[2019] IEHC 56

THE HIGH COURT

Circuit Appeal

[2017 258 CA]

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL

INSOLVENCY ACTS 2012 – 2015

AND IN THE MATTER OF LISA PARKIN, A DEBTOR

AND

IN THE MATTER OF AN APPLLICATION PURSUANT TO SECTION 115A (9) OF THE PERSONAL INSOLVENCY ACTS 2012-2015

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

Introduction

1. Ms. Parkin, the debtor in this case, was born in 1972. She is married but separated from her husband, who is now living in the United Kingdom. She has one dependent child (a daughter) who is now fifteen. Her daughter is obviously very talented. The evidence before the court shows that she is an excellent student and is particularly proficient in Irish. She is expected to do sufficiently well in her Leaving Certificate examinations to qualify to study veterinary medicine at UCD.

2. Ms. Parkin and her daughter live in the family home on Ballyfermot Road, Dublin 10. They have lived there since September 2005 when it was acquired, with the benefit of a bank loan, in the names of Ms Parkin and her husband.

3. In circumstances described in more detail below, Ms. Parkin's husband moved to the United Kingdom in 2015. According to the evidence of Ms. Parkin, he makes no contribution, financial or otherwise, to the household. He does not contribute to the mortgage repayments, nor does he make any payment in respect of child maintenance.

4. As noted above, the family home was acquired by Ms. Parkin and her partner in 2005 with the assistance of a loan (secured in the usual way by a mortgage) from Permanent TSB (PTSB). Ms. Parkin is described in the papers before the court as a finance manager employed by the HSE. Her net monthly income from her employment is €2,909.47.

5. Ms. Parkin fell into financial difficulty for the first time in 2007. She explains in her affidavit that her husband developed an addiction to gambling and borrowed €7,000 from "loan sharks" which he used to place bets. This debt was simply too much to repay on top of the ordinary expenses of the household and Ms. Parkin says that, as a consequence, she and her husband began to fall behind on various bills. In para. 8 of her affidavit sworn on 9 January 2017, she says: -

> *"The people who provided the loan were unsurprisingly persistent to be repaid and we were coming under pressure to pay off the debt in full. The harassment was becoming worse and I borrowed a sum of money from my sister . . . in order to discharge the debt. My husband's departure did not negatively impact [my financial situation] . . . as he was not contributing".*

6. Ms. Parkin also explains that, notwithstanding the episode with the loan sharks, her partner's gambling problem became worse. At that stage, she first fell into arrears with the mortgage repayments to PTSB. It is clear from the summary estimated statement of affairs at Appendix 1 to the proposed Personal Insolvency Arrangement ("PIA") that, in addition to the home loan liabilities to PTSB and the liability to her sister, she also incurred borrowing costs in respect of a loan obtained from her staff credit union at the HSE ("the credit union") and she ran up a significant bill on her PTSB credit card.

7. In the meantime, in common with many other properties, the value of Ms. Parkin's home fell significantly. The current debt due to PTSB and secured on the home is in the order of €333,785 while the value of the home has dropped to €160,000. This value has been agreed between PTSB and Ms. Judy Mooney, the Personal Insolvency Practitioner ("the practitioner") acting in this case on behalf of Ms. Parkin.

8. There is no dispute between the parties that, as of 1 January, 2015, Ms. Parkin was in arrears with her payments in respect of the PTSB home loan. Ms Parkin's indebtedness on foot of the loan is therefore a relevant debt for the purposes of s 115A(18) of the Personal Insolvency Act 2012 ("the 2012 Act) such as to satisfy the gateway requirement of s. 115A. In the Circuit Court, Ms Parkin sought and obtained an order under s 115A(9) confirming the coming into effect of proposals for a Personal Insolvency Arrangement ("PIA") notwithstanding that the proposals have been rejected by a majority (in value) of her creditors.

9. It should be noted, at this point, that the home loan (and the relevant mortgage in favour of PTSB) are in the joint names of Ms. Parkin and her husband. The family home (which is clearly a principal private residence for the purposes of the Personal Insolvency Acts 2012 – 2015) is also in joint names.

10. Ms. Parkin has not taken any steps against her husband to require him to make any contribution to the mortgage repayments or to the maintenance of their daughter. In para. 6 of her affidavit sworn on 9 January 2017, Ms. Parkin says that her partner: -

> *". . . does not communicate with me and I do not know the address at which he currently resides nor do I have any forwarding address for him. I say that [he] has deliberately not provided me with any contact details lest he is pursued for child maintenance or other financial obligations. My daughter visits her grandmother in Yorkshire and has met her father there. . . ."*

The application under the 2012-2015 Acts

11. Proceedings under the 2012 – 2015 Acts were commenced in the Circuit Court in 2016. In accordance with the requirements of the Acts, the practitioner formulated proposals for a PIA which were considered by Ms. Parkin's creditors at a meeting of creditors held on 7 November, 2016. Under the proposals, the secured debt on foot of the mortgage granted to PTSB will be written down to €160,000 (which is the agreed market value of the principal private residence). The balance of €173,785.39 will be treated as

unsecured debt and will share with the credit union a dividend of 8 cent in the euro. At the end of the PIA, the balance of the unsecured element of the debt will be written off.

12. The creditors' meeting was attended by two creditors namely PTSB and the credit union. PTSB voted against the proposal. The credit union voted in favour. The total debt due to PTSB (including the sum of €9,948 due on foot of Ms. Parkin's credit card and the sum of €20 due on foot of a personal loan) amounted to €343,753.00. In percentage terms this represents 98.9% of the total debt voted at the meeting. The amount due to the credit union is €3,752.43 which represents 1.1% of Ms. Parkin's total indebtedness. Thereafter, an application was made to the Circuit Court by the practitioner under s. 115A(9) seeking an order confirming the coming into effect of the proposed PIA notwithstanding that it had been rejected in the manner outlined above. For the purposes of satisfying the requirements of s. 115A(9)(g), the practitioner argued that the credit union comprised a separate class of creditor from PTSB. For this purpose, s. 115A(17)(a)(i) enables a court to consider a single creditor as a separate class.

13. PTSB filed a Notice of Objection in the Circuit Court. In that Notice, PTSB raised a number of issues as follows: -

(a) It was contended that the credit union could not be said to constitute a separate class of creditor;

(b) It was contended that it was not appropriate for the court to approve the arrangement in circumstances where an alternative had been put forward by PTSB which, it was contended, was "*fairer and /or more appropriate (including to unsecured creditors by reason of providing a better return for them of 10.11% as opposed to 5.51%)".* At this point, I should record that on 3 and 7 November 2016, PTSB put forward an alternative proposal that would have split the mortgage debt into two parts namely (a) a live balance of €236,000 which would continue to accrue interest at 3.25% per annum and (b) the "*warehousing*" of the balance of €97,785 at zero interest "*with a 30% LTV write down upon maturity, if applicable*". The counterproposal also proposed an extension of the term to 312 months. At the end of that term, the warehoused balance would become due subject to the possibility of the partial LTV write-down mentioned above. In, the meantime, Ms Parkin would have a monthly mortgage bill in the order of €1,121.

(c) It was contended that the position adopted by the practitioner that the warehousing of a debt did not comply with the 2012 – 2015 Acts was an "*error of law*";

(d) It was argued that the PIA will not enable creditors (and in particular PTSB) to recover debts due to them to the extent that the means of the debtor reasonably permit. It was contended that this was a breach of s. 115A(9)(b)(ii).

(e) Reliance was also placed on s. 115A(9)(e) and (f) of the 2012 Act, (as amended). In support of this proposition, the notice stated that PTSB "*will rely, in particular, on the fact of the sizeable upfront write-down proposed in the PIA".*

(f) The fact that the debt was a joint debt with Ms. Parkin's husband was also a ground of objection. It was submitted that, to grant the order sought, would be to reduce the debt in respect of which Ms. Parkin's husband is jointly and severally liable and that this would breach s. 115A(9)(b)(ii) of the 2012 Act (as amended). In particular, it was argued that the terms of the proposed PIA did not address the joint borrowings in a manner that would preserve the rights of PTSB as against Ms. Parkin's husband.

14. A hearing subsequently took place before Her Honour Judge Susan Ryan in the Circuit Court at which PTSB and the practitioner were represented by counsel. On 9 August 2017, the learned Circuit Court Judge delivered a written judgment in which she rejected the grounds of objection and expressed the view that the proposed PIA does not unfairly prejudice PTSB.

15. Since the decision of the learned Circuit Court Judge, Ms Parkin has complied with the terms of the PIA.

The appeal

16. PTSB has appealed the decision of the learned Circuit Court Judge. Since an appeal from the Circuit Court to the High Court is an appeal by way of rehearing, a full rehearing of the application took place before me on Monday 3 December, 2018 at which the practitioner was represented by junior counsel and PTSB was represented by both senior and junior counsel.

17. Very helpful written and oral submissions were made which have assisted in crystallising the issues that now fall for determination by me. PTSB drew attention to the far reaching nature of s. 115A and submitted (correctly in my view) that the onus of proof lies on the practitioner to demonstrate that all of the requirements of s. 115A have been satisfied. PTSB relies in this context on the observations of Baker J. in *Laura Sweeney* [2018] IEHC 456 at para. 60 where she emphasised that the court can only approve a PIA where all of the statutory tests are met. PTSB also relies on the observation of Baker J. in *Siddhartha Varma* [2017] IEHC 218 at para. 23 where Baker J. drew attention to the impact which relief under s. 115A can have on the contractual and property rights of a creditor.

18. PTSB also contends that the onus lies on the practitioner to justify why the counter-proposal made by it (summarised in para. 13(b) above) ought not to be adopted.

19. PTSB strongly urges that the means of Ms. Parkin permit a greater recovery for PTSB than is proposed under the PIA. In this context, PTSB complains that, even if the practitioner was justified in not accepting the PTSB counter-proposal, the PIA should nevertheless have provided for some level of warehousing under which more extensive payments could be made in the future.

20. Having regard to Ms Parkin's means, PTSB also argues that the proposed write-down of the PTSB mortgage debt to the current market value of the principal private residence of Ms. Parkin is unnecessary and unjustified. PTSB submits that, in cases of this kind, it is incumbent on the practitioner to objectively justify a write-down of this nature.

