[2020] IEHC 164

THE HIGH COURT
CIRCUIT APPEAL

[2019 No. 369 C.A.]
[2019 No. 370 C.A.]

DUBLIN CIRCUIT
COUNTY OF DUBLIN

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012-2015
AND IN THE MATTER OF ALLEN NUZUM (A DEBTOR)
AND IN MATTER OF ELIZABETH NUZUM (A DEBTOR)

JUDGMENT of Mr. Justice Denis McDonald delivered on 30 March, 2020

Introduction

1. The facts underling the appeals in the above interlocking cases are unusual. First, the family home of the debtors, Mr. Allen Nuzum and Ms. Elizabeth Nuzum (who are a married couple) is worth significantly more than the debt due to the objecting creditor, Promontoria (Aran) Ltd ("*Promontoria*"). Secondly, Mr. Nuzum and Ms. Nuzum have no debts other than their debt to Promontoria (which is secured on their family home).

2. In circumstances where Promontoria is the only creditor of Mr. Nuzum and Ms. Nuzum, the personal insolvency arrangement proposed in both cases fell to be considered by Promontoria alone in accordance with the provisions of s. 111A of the Personal Insolvency Act, 2012 ("*the 2012 Act*"). Promontoria rejected the arrangements and has contended that, on the facts, Mr. Nuzum and Ms. Nuzum are not insolvent. Nonetheless, in each case, Mr. Eugene McDarby, the personal insolvency practitioner acting on behalf of the debtors *("the practitioner")* brought an application before the Circuit Court seeking an order under s. 115A of the 2012 Act confirming the coming into effect of the proposed arrangements. Those applications were dismissed by the learned Circuit Court judge on 23rd July, 2019. Thereafter, the practitioner appealed that decision to this court. The hearing of the appeals took place on 16 January 2020 and written submissions were subsequently made available to the court on 31 January.

3. The appeals are opposed by Promontoria. In the first place, as noted above, Promontoria contends that the debtors are not insolvent. In that context, Promontoria points to the fact that Mr Nuzum and Ms Nuzum have clearly been able to pay their day to day debts as they fall due. The absence of other creditors demonstrates this. In so far as the debt to Promontoria is concerned, it argues that a sale of the principal residence will generate ample funds to repay the debt of Mr. and Ms. Nuzum to Promontoria and to acquire new accommodation. In such circumstances, Promontoria contends that it cannot be said that Mr. Nuzum and Ms. Nuzum are insolvent.

4. In addition, Promontoria argues, on a number of grounds, that the proposed arrangement is, in any event, unfairly prejudicial to it. In this context, among the grounds advanced by Promontoria, is an argument that the costs of enabling the debtors to continue to reside in their family home are disproportionately large.

Relevant facts

5. Mr. Nuzum and Ms. Nuzum were both born in April 1971. They have four dependent children. At the time of preparation of the proposed arrangements in 2018 the children were aged 12, 11, 10 and 5 respectively. The family lives in a substantial five bedroomed home on the outskirts of Dublin. It is a detached property. On the basis of the evidence before the court, it is situated in a "*gated community*" comprising 25 detached homes in total. The valuation of the property has been agreed at €1 million.

6. The amount owed to Promontoria, secured by a mortgage over the property, is €710,625.96. As a consequence, the debtors have an equity of the order of €289,374.04 in the property. According to the affidavit sworn by Ms. Nuzum on 28th June, 2019, the family requires a five-bedroom property and would not be able to find such a property for €290,000.00. In para. 9 of her affidavit Ms. Nuzum says: -

> *"9 I considered and discussed trading down, social housing, mortgage to rent, and rental accommodation with my PIP however none of these options were appropriate (or indeed as beneficial for both myself and the Objecting Creditor as the PIA) due to the equity left over will not accommodate my young family of four children and au pair. I say the au pair is required to allow me go to work and enable me to discharge my debts. The au pair's services will not be required as the children grow older. I also have family in the immediate area and routine has been set for my children. I say I went of (sic) the DAFT website and could not find a five-bedroom house for €290,000.00. I say that with such equity left over, I would not be eligible for social housing or the mortgage to rent scheme".*

7. As noted above, Mr. Nuzum and Ms. Nuzum have no unsecured creditors. Their only creditor is Promontoria. Their indebtedness to Promontoria arises on foot of a loan advanced by Ulster Bank Ireland Ltd ("*UBIL*"). Promontoria is now the successor in title to UBIL. Promontoria contends that the loan in question (although advanced in 2009) was never intended to be anything more than a bridging facility which would be repayable in full within a period of four months.

8. Under the relevant loan agreement between UBIL and Mr. and Ms. Nuzum, UBIL agreed to advance €616,100 for a term of four months from drawdown. According to the agreement (which was incorporated in a facility letter issued by UBIL dated 8th September, 2009 and signed by Mr. and Ms. Nuzum on 18th September, 2009) the purpose of the loan is stated to be as follows: -

> *"Renewal of existing bridging loan facility originally provided as follows: -*
>
> *€1,160,000… to assist with the purchase of [the principal private residence] and fund stamp duty payable in respect of this purchase.*
>
> *€183,000… to refinance Irish Permanent Building Society relating to [a different property]*
>
> *€10,000 to allow roll-up of arrangement fee".*

9. The agreement also stated that the loan was *"repayable on demand and in the absence of demand the Bank has agreed that a moratorium on repayment of capital will apply for a further four-months and interest is payable monthly during this time. Based on the prevailing interest rates the monthly instalment will equate to €1,796.96…."*

10. The loan agreement also envisaged that, in addition to payment of monthly interest mentioned in para. 9 above, a lump sum payment of €80,000 would be made on 31st December, 2009 from the sale of a horse and a sum of €50,000 was to be paid from the sale of a further horse "*due prior to 31/03/2010*" (which, it should be noted, is beyond the four-month period for which the loan was stated to be given).

11. In the event that the lump sum reductions mentioned in para. 10 above were not applied against the loan within the time scales specified in the loan agreement, the agreement provided that the margin applicable to the loan would increase by a further 1%.

12. The loan agreement also contained the following provision: -

> *"Based on the planned reductions outlined above… there will be a residual balance of approximately €486,100 and the borrower is to arrange repayment of this through asset disposal, restructure on a home loan basis and/or refinance of the facility".*

13. The loan agreement further stated that, by extending the facility up to 31st December, 2009, UBIL was not *"committing to financing the residual debt on a long term basis. …*".

14. Notwithstanding these provisions of the loan agreement, there is no evidence that UBIL made demand for payment of the residual balance at the end of the four-month period for which the loan was stated to be given. It appears from the papers before the court that monthly payments were made by Mr. Nuzum and Ms. Nuzum to UBIL but there is no direct evidence before the court explaining how a facility which was repayable on 31st December, 2009 was left in place thereafter. In her affidavit, Ms. Nuzum exhibits a statement of account dated 29th December, 2017 for the 2017 calendar year. This shows that interest was debited quarterly during that period. In addition, during that period, Mr. Nuzum and Ms. Nuzum made three payments of €3,000, one payment of €500 and nine payments of €3,500. However, in the course of the affidavits sworn on behalf of Promontoria and in the course of the submissions made on its behalf at the hearing, it has nonetheless been contended by Promontoria that the loan remained a demand facility under which the debtors were liable to repay the entire amount of the loan and that it had fallen due on 31 December 2009. In this context, it should be noted that, for the purposes of s. 115A (18), the practitioner exhibited to his first affidavit, a letter sent by Capita Asset Services (Ireland) Ltd ("*Capita*") on behalf of Promontoria to Mr. Nuzum and Ms. Nuzum on 4th August, 2015 (relating to the mortgage arrears resolution process) which expressly stated that the "*account fell into arrears*" on 31st December, 2009.

15. Against that backdrop, Promontoria argues that, at the time of service of its proof of debt, the sum of €710,625.96 had fallen due in full. At the same time, Promontoria argues that

the debtors owned an asset valued at €1 million. In those circumstances, Promontoria submits that the debtors plainly had the means available to discharge the debt from the proceeds of sale of their residence and accordingly could not be considered to be insolvent for the purposes of the 2012-2015 Acts. It will be necessary, in due course, to consider the submissions of the parties in more detail. Before doing so, I should first draw attention to the relevant terms of the proposed arrangements and to some aspects of the evidence before the court.

The proposed arrangements

16. The arrangements proposed by the practitioner would, if confirmed by the court, last for twelve months. The loan owed to Promontoria would be restructured as follows: -

    (a) The current arrears would be capitalised;

    (b) The term would be extended into the future by 360 months. Given that Mr. Nuzum and Ms. Nuzum were both born in 1979, this would mean that, if the arrangements were confirmed now, they would each be 79 years old before the mortgage would be repaid;

    (c) The interest would remain at 3.81%;

    (d) Repayments would be fixed at €2,329.60 per month for the one-year term of the arrangement;

    (e) After the arrangement, what are described as full interest and capital payments of €3,376.36 would be made for the duration of the term.

17. As I understand it, the reason why repayments are fixed at a lower level for the one-year term of the arrangement is that a sum of €12,240 (to include VAT and outlay) is to be paid to the practitioner in respect of his fee.

The objection of Promontoria

18. Promontoria has raised a number of grounds of objection as follows: -

    (a) In the first place, as noted above, Promontoria argues that the debtors are not insolvent. In those circumstances, Promontoria submits that Mr. Nuzum and Ms. Nuzum do not satisfy the eligibility criteria set out in s. 91 of the 2020 Act and that the proposed arrangement must therefore be rejected by the court;

    (b) Promontoria also makes the case that its interests are unfairly prejudiced by the proposed arrangements in circumstances where the costs of enabling the debtors to continue to reside in their residence are disproportionately large and where the residence is said to be excessive for their needs.

