THE HIGH COURT

CIRCUIT APPEAL

[2018 No. 432 C.A.]

[2018 No. 435 C.A.]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015

AND IN THE MATTER OF TADHG HURLEY (A DEBTOR)

AND IN THE MATTER OF SINEAD HURLEY (A DEBTOR)

THE HIGH COURT

CIRCUIT APPEAL

[2018 No. 479 C.A.]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015

AND IN THE MATTER OF MICHELLE PHELAN (A DEBTOR)

JUDGMENT of Mr. Justice Denis McDonald delivered on 15 July, 2019

Introduction

1. The central issues which arise in each of the above appeals are essentially the same, namely:-

> (a) whether it is lawful, under a Personal Insolvency Arrangement, to require the debtors and their dependants to live, for a period of time, at a level below the reasonable living expenses set out in guidelines published by the Insolvency Service of Ireland ("*ISI*"); and
>
> (b) even if it is lawful for an arrangement to proceed on that basis, whether the arrangements proposed here can be said to be sustainable.

2. In each case, an application was made to the Circuit Court pursuant to s. 115A of the Personal Insolvency Act 2012 ("*the 2012 Act*"), as amended by the Personal Insolvency (Amendment) Act 2015 ("*the 2015 Act*") seeking an order confirming the coming into effect of a Personal Insolvency Arrangement proposed by the Personal Insolvency Practitioner ("*the practitioner*"), acting on behalf of the debtor. In each case, the application was refused by the learned Circuit Court Judge and the practitioner has appealed to this Court. Similarly, in each case, the original application and the appeal have been opposed by the secured creditor holding security over the principal private residence of the debtors. In the case of the interlocking applications made on behalf of Mr. Tadgh Hurley and Ms. Sinead Hurley, the secured creditor concerned is the Governor and Company of the Bank of Ireland ("*the Bank of Ireland*"). In the case of Ms. Michelle Phelan, the secured creditor is Allied Irish Banks plc ("*AIB*"). Although both Bank of Ireland and AIB raise additional issues in each case, the principal grounds of opposition are that it is not lawful for an arrangement to require debtors and their dependants to live beneath the reasonable living expenses set out in the ISI guidelines and that, even if it is lawful to do so, any such arrangement would clearly be unsustainable. Insofar as the latter point is concerned, the secured creditors argue that under s. 115A(9)(c) of the 2012 Act, the court is not entitled to confirm a proposed arrangement unless the court is 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. Some reliance was also placed on s. 115A(9)(b)(ii) under which the court must be satisfied that the proposed arrangement will enable the debtors to resolve their indebtedness without recourse to bankruptcy. In substance, these are opposite sides of the same coin. Both provisions require the court to consider the sustainability of the proposed arrangements.

Relevant Facts

3. Mr. Hurley and Ms. Hurley are a married couple with four children. They are jointly indebted to the Bank of Ireland in respect of a mortgage loan secured on their family home. At the time the Protective Certificates were issued by the Circuit Court, the amount due on foot of the mortgage loan was €377,484.05. In addition, they owed a further sum of €195,551.61 to the Bank of Ireland on foot of an unsecured loan, being the residual debt after a mortgaged investment property was sold in 2014. Mr. Hurley is employed as a technician. Ms. Hurley works in the home. Mr. Hurley is 45 years of age. Ms. Hurley is 42. Their eldest child is in third level education. Their remaining children are aged 15, 13 and 11.

4. Prior to the economic downturn, Mr. and Ms. Hurley had invested in a number of investment properties which, at that time were affordable. However, as a consequence of the economic downturn, Mr. Hurley's salary was reduced and he was placed on a four day working week. This had a significant impact on the finances of the family and left them in a position where they struggled to meet their financial commitments. Among the investments they had made prior to the downturn, was a holiday property in France which is the subject of security held by BNP Paribas ("*BNP*") on foot of a secured loan. BNP is owed €321,078.00. Mr. and Ms. Hurley also own an unencumbered investment property in Bulgaria which, it is suggested, is worth €20,000.

5. The market value of the family home is €220,000. The market value of the property in France is €237,000.00. In these circumstances, both properties are in what is colloquially known as negative equity.

