[2019] IEHC 751

THE HIGH COURT

CIRCUIT APPEAL

SOUTH WESTERN CIRCUIT

COUNTY OF LIMERICK

[2018 No. 445 C.A.]

**IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012-2015
AND IN THE MATTER OF MAEVE GRIFFIN (A DEBTOR)**

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[2018 No. 444 C.A.]

**IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012-2015
AND IN THE MATTER OF TIMOTHY GERARD GRIFFIN (A DEBTOR)**

JUDGMENT of Mr. Justice Denis McDonald delivered on 8 November, 2019

Introduction

1. In each of the above cases, KBC Bank Ireland Plc ("*the bank*") has appealed the decision of his Honour Judge Meghen in the Circuit Court made under s. 115A (9) of the Personal Insolvency Act, 2012 ("*the 2012 Act*") (as amended by the Personal Insolvency (Amendment) Act, 2015), confirming the coming into effect of two interlocking personal insolvency arrangements proposed by Maurice Lenihan, personal insolvency practitioner ("*the practitioner*") on behalf of the above named debtors Ms. Maeve Griffin and Mr. Timothy Gerard Griffin. In the very helpful written submissions delivered on behalf of the bank, the following grounds of objection have been canvassed:-

   (a) That the proposed arrangements are not fair and equitable to the bank, as a class of creditor which has not approved them, contrary to s.115A (9) (e) of the 2012 Act;

   (b) That the proposed arrangements are unfairly prejudicial to the bank, contrary to s. 115A (9) (f); and

   (c) The arrangements do not enable the creditors of Mr. Griffin and Ms. Griffin to recover the debts due to them to the extent that their means reasonably permit, contrary to s. 115A (9) (b) (ii) of the 2012 Act.

2. In the course of the hearing which took place on 5th July, 2019, counsel for the bank indicated that the primary grounds of objection are those set out at para. 1 (a) and (b). Nonetheless, the ground set out at para. 1 (c) has not, in any sense, been abandoned. All three grounds were fully argued in the course of the hearing. As discussed further below, it seems to me that there is some overlap between these three grounds. I will, nevertheless, consider each ground separately.

3. For completeness, it should be noted that no issue arises in this case in relation to the availability of s. 115A. It was accepted, in the course of the hearing, that the family home of Mr. Griffin and Ms. Griffin in County Limerick is a "*principal private residence*" within the meaning of s. 2 (1) of the 2012 Act. It is also accepted that the debt owed to the bank which is secured over the family home is a "*relevant debt*" within the meaning of

s. 115A (18) – namely a debt secured over the principal private residence of Mr. Griffin and Ms. Griffin which was in arrears on 1st January, 2015.

4. It was also very helpfully acknowledged, in the course of the hearing, that, for the purposes of s. 115A (9) (g) of the 2012 Act, Charleville Credit Union *("the credit union")* (which, along with the Revenue Commissioners voted in favour of the proposed arrangement) constitutes a separate class of creditors to the bank notwithstanding that both the bank and the credit union are secured creditors of Mr. Griffin and Ms. Griffin. Counsel for the bank acknowledged that, having regard to the decision of Baker J. in *Sabrina Douglas* [2017] IEHC 785, the bank, as a secured creditor over the principal private residence of Mr. Griffin and Ms. Griffin was in a separate class to the credit union which holds no security over the residence in question.

Relevant facts

5. Before attempting to address the issues which fall to be considered, it is important that the relevant facts should first be identified. At the time the proposed arrangements in this case were first proposed in August 2017, Mr. Griffin was aged 50 years of age and Ms. Griffin was 49. They are married and have two children. At the time the arrangement was proposed, their daughter was nineteen years of age and their son was seventeen years of age. Mr. Griffin works as a probation officer with the Department of Justice where he has worked since 2014. Ms. Griffin is currently unemployed. According to the proposed arrangement in her case, Ms. Griffin was a care assistant. Previously both she and Mr. Griffin appear to have operated a nursing home business which ultimately failed in 2009. The credit union holds security over the former nursing home.

6. Mr. Griffin and Ms. Griffin have the following liabilities:-

(a) There is a total sum of €277,308 owed to the bank which is secured over the family home which has been valued at €140,000;

(b) There is a sum of €638,505 owed to the credit union which is secured over the former nursing home which has been valued at €80,000;

(c) Mr. Griffin owes €23,560 to Tipperary Credit Union. This is unsecured;

(d) Mr. Griffin has a credit card debt of €1,628 while Ms. Griffin has a credit card debt of €2,269;

(e) Ms. Griffin owes €19,522 on an unsecured basis to Allied Irish Banks Plc in respect of an overdraft;

(f) Ms. Griffin owes €28,693 to the Revenue Commissioners in respect of unpaid PAYE/PRSI. There is also a preferential debt owed by her to the Revenue Commissioners in respect of income tax in the sum of €2,100;

(g) Mr. Griffin also has a small debt owed to Cabot Financial in the sum of €3,598.

7. The monthly household income of Mr. Griffin and Ms. Griffin is not sufficient to discharge their monthly expenses. Mr. Griffin's net monthly income is €3,410. Ms. Griffin receives unemployment benefit of €780 per month. This provides them with a total household income of €4,190 per month. Out of this sum, their set costs calculated in accordance with the guidelines issued by the Insolvency Service ("ISI") are €1,901.53 (based on a two adult household with one motor vehicle). Their monthly obligations on foot of a mortgage to the bank are €1,839.07. In addition, they incur what are described as "*special circumstance costs*" in the sum of €699 per month which are made up of €144 in respect of the cost of prescription medicine for their son who suffers from asthma together with €555 in respect of the cost of maintaining their daughter in third level education. That is marginally higher than the monthly figure of €549 which would be allowed by the Official Assignee in a bankruptcy.

The proposed arrangements

8. Under the proposed arrangements put forward by the practitioner, the indebtedness of Mr. Griffin and Ms. Griffin would be addressed over a six year (i.e. 72 month) term as follows:-

(a) Insofar as the debt of €277,308 to the bank is concerned, the secured debt would be written down to €140,000 (i.e. the agreed value of the family home) with the balance being addressed as an unsecured debt. For the 72 month duration of the arrangement, no element of principal would be repaid. Instead, interest at 4.25% would be paid of €495.83 per month. Following the completion of the arrangements, the interest rate would revert to the then standard variable rate applicable to mortgage loans of this kind. The term of the mortgage would be restructured to 240 months from the date the arrangements come into effect. After the arrangements come to an end, capital and interest monthly mortgage payments of €1,107.12 would be made for the 168 month period from the end of the proposed arrangements to the end of the restructured mortgage term. This is based on an assumed rate of 4.25% as at the end of the proposed arrangements. This, however, is obviously subject to the rate which is actually applicable at that time.

(b) Insofar as the credit union debt is concerned, Mr. Griffin and Ms. Griffin are to arrange for the sale of the former nursing home property. All costs associated with the sale of the property will be deducted from the proceeds of sale. In the event that the property is sold for less than €80,000 (which is the agreed valuation) the credit union will not be entitled to make any claim against Mr. Griffin or Ms. Griffin in respect of any shortfall. In the event that it is sold for more than €80,000, the credit union will be entitled to retain the proceeds for its own benefit. Mr. and Ms. Griffin agree to cooperate with the auctioneers during the sale process and will remove all personal effects from the property and assist the auctioneers. Any offers that are made will be subject to acceptance by the credit union. In the event that the credit union declines any offers over €60,000, the property will be voluntarily surrendered to the credit union. Similarly, if the property has not been sold within twelve months of the coming into effect of the proposed arrangements, the property will be voluntarily surrendered to the credit union.

(c) The preferential debt owed to the Revenue Commissioners by Ms. Griffin will be paid in full;

(d) The unsecured creditors will receive a dividend of 6.53% in the case of Ms. Griffin and 6.77% in the case of Mr. Griffin. In this context, it should be noted that, on p. 15 of the proposed arrangement in Ms. Griffin's case, the rate of dividend is stated to be 7.09%. However, in the bankruptcy comparison, in her case, it is stated to be 6.53%. For the purposes of this judgment, I will proceed on the basis of the figure set out in the bankruptcy comparison.

Comparing the outcome under the proposed arrangements with the outcome in bankruptcy

9. The practitioner has prepared a comparison of the outcome under the proposed arrangements with the outcome in the event of a bankruptcy. On the basis of the figures provided by the practitioner, the return to the secured creditors (on a combined basis) under the proposed arrangements is 24 cent in the euro compared to 22 cent in the euro in a bankruptcy. Insofar as the unsecured creditors are concerned, they will, as noted in para. 8 (d) above, receive 6.53 cent in the euro in Ms. Griffin's case and 6.7 cent in the euro in Mr. Griffin's case. This compares to 0.22 cent in the euro in the event of Ms. Griffin's bankruptcy and 0.50 cent in the euro in the event of Mr. Griffin's bankruptcy.