21. In light of the manner in which the 2012-2015 Acts engage the constitutionally protected property rights of secured creditors, PTSB submits that, having regard to the approach taken in *Heaney v. Ireland* [1994] 3 I.R. 593, the court is required to consider, insofar as possible, whether there is an alternative proposal which is less intrusive to the rights of the creditor. In this context, PTSB argues that this requires that the practitioner must conduct a real and substantiated analysis as to what level of postponed or "warehoused" debt would be affordable.

22. PTSB also contends in this regard that the future pension entitlements of Ms. Parkin are relevant and must be taken in account.

23. PTSB complains that the PIA makes no provision for contributions from Mr. Parkin and PTSB argues that Ms Parkin should have made attempts to pursue Mr Parkin.

24. Furthermore, PTSB submits that the practitioner has failed to substantiate the claim that the credit union constitutes a separate class of creditors for the purposes of s. 115A.

The credit union as a separate class of creditor
25. It seems to me that, logically, I should deal with the last of those issues first. If no class of creditor has accepted the proposed arrangement by a majority of more than 50% of the value of the debts owed to that class, the court could not make an order confirming the coming into effect of the proposed PIA. Section 115A(9)(g) makes that clear.

26. In the papers before the Circuit Court the practitioner had contended that the credit union formed a separate class of creditor on the grounds that the credit union was: -

> *"… A mutual organisation owned by the members with profit being shared between the members and operating in the interests of those members. A mutual lender must be formed for one or more objects and that the members must have a "common bond". A member must also have at least one fully paid-up share in the credit union. Further, the creditor is regulated under distinct regulatory frameworks and under law. In that regard, I consider the credit union to be in a separate class as their rights are so dissimilar that it would be impossible for them to consult together with any other creditor with a view to their common interest. …".*

27. PTSB, in its submissions, relied on the judgment of Baker J. in Sabrina Douglas [2017] IEHC 785 where Baker J, at paras. 37-38, held that a credit union could not be characterised as a separate class of creditors "*merely on account of the rules governing membership of the society*". Baker J. explained that the rules of a credit union, while relevant to the nature or legal status of such an entity, do not provide any support for treating a credit union as a separate class. Baker J. emphasised that what s. 115A is concerned with is the nature or claim of a creditor *as against* the debtor.

28. In *Sabrina Douglas*, Baker J. followed the same approach that is traditionally taken in the context of the constitution of classes for the purposes of voting on a scheme of arrangement under the Companies Act. In particular, Baker J. followed the approach taken by Laffoy J. in *Re: Millstream Recycling* [2010] 4 I.R. 253 where Laffoy J. applied the classic test laid down in Sovereign Life Assurance Company v. Dodd [1892] 2 Q.B. 573 where Bowen L.J. said:

> *"It seems plain that we must give such a meaning to the term "class" as will prevent [the statutory provision] being so worked as to result in confiscation and injustice, and that it must be confined 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".*

29. In the Circuit Court, the learned Circuit Court Judge did not accept the basis for the characterisation of the credit union as a separate class which had been suggested by the practitioner (as outlined in para. 26 above). Nevertheless, she took the view that, given the composition of the liabilities due and owing to PTSB (which involve both secured and unsecured elements), it could not be said that the credit union and the PTSB shared a common interest. In contrast, the debt due to the credit union was entirely unsecured. For that reason, Judge Ryan held that the credit union constituted a separate class.

30. In my view, the approach taken by the learned Circuit Court Judge was entirely correct. There were only two creditors who participated in the meeting – namely the credit union and PTSB. The credit union was solely an unsecured creditor. However, PTSB was both an unsecured creditor (in respect of the credit card and loan accounts) and a secured creditor in respect of the mortgage account. The fact that PTSB held a mortgage over the family home in respect of the bulk of the debt due to it shows very clearly that its rights were markedly different to those of the credit union. Because such a significant element of the debts due to PTSB were secured by the mortgage, PTSB's interest was in securing an outcome that best preserved its rights under the mortgage. In contrast, the credit union was solely concerned as an unsecured creditor. Its interests were in securing an outcome which maximised the return to unsecured creditors. In these circumstances, it seems to me that the rights and interests of PTSB and the credit union were so dissimilar as to make it impossible for them to consult together with a view to their common interest. In short, they had no common interest.

31. In the course of argument, it was suggested by counsel for PTSB that, in circumstances where the practitioner had relied solely on the credit union's mutual status in his statement given under s. 115A(2)(a)(ii), he could not now seek to put forward a different basis for his contention that the credit union should be treated as a separate class. I reject that argument. In my view, it is clear from s. 115A(17) that it is for the court to form a view as to whether any individual creditor or group of creditors should be treated as a class of creditor for the purposes of s. 115A. The role of the court in relation to this issue is not circumscribed by the approach taken by the practitioner. The court is free to reach its own view.

32. For the reasons discussed in para. 30 above, I hold that the credit union is to be treated as a separate class for the purposes of s. 115A. I appreciate that, on an overall basis, the debt due to the credit union represents no more than 1.1% of Ms Parkin's indebtedness. I must, of course, bear in mind s. 115A(17)(b)(ii) which requires the court to have regard (inter alia) to the proportion of the debtor's debts due to the creditor forming a separate class. Nonetheless, in the context of Ms Parkin's means, a debt of €3,816 is not insubstantial. It represents more than one month's income after tax. The credit union is also the only totally unsecured creditor to vote and, in those circumstances, its voice is important. Accordingly, I am of the view that it is appropriate that it should be regarded as a separate class.

33. In light of the findings made in paras. 30 and 32 above and in circumstances where the credit union has voted in favour of the proposed PIA, I find that the provisions of s. 115A(9)(g) have been compiled with in this case.

Warehousing
34. At the time the proposals for the PIA were formulated by the practitioner in this case, it was understood by the practitioner that warehousing of debt was not permitted under the 2012-2015 Acts. However, this view was rejected by the learned Circuit Court Judge who referred in her judgment to the decision of Baker J. in *Paula O'Callaghan* [2018] 1 IR 335 where Baker J. dismissed an argument that the statutory scheme of the 2012-2015 Acts precluded warehousing as an element of proposals for a PIA. For this purpose, Baker J considered the different ways in which s 102 of the 2012 Act envisages that a PIA can address secured debt. At para. 45 of her judgment in Paula O'Callaghan Baker J. said:

> *"I agree with the argument of KBC that the list contained in s. 102(6) is not intended to be exhaustive. The section is permissive and does not mandate the means by which a secured debt may be restructured, and neither s. 100 nor s. 102(6)(d) preclude a proposal by which a warehoused amount becomes payable after the expiration of the term of a PIA."*

35. During the course of the hearing before me, it was argued on behalf of the practitioner that Baker J. had subsequently taken a different approach in *Jacqueline Hayes* [2017] IEHC 657. In particular, it was submitted that, in para. 46 of her judgment in *Jacqueline Hayes,* Baker J. had stressed the difference in language between s. 102(6)(d) of the 2012 Act on the one hand and the provisions of s. 102(6)(e) on the other. In the case of the latter, no temporal limitation is placed on a proposal to fix an interest rate under a PIA. In the same paragraph, Baker J. stressed that this is quite different to s. 102(6)(d) (dealing with a deferral of secured debt payments). Section 102(6)(d) imposes a temporal limitation on proposals to defer payment of secured debt. In particular, it provides that any such deferral is not to "*exceed the duration of Personal Insolvency Arrangement"*. Counsel argued that, since warehousing involves deferral of part of a debt, s 102(6)(d) must therefore mean that warehousing is not permissible in the context of a PIA. Counsel argued that the fact that Baker J had adverted, in *Jacqueline Hayes*, to the provisions of s. 106(2)(d), must mean that she was adopting a different view to that previously taken by her of the same subsection in *Paula Callaghan*.

36. Notwithstanding the very able arguments of counsel for the practitioner, I do not believe that I can construe what was said by Baker J. in her judgement in *Jacqueline Hayes* as overruling or departing from the ratio of her previous decision in *Paula Callaghan*. If Baker J. had intended to overrule her previous decision in *Paula Callaghan*, I believe she would have made that clear in her judgment in *Jacqueline Hayes*. It is noteworthy that in her judgment in *Jacqueline Hayes*, she expressly refers to her previous decision in *Paula Callaghan* and does not call it into question in any way. Furthermore, Baker J, in *Laura Sweeney* [2018] IEHC 456, having cited her decision in *Paula Callaghan*, reiterated in para. 56 of her judgment that it may be appropriate in certain cases to split or warehouse part of a debt. In these circumstances, I believe that I must treat the decision of Baker J. in *Paula Callaghan* as authority for the proposition that proposals for a PIA which include a proposal to warehouse part of a mortgage debt are not per se contrary to the provisions of the 2012 – 2015 Acts. Given that the decision of Baker J. in *Paula Callaghan* is a relatively recent decision by a judge with unparalleled experience and expertise in personal insolvency matters, I do not believe that it would be appropriate for me to do anything other than to follow that decision. The decision of Clarke J (as he then was) in *Worldport Ireland Ltd. (in liquidation)* [2005] IEHC 189 makes this very clear. In that case, Clarke J. said at pp 7 – 8: -

> *"I have come to the view that it would not be appropriate . . . for me to revisit the issue so recently decided by Kearns J. . . . It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. . . . Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period In the absence of such . . . circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities . . ."*

37. In the course of the hearing before me, counsel for the practitioner did not identify that any of the additional circumstances discussed by Clarke J. in *Worldport* could be said to apply here. Accordingly, it would be quite wrong for me to revisit the approach taken by Baker J. in *Paula Callaghan*. Unless and until a different decision is given by the Court of Appeal or the Supreme Court, I believe that I should follow and apply the law in relation to warehousing as explained by Baker J. in *Paula Callaghan* and reiterated in *Laura Sweeney*.

38. I must therefore find that, there is no reason in principle why proposals for a PIA might not include a proposal for warehousing of part of a secured debt.