6. The interlocking arrangements proposed in the case of Mr. and Mrs. Hurley involve the following:-

> (a) a twelve month term;
>
> (b) the outstanding balance of the mortgage loan debt secured on the family home would be written down to €242,000.00 with the remaining balance of €135,484.00 being written off on the payment of a dividend in the sum of €5,033.00 to Bank of Ireland;

(c) the mortgage loan (written down as set out at (b) above) would be restructured by extending its term to 29 years, fixing the interest rate at 1.25% for the twelve month duration of the arrangements (resulting in a monthly mortgage payment of €829.00) following which the interest rate would revert to the existing tracker rate made up of the ECB rate plus a margin of 1.00% for the remaining 28 years of the mortgage term;

(d) the unsecured debt owed to the bank on foot of the residential investment property would be written off on payment of a dividend in the sum of €7,264.00;

(e) there would also be a payment of dividend at the same rate to the other unsecured creditors;

(f) the property in France would be surrendered to BNP. In circumstances where BNP did not prove its debt, no dividend will be paid to it;

(g) the practitioner would be paid total fees for both cases of €5,052.00; and

(h) the dividends to the unsecured creditors and the fees to the practitioner would all be funded from the proceeds of the property in Bulgaria which is said to be worth €20,000.

7. As noted above, the amount to be paid to Bank of Ireland in respect of its mortgage debt will be €829.00 per month (albeit this might vary somewhat after the twelve month duration of the proposed arrangements in the event that the ECB rate either increases or decreases after that time). At the time the arrangement was first proposed to the creditors, the payment of €829 per month did not create a difficulty based on (a) the total household income of the family and (b) the level of expenses which the ISI guidelines suggest a family of their size and age would likely incur. In this context, the net total household income of the family is €3,246.00 per month. At the time the arrangements were first proposed in 2017, the monthly expenses of the family (excluding the mortgage payment) was put at €2,236.00. This was based on a two adult household with a vehicle and three dependants aged 13, 11 and 9. This figure is derived from the Table of Reasonable Living Expenses published by the ISI in Guidelines issued by it under s. 23 of the 2012 Act (addressed in more detail below). As of 2017, two of the children of the family were still in primary school. Only one of them was in secondary school. Under the ISI guidelines, the monthly cost of maintaining a child in secondary school is recognised as being greater than the monthly cost of maintaining a child in primary school. Thus, in the context of items such as food, clothing, personal care, health, household goods, communications, social inclusion and participation and education, the monthly cost to a family of having a child in secondary school is pegged at a higher rate under the Guidelines than the equivalent monthly cost for a child in primary school.

8. At the time the arrangements were proposed in July 2017, the monthly costs for the family (based on two children in primary school and one child in secondary school) were €2,234.98 per month. However, by the following year (2018), the household expenses were due to increase by €212.79 per month to €2,447.77 when their second youngest child turned 12 and entered secondary school. Their costs will remain at that level for 2019. Notably, when their youngest child (on reaching 12 years of age) enters secondary school in 2020, their monthly costs will increase by a further €212.79 to €2,660.56 per month. The monthly expenditure will remain at that level until 2023 when the second eldest child (i.e. their eldest currently dependent child) turns 19 and will no longer be accounted for in accordance with the ISI guidelines. When the monthly mortgage payment of €829 is added to this monthly figure of €2,660.56, this would bring the monthly family expenditure to €3,489.56. This is greater than the total household income of €3,246.00 per month. Accordingly, the only way in which the family can meet their mortgage payments for the years 2020 to 2023, is to live at a level below the reasonable living expenses set by the ISI for a two adult household with a vehicle and three dependent children in secondary school. It is in these circumstances that the issues described in para. 1 above arise in the case of Mr Hurley and Ms Hurley.

9. In the case of Ms. Phelan, she is separated with one dependent child. She is a factory worker. She previously had her own corner shop business which, unfortunately, encountered financial difficulties causing her to cease trading in 2015. Following the closure of that business, she was left with a number of trade creditors. She was also out of work for a short period. As a consequence of this (and as a consequence of her marriage breakdown) she fell into arrears. However, since she has now secured employment, she seeks to put an arrangement in place with her creditors and return to solvency. She is 43 years old.

