THE HIGH COURT

CIRCUIT APPEAL

[2021] IEHC 327

[Record No. 2020 150 CA]

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

AND IN MATTER OF ESTHER KIRWAN OF THE BUNGALOW, MOYCARKEY, THURLES, CO. TIPPERARY ('A DEBTOR')

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115 OF THE PERSONAL INSOLVENCY ACTS 2012-2015

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 13th day of May, 2021

1. This is an application to this Court to appeal a refusal by the Circuit Court to approve the coming into effect of a Personal Insolvency Arrangement ('PIA') in accordance with s.115 of the Personal Insolvency Acts 2012 to 2015 (referred to collectively herein as 'the Act').

2. The circumstances in which this refusal was made are unusual, and raise an important point of principle as to the power of the court to refuse to approve a PIA notwithstanding that there has been compliance with the terms of s.115.

3. The application on behalf of the Personal Insolvency Practitioner ('PIP'), Mr. Mitchell O'Brien, was made on 19th October, 2020. As it is an application under s.115, rather than s.115A, the application was unopposed. Having heard counsel, I reserved judgment in the matter. However, at that time it became apparent that there were a number of applications before the court, under both s.115 and s.115A, in relation to arrangements which involved proposed extensions 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 at all permissible under the Act.

4. Accordingly, I decided that it would be appropriate to select one such case, and effectively to treat it as a test case, which might provide guidance as to how this issue might be addressed in other cases. The selected case was due to be heard in November 2020, but due to circumstances beyond the control of the parties, was ultimately heard in March 2021. Judgment was delivered on 29th April, 2021: see in *re Ann Fennell, A Debtor* [2021] IEHC 297.

5. While the judgment in Fennell was pending, I listed the present matter for hearing on 26th April, 2021 pursuant to s.115(3)(b) of the Act, so that some matters which I had encountered during my deliberations in relation to the *Fennell* judgment could be explored with counsel in the context of the present matter which, it must be emphasised, unlike *Fennell* concerned a s.115 application rather than a s.115A application. Having heard counsel, I adjourned the matter to 10th May, 2021, so that counsel could consider my judgment in *Fennell* and its implications, if any, for the present case. The court received considerable assistance from the submissions of counsel on both occasions.

Background

6. The debtor in this case, Ms. Esther Kirwan, is a single lady who lives on her own in a three-bedroom house in Moycarkey, Co. Tipperary. She was 54 years of age at the date of formulation of the PIA, and works in the local Spar shop as a shop assistant. She has

worked there since a retail business which she operated closed approximately five years ago.

7. The debtor's financial situation deteriorated in 2017, when her elderly mother, who had been living with her and who contributed to the costs of running the household from her Old Age Pension, passed away. At this time, the financial burden for Ms. Kirwan of the expense of a mortgage and running a car became insupportable.

The arrangement

8. As set out in the PIA, the debtor had, at the date of issue of the protective certificate, total debts of €108,265.29. Of this amount, €83,485.46 is secured on the principal private residence ('PPR') in favour of Start Mortgages DAC ('Start'), the only secured creditor. The section 105 agreed valuation for the PPR is €145,000. The majority of the remaining unsecured indebtedness is owed to Allied Irish Banks plc for business loans and a business overdraft, and to the Revenue Commissioners.

9. As regards assets and liabilities, the debtor's only significant asset is the PPR. The debtor's car is a 2005 Toyota Corolla with a notional value of €1,000, which together with the debtor's household effects are needed for her personal use. The debtor's total net income per month is €1,586.61, with set costs of €1,050.48 and special circumstance costs of €208.48. The debtor therefore is in a position to contribute €327.65 per month to her liabilities.

10. The PIP has constructed the PIA as a twelve-month term arrangement which seeks to protect the debtor's reasonable living expenses ('RLE') and to secure continued occupation of the home. The mortgage is to be restructured by way of a capitalisation of arrears, a term extension and a conversion of the annuity basis of the loan to interest only for the term of the loan.