10. In my view, it would have been helpful if the return to each of the secured creditors had been shown separately in the bankruptcy comparison. On the basis of my own calculations, the outcome for the bank under the proposed arrangements is significantly greater than 24 cent in the euro. By my calculations, it is 50.5 cent in the euro. In the event of a bankruptcy, the outcome is also better than 22 cent in the euro. By my calculations, the return for the bank in the event of bankruptcy is 45.40 cent in the euro. In contrast, the return for the credit union under the proposed arrangements (on the assumption that the nursing home sells for €80,000) will be of the order of 12.5 cent in the euro whereas, in a bankruptcy, the outcome would be 11.27 cent in the euro. In both cases, these rates of return exclude the dividend that will be paid as part of the distribution to the unsecured creditors. As outlined further below, a significant issue arises in this case in relation to the extent of the distribution to be made to the unsecured creditors.

The counter-proposal made by the bank

11. As discussed further below, a counter-proposal was made by the bank. That counter-proposal must be seen in the context of the statutory scheme for the making of representations by creditors to a practitioner. Under s. 98 of the 2012 Act, the practitioner is required to give notice to creditors of his or her appointment and to invite the creditors to make submissions regarding the manner in which the debts of a debtor might be dealt with under a proposed arrangement. The practitioner is also under an obligation to consider any submissions made by creditors. Insofar as secured creditors are concerned, s. 102 (1) imposes a specific obligation on such creditors (following receipt

of the notification under s. 98) to furnish to the practitioner an estimate of the market value of the security. In addition, s. 102 (1) enables the secured creditor to also indicate a preference as to how that creditor wishes to have the security and secured debt treated under the arrangement. This is, however, expressly made subject to s. 102 (3) and ss. 103 to 105 of the 2012 Act. In this context, it is important to bear in mind that under s. 104 (1) practitioners are required, in formulating proposals for personal insolvency arrangements, to do so in a manner which secures, insofar as reasonably practicable, the retention by a debtor of his or her principal private residence.

12. In this case, according to the evidence of the practitioner, the bank did not make any submission to him under either s. 98 or s. 102. The practitioner says that, in those circumstances, he had no alternative but to seek to formulate proposals in the absence of any submission from the bank. However, in para. 5 of his affidavit sworn in support of the bank's notice of objection, Mr. Gately explained that, on 16th June, 2017, the bank submitted a request for further information which was never answered by the practitioner.

13. Subsequently, the bank, by email sent at 12.18 pm on 17th August, 2017 (which was one day immediately prior to the creditors' meeting held on 18th August, 2017) submitted a counter-proposal. In that email, the bank complained that, in comparison to the credit union, it would fare significantly worse under the proposed arrangements. It said that, under the proposed arrangement, the credit union would be in a position to immediately recover the full value of its security over the nursing home and, over the course of the arrangement, would recover the same amount again through dividends over a six year period (€80,000). The email complained that: *"on a very basic level, the Credit Union will recover double the value of its security over the next six years. Conversely KBCI … will be precluded from realising its security and will recover only €19,500 over the same period as a secured creditor. In reality the proposed large dividend is not being generated from the means of the debtor in a true sense, but from the draconian reduction of, and six year deferral of capital repayments to, the KBCI debt. The proposal fails to recognise the priority of the KBC debt and unfairly seeks to provide a disproportionate return to the Credit Union relative to its security"*. Those concerns on the part of the bank were subsequently reiterated in para. 11 of the affidavit of Mr. Garret Gately.

14. In the email, the bank also complained that, on completion of the proposed arrangements, Mr. Griffin and Ms. Griffin would have a surplus monthly income of €1,596.26. The email made the point that even if 50% of that surplus was made available it would be sufficient to service payment of that part of the debt owed to the bank which it was proposed to write down (namely €138,000) over the remaining term of the mortgage.

15. The email concluded by making a counter-proposal as follows:-

(a) An extension of the mortgage term to 240 months;

(b) A 36 month personal insolvency arrangement (i.e. half the length of the proposed arrangements here);

(c) Interest only payments of €981 for the duration of the three year arrangement;

(d) A dividend pool of €24,500 from which the practitioner would receive a fee of €9,500 with the preferential debt due to the Revenue of €2,100 being repaid in full;

(e) The unsecured creditors would therefore receive a net dividend of €17,000 for distribution between them;

(f) The credit union (as the largest unsecured creditor) would receive €16,000. This is in addition to whatever it would recover through the realisation of the nursing home;

(g) Post the arrangement, Mr. Griffin and Ms. Griffin would commence full annuity repayments of €1,909 leaving them with a monthly surplus of €794 above the ISI guideline figure.

16. It should be noted that, under the terms of the arrangement proposed by the practitioner in each of these cases, it is acknowledged that the elder child of Mr. Griffin and Ms. Griffin (namely their daughter) would leave third level education in year 3 of the arrangement proposed by him. As I understand it, the monthly surplus of €794 suggested in the counter-proposal is based on this proposition.

17. In his replying affidavit, the practitioner deals with the counter-proposal at paras. 29-30 and paras. 42-43. In para. 29, he explained that, by reducing the term of the proposed arrangements to 36 months and increasing the monthly mortgage payment from €495.83 to €981, the counter-proposal would significantly reduce the monthly surplus that would otherwise be available to pay a dividend to the unsecured creditors. The proposal also envisaged a 50% reduction in his own fee but this is likely to be attributable, at least in part, to the fact that the duration of the arrangement proposed by the bank is 50% shorter than the 72 month arrangements proposed by the practitioner.

18. The practitioner says that the counter-proposal was considered and rejected by the debtors "*on the basis that it would not be supported by a majority of creditors and would not return them to solvency, particularly as it provided for the payment of the full mortgage loan and did not take account of the possibility of illness, marriage breakdown or other issues*". *He also says that: "it was unrealistic to assume that unsecured creditors would support the KBC counter-proposal where it clearly demonstrated a significant reduction in the return to them when compared to the PIA proposal which was circulated in advance of the meeting of creditors and on which proxies (voting in favour) had already been received".*

19. In para. 43 of his affidavit, the practitioner expands on this and says:-

"43. I discussed the counter-proposal with the debtors at a meeting on 17th August called at very short notice to them. I expressed the view that the KBC counter-proposal was self-serving and would not be acceptable to the other creditors on the basis that it provided a lower return than the existing PIA and denied those creditors scope to maximise their return over a 72 month term. I indicated to the debtors that the counter-proposal would not return them to solvency at the end of the PIA on the basis that the loan owed on their PDH will be almost twice the market value of the property. Accordingly, in the event of some unforeseen life event (illness, death, marriage breakdown, etc.) occurred (sic) which resulted in the sale of their home it was possible that they would be insolvent (again) and would be forced to consider bankruptcy in such circumstances. I also pointed out… that if the PIA was amended to reflect … the counter-proposal that it was highly likely that it would not be acceptable to their other creditors (who had already submitted proxies…) and that it was inevitably going to be rejected at the meeting … notwithstanding the support of the Objector. Accordingly, the debtors agreed to leave the proposal unchanged.

20. It should also be noted that, in para. 36 of his affidavit, the practitioner explained the reason why he had included a provision in the proposed arrangements that the bank would be paid interest only for the term of such arrangements. He said this was: *"…for the benefit of all creditors, and in particular of creditors with debts that will be extinguished at the end of the PIA. I say for the most part, this arises in circumstances where the negative equity is to be extinguished and written off at the end of the PIA. I say and believe that in placing the mortgage loan on interest only I have increased the dividend to unsecured creditors, and ensured the best possible return in the circumstances".*

21. In the course of the hearing, counsel for the bank drew attention to what was said by the practitioner in these paragraphs and submitted that the explanations given by the practitioner strongly suggests that the practitioner favoured the credit union who, after payment of the proceeds of sale of the nursing home, is, by far, the largest unsecured creditor of Mr. Griffin and Ms. Griffin. As will appear in more detail below, the case made on behalf of the bank is that the credit union has been treated significantly more favourably than the bank.

22. Counsel for the practitioner submitted that the counter-proposal was made at the last minute. He also argued that the proposal would see payments being made to the bank at more than the rent for a comparable property in the locality in which Ms. Griffin and Mr. Griffin currently resides. Counsel drew attention to the information contained in the proposed arrangement which indicates that the market rent for an equivalent property in the locality would be €950 per month which is less than 50% of the monthly payment to be made under the counter-proposal namely €1,909. Counsel submitted that the bankruptcy would accordingly be a more favourable outcome for Ms. Griffin and Mr. Griffin than the regime envisaged in the bank's counter-proposal.