    (c) Promontoria also argues that it is unfairly prejudicial to its interests to impose on it the costs of a personal insolvency arrangement and a home loan restructure in circumstances where the residence of Mr. Nuzum and Ms. Nuzum is in substantial positive equity;

(d) Promontoria also contends that the arrangement is unfairly prejudicial to it in circumstances where the proposed term extension will extend the term of the home loan beyond the ordinary retirement age of Mr. Nuzum and Ms. Nuzum. The point is made in the affidavit sworn by Alan Monahan on behalf of Promontoria that, under the proposed arrangement, Mr. Nuzum and Ms. Nuzum would be 78 years of age when the mortgage term comes to an end. Promontoria says that there is no evidence of any repayment capacity on their behalf at that time. For completeness, it should be noted that Mr Monahan's affidavit was sworn in 2019. As noted in para. 16 (b) above, if the arrangements are confirmed, Mr. Nuzum and Ms. Nuzum will be 79 by the time the mortgage has been paid off.

(e) Promontoria also argues that it would achieve a better outcome in the event of a bankruptcy of Mr. Nuzum and Ms. Nuzum. In the event of a bankruptcy, Promontoria would be repaid in full immediately without deduction. In the circumstances, Promontoria argues that s. 120 (e) of the 2012 Act applies.

The response of the practitioner

19. In a replying affidavit sworn on 14th March, 2019, the practitioner made a number of points as follows: -

(a) In para. 12 of his affidavit he rejected the suggestion made by Promontoria that Mr. Nuzum and Ms. Nuzum are not insolvent. He said:

> *"12…the Debtor is insolvent and eligible under section 91 in circumstances where the Debtor is cashflow insolvent and is unable to pay their debts as they fall due. I say that as is set out in the PFS and PIA… there is a monthly deficit in the sum of €3,972.75 and thus there is no doubt that the Debtor is insolvent".*

(b) He suggested that the term extension is the most "*benign of restructures*" and that it is both expressly provided for in the 2012 Act and in the Central Bank Code of Conduct on Mortgage Arrears;

(c) He also suggested that the extension of the term increased the payment which Promontoria would ultimately receive. He estimated that, over the course of the full restructured term, a sum of €1,202,928.48 would be paid to Promontoria (inclusive of both principal and interest);

(d) The practitioner contends that the household income of Mr. Nuzum and Ms. Nuzum will be sufficient to make the payments envisaged under the restructured mortgage loan. Based on total household income of €7,013.98 (and after allowing for household costs, childcare and special circumstances costs) there would be a monthly affordability of €3,401.81 which would be sufficient to meet the monthly mortgage repayment of €3,376.36 envisaged under the proposed arrangement;

(e) With regard to the concern expressed by Promontoria in relation to the extension of the mortgage term to a time when Mr. Nuzum and Ms. Nuzum would each be 78

years old, the practitioner said that, since they own their own business, there is no mandatory retirement age and they can therefore "*continue to work if required".* He also suggested that they would each be entitled to the State old-age pension at age 66. In para. 39 of his affidavit the practitioner said: -

> *"…the Debtor is employed as a company director. I say and believe that I have been informed by the Debtor that it is likely that the Debtor will pursue this occupation until 77 years of age, and hence while the mortgage restructure is as set out under the PIA".*

It should be noted that, at the time of swearing of this affidavit, the projected age of the debtors at the end of the mortgage term was 77.

(f) At para. 40 of his affidavit, the practitioner confirms that the debtors do not have a private pension. However, the practitioner suggests that both Mr. Nuzum and Ms. Nuzum will be entitled to the State old age pension at age 66. Given their dates of birth, I am not sure that the practitioner is correct in this suggestion. My understanding is that, under existing law, Mr. Nuzum and Ms. Nuzum would have to wait until they are 68 years of age before qualifying for payment of the State old age pension. Based on current figures, the practitioner says that each of them would be entitled to the sum of €1,054.30 per month in respect of the old age pension;

(g) The practitioner also exhibits to his affidavit a number of emails sent on behalf of Promontoria in advance of the finalisation of the proposed arrangement in which Promontoria indicated that, if the fees to be paid to the practitioner were reduced to €5,000 for both cases, Promontoria "*would strongly consider this PIA*". During the course of the hearing in January 2020, counsel for the practitioner argued that these emails demonstrated very clearly that Promontoria did not have any substantial objection to the proposed arrangement and that the reason for the change of stance by Promontoria has never been satisfactorily explained.

The reply of Promontoria

20. In response to the affidavit sworn by the practitioner, a supplemental affidavit was sworn on behalf of Promontoria by Mr. Alan Monahan on 3rd May, 2019. In that affidavit Mr. Monahan drew attention to the following: -

(a) In the first place, he noted that, at that point, no affidavit had been forthcoming from either Mr. Nuzum or Ms. Nuzum personally which he suggested was relevant *"for the propriety of the retention of the Principal Residence given the extravagance of same as well as the question of the Debtors' solvency has been raised by the Objecting Creditor";*

(b) In response to the suggestion made by the practitioner that Mr. Nuzum and Ms. Nuzum are "*cash flow insolvent*", Mr. Monahan said that this ignored the fact that the residence could be sold with very substantial equity which would be sufficient to

allow a replacement property to be acquired which would be "*more suited to the Debtors self-labelled status as insolvent*". However, notably, Mr. Monahan did not controvert the averment made by the practitioner in para. 12 of his affidavit (quoted in para. 19 (e) above) that there is a monthly deficit in the sum of €3,972.75;

(c) In para. 12 of his affidavit Mr. Monahan explains Promontoria's opposition to the term extension. He referred to the fact that the loan was advanced to Mr. Nuzum and Ms. Nuzum on a bridging basis and that it was not a home loan in the traditional sense. He also referred to the term of the loan agreement (described above) which stated that Mr. Nuzum and Ms. Nuzum would have to restructure their liabilities in order to make themselves eligible for standard housing finance. In the same affidavit, he suggested that the debtors are impermissibly seeking to rely on the 2012-2015 Acts to significantly renegotiate the terms of the "*very particular deal*" struck by them with UBIL in 2009 which they entered into as experienced business people;

(d) Mr. Monahan also complained that the proposed arrangement did not, as the practitioner sought to suggest, repay the debt in full. In this context, Mr. Monahan highlighted the term of the loan agreement (described in para. 11 above) which provides for an increase in the rate of interest in the event of a default.

(e) With regard to the suggestion made by the practitioner that the term extension is the "*most benign*" solution, Mr. Monahan said that this fails to have any regard to the fact that the "*underlying facility has long since expired and it is not a matter of simply extending same but rather as a matter of imposing an entirely new lending structure on the Objecting Creditor";*

(f) Mr. Monahan emphasised that, in Promontoria's view, the practitioner has failed to engage with the issue of the "*propriety*" of the retention of the residence. He exhibited a photograph of the property together with a description of the development of 25 homes (of which the residence forms part) given by an estate agent in the following terms: -

> *"An exclusive gated community with 25 luxurious detached homes …. The private gated community is located in landscaped grounds, with mature trees and a beautiful central park";*

In para. 29 of his affidavit Mr. Monahan further suggested that the value of the residence is far in excess of the average price for a five bedroomed detached house in that area of Dublin. He exhibited a report from a property website which suggested that a five bedroomed property in the same area of Dublin in the final quarter of 2018 could be acquired for €549,000 while, during the same period, the average asking price for a house in that area of Dublin was €311,916.00.

(g) Mr. Monahan concluded by suggesting that alternative and less costly accommodation is available to Mr. Nuzum and Ms. Nuzum and that the sale of the residence would generate positive equity of the order of €300,000 which "*would almost entirely cover the costs of the purchase of a new property in the immediate location… but on a more modest scale*". In the alternative, he suggested that the household income of Mr. Nuzum and Ms. Nuzum was sufficient to support a "*very high standard of letting if the Debtors chose not to purchase a property immediately"*. Mr. Monahan said that the interests of Promontoria are unfairly prejudiced by the proposed arrangement in circumstances where the residence is *"excessive for the needs of the Debtor and her family".*

The affidavit of Ms. Nuzum

21. The Circuit Court hearing of the application under s. 115A was fixed for 23rd July, 2019. Not long prior to that hearing, an affidavit of Ms. Nuzum sworn on 28th June, 2019 was filed on 8th July, 2019. The affidavit was made on behalf of both herself and Mr. Nuzum. As noted in para. 6 above, Ms. Nuzum, in that affidavit suggested that the equity left over from a sale of the property (were it to be sold) would not be sufficient to purchase an alternative property large enough to accommodate the debtors, their four children and an au pair. Ms. Nuzum also said: -

(a) With regard to the suggestion that the family might rent a property, Ms. Nuzum said that this would not give any long-term security or certainty for the family and she suggested that the rental costs for any property would be *"greatly in excess of the mortgage payments specified under the PIA…";*

(b) In para. 11 of her affidavit, Ms. Nuzum said that if the present application is not successful "*then my 'standard of living' … will in reality be as a homeless person*…". This contention is repeated in a number of paragraphs of the affidavit;

(c) Ms. Nuzum also stressed that the cost of alternative accommodation and the appropriateness of alternative accommodation must be borne in mind.

(d) Ms. Nuzum also placed some emphasis on the fact that Promontoria is not the original lender and she suggested that there is no way in which the court can properly assess any unfair prejudice argument advanced by Promontoria in circumstances where the "*discount or price paid for my loan*" has not been disclosed by Promontoria. This is an argument which is frequently made by debtors. However, in my view, the argument is without merit in circumstances where Promontoria is the successor in title to UBIL and is therefore entitled to the same rights against Mr. Nuzum and Ms. Nuzum as were previously enjoyed by UBIL. Even if it did acquire the debts due by Mr. Nuzum and Ms. Nuzum to UBIL at a discount, it will still suffer a prejudice if it does not recover the full amount to which it is contractually entitled to recover under the terms of the UBIL facility. In these circumstances, I do not propose to deal further in this judgment with this argument on the part of Ms. Nuzum;

(e) In para. 33 of her affidavit Ms. Nuzum further suggests that, at the time the loan was purchased by Promontoria, it knew that it was "*buying a long term contract*" and it knew also of the existence of the 2012 Act and the availability of personal insolvency arrangements;

(f) With regard to her personal position, Ms. Nuzum explained that the family difficulties of herself and her husband arose due to her "*father in law shutting down the family business leaving my husband unemployed"*. It appears from what is said by Ms. Nuzum in her affidavit that, subsequent to the closure of that business, Mr. Nuzum and Ms. Nuzum set up a new business of their own and that they are both directors of a company that carries on that business. There is no detail given in the affidavit as to the nature of that business or as to its commercial success. However, the arrangement suggests that the total net household income amounts on a monthly basis to €7,013.98 with the great bulk of that earned by Mr. Nuzum.

