THE HIGH COURT

Record Nos H:IS:HC:2016: 00046 and 000792

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS 2012-2015

AND IN THE MATTER OF NOEL TINKLER OF 3 STONEY LANE, RATHCOOLE, CO. DUBLIN

AND IN THE MATTER OF BRITT TINKLER OF 3 STONEY LANE, RATHCOOLE CO. DUBLIN

AND IN THE MATTER OF APPLICATIONS IN BOTH OF THE ABOVE NAMED CASES PURSUANT TO SECTION 115A (9) OF THE PERSONAL INSOLVENCY ACTS 2012-2015

JUDGMENT of Mr. Justice Denis McDonald delivered on the 3rd day of December, 2018.

Introduction

1. In both of the above cases, the debtors (who are husband and wife) have brought applications pursuant to s. 115A (9) of the Personal Insolvency Act 2012 ("the 2012 Act") (as inserted by s. 21 of the Personal Insolvency (amendment) Act 2015 ("the 2015 Act")) seeking orders confirming the coming into effect of a proposed Personal Insolvency Arrangement ("PIA") notwithstanding that the PIA, in both cases, has not been approved in accordance with Chapter 4 of Part 3 of the 2012 Act (as amended).

2. In each case, a creditors' meeting took place on 27th January, 2017 to consider the respective PIAs. In the case of Mr. Noel Tinkler, 22% of creditors voted in favour of the proposal with 78% voting against. When this is broken down as between secured creditors and unsecured creditors, 42.74% of secured creditors voted in favour of the proposal whereas 57.26% voted against. In the case of the unsecured creditors, 8% voted in favour while 92% voted against.

3. However, of the secured creditors, one class, namely the principal private residence class, voted in favour of the proposal and, on this basis, it has been possible to satisfy the requirement set out in s. 115A(9)(g) of the 2012 Act (as amended). That subsection makes it a precondition of any application under s. 115A that at least one class of creditors has approved the proposal.

4. In the case of Mrs. Britt Tinkler, the percentages were slightly different, but the overall outcome was similar. In her case, 19.1% of creditors voted in favour of the proposal while 80.9% voted against. Insofar as secured creditors are concerned, 42.73% voted in favour while 57.26% voted against. In the case of unsecured creditors 100% of those creditors voted against the proposal. Again, as in the case of her husband, the principal private residence creditor voted in favour of the proposal.

Material terms of the PIA in each case

5. In each case the terms of the PIA are similar. It is unnecessary to set out all of the terms here. In the case of Mr. Noel Tinkler, the dividend payable under the PIA to unsecured non-preferential creditors will be 6.32 cents per euro. In the case of Mrs. Britt Tinkler, the dividend will be 6.15 cents.

6. In the case of the principal private residence creditor, Start Mortgages Limited ("Start"), the debt to it is secured on the family home. Although the value of the family home was agreed at €380,000 there will be no write-down of the full mortgage debt outstanding at €502, 291.87. Instead, interest only repayments will be applied to this account for the term of the PIA (which is 72 months). On the successful completion of the PIA mortgage repayments will revert to full capital and interest repayments. An interest rate of 1.25% will be applied.

7. The debtors also own property at 14 Franford Close, Enniscrone, Co. Sligo. Under the respective PIAs, the debtors will sell this property and the residual mortgage balance due to Bank of Ireland Mortgage Bank ("BOIMB") will be treated as an unsecured debt after the proceeds of sale have been paid to BOIMB less the agreed costs of sale. BOIMB will be paid the same dividend as all of the other unsecured creditors and, on successful completion of the PIA, the balance of the unsecured debt will be written off.

8. The debtors also own commercial property known as "Tinkler's Yard", Main Street Rathcoole, Co. Dublin. This yard has a current market value of €350,000. Cheldon Property Finance DAC ("Cheldon") have the benefit of a mortgage over this property which was originally granted by the debtors to Permanent TSB. Under the PIAs, the debtors will retain this commercial property for business purposes. The rental income of this property (from a number of business tenants) forms a significant part of the debtors' overall income. The amount outstanding to Cheldon is in excess of €1,750,000. Under the PIA, the secured debt would be reduced to €350,000 with a balance of €1,430,522.11 being treated as an unsecured debt and ranking for a dividend accordingly. The term of the loan would be extended from 85 months to 252 months. The applicable rate of interest would be reduced from 6.95% to 4.5%. For the 72-month duration of the PIAs the debtors would make interest-only repayments in respect of the restructured commercial loan in the combined sum of €1,312.50 reverting to capital and interest repayments of €2,667.48 thereafter.

9. As I understand the proposal, Cheldon would receive a total of €90,344.22 by way of dividend in respect of the unsecured portion of its debt under the Noel Tinkler PIA while it would receive a further dividend of €87,911.41 under the Britt Tinkler PIA. On completion of the respective PIAs, the remaining debt of €1,252,266.48 would be written off.

10. The debtors also own a quarry site at Calligstown, Rathcoole, Co. Dublin. There are three judgment mortgages registered against that property which, together, exceed the current market value of the property at €165,000. Under the PIA, the debtors will retain this site as it is their place of work. At retirement age, the debtors will sell this property, at which stage the judgment mortgage debts secured on it will be discharged in full.

The Notice of Objection

11. Cheldon has filed a notice of objection in both cases. The grounds of objection in both cases are the same. While there were a large number of grounds set out in the notice of objection in each case, there were essentially three grounds relied upon by Cheldon at the hearing, namely:-

> (a) concern was expressed about the treatment of Revenue debt in the PIAs which it was suggested would have unintended consequences for unsecured creditors given that part of the Revenue debt has preferential status;
>
> (b) Cheldon argued that the proposed PIA in each case is not fair and equitable in relation to each class of creditor that has not approved the proposal and whose interests or claims would be impaired by its coming into effect;

(c) the proposed PIA in each case is alleged to be unfairly prejudicial to the interests of Cheldon.

The hearing

12. The hearing of the application under s.115A together with Cheldon's objections took place over the course of two days namely on 23rd July, 2018 and on 8th October, 2018. Very helpful and detailed submissions were made by counsel on behalf of the Personal Insolvency Practitioner ("the practitioner") and on behalf of Cheldon. The submissions addressed each of the three grounds of objection summarised in para. 11 above.