23. Counsel for the practitioner also drew attention to the fact that, under the counter-proposal, Ms. Griffin and Mr. Griffin would, for the three year duration of the arrangement proposed by the bank, have to live at a level beneath the reasonable living expenses set out in the ISI Guidelines. As set out on p. 40 of the proposed arrangement in Ms. Griffin's case, a sum of €1,901.53 would be regarded as appropriate for a two adult household with a vehicle. In addition, for the first three years of the arrangement, there are special circumstance costs of €699 payable per month (to cover the cost of third level education for the daughter of Ms. Griffin and Mr. Griffin) and also to cover the costs of asthma medication for their son. The total monthly income of the household is €4,190. When one sets off the sums of €1,901.53 and €699 against the monthly income of €4,190.00, that would leave no more than €1,590.00 to meet the mortgage repayments of €1,909 per month under the counter-proposal. Counsel for the practitioner submitted that the only way, therefore, in which the monthly mortgage payment could be met was if the family lived below the reasonable living expenses set out in the ISI Guidelines.

24. Counsel for the practitioner also rejected the suggestion that there would be a monthly surplus of €794 after year 3 under the counter-proposal. As noted in para. 16 above, the case made by the bank is that there will be such a surplus from year 3 of the proposed arrangement when it is understood the daughter of Ms. Griffin and Mr. Griffin will leave third level education. Counsel for the practitioner suggested that it was reasonable to suppose that the son of Ms. Griffin and Mr. Griffin would go on to third level education (although counsel for the bank trenchantly submitted that this is nowhere mentioned in the proposed arrangement or in the evidence before the court). In fact, the practitioner, in para. 21 of his affidavit sworn on 19th June, 2018 does refer to the possibility (it is put no higher than that) that the son may go on to further education. The practitioner also says that the special circumstance costs in respect of the prescription medication in the amount of €144 should be extended beyond year 3. In my view, it is reasonable to take the cost of this prescription medication into account as an ongoing household expense. It is also understandable that the practitioner was not in a position to say that the son would definitely go on to third level education. For that reason, the continuing cost of third level education has not been factored into the calculation set out in the proposed arrangement. I am conscious that a very large number of students progress to third level education in Ireland. I therefore believe it is realistic to assume, for the purposes of this judgment, that it is reasonably likely that the son will progress to third level education. In those circumstances, I believe that it is appropriate to continue to take into account the special circumstance costs of €644 per month for a further three year period after the expiry of the three year arrangement proposed by the bank. For those years, the appropriate allowance to be made in respect of Ms. Griffin and Mr. Griffin (for a couple with no children) would be €1,509.59 (on the basis that they require a motor vehicle). If one adds €699 to that figure, that would mean that Mr. Griffin and Ms. Griffin would require €2,208.59 per month in order to meet reasonable living expenses and the special circumstance costs. If they were also to pay a further €1909 in respect of the mortgage repayment envisaged under the counter-proposal, they would have total monthly expenditure of €4,117.59. Assuming no substantial shocks, there would be a very marginal buffer available to them of €72.41 per month. However, this does not take

account of the possibility that interest rates might rise. While we currently live in an era of low interest rates, there is no guarantee that this will still be the case in several years' time.

25. Counsel for the practitioner also argued that the bank's counter-proposal was made too late. It was not made until the eve of the creditor's meeting. He argued that there had been a failure to comply with either s. 98 (1) or s. 102 (1) of the 2012 Act. In my view, the court must be cautious about any suggestion that a counter-proposal or submission should be wholly disregarded. The court has an obligation under s. 115A (10) (b)(i) to have regard to any submission made by a creditor under s. 98(1) or s. 102(1). Nonetheless, in this case, an issue arises as to whether the requirements of those subsections were actually observed by the bank. Section 98(1) does not expressly require that submissions should be made by a creditor within any specific time frame. However, it is clear from a consideration of s. 98(1) in the context of the 2012 Act as a whole, that it contemplates that the submissions will be made prior to the formulation of a proposed arrangement so that the practitioner will be in a position to have regard to them when he comes to formulate the proposal. The same considerations arise in relation to any indication of preference to be advanced by a secured creditor under s. 102(1). It is quite clear from s. 102(2) that the Act envisages that any indication of preference as to how the secured debt should be addressed, should be made prior to the formulation of the practitioner's proposal. While s. 102 does not prescribe a statutory time period for taking this step, s. 102 (4) makes it clear that the secured creditor should act within whatever period of time may be specified by the practitioner. In the present case, the counter-proposal was not made until the day prior to the meeting of creditors at which the proposals were to be considered. Consistent with the email of 17th August, 2017 (quoted in para. 13 above) Mr. Gately explained in para. 5 of his affidavit that, within three days of receipt of the protective certificate, the bank had sought clarification on a number of points in order to enable the bank to submit a s. 98 or s. 102 response. Although the practitioner responded on the same day advising that he would arrange to get the additional information to the bank, the information was not provided. In these circumstances, it seems to me that, in fairness to the bank, I should treat the bank as having made a submission under s. 98 and s. 102 of the Act. However, as a consequence of the timing of the counter-proposal, the reality is that the practitioner had no sufficient opportunity to take the counter-proposal into account in formulating his proposals in circumstances where it was received at such a late stage in the process. It is important to bear in mind in this context that the court, under s. 115A (10) (b)(i), is required not only to have regard to the submission made by a creditor but also to the date on which such submission was made.

26. Having regard to the date of receipt of the counter-proposal, I do not believe that there is anything that the practitioner could reasonably have done in the circumstances. He had already formulated proposals. Those proposals had been circulated to all of the creditors. On the basis of those proposals, decisions had already been made by creditors as to whether to support or reject the proposed arrangement. While it was theoretically open to the practitioner to go back to the creditors with revised proposals, I can well

understand why the practitioner, at that point, might have considered that it was not feasible to do so. I will examine in greater detail below the particular reasons given by the practitioner as to why he decided to proceed with the existing proposal. On the basis of the arguments put forward by counsel for the bank, those reasons are potentially material to the question as to whether the credit union was unduly favoured, under the proposals, at the expense of the bank. At this point, it is sufficient to record that, in my view, the timing of receipt of the counter-proposal was such as to make it reasonable for the practitioner to proceed with the creditors' meeting on the following day on the basis of the existing proposals. I am, of course, conscious in this context of the observations of Baker J. in *Paula Callaghan* [2017] IEHC 332 at paras. 13-17 as to the obligation of a practitioner to consider submissions made by a creditor. However, those observations by Baker J. were made in the context of submissions made prior to the formulation of proposals. The present case is in a different category. Moreover, it is clear from para. 43 of the practitioner's replying affidavit (quoted in para. 19 above) that the practitioner here did, in fact, consider the proposals. They were not ignored by him. He clearly took a considered decision to proceed with the creditors' meeting and to reject the counter-proposal made by the bank.

27. In the same judgment, Baker J. suggested that a margin of appreciation will be afforded to a practitioner in formulating an arrangement and she indicated that the court should not interfere unduly with a proposal even if another and possibly equally reasonable proposal could be formulated. At para. 59 of her judgment in that case she said:-

> *"Section 115A(9)(b) (ii) constrains a court by considerations of reasonableness, that there be a reasonable prospect that confirmation of a proposed PIA will enable the debtor to resolve his or her indebtedness, and enable the creditors to recover their debts to the extent that the means of the debtor 'reasonably permit'. The inclusion of a requirement of reasonableness supports the argument that a margin of appreciation will be afforded to a PIP in formulating a PIA, that the court will not interfere unduly with a proposal even if another, and possibly equally, reasonable proposal could be formulated, and the objection of a creditor will not be upheld merely on account of the fact that it can offer an alternative proposal. Reasonableness is assessed in the context of the means of the debtor, the likely return to the creditor of a proposal, the likely return on bankruptcy as an alternative, and the reasonableness of the proposed scheme taken as a whole, and in the light of the objective of the legislation that a debtor be facilitated in a return to solvency."*

28. Nevertheless, as noted in para. 25 above, the position taken by the practitioner is not determinative. It is clear from s.115A (10) (b)(i) that there is an obligation on the court to independently consider and have regard to any counter-proposal that may have been made by a creditor. I therefore believe that I must consider whether the counter-proposal made by the bank is one that achieves a better and fairer result than the proposal put forward by the practitioner. I reiterate that, in considering this issue, I will postpone any consideration of the motivation underlying the practitioner's proposals.

That is an issue which I address separately in the context of the bank's contention that the arrangement unduly favours the credit union at its expense.