(g) In para. 36 of her affidavit Ms. Nuzum said that approval of the arrangement would allow the family to overcome their past financial difficulties and she said that retention of the residence:

> *"will have a huge impact on my life as my children (aged between 6-14) attend the local schools … which I believe will give them a head start in life. I say my children are members of the following clubs:… Rugby Club, … Tennis Club, ... Drama Club and … Swimming Club which I believe helps them build character and routine. I say my family live in … and … who help out with my children. Furthermore, the business my husband and I run is located literally ten minutes away from the PPR, my source of income to meet my debts";*

(h) With regard to the suitability of the family home, Ms. Nuzum also says in para. 39 of her affidavit that; -

> *"…my property is a five-bedroom house. It is located in … roughly 14.9 kilometres from Dublin City Centre. I say that the property is in average condition. I say that my home is suitable for my needs and appropriate in the circumstances. I say that average rent for a similar and/or suitable property in the area is circa €2,300.00 for a three-bedroom house which would not meet my family requirements. I say I did locate a number of houses with five bedrooms within the price range both my husband and I could afford but regretfully they are not in the proximity to schools and clubs my children attend nor my family…."*

(i) With regard to the ability of herself and her husband to meet their obligations in the future, Ms. Nuzum says in para. 56 of her affidavit that she has considered those obligations and that she is *"confident that I will comply with same…."*. However, Ms. Nuzum provides no detail which would enable me to form a view as to whether there is any substance to that contention. The affidavit sworn by Ms. Nuzum is somewhat repetitious. As noted above, it does not provide any details as to the

nature of the business carried on by Ms. Nuzum and her husband. Nor does it provide any information of the work undertaken by Mr. Nuzum and Ms. Nuzum respectively. This calls into question whether there is any sufficient information before the court to suggest that Mr. Nuzum and Ms. Nuzum will be in a position to continue working up to age 78 or 79. I appreciate that, as noted above, the practitioner has said in his affidavit that he has been informed that it is likely that Mr. Nuzum and Ms. Nuzum will pursue their occupation until 77 years of age. However, that is an extraordinarily bald assertion. It falls far short of constituting evidence on which a court could act. In circumstances where no evidence is provided as to the nature of the work actually undertaken by the debtors, it is simply not possible for me to reach any view as to whether there is any reasonable likelihood that what the practitioner says is correct.

The application to adduce further evidence

22. In the course of the hearing of the appeal in January 2020, counsel for the practitioner, when replying to the submissions made by counsel for Promontoria, intimated, for the first time, that he would like to have an opportunity to adduce further evidence in relation to the business carried on by Mr. Nuzum and Ms. Nuzum so as to assist in demonstrating that they could reasonably continue to work up to age 78 or 79. That application was (understandably) opposed by counsel for Promontoria. I refused that application in circumstances where (a) this is the hearing of an appeal from the Circuit Court, (b) no justification was offered as to why the evidence was not placed before the Circuit Court in the first place and (c) in circumstances where, at the point the application to adduce additional evidence was first made, the matter had been fully argued before me. The issue as to the earning capacity of the debtors had been raised in stark terms in para. 19 of Mr. Monahan's first affidavit sworn on 22nd November, 2018. There was ample opportunity for the practitioner to address that issue which clearly required more than a bald averment of the kind made by him in his replying affidavit sworn, more than 4 months later, on 14th March, 2019. The appropriate time in which to place the necessary evidence before the court was in the course of the proceedings before the Circuit Court. It is not acceptable that, after the hearing has taken place in the Circuit Court, and after the matter was fully argued in the High Court, that an application would be made, for the first time, to adduce further evidence. I must bear in mind, in this context, that the onus of proof is on the practitioner in an application under s. 115A and no justification whatever has been offered as to why this evidence was not placed before the Circuit Court in the first instance.

Discussion

23. This is an atypical case. I have not previously encountered a case in which a debtor has had such significant equity in a family home. In the vast majority of cases which come before the courts under the 2012 Act, the debtor is in what is known colloquially as "*negative equity*". It is true that, in a handful of cases, the value of the family home exceeds the debts secured against it. However, in most such cases, the extent of this "*positive equity*" is quite modest. I have never seen a case, before now, where the

extent of the equity available would be sufficient to acquire a new family home (albeit on a less substantial scale than the current family home).

24. This case is also unusual in circumstances where the loan facility secured on the family home is stated to be a bridging facility only. In the course of the hearing, I suggested to counsel for the parties that, given that the repayment date of 31st December, 2009 appears to have passed without a demand being made for immediate repayment of the loan, there might be a basis to suggest that the terms of the loan had been altered either as a consequence of an implied agreement arising from the conduct of the parties or arising by reference to the species of estoppel known as estoppel by convention (which again usually arises from the conduct of the parties). However, counsel for Promontoria argued that no evidence was adduced by the practitioner or by the debtors to contradict the evidence given by Mr. Monahan as to the nature of the facility. I am not sure, however, that this is correct. While there is certainly no significant level of detail in the affidavits sworn by Ms. Nuzum or by the practitioner in relation to the issue, it is clear from the affidavit sworn by Ms. Nuzum that, as noted in para. 21 (e) above, she has sought to make the case that this was a "*long term contract".* In addition, it is clear from the statement of account for the year 2017 (described above) that Promontoria was accepting monthly payments from Mr. Nuzum and Ms. Nuzum even after the letter of 4th August, 2015 which noted that the account "*fell into arrears*" on 31 December, 2009 (as described in para. 14 above).

25. The issues described in paras. 23 and 24 above are of concern to me. However, before reaching any conclusion in relation to either issue, it may be helpful if I address some of the other issues that were argued in the course of the hearing on 16 January 2020 and in the written submissions that were subsequently made available to the court on 31 January. In particular, it may be helpful at this point, to address the objection made by Promontoria that the debtors are not, in fact, insolvent within the meaning of the 2012-2015 Acts. If they are not insolvent, there would be no basis for the applications under s. 115A.

The meaning of the word "insolvent"

26. Section 91 (1) (d) of the 2012 Act makes clear that, for a debtor to be eligible to make a proposal for an arrangement, he or she must be "*insolvent*". In turn, s. 2 (1) defines "*insolvent*" in the following terms: -

> "'*insolvent'*, *in relation to a debtor, shall be construed as meaning that the debtor is unable to pay his or her debts in full as they fall due*".

27. As noted above, the practitioner, in para. 12 of his affidavit sworn on 14th March, 2019 says that each of the debtors is "*cash flow insolvent*". He makes that case on the basis that *"as … set out in the PFS and PIA … there is a monthly deficit in the sum of €3,972.75"*. I have to say that I am unable to identify any statement in the arrangements or in the prescribed financial statements ("*PFS*") of the debtors which confirms that the debtors are in default of their monthly payments to Promontoria to the extent of €3,972.75. I can find no information to that effect in the proposed

arrangements. Insofar as the PFS is concerned, I can see that it suggests that there is a deficit in monthly payments of the order of €2,471.72. This appears from the income and expenditure summary on p. 4 of the PFS where the current monthly payment due to Promontoria is stated to be €5,471.72 while the monthly payments actually made by the debtors is stated to amount to €3,000. However, this information is not entirely consistent with the information provided in the monthly expenditure table at p.p. 11-12 of the PFS where the current monthly payment due to Promontoria is stated to be €5,275.70 and the actual payment is stated to be €3,000.

28. As noted in para. 20 (b) above, Mr. Monahan on behalf of Promontoria has not specifically contradicted what is stated by the practitioner in para. 12 of his affidavit. Mr. Monahan does contest the suggestion that Mr. Nuzum and Ms. Nuzum are insolvent. However, he does so, not on the basis of the ability of Mr. Nuzum and Ms. Nuzum to make monthly payments but on the basis of their suggested ability to repay the entire indebtedness in full out of the proceeds of sale of the family home. Essentially, he says that, on a balance sheet basis, it is quite clear that Mr. Nuzum and Ms. Nuzum are not insolvent. That begs the question whether a balance sheet test is appropriate in assessing solvency or insolvency for the purposes of the 2012 Act.

29. In so far as I can see from the case law, the definition of "*insolvent*" in s. 2 (1) of the 2012 Act has not yet been considered in any detail. The case law suggests, however, that the balance sheet approach is not appropriate in the context of the 2012 Act. Thus, in *Sweeney (a debtor)* [2018] IEHC 456 an issue arose as to whether the fact that the principal private residence of the debtor was in "*negative equity*" meant that the debtor was insolvent. In para. 55 of her judgment, Baker J. rejected the suggestion that this, of itself, gave rise to insolvency. She said: -

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

30. However, it is clear from para. 59 of her judgment, that Baker J. considered that a demand made by a secured creditor could nonetheless trigger an insolvency. At para. 59 she said: -

> "*59. What is also highlighted by the present case is the fact that it is for the court and not the PIP to ultimately approve the PIA. This is so even in circumstances where the PIA is approved by the … creditors …. I am aware of one application where I refused to approve the coming into operation of a PIA after it has been approved by a meeting of creditors, in which the circumstances concerned a secured debt to be kept outside the PIA and demand of which would have caused an immediate insolvency. …"* (emphasis added).

