[2017] IEHC 657

THE HIGH COURT ON CIRCUIT

[2017 No. 38 CA]

[C: IS: SEWD: 2016:000872]

SOUTH EASTERN CIRCUIT COUNTY OF WATERFORD

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

AND IN THE MATTER OF JACQUELINE HAYES OF 6 THE CRESCENT, KILL SAINT LAWRENCE, AIRPORT ROAD, WATERFORD ("THE DEBTOR")

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

JUDGMENT of Ms. Justice Baker delivered on the 1st day of November, 2017.

1. This judgment is given in the appeal of a determination of the Circuit Court of 6th February, 2017 and in the appeal of the spouse of the applicant, James Hayes [2017 No. 39 CA], an interlocking debtor.

2. Mitchell O'Brien, the personal insolvency practitioner ("PIP"), formulated interlocking Personal Insolvency Arrangements ("PIAs") on behalf of the debtors which were rejected by their respective creditors at a statutory meeting on 5th August, 2016.

3. Application was then made to the Circuit Court under s. 115A(9) of the Personal Insolvency Acts 2012 – 2015 ("the Act") that the court would confirm the coming into operation of the interlocking PIAs notwithstanding their rejection at the meeting of creditors.

4. By order of Her Honour Judge Enright, Judge of the Circuit Court, made on 6th February, 2017, the objection of Shoreline Residential DAC ("Shoreline"), the objecting creditor was upheld.

5. The debtors have appealed that decision.

6. Shoreline holds security on the principal private residence of the debtors having purchased a portfolio of mortgage loans from Irish Bank Resolution Corporation Limited from the special liquidators. Shoreline is an investment fund and is not a regulated entity, but has appointed a regulated entity, Pepper Asset Servicing, to undertake credit servicing. Shoreline objects to the PIA on the grounds that the Arrangement is unsustainable, would not return the debtors to solvency and is unfairly prejudicial to its interests as it proposes an extension of credit to the debtors on terms it argues depart radically from those generally available to borrowers from lenders in the Irish market.

7. Two primary matters arise for consideration in this judgment, the proposed extension of the mortgage term, from the current remaining term of eighteen years and two months, to twenty-seven years, when Mr. Hayes will be 79 and is likely to have retired from his employment, and the proposal to fix interest for the entire of the term at a rate of 3.65%.

8. The debtors argue that the return to creditors from the proposed PIAs is greater than the likely return on bankruptcy, that the maximum means of the debtors have been brought to bear on the repayment of debt, and that there is no unfair prejudice to Shoreline arising from the proposals.

Income and liabilities

9. The market value of the principal private residence of the debtors is €190,000, determined in accordance with the provisions of s. 105 of the Act, and the amount owed on foot of the secured loan is €323,626.21. The remaining term on the mortgage on the principal private residence is 218 months (eighteen years and two months). The principal private residence is a modest family home and no argument is made that it is not suitable for the needs of the couple and their children. The debtors have dependent children aged respectively eight and eleven years.

10. Jacqueline Hayes is employed full time in a permanent position and her monthly income after tax is €1,488. James Hayes in employed part-time and his monthly income, supplemented with social welfare payments, is €1,625.

11. The joint income of the couple is €3,112.65 per month and the set costs taking into account the Reasonable Living Expenses ("RLE") Guidelines (July, 2016 ed.) issued by the Insolvency Service of Ireland ("ISI") are €1,835.74 per month. The PIA provides for a mortgage repayment of €1,080.58 per month. The mortgage protection insurance is to continue at €106.48 per month. The monthly outgoings of €3,022.80 per month leave therefore a surplus of €89.85 per month. The PIP asserts that the mortgage payment of €1,080.58 is sustainable on the current income of the debtors.