10. Ms. Phelan is indebted to AIB in the sum of €170,268.48 on foot of a number of facilities including a mortgage loan on her principal private residence, a current account and a business loan. For completeness, it should be noted that part of her indebtedness is to AIB itself and part is to AIB Mortgage Bank. Insofar as the mortgage loan is concerned, she is jointly liable on this loan in the sum of €161,131.29. However, the value of that home is no more than €95,000. In her case, the proposed arrangement involves the following features:-

(a) The amount due in respect of the loan secured on her family home will be reduced to the value of the property namely €95,000. The balance of €66,131 will be written off subject to payment of the dividend described in subpara. (c) below.

(b) For the duration of the proposed 72 month term of the arrangement, the interest on the mortgage loan will be fixed at 3.65%. However, it was confirmed, in the course of the hearing, that it would revert to a variable rate after the expiry of the arrangement.

(c) The unsecured creditors would each be paid a dividend of 10 cent in the euro. This includes AIB who would be paid a total dividend of €6,323 in respect of the unsecured element of the mortgage loan (after taking account of the current market value of the family home). In addition, AIB would be paid a total of €873 in respect of the other liabilities of Ms. Phelan to it.

(d) Of Ms. Phelan's net monthly income of €2,149.00, €443 would be paid to AIB on foot of the mortgage loan. In addition, for the first five years of the arrangement, a sum of €200 would be paid by Ms. Phelan to fund the dividends to be paid to the unsecured creditors and the fees of the practitioner. In the sixth year, a sum of €656 per month would be paid in respect of dividends and fees. By that stage, her youngest child will have finished secondary school. On the basis of the ISI guidelines, the monthly living expenses (currently €1,506.00 for a family comprising one adult, a dependent child and a motor vehicle) will reduce to €1,050.00.

11. On the basis of the figures described in para. 10 above, it might appear that, under the proposed arrangement, Ms. Phelan's monthly expenditure for her ordinary living expenses will not drop beneath the level set in the ISI guidelines. However, in addition to the payments described above, Ms. Phelan has ongoing obligations to make monthly payments in respect of a hire purchase agreement entered into by her in May 2015, in order to acquire a VW Polo motor car which, she says, is essential in order to commute

to and from her place of work and also to bring her youngest child to and from school. In the affidavit sworn by her on 11th July, 2018, during the course of the Circuit Court proceedings, she said that she will make the monthly hire purchase payment of €227 per month out of her set living costs (i.e. the monthly expenses set out in the ISI Guidelines exclusive of the mortgage repayment) until the end of the hire purchase arrangement which is due to be completed in 2020. It is in these circumstances that the issues described in para. 1 above arises in the case of Ms. Phelan. In common with Bank of Ireland in the case of Mr. and Ms. Hurley, this is not the only issue raised by AIB in respect of the proposed arrangement. However, for convenience, I will deal first with the questions (common to both cases) identified in para. 1 above. To the extent that it is necessary to do so, I will then turn to consider the remaining issues in both cases.

The Legal Position in relation to Reasonable Living Expenses

12. Section 115A(8)(a)(ii) of the 2012 Act (as amended) provides that, before proceeding to consider an application to confirm the coming into effect of an arrangement, the court must be satisfied (inter alia) that each of the mandatory requirements referred to in s. 99 of the 2012 Act have been complied with. Section 99 of the 2012 Act lays down a series of mandatory requirements concerning Personal Insolvency Arrangements. These include the requirement set out in s. 99(2)(e) that a Personal Insolvency Arrangement:-

> *"…shall not contain any terms which would require the debtor to make payments of such an amount that the debtor would not have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants."*

13. For this purpose, s. 99(4) provides that:-

> *"…in determining whether a debtor would have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants under the … Arrangement, regard shall be had to any guidelines issued under section 23."*

14. Under s. 23(1) of the 2012 Act, the ISI is required, for the purposes (*inter alia*) of s. 99(4) to prepare and issue guidelines as to what constitutes a reasonable standard of living and reasonable living expenses. Section 23(3)(f) provides that, in preparing such guidelines, the ISI shall have regard to a number of matters including *"the need to facilitate the social inclusion of debtors and their dependents and their active participation in economic activity in the State".*