31. I was not referred to any other authorities on the meaning of the word "*insolvent*" in the 2012 Act. In the circumstances, it seems to me that it would be appropriate to consider

whether any guidance can be obtained by reference to case law on analogous provisions of the Companies Act, 2014 ("*the 2014 Act").* Under s. 569 (1) (e) of the 2014 Act, a company may be wound up if it is "*unable to pay its debts".* This is a re-enactment of s. 213 (e) of the Companies Act, 1963 ("the 1963 Act"). Section 569 (1) (e) must be read in conjunction with s. 570 of the 2014 Act which is a re-enactment (with some additional provisions) of s. 214 of the 1963 Act. Section 570 (d) of the 2014 Act provides that a company is to be deemed to be unable to pay its debts: -

> *"if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company".*

32. The equivalent provision in the 1963 Act (namely s. 214 (c)) was considered by Laffoy J. in *Re. Connemara Mining Co.* Plc [2013] 1 I.R. 661. That case was principally concerned with the locus standi of the petitioner (who was a contributory of the company). However, at p.p. 682-686, Laffoy J. considered the provisions of s. 213 (e) of the 1963 Act. She drew attention to the decision of Barron J. (which was not directly concerned with s. 213 (e) of the 1963 Act) in *H. Albert de Barry & Co. v. O'Mullane* (High Court, unreported, 2 June 1992) where Barron J., at p.p. 54-55, observed as follows: -

> *"Insolvency is essentially a matter of assets and liabilities. If liabilities exceed assets, the position is one of insolvency. But the reverse is not necessarily true. A Company is not solvent because its assets exceed its liabilities. It cannot for example take into account assets which it requires to remain in existence save in so far as they may be used as security to raise finance. The test is ultimately; can it pay its debts as they fall due …".*

33. Laffoy J. also referred to the decision of the Supreme Court in *Crowley v. Northern Bank Finance* [1981] I.R. 353 (which concerned an issue as to whether, for the purposes of s. 288 (1) of the 1963 Act, a company was solvent when it created a floating charge). In his judgment in that case, Kenny J. said at p.p. 358-359: -

> *"'Solvent' and 'insolvency' are ambiguous words. It has now been established by the decided cases that, for the purposes of s. 288, the test to be applied in determining this is whether immediately after the debenture was given, the company was able to pay its debts as they became due. The question is not whether its assets exceeded in estimated value its liabilities or whether a business man would have regarded it as solvent*
>
> *… The question whether a company was solvent on a specified date is one of fact and involves many difficult inferences. …".*

34. At p. 683 of the report in *Connemara Mining*, Laffoy J. drew attention to the submission made by counsel for the petitioner in that case that, in determining whether the company there was able to pay its debts as they fell due, the court should apply a "*cash flow test*" and not a "*balance sheet test".* The former is concerned principally with whether a

company is able to pay its debts as they fall due while the latter is concerned with whether the value of a company's assets is less than the amount of its liabilities. Laffoy J. did not consider it necessary to express any view on the applicability of a balance sheet test.

35. At p.p. 683-684, Laffoy J. records the submission made by counsel on behalf of the petitioner in that case in relation to the factors which he suggested should be examined by the court when considering the application of the cash flow test. These were: -

    (a) the inability of the company to pay debts as they fall due;

    (b) only readily realisable assets can be used to determine the solvency of a company; and

    (c) any evidence about future funding of the company must be credible.

36. At p. 684, Laffoy J. made the following observations in relation to this submission by counsel for the petitioner: -

> *"The factor at (a) is certainly part of Irish law, having regard to the decision of the Supreme Court in Crowley v. Northern Bank Finance …, although there is no specific authority in this jurisdiction as to how far into the future the court must look to determine whether or not the Company can meet its debts as they fall due. In relation to the factor at (b), the Petitioner properly conceded that, in determining whether a company is able to pay its debts as they fall due, the court is not limited to assessing whether cash in hand was adequate to cover the debt. Where other assets have to be resorted to, the factor at (b) certainly accords with common sense. If a company is relying on borrowings or raising capital by a share issue to meet current liabilities, the application of the factor at (c) also accords with common sense. Accordingly, while I do consider that in an appropriate case the factors at (b) and (c) may be relevant in determining whether a petitioner has proved that the company, the subject of the petition, was unable to pay its debts as they fell due at the relevant time, each petition must be considered on its own facts. It is unnecessary to express any view on the appropriateness of the cash flow test as distinct from the balance sheet test, having regard to the facts before the court".*

37. On the facts, Laffoy J. came to the conclusion that the petitioner in that case had not established that the company was unable to pay its debts as they fell due. In reaching that conclusion, it is clear that Laffoy J. was of the view, on the basis of the evidence available in that case, that the company did not have to realise assets in order to pay its debts as they fell due. She also came to the conclusion that, even if it was necessary to realise assets, there is no evidence that it would not be able to do so. At p. 685 she said: -

"The contention that the intangible assets of the Company are not readily realisable contradicts [the] representation made to the court in the petition [that the company's interest in shares in another entity were freely transferable]. More significantly, there is no evidence before the court that a situation has arisen, or will arise in the short to medium term, in consequence of which, in order to meet its debts as they fall due, it will be necessary to realise the assets of the Company. On the contrary, the evidence shows that, with the exception of the remuneration of the directors, the Company has discharged its liability to its creditors…."

38. In my view, the approach taken by Laffoy J. in *Connemara Mining* provides valuable guidance. In particular, it seems to me that the passage quoted in para. 36 above confirms that, in applying a cash flow test, the court is entitled to take into account assets which are readily realisable. While Laffoy J did not express any view on the applicability of a balance sheet test, it is important to bear in mind that, under s. 570 (d) of the 2014 Act (in common with s. 214 (c) of the 1963 Act), the court, in determining whether a company is unable to pay its debts, is specifically enjoined to take into account the contingent and prospective liabilities of a company. Significantly, there is no equivalent requirement in the definition of "*insolvent*" in s. 2 (1) of the 2012 Act.

39. It is clear from a consideration of the English case law (to which I was referred in the written submissions delivered on behalf of the practitioner) that this requirement that the court should have regard to contingent and prospective liabilities had a significant impact in the development of the balance sheet test in a company law context. In fact, the balance sheet test is now expressly incorporated into English law by s. 123 (2) of the Insolvency Act, 1986 (UK) *("the UK Act").* The relevant legislative history of the position under the Companies Acts was traced by Lord Walker in the UK Supreme Court in *BNY Corporate Trustee Services Ltd v. Eurosail-UK* [2013] 1 WLR 1408. In that case, an issue arose as to the proper interpretation of s. 123 of the UK Act. Section 123 is the equivalent provision in the United Kingdom to s. 570 of the 2014 Act. Under s. 122 of the UK Act (which is the equivalent to s. 569 of the 2014 Act) the court is empowered to wind up a company if "*the company is unable to pay its debts*". Section 123 (1) then sets out five cases in which a company is deemed unable to pay its debts. These include, the failure to comply with a statutory demand and the non-satisfaction of execution of a judgment debt. The relevant deeming provisions are contained in s. 123 (1) (a) - (d) of the UK Act. However, s. 123 (1) (e) is different in form. As Lord Walker observed, at p. 1419: -

"25. Section 123(1)(e) is significantly different in form: 'if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.' This is not what would usually be described as a deeming provision. It does not treat proof of a single specific default by a company as conclusive of the general issue of its inability to pay its debts. Instead it goes to that very issue. It may open up for inquiry a much wider range of factual matters, on which there may be conflicting evidence. The range is wider because section 123(1)(e) focuses not on a single debt (which under paragraphs (a) to (d) has necessarily accrued due) but on all the

company's debts 'as they fall due' (words which look to the future as well as to the present)".

40. It will be seen that s. 123 (1) (e) of the UK Act is in very similar terms to the definition of "*insolvent*" in s. 2 (1) of the 2012 Act. It is also in very similar form to s. 570 (d) of the 2014 Act but without the injunction to the court to take into account the contingent and prospective liabilities of the company. In addition, unlike s. 570 (d) of the 2014 Act, it contains the words (in common with s. 2 (1) of the 2012 Act) "*as they fall due*".

41. On p. 1419, Lord Walker also explained that the words "as they fall due" found in s. 123 (1) (e) of the UK Act did not appear in UK legislation until the Insolvency Act, 1985 (UK). However, Lord Walker suggested that those words were always implicit in the earlier statutory language. On the same page, Lord Walker also highlighted that the balance sheet insolvency test now found in s. 123 (2) of the UK Act did not appear in express terms in UK legislation prior to the enactment of the Insolvency Act, 1985 (UK). Section 123 (2) of the UK Act provides as follows: -

"A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities."

42. In the context of the balance sheet test, Lord Walker, very helpfully, traces the legislative history of the predecessor provisions to s. 123 of the UK Act and the case law relevant to those provisions. Given that the nineteenth century and early twentieth century companies legislation also applied in Ireland, that history is equally relevant in an Irish context. In the course of that exercise, Lord Walker identified that, prior to the enactment of the Companies Act, 1907 *("the 1907 Act*"), there was no reference in companies legislation to a requirement for a court to take into account contingent and prospective liabilities when determining whether a company was or was not able to pay its debts as they fell due. However, s. 28 of the 1907 Act (subsequently re-enacted in the Companies (Consolidation) Act, 1908) provided that a company would be deemed to be unable to pay its debts *"if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company*" (emphasis added). That language is identical to the language still found in s. 570 (d) of the 2014 Act in Ireland. As Lord Walker observed at p. 1421, the amendment made by s. 28 of the 1907 Act tended to focus attention on balance sheet considerations. He also referred to the observation made by Slade J. (as he then was) in *Re Capital Annuities Ltd* [1979] 1 WLR 170 at p. 185 namely: -

"From 1907 onwards, therefore, one species of 'inability to pay its debts' specifically recognized by the legislature as a ground for the making of a winding up order in respect of any company incorporated under the Companies Acts was the possession of assets insufficient to meet its existing, contingent and prospective liabilities".

43. On the same page, Lord Walker referred to the decision of Nourse J. in *Re A Company* [1986] BCLC 261 where, at p. 263, Nourse J. said: -

> *"Counsel says that if I take into account the contingent and prospective liabilities of the company, it is clearly insolvent in balance sheet terms. So indeed it is if I treat the loans made by the associated companies as loans which are currently repayable. However, what I am required to do is to 'take into account' the contingent and prospective liabilities. That cannot mean that I must simply add them up and strike a balance against assets. In regard to prospective liabilities I must principally consider whether, and if so when, they are likely to become present liabilities."*

44. At p.p. 1421-1422 Lord Walker also referred, in this context, to the judgment of Nicholls L.J. in *Byblos Bank v. Al-Khudhairy* [1987] BCLC 232 at p. 247 where the following explanation of s. 223 (d) of the Companies Act, 1948 (UK) (which was in identical terms to s. 570 (d) of the 2014 Act in Ireland) is given by Nicholls L.J.: -

> *"Construing this section first without reference to authority, it seems to me plain that, in a case where none of the deeming paras (a), (b) or (c) is applicable, what is contemplated is evidence of (and, if necessary, an investigation into) the present capacity of a company to pay all its debts. If a debt presently payable is not paid because of lack of means, that will normally suffice to prove that the company is unable to pay its debts. That will be so even if, on an assessment of all the assets and liabilities of the company, there is a surplus of assets over liabilities. That is trite law. It is equally trite to observe that the fact that a company can meet all its presently payable debts is not necessarily the end of the matter, because para (d) requires account to be taken of contingent and prospective liabilities. Take the simple, if extreme, case of a company whose liabilities consist of an obligation to repay a loan of £100,000 one year hence, and whose only assets are worth £10,000. It is obvious that, taking into account its future liabilities, such a company does not have the present capacity to pay its debts and as such it 'is' unable to pay its debts."*

45. Lord Walker concluded, at p. 1422, that the authorities "*go quite a long way to establishing"* that neither the notion of paying debts "*as they fall due*" nor the notion of balance-sheet insolvency was unfamiliar before the enactment of the Insolvency Act 1985 (UK) and, subsequently, the enactment of the UK Act.

