**THE HIGH COURT**

**ON CIRCUIT**

**[2017 No. 277 CA]**

**EASTERN CIRCUIT COUNTY OF MEATH**

**[C:IS:ESNH:2016:002044]**

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

**AND IN THE MATTER OF LAURA SWEENEY OTHERWISE LAURA HUTTON OF BALTAZAAR, KILLASKILLEN, KINNEGAD, MEATH**

**("THE DEBTOR")**

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

**JUDGMENT of Ms. Justice Baker delivered on the 31st day of July, 2018**

1. Laura Sweeney, the debtor, made a proposal for a Personal Insolvency Arrangement ("PIA") which was rejected by EBS Ltd. ("EBS"), her single creditor pursuant to s. 111A(6) of the Personal Insolvency Acts 2012 to 2015 ("the Act"). This judgment is directed to the appeal of the debtor of the rejection by Judge O'Malley Costello in the Circuit Court on 12 September 2017 of the application under s. 115A(9) of the Act for an order that the PIA be approved notwithstanding its rejection by the single creditor.

2. The notice of appeal of 18 September 2017 pleads that the circuit Judge erred in law and in fact in failing to properly consider the totality of the evidence and in particular in determining that the PIA was unfairly prejudicial and in making a determination that the special circumstance costs and childcare costs for which provision was made in the PIA were not properly calculated.

3. An unusual element of the present case which bears consideration is the correspondence that took place between the PIP and EBS, which has the appearance of having resulted in an agreement to terms ultimately not incorporated into the proposed PIA.

**Background facts**

4. In 2008 the debtor borrowed the sum of €225,000.00 repayable over a term of 35 years at variable interest rates secured by way of a first legal charge on her principal private residence. She fell into arrears in February 2010, less than two years after the term of the mortgage commenced. An attempt to resolve her arrears through the Mortgage Arrears Resolution Process ("MARP") failed.

5. EBS issued proceedings for possession on 17 June 2015 in the Circuit Court and these were adjourned pending the attempt by the debtor to resolve her indebtedness through the Act, the application to the Circuit Court under s. 115A, and the result of this appeal.

**Material facts**

6. Ms. Sweeney is a 37 years old married woman employed full-time as a teacher and with one young dependent child. Her husband derives a very small income from a start-up self-employed business enterprise and his contribution to family income is minimal. The principal private residence of the couple is a detached home in the sole name of Ms. Sweeney, has an agreed current market value of €130,000.00, and is held by her subject to a mortgage in favour of EBS with a current balance of €258,183.86. The premises are, therefore, in significant negative equity. Ms. Sweeney has no other assets of note.

7. Ms. Sweeney's total net income is €3,014.53 per month and having regard to the very low income of her husband, Ms. Sweeney is responsible for 89.17% of total family expenditure.

8. The PIP, Colm Arthur, proposes a six-year PIA, with the write down of the mortgage on the principal private residence to its current value of €130,000.00, mortgage payments on that amount on a capital and interest basis on variable interest rate, and at the end of the six-year PIA the balance of the amount due on the mortgage be written off. For the currency of the PIA that balance is to be treated as an unsecured debt on which a small dividend will be paid.

9. The current monthly payment on the mortgage is €1,181.14 and the revised payment will be €594.72 of which €530.33 will be contributed by the debtor through the PIA.

10. The comparison with bankruptcy shows that on the realisation of the principal private residence, and allowing for standard deductions, the amount available to the secured creditor will be €117,000.00. The dividend on the unsecured debt is 16.244% on the PIA and 5.899% on bankruptcy. The calculation on the bankruptcy option is based on an agreed assumption that the debtor will lose her principal private residence and the family will live in rental accommodation.

**The basis of objection**

11. EBS served a notice of objection on 16 March 2017 in which it made the general argument that the proposed PIA is unfair and inequitable in that it does not provide for repayments to the creditor in accordance with the true repayment capacity of the debtor as required by s. 115A(9)(d) of the Act. EBS also argues that no write-off of her secured debt is necessitated.

12. The objections of the single creditor fall into two broad factual categories:

> a) the single creditor argues that the proposed duration of the PIA of 72 months is unreasonable and prejudicial to its interests. The primary basis for this argument is that the PIP fee and outlay on a six-year PIA, estimated at €10,500.00 including outlay and VAT, is excessive and that on a one-year PIA the PIP costs will be considerably less;
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> b) the single creditor argues that the level of special circumstances costs, especially childcare costs is excessive. Childcare costs are estimated for the household at €650.00 per month, of which €579.63 is attributable to the debtor. Ms. Sweeney had proposed originally childcare costs of €800.00 *per* month, and these were ultimately reduced in consultation with her childminder to €650.00.