29. I have come to the conclusion that the counter-proposal put forward by the bank lacks reality. In the first place, it does not take account of the current market value of the family home of Ms. Griffin and Mr. Griffin. While I must separately consider whether the practitioner was correct in writing the secured debt down to the value of the family home, it seems to me that, in cases of significant "*negative equity*", the current market value of the family home is a relevant factor in any arrangement proposed under the 2012-2015 Acts. It seems to me to be clear from a consideration of the provisions of ss. 102-103 of the 2012 Act that the legislature envisaged that, in arrangements of this kind (where the home is in "*negative equity*"), it will often be appropriate that the value of secured debt should be written down to some extent albeit that, in accordance with s. 103(2), it cannot be reduced below the value of the underlying security. Of course, there are cases where a write-down might not be appropriate. For example, if the debtors were of reasonably substantial means and were in a position to sustain mortgage payments of sufficient size, a write-down might be entirely inappropriate. However, in my experience, such cases are rare. This is not such a case. The means of Mr. Griffin and Ms. Griffin are clearly not sufficient to sustain mortgage repayments on the scale suggested by the bank in its counter-proposal. As discussed in para. 24 above, if they were to pay €1,909 in respect of the mortgage repayment envisaged under the counter-proposal, they would have no more than €72.41 available to them on a monthly basis over and above their monthly expenditure. As noted in para. 24, that seems to me to be a very marginal buffer. While I acknowledge that the buffer is likely to increase over time (as the children of Mr. Griffin and Ms. Griffin complete full time education) the Griffin family would nonetheless have to live for a sustained period of time at or very near the upper limit of the reasonable living expenses measured by the ISI. While there are cases where there may be no alternative to an arrangement on such stringent terms, it seems to me that the proposal put forward by the bank would impose a burden on Mr. Griffin and Ms. Griffin which is disproportionate to their means. I also bear in mind that, under the counter-proposal, Ms. Griffin and Mr. Griffin would have to make payments to the bank significantly in excess of the market rent for an equivalent property in the locality. As counsel for the practitioner observed, this would make bankruptcy a more favourable outcome for Ms. Griffin and Mr. Griffin than the regime envisaged in the bank's counter-proposal. In these circumstances, I have come to the conclusion that the practitioner was right to reject the counter-proposal. I am furthermore of the view that the counter-proposal is not relevant to the remaining issues which arise for consideration (and which are addressed below).

The issues raised by the bank

30. To the extent that it is necessary to do so, I now turn to consider each of the grounds of objection which were debated in the course of the hearing before me in July 2019.

The alleged inequality of treatment

31. Under s. 115A (9) (e), the court, on an application of this kind, must be satisfied that the proposed arrangement is: *"fair and equitable in relation to each class of creditor that has not approved the proposal and whose interests or claims would be impaired by its coming*

into effect." The debate between the parties in relation to this issue occupied most of the time at the hearing in July.

32. In his written submissions, counsel for the bank sought to illustrate that, under the proposed arrangements, the return to the credit union was significantly better relative to the return to the bank. He drew attention to the fact that, under the proposed arrangement, the bank would receive a dividend from Mr. Griffin of €9,294.99 and a dividend from Ms. Griffin of €8,690.93 during the currency of the arrangement. This is in addition to the value of the bank's security of €140,000. Insofar as the credit union is concerned, it would receive the value of its security namely €80,000 together with a dividend from Mr. Griffin of €37,807.68 and a dividend from Ms. Griffin of €36,448.89. The total to be received by the bank (excluding interest payable over the term of the arrangement and subsequently over the term of the mortgage) would be €158,255.92. In the case of the credit union, the total to be received would be €154,256.57.

33. Counsel for the bank then looked at the projected return in a bankruptcy. In a bankruptcy, the bank would receive €126,000 in respect of the family home together with an approximate dividend of €707.50 from Mr. Griffin and €300 in respect of Ms. Griffin. This would be a total realisation of €127,007.50. The credit union would receive €72,000.00 in respect of its security, a dividend of €1,222.00 from Mr. Griffin and a dividend of €2,878.00 from Ms. Griffin. This would be a total realisation of €76,100.00.

34. Counsel argued that, when one took account of the difference between the proposed realisation under the proposed arrangement of €158,255.92 as compared with €127,007.50 in a bankruptcy, the bank would achieve a 24.6% better return under the proposed arrangement than in a bankruptcy. In contrast, when one takes the difference between €76,100 which the credit union would receive in a bankruptcy and €154,256.57 which the credit union will receive under the proposed arrangement, the return for the credit union under the proposed arrangement is 102% better than in a bankruptcy.

35. Counsel also submitted that, if one takes the total realisation for the bank, under the proposed arrangement, to be €158,255.92, the difference between that sum and €140,000 reflects a 13% return for the bank over the value of its security. In contrast, if one takes the sum of €154,256.57 which would be payable to the credit union under the proposed arrangements, the credit union will receive a return of 93% on top of the value of its security. Counsel submitted that the comparison of the combined returns illuminates the reasons why the bank says that the arrangements are not fair and equitable to it and why they unduly favour the credit union. Counsel also submitted that the counter-proposal had been put forward by the bank to "*rebalance the equities"* and he said that this counter-proposal was still on offer from the bank.

36. Counsel for the bank argued that there was no justification for the approach taken by the practitioner here in "*favouring*" the credit union in the manner summarised above. As noted in para. 21 above, counsel argued that the explanation given by the practitioner (as quoted in paras. 18-20 above) demonstrates that the practitioner consciously favoured the credit union at the expense of the bank. Counsel sought to rely in this context on my

decision in *Noel Tinkler* [2018] IEHC 682. In that case, very unusually, the proposed arrangement envisaged that the secured creditor over the principal private residence of the debtors would be paid in full notwithstanding that the value of the property was significantly less than the debt owed. The practitioner involved in that case had sworn an affidavit, in the course of the proceedings, in which he had acknowledged that the arrangement proposed by him had been formulated with a view to obtaining the support of the secured creditor concerned. An entirely different approach had been taken in the context of the objecting creditor (which held security over other property of the debtors). In para. 45 of my judgment in that case I said:-

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

37. Counsel for the bank argued that, on the basis of the calculations set out in paras. 32-35 above, the proposals here unduly favour the credit union. Counsel also argued that there has been no objective justification for that difference in treatment. He submitted that, as occurred in *Tinkler*, the practitioner has explicitly stated that he refused to put the counter-proposal to the credit union on the basis that it would not be accepted by it. Counsel referred in this context to the averments made by the practitioner (quoted in paras. 18-20 above).

38. In contrast to the position in Re. *Antigen Holdings* [2001] 4 IR 600, counsel submitted that there was no objective justification for the difference in treatment, as between the credit union and the bank. In the *Antigen* case, the court accepted that the trade creditors were entitled to some priority under the arrangement proposed by the examiner in that case in circumstances where, as McCracken J. observed, they were going to continue trading with the company. Counsel argued that, in contrast, no such justification existed in the present case. He drew attention in this context to the additional affidavit that had been served, with the leave of the court, in the course of the

appeal, in which Mr. Gately had explained that the credit union was now in liquidation (although this had not been known at the time of the Circuit Court hearing). Counsel submitted that the "*preferential treatment*" given to the credit union, in those circumstances, cannot be justified. There is no question of any ongoing relationship between the credit union and Ms. Griffin and Mr. Griffin. The nursing home has ceased business.

39. In response, counsel for the practitioner argued that the credit union and the bank are dealt with in precisely the same way under the scheme. In both cases, the property secured in their favour is in negative equity and the secured debt is to be written down to the value of the secured property. In both cases, the balance of the indebtedness (after making due allowance for the value of the secured property) is treated as an unsecured debt. In both cases, the dividend payable to the bank and to the credit union is calculated in the same way. Counsel said that this was in compliance with s. 100 (3) of the 2012 Act which applies the pari passu principle. Section 100 (3) is in the following terms:-

> *"(3) Unless provision is otherwise made in the … , arrangement and subject to section 101, the arrangement shall provide for payments to creditors of the same class to be made on a pari passu basis, and where so otherwise provided the … Arrangement shall specify the reasons for such provision being made" .*

40. The reference in s. 100 (3) to s. 101 is not relevant for present purposes. Section 101 deals with preferential debts. Counsel for the practitioner stressed that the *pari passu* principle also features in bankruptcy, examinerships and the winding up of companies. It has often been described as a fundamental principle in the context of insolvent estates (whether corporate or personal). That said, I believe that counsel for the practitioner is mistaken in suggesting that s. 100 (3) of the 2012 Act is immediately relevant. It will be seen from the terms of the subsection (quoted in para. 39 above) that the statute envisages that the *pari passu* principle will be applied as between creditors of the same class. It has been agreed in this case (and the parties were correct to do so) that, although both are secured creditors, the bank and the credit union are not in the same class of creditor for the purposes of the 2012-2015 Acts. In those circumstances, I do not believe that it is entirely correct to suggest that s. 100 (3) has application save to the extent that both the bank and the credit union are also unsecured creditors.

41. Nonetheless, the *pari passu* principle has, for many years, been regarded as a hallmark of fairness insofar as distributions to creditors are concerned. Thus, although section 100 (3) may have no immediate application, the *pari passu* principle is relevant to the question of fairness and it is clear from the terms of the proposed arrangement that it is proposed by the practitioner that it should apply in this case. All of the unsecured creditors will be paid at the same rate. This includes the unsecured element of the debt due to the bank and the unsecured element of the debt due to the credit union. In principle, it is difficult to see how the application of the *pari passu* rule, of itself, could be said to give rise to unfairness. That does not, however, resolve the fairness issue. A

separate question arises as to whether the arrangements here have been framed in a way that gives rise to unfairness as a consequence of the amount set aside for payment to the unsecured creditors (under which the bank argues that the credit union is to benefit at the bank's expense).