39. That is not to say that warehousing will be appropriate in any particular case. On the contrary, the decision in *Paula Callaghan* illustrates that, while warehousing is permissible in principle, it may not work in practice. The decision in *Paula Callaghan* demonstrates this very well. In that case, the secured indebtedness amounted to €285,647. The value of the principal private residence was agreed under s. 105 at €105,000. In the proposals for a PIA, it was proposed that there should be a debt write-off of €165,647 leaving a live mortgage balance of €120,000. KBC Bank had made a counterproposal to write off €15,000 and then to split the remaining mortgage debt of €270,000 into two moieties of €135,000 each. The first moiety was to be paid by instalments in the traditional way. KBC proposed that the second moiety would carry interest at 0%; that the security would not be enforceable until after the debtors had died which meant that the debtors would be permitted to occupy their principal private residence for the rest of their lives. I agree with the submission made by counsel for the practitioner in this case, that the warehousing proposal in *Paula Callaghan* was significantly more beneficial to the debtors there than the proposal made by PTSB here. Nonetheless, Baker J. refused to accept that the counterproposal was appropriate. At paras. 79-81 of her judgment, she said: -

> *"[79] However, the fact that a court will not require that a PIA would guarantee solvency into the future has the corollary that a court will equally not make assumptions regarding the likely financial or other circumstances of a debtor far into the future. In the present case whilst the counterproposal does make provision for the continued occupancy by the debtors of their principal private residence for their respective lives, it is predicated on assumptions and conjecture regarding the living arrangements of the debtors far into the unknown future to a time at the expiration of the mortgage term, when Mr. Callaghan will be 62 years of age and his wife close to that age.*
>
> *[80] In addition I am not satisfied that the reasonableness of the counterproposal is to be tested in the light of an assumption that the couple will wish to remain living in their present home for the rest of their lives, or even for the rest of their working lives. Many life events could mean that they will wish or need to live elsewhere.*
>
> *[81] It is crucial in this context that s. 90 of the 2012 Act precludes a debtor entering into more than one personal insolvency arrangement in his or her lifetime. This means that the legislation envisages an arrangement which will deal with all present insolvency of the debtors or at least the achieving of solvency within five years. While the counterproposal made by KBC may seem attractive and to some extent benevolent, it is capable of creating circumstances amounting to insolvency at the end of the mortgage term in approximately 23 years' time. Because a PIA is a once in a lifetime solution it would be wrong to test the reasonableness of a proposal in the light of a preferred solution or counterproposal that could on its terms result in insolvency at a future date. The discussion above with regard to speculative proposals is also relevant in regard to this proposition. A warehousing solution should on present or known figures offer a solution to indebtedness that is likely to be achieved. Neither of the debtors has the benefit of a pension which might provide a lump sum on retirement to deal with the warehoused amount. The repayment of the inactive [moiety] therefore is not predicated on any anticipated ability to pay in the future, and is entirely on the hazard. This results in unfairness [to the debtor] at a level which I consider material."*

40. Counsel for the practitioner in this case relied very strongly on these observations by Baker J. He submitted that the PTSB

counterproposal here is essentially predicated on a future sale at a time when Ms Parkin will be at an advanced age. This is because the warehoused amount of €97,785.00 will become due upon maturity (following the expiry of the proposed extension of the term of the PTSB mortgage loan to 312 months). While there is the possibility of a 30% loan-to-value write-down, this is not guaranteed. Thus, unless Ms. Parkin is in a position to pay €97,785.00 on maturity, she will be left with no alternative but to sell her home. By that stage, Ms. Parkin will be 71 years of age. While it is likely that her retirement age will be 68, and while it appears that she will be entitled to payment of a pension, counsel for the practitioner urged that the observations of Baker J. in *Paula Callaghan* (quoted in para. 39 above) apply with even greater force here given that the KBC proposal in that case at least gave the debtors security of tenure in their home for their lifetime. In contrast, in the present case, counsel submitted that Ms. Parkin would be facing a very significant liability in her old age, and would very likely have to sell her home in order to meet the liability that would crystallise at age 71. Counsel also submitted that the warehousing of part of the debt would effectively mean that Ms. Parkin would remain insolvent even after the termination of a PIA. In this regard, he drew attention to the observation of Baker J. in *Laura Sweeney*, where she said at para. 46: -

> *". . . .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".*

41. On the other hand, counsel for PTSB stressed that the observations of Baker J in *Paula Callaghan* suggest that she had in mind that a different conclusion might have been open, in that case, had the debtors there had the benefit of a pension arrangement which would have given rise to a lump sum payment on reaching retirement age. This is an issue that I consider further below when I address the arguments of the parties in relation to Ms Parkin's pension entitlements.

42. In light of the approach taken, on the facts, in *Paula Callaghan*, it is understandable that warehousing does not regularly feature in proposals for PIAs. The observations of Baker J. in that case (as quoted above) make very clear that even a relatively benign warehousing proposal may encounter difficulty for the reasons explained by Baker J. – namely that it is capable of creating circumstances amounting to insolvency at the end of the mortgage term. In this context, it is important to bear in mind that, between now and the end of the mortgage term, Ms Parkin will continue to have to incur the ordinary expenses of life. For example, money will inevitably be required from time to time for expenses such as medical and dental treatment and for the upkeep and maintenance of the family home; and relatively large sums may need to be spent when the roof springs a leak or the windows need to be replaced or the central heating irretrievably breaks down.

43. That is not to say that there may not be cases where warehousing may be appropriate on the facts. It will always depend on the particular facts of an individual case. In order to properly evaluate its potential applicability here it is necessary to consider the evidence in more detail and to address the underlying issue of affordability. I will therefore return to the issue in the concluding section of this judgment.

Affordability

44. In the course of the hearing before me, it was strongly urged by counsel for PTSB that, even if the practitioner was not obliged to incorporate the PTSB warehousing proposal into the terms of the PIA, the practitioner had an obligation to consider what was affordable for Ms. Parkin. PTSB makes the case that the means of Ms. Parkin permitted a greater recovery for PTSB than is proposed under the PIA. PTSB contended that the approach taken by the practitioner was highly conservative, and that the practitioner has wholly failed to justify why, under the proposals made by her, the mortgage debt is written down to market value notwithstanding the level of Ms Parkin's income. PTSB lays emphasis on the observation made by Baker J. in *Laura Sweeney* at para. 56 where she said: -

> *"The determination as to whether a mortgage debt is to be written down is to be made by reference to the affordability of payment"*

That observation must be seen in the context of s. 115A(9)(b)(ii) of the 2012 Act which makes it clear that the court must be satisfied that there is a reasonable prospect that confirmation of the proposed PIA will enable the creditors of the debtor to "*recover the debts due to them to the extent that the means of the debtor reasonably permit*."(emphasis added).

PTSB complains that, in circumstances where the practitioner proposes the maximum possible write-down, (i.e. a write-down to market value), the practitioner ought to be required to satisfy the court as to why a permanent write-down of debt should take place rather than a postponement of some of the debt pending a further payment in the future (i.e. warehousing). PTSB further submits that, in the present case, the evidence suggests the availability of additional and ascertainable income which has not been properly addressed by the practitioner. In addition, PTSB contended, in the course of the hearing before me, that the practitioner has failed to explain the rationale for the write-down of the mortgage debt to market value. PTSB highlights what it characterises as a bald averment made by the practitioner at para. 9 of her affidavit sworn on 18 May 2017 where she says: -

> *"I say and believe that the write-down is based on the current affordability of the Debtor in a fair and equitable treatment between the Creditors including both secured and unsecured Creditors in the personal insolvency arrangement proposal. Indeed, it is the case that there are few certainties in personal insolvency and bankruptcy and rather there be (sic) an arbitrary write-down wherein I would pick a figure I have grounded the restructure (and write-down) on the certainties of the PIA, being the agreed s. 105 valuation and the proven and accepted income and expenditure, and thus the agreed capacity".*

45. PTSB says that this passage is not easy to understand but that what it appears to suggest is that the write-down amount here was selected on the sole basis that the relevant figure was said to be one of the "*certainties of the PIA*" namely the agreed valuation under s. 105 (which represents the maximum permissible write-down under s.103). According to PTSB, it is familiar with similar averments by practitioners which invariably state that a write-down, often to current market value, has been determined on the basis of "*affordability*" with no other supporting detail being provided whatsoever. PTSB seeks to make the case that such "*bland averments*" are entirely inappropriate. As noted above, PTSB suggest that this issue has to be viewed against the background where, as Clarke J. acknowledged in *Re: McInerney Homes* [2011] IEHC 4 at para 3.10 that: -

> *". . . in assessing whether a scheme is fair or "unfairly prejudicial" the court must have regard to the secured status of . . . [secured] creditors and the fact that that enhanced status places those creditors in an advantageous position in any alternative scenario such as liquidation or receivership".*

46. PTSB also anchors its argument by reference to the manner in which s. 115A impinges on its constitutionally protected property rights. PTSB relies on the well-known passage in *Heaney v. Ireland* [1994] 3 IR 593 at p. 607 where Costello J. (as he then was) said: -

" . . .The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must: —

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible, and

(c) be such that their effects on rights are proportional to the objective . . ."

47. Against a background where (as the judgments of Baker J. in a number of cases make clear) s. 115A adversely affects the constitutionally protected property rights of secured creditors, PTSB submits that its rights should be impaired to the smallest extent possible by any proposed PIA. Thus, PTSB argues that the court should very carefully scrutinise the evidence as to affordability particularly in circumstances where the practitioner proposes to reduce the mortgage debt to the maximum extent permitted under s. 103 – namely to the agreed market value of the underlying security.

48. In order to address the case made by PTSB in relation to affordability, it is necessary to consider the evidence before the court in relation to this issue. As noted above, the affidavit evidence filed by the practitioner has been heavily criticised by PTSB. In addition to the principled criticisms outlined above, PTSB also makes a number of specific criticisms about (a) the failure of the proposals to take account of the full extent of the income which will be available to Ms Parkin after the PIA comes to an end; (b) the failure of the proposals to address the likely pension entitlements of Ms. Parkin; (c) the likelihood that her salary will increase over time; (d) the fact that Ms. Parkin's daughter will not be a dependent once she obtains her primary university degree; and (e) the manner in which the PIA makes no provision for any contributions at all from Mr. Parkin, the estranged husband of Ms. Parkin.