11. In relation to the secured creditor, the figures indicate that the debtor currently has equity in the PPR of €61,514.54 (agreed valuation €145,000 less mortgage balance €83,485.46). Under the PIA, the secured debt is to be restructured to 420 months (35 years) from the coming into effect of the PIA. This would mean that the term would not expire until Ms. Kirwan was 90. If she should pass away before the end of that period, the full loan balance (and continuing interest) will be paid from the proceeds of sale of the PPR by the representatives of her estate. As interest will have been discharged during the term, there is no reason to believe that the property will not yield more than sufficient proceeds to discharge the loan balance in full.

12. The interest rate relating to the mortgage loan will be charged at the standard variable rate of 3%, although this may of course be subject to fluctuations. The mortgage loan repayments will be of interest only, estimated at €214.98 per month. The loan balance itself is not being reduced, and will be payable on the expiry of the term or the death of the debtor, whichever occurs first.

13. The bankruptcy comparison proffered by the PIP shows that, in bankruptcy, the PPR would be sold and the secured and unsecured creditors would both be paid in full, although the bankruptcy fees are substantially higher than the modest fee charged by the PIP. Under the PIA, the PPR will be retained, so no assets are available to generate a dividend for the unsecured creditors.

The creditors' meeting and the section 115 application

14. However, at the creditors' meeting held under s.106 of the Act on 20th March, 2020, the unsecured creditors present and voting - €21,536.37 out of a possible €24,779.83 – voted in favour of the arrangement. No unsecured creditor voted against it. The only secured creditor, Start, voted in favour of it. There was therefore unqualified support from the creditors for the arrangement, notwithstanding the fact that the unsecured creditors would have been paid in full if the debtor had been adjudicated.

15. Likewise, when the matter came before the Circuit Court in June 2020, no creditor opposed the application by the PIP for an order for approval of the coming into effect of the arrangement. The Circuit Court appears to have expressed a concern that, at the end of the 420-month term when the debtor would be aged 90, she would not be solvent or have secured continued occupation in the property, given that the outstanding balance of the mortgage would then be payable. The court adjourned the s.115 hearing to allow the PIP to respond in relation to these issues.

16. The PIP duly responded by way of a detailed written submission of 4th July, 2020. In relation to the "return to solvency" issue, the PIP expressed the view that the debtor was "cash flow solvent", in that following successful completion of the PIA within the twelve-month term, the debtor would have €112.67 monthly available to her after discharge of the revised mortgage payment. As regards "balance sheet solvency", the debtor's net asset position would be €63,514.54, the sum representing the equity in her home, and she would thus have a solvent balance sheet position.

17. In relation to the continued occupation of the PPR after the term of the loan, the PIP explained his rationale for the arrangement. He considered a capitalisation of arrears, a reduction of the interest rate from 4.5% to 3%, and a term extension to age 68 (the assumed old age pension rate for the debtor). This generated a monthly mortgage rate necessary to clear the mortgage of €646.95. This was clearly far in excess of the debtor's capacity to pay.

18. The PIP also considered the applicability of the government Mortgage to Rent Scheme. As the debtor has equity in her home in excess of €15,000, it appears that she is not eligible for this scheme.

19. Consideration was also given to the possibility of the debtor obtaining social housing. Even if the debtor could establish her eligibility, the PIP estimated that the likely cost of social housing would be €273.99 per month, €59.01 per month more than the cost of servicing the mortgage as set out in the PIA. The debtor would also be paying the social housing rent for life.

20. The obvious concern in relation to the PIA was that the debtor might arrive at the end of the 35-year term and be required to repay the mortgage debt at 90 years of age. In his response, the PIP referred to data from the Central Statistics Office which suggested that the average life expectancy for a female in Ireland is 82 years, and that just 0.1% or one in one thousand females in County Tipperary live to age 90. The PIP stated that: -

> "…[T]his PIA was constructed to provide the Debtor with the lowest sustainable cost of housing (lower than the likely cost of social housing) for what is believed to be for the whole of her life, securing her continued occupation of her PPR. Financial institutions find it difficult or impossible to record a loan in their systems without a defined term. The term of 420 months (35 years) for a person aged 55, where life expectancy is 82, is considered to be whole of life for this Debtor." [PIP's written submission, 4th July, 2020]

21. In the event, the Circuit Court refused the s.115 application. It was intimated to this court by counsel for the debtor that the Circuit Court was uncomfortable with the possibility that the debtor might be compelled, at age 90, to sell her home to satisfy the mortgage debt, as a result of a PIA that did not provide for her solvency after the expiry of the 420-month term. Counsel stated that arrangements of this nature were increasingly being seen as a solution for debtors who are encountering debt problems in late middle age, but who have substantial equity in their homes, and suggested that some guidance from this Court as to whether such a scheme is permissible would be welcome.

