THE HIGH COURT

CIRCUIT APPEAL

[2018 No. 436 CA]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012 TO 2015

AND IN THE MATTER OF AHMED ALI (A DEBTOR)

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACT, 2012 (AS AMENDED)

JUDGMENT of Mr. Justice Denis McDonald delivered on 4 March, 2019

1. This is an appeal by a Personal Insolvency Practitioner, James Greene, ("the practitioner") on behalf of a debtor, Mr. Ahmed Ali, from a decision of the Circuit Court of 30th October, 2018, refusing the practitioner's application under s. 115A(9) to approve the coming into effect of proposals for a Personal Insolvency Arrangement ("*PIA*"). The hearing of the appeal took place on Monday, 11th February, 2019, during which I heard submissions from counsel for the practitioner and also counsel for an objecting creditor, namely Bank of Ireland Mortgage Bank ("*the bank*") which holds security in the form of a mortgage over the home of Mr. Ali in Castlemartyr, Co. Cork.

2. In the course of the hearing on 11th February, 2019, the submissions of counsel, on both sides, focused primarily on the issues raised by the bank in its notice of objection dated 11th September, 2017. I address these issues, in turn, below.

Is there is a *"relevant debt"* within the meaning of section 115A(18)?

3. Provided certain conditions are met, s. 115A provides a mechanism whereby a practitioner can seek to persuade the court to approve the coming into effect of proposals for a PIA notwithstanding that the proposals have been rejected by a majority of the creditors of a debtor. One of the conditions which must be satisfied in order to trigger the jurisdiction of the court under s. 115A, is that the debts covered by the proposed PIA must include a *"relevant debt"*. For this purpose, s. 115A(18) defines a relevant debt as follows:-

> *"(18) In this section—*
>
> *'relevant debt' means a debt—*
>
> > *(a) the payment for which is secured by security in or over the debtor's principal private residence, and*
> >
> > *(b) in respect of which—*
> >
> > > *(i) the debtor, on 1 January 2015, was in arrears with his or her payments, or*
> > >
> > > *(ii) the debtor, having been, before 1 January 2015, in arrears with his or her payments, has entered into an alternative repayment arrangement with the secured creditor concerned."*

4. The bank takes a preliminary objection in this case on the basis that (so it submits) there cannot be a *"relevant debt"* in circumstances where Mr. Ali was not residing in the principal private residence on 1st January, 2015. In this context, it is clear from the affidavit evidence before the court that Mr. Ali had previously lived in the property from 2004 to 2011 with his then wife. However, his marriage broke down and, at some stage in 2011, he moved out of the home. He subsequently lived in rented accommodation from 2011 until June 2015.

5. It appears from the materials before the court that Mr. Ali sought to remove his name from the mortgage at the time of the breakdown of his marriage but the bank refused to do this. At that time, Mr. Ali says that he was in a low paid job and was not in a position to contribute anything towards the repayment of the mortgage debt. In 2014, his estranged wife (who was also in financial difficulty) decided to move out of the home. She was later adjudicated a bankrupt (on her own application). The property, therefore, appears to have been empty for a time between 2014 and June 2015. According to the PIA, Mr. Ali decided to move back into the property at that time in circumstances where he realised he had a personal liability on foot of the mortgage loan and he has since paid a sum of €700 per month to the bank.

6. On the basis of this evidence, the bank submits that the requirements of s. 115A(18) are not satisfied; it submits that it follows that Mr. Ali does not have a *"relevant debt"* and, accordingly, the application under s. 115A (according to the bank) must fail in *limine*.

7. While I understand why the bank should make this submission, it is noteworthy that there is nothing in the language of the definition of *"relevant debt"* which expressly requires that the debtor should reside in the principal private residence as of 1 January, 2015. What is required is that the mortgage loan should be in arrears as of that date. However, there is no express requirement that the debtor should reside in the principal private residence as of that date.

8. There are two aspects to the definition of *"relevant debt"* in s. 115A, namely:-

> (a) the requirement that there should be a debt secured over the principal private residence; and
>
> (b) that the debt was in arrears as of 1 January, 2015, or had been in arrears prior to that date and the debtor had entered into an alternative repayment arrangement with the secured creditor concerned.

9. It is obviously a critical component of the definition of *"relevant debt"* that there should be arrears as of 1 January, 2015, or arrears before that date. Notably, s. 115A(18) does not go so far as to require that the debtor must reside in the property as of that date. For the subsection to operate, there must be a mortgage over the principal private residence of the debtor prior to 1 January, 2015. There must also be a *"principal private residence"*. That term is defined in s. 2 of the 2012 Act as meaning (insofar as

relevant): *"a dwelling in which the debtor ordinarily resides*." Importantly, there is nothing in the definition of "*principal private residence*" in s. 2 to require that the debtor must reside in the dwelling as of any particular date.