13. I now consider, in turn, each of these grounds of objection.

The position of the Revenue

14. The Revenue Commissioners were not represented at the hearing. However, counsel for Cheldon emphasised that s. 115A confers a far-reaching power on the Court. He argued that this places a significant onus upon the practitioner to satisfy the Court that all of the relevant statutory conditions are met. Counsel submitted that there were a number of issues of concern in relation to the way in which the Revenue Commissioners were dealt with in this case, namely:-

(a) in the first place, in s. 5 of the PIA in each case, it is stated that there are no "*permitted debts*" and no "*preferential debts*" and that the PIA does not include any "*excludable debts*". This is relevant in the context of s. 115A(8)(iii) which requires that, on an application under s. 115A the Court must be satisfied that the proposed PIA does not contain any terms that would release the debtor from (*inter alia*) an excludable debt (other than a permitted debt). For this purpose, s. 2 of the 2012 Act defines an excludable debt as including a liability of a debtor in respect of taxes. Thus, amounts due to the Revenue would fall within the ambit of an "*excludable debt*". S. 92(1) makes clear that such a debt can be included in a proposal for a PIA only where the creditor (in this case the Revenue) has consented to the inclusion of that debt in the PIA. Where such consent is given, s. 92(a) provides that the debt in question will then be regarded as a "*permitted debt".*

(b) in the case of Mr. Noel Tinkler, the statements made in s. 5 of the PIA (as summarised in subpara. (a) above) are incorrect. It is clear that the PIA does in fact include debts in that it shows a total of €261,599.20 due to the Revenue of which €145,940.56 is to be repaid to Revenue on sale of the Calligstown property on the retirement of Mr. Tinkler. The statements of s. 5 of the report are therefore manifestly incorrect. As noted by me in para. 63 of my judgment in *Donal Taffe* [2018] IEHC 468, there is no mechanism under the 2012 Act to correct an error of this kind in a PIA. Where an error is inconsequential, it is possible, in the order of the Court confirming the PIA to note that the error exists and to set out the correct position in the order. It is open to question whether the error in s. 5 of the Noel Tinkler PIA could be said to be inconsequential. However, when the PIA is read as a whole, I believe it would readily be seen by any creditor that s. 5 could not possibly be correct given the detailed information which is given in s. 12 of the PIA dealing with the position of creditors including the Revenue. However, the creditors might not have been aware that any aspect of the Revenue debt was preferential. Section 12 of the PIA simply identifies how much of the Revenue debt is secured and how much of it is unsecured. Section 25.5 of the PIA provides that where Revenue debt has a preferential status this will be specified in Part IV. I can see nothing in Part IV of the PIA in Mr. Tinkler's case which identifies that any part of the Revenue debt is preferential. On the contrary, there is a statement in s. 5 (which is contained in Part IV) that there is no preferential debt. Furthermore, s. 3 of Part IV simply records the amount that will be paid to Revenue on foot of its secured debt together with the small dividend to be paid in respect of the unsecured balance.

(c) Counsel for Cheldon also raised an issue as to whether the Revenue Commissioners had in fact opted into the PIA process in this case such as to make the "exc*ludable debt*" due to them a "*permitted debt*" for the purposes of the PIA. If it was not a permitted debt, this would raise an issue as to whether s. 115A(8)(a)(iii) of the 2012 Act had been complied with. In order for an excludable debt to become a permitted debt, the creditor concerned (in this case the Revenue) must consent or be deemed to consent under s. 92 to the inclusion of the debt in the proposal for a PIA. In this context, my attention was drawn by counsel for the practitioner to the proof of debt form which was submitted by the Revenue Commissioners in this case which shows the total amount of the Revenue claim to be €261,559.20 of which €249,046.51 is secured by the judgment mortgage on the Calligstown property. It also shows that €78,957.27 is a preferential debt. In the table attached to the proof of debt, one can see that the entire of the preferential debt is secured by that judgment mortgage. My attention was also drawn to an email of 11 January 2017 furnished by the Insolvency Unit of the Revenue Commissioners in which the Revenue advised the practitioner that: -

> *"Revenue opts in to the Personal Insolvency Arrangement . . . proposed on the 9th January 2017.*
>
> *Please find attached a proof of debt listing all the outstanding amounts to be as Revenue's specified debt in the PIA."*

In these circumstances, it appears to be clear that the Revenue debt is covered by s. 92 of the 2012 Act and is accordingly a "permitted debt". In those circumstances, there would not appear to me to be any danger that the provisions of s. 115A (8)(a)(iii) have not been complied with.

(d) However, a further point was made by counsel for Cheldon that there is no evidence in writing that Revenue have agreed that the preferential debt due of €78,957.27 will not be paid in priority. S.101(1) of the 2012 Act is very relevant here. It provides as follows: -

> *"Unless the creditor concerned otherwise agrees in writing and provision is so made in the terms of the [PIA], a preferential debt shall, subject to subsection (3), be paid in priority by the debtor . . .."*

S.101(3) is not relevant here, since it only applies where a creditor fails to satisfy the practitioner that the debt in question is a preferential debt. There was no suggestion in the hearing before me that the practitioner here was not satisfied that €78,957.27 is preferential. Counsel for Cheldon made the simple point that, for s. 101(1) to be disapplied, there must be consent in writing from the creditor concerned (in this case the Revenue) and specific provision to that

effect must also be made in the PIA. In this case, it is implicit in the PIA that no part of the Revenue debt will be paid in priority to other debts. On the contrary, it is envisaged that €145,940.56 will be paid out of the proceeds of sale of the Calligstown site (but this will not take place until the retirement of Mr. Tinkler) while the Revenue will receive no more than €7,301.86 by way of dividend in respect of the balance of its debt of €115,658.64. However, counsel makes the point that, absent consent in writing from the Revenue Commissioners, s. 101(1) nonetheless applies and accordingly the Revenue Commissioners would be entitled, as a matter of law, to enforce the preferential element of the debt at the expense of the other creditors. In response, counsel for the practitioner argued that this would have no more than a marginal impact on the creditors reducing the anticipated dividend from 6.32% to approximately 6%. He argued that the PIA could therefore still be performed even if the Revenue were to proceed in that way. He also submitted that it was unlikely that Revenue would proceed in that way, given that Revenue did not appear at the hearing to oppose the application under s. 115A. He drew attention to an email from the Insolvency Unit of Revenue of 27 January 2017 in which Revenue had indicated that it would not be voting in favour of the proposal. However, these points on behalf of the practitioner are undermined by the fact that the Revenue proof of debt refers very clearly to the preferential element of the debt such that there can be no guarantee that the Revenue Commissioners will not wish to rely on their rights under s. 101(1). The proof of debt form also makes it difficult to understand how the preferential debt was overlooked in the PIA.

