for the continued occupancy by the debtors of their principal private residence for their respective lives, it is predicated on assumptions and conjecture regarding the living arrangements of the debtors far into the unknown future to a time at the expiration of the mortgage term, when Mr. Callaghan will be 62 years of age and his wife close to that age.
>
> 80. In addition I am not satisfied that the reasonableness of the counterproposal is to be tested in the light of an assumption that the couple will wish to remain living in their present home for the rest of their lives, or even for the rest of their working lives. Many life events could mean that they will wish or need to live elsewhere."

70. However, it seems to me that the principle that the court should not make assumptions regarding the likely financial or other circumstances of the debtor far into the future cuts both ways. At present, the debtors can discharge their liabilities reasonably comfortably. They are not in arrears of their mortgage. Nonetheless, their position is that they will, in over 20 years' time, be unable to discharge the warehoused amount of €97,979.07.

71. Section 91(1)(d) of the Act provides that a debtor is not eligible to make a proposal for a personal insolvency arrangement unless he or she is insolvent. Section 2(1) of the Act defines "insolvent" as a situation where "the debtor is unable to pay his or her debts as they fall due".

72. On 5th February, 2021, I delivered judgment in re *Keith Cremin (A Debtor)* [2021] IEHC 80. In that case, the debtor's mortgage involved "interest-only" payments of €275 per month, with the capital to be discharged by a bullet payment at the end of the term in 2025. The debtor contended that, while he had discharged all interest-only payments and was not in arrears in this regard, he would not be able to discharge the bullet payment in 2025, and his PIA consequently envisaged a write-down of the mortgage to the value of

the PPR, and an extension of the mortgage term to 264 months. A restructured sum for capital and interest was to be discharged monthly after the two-year term of the PIA, during which the debtor would continue to make payments on an interest-only basis at a reduced level, together with other payments in respect of the PIP's fees and the debtor's other unsecured creditors. However, no application under s.115A was made by the debtor's father, who was jointly liable for the loan, so that there was no visibility as regards his assets and their ability to meet the mortgage repayments.

73. While I held that a number of objections made by the objecting creditor in that case were not well founded, I held that the PIA was not appropriate in the circumstances of the case: -

> "135. However, it seems to me that the complaints of the objecting creditor in relation to the appropriateness of the arrangement are justified. The debtor is in compliance with the terms of his loan with Pepper… [136.] …[t]he objecting creditor will suffer a very significant write-off of its loan amount if the proposals are approved, notwithstanding that there is no default in repayments. In this way, it is affected by the proposals in a manner, and to a degree, in which no other creditor is affected."

74. The judgment went on to state as follows: -

> "138 ….it seems to me that there is a fundamental unfairness in imposing on the objecting creditor a very substantial write-off of a loan which is performing and in respect of which no default arises, particularly where there are no other pressing insolvency issues. The debtor's application is at best premature; if indeed he defaults in payment of the capital sum in 2025, the PPR loan will at that stage be causative of his insolvency and an application for the protection of the court to see if proposals can be formulated may well be appropriate at that stage…".

75. In that case, the debtor maintained that he was insolvent by reason of liabilities to certain other creditors, none of which was exerting any pressure on the debtor to collect those debts. In the present case, it is not suggested that the debtors have any other significant debts, or are otherwise under financial pressure.

76. I am conscious that the parties did not have the opportunity to consider the *Cremin* judgment, which was delivered several months after the hearing of the present matter before me. However, there is a degree of similarity between the cases. In *Cremin*, the debtor was fully compliant with the terms of his PPR loan, and his concern was that he would not be able to discharge the bullet payment of capital at the end of the mortgage term. He did not contend for the purpose of satisfying s.91(1)(d) that he was insolvent by virtue of the PPR loan, but rather by virtue of certain other debts which he contended that he was unable to discharge, but in respect of which the creditors in question were not pressing for payment.