10. It is clear that Mr. Ali did not ordinarily reside in the property in issue here as of 1 January, 2015. However, there is no doubt (on the basis of the evidence before the court) that as of the date of commencement of the proceedings under the 2012-2015 Acts in 2017, he was ordinarily resident in the property.

11. Thus, for the purposes of these proceedings, the property is Mr. Ali's principal private residence within the meaning of s. 2. Furthermore, there is a debt secured over that property in favour of the bank. That debt was in arrears as of 1 January, 2015. In these circumstances, each of the express requirements set out in the definition of *"relevant debt"* are satisfied. There is accordingly a *"relevant debt"* within the meaning of s. 115A(18).

12. Had it been the intention of the Oireachtas to require that the debtor should actually reside in the principal private residence as of 1 January, 2015, it would have been a very simple matter for that requirement to be spelt out in section 115A(18). No such provision was made. I can see no basis on which such a requirement can be read into s. 115A(18). In fact, no argument was addressed to me at the hearing that would provide any proper basis for the court to conclude that it is implicit in the definition of *"relevant debt"*, that the debtor should be resident in the relevant property as of 1 January, 2015.

13. In the circumstances described above, I have come to the conclusion that the requirements of s. 115(18) have been satisfied and that there is, accordingly, in this case, a *"relevant debt"* for the purposes of section 115A.

Section 115A(8)(a)(i) of the 2012 Act (as amended)

14. The next issue that was debated in the course of the hearing related to the requirement set out in s. 115A(8)(a)(i) of the 2012 Act (as amended) under which the court is required to be satisfied that the eligibility criteria specified in s. 91 of the 2012 Act have been satisfied. The bank contends that one of those criteria has not been met in this case in that there was no evidence placed before the Circuit Court that Mr. Ali had made the declaration in writing required by s. 91(1)(g) that he had cooperated for a period of, at least, six months with the bank with regard to the principal private residence "*in accordance with any process relating to mortgage arrears operated by the secured creditors concerned which has been approved or required by the Central Bank…".*

15. There is no doubt that there was no such declaration placed in evidence before the Circuit Court. Nor was any evidence placed before the Circuit Court of any confirmation in writing from the practitioner under s. 91(2) which would have overridden the s. 91(1)(g) requirement. If the practitioner had a basis for doing so, the practitioner could have provided a written confirmation that it is his belief that, if Mr. Ali had entered into a process of the kind contemplated by s. 91(1)(g), it is unlikely that Mr Ali would have become solvent within a period of five years from the date of such confirmation. Section 91(2) provides that, where such a confirmation is given, the criterion specified in s. 91(1)(g) shall not apply.

16. In the affidavit of Patrick Baxter sworn on behalf of the bank on 16 May, 2018, in support of its notice of objection, Mr. Baxter drew attention to the failure of the practitioner to exhibit any evidence of the declaration required by s. 91(1)(g). Furthermore, in the course of the submissions on 11th February, 2019, counsel for the bank highlighted the absence of any confirmation under s. 91(2) from the practitioner. It was, therefore, submitted on behalf of the bank that there was a fatal flaw in the present application in so far as there was no evidence before the court to show that either s. 91(1)(g) or s.91(2) had been satisfied.

17. It should be noted that, subsequent to the service of Mr. Baxter's affidavit on behalf of the bank, no further affidavit was sworn by the practitioner in the course of the Circuit Court proceedings. There was a replying affidavit sworn by Mr. Ali on 18th July, 2018, which did not exhibit the declaration required by section 91(1)(g). Nor did it exhibit any s. 91(2) confirmation from the practitioner. However, in para. 12 of his affidavit, Mr. Ali deposed as follows:-

> *"I say in particular response to paragraph 35 of the Objector's affidavit that I cooperated with the Objecting Creditor for significant periods of time since my mortgage loan went into arrears. I say and believe that this is indeed evidenced by the averment made by the Objecting Creditor and that they say that my loan account went into arrears in 2009. However, I was not removed from the MARP process until July 2015."*

18. The averment made by Mr. Ali in para.12 in his affidavit must be read in light of the provisions of the Central Bank Code of Conduct on Mortgage Arrears 2013 (which is the relevant code governing cooperation between a borrower and a lender). In the course of the hearing, my attention was drawn to the definition of "not co-operating" in the Code. That definition makes clear that a borrower will not be regarded as not cooperating until a warning letter has been issued to the borrower in accordance with para. 28 of the Code. Paragraph 28 provides that, prior to classifying a borrower as not cooperating, a lender must write to the borrower and inform the borrower that, unless specific actions are taken within 20 business days, the borrower will be classified as not cooperating. It was submitted that, since the bank did not remove Mr. Ali from the Mortgage Arrears Resolution Process ("MARP") until July 2015 (notwithstanding that the appellant had gone into arrears in 2009), Mr. Ali must be deemed to have been cooperating until July, 2015. In this context, it should be noted that, although a further affidavit was delivered on behalf of the bank, no response was made by the bank to para. 12 of Mr. Ali's affidavit.