13. The opposition, therefore, is founded in the alleged non-compliance with the provisions of ss. 115A(9)(b)(ii) and 115A(9)(d) of the Act.

14. Section 115(9)(b)(ii) provides that in determining an application under s.115A(9) the court must be satisfied that:

> " […] having regard to all relevant matters, including the terms on which the proposed Arrangement is formulated, there is a reasonable prospect that confirmation of the proposed Arrangement will […] enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit".

15. This factor was considered by me in *In re Callaghan* [2017] IEHC 332 and *In re Hayes* [2017] IEHC 657.

16. Whilst the continued ownership or occupation of the principal private residence of a debtor is a special statutory factor to which the court must have regard under s. 104, the court must by s. 115A(9)(d) assess whether:

> " […] it is satisfied that having regard to the matters referred to in section 104(2) the costs of enabling the debtor to continue to reside in the debtor' s principal private residence are not disproportionately large".

17. This provision was considered in *In re J. D.* [2017] IEHC 119 and *In re Hill* [2017] IEHC 18.

18. The creditor makes the broad argument that the special circumstance costs are unfairly prejudicial within the meaning of 115A(9)(f) of the Act, which reads as follows:

> "The court, following a hearing under this section, may make an order confirming the coming into effect of the proposed Personal Insolvency Arrangement only where it is satisfied that […] the proposed Arrangement is not unfairly prejudicial to the interests of any interested party".

**The counter proposal and the correspondence**

19. EBS made a counter proposal which it says offers the debtor the best prospect of returning to solvency without recourse to bankruptcy whilst retaining her principal private residence. This provides for the splitting of the mortgage, the creation of an active mortgage of €235,499.00 and a warehoused amount of €22,815.00 to be repaid at the end of the proposed extended 364-month term, and under which the monthly repayment at variable interest rates is €1,082.00.

20. That proposal was the subject of some correspondence between the PIP and EBS which resulted in an email exchange on 27 February 2017 which is useful to analyse and which gave rise to an argument in the course of the hearing that the PIP appeared to have accepted the counter proposal but thereafter presented for approval a PIA in quite different terms.

21. The PIA issued on 13 February 2017 and the PIP invited a response. The PIA was adjusted to deal with some minor errors on 21 February 2017 and email correspondence regarding its substance commenced on 23 February 2017.

22. EBS indicated that it was not agreeable to the proposal but made a number of comments on a without prejudice basis, including that the childcare costs were excessive, and that in that context it was believed Ms. Sweeney had the capacity to service a mortgage in the sum of €1,082.00 *per* month, "based on reduced level of additional costs". It was also suggested that EBS would prefer a shorter term arrangement and not a six-year one, as proposed.

23. In his replying email of 24 February 2017, at 9:43, Mr. Arthur said that the debtor was "prepared to accept" a shorter PIA "in line" with EBS email and that he was "happy to amend the proposal" to provide for a one-year PIA in response to the EBS submission. He also said in that email that the childcare costs would be reviewed.

24. Later that same day, at 12:38, Mr. Arthur wrote to EBS in response to its request to outline the agreed amendments and indicated a preparedness to amend the proposal, that the PIA would have a duration of one year, that the mortgage term be increased to 364 months, and that "any change deemed necessary in relation to special circumstances" would be made. This was presumably a reference to childcare costs which were still being investigated. Mr. Arthur seems to have unreservedly agreed to amend the PIA by this email.

25. The next email in the chain was from Mr. Arthur on 27 February 2017 at 9:06 where *inter alia* it was indicated that Ms. Sweeney would be reducing her childminding costs. In that email Mr. Arthur asked EBS to confirm that he could issue the amended proposal "in line with [the creditor's] RLE [Reasonable Living Expenses] figures" that day, as the protective certificate was about to expire.

26. In its following email in response shortly thereafter, EBS indicated that it would accept the proposal on short notice on the basis that the mortgage would be split.

27. Later that day, at 12:04, Mr. Arthur replied and said he had "agreed to use your figure for household repayment capacity of €1,082" and it is clear that that email envisaged the issue of an amended proposal with that in mind.

28. However, the PIA that issued only days later made no provision for a mortgage repayment of €1,082.00 per month and no proposal to split the mortgage which EBS describes as "inexplicitly absent", and which proposed a six-year PIA.

**The arguments of the parties**

29. The creditor makes a number of arguments primarily focused on an assertion that the debtor is not proposing to bring into account all of her means, and that her primary objective is to seek a write-down of the negative equity on her principal private residence and that the proposal is unfairly prejudicial to its interest.