46. To my mind, the judgment of Lord Walker in *Eurosail* is instructive. In my view, it explains very clearly that the concept of balance sheet insolvency was developed following the amendment in 1907 of the earlier Victorian companies legislation, requiring the court, in determining whether a company is unable to pay its debts, to take into account the contingent and prospective liabilities of the company. That amendment essentially led the courts into a consideration of balance sheet issues. The language used in the 1907 Act remains in force today in s. 570 (d) of the 2014 Act.

47. In contrast, there is no equivalent requirement to have regard to contingent and prospective liabilities in the definition of "*insolvent*" in s. 2 (1) of the 2012 Act. At the time of enactment of the 2012 Act, s. 214 (c) of the 1963 Act (which is in precisely similar terms to both s. 28 of the 1907 Act and s. 570 (d) of the 2014 Act) had been in force (through s. 28 of the 1907 Act and subsequently s. 130 (iv) of the Companies (Consolidation) Act, 1908) for more than a century in the context of company insolvency. Against that backdrop, it is noteworthy that the Oireachtas chose not to include a similar requirement in the definition of "*insolvent*" in s. 2 (1) of the 2012 Act. To my mind, this strongly supports the conclusion that what the Oireachtas had in mind in the context of the 2012 Act was cash flow insolvency rather than balance sheet insolvency. That said, it is nonetheless clear from the judgment of Laffoy J. in *Connemara Mining* that, in applying a cash flow test, the ability of a company to pay debts as they fall due will usually take account of readily realisable assets. While counsel for Promontoria sought to suggest that Laffoy J. did not expressly adopt the three factors relied upon by counsel for the petitioner in that case (as set out in para. 35 above), it is clear from the extract from her judgment at p. 684 of the report (quoted in para. 36 above) that Laffoy J. accepted that this factor "*accords with common sense*". It therefore seems to me to be a factor which, depending upon the circumstances, may well be appropriate to take into account in applying the cash flow test under the 2012 Act. However, it was argued by counsel for the practitioner in this case that it would not be appropriate to have regard to the realisable value of the family home (i.e. the principal private residence for the purposes of the 2012 Act) of Mr. Nuzum and Ms. Nuzum. In the first place, counsel for the practitioner argued that realisable assets, in this context, should be confined to "*non-core assets"*. Secondly, he sought to rely on what he described as the "*special protection"* which s. 104 of the 2012 Act provides for the principal private residence of a debtor.

48. Insofar as the first of those arguments is concerned, counsel for the practitioner did not cite any authority in support of the proposition advanced by him. However, his submission is consistent with the observation made by Barron J. in the *H. Albert de Bary* case cited by Laffoy J. in *Connemara Mining*. It will be recalled that Barron J. suggested that, in considering whether a company could pay its debts as they fell due, one could not take into account assets which a company requires in order to remain in existence. By analogy, it might be argued that the principal private residence of Mr. Nuzum and Ms. Nuzum is required by them as their family home and therefore cannot be taken into account in determining whether they are in a position to pay their debts as they fall due.

49. Insofar as the second argument advanced on behalf of the practitioner is concerned, counsel referred to a number of observations made by Baker J. and by me in which the court highlighted the intention of the 2012 Act to preserve, insofar as possible, the ability of a debtor to remain in occupation of his or her principal private residence. Among the decisions relied upon by the practitioner is the decision of Baker J. in *Re Douglas (a debtor)* [2017] IEHC 785 where Baker J. said at para. 43: -

> *"The Act also envisages special protection for the principal private residence in that s. 104 provides that a PIA should insofar as may be reasonably practicable not*

require that a debtor cease to own or occupy his or her home. But the interest of a creditor holding security over a principal private residence has a particular focus when a court is exercising its jurisdiction under s. 115A, as that section is formulated to enable a court to approve a PIA if the principal private residence can be retained."

50. I believe that the arguments advanced by counsel on behalf of the practitioner need to be treated with some caution. While I accept that there is some merit in the suggestion that the 2012 Act does not ordinarily envisage that the family home of a debtor would be considered to be a realisable asset for the purposes of determining whether the debtor is insolvent, I do not believe that one could say that this is so in every case. As Laffoy J. stressed in a company context in *Connemara Mining*, each case must be considered on its own facts. My views on this issue are set out in more detail in para. 51 (e) - (f) below.

Applicable principles in relation to insolvency

51. It seems to me that a number of general principles can be extracted from the case law discussed above: -

(a) In the first place, it is important to bear in mind that, as explained by Lord Walker, balance sheet insolvency was developed in a company law context in circumstances where the court, in determining whether a company is unable to pay its debts, has been required since 1907 to have regard to the prospective and contingent liabilities of the company;

(b) In circumstances where there is no such requirement contained in the definition of "*insolvent*" in s. 2 (1) of the 2012 Act, it seems to me to follow that the balance sheet test is not applicable for the purposes of determining whether a debtor is insolvent for the purposes of the 2012-2015 Acts. This conclusion is also consistent with the view taken by Baker J. in *Sweeney (a debtor*).

(c) However, as Laffoy J. made clear in *Connemara Mining*, in applying the "*cash flow"* test (i.e. determining whether a debtor or a company is unable to pay debts as they fall due) the court will have regard to the readily realisable assets held by the debtor or company concerned. As Laffoy J. stressed in *Connemara Mining*, this is a matter of common sense.

(d) Thus, the mere fact that a debtor may not have cash available to pay his or her debts at a particular point in time is not determinative. It will be necessary to consider whether there are other realisable assets of the debtor that could readily be realised with a view to discharging the debts in question. For example, if the debtor held An Post savings certificates or prize bonds, or readily realisable shares, those are assets which would very obviously be taken into account in determining whether a debtor is unable to pay debts as they fall due. The fact that it may take a number of days or even a few weeks to obtain payment on foot of such instruments, would not matter;

(e) It is unlikely that a family home would ordinarily fall within the same category. This is for the very simple reason that a family home cannot usually be sold so readily. In particular, it cannot usually be sold until the owners have found alternative accommodation. Experience tells us that this process can take a number of months and it is therefore difficult to see how, in most cases, a family home could fall within the category of readily realisable assets;

(f) On the other hand, there may well be cases where, having regard to the extent of the positive equity held in a family home, it would be absurd to consider the owner to be insolvent for the purposes of the 2012 Act. To take a hypothetical example, if a family home is worth €1 million and the only debts of the owner amount to €40,000, it is unlikely that it would be appropriate to invoke the application of the 2012 Act. In this context, I do not accept the submission made by counsel for the practitioner that, by reason of its status under the Acts, the family home (or "*principal private residence*" to use the language of S. 115A (18) (a)) must always be excluded from a determination as to whether a debtor is or is not unable to pay his or her debts as they fall due. While the 2012-2015 Acts undoubtedly demonstrate that the Oireachtas was concerned to ensure, in so far as feasible, the continued occupation by a debtor of his or her home, that is only in circumstances where the debtor falls within the ambit of the 2012-2015 Acts in the first place. In order to trigger the protections afforded by the Acts, it must first be demonstrated that the debtor is, in fact, insolvent within the meaning of s. 2 (1). It is only after that hurdle has been surmounted that the considerations identified by counsel for the practitioner can be said to arise.

Can it be said that Mr. Nuzum and Ms. Nuzum are insolvent?

52. In the written submissions delivered on behalf of Promontoria, it was argued that it is open to the court, in assessing the solvency of any debtor, to consider not only cash-flow but also the balance sheet position. It was argued on behalf of Promontoria that there is nothing in s. 91 of the 2012 Act which precludes this. It was also argued that it is "*clear and indisputable that the Debtors are balance sheet solvent*". However, for the reasons discussed above, I do not believe that this submission is correct. It seems to me that, properly analysed, the 2012 Act does not envisage the use of a balance sheet test in determining whether or not a debtor is insolvent.

53. Insofar as a cash-flow assessment is concerned, Promontoria submitted that, even applying such a test, the debtors are not insolvent. Promontoria suggested that the following factors were important in assessing solvency:

(a) In the first place, Promontoria drew attention to what it described as the "*short-term nature*" of the facility;

(b) Secondly, Promontoria stressed that demand had been made on the facility. As previously noted, I am not sure when that demand was made (if ever). No letter of demand was exhibited. It is true that the mortgage arrears process letter of 4th August 2015 (noted in para. 14 above) was placed before the court but it merely

notes that the account "*fell into arrears*" on 31st December 2009. It does not appear to me to constitute a demand;

(c) Thirdly, Promontoria drew attention to the aspects of the facility letter described in paras. 8-13 above and highlighted in particular that the facility was never a housing loan;

(d) Fourthly, Promontoria emphasised that the facility letter made clear that, at its expiry, there would have to be either a refinancing of the facility or an asset disposal by Mr. Nuzum and Ms. Nuzum: and

(e) Finally, Promontoria highlighted that payment of all other debts of the debtors is up to date.