Submissions

22. The appeal of the Circuit Court Order came before me on 19th October, 2020, Mr. Keith Farry BL appearing for the PIP. Counsel went to some pains to stress that this was not an appeal under s.115A(9), where the proposal had not been approved by the requisite percentage of creditors. In such a case, other criteria would apply, and the appellant debtor would bear a different burden in attempting to satisfy the court that the arrangement should be approved.

23. As the arrangement had the unanimous support of both secured and unsecured creditors present and voting, the application to the Circuit Court for approval of the coming into force of the arrangement was in accordance with s.115. On the face of the wording of that section, the text of which is set out at para. 28 below, it was submitted that it would appear that the wording of s.115(2)(a) suggested that, if the court is satisfied that there has been compliance with the requirements set out at (i) to (iv) of that subsection, the court is obliged to approve the coming into effect of the arrangement; the use of the term "shall approve" being a mandatory direction to the court by the legislation, so that the court does not have the option, even where it has reservations in relation to the arrangement, not to approve its coming into effect.

24. Counsel advanced this submission with considerable diffidence, acknowledging that it was an "unattractive" submission to make. This is because it does on occasion become apparent on a s.115 application, when the arrangement is interrogated by the court, that

even though the arrangement has found favour with the creditors, it contains some flaw which renders it unfair, unworkable or in some other way unsuitable or at odds with the aims of the legislation. If the court's role were to be limited to that of simply checking that there had been compliance with certain statutory criteria – which is certainly an arguable interpretation of the section – it might be that the court would be constrained from protecting the interests of debtors by refusing to approve the arrangement in circumstances where the coming into effect of that arrangement was patently not in the debtor's interest.

25. Counsel frankly expressed the hope that it would not be necessary for the court to express a view on this issue, on the basis that there was in fact no legal infirmity in the PIA, and that it was in the best interests of the debtor in any event that it should be approved. Counsel referred to the decision of Baker J in *re Jacqueline Hayes* [2017] IEHC 657, where the court referred to the "margin of appreciation" being given to a PIP in formulating a PIA, stating however that "notwithstanding that a PIA may be formulated in many ways, and that a PIP may take a different approach to broadly similar financial circumstances, a proposed PIA must be shown to be reasonably sustainable during its currency". [Paragraph 19].

26. The decision in *Hayes* concerned a s.115A(9) application, and must be seen in that context. However, Baker J had this to say about the court's responsibility in relation to events which would occur after the expiry of the PIA: -

> "22. The legislation does not expressly require the court to examine the likely circumstances of a debtor after the six-year term of a proposed PIA, but in my view the creditor is correct that a court may not, if it has the evidence before it, disregard the likely or reasonably likely circumstances that will exist at the end of the six-year period of the PIA, or of the reasonably foreseeable future thereafter. There is likely to be a spectrum of circumstances and the degree of certainty regarding future financial circumstances will usually diminish over the middle to long term".

Analysis

27. While the decision in *Fennell* addressed the issue of whether the restructuring of a mortgage term beyond normal life expectancy was permissible, it did so in the context of a s.115A application, in which the application of the PIP in that case for an order confirming the coming into effect of the PIA was strenuously opposed by the creditor secured over the PPR.

28. In the present case, no such opposition exists, with the result that the application to the Circuit Court for approval of the coming into effect of the PIA was pursuant to s.115 of the Act, rather than s.115A. As there is no previous extended consideration of s.115 in a written judgment of this Court, and as it will be necessary to consider the section in some detail, it is appropriate to set out the rather lengthy provisions of the section below: -

> "115-(1) Where –

(a) no objection is lodged by a creditor with the appropriate court within 14 days of the giving of the notice referred to in section 112, or

(b) an objection is lodged with the appropriate court and the matter is determined by the court on the basis that the objection should not be allowed,

the appropriate court shall proceed to consider, in accordance with this section, whether to approve the coming into effect of the Personal Insolvency Arrangement.