30. The creditor makes the argument that the debtor has a present greater capacity to service the mortgage than that proposed and in his affidavit, Alan Desmond, an employee in the Personal Insolvency Unit of EBS, avers to a belief that the debtor is "supplementing the enterprise of her husband", who has the "full benefit of residing" in a house in the sole name of his wife and that if she was not so "supplementing his income" she "would be in a position to make greater payment to the Bank on foot of her contractual liability to the Bank".

31. This is my view a quite extraordinary assertion, and it is not supported by any credible argument or assertion that Ms. Sweeney's husband has deliberately chosen not to work in order to reduce the amount available to service his wife's debt or for any other reason which might be material.

32. Ms. Sweeney is the primary, and in truth the sole, breadwinner in her family but her husband is engaging in a financial enterprise

which both of them hope will result in an improved financial position for the family. Ms. Sweeney is only 37 years of age and she has one child. The couple may well choose to have another child.

33. Ms. Sweeney swore a replying affidavit to that of Mr. Desmond on 4 August 2017 when she said: "I am clearly married and have been so for a significant period of time". Ms. Sweeney's replying affidavit expresses her surprise and describes the suggestion by the creditor as "unusual and outrageous". I agree with the import of this averment, although I might not use language of such force, and one might wonder whether an argument with the same intent would be made were the mortgagor the male member of a household, and where his wife had chosen to adopt what is still described as the "traditional" role of homemaker.

34. A PIA must be assessed on the basis of the living arrangements of the debtor and her family as they exist, and the creditor and the court must assess the reasonableness and fairness of a PIA in the context of the family, personal, and financial circumstances of the debtor and of any other person who is in a position to contribute to his or her outgoings. I am not prepared to accept the argument advanced in the replying affidavit of Mr. Desmond that the proposed PIA is unacceptable because Ms. Sweeney "supports" her husband financially without cause.

35. The circumstances regarding the living accommodation of the couple must appropriately be tested against the outcome on bankruptcy, and the result of a bankruptcy would be the inevitable sale of the principal private residence, which is likely to occur if the PIA fails. While the creditor would, in those circumstances, be likely to receive a more immediate return on its loan, the actual amount repaid would be less than that proposed in the PIA.

36. Furthermore, absent any other basis of challenge, the sale of the principal private residence and the making of an assumption that the debtor and her husband would seek local rented accommodation is not a factor that ought to overly weigh in my considerations, and a return to solvency is not to be achieved by a formulaic approach by which rental cost is assessed against the ongoing costs of servicing the mortgage. In the present case the mortgage has a very long term of 35 years, and it could not be said in the circumstances that the retention of the principal private residence will amount to a capital windfall for the couple when the mortgage is finally paid off at the end of that very long term and when Ms. Sweeney will be close to 70 years of age.

**Special circumstances/childcare costs**

37. Another factor relied on by EBS is the suggestion in the affidavit of Mr. Desmond that having regard to the fact that Ms. Sweeney's husband provides a very modest amount towards the family outgoings that an "alternative option" with regard to childcare ought to be considered. While this is not express, I assume that what is proposed is that Ms. Sweeney's husband would work part-time and take responsibility for after school childcare and care of the young child during holidays, illness *etc*.

38. Ms. Sweeney's response to this is that her husband does in fact work and that evidence is not contradicted, nor indeed do I consider it proper for me to determine the matter on the basis that a different financial arrangement ought to have been put in place so that childcare costs were reduced or eliminated altogether.

39. It is also suggested in the replying affidavit that the childcare costs were too high and that they are payable throughout the year. A handwritten letter from the childminder is exhibited in the affidavit of Ms. Sweeney and signed by both her and her childminder which documents a renegotiated cost over the calendar year, at €650.00 *per* month. No evidence to suggest that this is other than the market rate for childcare for a child in primary school has been adduced, and I consider it correct to approach the question of childcare on the basis that a childminder is entitled to be paid throughout the calendar year, unless it is specifically agreed that she is employed as a temporary worker, who works only when required. Therefore, I reject the suggestion of the creditor that if childcare cost was "disposed of" the debtor's repayment capacity would increase substantially and she would be in a position to make larger monthly repayments in discharge of her mortgage.

40. Counsel for the debtor argues the EBS proposal means that on presently known figures, and absent an increase in her husband's income, Ms. Sweeney will go into insolvency when her child goes into secondary school, and the standard allowance of RLE under the ISI guidelines shows that the estimated costs of a child in secondary school is considerably more than those for a child in primary school.