54. On the basis of these factors, Promontoria submitted that Mr. Nuzum and Ms. Nuzum cannot claim to be unable to pay their debts as they fall due. On the contrary, at the time of service of the Promontoria proof of debt, Mr. Nuzum and Ms. Nuzum were indebted to Promontoria in the sum of €710,65.96 which had fallen due. At the same time, they owned an asset then valued at €1 million. In those circumstances, Promontoria strongly argued that the debt which had fallen due could be paid out of the disposal or refinancing of the family home (which was consistent with the terms of the facility). On that basis, Promontoria argued that Mr. Nuzum and Ms. Nuzum are not insolvent for the purposes of s. 91 of the 2012 Act.

55. In my view, there are a number of difficulties with the case made by Promontoria: -

(a) In the first place, although the facility is undoubtedly described as a short term facility and although it clearly contemplated that, within four months of drawdown, there would either have to be refinancing of the facility or asset disposal by Mr. Nuzum and Ms. Nuzum, it appears to be the case that interest was thereafter charged on a quarterly basis and payments were made on a monthly basis by Mr. Nuzum and Ms. Nuzum. This appears from the statement of account for the 2017 year (discussed in para. 14 above). No explanation has been provided by Promontoria as to how it was that the facility continued in existence in this way notwithstanding the expiry of the original four-month term. There is no evidence as to how this was allowed to occur. In the circumstances, I find it difficult to see how a facility which was apparently left in place for many years after the expiry of a four-month term can still be described as "*short-term".*

(b) That said, this does not dispose fully of the argument made by Promontoria that, given the value of the family home, Mr. Nuzum and Ms. Nuzum cannot be said to be insolvent. As noted above, it seems to me that, if a debtor has very significant "*positive equity*" in his or her family home, it may well be absurd to treat a debtor as insolvent. On the other hand, as I have also indicated above, it seems to me that, very often, a family home cannot readily be treated as a realisable asset for the purposes of a cash-flow assessment of solvency. There are obvious practical

difficulties in realising a family home, not least the necessity, before disposing of the family home, to find a suitable alternative. In this case, while the "positive equity" held by Mr. Nuzum and Ms. Nuzum in the family home is not insubstantial, it is not on a scale which, in my view, would make it absurd to disregard it for the purposes of determining whether Mr. Nuzum and Ms. Nuzum are in a position to pay their debts as they fall due.

(c) Nor do I believe that it can be said, on the facts, that the family home here is a readily realisable asset. Given the extent of the "*positive equity*" at just under €300,000, the process of finding another suitable property sufficient to meet the needs of Mr. Nuzum and Ms. Nuzum and their four children will, in all likelihood take some time. In these circumstances, I could not plausibly conclude that the family home is an asset which is "*readily realisable*" for the purposes of the application of the cash-flow test.

56. It therefore seems to me that, in this case, I must look at the ability of Mr. Nuzum and Ms. Nuzum to pay their debts as they fell due without regard to the value of their family home. It is true that, other than the debt to Promontoria, Mr. Nuzum and Ms. Nuzum have no outstanding day to day debts. However, on the basis of the evidence before the court, it appears to me that they are unable to pay the full extent of the periodic payments due to Promontoria. In this context, notwithstanding the expiry of the original four-month term of the facility, it appears that monthly payments in respect of interest continued to be accepted thereafter and that Mr. Nuzum and Ms. Nuzum were not in a position to pay the full amount of the interest due on the facility. On the basis of what is stated in para. 12 of the practitioner's affidavit (quoted in para. 19 (a) above) it seems to me that Mr. Nuzum and Ms. Nuzum must be taken to be unable to pay their debts as they fall due. They are accordingly insolvent within the meaning of s. 2(1) of the 2012 Act. Although I have been unable to understand how the monthly deficit of €3972.75 has been calculated, the evidence of the practitioner is that a monthly deficit to that extent arose and this averment on the part of the practitioner has not been controverted by Mr. Monahan in his affidavit sworn on behalf of Promontoria in reply. Moreover, as explained in para. 27 above, on the face of the PFS, there is a deficit in monthly payments of the order of either €2,275.70 or €2,471.72 (depending on which section of the PFS is correct). Accordingly, on the basis of the evidence before the court, it appears to me that there is evidence that Mr. Nuzum and Ms. Nuzum, at the time of issue of the protective certificate in this case, were not in a position to pay their debts as they fell due. In those circumstances, it seems to me that they were insolvent within the meaning of s. 2 (1) of the 2012 Act and were therefore entitled, on that basis, to seek relief under the 2012-2015 Acts. In these circumstances, I must now consider whether the requirements of s. 115A of the 2012 Act have been satisfied in this case.

Are the requirements of s. 115A satisfied in this case?

57. In order to succeed in an application under s. 115A, a practitioner must place before the court sufficient evidence to satisfy the court of each of the requirements set out in s. 115A (8), s. 115A (9) and s. 115A (10). Unless the court is satisfied as to each of the

matters set out in those provisions, the court is precluded from making an order confirming the coming into effect of a proposed arrangement.

58. In this case, Promontoria has raised issues as to whether the requirements of s. 115A (9) (a), s. 115A (9) (b), s. 115A (9) (c), s. 105A (9) (d) and s. 115A (9) (f) have been satisfied. I will now deal with each of those issues in turn save that I will address s. 115A (9) (a) in tandem with s. 115A (9) (d). Both of these provisions require the court to have regard to s. 104 of the 2012 Act.

Section 115A (9) (a) and (d)

59. Under s. 115A (9) (a), the court is required to be satisfied that the terms of any proposed arrangement have been formulated in compliance with s. 104. In addition, under s. 115A (9) (d), the court is also required, where applicable, having regard to the matters referred to in s. 104 (2) to be satisfied that the costs of enabling a debtor to continue to reside in his or her principal private residence "*are not disproportionately large*".

60. Section 104 (which must be considered in conjunction with s. 99 (2) (h) of the 2012 Act) makes clear that, subject to a number of considerations (addressed further below), a practitioner, when formulating a proposed arrangement, should do so on terms that will not require a debtor to dispose of his or her principal private residence or to cease to occupy that residence.

61. Section 104 (1) provides as follows: -

> *"(1) In formulating a proposal for a Personal Insolvency Arrangement a … 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."*

62. Section 104 (1) therefore requires the practitioner, in so far as reasonably practicable (while at the same time having regard to the matters set out in s. 104 (2)) to formulate the proposal with a view to securing the continued occupation by the debtor of his or her home. Nonetheless, the subsection also very clearly imposes an obligation on the practitioner to consider "*any appropriate alternatives".*

63. In turn, s. 104 (2) sets out the matters to which the practitioner is to have regard. These are described as follows: -

> *"(2) The matters referred to in subsection (1) are—*

(a) the costs likely to be incurred by the debtor by remaining in occupation of his or her … residence (including rent, mortgage loan repayments, insurance payments,… , taxes or other charges relating to ownership or occupation of the property …),

(b) the debtor's income and other financial circumstances as disclosed in the Prescribed Financial Statement,

(c) the ability of other persons residing with the debtor in the … residence to contribute to the costs referred to in subsection (2), and

(d) the reasonable living accommodation needs of the debtor and his or her dependents and having regard to those needs the cost of alternative accommodation (including the costs which would necessarily be incurred in obtaining such accommodation)."

64. Thus, although s. 104 (1) (in common with s. 99 (2) (h)) demonstrates that the Oireachtas was concerned to ensure, insofar as reasonably practicable, that personal insolvency arrangements should aim to secure the continued occupation of the debtor's residence, the practitioner is nonetheless required by statute to not only consider the appropriate alternatives but also to consider the specific matters enumerated in s. 104 (2) which includes the costs of ongoing mortgage loan repayments and also the costs of ongoing necessary maintenance in respect of the residence. This dovetails with the obligation imposed on the court by s. 115A (9) (d) to be satisfied, where applicable, that the costs of enabling the debtor to continue to reside in the residence are not disproportionately large. By imposing these requirements, it seems to me that the Oireachtas was seeking to strike a balance between the obvious desirability of a debtor being able to retain the family home, on the one hand, and the need to ensure that this did not give rise to excessive or unrealistic costs, on the other. Depending on the circumstances, it may be counter-productive, in some cases, to attempt to retain the existing family home, particularly if the costs of doing so create a real risk of future insolvency.

65. In order for the court to be satisfied for the purposes of s. 115A (9) (a) that the terms of the proposed arrangement have been formulated in compliance with s. 104, it is obviously necessary that the practitioner should provide appropriate evidence to that effect. This requires the practitioner to provide evidence (inter alia) that appropriate alternatives have been considered and that the practitioner has had regard to each of the matters referred to in s. 104 (2). In the present case, Promontoria complains that the practitioner has not provided any such evidence. To the extent that the requirements of s. 104 is addressed in the evidence filed by the practitioner, Promontoria has suggested that the affidavits are "*pro forma in the extreme*" and "*very generalised*".

66. It is therefore necessary to consider what has been said on affidavit with regard to s. 104. In para. 8 of his first affidavit sworn on 24th September, 2018, the practitioner says: -

(a) At para. 14.8, he says: -

"…I am satisfied that … having regard to the matters referred to in section 104 (2), the costs of enabling the Debtor to continue to reside in the Principal Private Residence are not disproportionately large";

(b) This averment is essentially repeated in para. 27 of the same affidavit where the practitioner says, in similarly bald terms, that *"the costs associated with the Debtor continuing to reside in the … Residence are not disproportionately large nor is there a breach of section 104".*

67. In my view, the criticism made by Promontoria of these paragraphs is justified. No detail whatever is provided as to the basis on which the practitioner came to these conclusions. While the affidavit discloses the cost of extending the mortgage by 360 months, it does not contain any assessment of the wisdom of incurring those costs having regard to the circumstances of Mr. Nuzum and Ms. Nuzum. No information whatever is provided in relation to the consideration given by the practitioner (if any) of any alternatives. Nor is there any assessment made of the proportionality of the costs of enabling Mr. Nuzum and Ms. Nuzum to continue to reside in the family home. Having regard to the provisions of s. 104 (1), s. 104 (2) and s. 115A (9) (a) and (d), these are all matters which the practitioner was required to address so that the court could make a determination as to whether the relevant statutory requirements had been satisfied in this case.