19. During the course of the hearing before me, I was provided with a copy of a declaration dated 15th May, 2017 made by Mr. Ali for the purposes of s. 91(1)(g) of the 2012 Act. No explanation was provided on affidavit or otherwise as to why this declaration was not made available in advance of or during the course of the Circuit Court hearing.

20. I am very conscious of the provisions of s. 37 of the Courts of Justice Act, 1936 ("the 1936 Act") which provides that, in the case of an appeal from the Circuit Court in a civil case heard without oral evidence, the appeal is to proceed by way of re-hearing on the basis of the evidence that was before the Circuit Court. Special leave of the judge hearing the appeal is required if additional evidence is to be received for the purposes of the appeal.

21. On the other hand, I am also conscious that the declaration which has now been furnished to the court at the appeal stage provides *prima facie* proof of compliance with s. 91(1)(g). I must bear in mind that this declaration is consistent with evidence that was properly before the Circuit Court – namely para. 12 of Mr. Ali's affidavit. It is also consistent with para. 12(a) of the Circuit Court notice of motion under s 115A(9) in which the practitioner expressed the opinion that the debtor satisfied the eligibility criteria specified in s. 91.

22. Furthermore, the declaration in question is an item of proof. In my view, it is not in the same category as affidavit evidence as to some factual matter in dispute between the parties. While I fully appreciate that the bank very strongly rejects the suggestion that there was any cooperation by Mr. Ali, the requirements of s. 91(1)(g) are nonetheless met if the necessary declaration is given by the

debtor. The provision of such a declaration is therefore in a different category to the type of additional evidence which is usually the subject of an application for special leave. The issues that arise in the context of the latter category of evidence were addressed by O'Donnell J. in the Supreme Court in *Emerald Meats Ltd. v. Minister for Agriculture* [2012] IESC 48 where he said, at para. 36:

> *"The rules on the admission of fresh evidence on an appeal are quite strict. This is as it should be. There are very few cases in which the losing side does not regret that different witnesses were called, evidence given or points made either in cross-examination or in submission. But a trial is not a laboratory experiment where one element can be substituted and all other elements maintained and a different outcome obtained. It is important that parties are aware of the finality of litigation, and bring forward their best case for adjudication. Cases develop organically and unpredictably. One of the benefits which litigation brings at some cost is certainty. A party may reasonably dispute the merits of a conclusion, but cannot doubt that it is a conclusion. The court must make its decision on the evidence and case advanced on the day, or in this case, over the 17 days. It is partly for this reason that the rules and practice of the courts go to such elaborate lengths to attempt to ensure that both sides are fairly apprised of what is in dispute and have an adequate opportunity to prepare for the litigation. It is also why appellate courts have developed rigorous tests on applications to admit fresh evidence. There are few cases which in hindsight could not be rerun with different witnesses, evidence, arguments, or advocates, but to consider that such a course is in the interests of justice is to engage in the delusion that endless litigation is a desirable rather than a tormented state."*

23. What O'Donnell J. had in mind in *Emerald Meats* was factual or documentary evidence which should have been addressed at the first instance hearing. If appellate courts too readily admitted fresh evidence on appeal, it would allow litigants to re-run cases on the basis of new evidence which would place respondents to such appeals at a significant disadvantage since they would then have to address this new evidence and effectively meet a new case – a case which should have been explored at the original hearing. The underlying rationale is not unlike the basis of the Rule in *Henderson v Henderson* (1843) 3 Hare 100.

24. In my view, there is a qualitative difference between evidence of the kind discussed in *Emerald Meats* and the provision of a simple proof such as a s. 91(1)(g) declaration. The provision of such a declaration does not create the same level of difficulty for a party in the position of the bank as would be the case if the bank, on appeal, was faced with new factual or documentary evidence. In particular, it does not expose the bank to the mischief of having to interrogate and address a new factual scenario – potentially requiring the bank to seek out new documents or even new witnesses. Furthermore, once that declaration is provided, the requirements of s. 91(1)(g) are met even where the bank may strongly contest the basis for the declaration. The fact is that, even where the underlying basis of the declaration is contested, s. 91(1)(g) will still be satisfied once the declaration has been provided. Any dispute between the bank in relation to the previous payment history or cooperation of the debtor is likely to fall to be considered under a separate provision namely s. 115A(10) of the 2012 Act or possibly in the context of the sustainability of the proposed PIA.