(2) For the purposes of its consideration under subsection (1), the appropriate court shall consider the notification and documents furnished to it under section 113(1) and, subject to subsection (3) –

(a) shall approve the coming into effect of the Arrangement, if satisfied that the –

(i) eligibility criteria specified in section 91 have been satisfied,

(ii) mandatory requirements referred to in section 99(2) have been complied with,

(iii) Personal Insolvency Arrangement does not contain any terms that would release the debtor from an excluded debt, an excludable debt (other than a permitted debt) or otherwise affect such a debt, and

(iv) proposal for a Personal Insolvency Arrangement, as the case may be -

(I) has been approved by the requisite proportions of creditors referred to in section 110(1),

(II) is one to which section 108(8)(a) (as amended by section 15(b) of the Personal Insolvency (Amendment) Act 2015) applies, or

(III) has been approved or, as the case may be, deemed to have been approved in accordance with section 111A(7) (inserted by section 17 of the Personal Insolvency (Amendment) Act 2015),

and

(b) if not so satisfied, shall refuse to approve the coming into effect of the Personal Insolvency Arrangement.

(3) Where the appropriate court, for the purpose of its arriving at a decision under subsection (2), requires –

(a) further information, it may request the Insolvency Service to provide this information, and the Insolvency Service shall provide the information requested to the court and to the personal insolvency practitioner concerned or

(b) further information or evidence, it may hold a hearing, which hearing shall be on notice to the Insolvency Service and the personal insolvency practitioner concerned.

(4) [This section was deleted by the Courts and Civil Law (Miscellaneous

Provisions) Act 2013 (32/2013), s.87(c), SI no. 286 of 2013].

(5) For the purposes of subsection (2), the appropriate court may accept –

(a) the certificate of the personal insolvency practitioner referred to in section 112(1)(a)(i) (as amended by section 18(a) of the Personal Insolvency (Amendment) Act 2015) as evidence that the proposal for a Personal Insolvency Arrangement has been approved by the requisite proportions of creditors referred to in section 110(1),

(b) the certificate of the personal insolvency practitioner referred to in section 112(1)(a)(ii) (as amended by section 18(a) of the Personal Insolvency (Amendment) Act 2015) as evidence that the proposal for a Personal Insolvency Arrangement is one to which section 108(8)(a) (as amended by section 15(b) of the Personal Insolvency (Amendment) Act 2015) applies,

(c) the certificate of the personal insolvency practitioner referred to in section 112(1A) (inserted by section 18(b) of the Personal Insolvency (Amendment) Act 2015) as evidence that the Personal Insolvency Arrangement has been approved or, as the case may be, deemed to have been approved in accordance with section 111A(7) (inserted by section 17 of the Personal Insolvency (Amendment) Act 2015), and

(d) the statement of the personal insolvency practitioner referred to in s.112(1)(c) (inserted by section 85 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 or, as the case may be, section 112(1A) (c) (inserted by section 18(b) of the Personal Insolvency (Amendment) Act 2015) as evidence of any matter referred to in subsection (2) which is the subject of that statement.

(6) The registrar of the appropriate court shall notify the Insolvency Service and the personal insolvency practitioner concerned where the court –

(a) approves or refuses to approve the coming into effect of the Personal Insolvency Arrangement under this section, or

(b) decides to hold a hearing referred to in subsection (3).

(7) On receipt of a notification under subsection (6) of the approval of the coming into effect of the Personal Insolvency Arrangement, the Insolvency Service shall register the Personal Insolvency Arrangement in the Register of Personal Insolvency Arrangements.

(8) The Personal Insolvency Arrangement shall come into effect upon being registered in the Register of Personal Insolvency Arrangements."