15. In my view, it is unsatisfactory that a PIA should be presented to creditors and voted upon by creditors in circumstances where the PIA does not expressly identify the preferential element of the debt due to Revenue. Not only is this inconsistent with s. 25.5 of the PIA but it is manifestly wrong that creditors should be asked to vote upon a PIA without any explanation as to how the preferential element of the debt to Revenue is to be dealt with. Furthermore, in my view, counsel for Cheldon was correct insofar as he suggested that, absent a written consent from Revenue, s. 101(1) continues to apply and that it would therefore be open to Revenue, notwithstanding the existence of the PIA, to enforce its right to be paid in priority in respect of the preferential debt of €78,957.27.

16. If this were the only issue to be considered, I would adjourn my consideration of the matter and require the practitioner to provide a full explanation on affidavit as to how this occurred. However, this is not the only issue that falls to be considered. The delivery of such an affidavit would serve no useful purpose if it transpires that Cheldon is to succeed on one of its remaining grounds of objection raised by Cheldon, namely: -

> (a) Whether the proposed PIA is fair and equitable in relation to each class of creditors that has not approved the proposal;
>
> and;
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> (b) Whether the proposed PIA is unfairly prejudicial to the interests of Cheldon.

Is the proposed PIA fair and equitable in relation to each class of creditor?

17. Under s. 115A(9)(e), the court must be satisfied (if it is to confirm the coming into effect of the proposed PIA) that the PIA is: -

> "Fair and equitable in relation to each class of creditors that has not approved the proposal and whose interests or claims would be impaired by its coming into effect."

18. For the purposes of this issue, counsel for Cheldon argued that Start and Cheldon are in different classes and that the proposed PIA is not fair and equitable as between those classes.

19. The judgment of Baker J. in *Sabrina Douglas* [2017] IEHC 785 provides considerable guidance as to the constitution of classes for this purpose. As Baker J. observes in para. 27 of her judgment, the governing criterion is contained in s.115A(17)(a)(ii) under which the court is to have regard to whether the creditors: -

> *" . . have, in relation to the debtor, interests or claims of a similar nature"*

20. In Sabrina Douglas, Baker J. referred to the decision of Laffoy J. in *Re: Millstream Recycling Ltd* [2010] 4 IR 253 where Laffoy J. (in the context of the constitution of classes for the purposes of a scheme of arrangement under s. 201 of the Companies Act 1963) applied the classic test laid down in *Sovereign Life Assurance Company v. Dodd* [1892] 2 QB 573 where Bowen L.J. said: -

> *"The word 'class' used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the Court to order a meeting of a 'class of creditors' to be summoned. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."*

21. That test has been consistently applied by the courts ever since. In the *Millstream* case, Laffoy J. also referred to the observation by Chadwick L.J. in *Re: Hawk Insurance Co. Ltd.* [2001] BCLC 480. Laffoy J. at p. 277 summarised the approach proposed by Chadwick L.J. in that case as follows: -

> *"are the rights of those who are affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought to be regarded, on a true analysis, as a number of linked arrangements? . . . it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements and have their own separate meetings, but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so. . .."*

22. Each of the decisions in *Sovereign Life Assurance Co. v. Dodd*, *Re: Hawk Insurance Co Ltd.*, and *Re: Millstream Recycling Ltd* were concerned with whether class meetings were properly constituted for the purposes of voting on a scheme of arrangement. That is not the issue here. However, the approach taken in those cases is nonetheless of significant assistance in deciding whether, for the purposes of the application under s. 115A, Start Mortgages and Cheldon should be considered to be in separate classes of creditors. In *Sabrina Douglas*, Baker J. held that the principal private residence creditor in that case was in a different class to the secured creditors. She arrived at that conclusion applying the approach taken by Laffoy J. in the *Millstream Recycling* case. In

particular, she drew attention to which the 2012 Act (as amended in 2015) gives special protection for the principal private residence of a debtor. In my view, applying the approach taken by Laffoy J. in *Millstream Recycling*, Start and Cheldon should be treated as different classes for present purposes. Their rights under the proposed PIA are quite different. In truth, the scheme is not a single arrangement which treats all secured creditors in the same way; instead it is, on a true analysis, a number of linked arrangements, insofar as the secured creditors are concerned. In particular, Start is dealt with quite separately and distinctly under the scheme from the way in which the position of Cheldon is addressed.

23. In contrast to Cheldon, Start does not suffer any write down of the indebtedness secured on the family home of Mr. and Mrs. Tinkler. In the case of both Start and Cheldon, the underlying security is worth less than the amount of the secured debt. In the case of Start, the current market value of the family home of Mr. and Mrs. Tinkler is €380,000. This leaves a deficit of €122,292.00. The proposed PIA does not involve any write down of that deficit. Nor does it envisage that Start will be paid only a dividend in respect of that element of the debt.

24. In the case of Cheldon, the indebtedness is €1,780,522.11. The value of the underlying security is €350,000. Under the proposed PIA, the balance of €1,430,522.11 will fall to be dealt with as an unsecured debt resulting in a dividend payment at a rate of 6.32% (or a rate of 6% in the event that the Revenue exercise their priority right in respect of the preferential debt).

25. In the circumstances described in paras. 23-24 above, I find it impossible to understand how Cheldon and Start could, to paraphrase Bowen L.J. consult together with a view to their common interest. Under the proposed PIA, their respective rights are simply too dissimilar. There is an obvious incentive for Start to vote in favour of the PIA. If the PIA succeeds, Start will achieve a much better result under the PIA than it would in the event of bankruptcy. Under the PIA, Start will ultimately get paid in full. In a bankruptcy, Start would have to compete with the other creditors of the debtors in relation to the extent of the indebtedness over and above the value of their security.

26. In contrast, there is no such incentive available to Cheldon. Its rights are different under the proposed PIA. It will simply receive a dividend in respect of the element of the debt which exceeds the value of the underlying security.

27. Given the dissimilar ways in which Start Mortgages on the one hand and Cheldon on the other are addressed in the proposed PIA, I believe the PIA is better characterised as a series of interlinked compromises or agreements – there is one form of agreement with Start and another with Cheldon. In all of these circumstances I have come to the conclusion that Start and Cheldon are not to be treated as being in the same class for the purposes of this application under s. 115A. For completeness, I should add that, although BOIMB was not represented at the hearing, it appears to me that its rights under the proposals are also quite different to the rights of either Cheldon or Start, such that the arrangement with it should be treated as separate to that with either Cheldon or Start. In para. 7 above, I have summarised the way in which the BOIMB debt is to be addressed under the proposals. The manner in which it is to be dealt with is markedly different from the way in which the proposals treat either Cheldon or Start. It will be able to realise its security under the proposals, such that it is impossible to see how it could plausibly be suggested that it could consult together with Start and Cheldon or either of them in the manner envisaged in the *Sovereign Life* case. The true position is that each of the three is being pulled in different directions given the very different ways in which each is treated under the proposals.