25. In these very particular circumstances, I do not believe that it would be appropriate to take the approach traditionally followed under s. 37 of the 1936 Act. In my view, for the reasons discussed above, different considerations apply in the context of an item of proof of this nature. I am satisfied that, in the interests of justice, it is appropriate to admit the s. 91(1)(g) declaration into evidence for the purposes of this appeal. I have already explained why I do not believe that the admission of the declaration does not give rise to prejudice to the bank in the sense explained in *Emerald Meats*. It follows that, for the purposes of this appeal, there is no longer any issue as to non-compliance with s. 91(1)(g). Nonetheless, the failure to put that declaration before the Circuit Court may potentially have costs consequences and I will, in due course, give the parties an opportunity to address me on any possible costs consequences that flow from that failure.

The requirements of s. 115A(9)(g)

26. Under s. 115A(9)(g), at least one class of creditors must have accepted the proposed PIA by a majority of over 50% of the value of the debts owed to that class. In this context, the practitioner, in para. 13 of his affidavit sworn on 1st September, 2017, said that the "*excludable creditor class of creditors*" have voted in favour of the proposed PIA. For this purpose, the "*excludable creditor class*" has been recognised in a previous judgment of Baker J. as constituting a separate class of creditors for the purposes of section 115A(9)(g). However, a further point was made by counsel for the bank, in the course of the appeal, that the votes of the Revenue Commissioners should be disregarded for this purpose in circumstances where the preferential debt due to the Revenue Commissioners will be paid off in full under the PIA and the remaining debt (in respect of local property tax) will be paid in full also.

27. In addition, it was submitted on behalf of the bank that the amount owed to the Revenue Commissioners is so small that it would be disproportionate to treat the Revenue Commissioners as a separate class of creditor. In this context, reliance was placed on s. 115A(17)(b) of the 2012 Act (as amended) which provides as follows:

> *"In deciding … whether to consider a creditor or creditors to be a class of creditor, the court shall have regard to the circumstances of the case, including, … -*
>
> > *(i) the overall number and composition of the creditors who voted at the creditors' meeting, and*
> >
> > *(ii) the proportion of the debtor's debts due to the creditors participating and voting at the creditors' meeting that is represented by the creditor or creditors concerned."*

28. As noted above, there are a number of points made by counsel on behalf of the bank in relation to section 115A(17). In the first place, counsel submits that there is no basis to include the preferential debt due to Revenue within the value of the debt attributable to the Revenue Commissioners. At this point, I should explain that, of the total debt due to the Revenue Commissioners by Mr. Ali of €2,496.00, €1,319 relates to income tax and is preferential while the balance (namely €1,177) relates to Local Property Tax (LPT).

29. Counsel for the bank drew attention to the provisions of s. 101(1) of the 2012 Act which applies s. 81 of the Bankruptcy Act 1988 (the 1988 Act) to preferential debts in a PIA. Counsel submitted that, when one looks at the provisions of s. 81(8) of the 1988 Act, the vote of the Revenue Commissioners in relation to its preferential debt should not have been counted

30. Counsel emphasised that, under s.81(8) of the 1988 Act, any creditor, entitled to be treated as a preferential creditor, will lose that status if the creditor votes in favour or against an arrangement proposed by an "*arranging debtor*". As I understand the submission, it proceeded on the basis that the Revenue Commissioners were afforded a preferential status in the proposed PIA and therefore their vote should not have been counted in relation to the preferential element of the Revenue claim. In this connection, it is clear from Appendix 2 to the proposed PIA that the Revenue Commissioners have opted into the proposed arrangement claiming the amount of €1,318.85 in respect of income tax due for 2016 as a preferential debt. Note 8 to Appendix 2 states that Mr. Ali proposes to address this liability in full by making 24 monthly payments of €54.95.

31. Counsel for the practitioner did not contest this submission and I believe that he was right to take that course. If the Revenue Commissioners are being paid in full in respect of a preferential debt and if they have opted into the proposed arrangement on that basis, it would be wrong to count the value of the preferential claim in the overall value of the Revenue debt. This means that the only debt that would be capable of being taken into account (in terms of the votes of creditors) is the debt in respect of LPT in the sum of €1,177. This represents less than one percent of the overall indebtedness of Mr. Ali to his creditors.

32. Counsel for the bank made two submissions in relation to the LPT debt. She argued that since it was to be paid in full in the same way as the preferential debt, it should be treated in the same way. Notwithstanding the logic of this argument, I do not believe that the submission is well founded. The reason why LPT is ordinarily paid in full under the terms of a PIA is that there are significant consequences for a taxpayer if LPT is not paid. These include the withholding of any refund of other tax that might become due to a taxpayer, the withholding of a tax clearance certificate, the imposition of an LPT surcharge, the imposition of interest at 8% per annum and the imposition of additional penalties. Thus, LPT is paid in full to avoid these serious practical consequences for a debtor; it is not paid in full because it has a preferential status.