15. Although the Bank of Ireland and AIB have framed their arguments in slightly different terms, the nub of the submission made by both parties is the contention that an arrangement of this kind cannot lawfully contain a term which would require the debtor to make payments of an amount which would result in the debtor having insufficient income to maintain a reasonable standard of living in accordance with the guidelines set by the ISI under section 23. Both parties have sought to rely, in this context, on an observation made by Baker J. in *Jacqueline Hayes* [2017] IEHC 657, at para. 28 where she said that the statutory restriction contained in s. 99(2)(e):-

> *"…prohibits formulation of a proposal which provides for expenditure below the RLE within the period of the PIA. It does not prohibit a scheme by which a debtor might on current known figures live below the RLE guidelines outside the 6-year term of the PIA. The legislation is formulated to govern spending within the 6-year window as the purpose of the PIA to give breathing space to enable a return to solvency by an insolvent debtor."*

16. Having regard to the decision of Clarke J. (as he then was) in *Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, and the subsequent decision of the Supreme Court in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, if that observation of Baker J. forms part of the *ratio* of her decision in *Jacqueline Hayes*, I would clearly be required to follow the same approach here save in the very limited circumstances described by Clarke J. in *Worldport*. It is, therefore, necessary to consider the status of that observation made by Baker J.

17. In my view, it is clear from a consideration of the judgment of Baker J. in that case that the observation made by her (as quoted above) was *obiter*. In particular, it is clear from para. 40 of her judgment that there was no evidence in that case that the debtor would have to live below the reasonable living expenses set by the ISI during the currency of the arrangement. There was no more than a danger that the debtor might have to do so in year 18 of the term of the mortgage (which was well after the term of the proposed arrangement had expired). In those circumstances, the observation of Baker J. cannot be said to form part of the *ratio decidendi* of her decision. It is well settled that the *ratio decidendi* includes only those statements contained in a judgment that are part of the essential basis for reaching the decision of the court. Where, on the facts of *Jacqueline Hayes*, there was no issue that the debtor would have to live below reasonable living expenses during the currency of the arrangement, the observation made by Baker J. in para. 28 of her judgment cannot be said to form part of the *ratio* of her decision. Accordingly, I am of opinion that, notwithstanding my own preference to defer to the judgments of Baker J, I am free to consider the arguments made by the parties in this case and that I am equally free to take a different view to that suggested by Baker J., on an *obiter* basis in para. 28 of her judgment. In this context, I have had the benefit of very detailed submissions (both written and oral) in relation to the issue described in para. 1(a) above. I think it is unlikely that a similar level of argument was addressed to Baker J. in *Jacqueline Hayes* on this specific issue. In the first place, the specific issue did not arise on the facts of that case. Secondly, the judgment of Baker J. does not record that any detailed argument was made to her in relation to the proper interpretation of s. 99 of the 2012 Act.

18. It may seem incongruous that secured creditors (whose interests lie in enforcing their security against the property of the debtors) should raise any issue in relation to a debtor living below the level of the reasonable living expenses set by the ISI. I should make it quite clear that the concerns expressed on behalf of the secured creditors here are not motivated by any altruistic solicitude for the debtors. The secured creditors obviously wish to defeat the applications to approve the arrangements. They are also motivated by a concern (addressed further below) that the debtors will be driven to default on their obligations under the arrangements (in particular the obligation to make ongoing payments on foot of the mortgage loans) in the event that they are required to live at a level which is below the reasonable living expenses set by the ISI. Counsel for the practitioner has argued that the requirements in relation to reasonable living expenses are for the protection of debtors rather than creditors and that it should not be open to creditors to raise issues of this kind. Counsel argued that the provisions of s. 99(2)(e) should be seen as a shield for the debtor rather than a sword for the secured creditors. I fully understand why counsel for the practitioner should make this argument. However, notwithstanding the obvious incongruity involved, I can see nothing in the 2012 – 2015 Acts which would prohibit the secured creditors from raising and arguing this issue. In my view, they are entitled to do so – just as they are entitled to raise any other issue (as to alleged non-compliance with any of the statutory pre-conditions to the grant of relief under s. 115A) that may assist them in defeating an application which they believe to be contrary to their interests. The fact is that the Oireachtas has made it a precondition to the grant of relief under s. 115A that the requirements of s. 99 (including the requirements of s. 99(2)(e) dealing with a reasonable standard of living) are satisfied. In circumstances where the grant of relief under s. 115A is capable of having serious consequences for a creditor holding security over the principal private residence of a debtor, such a creditor is plainly entitled to raise arguments that address whether the preconditions to the grant of relief under s. 115A have or have not been satisfied.