28. Having decided that Start and Cheldon should each be classified as a separate class of creditor, the next question to be considered is whether the proposed PIA is unfair and inequitable as between Cheldon on the one hand and Start on the other. In this context, as counsel for Cheldon has very properly acknowledged, there are circumstances where classes of creditors can be treated differently without unfairness. For example, in the context of a scheme of arrangement formulated under the Companies (Amendment) Act 1990, McCracken J. in *Re: Antigen Holdings Ltd*. [2001] 4 IR 600 had to consider whether it was unfair that trade creditors of the company in examinership were treated more favourably then banking creditors. In that case, the banking creditors were to be paid in full but without interest. However, the banking creditors were subject to a longer repayment period than trade creditors. McCracken J. had to consider whether this was unfair. He came to the conclusion, that, notwithstanding the difference in treatment, it was not unfair. He said at p. 603: -

> *"It has to be said that no creditors are getting paid interest. The banks' debt . . .. is by far the largest proportion of the debts owed to the creditors and they undoubtedly are not being treated in the same way as the ordinary creditors. They are being paid off over a longer period and there is some validity in their point that interest to a bank is the equivalent to the profit made by an ordinary trade creditor on selling his goods and the trade creditors are in fact getting paid that profit. However, the question is: is this unfair?*
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> *The purpose of the scheme is to ensure the viability of the company. This can only be done if there is a reasonable time span in which to discharge the debt and if there is an amount being paid which is within the capacity of the company to pay. Now the vast bulk of remaining creditors are trade creditors who are presumably going to continue trading with the company. I do not think it is unfair they should get some priority because they are going to keep the company going."*

29. It will be seen that in the *Antigen* case, there was an objective justification for the difference in treatment between trade creditors and banking creditors. As McCracken J. said, the trade creditors were entitled to get some priority in that case because they were going to keep the company going.

30. In the present case, it is therefore necessary to consider whether there is some objective justification for the difference in treatment between Cheldon and Start. In this context, it must be acknowledged that, as counsel for the practitioner has argued, s. 100(3) of the 2012 Act implicitly acknowledges that creditors in different classes can be treated differently. While s.100(3) expressly envisages that creditors within the same class must be treated on a *pari passu* basis, there is no statutory requirement that the *pari passu* rule applies as between classes. Nonetheless, s. 115A(9)(e) requires that the Court must be satisfied that the proposed PIA is fair and equitable in relation to each class of creditors that has not approved the proposal and whose interests would be impaired by the PIA. In the present case, Cheldon has not approved the proposal. Furthermore, it is clear that its interests will be impaired by the PIA since it will be prevented from enforcing its security over the Tinkler's Yard property and will suffer a write down of the secured indebtedness. In these circumstances, if the court is to approve the PIA pursuant to s. 115A, the Court must be satisfied that there is some objective justification for the difference in treatment.

31. In his affidavit sworn on 6 July 2017, the practitioner seeks to justify the difference in treatment in the following terms in para. 15-17 of his affidavit: -

> *"15. . . I say that . . . it is clear that there is both a justifiable and legal reason why the two creditors are treated differently under the PIA proposal. However, the said different treatment is not what one would describe as a prejudice or an unfair prejudice in the circumstances.*

16. I say that there is a justifiable reason for the keeping and retention of the family and family home debt as opposed to the more variable and vulnerable commercial debt. I say that the commercial debt has been restructured but remains profitable for the creditor and represents a far greater return than bankruptcy. I say that the PIA is in reality contingent on the working life of the debtor to fund any payment and thus there must be a certain degree of reality in all of the restructuring.

17. . . . I say that it may be the case that the debtor's income is generated from rental income from the objector's security, however in the circumstances it is clear that the PIA both generates an income for the objecting creditor, a dividend for the objecting creditor, a better return than bankruptcy . . . and enables the debtors to retain their family home as per the objectives of the Act

18. For the avoidance of any doubt, I say and believe that there is no unfair or inequitable treatment of creditors but rather proper compliance with the Act and the realities of both personal insolvency practice and what would occur under the bankruptcy regime."

32. Essentially, what the practitioner appears to suggest in those paragraphs is that Start is entitled to preferential treatment because it holds security over the principal private residence of the debtors. It is certainly true that the 2012 Act (as amended) includes a number of provisions which display a clear legislative intention to protect the principal private residence. Thus, for example, s. 99(2)(h) expressly provides that a PIA shall not require that a debtor dispose of his or her interest in the debtor's principal private residence or to cease to occupy such residence unless the provisions of s. 104(3) applies. This is reinforced by s. 104(1) which makes clear that, in formulating a proposal for a PIA, a practitioner must, insofar as reasonably practicable, formulate the proposal on terms that will not require the debtor to dispose of an interest in or to cease to occupy his or her principal private residence. The only exception to this is under s. 104(3) where the debtor confirms in writing to the practitioner that he or she does not wish to remain in occupation of the residence or where the practitioner, having discussed the issue with the debtor, has formed the opinion that the costs of continuing to reside in the residence are disproportionately large.

33. The intention to preserve the principal private residence is further reinforced by the provisions of s. 115A itself which permits the Court (subject to being satisfied that each of the conditions stated in s. 115A have been complied with) to confirm a proposal for a PIA even where it has not been approved by a majority of the creditors

34. On the other hand, there is nothing in the 2012 Act (as amended) which suggests that the holders of security over a principal private residence should be treated more favourably than other secured creditors. In particular, there is nothing in s. 102 of the 2012 Act (which deals with the manner in which secured debts should be addressed in a PIA) which suggests that the holder of security over the residence should be treated more favourably than those holding security over other assets. Similarly, there is nothing in s.103 or s.105 (which also deal with the position of secured creditors) which suggests that the holder of security over the residence is entitled to any more favourable treatment than any other secured creditors. What the Act envisages is that the residence, the subject matter of the security held by the principal private residence lender, will not be sold (save in the very limited circumstances outlined in the Act). However, the value of the security held by such a creditor still falls to be assessed in accordance with s. 105(1) of the 2012 Act – namely the market value of the security. In the event that the PIA did not proceed, that is what the holder of security could realise through a forced or consensual sale of the residence. That is precisely the same as the holder of security over any other property could expect to receive on a sale.