33. During the course of the hearing, there was no suggestion made that the unpaid LPT in this case was entitled to be treated as a preferential debt within the meaning of s. 81(1) of the 1988 Act. As a consequence, I can see no basis on which s.81(8) would apply in relation to the LPT debt of €1,177. Subsection (8) only applies in respect of a debt that is entitled to preferential status. I therefore do not believe that the debt in respect of LPT should not be counted.

34. However, Counsel for the bank also argued that the debt due in relation to LPT is so small and insignificant, relative to the overall indebtedness of Mr. Ali, as to engage, in a very compelling way, the provisions of section 115A(17)(b)(ii). In this context, the court is required under s. 115A(17)(b), in assessing the existence of a separate class of creditor, to have regard to all the circumstances of the case including the proportion of the debts of the debtor due to the creditor or creditors who are suggested to comprise a separate class. Given that the debt due to the Revenue Commissioners in respect of LPT is less than one percent, it is suggested that the court should not treat the Revenue Commissioners as a separate class.

35. In my view, there is significant force in the argument made by the bank. In many cases, it might well be appropriate to take the view that a creditor holding less than one percent of the debt should not be regarded as constituting a separate class for the purposes of section 115A(17). However, in this case, notwithstanding the relatively insubstantial amount due (in absolute terms) to the Revenue Commissioners, I do not believe that it would be appropriate to refuse to treat the Revenue Commissioners as a separate class. In this context, it is to be noted that, although s. 115A(17)(b)(ii) requires the court to have regard to the proportionate size of the debt due to the Revenue Commissioners, the subsection does not rule out the possibility that the court may still conclude that a creditor in their position should be treated as a separate class notwithstanding that the amount due may be only a very small fraction of the overall indebtedness. In my view, the court remains free to do so, if, notwithstanding the proportionate size of the creditor concerned, the court is nonetheless of the view that there is a proper basis to treat that creditor as a separate class.

36. In my view, there is a proper basis, here, to treat the Revenue Commissioners as a separate class. In the first place, I bear in mind that there are only two creditors in this case namely the bank and the Revenue Commissioners. In such circumstances, it seems to me that the voice of the Revenue Commissioners is important. I am also conscious that the Revenue Commissioners have long experience of assessing schemes of arrangement (both at a corporate and an individual level). There can be no doubt that one of the purposes of requiring that at least one class of creditor should have approved of a proposed PIA is to give a measure of assurance to a court that the terms of the arrangement are commercially acceptable. The Revenue Commissioners have unparalleled experience of making such assessments.

37. It might be suggested that, in this case, the Revenue Commissioners were hardly likely to vote against an arrangement under which they are ultimately to be paid in full. However, this ignores the fact that the Revenue Commissioners will not be paid interest or penalties and furthermore that the payment to be made to them will be made over a period of time by monthly instalments. It could not plausibly be suggested in those circumstances that the Revenue Commissioners are unaffected by the terms of the terms of the proposed PIA. In all of these circumstances, it seems to me that, notwithstanding the relatively small sum due to the Revenue Commissioners, it is appropriate to treat the Revenue Commissioners as a separate class for the purposes of section 115A.

The Sustainability of the Proposed PIA

38. It is a requirement of s.115A(9)(b)(i) that the court should be satisfied that there is a reasonable prospect that confirmation of the proposed PIA will enable the debtor to resolve his indebtedness without recourse to bankruptcy. It is also a requirement of s.115A(9)(c) that the court should be satisfied *"having regard to all relevant matters, including the financial circumstances of the debtor and the matters referred to in subsection (10(a)), the debtor is reasonably likely to be able to comply with the terms of the proposed Arrangement".*

39. The bank argues that, in this case, the evidence is insufficient to satisfy the court that Mr. Ali will be able to afford the payments required under the proposed PIA. At this point, I should explain that, under the proposed PIA, two mortgage loans are to be merged into one account. The merged mortgage balance of €283,665.00 is to be written down to €220,000.00 with the balance of €63,665.00 treated as an unsecured debt (in respect of which the bank will receive a total dividend of €6,724.00 over the lifetime of a 24 month PIA). For the duration of the proposed PIA, the restructured balance of €220,000.00 is to be repaid on an interest only basis at a rate of 1.25% in the approximate sum of €229.00 per month. Thereafter the restructured balance is to be repaid on a capital and interest basis at a tracker interest rate based on the ECB rate plus a margin of 1.00%. This will result in monthly repayments estimated to be of the order of €678.00. The term of the mortgage is to be extended to 396 months (i.e. 33 years) by which stage Mr. Ali will be 70 years of age.