19. While I accept that the secured creditors are entitled to raise the issue, I have come to the conclusion that they are mistaken in their contention that the arrangements here are contrary to the requirements of s. 115A(8)(a)(ii) and s. 99(2)(e) of the 2012 Act. In my view, it is clear from a consideration of the relevant statutory provisions that they do not go so far as to prohibit any arrangement that may have the effect of requiring a debtor to live below the reasonable living expenses set by the ISI. A consideration of the relevant statutory provisions makes this clear.

20. In the first place, s. 99(2)(e) does not, by its terms, prohibit an arrangement which would have the effect that a debtor will be required to live at a level below the reasonable living expenses set by the ISI pursuant to s. 23 of the Act. It would have been a relatively straightforward matter for s. 99(2) to so provide. Instead, what the subsection prohibits is an arrangement where the debtor would not have sufficient income to "*maintain a reasonable standard of living* for the debtor and his or her dependants" (emphasis added). This is debtor specific. It is, therefore, necessary to consider the particular personal circumstances of the individual debtor concerned and of his or her dependants.

21. Secondly, the debtor specific language is continued in s. 99(4) which also speaks of a "*sufficient income to maintain a reasonable standard of living* for the debtor and his or her dependants" (emphasis added). Furthermore, s. 99(4) does not require that a "*reasonable standard of living*" must be measured at the level set by the ISI in its guidelines. What s. 99(4) requires is that, in determining whether a debtor would have sufficient income to maintain a reasonable standard of living for himself or herself and his or her dependants, "regard shall be had *to any guidelines issued under s. 23*" (emphasis added). This plainly requires that regard should be given to the guidelines and that they must be taken into account but it does not go so far as to require that, in every case, the reasonable standard of living for a particular debtor and his or her family will always equate to that set in the ISI guidelines. It permits a determination to be made, in an individual case, that a reasonable standard of living for a particular debtor and his or her family may be set at a different level to that suggested by the guidelines. But obviously such a determination would only be appropriate where a court can be satisfied, on the evidence, that, in the particular circumstances of an individual debtor, it is appropriate to do so. In circumstances where the Oireachtas requires that regard be had to the guidelines, a court would have to be satisfied that there is a proper basis, in an individual case, to make a determination that a particular debtor and his or her dependants can reasonably live at a level which is below that set by the guidelines.

22. There is nothing in s. 23 of the 2012 Act that, in my view, requires a different approach to be taken. Under s. 23(1), the ISI is placed under a statutory obligation to prepare and issue guidelines as to what constitutes a reasonable standard of living and also guidelines in relation to reasonable living expenses. Under s. 23(2), the ISI is required to consult with the Minister for Justice and Equality, the Minister for Finance, the Minister for Social Protection and such other persons or bodies as the ISI thinks appropriate. Under s. 23(3), the ISI is required to have regard to a number of very important factors in preparing the guidelines including differences in the size and composition of households, the differing needs of persons (having regard to their age, health and whether they have a disability) and the need to facilitate the social inclusion of debtors and their dependents and their active participation in economic activity in the State.