12. The PIP has presented the interlocking PIAs by pooling the income of the couple and presenting the figures in the PIA as notional figures to reflect this. There is no requirement in the legislation that mandates this approach by the PIP, but having regard to the fact that a PIP has a margin of appreciation in the way in which he presents the financial information, and in the way in which the income and outgoings are structured in a proposed PIA, I am satisfied that the total available income is correctly stated at €3,112.65 (at p. 40 of the PIA) and that the means by which the payments are to be met on the restructuring are adequately reflected in the income and expenses schedule (at p. 39 of the PIA). The PIA was structured to take account of the fact that Mr. Hayes has a greater proportion of the debt and the repayment provision is accordingly presented at a ratio of 52:48, with the smaller proportion being allocated to Mrs. Hayes.

13. The total unsecured debt is €33,529.66, and the class of unsecured creditors voted in favour of the proposals.

The proposed PIA

14. The proposed PIAs deal with the secured and unsecured debt and provide for a small dividend payment to the unsecured creditors.

15. There are two secured creditors, Shoreline, with a debt of €323, 626.21 and First Citizen which holds a judgment mortgage in the amount of €14,071.36 against the debtors' interest in their principal residence. The PIA proposes the write-down of the Shoreline mortgage balance to €190,000, the current value of the principal private residence. The PIA proposes that the First Citizen secured

debt will rank as unsecured debt and that First Citizen will release its judgment mortgage on successful completion of the PIA.

16. The PIA proposes to extend the term of the mortgage to 27 years from the coming into effect of the PIA, or 21 years from its completion. It is proposed that during the currency of the PIA interest only payments would be made on the mortgage and thereafter the interest rate would remain fixed at 3.65% over the remaining term of the mortgage.

Are the interlocking PIAs sustainable?

17. Section 115A(9)(b)(i) provides that a court may confirm a PIA under the section only where it is satisfied that there is a reasonable prospect that confirmation of the PIA will enable a debtor to resolve his or her indebtedness without recourse to bankruptcy. This is a statutory formulation requiring that the court be satisfied that a proposed Arrangement is capable of being maintained by the debtor, and finds an echo in s. 115A(9)(c), that the court be satisfied that a debtor is reasonably likely to be able to comply with the terms of a proposed Arrangement.

18. The objecting creditor argues that the proposed arrangements are unsustainable in a number of respects. It is argued that the debtors do not have the income to meet the capital and interest repayments on the restructured mortgage after the expiration of the 72-month period of the PIA. Second, the proposal to extend the mortgage terms to 27 years will require mortgage payments to continue until Mr. Hayes is 79 years of age, and his wife is 68 years of age. In those circumstances, it is argued that the information now available points to the unavoidable conclusion that the arrangements are unsustainable.

19. The PIP in formulating a PIA is given what I described as a "margin of appreciation" in *Re Callaghan (a debtor)* [2017] IEHC 325 at para. 59. However, 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. The language used in the Act is that it be shown that the debtor is "reasonably likely" to meet the terms of the PIA: s115A(9)(c).

20. While the legislation requires that the court be satisfied that the PIA is reasonably likely to be performed, I do not consider that it was envisaged that a PIA would merely act to suspend an inevitable bankruptcy, as the scheme of the Act is to enable restoration of a debtor to solvency without recourse to bankruptcy, so that, as recited in the preamble, the debtor will return to engage in economic activity in the State:

> "(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,"

21. The purpose of the legislation is to facilitate the return to solvency of a debtor, and to do so in a reasonable way, so that the new-found solvency is itself sustainable. It is in that context that the legislation has permitted the writing down of secured and unsecured debt, so that at the end of the six-year period of a PIA the debtors will have a reduced debt liability, which it is hoped will be sustainable by them, having regard to known circumstances.

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.

23. The objecting creditor argues that an assumption is made that Mr. Hayes will achieve an increase in his income and that his current part-time employment will be made permanent and full time. I reject that suggestion and consider that the PIAs show that the current known income of the debtors is sufficient to sustain the Arrangements.