42. Counsel for the practitioner acknowledged that the bank is treated differently to the credit union insofar as the property secured in favour of the latter is to be realised whereas the property secured in favour of the bank (namely the family home of Ms. Griffin and Mr. Griffin) will be retained. However, in common with the credit union, the bank would get the benefit of the market value of its security namely the family home. While the arrangements do not allow for the realisation of the family home in the way in which the property secured in favour of the credit union is to be realised, the bank would be compensated for this by the interest which would be paid between now and the completion of the term of the mortgage. He drew attention, in this context, to the policy of the 2012-2015 Acts to ensure that the family home should be retained. In this context, s. 99 (2) (h) of the 2012 Act expressly provides that an arrangement "*shall not require that the debtor dispose of his or her interest in the debtor's principal private residence or cease to occupy such residence unless the provisions of section 104 (3) apply*". In turn, s. 104 (1) reinforces the level of protection given to the family home under the 2012 Act. That subsection is in the following terms:-

> *"(1) In formulating a proposal for a Personal Insolvency Arrangement a personal insolvency practitioner shall, insofar as reasonably practicable, and having regard to the matters referred to in subsection (2), formulate the proposal on terms that will not require the debtor to—*
>
> *(a) dispose of an interest in, or*
>
> *(b) cease to occupy,*
>
> *all or a part of his or her principal private residence and the personal insolvency practitioner shall consider any appropriate alternatives."*

43. Counsel for the practitioner contended that the only other difference envisaged by the proposed arrangements between the position of the bank, on the one hand, and the credit union, on the other, arises from the size of the respective debts. Given the sheer size of the unsecured debt owed to the credit union, it must, of necessity, receive a larger dividend than the bank. In this context, counsel submitted that the debt owed to the bank comprised no more than 18% of the unsecured indebtedness of Ms. Griffin and Mr. Griffin whereas the debt owed to the credit union comprised 77% of that indebtedness. Applying the *pari passu* approach (which he argued was the correct approach), it was inevitable that the return to the credit union would greatly exceed in absolute terms the return to the bank.

44. Counsel for the practitioner also argued that the bank's interests were not harmed by the proposal under which it would be paid interest only for the duration of the proposed

arrangements. He argued that such an arrangement is expressly envisaged by s. 102 (6) (b) of the 2012 Act. Section 102 addresses the position of secured creditors. Section 102 (6) sets out a number of approaches which can be taken in relation to secured debt. Under s. 102 (6) (a), provision can be made that the debtor should pay interest and only part of the capital amount of the secured debt for a specified period of time (not exceeding the duration of the arrangement). Section 102 (6) (b) permits an arrangement to provide that the debtor should make interest only payments on the secured debt for a specified period of time (which again must not exceed the duration of the proposed arrangement). Section 102 (6) (c) provides that the period over which the secured debt is to be paid may be extended by a specified period of time. Furthermore, under s. 102 (6) (d), a complete moratorium on payments could be imposed for the duration of a proposed arrangement. Obviously, the arrangement here does not go that far. Counsel for the practitioner suggested that no injury is done to the bank by taking the approach set out in s. 102 (6) (b). He suggested that, once the arrangement comes to an end, the capital sum owed to the bank will remain to be paid in full and, in addition, interest will apply at the appropriate variable rate which the bank is entitled to charge under the terms of the loan contract with Ms. Griffin and Mr. Griffin.

45. The issue which I must address is whether the proposed arrangement is fair and equitable in relation to the class of creditor comprising the bank on the one hand and the class of creditor comprising the credit union on the other. Section 115A (9) (e) makes it clear that, before the court can approve an arrangement of this kind, it must be satisfied that the arrangement is fair and equitable in relation to each class of creditors that has not approved the proposal (and whose interests or claims would be impaired by the arrangement coming into effect). It must, however, be acknowledged that a practitioner, formulating an arrangement of this type, will rarely be in a positon to achieve mathematical or perfect equality. Furthermore, if the arrangement is to work, it is usually essential that some provision should be made for unsecured creditors. Depending on the circumstances, this may have the result that the secured creditors' interests will be impaired to some extent by the arrangements to be made for the benefit of the unsecured creditors. The very fact that s. 102 (6) of the 2012 Act envisages circumstances where, for the duration of an arrangement, there can be a moratorium on payments to a secured creditor (or the payment of interest only to a secured creditor) suggests that the legislature envisaged that modifications of that kind to mortgage obligations might be necessary in order to give a breathing space to debtors to address their obligations not only to their secured creditors but also to the remaining unsecured creditors.

46. As Baker J. observed in *Paula Callaghan*, at para. 59 of her judgment (quoted in para. 27 above), a margin of appreciation will be afforded to a practitioner in formulating a personal insolvency arrangement. In part, this is in recognition of the fact that, in any given case, a practitioner will be required to balance many different competing interests in formulating a proposal for an arrangement. The court must always be conscious of the practical difficulties which confront the practitioner in undertaking this hugely important task. The court must also keep in mind the very important statutory role given

to the practitioner under the 2012-2015 Acts. The practitioner is entrusted with the task of formulating proposals which are sustainable and which provide a return for the creditors of the debtor which is commensurate with the means of the debtor. As a personal insolvency professional, the practitioner is equipped with the necessary experience and expertise to assess the means of the debtor, the extent of the indebtedness, and the feasibility of any proposed arrangement, while at the same time balancing the competing interests which arise.

47. The question which arises in the present case is whether, notwithstanding this margin of appreciation, the proposal here involves a sufficiently serious difference in treatment as between the bank, on the one hand, and the credit union, on the other, as to engage the provisions of s. 115A (9) (e). In this regard, there can be no doubt that, in the absence of objective justification, inequality of treatment is an aspect of unfairness. As Fennelly J. observed in the Supreme Court in *Re. SIAC Construction Ltd* [2014] IESC 25 (at para. 69):-

> *"Unfairness, … comprises two essential aspects, the general notion of injustice and the more specific one of unequal treatment."*

On the other hand, it is clear from the decision of McCracken J. in *Re: Antigen Holdings Ltd* [2001] 4 I.R. 600 at p. 603 that, depending on the circumstances, a difference in treatment between different classes of creditors may be permissible if it can be objectively justified.

48. In my view, the bank has raised a very serious issue in relation to inequality of treatment. As noted in paras. 32-35 above, counsel for the bank has drawn attention to what, on its face, is a significant disparity of treatment as between his client and the credit union. As further noted in para. 34 above, the bank would achieve a 24.6% better return under the proposed arrangement than in a bankruptcy. In contrast, the return for the credit union under the proposed arrangement is 102% better than in a bankruptcy. This disparity cannot be explained by the value of the respective security held by the bank, on the one hand, and the credit union, on the other. The value of the security held by the bank is higher than the value of the security held by the credit union. The value of the bank's security (namely €140,000) equates to 50.5% of the total indebtedness of Ms. Griffin and Mr. Griffin to the bank (€277,308). In the case of the credit union, the value of the security held by it (€80,000) equates to only 12.5% of the amount owed by Mr. Griffin and Ms. Griffin (namely €638,505) to the credit union. It is therefore clear that the claimed disparity of treatment under the proposed arrangement arises as a consequence of the extent of the provision proposed for unsecured creditors. As noted above, it is entirely reasonable for a practitioner to formulate a proposed arrangement on the basis that appropriate provision should be made for unsecured creditors as well as secured creditors. However, the concern raised by the bank relates to the extent of the provision made for the unsecured creditors which has given rise to the disparity in the rate of return under the proposed arrangements relative to the return in a bankruptcy (as outlined above).

49. The total amount to be paid to the unsecured creditors, under the proposed arrangements, is the sum of €49,051.33 in the case of Ms. Griffin and the sum of €52,904.51 in the case of Mr. Griffin. This means that, between them, the proposed arrangements envisage that a sum of €101,955.84 will be paid to the unsecured creditors of both debtors. In contrast, according to the bankruptcy comparison set out in the proposed arrangements, the unsecured creditors, in the event of the bankruptcy of Mr. Griffin would receive €3,734 while, in the case of Ms. Griffin, they would receive €1,634. On a combined basis, the unsecured creditors would therefore receive €5,368 in a bankruptcy. By my very rough calculations, this is approximately 19 times less than they would receive under the proposed arrangements. In other words, they will be 19 times better off, under the proposed arrangements, than they would be in a bankruptcy. That seems to me to raise a significant issue as to the proportionality of the proposed arrangements. Is it right that the unsecured creditors should receive 19 times the return they would obtain in the event of bankruptcy while the bank (which holds security over property) would receive a 24.6% better return under the proposed arrangement than in a bankruptcy? In turn a similar question arises as to whether it is right that the credit union will receive a 102% better return under the proposed arrangements than it would receive in the event of a bankruptcy. On the other hand, it has to be borne in mind that, under the proposed arrangements, both the bank and the credit union would each participate in the distribution of the dividend to be paid to the unsecured creditors. They would therefore each get the benefit of the 19 fold return on that part of the debts due to them which exceeds the value of the underlying security.