41. Counsel for the debtor argues that the EBS proposal will absorb all available income and means that after the RLEs are discounted, and taking into account the small contribution from Ms. Sweeney's husband, the entire available income would be applied to the mortgage.

**Discussion**

42. It seems to be the case that, had Ms. Sweeney other creditors, the PIA would have been a 72-month PIA as that would have been the most appropriate way to ensure that all creditors took the benefit of any increase in the income of Ms. Sweeney's husband which would impact on the percentage of contribution that he could make to household expenses.

43. Ms. Sweeney can afford to sustainably meet a mortgage repayment of €1,082 *per* month or thereabouts, but only if the childcare costs are reduced or entirely eliminated. The argument of EBS that Ms. Sweeney has greater capacity to meet her debt than that identified in the PIA ignores the fact that there are family and living costs which are primarily or almost exclusively met by Ms. Sweeney and in respect of which her husband's contribution is nominal.

44. The primary issue in the present case is whether the PIA brings into account the means of the debtor and that requires the court to engage the question of affordability, as well as a consideration for the costs of permitting a debtor to remain in his or her principal private residence is excessive in all of the circumstances.

45. The evidence is that the likely rent that would be paid by the family is less than the mortgage repayments, but that figure taken alone must be weighed against the fact that on a sale of the principal private residence now, EBS would *de facto* obtain a smaller return that it would achieve on the PIA.

46. In that context, it must be recalled that a person may avail of a PIA only once in a lifetime, and that must mean that the court ought not to make an order which, on known figures, is likely to lead to insolvency at an identifiable time in the future, even if that time is far into the future.

47. Mr. Arthur explains that it was not possible for him to draft a short-term PIA even if that meant that the PIP costs would be lower. He avers that had he prepared a twelve-month PIA, it could well have been successfully argued by the objector that all of the means of the debtor were not brought to bear and that a 72-month proposal was the best means by which this could occur. In general, the continued supervision by the PIP over the length of a PIA is a relevant factor and in the present case, the possible

improvement in the income of the husband of the debtor is a factor that might come to have some importance.

48. The standard PIA contains an "additional income" provision by which any improvement in a debtor's income will be captured by the PIA to the benefit of creditors.

49. In *In re Hayes* I also considered the question at para. 12:

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

50. In *In re Callaghan*, the question of sustainability was considered at some length in the context of a proposal to warehouse as amount of a mortgage loan with a view to it being reactivated long into the future. The question for the court included that of the sustainably of the arrangement and at para. 27 I set out the guiding principles.

**Conclusion**

51. I am satisfied that, taking the present and currently known income and liabilities of the debtor and the current income of her husband and needs of her dependent child, the argument of EBS that Ms. Sweeney can afford a mortgage repayment of €1,082 *per* month is not made out. That figure would absorb all of the available income of the debtor and leave no scope for the payment of other special circumstances costs.

52. I find, as a matter of fact, that the childcare costs for which evidence has been given are reasonably being incurred and correctly stated.

53. I agree with the argument of counsel for the debtor that the arrangement for which EBS contends will become unsustainable once the child goes to secondary school, and therefore, the arrangement must be seen as unsuitable in the medium term, the precise language used in para. 30 of *In re Callaghan*.

54. The capital mortgage figure is to be assessed in the light of the amount of the repayment capacity of the debtor at present in interest rates, and I am satisfied in those circumstances that the write-down of the secured element of the principal private residence to the current market value is not unfairly prejudicial to the creditor, and is an appropriate means by the present insolvency of the debtor can reasonably be met.

55. I reject the argument of counsel for the debtor that the current "negative equity" in the principal private residence means that the debtor is now insolvent. "Insolvency", for the purposes of the Act, means that a debtor is unable to pay his or her debts as they fall due, not that a capital demand could not be met.

56. A write down of a mortgage to market value is not mandated by the Act, and it may be possible in certain cases to split or warehouse part of a loan (see *In re Callaghan* and *In re Dunne* [2017] IEHC 59). The determination as to whether a mortgage debt is to be written down is to be made by reference to the affordability of payment. A draft PIA is in general more focused on ascertaining a capital figure, repayment of which is affordable by the debtor, rather than seeking to ensure that the debtor is no longer burdened with a mortgage far in excess of the value of the secured property.

57. It must also be recalled in that context that the treatment of a secured debt under the Act requires that that part of the debt which is not to be secured under a draft PIA is to be treated as unsecured debt and in many cases some payment of the unsecured element of a debt will be met in many proposed PIAs.