24. The primary argument of the objecting creditor regarding the sustainability of the Arrangements, however, relates to the fact that the PIA proposes the restructuring of the term of the secured loan on the principal private residence by extending the term to Mrs. Hayes' 68th birthday when Mr. Hayes will be 79. It is said that the projected figures unequivocally show on present information a shortfall on family income when Mr. Hayes retires. Present evidence suggests that Mr. Hayes would be entitled to a non-contributory State pension of €219 per week. The evidence is that there is no term in Mr. Hayes' contract of employment that requires him to retire at an identified age, but it is accepted that it is unlikely that Mr. Hayes would continue working in his current employment in the security industry until he is 79 years of age. It is argued that the evidence suggests that there will be a monthly shortfall of €237 in year 18 when Mr. Hayes retires and where his sole income is his State pension.

25. Counsel for the debtors argues that the old age pension has increased since the affidavits were drafted, and that indeed historically, even during the height of government austerity measures, State old age pensions have increased, sometimes at a level in excess of inflation.

26. The debtors argue that the deficit at its height would be a €157.23 in year 18 and that if, the income of Mrs. Hayes does not increase in the intervening years, the debtors can choose to live below the RLE Guidelines issued by the ISI which provide for a social inclusion amount of €232.47 per month in the set costs, and €65.07 for "savings and contingencies". It is said that the deficit of €157.23 is approximately half of those amounts which are discretionary and that the debtors are ready to, and will without too much difficulty, be able to then reduce their discretionary spending to deal with the mortgage for the balance of the term. It is argued that the worst-case scenario is predicated on an assumption that there will be no improvement in the income of Mrs. Hayes or no increase in the State pension to which Mr. Hayes would be entitled.

27. The objecting creditor argues that a court may not approve a PIA that requires a debtor to live below the relevant RLE, and that is express in ss. 99(2)(e) and 99(4) of the Act, which provides as follows:

> "99.— (1) Subject to the mandatory requirements referred to in subsection (2), the terms of a Personal Insolvency Arrangement shall be those which are agreed to by the debtor and subject to this Chapter, approved by a majority of the debtor's creditors in accordance with this Chapter.
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> (2) The mandatory requirements referred to in *subsection (1)* are:
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> …

(e) a Personal Insolvency Arrangement shall not contain any terms which would require the debtor to make payments of such an amount that the debtor would not have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants;

…

(4) For the purposes of *subsection (2)(e),* and without prejudice to subsection (3), in determining whether a debtor would have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants under the Personal Insolvency Arrangement, regard shall be had to any guidelines issued under *section 23*."

28. That statutory restriction is one that prohibits formulation of a proposal which provides for expenditure below the RLE within the period of the PIA. It does not prohibit a scheme by which a debtor might on current known figures live below the RLE guidelines outside the 6-year term of the PIA. The legislation is formulated to govern spending within the 6-year window as the purpose of the PIA to give breathing space to enable a return to solvency by an insolvent debtor.

29. I accept that a court ought not to approve a PIA when the available evidence suggests that a restructured mortgage is shown on available evidence to be unsustainable and that a debtor is likely to fall into arrears, whether that be on the expiration of the term of the PIA or at an identified time in the future. For debt to be resolved without recourse to bankruptcy the debt solution needs to be sustainable taking into account reasonable expectations and what can now reasonably be predicted for the future: See the discussion in *Re Callaghan (a debtor)* [2017] IEHC 332.

30. The debtors rely on my judgment in *Re Dunne (a debtor)* [2017] IEHC 59 at para. 46 that:

"…the court is obliged to enquire as to whether it is reasonably likely that a debtor will meet the terms of the PIA, the court is not required to engage the broader question as to whether the debtor is reasonably likely to be able to perform the obligations as reformulated in the PIA with regard to the repayment of a secured debt over the length of the repayment term."

31. That dicta cannot be understood outside the context in which it was given and does not mean that a court will not examine the sustainability of a proposal in the light of known future circumstances. The further away one moves from the present and from the 6-year term of the PIA, the less scrutiny is possible or desirable as the court ought not engage in conjecture and prediction. The unusual proposition presented by the PIP in that case was that the PIA include a review provision that would limit the extent of revised payment terms when a warehoused element in the split mortgage was brought back into account. The PIP argued for provisions that could guarantee the continued solvency of the debtor, with a view to "ensuring the continuing solvency of the debtor after the expiration of the PIA" (paragraph 40). He argued for a limitation on the nature and extent of repayment terms, and sought to link a review to the ISI reasonable living expenses and that was rejected by me as being unfairly prejudicial to the creditor.