68. Before going further, I should make clear that, in some cases, it may be obvious on the facts that no issue arises under s. 104. It may be very clear that there is no alternative to the retention of the existing residence of a debtor. In such cases, it may not be necessary for a practitioner to go into significant detail. Similarly, in many cases, an objecting creditor may well accept that no s. 104 issue arises. However, in this case, the complaint about the *pro forma* nature of the averments made by the practitioner was raised, as a preliminary point, in the first affidavit sworn by Mr. Monahan on behalf of Promontoria on 22nd November, 2018. In addition, in para. 17 of that affidavit, Mr. Monahan expressly raised s. 115A (9) (d) and suggested that the costs of enabling Mr. Nuzum and Ms. Nuzum to continue to reside in the family home were disproportionately large and that the home was excessive for their needs. In the same paragraph, he expressly raised the issue (also raised elsewhere in the affidavit) that there was positive equity in the home. In light of the very stark way in which the issue was raised by Promontoria, it was, in my view, incumbent on the practitioner to ensure that the s. 104 requirements were addressed in an appropriately detailed way in the evidence before the court.

69. A further affidavit was sworn by the practitioner on 14th March, 2019. The practitioner therefore had a period of more than 4 months in which to respond to Mr. Monahan's affidavit. Insofar as I can see, the affidavit does not address the s. 104 issue in any way. In particular, the practitioner provided no additional evidence to explain how he had reached the view in his previous affidavit that the costs of maintaining Mr. Nuzum and Ms. Nuzum in their current family home are not disproportionately large. Nor did he provide any evidence as to any alternative accommodation considered by him. Likewise, he did

not provide any evidence of the consideration given by him to the matters set out in s. 104 (2).

70. As noted previously, a further affidavit was sworn by Mr. Monahan on behalf of Promontoria on 3rd May, 2019. In that affidavit, as noted in para. 20 (f) above, Mr. Monahan emphasised that the practitioner had failed to engage with the issue of the *"propriety of the retention of the Principal Residence"*. In paras. 26-31 of the affidavit Mr. Monahan addressed, in some detail, the issue of the costs of enabling Mr. Nuzum and Ms. Nuzum to continue to reside in the family home. He also addressed the cost of alternative accommodation and, in para. 30, he highlighted that the practitioner *"has failed to address whether alternative accommodation options were considered by him as required by the Personal Insolvency Acts, 2012 – 2015 …"*.

71. Notwithstanding the affidavit sworn by Mr. Monahan on 3rd May, 2019 highlighting the failure of the practitioner to address the propriety of the proposed retention of the existing family home, no further affidavit was sworn by the practitioner. However, as noted in para. 21 above, an affidavit was sworn by Ms. Nuzum. As summarised in para. 21, she addressed the issue of alternative accommodation and made the case that, having regard to the size of the family and the requirement to have an au pair, the family needed a five bedroomed house. She also suggested that in view of the proximity of the family home to other family members, her workplace, schools and sports clubs for the children, there is no suitable alternative to the existing family home. In para. 9 of her affidavit, Ms. Nuzum said that she discussed the alternatives with the practitioner. There is accordingly some evidence before the court as to the alleged unsuitability of alternative accommodation and of the fact that consideration was given to the issue through the discussions that took place between the practitioner and Ms. Nuzum. It is important to recall that s. 104 specifically requires the practitioner to address these issues and I would therefore expect that the issue should have been addressed by him. In this context, as I have already emphasised, the *pro forma* nature of the averments made by the practitioner in his first affidavit were highlighted by Promontoria in the course of the two affidavits sworn by Mr. Monahan. The practitioner was therefore on notice that this was an issue that required to be addressed. The averments made by him in his first affidavit are no more than bald assertion. They do not comprise evidence of the steps taken by him to satisfy himself that the cost of enabling Mr. Nuzum and Ms. Nuzum to remain in the family home were not disproportionately large. Likewise, the affidavit failed completely to address the requirement contained in s. 104 to consider any appropriate alternatives. This is an obligation that is imposed by s. 104 (1) of the 2012 Act on the practitioner personally. Nonetheless, I must bear in mind that the practitioner is the moving party in a s. 115A application and, in that capacity, he has placed the affidavit of Ms. Nuzum before the court which contains evidence that the question of alternative accommodation was considered by him in the context of his discussions with Ms. Nuzum. To that extent, there is evidence before the court to establish that, in formulating the proposed arrangements, alternatives to the family home were considered by him.

72. In the context of compliance with s.104, I am, however, concerned by the failure of the practitioner to address the issue raised by Mr. Monahan in para. 17 of his first affidavit, that the costs of enabling the debtors to remain in their current home are disproportionately large. That is an issue which the practitioner is expressly required to address under s. 104. While Ms. Nuzum says in para. 21 of her affidavit, that the costs are not disproportionate *"in light of the unpalatable alternatives"*, no evidence (other than the bare assertion of the practitioner in para 14.8 of his first affidavit) is available to the court to explain how the practitioner formed the view that the costs of keeping the Nuzums in their current home is not disproportionate. In these circumstances, on the basis of the evidence before the court, there is no sufficient basis to form the view that the terms of the proposed arrangement have been formulated in compliance with s. 104. In those circumstances, the condition set out in s. 115A (9) (a) has not been satisfied in this case and accordingly the proposed arrangement cannot be confirmed by the court.

73. In addition to the issue which arises in relation to s. 115A (9) (a), the court must itself be satisfied that the costs of enabling Mr. Nuzum and Ms. Nuzum to continue to reside in the family home are not disproportionately large. Notwithstanding the evidence of Ms. Nuzum, I am not satisfied that this is so.

74. One of the striking aspects of the proposed arrangement is that, according to the practitioner, Mr. Nuzum and Ms. Nuzum will pay, as a consequence of the extension of the mortgage term by 30 years, a total of €1,202,928.48 to Promontoria. This represents €492,302.52 over the current mortgage balance of €710,625.96. This represents a very substantial increase in their liability to Promontoria of 69%. That raises an obvious question as to whether such a sizable increase is disproportionate especially in circumstances where there is a realistic prospect that a new family home on a more modest scale could be acquired on a debt free basis.

75. Quite apart from the overall increase in the cost of the mortgage arising from the 30 year extension of the mortgage term, it is also necessary to have regard to the monthly cost to the Nuzum family of the payments which will fall due under the proposed new mortgage term. While the arrangement envisages that the monthly mortgage payment (after the expiry of the 12 month arrangement) will be €3,376.36, it is clear, on the basis of the figures provided by the practitioner in para. 34 of his affidavit sworn on 14th March, 2019, that they have monthly affordability (after household expenses, childcare and certain special circumstance costs) of no more than €3,401.81. That leaves an extremely tight monthly margin of no more than €25.45. That leaves no room for exceptional expenses that may arise from time to time (such as of house repairs or substantial medical expenses). While monthly childcare costs (currently at €350) may decrease over time, it is likely that each of the four children will, in common with most of their peers, wish to pursue third level education in the future. It is impossible to see how a monthly margin of €25.45 (or even a monthly margin of €375.45 if one excludes childcare costs) would ever be sufficient to cover the cost of third level education for four children.

76. In these circumstances, I regret to say that, in my view, the costs likely to be incurred by Mr. Nuzum and Ms. Nuzum by remaining in occupation of their current home (arising from the extent of the mortgage loan repayments that will require to be made under the restructured mortgage proposed as part of the arrangements), are, on the basis of the evidence before the court, plainly disproportionately large. Mr. Nuzum and Ms. Nuzum will be saddled with a huge ongoing debt which will require them to make repayments until they reach 78 or 79 years of age. It seems to me to be entirely unrealistic to increase the liabilities of Mr. Nuzum and Ms. Nuzum by 69% in order to enable them to continue living in their current home. It seems to me to be equally unrealistic to think that Mr. Nuzum and Ms. Nuzum will be in a position to survive on a monthly margin of €25.45 after discharging their normal monthly household expenses and the proposed monthly mortgage payment of €3,376.36.

77. In contrast, if Mr. Nuzum and Ms. Nuzum were to dispose of the family home, they would have available to them, in round terms, approximately €300,000 to acquire a new home. While I appreciate that it is unlikely that Mr. Nuzum and Ms. Nuzum would be able to acquire a five bedroomed home in the Dublin area for that price, the uncontroverted evidence before the court is that the average asking price for a house in the north Dublin area is €311,916.00. While I appreciate that, at that price, the average house in the Dublin area is likely to be a three bedroomed property rather than a five bedroomed property, I do not accept that such a property is inherently unsuitable for a family such as the Nuzums. There are a great number of families of two parents with four children living in three bedroomed houses throughout the State. I can well appreciate that it might be painful for the family to have to "downsize". But, looking at the matter objectively, it seems to me that this is by far the better option for the family than attempting to continue living in a house which is, on the basis of the figures before the court, plainly beyond the means of Mr. Nuzum and Ms. Nuzum and which would fix them, over the course of the extended mortgage term, with very significant additional costs which they may find impossible to meet in the future in the event that an exceptional expense item arises or in the event that either of them were to become ill and be unable to earn a living for a period of time. By disposing of the home now, they can free themselves of this very substantial debt to Promontoria and, at the same time, maintain a decent standard of living and a home of their own.

78. I also appreciate that it may not be possible to obtain a new home in the immediate vicinity. This may involve changes of school for their children and changes of sports clubs but, unfortunately, I do not believe that these factors justify the maintenance of a home at such substantial additional cost to Mr. Nuzum and Ms. Nuzum (and which is unlikely to be affordable by them in the future). By seeking to maintain their current home, they are exposing themselves to future insolvency. I must also bear in mind that changes of this kind are not unusual. Many people in the State have had to make difficult and sometimes painful decisions in order to adjust to the reality of their circumstances. In my view, the very significant additional cost of attempting to keep Mr Nuzum and Ms Nuzum in a home they cannot afford is not justified in circumstances where there is such significant positive equity in the home and where there will be sufficient funds available to acquire a more

modest replacement home. I am not therefore satisfied that the requirements of s. 115A (9) (d) have been satisfied in this case.