The evidence before the court

49. In light of these criticisms, it is necessary to carefully analyse the evidence before the court. While significant criticism has been made by PTSB of the affidavit evidence of the practitioner there is a significant level of detail relating to the means of the debtor contained in the proposals for the PIA and the accompanying appendices. Appendix 2 to the proposed PIA shows that, for the proposed six-year duration of the PIA, the entire of the net employment income of Ms. Parkin will be utilised. Her net income per month is €2,909.47. Out of this, the reasonable living expenses of Ms Parkin and her daughter will be met, €924.06 will be paid in respect of mortgage repayments to PTSB, €53.33 will be paid in years 1-5 in relation to Irish Language courses for Ms. Parkin's daughter (i.e. while she remains at secondary school), €26.25 will be paid in respect of local property tax each month and from year 6 onwards (until the daughter secures her degree in veterinary medicine) a sum of €549.91 per month will arise in respect of third level education costs. This figure of €549.91 is based upon the amount allowed by the official assignee in a bankruptcy for a child in third level education. Appendix 4 shows that the remaining balance will be applied in discharge of the fees of the practitioner over the six-year term of the PIA.

50. It is true that the terms of the proposed PIA might suggest that the employment income of Ms. Parkin will remain static at €2,909.47 net per month. Given Ms Parkin's employment with the HSE, this seems to me to be inherently unlikely. However, para. 10 of Part IV of the PIA makes clear that in the event that Ms. Parkin receives additional income in excess of the amount listed in Appendix 2, she will be required to contribute additional income in accordance with Clause 12 of the standard terms of the PIA. Similarly, if the debtor becomes entitled to a windfall at any time during the lifetime of the PIA, this will be dealt with in accordance with Clause 11 of the standard terms and Ms. Parkin will be required to introduce an amount not less than 50% of the net proceeds of any inheritance received during the term of the PIA. Thus, in the event that Ms. Parkin is entitled to increases in her employment income (whether by way of incremental increases in salary or increases awarded under public pay guidelines) which exceeds €100 per month, Ms. Parkin will be required to account to the practitioner for such payments and the creditors of Ms. Parkin (including PTSB) will benefit in accordance with paras. 11 and 12 of the standard terms.

51. Thus, insofar as PTSB complains about the lack of information in relation to likely salary increases available to Ms. Parkin, I do not believe that this is a significant concern. In making that observation, I stress that I do not wish in any way to suggest that it is appropriate for practitioners, in moving an application under s. 115A, to overlook expected salary increases. In my view, on an application of this kind, the proposals for the PIA should expressly address both known future salary increases and any likely increases. Furthermore, in any application to the court under s. 115A, I believe that the practitioner and the debtor should place full information before the court in relation to any entitlement to salary increases or pension entitlements (the latter issue is addressed in more detail below). It is plainly unsatisfactory that creditors or the court should be left in the dark in relation to such issues. The averment made by the practitioner in para. 18 of her affidavit sworn on 18 May 2017 is particularly unhelpful to the court in this context. There, the practitioner says: -

"I have discussed the Debtor's income and any increments that may be applicable in the coming years. I say that I am informed that the debtor is not in a position to confirm what, if any increments she will receive in the coming years. It is also worth noting that public service pay has in fact reduced over the last number of years".

52. In my view, this is patently unsatisfactory. It suggests that the issue was not adequately investigated by the practitioner. In my opinion, the practitioner should have set out exactly the debtor's entitlements to any increases in salary over the next number of years and in particular over the six-year lifetime of the proposed PIA. It is impossible to accept that Ms. Parkin (as a finance manager with the HSE) would not be in a position to obtain details from her employer as to any increases that are due to be paid to her over the next number of years or any increases that are likely to be made.

53. Nonetheless, I do not believe that the failure to provide details of any increases in salary is, of itself, fatal to the present application. As a public servant, any increases to which Ms. Parkin may be entitled in the future are likely to be extremely modest and, therefore, I do not believe that they would make a substantial difference to the overall affordability of any PIA proposals. Moreover, as set out above, any such increases will have to be accounted for in accordance with the standard terms of the PIA and therefore PTSB will obtain the benefit of them by a proportionately larger payment of dividend in respect of the unsecured element of the debt for the duration of the PIA.

54. The next point made by PTSB is that, quite apart from any increases in salary which may accrue to Ms. Parkin, the information contained in the appendices to the proposed PIA shows very clearly (so it is argued) that Ms. Parkin will be able to afford more by way of payments in the future than is currently provided for under the proposed PIA. In the written submissions delivered on behalf of PTSB the case is made, by reference to appendix 2 to the PIA, that Ms. Parkin will have a "*surplus*" of €358.77 per month. PTSB says that this equates to a surplus of €4,305.24 per annum. If Ms. Parkin worked until age 66 this would generate an overall "*surplus*" of €60,273.36 (this is calculated by multiplying the annual "*surplus*" by the period of fourteen years that would elapse between the end

of the PIA and Ms. Parkin's 66th birthday in 2038).

55. PTSB says that if Ms. Parkin worked until she was 68 (which will occur in 2040) she will have accumulated a "*surplus*" of €68,883.84. On this basis, PTSB argues that it is clear that Ms. Parkin can afford significantly higher payments than the figure of €924.06 which will be the monthly sum payable under the mortgage under the terms of the proposed PIA.

56. As noted above, the argument made by PTSB in this context is predicated upon appendix 2 to the PIA which shows that in year 6 of the PIA and in the first year after the PIA, Ms. Parkin will have a monthly "*surplus*" of €358.77 after payment of the "set costs", the mortgage repayment, the local property tax and college costs at €549.91. In reality, however, when one takes the fees of the practitioner into account together with the payment of the dividend to the unsecured creditors, the "*surplus*" will not arise in year 6 but will arise for the first time after the expiry of the 6-year period. It also has to be said that Ms Parkin would be doing very well if she can manage to keep her daughter's monthly college costs to €549.91.

57. In response to this part of the PTSB case, counsel for the practitioner stressed that the "*set costs*" of €1,506.06 are based on the Insolvency Service of Ireland ("*ISI*") reasonable living expenses. Counsel argued that a debtor who successfully completes a PIA has earned the right to return to some semblance of normal life and should not be confined to such living expenses once the PIA comes to an end.

58. However, PTSB submits that, in addition to the "*surplus*" of €358.77 per month, there would be a further "*surplus*" arising in the future in circumstances where the college costs allowed at €549.91 per month will not continue indefinitely. PTSB suggests that it is reasonable to take the view that they will not continue after Ms. Parkin's daughter reaches the age of 23 years. If that figure per month is factored into the equation, PTSB suggests that this will increase the overall surplus available to Ms. Parkin at age 66 to €146,059.32 or, were she to work until aged 68, this will increase by a further €21,908.32 to €167,867.64. PTSB makes the case that this is considerably higher than the sum of €97,785 which PTSB proposed should be warehoused and PTSB submits that, accordingly, Ms Parkin could well afford to pay them the warehoused amount or a significant part of it.

59. At first sight, this submission by PTSB appears to have significant force particularly in relation to the period after Ms. Parkin's daughter will be able to support herself. It is clear from the judgments of Baker J. that affordability is key in determining what is an appropriate write-down of secured debt. This was emphasised by her in *Laura Sweeney* at para. 56. If the PIA is approved, the result will be that, even if Ms. Parkin's net salary were to be frozen at €2,909.47 for the rest of her life, only €924.06 of that sum would have to be paid in mortgage costs every month leaving Ms. Parkin with a figure of almost €2,000 per month available to meet her ordinary living expenses and to cover the occasional emergency expense that arises from time to time in everyone's life. That might appear to be an overly generous margin but it has to be borne in mind that, out of that sum (or any enhanced sum in the event that Ms Parkin secures an increase in salary) her ordinary expenses of life will have to be discharged. The Guidelines issued by the ISI envisage that the reasonable living expenses of a single adult with a car will be €1,050.48 per month. That might appear to leave Ms Parkin with a very generous cushion even after her reasonable living expenses are taken into account. However, it must be borne in mind that those guidelines are intended to be applied for the duration of a bankruptcy, a PIA, or a debt settlement arrangement. They are not intended to be a measure of the expenses likely to be incurred over the course of a longer period and they are certainly not designed to apply for a lifetime. For example, they envisage an exceptionally modest sum of €0.97 per month for personal costs and an extremely modest sum of €31.34 per month for health. They are also based on very modest provision for contingencies and savings of no more than €43.38 per month. That figure for contingencies seems to me to be manifestly insufficient on a long term basis to deal with the costs every home owner incurs on a recurring basis in the upkeep and maintenance of property (even leaving aside the emergencies that occasionally arise requiring more substantial outlay such as roof repairs). Moreover, while the PTSB analysis has proceeded on the basis that Ms. Parkin's daughter will no longer be dependent after age 23, experience shows that parents continue to have to support children after that age and this is particularly so in the years where a child is trying to establish a new career or where, as sometimes happens, a bright student will remain in university at post-graduate level for a number of years after obtaining a primary degree. In those circumstances, I believe that PTSB is taking an overly optimistic approach in suggesting that Ms Parkin will no longer have to support her daughter once she reaches 23.