32. I rejected the argument that the personal insolvency legislation was to be viewed as requiring that a PIA *ensure* the continuing solvency of a debtor post PIA and as I explained in paras. 56 - 58:

"56. I consider that the scheme of the personal insolvency legislation cannot

be viewed as requiring that a PIA ensure the continuing solvency of a debtor

post PIA. A PIA may fail and the legislation cannot protect against unpredicted

events that give rise to the failure of a PIA in its currency, or thereafter.

57. The purpose of the legislation is to provide a means of orderly debt

resolution, not to guarantee continued solvency outside its timeframe.

58. Further, the statutory provisions do not envisage protection of continued

solvency as a correct approach."

33. *Re Dunne (a debtor)* is not authority for the proposition that a court examination of the sustainability of a proposed PIA may not examine likely future circumstances, but reflects the practical difficulty of predicting events far into the future and derives from the nature of the jurisdiction of the court under the Act to assess the sustainably of the PIA in the light of the stated objective to ensure a return to solvency, not guarantee continued solvency in all eventualities.

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

35. The judgment in *Re Dunne (a debtor)* must be understood in the context of other judgments including Re *J.D. (a debtor),* where a PIA was approved by the court as the debtor had obtained a court order for maintenance and an attachment of earnings order and was in those circumstances able to show that her projected income was reasonably secure, and because the test of sustainability required the court to "engage the question of reasonableness" (paragraph 82).

36. In *Re Callaghan (a debtor),* the question arose from a different perspective and the mortgage creditor sought to warehouse part of a debt for 23 years, no proposals or agreements were made as to what should happen at that time, although the creditor was prepared to concede that the security would not be enforced until the death of the last surviving borrower. The objection of the creditor was rejected as it was based on assumptions regarding the likely financial or other circumstances of a debtor far into the future. The "assumptions and conjecture regarding the living arrangements of the debtors far into the unknown future" (para. 79) were factors rejected as having any potential weight or force.

37. The circumstances in which the question of financial affordability or sustainability of the present case are quite different from those in *Re Dunne (a debtor).* The PIP in *Re Dunne (a debtor)* sought to make provision for an unknown or contingent difficulty. The figures presented show in the present case an actual shortfall identifiable in the known and knowable repayment schedules. The objecting creditor argues that the proposal identifies a point in the future when the mortgage repayments would be unsustainable.

38. The objecting creditor does not point to any events that cannot now be predicted or are hypothetical or unknown, and points to the known and identifiable fact that in year 16 (or 18) the debtors will not be in a position to meet the repayment schedule unless the income of Mrs. Hayes should increase, an unpredicted and unpredictable event.

39. The court in exercising its power to approve a PIA is required to look at the evidence adduced and to objectively examine that evidence with a view to forming a judgement as to whether a proposal is reasonable and sustainable.

40. In the present case, two factors influence my decision on the sustainability of the PIAs. The debtor may have to live below current RLE figures in year 18. This projection makes assumptions far into the future on which I consider it unsafe to rely as determinative. While the PIA is predicated in part on an assumption that the income of the debtors is unlikely to increased qualitatively over the working lives of the debtors, I cannot safely test the affordability of the mortgage repayments in year 18 against the present salaries and social welfare entitlements of the debtors, nor accept for that reason the argument of counsel for the debtors that the pension benefits may increase by more than inflation over the years. If the debtors are required in year 18 to live below the RLEs they may elect to do so, but may have the benefit of some contribution from their children who may by then be able to assist in a small way to relieve any hardship. All of these scenarios are based on conjecture and may not safely determine the question.

41. The figures presented by the PIP show to my satisfaction that the PIAs are reasonably likely to be sustainable during their term and on into the reasonable foreseeable future. I reject this ground of opposition.