50. I bear in mind that, in para. 33 of his affidavit filed in June 2018 in the course of the Circuit Court proceedings, the practitioner has made the case that the total return for the bank amounts to €226,318.70 when account is taken of the payment of interest which, over time, would amount to €68,062.78 (calculated at 4.25% per anum). If the total return for the bank is taken to be €226,318.70, this would represent a return of 81.67% of the total indebtedness of €277,308. This would represent a 78% better return than in a bankruptcy. This is much closer to the 102% figure achieved by the credit union than the 24.6% figure suggested by counsel for the bank (as recorded in para. 34 above). However, I do not believe that it is reasonable or appropriate to take the return to the bank to be €226,318.70. As the practitioner acknowledges in para. 33 of his affidavit, this return would only arise over the 72 month term of the arrangement and, thereafter, the 240 month term of the mortgage. In my view, the interest to be paid over the 240 month term of the mortgage is clearly compensation for the fact that, in contrast to the credit union, the bank will not be entitled to an immediate realisation of the security held by it over the family home and instead will have to wait until the mortgage term comes to an end. In this case, it is noteworthy that the bank was the original lender. The payment of interest was always, therefore, integral to the long term nature of the mortgage arrangement put in place.

51. I must also bear in mind that the practitioner was faced with the difficulty of formulating a proposed arrangement which required appropriate provision to be made for two secured creditors, one of which held security over the family home (i.e. the principal private

residence of Ms. Griffin and Mr. Griffin within the meaning of the 2012 Act) and the other (namely the credit union) which held security over commercial property. In accordance with the provisions of s. 99 (2) (h) and s. 104 (1), he was required to formulate the proposed arrangement on the basis that there would be no disposal of the family home. In the case of the credit union, he was required under s. 103 (1) to include a term in the arrangement that gave the credit union not less than the value of the security held by it over the nursing home. In the case of the bank, he was required under s. 103 (3) to ensure that the principal sum due under the mortgage would not be reduced below the value of the family home (although he was not required to reduce it to that value). There is one common thread underlying these requirements. In both cases, the practitioner is not entitled to reduce the amount due to the secured creditor below the value of the underlying security. He has formulated his proposals on that basis. In both cases, the value of the secured debt has been written down to the market value of the underlying property. In both cases, he has also taken the same approach in relation to payment of the balance of the indebtedness over and above the value of that security. In both cases, he has treated the balance as being wholly unsecured with each party participating in the dividend to be paid to the unsecured creditors at the same rate in accordance with the pari passu principle. In that way, it could be suggested that he has treated both secured creditors on an equal footing. It can be argued that the proposed arrangements accordingly bear all the hallmarks of equal treatment. While the credit union will receive a higher payment than the bank, this is simply a reflection of the fact that the unsecured debt due to the credit union is significantly higher than the amount due to the bank.

52. Based on the return to the credit union of €154,256.57 (mentioned in para. 32 above) the credit union would recover 24% of the overall debt due to it. In other words, it would suffer a loss of 76% of the amount due. In contrast, having regard to the higher value of its security and the lower extent of the debt due to it, the bank, based on the return to it (excluding interest) of €158,255.92, would recover 57% of the debt of €277,308. In other words, it would suffer a loss of 43% of the overall debt owed to it. This rate of loss is significantly less than the rate of loss which would be sustained by the credit union. To that extent, it could be suggested that the bank fares better under the practitioner's proposals than the credit union. By my calculations, the extent of the loss sustained by the credit union (at 76%) relative to the loss sustained by the bank (43%) has the consequence that the credit union is 77% (76.74% to be precise) worse off (in terms of its overall loss) than the bank. However, this is unsurprising given the extent of the "*negative equity*" in the nursing home relative to the extent of the "negative equity" in the family home. In circumstances where the *negative equity* in respect of the nursing home is proportionately greater than the negative equity in respect of the family home, one would expect that the credit union would be (relatively) worse off than the bank in terms of the extent of the loss suffered by it. However, the calculations highlighted by counsel for the bank (as summarised in paras. 32 to 35 above) demonstrate that, under the proposed arrangements, the credit union would benefit to a disproportionate degree. Under those proposed arrangements, the outcome for the credit union is significantly better than the outcome for the bank and no sufficient justification has been established for this disparity in treatment. In particular, the sheer extent of the provision made for

the unsecured creditors (which gives rise to the significantly better return for the credit union than the bank) has not been adequately explained or justified. I do not see anything in the papers before the court which sufficiently explains why such extensive provision was made for the unsecured creditors . In my view, the extent of the provision made for the unsecured creditors is disproportionate. It results in a rate of return which is out of kilter with the range of dividends which I have seen paid to unsecured creditors in comparable cases (i.e. in cases where, in the event of a bankruptcy of the debtor, the unsecured creditors would receive a dividend of the order of 0.22 - 0.50 cent in the euro). In the circumstances, I am compelled to come to the conclusion that the arrangements proposed by the practitioner here cannot be said to be fair and equitable to the class of creditors represented by the bank. In short, the disparity of treatment cannot be said to be equitable. As a consequence, I cannot be satisfied that the requirements of s. 115A (9) (e) have been satisfied in this case.

53. I believe that the analysis undertaken by counsel for the bank (as summarised in paras. 32-35 above) demonstrates that the effect of the arrangements proposed in these interlocking cases is that the credit union will fare significantly better than the bank. There is a clear disparity in the way in which they are each affected by the terms of the arrangement. While I fully accept that perfect equality can rarely be achieved as between creditors holding security over different assets, the sheer extent of the disparity here is such as to make it impossible to conclude that the bank has not been treated inequitably. It seems to me that the terms of the arrangements require recalibration so as to provide for a more equitable distribution as between the credit union and the bank.

54. In reaching this conclusion in relation to s. 115A (9) (e), I stress that I do not believe that there is any sufficient evidence to suggest that the practitioner, in these cases, has deliberately sought to inflate the extent of the dividend to be paid to the credit union. However, on my reading of the evidence, that is not what occurred. Unfortunately, the submission made by the bank in this case (which highlighted the claimed disparity of treatment) was not made until the day prior to the creditors' meeting. At that point, the practitioner had already circulated all of the creditors with the proposed arrangements. Each of the creditors had already reached a decision as to how to vote on the arrangement. It was simply too late at that stage to take account of the submission made by the bank. In my view, it is perfectly understandable why the practitioner should have proceeded with the creditors meeting in those circumstances. In paras. 18-20 above, I have quoted the most relevant extracts from the affidavit of the practitioner dealing with the dilemma faced by him after receipt of the counter-proposal from the bank. He expressed himself in quite blunt terms about the value of the counter-proposal. For reasons which I have explained at an earlier point in this judgment, I believe that the practitioner was entitled to reject the counter-proposal. It is true that the practitioner also advised Ms. Griffin and Mr. Griffin that if the arrangements were to be amended to reflect the counter-proposal, it was highly likely that it would not be acceptable to their other creditors (who had already submitted proxies). This does not suggest to me that the practitioner had intentionally drafted his proposal with a view to preferring the other creditors. On the contrary, it seems to me to be no more than quite pragmatic advice

that, if the arrangements were to be amended to reflect the less favourable terms proposed for creditors under the counter-proposal, there was a likelihood that the creditors (who had already been in receipt of the proposals circulated by the practitioner for an arrangement that was significantly less favourable to them) would reject them. As noted in para. 15 (e) above, the net dividend available to the unsecured creditors under the counter-proposal was €17,000. It is unsurprising that the practitioner thought that the creditors would not be prepared to support such an arrangement in circumstances where, under his proposals, the sum available for unsecured creditors was €101,955.84. If one excluded the unsecured dividend to be paid to the bank of €18,255.92, there would still be a significant fund of €83,699.92 available for distribution to the remaining unsecured creditors under the practitioner's proposals. The advice given by the practitioner to the debtors must be seen against this backdrop.