29. As no objection was lodged by any creditor, section 115(1) obliges the court "…to consider, in accordance with this section, whether to approve the coming into effect of the Personal Insolvency Arrangement…". The use of the phrase "in accordance with this section" is in my view significant. It seems to me to suggest that primary, if not exclusive consideration must be given by the court to the matters set out in the section

as to whether the coming into effect of the PIA should be approved, rather than to any wider considerations prompted by other sections of the Act.

30. Under subsection (2), the court must consider the notification documents to which s.112(1) refers which have been referred to it under s.113(1) "for the purposes of its consideration under subsection (1) …". Once again, this appears to direct the court's attention to what it must consider in a very specific way. Having considered the notification and documents, the court must be satisfied as to the various matters set out at s.115(2)(a) (i) to (iv). If it is not so satisfied, it "shall refuse to approve the coming into effect of the PIA". However, the corollary could be that, if the court is satisfied, it would follow that it must approve the PIA.

31. Section 115(3) provides that the court can seek further information from the Insolvency Service ('ISI'), or "further information and evidence", in which case it "may hold a hearing" on notice to the ISI and the PIP. These powers however are expressed to be "for the purpose of arriving at a decision under subsection (2) …". What is not entirely clear is whether or not the powers can be exercised only in aid of the consideration of the matters set out in subsection (2), or whether they might be deemed to be in service of the more generally expressed requirement in subsection (1) that the court "…shall proceed to consider, in accordance with this section, whether to approve the coming into effect of the Personal Insolvency Arrangement".

32. The matters set out at s.115(2)(a) suggest to me that the intention of the legislature was to encourage the approval of arrangements which satisfied the eligibility and mandatory requirements of the Act, did not release the debtor from excluded or excludable debts, and which were approved or not opposed by the creditors; that the commercial compromise of the parties should be respected, and that a mutually acceptable arrangement between debtor and creditors which observes the basic requirements of the Act should be approved without further ado. This interpretation is supported by the phrase in subsection (a) that the court "…*shall* approve the coming into effect of the arrangement…" [emphasis added].

33. If, however, the court is limited to consideration of the criteria at subsection 2(a) – if it is confined to what counsel for the debtor aptly characterised as a "tick-box" exercise – it is not difficult to imagine situations where an arrangement could comply with these criteria, and yet be profoundly unfair to the debtor in particular. Counsel for the debtor very fairly and helpfully referred to a recent case in the Circuit Court, in which the presiding judge refused to approve an arrangement in a s.115 application which complied with the criteria in subsection 2(a), but which left a judgment mortgagee outside the arrangement, thereby exposing the debtor to the probability of execution against his assets, or adjudication as a bankrupt. It would be impossible to regard the decision of the court in that case as anything other than just and commendable, and the Circuit Court, by careful scrutiny of applications under s.115, on occasion identifies infirmities in such arrangements which render them, by any objective standard, unacceptable and inappropriate, notwithstanding apparent compliance with that section.

34. It is clear that the court must ("shall") proceed to consider whether to approve the coming into effect of the PIA [s.115A (1)], and must ("shall") "for the purposes of its consideration" consider the notification and documents furnished to it under s.113(1). Section 115(2)(a) clearly requires the court to satisfy itself that there has been compliance with the criteria in that subsection so that if there has not been such compliance, the coming into effect of the PIA cannot be approved. The essential issue is whether, if it is so satisfied, the court must ("shall") approve the coming into effect of the arrangement, and may not consider other factors, whether arising out of the Act or otherwise; in short, whether the word "shall" in this instance is mandatory or directory.

35. The courts have long recognised that the word "shall" does not always connote a mandatory statutory requirement. As Henchy J, in a passage frequently quoted in personal insolvency matters in this Court, stated in the Supreme Court in State (*Elm Developments Limited) v. Monaghan County Council* [1981] ILRM 108 at 110: -

> "Where a provision in a statute …, which on the face is obligatory (for example, by the use of the word ('shall'), should be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement … may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused."