Section 115A (9) (b) (i)

79. Under s. 115A (9) (b) (i), the court must be satisfied, if it is to confirm a proposed arrangement, that there is a reasonable prospect that confirmation of the arrangement will enable the debtor to resolve his or her indebtedness without recourse to bankruptcy. I regret to say that, in my view, I cannot be satisfied, on the basis of the evidence before the court that the proposed arrangement here will enable Mr. Nuzum and Ms. Nuzum to resolve their indebtedness without recourse to bankruptcy. In my opinion, for reasons very similar to those which arise in relation to s. 115A (9) (d), the evidence very clearly highlights that the arrangement here (proposing as it does to increase the mortgage term to age 78 or 79 at a monthly cost of €3,376.36) carries with it a very real risk that Mr. Nuzum and Ms. Nuzum will become insolvent in the future. The margin of €25.45 between their monthly affordability and the amount of the monthly mortgage payment to be made under the terms of the restructured mortgage (which is a key element of the proposed arrangement) is so small that it is impossible to see how Mr. Nuzum and Ms. Nuzum will be able to maintain their monthly mortgage repayments while at the same time being in a position to meet any exceptional expenses that will almost inevitably arise. It is equally difficult to see how they will be in a position to withstand any financial shock in the future. In all of these circumstances, I cannot be satisfied that the requirements of s. 115A (9) (b) (i) have been satisfied in this case. I cannot form the view that there is a reasonable prospect that confirmation of the proposed arrangements will enable Mr. Nuzum and Ms. Nuzum to resolve their indebtedness without recourse to bankruptcy.

Section 115A (9) (c)

80. Section 115A (9) (c) is concerned with the sustainability of a proposed arrangement. Under s. 115A (9) (c), the court must be satisfied, having regard to all relevant matters (including the financial circumstances of the debtor) that the debtor is "*reasonably likely to be able to comply with the terms of the proposed Arrangement".*

81. One of the terms of the arrangements here is the 30 year extension of the mortgage. For similar reasons to those set out in respect of s. 115A (9) (b) (i), I am of the view that it is impossible to conclude that Mr. Nuzum and Ms. Nuzum are reasonably likely to be able to comply with the terms of the proposed arrangements. In my view, the monthly margin of €25.45 is simply too tight to enable me to come to that conclusion. The problem is that the monthly mortgage payment that will have to be made in the sum of €3,376.36 leaves Mr. Nuzum and Ms. Nuzum with no financial cushion to withstand financial shocks in the future or to meet exceptional expense items that will inevitably arise in the course of their lifetime between now and age 78.

82. Furthermore, as noted in para. 21 (i) above, there is no evidence before the court to explain how it is that Mr. Nuzum and Ms. Nuzum believe that they will be in a position to pursue their current occupations until 78 or 79 years of age and to generate a living sufficient to discharge the mortgage payments up to that age. There is no information in

the affidavits before the court in relation to the nature of the business carried by them or as to the extent of the roles played by them in that business. While I would not in any way wish to suggest that a person of 78 or even 79 years of age is never capable of earning a living, I would need to have some information in relation to the nature of the role carried on by them in order to form a view as to whether it is realistic to think that they would be in a position to continue to earn a living up to that age. There are some professions where it is accepted that people can continue to work well beyond normal retirement age. However, in this case, I have no information at all available to me which would enable me to form a view that Mr. Nuzum and Ms. Nuzum will be in a position to afford the monthly mortgage payments up to age 78 or 79. The bare assertion by the practitioner and by Ms. Nuzum that they will be in a position to do so falls far short of the evidence that would be required in a case of this kind.

83. In these circumstances, I cannot be satisfied that Mr. Nuzum and Ms. Nuzum are reasonably likely to be able to comply with the terms of the proposed arrangement insofar as it provides for a restructure of the mortgage and an extension of the mortgage term up to age 78. I therefore cannot be satisfied that the requirements of s. 115A (9) (c) have been satisfied in this case.

Section 115A (9) (f)

84. Under s. 115A (9) (f), the court cannot confirm a proposed arrangement unless it is satisfied that the arrangement is not unfairly prejudicial to the interests of any interested party. In the present case, Promontoria argues that the proposed arrangement is unfairly prejudicial to it in circumstances where the facility is to be restructured on terms that will see Mr. Nuzum and Ms. Nuzum making mortgage repayments up to a time when they reach 78 or 79 years of age. Promontoria also argues that it would be better off in a bankruptcy in which case it would secure a more immediate repayment of the amount due. In contrast, Promontoria submits that, under the terms of the proposed arrangement, it will be exposed to the very real risk that Mr. Nuzum and Ms. Nuzum will not be in a position to maintain the mortgage payments envisaged under the restructured mortgage. In addition, Promontoria says that there is a further risk of default towards the end of the mortgage term in the event that Mr. Nuzum and Ms. Nuzum are unable to continue working to age 78.

85. The nature of "*unfair prejudice*" was considered by Baker J. in *Re J.D. (a Debtor*) [2017] IEHC 119. In her judgment in that case, Baker J. referred to the decision of the Supreme Court in *McInerney Homes Ltd* [2011] IESC 31 where O'Donnell J., in relation to analogous provisions of the examinership legislation, emphasised the "*essential flexibility"* of the test of unfairness in the context of a scheme of arrangement. At paras. 26-29 of her judgment in J.D., Baker J. said that the same approach should be taken in personal insolvency: -

> *"26 the Acts require the relevant court to look at the nature of prejudice caused to creditors by the acceptance of a scheme of arrangement, and to consider whether the proposal is 'unfairly prejudicial' to the interests of that creditor.*

27 There is an express requirement in s. 115A that the court be satisfied that a PIA is not unfairly prejudicial before giving consideration to the exercise of its jurisdiction to approve a PIA notwithstanding its rejection by creditors.

28 Further, in s. 120(e) one of the grounds on which a PIA may be challenged by a creditor is that the PIA unfairly prejudices the interest of that creditor.

29. I accept the argument of counsel for EBS that the test for the court is not to engage the question of the magnitude of the unfairness for which a creditor contends, but rather to consider whether the PIA is unfair having regard to all of the circumstances. The engagement of the court is not simply to be with the figures and calculations, but with the fairness of the proposal having regard to the circumstances of the creditors and the debtor."

86. In the same case, Baker J. also drew attention to the necessity to have regard to the underlying purpose of the 2012 -2015 Acts. She explained that, in assessing the issue of fairness, the object of the legislation should be weighed in the overall consideration of the relevant circumstances by the court. In paras. 30 – 34 of her judgment, Baker J. said: -

"31 The public interest expressly identified in the long title to the … statutory scheme is the public interest in 'the rational resolution' by a debtor of his or her debts with a view to that debtor continuing to engage in the economic activity of the State.

32. More concretely, the amending legislation by which was added s. 115A, affords the far-reaching power of the court to approve a PIA notwithstanding its rejection by creditors. The public interest is in is the maintenance of a debtor's occupation and ownership of a principal private residence. That social and common good is concretely referable to the continued occupation by a debtor of a principal private residence, and the power contained in the section is limited by the fact that only those persons who had a relevant debt secured over his or her … residence which was in arrears … on 1st January, 2015 could avail of this exceptional remedy. The statutory provision then must be seen as a limited protection of persons whose mortgage payments on their principal … residence fell into arrears at the height of the financial crash. ….

33. Another factor that bears on the considerations of the court is that contained in s. 115A(9)(d), namely that:

'(d) where applicable, having regard to the matters referred to in section 104(2), the costs of enabling the debtor to continue to reside in the debtor's principal private residence are not disproportionately large,'

34. Thus the court will engage its jurisdiction to enable a person to continue to occupy or not dispose of an interest in his or her family home, provided the costs of continued occupation are not excessive or disproportionate. …".

87. For the reasons already explained above, I have reached the conclusion that the costs of enabling Mr. Nuzum and Ms. Nuzum to remain in the family home are excessive and disproportionately large. In those circumstances, I do not believe that the aim of the 2012 – 2015 Acts to enable the debtor to remain in occupation of a family home carries any significant weight in considering the question of unfair prejudice. However, the public interest in the rational resolution by a debtor of his or her debts is relevant. In this case, for the reasons discussed above, I am of the view that the proposed arrangements here are unlikely to save Mr. Nuzum and Ms. Nuzum from insolvency in the future. In those circumstances, the public interest is not served by confirming the proposed arrangement. On the contrary, Mr. Nuzum and Ms. Nuzum would be better off, in terms of resolving their indebtedness, to realise their interest in the family home and to use the proceeds of realisation to acquire a new (albeit smaller) home elsewhere.

88. Thus, in the present case, taking all of the relevant circumstances into account, I cannot see any scope to suggest that any countervailing considerations arise which could be said to justify the prejudice to Promontoria and thereby displace any suggestion of unfairness. On an objective analysis, the retention of the family home here is not in the best interests of the debtors or their family. On the other side of the equation, there is an obvious prejudice to Promontoria in circumstances where it is exposed to the risk of future default by Mr. Nuzum and Ms. Nuzum. That risk exists in circumstances where the restructured mortgage envisages payments being made up to age 78 or 79 by the debtors (without any evidence to support their ability to make payments up to that age) and in circumstances where there is such a tight margin of affordability. I have therefore come to the conclusion that, in the circumstances of this case, the proposed arrangement is unfairly prejudicial to Promontoria.

Conclusion

89. For the reasons outlined above, I have come to the conclusion that the requirements of s. 115A (9) (a), s. 115A (9) (b) (i), s. 115A (9) (c), s. 115A (9) (d) and s. 115A (9) (f) have not been satisfied in this case. In the circumstances, it is unnecessary to consider the remaining requirements of s. 115A. In my view, the applications under s. 115A cannot succeed. The only order I can therefore make is to dismiss the appeals and to affirm the orders previously made by the learned Circuit Court judge.

90. For the avoidance of any doubt, it should be borne in mind that the evidence of the value of the family home (and of house prices generally) discussed in this judgment was given long prior to the current Covid-19 outbreak. At this point, it is impossible to know whether that outbreak may significantly affect property values. However, I am constrained to decide this case in accordance with the evidence currently before the court.

91. I will invite the parties to confer with each other in relation to the issue of costs and to notify the registrar by email of any agreement they reach in relation to the issue, following which the orders made at para. 89 above will be drawn up. In the event that the parties are not in a position to agree on that issue, each party should set out their

position in writing by email to the registrar within 21 days from the date of this judgment, following which I will rule on the matter in writing. In the event of any unforeseen difficulty, there is liberty to apply by email.