Unfair prejudice to the bank

55. In light of my conclusion in relation to s. 115A (9)(e), it is, strictly speaking, unnecessary to consider the other issues debated at the hearing of the appeal. Nonetheless, for completeness, I will now address the issue of unfair prejudice within the meaning of s. 115A (9) (f) which has also been raised by the bank. As noted above, each of the unsecured creditors will participate on a *pari passu* basis in the distribution of the fund available under the practitioner's proposals for the unsecured creditors. As further noted above, the *pari passu* basis of distribution is universally recognised as a fair and equitable means of distribution to creditors of an insolvent estate (whether personal or corporate). However, the issue here is not with the application of the *pari passu* principle but with the extent of the provision that has been made for the unsecured creditors. As a consequence of the extent of provision made, it is contended that the bank suffers an unfair prejudice. The bank's complaint is that the generous dividend to the unsecured creditors in this case is, in fact, being funded by it. Were it not for the moratorium on repayments of capital under the proposed arrangements, it would not be possible to make such a generous payment to the unsecured creditors in these cases. While I stress that there is nothing, *per se*, objectionable in making provision for unsecured creditors, it is the extent of the provision which has been made in this case which gives rise to potential difficulty.

56. In the context of s. 115A (9) (f), I am required to consider whether the arrangements are not unfairly prejudicial to the interests of any interested party. The concept of unfair prejudice is not defined in the 2012 Act. Significant guidance was given as to its meaning (in an examinership context) by O'Donnell J. in the Supreme Court in *McInerney Homes Ltd* [2011] IESC 31 at paras. 29-30. In those paragraphs, O'Donnell J. highlighted that an arrangement of this kind is inherently prejudicial to creditors insofar as it requires them to accept a written down amount for their debt. Prejudice, of itself, is not sufficient to engage the provisions of s. 115A (9) (f). As a consequence, the question in any particular case is whether the prejudice suffered by an individual creditor can be said to be unfair. O'Donnell J. then continued as follows:-

"29. … The essential flexibility of the test appears deliberate. It is very unlikely that a comprehensive definition of the circumstances of when a proposal would be unfair could be attempted, or indeed would be wise. ... The Act … appears to invite a court to exercise its general sense of whether, in the round, any particular proposal is unfair or unfairly prejudicial to any interested party, subject to the significant qualification that the test is posed in the negative: the Court cannot confirm the scheme unless it is satisfied the proposals are not unfairly prejudicial to any interested party.

30. In this case, the trial judge's approach to the question was to view the scheme against the likely return to affected creditors under the likely alternative in the event that there was no examinership, and no successful scheme. I agree that that is a vital test. Furthermore, as the trial judge recognised, there may well be circumstances where a creditor may be required to accept less than would be obtained in such circumstances on liquidation or a receivership, but those circumstances would normally require weighty justification. ...".

57. Further guidance was given by Baker J. in *Michael Ennis* [2017] IEHC 120 where she said at para. 40:-

> *"I have considered the provisions of s. 115A in a number of judgments, most recently in Re JD … and it is clear that the court, in the exercise of the statutory power, must consider the fairness of the proposed PIA, and in that regard a comparison with bankruptcy is an essential element of the manner in which the court engages the question of fairness."*

In the interlocking cases before the court, the bank will fare better under the proposed arrangements than it would in a bankruptcy. To that extent, the proposed arrangements pass the "*vital test*" mentioned by O'Donnell J. in *McInerney Homes*. As noted in para. 10 above, by my calculations, the bank will secure a return of 50.5 cent in the euro under the proposed arrangements whereas, the outcome for the bank in the event of bankruptcy is 45.40 cent in the euro.

58. However, it is clear from the judgment of O'Donnell J. that, while a comparison with the outcome in a bankruptcy is an essential consideration in the context of unfair prejudice, it is not the only consideration. O'Donnell J. stressed the flexibility of the test. It is also clear that, in assessing whether any prejudice is unfair, the issue should be considered in the round. The bank contends that there is manifest unfairness to it here in the circumstances where the main source of funding for the generous dividend to the unsecured creditors is generated by the moratorium on the repayment of capital over the 72 month period of the proposed arrangements. During that period, the bank loan will be paid on an interest only basis. The bank also reiterates the points made by it in the context of s. 115A (9) (e) that, as a consequence of the way in which the proposed arrangements have been formulated, the return to the credit union is "*vastly superior*" to the return under a bankruptcy when compared with the relative return for the bank under the proposed arrangements, relative to the rate of return in a bankruptcy.

59. As noted in para. 44 above, counsel for the practitioner has argued that the proposed moratorium on the repayment of capital is expressly envisaged by s. 102 (6) (b) of the 2012 Act. He is obviously correct in making that submission. However, the extent of the provision made for unsecured creditors here is striking. In my experience, it is unusually generous. As noted in para. 9 above, the return for the unsecured creditors in a bankruptcy would be of the order of 0.22 cent in the euro in the event of Ms. Griffin's bankruptcy and 0.50 cent in the euro in the event of Mr. Griffin's bankruptcy. This compares with 6.53 cent in the euro and 6.7 cent in the euro respectively under the proposed arrangements.

60. As noted above, the practitioner, in formulating arrangements of this kind, is to be accorded an appropriate margin of appreciation. However, that is not to be confused with *carte blanche*. Any arrangements proposed by a practitioner will, in the event that s. 115A has to be invoked, be subject to the myriad of considerations which arise under that section including the requirements of s. 115A (9) (f). As a number of judgments of Baker J. highlight, the onus is on the practitioner to demonstrate that the requirements of s. 115A have been satisfied.

61. As noted in the context of s. 115A (9) (e), the proposed arrangements, on their face, might appear to treat both the bank and the credit union in the same way. Nonetheless, as the submissions of counsel for the bank have demonstrated (as set out in paras. 32-35 above) the credit union will fare better than the bank, on a relative basis, under these arrangements than in the event of a bankruptcy. In considering the matter in the round, I must also bear in mind that, in the case of the security held by the bank over the family home, s. 103 (2) of the 2012 Act applies. That subsection applies to cases where property secured in favour of a secured creditor is to be retained under an arrangement and, at the same time, the arrangement provides for a reduction of the principal sum due in respect of the secured debt. In such circumstances, s. 103 (2) provides, for the protection of the secured creditor, that the principal sum cannot be reduced to an amount less than the value of the security (as determined in accordance with s. 105). However, it is clear from the case law, that a write down of the principal sum to the market value of the secured property is not automatic. As Baker J. explained in *Laura Sweeney* [2018] IEHC 456 at para. 54 any write down of the principal sum under s. 103 (2) is to be assessed in the light of the repayment capacity of the debtor. At para. 56 of the same judgment Baker J. emphasised that a write-down to market value is not directed by the 2012-2015 Acts and she reiterated that the extent of any write-down is to be measured by reference to the affordability of payment.

62. Consistent with the approach taken by Baker J., I expressed a similar view subsequently in Lisa Parkin [2019] IEHC 56 where I said at para. 109:-

> *"I … 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. … That is an extremely important protection for secured creditors and is undoubtedly informed by respect for the property rights of such creditors."

63. In order to consider the matter in the round, it seems to me that I must, therefore, consider whether the practitioner has justified the proposed write-down of the mortgage debt due to the bank to the market value of the family home. If that write-down can be justified, then the only issue that would arise under s. 115A (9) (f) is whether the generous provision made for unsecured creditors gives rise to unfair prejudice. If, on the other hand, it emerges that there is no sufficient justification put forward for the write-down in value, then it seems to me, considering the matter in the round, it would be very difficult to say that the bank has not been unfairly prejudiced by the "*double-whammy"* of the imposition of a moratorium on repayments of capital and an unjustified write-down in market value. In those circumstances, I propose to move, at this point, to a consideration of the third of the issues raised by the bank.

The complaint made under s. 115A (9) (b) (ii) of the 2012 Act

64. It is a requirement of s. 115A (9) (b) (ii) of the 2012 Act that, before an arrangement can be approved, the court must be satisfied that there is a reasonable prospect that the arrangement will:

"enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit".

65. In this case, the bank draws attention to the fact that, on the basis of the figures set out in the proposed arrangements and the written down value of the principal sum to €140,000, the debtors will have a monthly surplus, following completion of the arrangements of €1,596.26, after discharging their reasonable living expenses and the payments due on foot of the mortgage. This raises a question as to why it was necessary in those circumstances to reduce the principal sum due in respect of the mortgage over the family home to €140,000. Having regard to the principles outlined by Baker J. in *Laura Sweeney*, the existence of such a significant monthly surplus, after completion of the arrangements, suggests that Ms. Griffin and Mr. Griffin could afford to make repayments in respect of a higher principal sum.

66. The existence of this surplus was very specifically raised by the bank in the course of the Circuit Court proceedings. The response given by the practitioner in paras. 21 and 22 of his affidavit was in the following terms:-

"Paragraph 8 of the objecting creditor affidavit states that '…will have a surplus monthly income of €1,596.26'. This is entirely incorrect. Based on year 1 household income, year 7 RLE and year 7 mortgage repayment the debtors will have a 'projected' monthly surplus at the end of the PIA. There is no visibility or certainty to this figure. In my view it is merely a projected/theoretical amount based on 'known knowns' when the PIA is proposed to creditors in the first instance. It does not take account of the possible reduction or loss of illness benefit entitlements, the possibility of special circumstance costs for their son's further

education, any costs arising based on Maeve Griffin's health situation or any other issues over the term of the PIA. Equally it does not take account of any potential salary increments that may accrue to Gerry Griffin over the period.