23. It is important to keep in mind that what s. 23 envisages is the formulation of guidelines. The very fact that they are referred to as "*guidelines*" is of some significance. By its very nature, a guideline is a guide as to how to proceed. It is to be distinguished from an instruction or a prescription. The Oireachtas chose to proceed in this way. The ISI could have been empowered to proceed by way of statutory instrument prescribing a minimum standard of universal applicability. In particular, the ISI could have been directed by statute to fix what constitutes a reasonable standard of living and the Oireachtas could equally have prescribed that all arrangements would be required to adhere to that standard. As outlined in para. 22 above, that is not what the Oireachtas directed. Instead, it directed that guidelines would be issued by the ISI and that regard should be had to those guidelines. To my mind, that very clearly stops short of requiring strict adherence to the guidelines in every case. That is not to say that the guidelines can be readily departed from. Given the very important role given to the ISI under s. 23 of the 2012 Act and the extensive nature of the exercise carried out by it in their formulation, the guidelines provide an essential yardstick by reference to which an objective assessment can be made as to what is an appropriate standard of living in any individual case for a debtor and his or her dependants. Ultimately, an individual assessment must be made in each case by reference to the guidelines but the language of the Act stops short of requiring that, in all cases, a debtor must have disposable income at or above the level set in the guidelines. This reflects the reality that some households are more resourceful than others and are able to have a full and rewarding family life at a more modest cost than others.

24. In all of the circumstances, I have come to the conclusion that there is nothing in the 2012 Act which goes as far as to prohibit the formulation of proposals for an arrangement under which a debtor might, for a period of time, have to live at a level below that set in the guidelines as to reasonable living expenses set by the ISI. That is not, however, the end of the inquiry. Having regard to the language of the statutory provisions discussed above, it will always be necessary to have regard to the ISI guidelines in determining, in any individual case, whether debtors will have a sufficient income, under a proposed arrangement, to maintain a reasonable standard of living for them and their respective dependants. That is the question to which I now turn in the context of the present appeals.

Will the debtors have a sufficient income to maintain a reasonable standard of living?

25. Having regard to the considerations discussed in paras. 22 to 24 above, it is necessary to consider very carefully the guidelines which have been issued by the ISI. In August 2018, the ISI issued two explanatory documents entitled "*Guidelines on Reasonable Standard of Living*" and "*Reasonable Living Expenses Background Information*". On p. 4 of the latter document, the ISI states:-

> *"Guidelines on a reasonable standard of living and reasonable living expenses are essential to the process of moving towards long-term restructuring measures in that they enable the debt servicing capacity of a distressed debtor to be calculated in a fair and consistent manner so that the sustainability of repayments can be established. The guidelines safeguard a minimum standard of living so as to protect debtors while facilitating creditors in recovering all, or at least a portion, of the debts due to them."*

26. On p. 6, the ISI states that a reasonable standard of living does not mean that a person should live at a luxury level (on the one hand) or at a subsistence level (on the other). A debtor should be able to participate in the life of the community, to eat nutritious food, to have clothes for different weather and situations, to maintain a home and to be able to devote some time to leisure activities. On p. 7, the ISI stresses that reasonable living expenses will vary depending on a number of factors such as the particular composition of a household and the need for a car. On p. 8, it notes that a car will be required where a debtor needs it to travel to and from work and where there is not an adequate public transport system in place. Importantly, on p. 10, the ISI recognises that reasonable living expenses will necessarily vary depending on a number of factors including the debtor's relationship status, the need for a vehicle, and the number and ages of any children. The ISI also stresses on the same page that, while reasonable living expenses have to be calculated on a mainly objective standard "*it is important that some flexibility be allowed so as to recognise and provide for the differing needs of persons…"*

27. In the course of the hearing of the appeal in the case of Mr and Ms Hurley, counsel for the practitioner drew attention to what is said on p. 12 of the Background Information document where, the ISI state that, in the context of a Debt Relief Notice, there must be strict application of the reasonable living expenses model set out in the Guidelines in determining the eligibility of an applicant. In contrast, when dealing with debt settlement arrangements and personal insolvency arrangements, the ISI state:-

> *"Ultimately, it is a matter for the …Practitioner to determine an acceptable level of reasonable living expenses and for creditors to agree on this and vote in favour of it.*
>
> *The Act requires that the debtor have sufficient income to maintain a reasonable standard of living. Accordingly, reasonable living expenses should not be at a level below that proposed under these guidelines.*
>
> *Reasonable living standards may be higher than these guidelines propose where acceptable to creditors. This may occur where creditors can see value for themselves in incentivising the debtor."*

28. Counsel for the practitioner submitted that the extract shows that the ISI itself envisages that a reasonable standard of living does not invariably equate to the level suggested in the guidelines. Counsel stressed in this context the reference to "*reasonable living expenses* should not ordinarily *be at a level proposed under these guidelines*" (emphasis added).