35. In those circumstance, it is very difficult to understand the justification for the treatment of the Start debt in this case. As noted above, under the terms of the proposed PIA, Start will receive payment not merely of the value of the residence (which has been agreed at €380,000) but it will also receive payment of the balance of €1,222,292.00 albeit over a significantly extended term. Prior to the proposal for the PIA, the remaining term was 105 months. Under the PIA this will be extended to 252 months. In addition, for the duration of the PIA, interest only will be paid at a reduced rate of 1.25%. While that rate appears to be significantly lower than a market rate, the proposal is that on completion of the PIA, all mortgage arrears will be capitalised. This means that they will be treated as principal. Furthermore, on completion of the PIA, the payments will revert to full capital and interest repayments. Thus, in circumstances where the arrears will be capitalised, the interest in the 180-month period subsequent to the PIA will be charged on this capitalised sum rather than on the existing principal. Of course, as counsel for the practitioner correctly argued, Start is itself adversely affected by the terms of the proposed PIA. The interest rate is to be reduced for the duration of the PIA, no payments of principal are to be made during the currency of the PIA, and the repayment period is to be significantly extended. However, even allowing for these factors, it seems to me to be clear that Start is treated significantly more favourably under the PIA than Cheldon. In contrast to Start, the secured indebtedness in Cheldon's case will be reduced to the current market value of the Tinler's Yard property namely €350,000. The balance of €1,430,522.11 will be treated as unsecured and Cheldon will be confined to a dividend of somewhere between 6% - 6.3% (depending upon whether or not Revenue exercise their rights under s. 101(1) of the 2012 Act). That seems to me to be manifestly less favourable than the treatment of the Start debt. I can see no justification for this disparity in treatment on the basis of anything said by the practitioner in paras. 15-17 of his affidavit sworn on 6th July 2017. Furthermore, as outlined in more detail below, the further justification offered by the practitioner (in a later affidavit) for the disparity in treatment gives cause for concern,

36. In this context, it should be noted that Mr. John Burke of Cheldon swore an affidavit on 7 June 2018 in which he responded to the practitioner's affidavit. In para. 17 of this affidavit, Mr. Burke said: -

"17. It is not contended, nor could it be, that the preferential treatment of the Start debt is necessary to ensure that the Debtors continued to reside in their principal private residence. It would clearly have been open to the PIP to formulate a PIA under which the Debtors retained their principal private residence but with a reduction in debt owed to Start. Thus I do not accept that the differential treatment of two similarly situated creditors can be justified in the manner contended for by the PIP".

37. In turn, this contention on the part of Mr. Burke was addressed in a subsequent affidavit sworn by the practitioner on 19 June 2018 in which he said, in para 26: -

"26. I say in particular response to para. 17 of the objector's Affidavit . . . Start Mortgages engaged pursuant to s. 98 and s. 102 with my offices and submitted a counterproposal that they would accept. I say and I took it that they would not accept anything beyond this and in circumstances where the PIA is predicated on the retention of the family home and where the s. 115 A application is predicated on the principal private residence class of creditors it therefore was necessary to obtain the support of Start Mortgages".

38. I have to say that I am deeply troubled by this averment on the part of the practitioner. It clearly suggests that the practitioner

considered it necessary to offer favourable terms to Start in order to obtain its support for a proposed PIA. In my view, such an approach is manifestly at odds with the requirement that there should be fair and equitable treatment of different classes of creditors. It is also impossible to reconcile this statement with earlier averments made by the practitioner on affidavit. For example, in para. 5 of his affidavit sworn on 22 February 2017, grounding the application under s. 115A, he expressly stated: -

> *"5. For the record, I say that I am an independent Personal Insolvency Practitioner . . .and as such, whilst I stand over the . . .PIA . . .I do same whilst . . . balancing the interests of each specified creditor and the Debtor . .."*

39. It also seems to me to be at variance with what is said by the practitioner in para. 14 of his affidavit sworn on 6 July 2017 in which he said: -

> "*14. . . I say that . . . I therefore drafted the PIA proposal 'in the dark' to the best of my abilities and with a view to ensuring a return to solvency, the retention of the family home* and a fair and equal treatment of all creditors." (emphasis added)

40. In my view, the approach set out in para. 5 of his first affidavit and para. 14 of his second affidavit, very correctly identifies the approach which a practitioner should take in formulating proposals for a PIA. I cannot see any proper basis on which a practitioner could formulate proposals favourable to a particular creditor with a view to securing the approval of that creditor to the proposal. If proposals for a PIA were to be formulated on that basis, it would inevitably distort and fundamentally undermine the ability of a PIA to operate fairly and equitably in relation to each class of creditors and to ensure that the PIA is not unfairly prejudicial to the interests of any interested party.

41. The practitioner makes the point in his affidavits that, in contrast to Start, Cheldon did not engage with him pursuant to s. 98 and s. 102. Cheldon did not respond to the notice under s. 98. At this point, I should explain that under s. 98(1) of the 2012 Act, the practitioner is required, as soon as practicable after a protective certificate has been issued, to give written notice to the creditors of the debtor that the practitioner has been appointed for the purposes of making a proposal for a PIA and he or she is required to invite creditors to make submissions regarding the debts concerned and the manner in which the debts might be dealt with as part of a PIA. The practitioner is also required to consider any submissions made by creditors including any submission made by a secured creditor under s. 102.

42. S. 102(1) imposes an obligation on a secured creditor, following receipt of the notification under s. 98, to furnish to the practitioner an estimate, made in good faith, of the market value of the securities. In addition, s. 102(1) envisages that the secured creditor may also indicate, a preference as to how that creditor wishes to have the security and the secured debt treated under the PIA. In turn, s. 102(2) provides that the practitioner, in formulating the proposal for a PIA, is to have regard to any preference indicated by the secured creditor under s. 102(2) as to the manner in which the security and the secured debt should be dealt with. This is subject, however, to the qualification that this is *"to the extent [that the practitioner] considers it reasonable to do so"*. That very clearly indicates that the practitioner is required to form his own view on the preference suggested by the secured creditor. It does not authorise the practitioner to accept whatever is put forward by the secured creditor without scrutiny or evaluation by the practitioner. One further feature of the statutory scheme to be borne in mind is that, as 102(4) makes clear, a failure by a secured creditor to furnish a valuation and an indication of preference will not operate to prevent the practitioner from formulating a proposal for a PIA.