36. The objectives of the Act as expressed in its long title are as follows: -

"(a) The need to ameliorate the difficulties experienced by debtors in discharging their indebtedness due to insolvency and thereby lessen the adverse consequences for economic activity in the State,

(b) The need to enable creditors to recover debts due to them by insolvent debtors to the extent that the means of those debtors reasonably permits, in an orderly and rational manner and,

(c) The need to enable insolvent debtors to resolve their indebtedness (including by determining that debts stand discharged in certain circumstances) in an orderly and rational manner without recourse to bankruptcy, and to thereby facilitate the active participation of such persons in economic activity in the State…"

37. In my view, an arrangement which complied with the criteria in s.115(2)(a), but which did not resolve the indebtedness of the debtor in an orderly or rational manner, or exposed her to the possibility of bankruptcy, or otherwise was so unfair to the debtor as to be clearly contrary to the spirit and intendment of the Act, could not be such as a court could consider it appropriate for approval under s.115(1). The instance to which I refer at para. 33 above is a good example of how this might occur, where a fundamentally unjust

arrangement is proposed through a failure to appreciate how a properly constructed PIA should work, or through plain oversight.

38. It seems to me that, in the normal course, it should be sufficient for the court only to have regard to the criteria in s.115(2). This is particularly so, as the "mandatory requirements" in s.99(2), which must be observed for a s.115 application to succeed, are wide-ranging and contain protections for the debtor: for instance, see s.99(2)(e), which demands that the debtor not be required in the PIA to make payments "of such an amount that the debtor would not have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants…". I would have thought also that a court should not, as a general rule, seek to interfere with the commercial judgment of the parties, even if the court might be doubtful as to the efficacy or practicality of the arrangement. This would be particularly so where the court is satisfied that the debtor has had appropriate legal and commercial advice.

39. Where a court has such doubts or concerns, s.115(3) provides a means by which they can be interrogated. That section was invoked by the Circuit Court in the present case, as the Circuit Court judge expressed concern that the debtor would not be solvent at the end of the restructured period or have secured continued occupation of the property at age 90, given her obligation to discharge the capital at that stage. The PIP responded with a thorough and helpful, if ultimately unsuccessful, submission addressing the court's concerns. This seems to me to be an exemplary illustration of how the system should work.

40. However, this assumes that the court does indeed have jurisdiction to consider matters other than the criteria set out in s.115(2)(a). I do not think that the legislature can have intended, in its use of the word "shall" in that part of the subsection, to preclude the court from considering whether an arrangement that complied with the criteria in s.115(2)(a) might offend against "the statutory intendment" - as Henchy J. put it – and refusing to approve its coming into effect if it did. In my view, the word "shall" in s.115(2)(a) ("…shall approve the coming into effect of the Arrangement, if satisfied…") is directory rather than mandatory, and permits the court to consider matters outside the criteria in s.115(2) in its deliberations on whether or not to approve the coming into effect of the arrangement. For the reasons set out above, this is a jurisdiction to be exercised sparingly, and only in exceptional circumstances.

41. In the present case, notwithstanding the debtor's compliance with the statutory criteria, the concern is that expressed by the Circuit Court – that the debtor will be in her 90's when the restructured arrangement ends, at which point she will be obliged to discharge the outstanding capital, and is unlikely to have sufficient equity to acquire a new home, even if that were suitable or appropriate at that stage in her life.

42. Counsel for the PIP indicated to the court that the ideal situation would be that the secured creditor would undertake to the court that no action would be taken by it to remove the debtor from her home in the event that she survived until the end of the restructured term. However, the secured creditor was for internal reasons not able to do

this: as the PIP commented in his written submission to the Circuit Court "…[F]inancial Institutions find it difficult or impossible to record a loan in their systems without a defined term. The term of 420 months (35 years) for a person aged 55, where life expectancy is 82, is considered to be whole of life for this Debtor". While I was given to understand that the creditor had intimated to the PIP that there was no reality to it insisting that a 90-year-old person vacate her home in order to sell it to discharge a mortgage, the creditor is unable to give a legal commitment in that regard.

43. Clearly there is an air of unreality to predicting what will happen in 35 years' time. According to the PIP, the Central Statistics Office states that "just 0.1% or 1 in 1,000 females in County Tipperary live to age 90". Start may still be the owner of the security at that stage, or may have disposed of it to another financial institution. It is probably safe to assume that the persons presently dealing with the matter for Start will not be the persons dealing with it in 35 years' time, nor is it possible to predict with any certainty what attitude Start or any other institution might have at such a remove.