58. This application engages a number of statutory factors and the starting point must be that the court hearing an application under s. 115A(9) has no power to vary or modify the proposed PIA. Thus, while certain criticisms of EBS to elements of the proposed PIA in the present case may be attractive, a margin of appreciation to be given to the PIP as an independent intermediary who brings to the process financial specialist knowledge must be respected: see *In re Nugent* [2016] IEHC 127, *In re Reilly* [2017] IEHC 558 , and *In re Meeley* [2018] IEHC 38.

59. What is also highlighted by the present case is the fact that it is for the court and not the PIP to ultimately approve the PIA. This is so even in circumstances where the PIA is approved by the body of creditors, or a single creditor, as the case may be. I am aware of one application where I refused to approve the coming into operation of a PIA after it has been approved by a meeting of creditors, in which the circumstances concerned a secured debt to be kept outside the PIA and demand of which would have caused an immediate insolvency. The court will in general approve a PIA which has achieved approval at a meeting of creditors, but it does so in the careful exercise of a power to approve the PIA and to bind all creditors thereto.

60. The additional power vested in the court under s. 115A(9) is one that has been considered by me in a number of judgments, notably *In re Callaghan* and *In re Hayes*, and is as apparent from the discussion in those cases, the court must scrutinise the PIA with a view to ascertaining its affordability, whether it will genuinely achieve a return to solvency, whether it is unfairly prejudicial to any impaired creditor, and whether the costs of permitting a debtor to retain ownership or occupation of his or her principal private residence is disproportionately large. The court will scrutinise the PIA and approve it only if all of the statutory tests are met, and this is irrespective of the position advanced by the PIP, albeit the voice of the PIP is one that is heard by the court and to which the court gives weight.

61. The rejection by the court of an application under s. 115A can have a number of consequences, and it is not always the case that should a proposed PIA fail to be approved by the court under s. 115A, the debtor will become bankrupt, although bankruptcy is likely to be the primary alternative option available to either the creditors or the debtor. Further negotiations can, and probably often do, occur in many cases to achieve a solution to debt resolution outside of bankruptcy.

62. In the present case, the single creditor has commenced proceedings seeking possession of the principal private residence of the debtor which stand adjourned. It seems inevitable in the circumstances that the failure to approve the PIA will mean that the debtor

and her husband and small child will lose their principal private residence, and that factor, taken with the uncontested evidence that the financial outcome for EBS on a sale should it take possession will be less than that to be achieved under the proposed PIA is central to my decision.

63. I consider that I ought to approve the coming into operation of the PIA. This is not to say that in all cases where a single creditor opposes an application with the vigour that is apparent in the present case, the court will not give considerable weight to the view of that single creditor, but the various factors taken together are sufficient for me to approve the PIA.

**The Role of the PIP**
64. I have considered the role of the PIP in a number of judgments, including *In re Nugent*, *In re Reilly*, and *In re Meeley*.

65. The PIP plays a unique role at the centre of the process as an independent intermediary with responsibility to the court, to creditors and the debtor. The engagement of Mr. Arthur with the insolvency agent of EBS was mystifying, and even taking a benevolent view, the correspondence in regard to the proposal to warehouse part of the loan, the length of the PIA, and to eliminate childcare costs entirely, could be read as being careless and confusing and in my view did give the impression to the agent of EBS that the suggested amendments would be incorporated into a draft PIA, and that the elements to satisfy the arguments of EBS were to be included.

66. The draft PIA that was presented by Mr. Arthur did not contain many of the elements which EBS stressed were central to its approval, and whilst I accept that Mr. Arthur was under pressure to conclude the draft of a proposal as the protective certificate was close to its expiry, the urgency does not justify his failure to clearly outline what he now says was the reason for presenting quite a different PIA. The reasons advanced now that the PIP could not incorporate the changes proposed by EBS as he could not justifiably present that proposal to the court either for approval under s. 115A(9) of the Act or following the formal consent of EBS for the court for approval under s. 115 of the Act, is not apparent in the correspondence.

67. Mr. Arthur deserves some criticism for the manner in which he engaged the correspondence which in my view is neither careful nor clear.

**Other Factors**
68. I agree in general that where the only objection of the creditor is to the length of the PIA, the creditor's preference for a short PIA would be respected, and this would have the effect that the PIP costs would be less and the secured creditor would receive somewhat more in respect of the unsecured amount of the debt. However, as I have said, the court has no power to vary the terms of the PIA and as the length of the PIA was only one of many factors, it is not sufficient to persuade me to refuse the order under section 115A(9) of the Act.

69. Accordingly, I propose making an order under s. 115A(9) of the Act approving the coming into operation of the PIA of Ms. Sweeney, notwithstanding that it was rejected by her single creditor.