43. The provisions discussed in paras. 41-42 above clearly envisage that a secured creditor will respond to the notice from the practitioner. While it is not mandatory for a secured creditor to indicate any preference as to how the secured debt should be dealt with, it is highly desirable that a secured creditor should indicate a preference so that the practitioner will not have to approach the matter "in the dark" to paraphrase what was said by the practitioner in his affidavit evidence before the Court. In this case, it is regrettable that Cheldon did not respond in any way to the notification sent by the practitioner under s. 98. That undoubtedly placed the practitioner at a significant disadvantage. In contrast, as the practitioner explains in his affidavits, Start engaged and submitted a counterproposal. In para. 26 of his final affidavit, the practitioner says that he: - *"took it that they would not accept anything beyond this*". This appears to suggest that the manner in which the Start debt is proposed to be addressed in the PIA is derived from the Start counterproposal.

44. I accept that the practitioner was placed in a difficult situation in circumstances where he received no communication from Cheldon. However, I can see no basis on which the failure of Cheldon to respond could in any way relieve the practitioner from the obligation to formulate a proposal for a PIA that was fair and equitable as between all classes of creditors. In addition, I do not believe that the failure of Cheldon to respond can in any way justify the decision of the practitioner (as frankly acknowledged in para. 26 of his final affidavit) to agree to the favourable treatment accorded to Start in order to obtain their support for a proposed PIA. Whether or not a response was received from Cheldon, there was, in my view, an obligation on the practitioner to formulate proposals for a PIA which were fair and equitable as between the different classes of creditors. The failure to respond did not give the practitioner *carte blanche* to formulate proposals for a scheme of arrangement which included such a disparity of treatment as between Start Mortgages and Cheldon. On the contrary, the obligation remained, as stated above, to formulate proposals which involved the fair and equitable treatment of the classes. I fully accept that did not require identical treatment as between Start and Cheldon. I do not rule out the possibility that it might be possible to justify a level of disparity of treatment. The difficulty in the present case is that I can see no justification for the disparity in treatment here. In my view, the desire to win the support of an individual secured creditor (even where that secured creditor holds security over a principal private residence) cannot justify the disparity in treatment.

45. It is true that, of course, a practitioner, when formulating proposals, must have in mind that any proposed PIA must have a reasonable prospect of appealing to creditors. It would be foolhardy for a practitioner to seek to formulate proposals which did not have any prospect of success. However, that does not, in my view, entitle a practitioner to single out one creditor or one class of creditors for particularly favourable treatment in order to secure the support of that creditor or class of creditors for a particular proposal. On the contrary, the obligation is always to formulate proposals which are fair and do not give rise to manifestly inequitable treatment as between different classes. The usual way in which to persuade creditors to vote in favour of proposals is to demonstrate that the proposals will achieve for the creditors a more favourable outcome than is likely to be achieved in a bankruptcy. If proposals are formulated with that object in mind, there is unlikely to be any basis on which a creditor can show that it has been unfairly treated or unfairly prejudiced by the proposals. On the other hand, if practitioners were to formulate proposals aimed at securing the support of particular creditors or particular classes of creditors, this is a recipe for unfairness and will inevitably give rise to objections which will add enormously to the length and expense of the process and put the confirmation of the proposals in jeopardy.

46. I have therefore come to the conclusion that the proposals for a PIA which have been formulated in these interlocking cases, are

not fair and equitable in relation to Cheldon (when compared with the proposals insofar as they affect Start). In those circumstances, the requirement set out in s. 115A(9)(e) of the 2012 Act (as amended) cannot be satisfied. It necessarily follows that an order cannot be made confirming the coming into effect of the proposed PIA.

Unfair prejudice

47. Lest I am wrong in the conclusion which I have reached in relation to s. 115A(9)(e) I will, for completeness, also consider the case made by Cheldon by reference to s. 115A(9)(f) under which the Court cannot make an order confirming proposals for a PIA if the proposed arrangement is unfairly prejudicial to the interests of any interested party. It is clear that the proposed PIA here is prejudicial to the interests of Cheldon in circumstances where its secured debt is being written down to the value of the underlying securities and where Cheldon will receive only a dividend of between 6% and 6.3% in respect of the balance of the sum due to it. The question is whether that prejudice is unfair in all of the circumstances.

48. Unfair prejudice is not defined in the 2012 Act (as amended). Nor is it defined in the equivalent provisions in the Companies Act 2014 dealing with examinerships. However, significant guidance as to the meaning of "*unfair prejudice*" was given by the Supreme Court in the context of examinerships in *Re: McInerney Homes Ltd*. [2011] IESC 31 where O'Donnell J. said at paras. 29 – 30: -

> *"It might be said that the Act contemplates necessary prejudice to creditors, and only prohibits prejudice which is unfair. However, it may be more correct to conceive of any scheme as being prejudicial since it requires a creditor to accept a lesser amount than is, in theory, his or her legal entitlement. For example, in this case the scheme was prejudicial in that it required creditors to accept a written down amount for their debt. But it was said to be unfairly prejudicial because that was less than the banks could obtain on a receivership. The question in any particular case is whether that particular prejudice is "unfair". The essential flexibility of the test appears deliberate. It is very unlikely that a comprehensive definition of the circumstances of when a proposal would be unfair could be attempted, or indeed would be wise. The fact that any proposed scheme must receive the approval of the Court means that there will be a hearing. The Act . . . appears to invite a court to exercise its general sense of whether, in the round, any particular proposal is unfair or unfairly prejudicial to any interested party, subject to the significant qualification that the test is posed in the negative: the Court cannot confirm the scheme unless it is satisfied the proposals are not unfairly prejudicial to any interested party.*
>
> *In this case, the trial judge's approach to the question was to view the scheme against the likely return to affected creditors under the likely alternative in the event that there was no examinership, and no successful scheme. I agree that that is a vital test. Furthermore, as the trial judge recognised, there may well be circumstances where a creditor may be required to accept less than would be obtained in such circumstances on . . . a receivership, but those circumstances would normally require weighty justification. However, as this case illustrates, there may remain considerable difficulty in determining the value which a creditor, and in particular a secured creditor, might otherwise obtain, by reference to which the proposal can be judged."*

49. The decision of the Supreme Court in *Re: SIAC Construction Ltd*. [2014] IESC 25 is also relevant. In that case, Fennelly J. said at para. 69: -

> *"There are two aspects to the notion of unfairly prejudice. The underlying assumption is that the person in question is, to begin with, prejudiced, that is to say that his interests as a creditor . . . are adversely affected or impaired by the proposals. It is the inevitable consequence of the insolvency . . . that every creditor will, in that sense, suffer prejudice no matter what proposals are put forward. But prejudice is not enough to trigger the court's obligation to refuse to confirm the proposals. It must in addition be unfair. Unfairness, in turn comprises two essential aspects, the general notion of injustice and the more specific one of unequal treatment."*

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

51. Counsel for Cheldon submitted that Cheldon will be worse off under the PIA than it would be in the event of a bankruptcy. In the event of a bankruptcy, Cheldon would be entitled to rely upon its security and remain outside the bankruptcy. It would therefore be entitled, for example, to appoint a reciever over the rents currently paid by the tenants of the debtors at Tinkler's Yard. Under the terms of the PIA, the debtors would make interest only repayments in respect of the Cheldon loan in the sum of €1,312.50 per month for the 72 month duration of the PIA, reverting to capital and interest repayments of €2,667.48 for the remaining 150 months of the extended mortgage term. However, the monthly rent roll from Tinkler's Yard significantly exceeds these figures. The point made by Mr. Burke on behalf of Cheldon in para. 22 of his first affidavit is that, absent the proposed PIA, Cheldon would be entitled to appoint a receiver over Tinkler's Yard and collect the entire rent roll. Mr. Burke suggests that, accordingly, the outcome for Cheldon is clearly better outside the PIA.