40. Prior to the commencement of these proceedings under the 2012-2015 Acts, Mr. Ali was in low paid employment. He is now self-employed. He runs a car valeting business. His current net monthly income from self-employment is €1,548.00. Under the proposed PIA, Mr. Ali will pay the sum of €104.00 each month to the Revenue in respect of the Revenue debts and €200 per month in respect of child maintenance leaving a balance of €1,244.00 per month to fund his living expenses and the mortgage and other debt repayments. Mr. Ali's reasonable living expenses are stated to be €842 per month. When these living expenses are taken into account, this leaves Mr. Ali with a sum of €402 per month to fund the proposed mortgage repayments in the sum of €229.00 per month and payments to unsecured creditors in the sum of €547.00 (which together equate to €776.00). This would leave a monthly deficit of €374.00. According to the terms of the PIA, this is to be made up by a *"contribution from girlfriend (rent)"* in the sum of €400 per month.

41. After the period of the PIA, it is proposed that Mr. Ali will pay the sum of €26 per month in respect of LPT, €200 in respect of child maintenance and €678.00 per month in respect of the mortgage loan making a total of €904.00 per month. This would leave Mr. Ali with the sum of €644.00 per month to fund his living expenses. These expenses are again stated to be in the sum of €842 per month.

When those living expenses are taken into account, this would leave Mr. Ali with a monthly deficit of €198. Again, it is proposed, that this deficit will be made up by the monthly contribution of €400 from Mr. Ali's girlfriend.

42. In the affidavit sworn by Mr. Baxter on behalf of the bank, it is contended that the proposed PIA is therefore entirely dependent on "*an unnamed girlfriend of the Debtor – who is not a party to the Arrangement and has no liability to the Bank – paying fifty percent of the Debtor's household living expenses and contributing a further €400.00 per month to the Arrangement*". Mr. Baxter also complains that the bank had not been provided with any evidence of the ability of Mr. Ali's girlfriend to contribute €400 per month together with fifty percent of Mr. Ali's household living expenses. In this context, I should explain that the living expenses of €842 per month are based on a two adult household with the remaining fifty percent being paid by Mr. Ali's partner.

43. The bank also draws attention to the proposed extension of the term of the mortgage until Mr. Ali reaches 70 years of age. In para. 47 of his affidavit, Mr. Baxter complains that the practitioner has provided no evidence of Mr. Ali's ability to maintain the mortgage loan repayments after the age of retirement. In para. 48 of his affidavit, Mr. Baxter also suggests that there could well be an increase in ECB interest rates in the future which would have significant implications for Mr. Ali's ability to afford repayments.

44. In response to Mr. Baxter's affidavit, Mr. Ali swore an affidavit on 18th July, 2018. In that affidavit, he exhibited a letter from his partner which was witnessed by a solicitor in the well known firm of Cantillons Solicitors of Cork who are her employers. In that letter, the partner explained that she is employed as a legal executive in Cantillons. She earns €43,000 per annum and that she has surplus income (following the payment of her own liabilities) of approximately €2,000 per month. She also says that she has savings in the sum of €5,000. The letter continued as follows:-

> *"As matters currently stand, you receive €400 per month by way of assistance from me…As confirmed, I pay the sum of €400 to you each month. I can, and will, continue to make this money available to you if your PIA is approved. This money will not be available in a bankruptcy scenario, if your PIA is not approved, or if your home is repossessed.*
>
> *As you are also aware, I have a personal interest in the retention of your family home due to my long term relationship to you (sic) and I reside in the property as my principal private residence.*
>
> *There appears to be a query raised in the relation to the sustainability of your mortgage payments, and the retention of your family home. I understand that you are repaying your debt to your family home creditors.*
>
> *It is hereby confirmed that the €400 is guaranteed for six years. For clarity, the said sum of €400 is guaranteed and it is undertaken that same will be paid to you in the event that your PIA is approved.*
>
> *If there is a requirement for further financial assistance, I will be in a position to contribute up to €500 per month to ensure the mortgage is paid in full. As can be seen from my employment and income position this is sustainable. I do not have any other financial commitments that impinge on my ability to provide this assistance. I do not foresee that I will have further future commitments that would cause this money be any issue.*
>
> *I hereby provide this letter as an irrevocable undertaking to you personally to provide such financial assistance as may be required and sought of me."*