The proposed fixing of interest rates
42. The more difficult question that arises in this appeal is the proposed fixing of interest at a rate of 3.65% over the extended mortgage term of 27 years. The objecting creditor describes this as "completely unheard of in banking practice" and argues that it is unfairly prejudicial within the meaning of the legislation.

43. The PIP, Mitchell O'Brien, in his replying affidavit sworn on 19th October, 2016 explains that he formulated the proposal with a long-term fixed interest rate which is higher than the current variable rate, in order to formulate a "conservative and prudent treatment" of the debt with a view to achieving a sustainable mortgage for the debtors.

44. Section 102(6)(e) of the Act expressly contemplates that a PIA may include a term providing for the change of the basis on which interest is paid, and that interest provisions may be changed from a variable interest rate to a fixed rate, or that a rate may be fixed at a margin above or below a reference rate. Section 102(6)(e) provided as follows:

> "(6) Without prejudice to the generality of section 100 or subsections (1) to (3) and subject to sections 103 to 105, a Personal Insolvency Arrangement may include one or more of the following terms in relation to the secured debt:
>
> …
>
> (e) that the basis on which the interest rate relating to the secured debt be changed to one that is fixed, variable or at a margin above or below a reference rate;"

45. In the course of arguments, it was accepted that many proposed PIAs will involve the fixing of interest for an identified period, usually the duration of an Arrangement or to include a short period thereafter.

46. Section 102(6)(e) can be distinguished from the provisions of s. 102(6)(a), (b) and (d) by which is permitted a provision for interest only payments, interest and part capital payments or deferral of a mortgage payment in each case for a period of time which "shall not exceed the duration of the Personal Insolvency Arrangement", i.e. for a maximum of six years. No such temporal limitation is placed on a proposal to fix interest rate, or to track it to another identifiable rate.

47. Thus, the statute permits that interest rates may be fixed or variable, or linked to a reference rate, and the legislation does not limit the period of time for which this can be done.

48. The objecting creditor has dealt with the proposed long term fixing of the rate of interest in two affidavits of a director Jeffrey Johnston, sworn on 3rd October, 2016 and 5th of December, 2016 respectively. Mr. Johnston describes the restructured term and the fixing of the interest rate over such a long period as "commercially unjustifiable" and as almost certain to lead to future losses to the creditor. Mr. Johnston avers that the proposal to fix a rate of 3.65% "represents a radical departure even from the most competitive rates available on the open market" and argues in the circumstances that it is "objectively unreasonable".

49. Mr. Johnston goes on at para. 25 to say that:

> "I say that it would be impossible for the Objecting Creditor to borrow an equivalent sum to the restructured mortgage at 3.65% fixed rate over anything approximating a 27-year period. The reason for this is that, although short term base interest rates are at historically low levels, it becomes increasingly difficult to project what the prevailing interest rates will be as the time horizon extends. Barring an unprecedentedly protracted period of interest rates remaining anchored at or near their theoretical minima, interest rates will eventually fluctuate and, in this regard, the only direction in which it is possible for them to fluctuate is upwards".

50. Mr. Johnson then goes on to say that as "no lender on the open market is offering a fixed rate term even close to the term proposed" this term of the PIA is unjustly prejudicial to the objecting creditor.

51. The final affidavit in the sequence is the supplemental affidavit of Mr. Johnston. Evidence is adduced of products at present available in the Irish market: a ten-year fixed interest rate offered by Bank of Ireland at 4.2%, and a five-year rate at 3.55%, which Mr. Johnston says, "reflects the market risks of fixing for a term that is almost one third of the proposed fixed term under the arrangement".

52. Mr. Johnston says it would be impossible to quantify the actual loss a lender might suffer if interest were fixed at a low level which did not reflect, or in some way track, ECB base rates.

53. I am not satisfied that the test for which the objecting creditor contends is based on a correct assumption. The objecting creditor is not a bank but an investment fund, and while the affidavit evidence of Mr. Johnston refers to the risk that "a lender" might suffer loss were interest rates to be set at a low level over a long period and not be fixed in relation to, or in some other way track,

ECB base rates, the affidavit of Mr. Johnson does not say or suggest as a matter of fact that the objecting creditor will require to return to the market to meet its capital needs in the future or fund the investment. The terms on which the asset was purchased or how it was financed are not identified.