52. In response to Mr. Burke's affidavit, the practitioner swore an affidavit on 6 July 2017 in which he said, at para. 9, that the net monthly rent (referable to Mr Noel Tinkler) is €2,041.20 from Tinkler's Yard. As discussed further below, this is incorrect. In addition, it should be noted that it is clear from the terms of the PIA itself that one of the principal reasons why the practitioner proposes the retention of Tinkler's Yard is that it generates 45% of the debtors' income. By retaining Tinkler's Yard, there will be a continued source of income from which other payments due by the debtor can be made, including, of course, the payments to be made to Start and Cheldon itself. The other side of that coin is that, in the absence of the PIA, the entire of the rent roll would be available to pay Cheldon in the event that Cheldon were to appoint a receiver over the rents. Cheldon would, in due course, also be in a position to sell Tinkler's Yard but would be unlikely to achieve anything more on a sale than the value attributed to Tinkler's Yard in the PIA. The sale would, however, generate an immediate return for Cheldon whereas under the PIA it will have to await payment of the stage payments envisaged over the course of the 72 month duration of the PIA.

53. In his replying affidavit sworn on behalf of Cheldon on 7 June 2018, Mr. Burke took issue with the suggestion made by the practitioner that the net income of Tinkler's Yard in the case of Noel Tinkler was only €2.041.20. In para. 15 of his affidavit, Mr. Burke drew attention to the fact that in the repayment tables appended to the respective PIAs the income of Mr. Tinkler from the yard is stated to be €3,995.43, while the income of Mrs. Tinkler is stated to be €3,050.73, giving a total combined income of €7,046.16. Mr Burke made the point that the repayment provisions of the proposed PIAs are based on the figures of €3,995.43 and €3,050.73 respectively.

54. In his final affidavit sworn on 19 June 2018, the practitioner confirmed that Mr. Burke was correct and he apologised for what he described as a "*typographical error*" in his earlier affidavit. I have to say that I am surprised by the suggestion that the figure given in the practitioner's first affidavit could be said to be a typographical error. On no reading of para. 9 of the practitioner's affidavit sworn on 6 July 2017, could one conclude that the reference to €2,041.20 as the net monthly rent was simply a typographical error. On the contrary, it is clear that the practitioner very deliberately referred to that sum in contradistinction to the amount of €3,200.00 which had been the figure given by Mr. Burke in his first affidavit. In substance, the practitioner, in para. 9 of his affidavit is purporting to contradict what Mr. Burke had said as to the level of rental income available from Tinkler's Yard. The practitioner, in para. 9, is seeking to suggest that Mr. Burke had overstated the amount of rent. I therefore cannot see any basis on which the practitioner can now plausibly suggest that his reference to €2,041.20 was merely a typographical error. I regret to say that I am wholly unimpressed by the practitioner's attempt to characterise this as a typographical error.

55. I am also deeply unimpressed by a further feature of the practitioner's affidavit sworn on 19 June, 2018. In para. 21 pf his affidavit, the practitioner says that: -

> *"If a receiver was appointed then there would be no tenants, no rent, and thereafter there would be the sale of the land and the factual and financial position would be that the creditor would have to discharge the cost of sale, the cost of the receiver and thus the comparison with bankruptcy is in fact absolutely one hundred percent correct."*

56. This averment on the part of the practitioner is, in turn, based on an averment by Mr. Noel Tinkler in his affidavit sworn on 25 June 2018 in which he says that the yard is a: - "*very old yard and is in disrepair*", and that he operates his gravel business from it together with his "*two other small businesses*". More pertinently, Mr. Tinkler continues in para. 8 of his affidavit as follows: -

> *"8. I say and believe that there are three tenants in situ since 2010. A Chinese take away, Indian take away, by the names of Mandarin House and Pure Indian and a mechanic business called Best Price Tyres. I say that I have spoken to the three tenants, being Jimmy Chan, Bhapa Singh, and Valdes Lydnusky. I say that they have outlined to me that if it was the case that a receiver and the uncertainty that brings was appointed on the basis of an inevitable sale in any event, they would immediately seek to transfer their business and move out of the yard. I beg to refer to a copy of a letters (sic) from each of them confirming the said position . . .."*.

57. Mr. Tinkler then exhibits two letters which are both in identical form and both very obviously typed on the same machine. One of them is signed by both Mr. Chan and Mr. Singh. The other is signed by Mr. Lydnusky. In both documents, the signatories confirm that they have "*developed a very strong professional relationship with . . .my landlords*". The documents then conclude in the following terms: -

> *"As a result, should Mr. and Mrs. Tinkler stop renting the premises and a new landlord appointed, I confirm that I would not hesitate to relocate my business to a different premises, as I do not believe I would enjoy the same working relationship with a new owner".*

58. These documents bear all the hallmarks of having been pre-prepared and placed in front of the tenants for signature. Quite apart from the hearsay nature of this material, it is of no evidential value in circumstances where the documents were not prepared by the tenants themselves. It is important to bear in mind that, in an application of this kind, the onus is on the practitioner and the debtors to place appropriate evidence before the Court to show that the proposals are not unfair. This was made clear by the Supreme Court in the context of examinerships in *Re Tivway* [2010] 3 IR 49. I am deeply unimpressed by this very naked attempt to manufacture evidence to support the proposition that Cheldon would be worse off in a receivership than it would be under the PIA. If there was genuine evidence to support such a case, it should have been presented to the court in the usual way on affidavit and any such affidavit should be drafted on the basis of the personal input of the deponent.