60. In addition, counsel for the practitioner submitted that the very fact that PTSB was proposing to warehouse a part of the debt for a lengthy period shows very clearly that PTSB itself recognises that the debt is not affordable in the period between now and maturity of the loan. Counsel also argued strongly that one must always keep in mind the bankruptcy comparison. He acknowledged that the figures given in appendix 5 to the PIA are incorrect. However, he said that even when one takes account of the true comparison between the outcome in a bankruptcy as against the outcome under the proposed PIA, PTSB will fare significantly better under the PIA. In the case of a bankruptcy, the total assets available would be €144,000 (made up of the value of Ms Parkin's home at €160,000 less 10% for realisation costs, 10% being the usual estimate allowed by the official assignee in bankruptcy). This would generate a dividend to the secured creditor of 43 cents in the euro. In contrast, under the terms of the PIA, the bank will recover not only the sum of €160,000 but also a further sum by way of dividend in respect of what would be treated as the unsecured element of its debts. It would also recover €14,483 in respect of the mortgage, €2 in respect of the very small loan account and €829 in respect of the credit card liabilities of Ms. Parkin. In that way, PTSB will recover a total of €175,314 which equates (on an overall basis) to a dividend of 52.5 cents. This dividend of 52.5 cents is on the basis that the total mortgage debt (€333,784) is used as the denominator rather than the entire PTSB debt of €343,785. In the context of the comparison with bankruptcy, it seems to me that, arguably, the mortgage debt is relevant as the denominator given that, in a bankruptcy, none of the unsecured debt would have any prospect of being paid. By my calculations, the relevant dividend would be 48 cents in the euro if one were simply to measure the secured indebtedness allowed under the PIA of €160,000 against the overall indebtedness to PTSB on foot of the mortgage account of €343,785. For the purposes of the bankruptcy comparison, however, it seems to me that the appropriate comparator is not 48 cents in the euro but 52.5 cent in the euro. This is almost 10 cents in the euro higher than the amount which PTSB would recover in the event of the bankruptcy of Ms. Parkin. In absolute terms, the most that PTSB would recover in a bankruptcy is €144,000 whereas, under the PIA, the bank will recover €175,314 in total. This means that the bank would recover €31,314 more under the proposed PIA than it would recover in a bankruptcy. This is a factor which must, in my view, also be borne in mind in considering the overall fairness of the proposals for a PIA here and in addressing the complaint made by PTSB in relation to the extent of the proposed write-down of the debt (which I address further in the concluding section of this judgment).

The position of Ms Parkin's husband

61. The next point made by PTSB is that there is no evidence that Ms. Parkin has taken any steps to require her estranged husband to make payments towards the mortgage or towards the maintenance of their daughter. PTSB accepts that the fact that there are no interlocking proceedings involving Mr. Parkin is not, of itself, fatal to the application. PTSB has very properly accepted that, in *JD* [2017] IEHC 119, Baker J. held that a debtor is not precluded from seeking relief under s. 115A where he or she does not own the entire interest in the principal private residence or is not the sole mortgagor. Nonetheless, PTSB makes the case that there has been a failure on the part of Ms. Parkin to properly engage with Mr. Parkin such that the proposal amounts to unfair prejudice in all of the circumstances. PTSB distinguishes the present case from *JD* on the basis that, in that case, efforts had been made by the debtor to

bring income or contribution on the part of her co-debtor into play. PTSB draws attention to what was said by Baker J. at para. 12 of her judgment in *JD* where she said:

> *"Ms. D. made application against her former husband, and a maintenance order in respect of the dependent children was made in the District Court … in the sum of €120 per fortnight, and in December, 2014 after he had ceased making payments she sought and obtained an attachment of earnings order in respect of the maintenance liability."*

62. In the same case Baker J., at para. 82, said that she could not ignore the fact that the debtor in that case had obtained an order for maintenance and an attachment of earnings order. Baker J. said that the debtor had taken "*all rational steps to secure the payment of maintenance on an ongoing basis*".

63. However, in my view, it is essential to understand why it was that the issue of maintenance payments arose in *JD*. In that case (in common with some other cases which have recently been heard by me) a secured creditor argued that the fact that the debtor was partly dependent on maintenance payments in order to fulfil her obligations under the PIA, meant that the PIA was not sustainable. Thus, in para. 80 of her judgment in *JD*, Baker J. records that the secured creditor, in that case, argued that, because there was no certainty that the maintenance payments would be honoured by the debtor's husband, there was insufficient evidence of the ability of the debtor to meet her obligations under the proposed PIA. In para. 81, Baker J. notes the point made by the creditor in that case that the debtor had previously fallen into arrears in her mortgage repayments after her former spouse ceased to pay maintenance and that there was a risk that this would happen again. It was in those circumstances that Baker J. made the observation (quoted above) in para. 82 of her judgment. Baker J was not laying down any general requirement that, in all cases involving an estranged spouse and co-debtor, the debtor is obliged to first make a claim against the co-debtor before seeking relief under the 2012 Act.

64. I do not see anything in *JD* to support the contention that a debtor in the position of Ms. Parkin must, if she is to seek approval of a proposed PIA, take steps against a co-debtor or seek to obtain maintenance payments for a child. Moreover, it is perfectly understandable why Ms. Parkin has not sought to pursue Mr. Parkin. It was his gambling debts that caused the insolvency of Ms. Parkin. His gambling addiction is such that he resorted to loan sharks which in turn led to the problems described by Ms Parkin in her affidavits (which I have sought to summarise in the introductory section of this judgment). He has now returned to the United Kingdom and, on the evidence available, there is nothing to suggest that he has reformed himself or that he would be a mark for a maintenance order.

65. In addition to raising the issue in relation to the non-pursuit of Mr. Parkin, PTSB has also suggested that the proposed PIA requires PTSB to "*upfront write off debt for a debtor not party to any proposed arrangement"* to quote from the email from PTSB to the practitioner of 3 November 2016 (which in turn is quoted in para. 93 of the written submissions delivered on behalf of PTSB). It was not clear to me at the hearing on 3 December 2018 that PTSB was persisting with this aspect of its case. It was not pressed at the hearing. In any event counsel for the practitioner argued that there is nothing in the 2012 Act that will prevent PTSB from proceeding against Mr. Parkin, should they choose to do so. Counsel relied in this regard on s. 116 of the 2012 Act. S. 116 deals with the effect of a PIA once it has been registered in the register of PIAs maintained by the ISI. S. 116(2) makes clear that the PIA binds the debtor and also, "*in respect of every specified debt",* the creditor concerned. S. 2(1) of the 2012 Act explains what is meant by a "*specified debt*". There, it is defined in the following terms: -

> *"'specified debt", in relation to a protective certificate, means a debt that is specified in that protective certificate as being subject to that certificate;"*

66. The only protective certificate that was issued in this case was the certificate issued in respect of Ms. Parkin. There was never any application made in relation to Mr. Parkin. In those circumstances, and having regard to the requirement to interpret the 2012 Act in a manner that is consistent with the Constitution, it seems to me to be clear that the effect of s. 116(2) of the 2012 Act is that the creditor (here PTSB) would only be bound by the terms of the PIA insofar as the indebtedness of Ms. Parkin is concerned. S. 116(2) would not appear to me to have any impact on the indebtedness owed by Mr. Parkin. Therefore, the PIA cannot have had the effect of reducing Mr. Parkin's liability to the bank.

67. Furthermore, s. 116(6) makes very clear that the PIA will not in any way impede the ability of PTSB to pursue Mr. Parkin. In this context, I should explain that under s. 116(3), once a PIA is in effect, a creditor bound by it is prevented from taking any legal proceedings or enforcement steps against the debtor. Likewise, under s. 116(4) the creditor is prevented from taking bankruptcy proceedings against the debtor. However, s. 116(6) provides that neither subs. (3) nor (4) will operate in respect of a joint debtor. S. 116 (6) provides as follows: -

> *Nothing in subsections (3) and (4) shall operate to prevent a creditor taking the actions referred to in that subsection as respects a person who has jointly contracted with the debtor or is jointly liable with the debtor to the creditor and that other person may sue or be sued in respect of the contract without joining the debtor".*

68. In light of these statutory provisions, I can see no reason why PTSB would not be entitled to pursue a claim against Mr. Parkin, including a claim to enforce the mortgage against him. It may well transpire that if such steps are taken by PTSB, there will be an issue as to the extent of the beneficial interest of Mr. Parkin in the principal private residence. That is not an issue on which I can or should express any view at this stage. What is clear is that, even if an order is made affirming the order of the Circuit Court, PTSB will not be prevented from pursuing Mr Parkin in respect of his ongoing indebtedness to it and will not be prevented from taking enforcement proceedings in respect of any interest he may have in the family home. It will be a matter for the court in any such proceedings to determine what relief might appropriately be granted and I can neither prejudge nor predict the outcome of any such proceedings.

Ms Parkin's pension entitlements

69. The next issue raised by PTSB relates to the pension entitlements of Ms. Parkin. PTSB makes the very valid point that it is improbable that Ms. Parkin, as an employee of the HSE does not have valuable pension entitlements. PTSB draws attention to the way in which the pay slips exhibited by Ms. Parkin to her affidavit (at Exhibit "LP 1") include deductions for "Supern-1" which would appear to relate to superannuation. In addition, at p. 4 of the Prescribed Financial Statement ("PFS") reference is made to deductions for "*mandatory pension*" as well as income tax.

70. PTSB complains that in the Circuit Court, the learned Circuit Court Judge took the view that Ms. Parkins' pension is: -

> *"For the purpose of providing her with an income on her retirement".*

71. PTSB submits that the Circuit Court was in error in taking that approach. In the first place, PTSB suggests that, taken to its extreme, any insolvent debtor could assert that any source of income is intended for one specific purpose only and so should not be taken into account. PTSB contends that insolvency: -

> *"..imposes particular responsibilities which cannot be skipped over in this manner".*

72. Secondly, PTSB suggests that, after retirement, it would appear that Ms. Parkin will have the benefit of both the old age pension and a separate pension associated with her HSE employment. PTSB submits that the regular old age pension adequately addresses the reasonable living expense of a single person.

73. Notwithstanding the provisions of s. 51 of the 2012 Act (dealt with in more detail below), PTSB argues that it is appropriate to have regard to pension entitlements particularly for the purposes of considering whether a debtor could afford to discharge a warehouse balance in the future. PTSB also observe that, in *Paula Callaghan*, Baker J. appears to have accepted the potential relevance, for warehousing purposes, of a pension payable in the future. As noted previously, at para. 81 of her judgment in that case, Baker J. said: -

> *"Neither of the debtors has the benefit of a pension which might provide a lump sum on retirement to deal with the warehoused amount. The repayment of the inactive account therefore is not predicated on any anticipated ability to pay in the future, and is entirely on the hazard."*

74. PTSB argue (again on the basis of what was said by Baker J. in para. 81 of her judgment in *Paula Callaghan*) that a pension should not be regarded as some hypothetical source of income in the future. PTSB also strongly complains that neither Ms. Parkin nor the practitioner placed any details of Ms. Parkin's pension entitlements before the court. PTSB argues that since Ms. Parkin has peculiar knowledge of her own pension rights, and PTSB has no such knowledge, it was incumbent on Ms. Parkin to place appropriate evidence before the court in relation to her pension entitlements.