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

55. I consider in those circumstances that the asset value might perhaps be more accurately compared to that of a bond and that the objecting creditor may establish that the return from such an investment is unfairly or prejudicially low by reference to an investment or bond market, and not to interest rates. I consider that the Act envisages circumstances where a court might be prepared to accept as not unfairly prejudicial a long-term fixed interest rate where the court would test the reasonableness of such rate having regard to factors other than those that would be in the mind of a lender granting finance. While it is necessarily the case that an interest rate may reflect the ability of a lender to borrow, the interest rate proposed by the PIP in the present case is to be tested against the future costs of, or value to an investor not a lender.

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

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

58. However, the matter does not end there, and one approach mandated by the Act in order to test unfair prejudice is to look to the likely return in bankruptcy, namely that the return to the objecting creditor not be less than that that would be achieved on a bankruptcy in which one is to assume that the secured premises would be sold. In the present case that test comes into sharp relief.

Likely return on bankruptcy

59. I considered the requirement that a court would look to the likely outcome in bankruptcy as one means by which the court would consider the fairness of any prejudice likely to be suffered by a creditor in *J.D. (a debtor)* at paras. 62 and 69 and will not repeat them here. Both parties to the present case accept that it is appropriate that the court would make a comparison with the likely bankruptcy outcome, and the Act expressly makes reference to the comparison as a factor relevant to the test for unfair prejudice. Section 107(1)(d)(i) of the Act sets out the requirement that the comparison be engaged:

> "**107.** — (1) The documents referred to in *section 106(2)(b)* and *section 111A(2)(b)* (inserted by section 17 of the Personal Insolvency (Amendment) Act 2015) are—
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> …
>
> (d) a report of the personal insolvency practitioner—
>
> (i) describing the outcome for creditors, and having regard to the financial circumstances of the debtor whether or not the proposed Personal Insolvency Arrangement represents a fair outcome for the creditors, and indicating, where relevant, how the financial outcome for creditors (whether individually or as a member of a class of creditors) under the terms of the proposal is likely to be better than the estimated financial outcome for such creditors if the debtor were to be adjudicated a bankrupt (having regard to, amongst other things, the estimated costs of the bankruptcy process);"

60. The bankruptcy comparison contained in the proposed PIA shows a total return on the PIA to the secured creditor of €196,853.74, being €190,000, the capital value of the reduced mortgage, plus, bearing in mind that the written down balance of the mortgage debt ranks as an unsecured debt, an unsecured creditor dividend of €6,853.74.

61. The objecting creditor disagrees with that valuation, and para. 22 of the affidavit of Jeffrey Johnston sworn on 3rd October, 2016 proposes a valuation that tests the present value of the restructured mortgage, taking an annualised discount of 5% (the projected annualised cost of funds for 27 years), and arrives at a figure of €173,384. Adding the dividend for unsecured creditors of €6,854, a return therefore of €179,295 is shown on this basis.

62. The evidence of the PIP is that on the revised mortgage debt of €190,000 at the proposed fixed interest rate the interest payable amounts in total to €123,915 (replying affidavit of Mitchell O'Brien sworn on 19th October, 2016), and that this, when taken in conjunction with the fact that the objecting creditor continues to have the benefit of security over the capital sum, is a better outcome than that calculated on a simple basis of present value calculation.

63. I consider that the PIP is correct. The calculation is not to be done on a present value basis without having regard to the entire proposal, which in the present case includes fixed payments over the term, security over real property, and a claw back should the property sell in the first 20 years at a value higher than that on which the calculations are based.

64. There is disagreement too regarding the return on bankruptcy. The evidence of the debtor is that, taking the principal private residence as having a value of €190,000, after the costs of sale and administration fees the amount available for distribution to creditors on bankruptcy is €171,000.