77. In the present case, having had the benefit of a large write-off of debt in the restructured loan in 2014, the debtors are likewise compliant with the terms of that loan. They are not insolvent by virtue of any failure to discharge amounts currently due to the bank; they say however that they are insolvent on a balance sheet basis, and will not be able to meet the warehoused amount when it falls due in 2041.

78. While the PIA envisages a reduction of some €200 per month in the monthly repayments of the debtors, it does not seem to me that it can be said that the current circumstances of the debtors suggest that they will be unable to discharge the current level of repayments in the future. At present, they have between them €850 per month over and above their set costs, mortgage repayments, childcare costs and hire purchase repayments. While these costs are likely to increase as the children grow older, there is no evidence before me which would suggest that those costs are likely to render the current level of repayments unaffordable.

79. If this is so, the only possible instance of insolvency as regards the bank would be the prospective failure of the debtors to discharge the warehoused amount in 2041. As stated at para. 71 above, s. 91 (1) (d) of the Act provides that a debtor is not eligible to make a proposal for a PIA unless he or she is insolvent, i.e. unable to pay his or her debts as they fall due. I cannot see how, in 2021, a court could hold that a debtor is insolvent on the basis of an alleged inability to discharge a sum in 20 years' time. The circumstances of the debtors may be entirely different by that time. Their children will be adults, and hopefully independent at least to some degree. The debtors may still be working, or they may have retired. They may have had the opportunity to develop some savings, or to acquire resources in some other way. As Baker J. pointed out in Callaghan, it is not even certain that they will still be living in the PPR at that stage, as "life events could mean that they will wish or need to live elsewhere".

80. There is a myriad of circumstances which could affect the debtors' ability to repay the warehoused amount when it falls due, and the court cannot be required to speculate or anticipate at this stage whether the debtors will be in a position to meet a liability which falls due in 20 years' time. In my view, the applications of the debtors are premature. The debtors have not established that they cannot discharge their liabilities to the bank as they fall due, given that they are fully compliant with their existing loan. I think it would in any event be extremely unfair to the objecting creditor, which has already made major concessions in ease of the debtors, to impose further write-offs on it in circumstances where the repayments on the restructured loan are currently being discharged without undue difficulty.

81. It may be that there are events which occur in the future which give rise to a different perspective on the solvency or otherwise of the debtors. Their existing loan agreement provides for a review of the arrangements every five years, so that material changes in circumstances could be addressed. If any difficulties the debtors experience cannot be resolved with the bank, they are not shut out from making a fresh application for a protective certificate, assuming they comply with the eligibility requirements. I do not

consider that Mr. McKiernan's fears about the sale of the loan are justified; it is difficult to see how the debtors could be forced to sell their home if they are complying with the terms of the loan.

Conclusions

82. While the debtors may technically be regarded as "insolvent" for the purposes of s.91(1)(d) of the Act, in that there are some minor creditors disclosed in the PFS of each of the debtors, none of which appears to be exerting pressure for payment, the debtors cannot be considered insolvent by virtue of the bank debt for the reasons set out above. The restructured 2014 loan is currently affordable, and on the evidence before me, likely to remain so. To the extent that the debtors anticipate being unable to discharge the warehoused amount in 2014, it seems to me that the PIAs are premature, and in any event unfairly prejudicial to the interests of the objecting creditor.

83. Counsel for the bank urged the court strongly that the debtors had a ready means of raising funds to discharge the warehoused amount, in that they could sell some or all of the 25 acres of land which surround the PPR, and that the land on the other side of the public roadway in particular could be sold without impinging on the amenity of the PPR and the land immediately adjacent to it. Any sale of portion of the land would of course necessitate the release of the bank's security in relation to that portion, and any such sale would have to be the subject of negotiation between the debtors and the bank. However, no reason was advanced to me on behalf of the debtors as to why at least some of the lands surrounding the PPR could not be sold, and the proceeds used to ease their burden of indebtedness. Perhaps this is something which the parties could discuss in due course.

84. In any event, there will be an order in respect of each debtor allowing the bank's appeal. The matter will be listed for mention in the next personal insolvency list, so that the parties may consider this judgment and make any submissions they wish in relation to the orders to be made.