75. In response, counsel for the practitioner strenuously argued that the approach proposed by PTSB is contrary to s. 51 of the 2012 Act. He also argued that s. 51 is consistent with the approach taken under the Bankruptcy Act 1988 where a pension will only be treated as an asset of a bankrupt if it falls into payment within a period of five years from the date of adjudication.

76. In these circumstances, it is necessary to consider the provisions of section 51. Insofar as relevant, s. 51(1) provides as follows:-

> *"(1) Subject to subsection (4), in relation to … Personal Insolvency Arrangements, where a debtor has an interest in or an entitlement under a relevant pension arrangement, such interest or entitlement of the debtor shall not be treated as an asset of the debtor unless subsection (2) applies."* (emphasis added)

77. S. 51 thus provides that, where a debtor has an interest in or an entitlement under a relevant pension arrangement, it is not to be treated as an asset of the debtor unless s. 51(2) applies (dealt with further below). This is stated to be the case "in relation to" a PIA. Those words "in relation to" appear, on their face, to be capable of wide application. That was the view of the Supreme Court in an arbitration context in Gulliver v Brady [2003] IESC 68. Murphy J took a similar view of the somewhat similar words "*in connection with"* in the context of s. 60 of the Companies Act 1963 in *Eccles Hall v Bank of Nova Scotia* (High Court, unreported, 3 February, 1995).

78. "*A relevant pension arrangement*" for this purpose is defined in s. 2(1) of the 2012 Act as including a range of pension entitlements such as retirement benefit schemes approved by the Revenue Commissioners, PRSA contracts, a qualifying overseas pension plan, a public service pension scheme, a statutory pension scheme other than a public service scheme and also such other pension arrangements as may be prescribed by the Minister for Justice and Equality in consultation with the Ministers for Finance, Social Protection and Public Expenditure and Reform.

79. It will be seen, therefore, that a pension scheme applicable to an employee of the HSE will readily fall within one or other of the schemes outlined in section 2(1). Section 51(1) will thus apply to Ms. Parkin's pension entitlements.

80. It is next necessary to consider s. 51(2) which is in the following terms:-

> *"(2) Where this section applies and a debtor has an interest in or entitlement under a relevant pension arrangement which would, if the debtor performed an act or exercised an option, cause that debtor to receive from or at the request of the person administering that relevant pension arrangement—*
>
> > *(a) an income, or*
> >
> > *(b) an amount of money other than income,*
> >
> > *in accordance with the relevant provisions of the Taxes Consolidation Act 1997, that debtor shall be considered as being in receipt of such income or amount of money."*

81. It is clear that s. 51(2) applies where the debtor is entitled to some form of immediate access to a pension entitlement either upon exercising an option or taking some other step.

82. Section 51(2) must be read in conjunction with s. 51(3) which identifies the relevant time range during which s. 51(2) will apply. I do not believe that it is necessary to set out the text of that sub-section in full. In my view, the effect of s. 51(3) is that s. 51(2) will apply where the debtor:-

> (a) is entitled to exercise an option or take some other step to obtain access to pension payments at the date of the making of the application for a protective certificate;
>
> (b) the same applies where the entitlement arose before the date of that application; and
>
> (c) section 51(2) will also apply where the entitlement arises within seven years and six months from the date of making an application for a protective certificate in relation to a PIA.

83. For completeness, it should be noted that under s. 51(4), there is, notwithstanding the provisions of s. 51(1)(3), an obligation on

a debtor, when making an application for a protective certificate, to disclose in his or her Prescribed Financial Statement ("PFS") any relevant pension arrangements.

84. The question which arises is whether, having regard to the provisions of s. 51, there is any scope to take the view that, when assessing the issue of affordability (and the related question of the extent of a write down of secured debt), regard can be had to future pension entitlements (i.e. entitlements that will arise more than seven years and six months from the date of application for the protective certificate). I have not been referred to any authority directly in point. As noted above, PTSB has referred to an observation by Baker J. in *Paula Callaghan*, but that observation does not address this specific issue. Moreover, the judgment in that case does not address the effect of s.51 of the 2012 Act. There was no need for Baker J to do so because, in that case, the debtors did not have an entitlement to a private or public service pension at any point.

85. There is also a brief reference to pension payments in my judgment in *Richard Featherston* [2018] IEHC 683. Ironically, in that case, counsel for the practitioner there suggested that one aspect of future means that might potentially be brought into account is where the debtor has a pension provision which will be payable at retirement age. In that case, as para. 51 of my judgment records, counsel distinguished such an asset (which was relatively certain) from hypothetical receipts at some stage in the future which were entirely uncertain. However, as in the case of *Paula Callaghan*, s. 51 was not addressed in the course of argument in that case and was not considered by me in my judgment.

86. In the written submissions delivered on behalf of PTSB, the case is made that s. 51 should be read as confined to the period of the PIA itself. PTSB submits that, for the purposes of assessing affordability, s. 51 was not intended to exclude pension payments payable in the future long after the PIA has come to an end. PTSB argues that s. 51 does not affect the issue as to whether discharging a warehouse balance in the future would be affordable. Its case is that a future pension pot is only excluded in relation to payments which are to be made during the course of the PIA. I have to say that, while this argument was advanced by PTSB, it was not supported by any detailed analysis of the Acts or of the provisions of s 51. Nor did it address how those provisions should be construed against the backdrop of the scheme of the Acts as a whole. It is crucially important to consider the Act as a whole. For example, it would be necessary to hear submissions in relation to the interplay between s. 51 on the one hand and s 121 on the other. Under s 121, the court is given power in certain circumstances, to reverse excessive payments made into a pension fund in the three year period prior to the grant of a protective certificate. At first sight, it is difficult to see why that provision would have been considered to be necessary if proposals for a PIA were required to take into account the value of future pension payments payable long after the term of the PIA.

87. PTSB also drew attention to the obligation under s. 51(4) requiring a debtor to disclose, in his or her PFS, any pension entitlements and argued that this must mean that there is no blanket prohibition on taking such entitlements into consideration on the issue of future affordability (i.e. after expiry of the PIA and after the expiry of the periods prescribed by s. 51(3)). At first blush, it may appear curious that such a provision should exist if pension entitlements payable outside the time periods prescribed by s 51(3) are not to be treated as assets of a debtor. Nonetheless, I do not believe that much reliance can be placed on s 51(4). On reflection, it is understandable that a debtor should be required to disclose pension arrangements in the PFS. This is important so that, for example, an assessment can be made as to whether the arrangements in question could be said to fall within the ambit of a "*relevant pension arrangement*" as defined. It is also important to bear in mind that not all pension arrangements are excluded by s 51(1). It is accordingly necessary that all pension arrangements should be disclosed so that appropriate enquiries can be made as to whether any of the provisions of s 51(2) could be said to apply.

88. Furthermore, although counsel for the practitioner at the hearing argued strongly that the language of s. 51(1) contained a clear prohibition on any attempt to treat a pension entitlement as an asset of a debtor (unless s 51(2) applied), there was no significant engagement with that argument on the part of PTSB. This causes me concern particularly in circumstances where, as noted above, the words "*in relation to*" as used in s. 51(1) are on their face of wide import. On their face, those words tend to suggest that, even in the context of the affordability requirement contained in s. 115A(9)(b)(ii), Ms Parkin's future pension entitlements are not to be treated as her assets. After all, the question of affordability is an issue that must be considered in relation to a PIA.

89. On the basis of the limited arguments heard by me, I have come to the conclusion that the submissions of the practitioner are correct and that, on the basis of the language of s 51(1), a pension arrangement is excluded from the court's consideration under s 115A unless s 51(2) applies. Given Ms Parkin's age, there is no basis on which s 51(2) could be said to apply here. In my view, if a different view is to be taken, it would be necessary to have more extensive and detailed argument addressed to this issue than I have heard in this case. I wish to make it very clear that I do not rule out the prospect that the court could be persuaded to take a different view. There may well be cogent arguments that could be made. If no regard whatever can be had to pension entitlements payable in the future (i.e. outside the period prescribed by s. 51(3)), there could, conceivably, be grotesque consequences in a particular case. For example, it would mean that no regard could be had to a very large pension pot (for example, one predicted to reach, by retirement age, the maximum value permitted for tax purposes by Revenue).

90. The proper interpretation of s 51 is therefore a question of very significant importance that, in my view, calls for more comprehensive consideration and debate than I have heard in this case. All that I can say at this point is that I have not been persuaded on the basis of the arguments made by PTSB in this case that I am entitled to have regard, in assessing affordability, to Ms Parkin's pension entitlements. On the face of it, s. 51(1) appears to me to have that effect.

The Constitutional dimension

91. As noted above, PTSB has emphasised the constitutional dimension. PTSB contends that the write-down of the secured debt to the current market value of the principal residence is draconian. As noted above, PTSB submits that, consistent with *Heaney v. Ireland*, the court must consider whether the write-down impairs the rights of PTSB as little as possible. It is also submitted that the court must consider whether an alternative exists which is less intrusive.

92. However, it is important to bear in mind that the proportionality test formulated by Costello J (as he then was) in *Heaney* arose in the context of a challenge to the constitutionality of a legislative provision. There is no such challenge here. I must also bear in mind that the Oireachtas in enacting the 2012 Act has expressly invoked the interests of the common good. This is clear from the long title to the 2012 Act and the express objectives set out in the recitals. The recitals make clear that the Oireachtas considers that it is in the interest of the common good that:

> (a) the difficulties experienced by debtors as a consequence of insolvency should be ameliorated. It is clear from the recitals that the amelioration of such difficulties is regarded as being important for the purpose of minimising the adverse consequences of significant indebtedness for economic activity in the State.
>
> (b) The needs of creditors to recover debts due to them by insolvent debtors is also recognised in the recitals to be in

> the interests of the common good. This is expressly stated to be subject to "the extent that the means of those debtors' reasonably permits" which seems to me to show very clearly that the Oireachtas was attempting to balance potentially conflicting rights in a proportionate way.
>
> (c) The recitals also acknowledge the necessity to enable insolvent debtors to resolve their indebtedness (including by obtaining a determination that they stand discharged from their debts in certain circumstances) in an orderly and rational manner without recourse to bankruptcy. Again, the objective of such measures is to facilitate the active participation of persons in economic activity in the State.