65. The PIP therefore says the return in bankruptcy is 53% of the current loan balance, and the return on the combined PIAs is 61%.

66. A dispute arose in that context regarding a discount of 10% proposed by the PIP as the relevant deduction, and the PIP said that a discount of 10% is recognised by the ISI and by the Official Assignee in Bankruptcy as accurately representing the likely costs in

bankruptcy. I accept the argument of the objecting creditor that it is not correct to assess the likely return on bankruptcy on the basis that it is likely that in the present case the secured creditor will incur legal costs in pursuing possession of the premises having regard to the fact that proceedings are already in train and have been stayed pending this process. I consider the correct approach is for the court to calculate the likely return on bankruptcy on the basis that the costs are to be assessed without exceptional factors such as the costs of repossession proceedings.

67. The objecting creditor on that basis calculates a return on bankruptcy if it chooses to rely on its security of €183,254.90, allowing for sale costs of €6,745.10. That is a return on my calculation (taking round figures) of approximately 57%, 4% higher than the figure proposed by the PIP.

68. However, even on that calculation the return on the interlocking PIAs is better on the calculation of the PIP.

Unfair prejudice: the test
69. Shoreline argues that the proposed arrangement is unfairly prejudicial to its interests. I examined the concept of unfairness in *Dunne & Personal Insolvency Acts* [2017] IEHC 59 and also in *Re Callaghan (a debtor).*

70. As Clarke J. said in *Re McInerney Homes Limited* [2011] IEHC 4, any write down of a debt is likely to be prejudicial to a creditor, an observation made in the context of examinership, which contains a broadly similar statutory scheme for the restructuring of corporate debts, where restructuring can involve a reduction of the capital owed. It is only where the consequence is not merely prejudicial to the interest of the creditor, but unfairly so, that the court must decline to make the order.

71. I do not consider a mathematical difference taken alone may create an unfair prejudice. Unfairness is tested in the light of all the circumstances, and the primary loss to the creditor arises from the loss of market value in the principal private residence and the fact that the debtors have a significant negative equity as a result. I am not persuaded that the question of fairness is to be tested wholly on a mathematical basis, and even if it were, the differential would not justify the rejection of the proposed PIAs having regard to the stated objective of s. 115A and s. 104 that a PIA should endeavour to contain a term that protects the principal private residence insofar as this is reasonable and not unfair.

72. A court considering whether to make an order under s. 115A of the Act must have regard to the mandatory conditions set out in subsection 9. Those mandatory conditions require that the court consider all the circumstances, including whether the proposed PIA creates a reasonable prospect that a debtor will not be required to cease to occupy or own his or her principal private residence. The court is mandated to have regard to the specific question whether the proposed PIA would enable a debtor to resolve his or her indebtedness without recourse to bankruptcy and enable creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit. The comparison with bankruptcy is put at the centre of the analysis, but having regard to the fact that the court must examine whether the proposed PIA enables the creditor to recover the debts as is "reasonably" possible having regard to the means of the debtor, I do not consider that the legislation envisages a merely mathematical exercise.

73. I consider also that the legislation envisages that the preferred option is to avoid that the debtor would have recourse to bankruptcy, and the legislation is framed in a manner which suggests that preference. The relevant provisions of s. 115(A)(9)(b) support this:

> "115A (9)(b) having regard to all relevant matters, including the terms on which the proposed Arrangement is formulated, there is a reasonable prospect that confirmation of the proposed Arrangement will—
>
> (i) enable the debtor to resolve his or her indebtedness without recourse to bankruptcy,
>
> (ii) enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit, and
>
> (iii) enable the debtor—
>
> (I) not to dispose of an interest in, or
>
> (II) not to cease to occupy,
>
> (III) all or a part of his or her principal private residence"

74. The language of "unfair prejudice" is found in s. 115A(9) and also in s. 120(e) and forms the basis on which a creditor may object to a PIA under s. 114 of the Act. What is unfair will depend on the circumstances, including the likely return on bankruptcy, but a test of fairness invokes a comparison or comparative analysis and the principles of proportionality. A proposal in a PIA which disproportionally prejudices a creditor is likely to be unfair, and disproportion could be found if the likely result in bankruptcy, would be not just marginally better than under a proposed PIA, but materially so. It could arise for example if a principal private residence was of a size, value or condition that could not justify its retention.