45. A replying affidavit was sworn on behalf of the bank by Ms. Sandra Harrison on 2nd August, 2018. In that affidavit, Ms. Harrison expressed a number of concerns about the letter from Mr. Ali's partner. These concerns were also reiterated by counsel on behalf of the bank in the course of the hearing before me. In particular, it was submitted that the letter from Mr. Ali's partner provides no detail of her financial situation other than what is characterised as a "*vague statement*" that she earns €43,000 per annum and has surplus income in the sum of €2,000 per month. Ms. Harrison says that there has been a failure to provide any basic financial documents such as pay slips, a P60 form, credit card statements or statements of current loan or saving accounts. While I appreciate that it would be preferable that documents of that kind should be exhibited. I believe that it is important that the letter from Mr. Ali's partner is witnessed by a solicitor in the firm of Cantillons (who are her employers). I, therefore, do not believe that there is any reason to suppose that the information contained in the letter is incorrect. I fully appreciate that the letter only provides an irrevocable commitment to pay Mr. Ali for a period of six years and is conditional on the approval of the PIA. However, I believe that the letter provides a very significant measure of reassurance that Mr. Ali will be in a position to afford to make the payments provided for under the proposed PIA. Even in the event that the relationship between Mr. Ali and his partner were to break down in the future, it is highly improbable that Mr. Ali would not be in a position to rent out one of his bedrooms. I note that Mr. Ali's home is in Castlemartyr which is within commuting distance to Cork and to the significant industrial developments in Little Island and elsewhere in Cork Harbour. In those circumstances, it seems to me that Mr. Ali will have an ability in the future to tap into an additional source of income in the event that his relationship with his current partner were to come to an end. Ironically, it has been my experience in dealing with cases of this kind that secured creditors frequently complain that more extensive payments could be made by debtors by renting out rooms in their homes.

46. In Mr. Ali's case, it is clear that he has shared his home with a partner who, in turn, shares the burden of household living expenses and who, in addition, pays the sum of €400 per month. On the basis of the evidence before the court, I am satisfied that there is a reasonable prospect that confirmation of the proposed PIA will enable Mr. Ali to resolve his indebtedness without recourse to bankruptcy and I am also satisfied that he is reasonably likely to be able to comply with the terms of the proposed PIA. In those circumstances, it seems to me that the statutory tests set out in s. 115A(9)(b)(i) and (c) are met in this case.

47. A further point arises in relation to the potential for ECB rates to increase in the future. While there appears to be no immediate prospect that this will occur, it is something that obviously may happen in the future. However, it is clear from the letter from Mr Ali's partner, that, if required, his partner is prepared to commit more than €400 per month and that she has the capacity to do so. In addition, in circumstances where Mr. Ali is self-employed, he may be able to work longer hours to ensure that he will be in a position to meet those payments.

48. The bank has also expressed concern that the PIA envisages that it will continue until Mr Ali is 70 years of age. The bank submitted that a serious question mark hangs over any PIA that extends beyond the normal age of retirement. However, again, because Mr Ali is self-employed, this is not a major factor. The evidence on affidavit is that he intends to work until he is 70. Because he is self-employed, he has the ability to do so. This is not unusual. Experience teaches us that many self-employed people work beyond 65. This is not uncommon, for example, in the case of general practitioners and barristers. It is also likely to become less unusual in the case of many employed persons such as civil servants who, since January of this year, have the option of working until they reach 70 years of age. This is also currently the retirement age for judges. Retirement at age 65 or 66 is no longer a given. Accordingly, I do not share the bank's concern in relation to a self-employed person such as Mr Ali.

Unfair Prejudice
49. There was no dispute between the parties that the bank will fare better under the proposed PIA than in a bankruptcy of Mr. Ali. Under the proposed PIA, the bank will receive payment of €220,000 over the course of the extended lifetime of the mortgage together with a further dividend of €674.00 during the two year lifetime of the PIA. The current market value of Mr. Ali's home is €160,000. If one allows 10% to cover the cost of sale in the event of a bankruptcy, this would leave the bank in a position where it would recover no more than €144,000. Nonetheless, the bank contends that it will be unfairly prejudiced by the proposed PIA in circumstances where the remaining mortgagor, Ms. Andrea Ali (Mr. Ali's estranged wife) was adjudicated a bankrupt on 18 May, 2015, and subsequently discharged from bankruptcy on 29 July, 2016. In the course of her bankruptcy, the bank notified the Official Assignee that it wished to value its security and prove in the bankruptcy for a dividend for the remaining balance. No dividend was, in fact, paid. In para. 53 of his affidavit sworn on behalf of the bank, Mr. Baxter says that Ms. Andrea Ali, being a discharged bankrupt has no longer any liability to the bank on foot of the loan agreements. In those circumstances, the bank's only possible remedy against her is to rely on its security. The bank had issued a Civil Bill seeking possession of the property in December 2014. The Civil Bill has been adjourned pending the outcome of the proceedings under the 2012 – 2015 Acts. In these circumstances, Mr. Baxter suggests that the bank would be *"greatly prejudiced by being precluded from having recourse to its security in the event that this Honourable Court sanctions the proposed Arrangement".*