44. The PIP's view can be briefly and clearly stated. The PIA is affordable and sustainable, and the interest-only repayments are appreciably less than social housing rent, even if the debtor were eligible for the Social Housing Scheme, which the PIP asserts that, due to her equity in the PPR, she is not. For the same reason, the debtor is not eligible for the Mortgage to Rent Scheme. The PIA gives her the opportunity to remain in her home for what will almost certainly be the rest of her life. The debtor is balance-sheet solvent, and the PIA will restore her to cash-flow solvency.

45. Obviously, the "nightmare scenario" is that the debtor reaches the end of the restructured term and is forced by agreement or legal action to sell her home to discharge the capital sum due on the mortgage, leaving her with insufficient equity to buy a new home or provide a suitable level of care in her advanced years. In *re Callaghan, A Debtor* [2018] 1 IR 335, Baker J considered a s.115A application in which a counter proposal from a creditor involved warehousing a debt on the basis that the debtors would be given "lifetime tenure" in the PPR so that the security would not be enforced until after the survivor of the debtors had passed away. In *re Denise Lowe, A Debtor* [2020] IEHC 104, McDonald J referred to the decision of Baker J in *Callaghan* with approval, commenting as follows:

> "…while Baker J., in *Paula Callaghan* [2018] 1 IR 335 accepted that warehousing of this kind was not precluded under the 2012-2015 Acts, she made clear that such an arrangement would only be suitable in circumstances where there is a proper basis to believe that the debtor concerned would be in a position to pay the warehoused amount at the time of expiry of the mortgage. In that case, the relevant warehousing suggestion was in fact made by way of counterproposal by the objecting creditor. In para. 81 of her judgment, Baker J. explained why the counterproposal was not appropriate. In that para, she said: -
>
> > 'It is crucial in this context that s. 90 precludes a debtor entering into more than one personal insolvency arrangement in his or her lifetime, this means

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

46. The position in the present case is somewhat different for a number of reasons. Baker J held that the counterproposal was "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…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…" [paras. 79 to 80]. By contrast, the debtor in the present case will be of a far more advanced age at the end of the mortgage term, even indeed if she is still alive at that time. She will in all probability be able to discharge the capital sum if required to do so – the issue is the paucity of her resources after that occurs, as the equity available to her after discharge of the mortgage is almost certainly insufficient to enable her to acquire suitable alternative accommodation. The court must be cognisant of the fact that it is difficult to see what options are available to the debtor if the PIA is not approved.

47. Importantly, both the *Callaghan* and *Lowe* decisions concern s.115A applications. The context in which such applications are approached by the court is very different to the context in which a s.115 application is considered. The issue for the court is whether the jurisdiction, which I have found to exist, to look outside the criteria in s.115(2)(a) in deciding whether or not to approve the PIA should be invoked to decline to confirm the coming into effect of the arrangement, and in doing so, to override the express wishes of the creditors, the PPR creditor, and the debtor herself.

48. It is clear to me that the PIA has been constructed with care and expertise by the PIP. It complies with the criteria in s.115(2)(a). The general body of creditors has voted overwhelmingly in favour of it, as has the PPR creditor. No creditor has voted against it, notwithstanding that a better outcome would be available to the creditors if the debtor were adjudicated bankrupt. The debtor has been represented by solicitor and counsel, and they and the PIP have at all times presented the debtor's case with complete

candour, acknowledging the difficult legal issues to which the matter gives rise. There can be no doubt that the debtor understands the implications of the PIA; however, she wishes to remain in her home, notwithstanding the apparently minimal statistical risk that she runs of ending up in an unfortunate situation.

49. In the absence of any suggestion of error or incompetence on the part of the professionals involved on the debtor's behalf, and given the overwhelming support of her creditors, it does not seem to me to be an appropriate case for the court to override the wishes of all concerned, and most particularly the debtor, given her adherence to the criteria in s.115(2)(a) and her informed decision, having taken appropriate professional advice, to accept whatever risk there may be in embarking upon the arrangement. Accordingly, I will accede to the PIP's application, and there will be an order confirming the coming into effect of the PIA.