59. I must also record that, in my view, it is inherently improbable that tenants would choose to leave premises in which they have an established business just because there is a change in the landlord's interest or because a receiver has been appointed over the rents. Unhappily, since the financial crisis in 2008, there have been a significant number of appointments both of receivers and of rent receivers. The Court would require evidence that such appointments have led to the loss of tenants. In the absence of evidence of that kind, I do not believe that I can place any reliance on the averments made by Mr. Tinkler and by the practitioner respectively in relation to the suggestion that the tenants will move if a reciever is appointed.

60. A separate point is made by the practitioner and by Mr. Tinkler in the same affidavits. It is suggested that there is no unfair prejudice in circumstances where (so it is contended) Cheldon purchased the loan book sold by Permanent TSB (to whom the original mortgage over the Tinkler's Yard property was originally granted) at a very significant discount. Mr. Tinkler suggests that the loan book in question was "*one of the most impaired loan books in the Irish market*" and was sold for ten cents in the euro. On the basis of this suggestion, Mr. Tinkler speculates that his loan was purchased for "*circa 80,000.00"* whereas the return under the PIA would be €350,000.00.

61. In response, Mr. Burke, in his affidavit sworn on behalf of Cheldon on 7 June, 2018, makes the point that the test for unfair prejudice involves a comparison of the anticipated outcome for the relevant creditor under the proposed arrangement and the outcome that would arise in the likely alternative in the absence of such an arrangement. He reiterates the point previously made by him that the appointment of a receiver over Tinkler's Yard would result in a: - "*manifestly better outcome . . . than under the PIA*". He also notes the concession made by Mr. Tinkler in para. 10 of his first affidavit that Cheldon stands in the shoes of the original lender and has the right to claim and sue on foot of the purchased debt.

62. It is this paragraph of Mr. Burke's affidavit that leads to the averment made by the practitioner (in para. 21 of his affidavit sworn on 19 June 2018) that Cheldon would be worse off in the case of a receivership because it would be left with no tenants and no rent. I have already expressed my dissatisfaction with that suggestion. In my view, Mr. Burke is correct in what he says in para. 9 of his affidavit. In my view, it is very clear that Cheldon would be better off in a receivership than under the proposed PIA. Under the proposed PIA, Cheldon will not be in a position to recover any part of the rents other than the reduced monthly amount to be paid to it under the terms of the PIA for the 72 month period of the PIA. Furthermore, most of its debt will be written down very significantly. In contrast, in a receivership, while Cheldon will, of course, suffer a significant loss in the event that the premises are sold for €350,000, it will, in the event of a sale, have the ability to obtain an early payment of the full value of the property (less the costs of sale). While the costs of sale must of course be factored into the equation, the fact remains that pending any sale Cheldon will be in a position to appoint a receiver to collect the rents and will therefore have a significant income stream of just over €7,000 per month which it can use to discharge the costs of any sale and to pay down part of the indebtedness on foot of the loan accounts of the debtors or the loan accounts of the debtors which it purchased from Permanent TSB. In the course of the argument before me, it was suggested that Cheldon, as an investment fund, would have no interest in keeping a receiver in place for any length of time.

However, that is an entirely speculative point. There are obvious commercial advantages for Cheldon in appointing a receiver over Tinkler's Yard. The appointment of a receiver will generate a significant monthly income which, on an annualised basis, will be more than €84,000 per annum. When one compares that with the return which Cheldon will get under the PIA, it is obvious that even by leaving a receiver in place for six years (which would be the duration of the PIA if it was confirmed) Cheldon would generate receipts of more than €500,000. In addition, Cheldon would be in a position to dispose of Tinkler's Yard at a time of its choice. If, for the sake of argument, it was to decide to sell after leaving a receiver in place for six years, and even if the value of Tinkler's Yard had not increased in the meantime, it would ultimately generate gross receipts of more than €800,000 in respect of the debtors' indebtedness. This is manifestly a greater return than anything it could achieve under the PIA. I fully appreciate that these are gross figures before deduction of costs and expenses. Nonetheless, one can readily see that Cheldon would be significantly better off in the context of a receivership than under the proposed PIAs. In these circumstances, it seems to me that, based on the generally accepted understanding of "*unfair prejudice*" as explained by the Supreme Court in *McInerney Homes* and in *SIAC*, Cheldon would be unfairly prejudiced by the proposal. More correctly, in the context of s. 115A(9)(f) I cannot be satisfied that the proposed PIAs are not unfairly prejudicial to the interests of Cheldon, as an interested party.

63. In these circumstances, I have come to the conclusion that, in addition to the reasons set out at paras. 17 to 46 above, I must refuse to confirm the proposals for the PIAs in these two cases in circumstances where I have not been persuaded that the requirements set out in s. 115A(9)(e) have been satisfied.

64. In reaching this conclusion, I have not taken into consideration the fact that Cheldon is an assignee of the original mortgagee, Permanent TSB. I appreciate that in *Jacqueline Hayes* [2017] IEHC 657, Baker J. distinguished between the position of a retail banking company and the position of a party such as Cheldon. However, that was in a very specific context – namely the fixing of an appropriate interest rate. In that case, Baker J. took the view that, insofar as interest rates are concerned, an investment fund is not in the same position as a bank. The latter would, from time to time, have to return to the market to meet ongoing capital needs such that any interest rate would have to reflect (and exceed) in some way ECB base rates. In contrast, there was no evidence in that case that an investment fund would ever have to return to the market.

65. In my view, there is nothing in the judgment of Baker J. in *Jacqueline Hayes* to suggest that investment funds are to be treated any differently to other creditors when it comes to a consideration as to whether they would be worse off in a bankruptcy than under an arrangement. In particular, I can see nothing in that judgment which would justify the court taking the approach suggested by Mr. Tinkler in his affidavit (summarised in para. 60 above).

66. In my view, the correct legal position is that Cheldon, as successor in title to Permanent TSB, is entitled to all of the contractual rights which were previously held by Permanent TSB including the right to recover in full the amounts due on foot of the loans purchased by Cheldon. Whether or not Cheldon purchased those loans at a discount is not, in my view, relevant. As a matter of law, Cheldon is entitled to recover the full amount due. Therefore, when considering whether Cheldon is unfairly prejudiced by the terms of the proposed PIA, the correct comparison to make is as between the amount which it would recover in a receivership (without making any discount for the fact that it may have purchased the loans at a discount) as against the recovery it is likely to make under a PIA.

67. In light of my conclusions in paras. 17 to 66 above, I do not believe that it is necessary to consider further the concerns expressed by Cheldon in relation to the preferential debt to the Revenue Commissioners.

Conclusion

68. For the reasons set out above, in each case, I must uphold the objection of Cheldon by reference to s 115A(9)(e) and (f). I must therefore refuse the application made by the practitioner in each case for an order confirming the coming into effect of the proposals.