50. The circumstances described above are very unusual. Ordinarily, as I sought to explain in *Lisa Parkin* [2019] IEHC 56, at paras. 66-68, the bank would not be prevented, by the existence of a PIA in respect of one joint and several debtor, from pursuing another joint and several debtor who is not a party to the same or an interlocking PIA. But, in this case, it is clear that, if the PIA proposal is approved, the bank will no longer be able to take possession of the Castlemartyr property notwithstanding the order for possession already obtained against Mrs Ali. In the course of the hearing, I suggested to counsel that although the bank could clearly no longer seek possession of the property (in the event that the proposed PIA is approved by the court) it might be possible for the bank to pursue its claim as against Mrs. Ali by seeking a sale of the property in lieu of partition. As the decision of the Supreme Court in *Irwin v. Deasy* [2011] 2 I.R. 752 at p. 778, shows, a mortgagee (other than a judgment mortgagee) is entitled to pursue the remedy of partition. However, on further reflection, it seems to me to be unlikely that the bank could realistically pursue an action for sale in lieu of partitions. I note from para. 52 of Mr. Baxter's affidavit, that the bank valued its security for the purposes of the bankruptcy of Mrs. Ali at €192,200. Given that the bank will recover more than that sum under the PIA, it is difficult to see that the bank would be in a position to pursue an action for sale in lieu of partition. However, I make no finding to that effect. It will be for the bank to decide what remedy it may have in relation to the indebtedness of Mrs. Ali to it and I would not wish to prejudge in any way the outcome of any proceedings that the bank might be advised to take.

51. For the purposes of these proceedings under the 2012-2015 Acts, I have come to the conclusion that the bank is not unfairly prejudiced by the proposed arrangement. In the first place, as noted above, the bank will recover more, under the PIA, than it would in the event of the bankruptcy of Mr. Ali. Furthermore, if one looks at the value which the bank placed on its security in the bankruptcy of Mrs. Ali, the bank will also recover more under the proposed PIA than it would recover if it were to proceed with possession proceedings against the property (having valued its security at €192,200).

Section 115A(10)
52. As noted in para. 8 of the notice of objection filed on behalf of the bank, the conduct of Mr. Ali in the two years prior to the issue of the Protective Certificate in this case is a matter that I am required to consider under the provisions of section 115A(10)(a)(i). In response to this element of the objections raised by the bank, Mr. Ali in his affidavit has said that he was making payments in the sum of €700 per month towards his mortgage debt in the period from July 2015 to February 2018. He exhibited a statement of account showing that a figure of €650 was paid monthly during this period. Although Ms. Harrison, in her affidavit sworn on behalf of the bank on 2nd August, 2018, contended that Mr. Ali was not correct in suggesting that €700 per month was paid, it was confirmed in the course of the hearing on 11th February, 2019, that in fact the correct figure paid by Mr. Ali in the period in question was €700 per month. In addition to paying €650 per month in respect of account No. 31857103, Mr. Ali also paid a sum of €50 per month into the second mortgage account. Thus, the total paid was €700. In these circumstances, it seems to me that no issue arises under section 115A(10).

Criticism of the affidavit evidence
53. I note that, in Ms Harrison's affidavit, very strong criticism is made of some of the averments made by Mr. Ali in his affidavit. Ms Harrison goes so far as to suggest that Mr Ali has been untruthful on affidavit in so far as he suggested in para. 6 that the Castlemartyr property was his principal private residence on 1 January, 2015. I can understand why Ms Harison should be critical of that averment. However, I believe that, when the affidavit is read as a whole, it is clear that Mr Ali is not making the case that he was living in the property on that date.

54. Furthermore, Ms Harrison is not in a position to throw stones. Her own affidavit suggests at paras. 6, 7 and 12 that she was the deponent of the first affidavit sworn on behalf of the bank when this is plainly not the case. It appears to be clear that Ms Harrison did not properly read through the affidavit she swore on 2 August, 2018. She also contends in para. 22 that, contrary to what he had said in his own affidavit, Mr Ali was not paying €700 per month. At the hearing on 19 February, this was, very properly, confirmed to be an erroneous averment on her part.

Conclusion
55. In light of the considerations outlined above, I have respectfully come to a different conclusion to that adopted by the learned Circuit Court judge. I should make clear that the learned Circuit Court judge could not have decided the case in any other way given that the s. 91(g) declaration was not before her.

56. Although I have not listed them all here, I confirm that I am satisfied that all of the requirements of s. 115A are satisfied in this case and that it is appropriate, in all the circumstances, to approve the coming into effect of the proposals for a PIA.

57. I will therefore allow the appeal, set aside the order made by the learned Circuit Court judge, and in lieu thereof, I will make an order under s. 115A(9) confirming the coming into effect of the proposals. I will hear the parties in due course in relation to costs.