22. Based on the foregoing the income and RLEs have been maximised for the benefit of creditors for the maximum period of a PIA and a theoretical post PIA household monthly surplus cannot be taken as a firm/actual amount at this point in time as it may be influenced/impacted by other factors in the intervening period, and in any event, is not captured in the 'means of the debtor' as per the capital PIA."
(Emphasis in original).

67. In my view, these averments by the practitioner fall far short of providing any sufficient explanation as to why the practitioner reduced the principal debt due to the bank to the value of the family home particularly in circumstances where, on his own figures, there is likely to be a surplus of as much as €1,596.26 per month after the completion of the 72 month arrangements. I note, in this context, that in para. 22 of his affidavit (quoted above) the practitioner suggests that any surplus arising following completion of the proposed arrangements would not be "*captured*" by the "*means of the debtor*" as provided for in s. 115A (9) (b) (ii). As I understand the suggestion made by him, the practitioner seeks to rely on the language of the statutory provision in question which suggests that what the court is required to address is the extent to which the means of the debtor are brought to bear under the terms of the arrangements. If the court is confined to considering the terms of the arrangements, any surplus which arises post arrangement (so it might be argued) falls outside the ambit of the statutory provision. If that is what the practitioner is suggesting, it is, in my view, a mistaken understanding of the effect of the statutory provision and of the proposed arrangements which he has formulated. The fact is that it is a term of the proposed arrangements which he has formulated that the principal debt due to the bank will be written down to the value of the family home. That is an essential and integral part of the terms of the arrangements which he proposes. The write-down will endure not just for the duration of the arrangements but for the balance of the mortgage term. The question which arise here is whether that write-down has the effect that the means of Ms. Griffin and Mr. Griffin have been sufficiently brought to bear. On the face of the evidence before the court as to the surplus which will arise after the completion of the proposed arrangements, there was, in my view, a particularly heavy onus on the practitioner to justify and explain how he had come to the conclusion that it was appropriate to write-down the debt to market value. I can see nothing in the evidence which he has placed before the court in the course of the Circuit Court proceedings which justifies the extent of the write-down.

68. I fully accept that, following the successful completion of an arrangement, debtors should not, where possible, be confined to the reasonable living expenses recommended by the ISI. That is an issue which I addressed in my judgment in *Lisa Parkin* [2019] IEHC 56 and it is unnecessary to repeat that analysis here. However, it is difficult to see how Ms. Griffin and Mr. Griffin require a buffer of the order of €1,569.26 above the reasonable living expenses. While I appreciate that in the *Lisa Parkin* case, a reasonably generous

buffer was accepted by the court, this was not intended to be a bench mark for what would be acceptable in all cases. In that case, I had a very significant concern that the issue in relation to the extent of the surplus had not been adequately flagged by the objecting creditor in the course of the Circuit Court hearing and therefore had not been addressed in any detail in either the affidavits filed by Ms. Parkin or by the practitioner in that case. In contrast, in the present case, the issue was raised very plainly by the bank in para. 8 of Mr. Gately's affidavit filed in May 2018 and the point was specifically made by him that, even if 50% of that monthly surplus was made available, it would be sufficient to service payment of part of the amount which had been written down. The practitioner and Ms. Griffin and Mr. Griffin were each therefore on notice that this was an issue of concern to the bank and they failed to address it in any sufficient level of detail in response. In these circumstances, I have come to the conclusion that there is no sufficient evidence before the court which would allow the court to form the view that surplus income of the order of €1,596.26 per month is justified or reasonable. Similarly, there is no evidence to justify the extent of the write-down.

69. I appreciate that, in the course of the appeal, further evidence was delivered by Ms. Griffin and by the practitioner in response to the additional affidavit delivered by the bank with leave of the court. These affidavits go far beyond a response to the matters raised on behalf of the bank in its new affidavit. No leave was given for the delivery of such affidavits. Even if regard is given to these affidavits, they are at a level of generality which again falls far short of justifying the retention of the monthly surplus described above or the write-down of the principal sum due to the bank. While a large number of potential expenses in the future are listed in the affidavit (which may or may not arise), the explanation for the reduction in the principal sum is ultimately given in para. 32 of the practitioner's affidavit in the following terms:-

> *"32. I say that an order to reach a sustainable and affordable payment, and to return the debtor to solvency, I had to reduce the debt, and the appropriate reduction was to €140,000. I say that this reduction was based on the age and means of the debtor and based on affordability. I say that fact the payment of interest only mortgage repayments over the 72 month term of the PIA would automatically result in a significant uplift in the monthly payments after the PIA for the remaining 168 month mortgage term. In this case the mortgage during the PIA amounted to €495.83 on an interest only basis increasing to €1,107.12 on a full capital and interest basis after the PIA".*

70. In my view this does not provide any rational or objectively justifiable basis for the reduction of the mortgage debt to €140,000. While the practitioner says that this is based on the age, means, and affordability of the debtors, he does not explain this in any way and, in particular, does not sufficiently explain why the debtors here need a buffer of €1,596.26 per month. On the face of it, that is a very generous buffer and requires a more detailed explanation. While reference is made to the potential for future medical expenses for Ms. Griffin, no attempt has been made to evaluate the likelihood that such expenses might arise in the future. In fact, no sufficient evidence has been given as to

Ms. Griffin's medical needs. In the circumstances, it seems to me that not only can I not be satisfied that the requirements of s. 115A (9) (b) (ii) have been satisfied but the same difficulty arises in relation to s. 115A (9) (f). In circumstances where the write-down of the mortgage debt has not been justified, it is impossible to conclude that a bank would not be unfairly prejudiced by the proposed arrangements.

Conclusion

71. In light of the considerations outlined above, I am unable to conclude that all of the requirements of s. 115A have been satisfied in this case. In those circumstances, it is not possible to make an order confirming that the proposed arrangements should come into effect. In reaching this conclusion, I am very conscious that I differ from the decision of the learned Circuit Court judge. However, I have had the benefit of more extensive submissions (both written and oral) than were made in the Circuit Court. I have also had more time to reflect on the arguments than was available to the learned Circuit Court judge.

72. At the same time, I am also conscious that more than a year has passed since the decision of the learned Circuit Court judge and that, in the meantime, the practitioner has taken steps to implement the arrangements which were the subject of the order made by the Circuit Court in July 2018. Regrettably, there is no facility available under the 2012-2015 Acts for the court to make adjustments to an arrangement that has already been voted on by creditors so as to correct or counter-balance any perceived unfairness. It is clear, on the basis of the evidence before the court, that it would be possible to formulate arrangements in both of these cases which would meet the requirements of s. 115A. The circumstances of persons such as Ms. Griffin and Mr. Griffin are precisely what the Oireachtas had in mind when enacting the 2012-2015 Acts. It should not be difficult to formulate proposals which would address the concerns outlined in this judgment while, at the same time providing a fair distribution to the other creditors of Ms. Griffin and Mr. Griffin. In this context, I do not know whether any steps might reasonably be taken which, with goodwill from all parties, might avoid the necessity to recommence the process. I believe it would be worthwhile adjourning the matter for a short period of time to see whether any such steps might be taken.

73. If it is not possible to avoid recommencing the process under the 2012-2015 Acts, it seems to me that there would be a good basis on which to apply to the Circuit Court for an order pursuant to s. 91 (3) of the 2012 Act to permit an application for a protective certificate to be made in advance of the twelve month period prescribed by s. 91 (1) (i). While it would obviously be a matter for the learned Circuit Court judge to form his or her own view on any such application, it seems to me that there are factors here outside the control of Ms. Griffin and Mr. Griffin which would make it just to permit them to make a new proposal for a personal insolvency arrangement. In this regard, I am struck by the fact that the counter-proposal from the bank was made at such a late stage that it was wholly impracticable for the practitioner to reformulate the proposals at that point. In light of the fact that proxies had already been received from creditors, it was entirely reasonable for the practitioner to take the step which he did. If the counter-proposal had

been made in a more timely way, it would have highlighted the issue which became the focus of the hearing before me and would have allowed the practitioner to formulate proposals (in advance of circulation to creditors) which took account of the underlying complaint made by the bank in the email of August 2017. While the counter-proposal itself lacked reality, the complaint that the proposals then under consideration were unduly weighted in favour of the credit union was an issue that could have been taken on board and appropriate proposals prepared which provided for a fairer distribution as between the credit union on the one hand and the bank on the other.

74. In light of the considerations discussed in paras. 72 to 73 above, I propose, before making any order in this case, to adjourn the matter for a period of weeks to see whether any practical solution can be found which would avoid the re-commencement of the process. I will discuss with counsel what period of time should be allowed for that purpose. I should make clear that I am not confident that any such practical solution can be found but I believe it would be a pity not to allow an opportunity to the parties to explore whether a solution can be identified.