93. Insofar as s. 115A is concerned, it was inserted by the 2015 Act. The 2015 Act does not contain any long title. However, since it is inserting new provisions into the 2012 Act, it must follow that the Oireachtas, in enacting the 2015 Act, believed that it was still acting with a view to promoting the common good objectives expressly invoked in the 2012 Act. The underlying purpose of s. 115A was identified as follows by Baker J. in JD at para. 32:

> *"... the amending legislation by which was added s. 115A, affords the far-reaching power of the court to approve a PIA notwithstanding its rejection by creditors. The public interest is in is the maintenance of a debtor's occupation and ownership of a principal private residence. That social and common good is concretely referable to the continued occupation by a debtor of a principal private residence, and the power contained in the section is limited by the fact that only those persons who had a relevant debt secured over his or her principal private residence which was in arrears as defined by s. 115A(18) on 1st January, 2015 could avail of this exceptional remedy. The statutory provision then must be seen as a limited protection of persons whose mortgage payments on their principal private residence fell into arrears at the height of the financial crash. Absent a 'relevant debt', a debtor may not seek to engage the jurisdiction of the court to overrule the result of a creditors' meeting …"*

94. In para. 34 of her judgment, Baker J. clarified that s. 115A does not have, as its focus, the continued ownership or a debtor of the family home, but is concerned with the continued occupation of the home. She also said in the same paragraph:

> *"… the section is concerned with enabling a debtor not to dispose of an interest in a property, rather than positively stated as enabling the debtor to continue to own the property. Thus, the perceived public interest in the continued occupation of a premises is not a focus on the acquisition of a capital asset, but rather the preservation of a right to live in a premises."*

95. Those observations of Baker J. have particular resonance in present circumstances where homelessness has become all too prevalent.

96. In circumstances where the Oireachtas, in enacting the 2012-2015 Acts, was acting in the interests of the common good, and in circumstances where the Oireachtas has also sought to balance the interests of the common good against the rights of creditors, I do not believe that it would be appropriate for the court (in the absence of a constitutional challenge to the provisions of the Acts) to add some new test to s. 115A which is not there already. In this context s. 115A already contains very significant statutory checks and balances to ensure that the interests of creditors are appropriately considered in any application under s. 115A. Thus, for example the court is required under s. 115A (9)(b) (ii) to be satisfied that there is a reasonable prospect that confirmation of the proposed PIA will "*enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit".* In addition, the court is not permitted to make an order under s. 115A unless it is satisfied (as required by s. 115A (9)(e)(f)) that the proposed PIA is fair and equitable in relation to each class of creditors that has rejected the proposals and the court must also be satisfied that the arrangement is not unfairly prejudicial to the interests of any interested party (which would, of course, include the creditors).

97. Furthermore, save in cases involving a single class of creditors, the court is required by s. 115A (9)(g) to be satisfied that at least one class of creditors has accepted the arrangement. This is a very important provision because it provides a measure of reassurance to the court that at least one class of creditors regarded the arrangement as commercially acceptable.

98. In addition, as Baker J. has already highlighted in *JD*, the section only applies to a very limited class of debtor – namely those debtors who were in arrears with payments on a home loan mortgage as of 1st January, 2015 (or who had been in arrears prior to that date but had entered into an alternative repayment arrangement with the secured creditor concerned). As Baker J. explained, this is clearly intended to cover debtors who fell into arrears at the height of the financial crash.

99. It therefore seems to me that, when considering an application under s. 115A, the court is confined to a consideration of the specific provisions of s. 115A which include, within them, a number of important safeguards for the protection of creditors including an overall requirement of fairness, a prohibition on unfair prejudice to any individual creditor, and also a requirement that the claims of creditors should be met to the extent that a debtor's means permit. Of course, as the decisions of Baker J. make clear, the court must always bear in mind that s. 115A represents a significant intrusion into the property rights of creditors and that, in those circumstances, the court must be careful, on an application under s. 115A, to ensure that all of its provisions have been appropriately complied with. The court has no power to dis-apply any of the provisions of s. 115A.

Conclusions

100. I have already set out my conclusions in relation to a number of the issues which were debated in the course of the hearing, namely (a) the treatment of the credit union as a separate class of creditor; (b) the position of Mr Parkin as a joint and several debtor; (c) Ms Parkin's pension entitlements; and (d) the *Heaney v Ireland* argument. I set out, below, my conclusions in relation to the balance of the issues that arise.

101. As noted above, PTSB makes complaint in relation to the extent of the write-down of the secured debt to the current market value of the principal private residence of the debtor and also strongly argues that Ms Parkin's circumstances show that she can afford to pay more than the amounts contemplated under the proposed PIA. In addition, PTSB contends that warehousing is appropriate here given Ms Parkin's expected future means especially after her daughter moves from college to employment.

Conclusion on warehousing

102. I deal, in more detail below, with the issues that arise in relation to the write-down of the secured debt. In so far as the warehousing issue is concerned, I have come to the conclusion that warehousing would not be appropriate in this case. I have formed that view for a number of reasons. In particular, I am concerned that the form of warehousing proposed by PTSB here envisages a very large debt crystallising at Ms Parkin's retirement age. I believe that counsel for the practitioner is correct in his submission that, as in the *Paula Callaghan* case, this has the capacity to result in Ms Parkin's insolvency as of the date of her retirement. That seems

to me to undermine a very important goal of the 2012-2015 Acts namely the objective to resolve indebtedness and restore a debtor to solvency. It would also put Ms Parkin's ability to remain in her home in serious jeopardy.

103. I am, of course, mindful of all of the submissions which have been made in relation to Ms Parkin's means (which I accept are relevant in a warehousing context). However, for reasons which I address further below, I am concerned that, in the course of the proceedings in the Circuit Court, neither the practitioner nor Ms Parkin had adequate notice of the extent of the case now made by PTSB in relation to the issue of Ms Parkin's means.

104. I have also come to the conclusion that PTSB, in the detailed calculations set out in its written submissions in this court, has failed to take account of the fact that the "surplus" (which it is suggested is likely to arise in the future) is based on the assumption that everything above the ISI reasonable living expenses can be treated as surplus to Ms Parkin's needs. In my view, it is a fallacy to suggest that the ISI reasonable living expenses can be treated as a reliable indicator of the expenses that an adult is likely to incur over the course of a lifetime. As explained in para. 59 above, those guidelines are designed to address the position of a debtor over the course of a limited time period. They do not address the more extensive lifetime expenses that arise over longer periods in the life of an adult. Thus, the approach advocated by PTSB fails to take account of expense items such as the examples cited in paras. 42 and 59 above.

105. Nor does the approach suggested by PTSB pay sufficient attention to the uncertainties that inevitably arise when seeking to predict what may happen in the future. As Baker J emphasised in *Paula Callaghan*, a warehousing solution would only be appropriate where the court can be satisfied that there is sound evidence available that it is likely to be achieved.

106. I have therefore come to the conclusion that, in this particular case, warehousing would not be appropriate. I have also come to the conclusion that, in the circumstances, the practitioner was justified in ruling out a warehousing proposal (even though the practitioner was mistaken in thinking that any form of warehousing was impermissible under the Acts).

The proposed write down

107. In the context of the write-down, PTSB makes the point that, in common with many other cases, too little detail is provided by the practitioner regarding Ms Parkin's future means and expenditure. I share that concern. Based on my experience to date in dealing with these case, I am of the view that, too often, much of the affidavit evidence is in standard form and does not concentrate (as it should) on the individual circumstances of the debtor. PTSB refers in this context to para. 9 of the practitioner's affidavit sworn on 18th May, 2017 which I have quoted in para. 44 above.

108. I agree with the observation made in para. 49 of PTSB's written submissions where they say that this passage is not easy to understand. If anything, that observation is an understatement. With due respect to the practitioner, para. 9 is entirely lacking in clarity. Regrettably, it is in similar form to averments which I have seen in several other cases. It appears to proceed on the basis that any write down to a figure greater than market value is, in some unspecified way, arbitrary or uncertain. In my view, that is based on a mistaken understanding of the legal position. As Baker J explained in *Laura Sweeney*, at para. 54, the appropriate capital mortgage figure is to be assessed in the light of the repayment capacity of the debtor. In the same case, at para. 56, Baker J made clear that a write-down of a mortgage debt to market value is not mandated by the Acts and that the extent of any write-down is to be measured by reference to the affordability of payment. There is nothing arbitrary or uncertain involved in working out, by reference to a debtor's net income and recurring and expected expenses (including an appropriate allowance for contingencies), the level of monthly mortgage payment which that debtor can reasonably afford. Once that figure is identified, it should be a relatively straightforward exercise to assess the capital sum which can be paid over the term of the mortgage and this, in turn, will provide a reliable basis on which to calculate the extent of any write-down. Thus, in the present case, Ms Parkin's net monthly income provided the base line against which the relevant calculation can be made.

109. I also agree with PTSB that there can be no question of any automatic write-down of a mortgage debt to the value of the underlying security. Section 102(2) makes clear that the value of the security is a "floor" beneath which the proposals must not go. It provides that, where a proposed PIA envisages the retention by a secured creditor of security and also a reduction in the principal sum due in respect of the secured debt, then, in the absence of agreement on the part of the secured creditor, the principal sum cannot be reduced below the value of the security determined in accordance with s. 105. That is an extremely important protection for secured creditors and is undoubtedly informed by respect for the property rights of such creditors.

110. Nor is s.102(2) intended to be a ceiling. As the judgments of Baker J make clear, the extent of any write down of secured debt is related to affordability. If one can predict that, on the conclusion of a PIA, the debtor will have sufficient means to continue to make significant mortgage repayments to a level beyond the current value of the secured property, it is difficult to see that it could be appropriate to write down the quantum of the secured debt to the current value of the property. It is important that practitioners should not use the s. 105 value as some unofficial rule of thumb that can be applied in all cases without a proper analysis of a debtor's means.