75. Whether a proposal is unfair must also have regard to the stated statutory objective which is contained in s. 115A but also in the earlier s. 104, that a proposed PIA should insofar as this is practical, seek to preserve the occupancy or ownership by a debtor of his or her principal private residence. The purpose of the amending legislation, in particular s. 115A, and the purpose of s. 104 which was found in the original Act of 2012, was to protect the interest of a debtor in the principal private residence, and no such protection is found in respect of other property.

76. A proposed PIA is not of itself unfairly prejudicial merely on account therefore of the fact that the likely return on bankruptcy could be marginally better.

77. Equally, the court in considering whether a proposed PIA is unfairly prejudicial must examine the actual circumstances of the creditor, and in the present case a particular focus of the argument arose from the evidence adduced on the part of Shoreline regarding likely lending rates in the Irish market in the near and not so near future. However, Shoreline is not a lender, and accordingly the test of unfair prejudice regarding its interest must be seen in the light of investment returns and not the cost of the capital needs of the creditor in the future. The examination of the fairness is conducted in the circumstances of the case and having regard to the financial profile of the objecting creditor and the means of the debtor.

The means of the debtor are to be brought to bear

78. The legislation expressly requires the court to consider whether the means of the debtors have reasonably been brought to bear in the proposal. This is an important factor in the present case and the PIP says he has formulated the PIAs in a conservative way to achieve the protection of their principal private residence.

79. The present case concerns a family of modest means, who occupy a modest principal private residence with their small children. I accept the argument of the objecting creditor that an extended mortgage term which will leave a person with mortgage debt into his or her retirement would not always be desirable. The factor which makes the present proposal acceptable is that Mrs. Hayes is significantly younger than her husband, her income is secure, and the proposed extended mortgage term will not continue far into her retirement.

80. The other factor that influences me in the present case is that the proposed fixed interest rate mortgage payment provides for an equal monthly instalment over the entire period of the mortgage of €1,080.58, and having regard to the modest income of the couple, and the age of Mr. Hayes in particular, this must be seen as the only proposal which could be presented to creditors and which would secure the ongoing occupation and ownership by the couple of their home. The proposal undoubtedly will stretch the couple in their later years, and even if I cannot accept the invitation of their counsel to make a working assumption that by the time Mr. Hayes retires the State Old Age Pension will have increased somewhat, and Mrs. Hayes's income may have increased, even if only in line with inflation, I am satisfied that the PIAs and the mortgage repayment following successful completion of the PIAs are capable of preserving the principal private residence.

81. In no sense could it be said that Mr. and Mrs. Hayes are obtaining a benefit or a bonanza from the write down of their debt, the extension of the term of their mortgage, and the fixing of interest rates. Rather, a result of the PIAs they will be returned to solvency, and they are likely to remain solvent, insofar as this can be reasonably predicted, albeit their discretionary income will, barring exceptional and unanticipated circumstances, be modest.

82. No provision is made for the costs of third-level education for their children, and counsel for Shoreline argues this suggests that the PIAs are not sustainable and that the debtors will fall into financial difficulty by year 7 or 8 when the elder child might want to undergo third-level studies. That factor is not one that would influence me to reject the proposed PIA, as the evidence is that the likely cost of rental property would be the same or not materially lower than the projected mortgage repayments, and preservation of the principal private residence for the couple and their children is likely to be more beneficial to the children than the sale of that home in a bankruptcy, and the move to rental accommodation, where security of tenure is not guaranteed. The likely cost of third-level education furthermore is mere conjecture at this point in time.

Decision

83. Taking all of these circumstances into account, and noting that the case has a number of unusual features, I propose making an order allowing the appeal and providing for the coming into force of the PIA notwithstanding its rejection at the meeting of creditors.