111. Counsel for the practitioner rejected the suggestion that the proposed write-down was the most draconian outcome for PTSB here. He emphasised that, as Appendix 6 to the proposal clearly shows, bankruptcy would represent a worse outcome. In a bankruptcy, the costs of the forced sale would reduce the net receipts from the secured property to €144,000. He also said that, in reality, PTSB is no more than an unsecured creditor in relation to the balance over and above the current market value. This is for the very simple reason that if there was a forced sale of the property now, the most that PTSB could in fact recover is the market value (less the costs of sale). Even if there was no bankruptcy and PTSB were to take proceedings to enforce its mortgage over the property, it would ultimately receive less than market value given the costs of such proceedings and the costs of sale.

112. Counsel for the practitioner also stressed that, under Clause 37 of the PIA, PTSB will remain protected in the event of a sale of the home in the future at a value greater than €160,000. Clause 37 essentially provides that a secured creditor is entitled to a clawback in the event that the secured property is sold within twenty years from the date the PIA comes into effect for an amount greater than the reduced principal sum (written down pursuant to the PIA). The secured creditor will get the benefit of an increase in value notwithstanding that, in the meantime, the secured debt has been written down to the market value of the property at the time of the PIA.

113. In my view, the arguments that have been made by the practitioner are more relevant to the issue of fairness and unfair prejudice than to the issue of the write down. On the other hand, as explained in paras. 103-104 above, the arguments that have been advanced on behalf of PTSB are based on the mistaken premise that Ms Parkin will have substantial surplus income after her daughter finishes college. PTSB has failed to appreciate that the ISI reasonable living expenses are not an appropriate measure of living costs on a long term basis. PTSB also failed to appreciate that recurring expenses must also include an allowance for contingencies. I accept that it may not be possible to scientifically assess what should be allowed for contingencies. On the other

hand, saving or setting aside an amount on a monthly basis to provide for larger expense items that may arise in the future is a normal feature of life and I do not believe that it should give rise to any significant difficulty, in practice, in estimating what would be reasonable. What is clear is that the figure for savings and contingencies measured by the ISI would not be appropriate on a long term basis.

114. I recognise and fully understand that PTSB feels aggrieved that the affidavits filed on behalf of the practitioner and Ms Parkin in the course of the Circuit Court proceedings could have provided more detail about Ms Parkin's likely income and expenditure in the future. Nonetheless, I have come to the conclusion, with some hesitation, that there is just about enough evidence available in the terms of the PIA itself to allow the court to extrapolate that Ms Parkin is unlikely to be in a position to afford a larger monthly mortgage payment and to accordingly conclude that the proposed write-down is not excessive.

115. In expressing this view, I wish to make it very clear that, in future cases, it will be important that practitioners should not rely on general or template averments and should instead provide clear evidence as to how the write-down has been calculated. That is likely to require a practitioner to carry out an exercise of the kind suggested in para. 108 above.

116. In arriving at my conclusion on this issue, I am also concerned that the practitioner and Ms Parkin may not have properly understood, in advance of the hearing in the Circuit Court, the extent to which PTSB was exercised about the nature of the evidence as to her means. Certainly, the foundation for the argument made on behalf of PTSB at the hearing before me was not comprehensively laid down in the materials which PTSB put in evidence in the Circuit Court.

117. In this context, while I am very definitely of the view that the practitioner, in a case of this kind, has the obligation to demonstrate that a proposed write-down of secured debt is objectively justifiable, I have come to the conclusion that it would be inappropriate to hold that the practitioner has failed to discharge that obligation in this case.

118. It seems to me that, in the notice of objection filed on behalf of PTSB in the Circuit Court on 9th December, 2016, the focus of the objections related, not to the write-down of the debt, but to the alleged failure to address the warehousing proposal made by PTSB. This is clear from a consideration of paragraphs 3 and 4 of the notice of objection. This is reinforced by a consideration of the grounding affidavit of Terence Smith. The warehousing proposal made by PTSB is the subject of paragraphs 12-18 of that affidavit (which is the longest individual section of the affidavit).

119. It is true that, in paragraph 6 of the notice of objection, the write-down of the debt is signalled as an issue in the context of the fairness of the proposed PIA. However, the issue is not addressed in Mr Smith's affidavit in the way in which the issue has been canvassed in this court. There are 25 paragraphs in that affidavit. As noted above, paras. 12-18 deal with warehousing. Paras. 7-9 deal with the creditor class issue; paras. 5-6 deal with the timing of PTSB's notice of objection; and paras. 19-10 dealt with Ms Parkin's employment. The write-down was addressed in paras. 10-11 but, as explained in paras. 121-122 below, the objection was focused on a contention that the market value was out of date, not on a failure to show that Ms Parkin did not have the means to afford any lesser write-down.

120. Paragraph 7 of the notice of objection (which also addresses the question of means) concentrates on the joint borrowings issue and does not contain any hint of the argument now so strongly and comprehensively made in this court in relation to the alleged failure of the practitioner to address, in a meaningful way, Ms Parkins means in the period after the termination of the PIA.

121. In the affidavit of Terence Smith, sworn subsequently in March 2017, the write down is dealt with in two paragraphs (namely paragraphs 10-11). Crucially, the objection is framed in the following terms in paragraph 11: -

> *"While it is not apparent that any evident justification has been furnished for a write-down in this quantum, the reason for choosing the figure would appear that the PIP proposed that the mortgage be written down to the current negative equity value of €160,000. The valuation of the security was agreed with the objecting creditor. Given recent developments in the property market in Dublin, it is likely that this sum is very conservative and a valuation undertaken today, would probably exceed this sum. Furthermore, the Rejected Arrangement envisages this upfront write-down, unfairly prejudices the Objecting Creditor and is unfair and inequitable, in circumstances where the write-down contained therein, would now have the effect that the live balance leftover is likely to be less than the current market value for the property, given the recent uplift in values. This would be particularly unfairly prejudicial to the Objecting Creditor and I am advised that this provision may be contrary to the legislation, in particular Section 103 of the Act".*

122. It will be observed that para. 11 is focused not on a principled objection to the write-down or on a failure of the practitioner to justify the write-down, but instead is focused on a contention that property prices have risen since the valuation of the security was agreed between the practitioner and PTSB. In my view, that does not signal in any way the contentions now made by PTSB in the course of the hearing before me. In fact, when one reads paragraphs 10-11 in conjunction with paragraph 12 and the following paragraphs of the affidavit, it would appear that PTSB was linking the argument in relation to the write-down with the case it made that warehousing was the appropriate course to take.

123. My concern is that, when the notice of objection is read with the affidavit of Terence Smith, the practitioner in the course of the Circuit Court proceedings would have had no proper understanding of the nature of the case that PTSB subsequently made. Had such a case been signalled appropriately in the notice of objection and grounding affidavit of Mr. Smith, the practitioner would then have been in a position to place more extensive evidence before the Circuit Court to demonstrate more clearly that the write-down of the secured debt to current market value was appropriate in Ms Parkin's circumstances. On the basis of Mr. Smith's affidavit, the practitioner would have been led to believe that the focus of the objection in relation to the write-down was the unsubstantiated suggestion made in paragraph 11 of Mr. Smith's affidavit that recent developments in the property market in Dublin meant that it was likely that the valuation of €160,000 represented an undervalue as of March, 2017. Given the very general and unsubstantiated way in which this was put forward by PTSB (without any reference to the specific market in the Ballyfermot area), it is unsurprising that the practitioner did not respond to it in detail. More importantly, the practitioner is likely to have been lulled into thinking that PTSB's concern in relation to the alleged rise in property values was the basis for its objection to the write-down.

124. The affidavit evidence provided by PTSB also fell short of making the case (now made so strongly in the course of the submissions before me) that the practitioner was relying on wholly unsupported and general averments of a template nature. Had such a case been signalled by PTSB in its notice of objection and affidavit evidence, the practitioner would have had an opportunity to deal with that case in the course of the Circuit Court hearing and to place appropriate evidence before the Circuit Court in response.

125. In making these observations, I do not wish, in any way, to suggest that the onus of proof lies on PTSB. For the reasons already

addressed above, I am of the view that the onus lies on the practitioner in an application of this kind to satisfy the Court that all of the requirements of Section 115A have been met (including the requirement that the Court must be satisfied that the terms of the PIA are not unfairly prejudicial to the interest of any interested party and that the proposed arrangement is fair and equitable to each class of creditor). My concern is with basic procedural fairness. The 2012 Act envisages that an objecting creditor will lodge a notice of objection. This is made clear by Sections 112(3) and 115A(3) of the Act. In my view, the submissions which PTSB have addressed to me in relation to the obligation of the practitioner to make out his case are also relevant to a notice of objection on the part of an objecting creditor. To my mind, the objecting creditor must set out its objection with clarity so that it can be appropriately addressed by the practitioner (or the debtor as the case may be) in advance of the first instance hearing. It is unsatisfactory that arguments are subsequently made which have not been appropriately and fully signalled in advance so that all sides will be in a position to place appropriate evidence before the Court to address the issues in an informed way.

126. In the circumstances outlined above, I have come to the conclusion, on the issue of the write-down of the debt and the related issue of the extent of Ms Parkin's means, that it would not be appropriate in this case to hold that there is insufficient evidence before the court to justify the write-down proposed. As explained in para. 114 above. I believe that there is just about enough evidence available to the court to permit me to reach the view that the write-down is not excessive in Ms. Parkin's particular circumstances.

Fairness and unfair prejudice
127. In circumstances where (a) the outcome for PTSB, as a secured creditor, is significantly better under the proposed PIA than in a bankruptcy; (b) PTSB will have the protection of clause 37 (in the event that the home is sold at a value that exceeds the agreed market value); and (c) PTSB will remain free to take action against Mr Parkin, I am satisfied that the proposed PIA will not be unfairly prejudicial to PTSB. I am also satisfied that the proposed PIA is fair and equitable in relation to each class of creditor.

Decision
128. I do not propose here to separately enumerate each of the other requirements of s 115A. I confirm that, having considered all of the material before me, I have reached the conclusion that all of the requirements of s. 115A have been satisfied. I will accordingly dismiss the appeal of PTSB and affirm the order of the learned Circuit Court Judge. I will hear the parties in due course as to any consequential orders that may be required.