29. In the case of Mr. Hurley and Ms. Hurley, the guidelines envisage that a couple in their position, should have available to them (in the context of an arrangement) available income to the tune of €2,447.77 per month in the current year and €2,660.56 per month until 2023, in order to meet their living expenses. The reason why they require more available income in the current and following years is that another child will pass from primary to secondary school later this year. As noted above, having regard to their obligation to make payments of €829 per month in respect of the mortgage loan, they would require to have a net monthly income of €3,489.56, if they were to be in a position to live at the level contemplated by the ISI guidelines and also discharge their obligations in relation to the mortgage debt. That is more than their net monthly income of €3,246.00. Accordingly, in order to meet the monthly repayments of €829 in respect of the mortgage loan, the Hurley family, in the period between 2020 and 2023, will have to live at €245.56 per month less than the figure of €2,660.56 set out in the ISI guidelines. Counsel for the Bank of Ireland argued that it could not be said in these circumstances, that Mr. Hurley and Ms. Hurley will have sufficient income to maintain a reasonable standard of living and that, as a consequence, the requirements of s. 99(2)(e) have not been satisfied in their case.

30. When this issue was first raised on affidavit by Bank of Ireland, a detailed response was provided by Mr. Hurley in an affidavit sworn by him on 25th October, 2018, in the course of the proceedings before the Circuit Court where he said:-

> *"7. …my wife is not in a position to get a part time job in circumstances where our nine year old son has developed Diabetes and requires constant care everyday. He is dependent on her and he has to get daily injections 5 – 6 per day and my wife gives them to him.*
>
> *8. I say that we have been in receipt of income supplement for a number of years and this will continue going forward.*
>
> *9. I say … that if I am not successful in having a PIA approved then repossession proceedings … is imminent for my family home. I say and it would appear that I do not have a defence to same … in circumstances where the PIA process may come to an end, save that I have a PIA which I understand gives a better outcome than repossession, a better outcome than bankruptcy and complies with the objectives of the Personal Insolvency Acts. It therefore appears that without the … PIA I will be evicted from my family home and made homeless.*
>
> *10. I say that my reasonable standard of living … in my PIA is appropriate, adequate, and realistic in the circumstances. Since 2008, my family and I have been reducing our living expenses and spending in an effort to retain our family home. I say that we live modestly, carefully considering our shopping choices over the last number of years and we have streamlined the family finances and spendings.*
>
> *11. I say and believe in the drafting of the PIA, we did not have to drop or reduce our spending to enable payment to the PIA. We did not need to adopt a new standard of living. Whilst I accept that the [ISI] have set out what they consider to be a set of guidelines that they believe represent a reasonable standard of living, unfortunately for many people, including my family, those guidelines are, aspirational.*
>
> *12. I say that in addition to the above, the reality of a standard of living must be viewed in my alternative… If I am not successful in [this] … application then my 'standard of living' is in reality going to be as a homeless person. Whilst this may initially seem dramatic, a PIA and the … Guidelines … must… be viewed in relation to the reality of the alternative. If I do not succeed in having my PIA approved, then it is foreseeable that our family home is at risk of repossession.*
>
> *…*
>
> *14. In light of the above, it is clear that my 'reasonable standard of living' is best maintained and protected in my own family home. Each family and each person will have a different 'reasonable standard of living' depending on their standing, their income and what they have become accustomed to. With that, we live within our means to ensure our family standard of living in our own home is maintained … I say, for the avoidance of any doubt, that this is not a newly adopted position in light of the 115A process but rather an active choice and position that we have maintained since we engaged with [a practitioner] in about 2017."*

31. These averments on the part of Mr. Hurley are strongly corroborated by the pattern of payments which have been made by him and his wife since July 2016. In the 25-month period running from July 2016 to July 2018 (both months inclusive) Mr. and Ms. Hurley made 25 payments of €930 each to Bank of Ireland. According to what I was told at the hearing before me in April 2019, those payments have continued since July 2018 at the same rate. It should be noted that this payment of €930 is higher than the amount payable monthly under the proposed arrangement. Thus, for the past three years, the Hurley family have shown that they can live, on a consistent and prolonged basis, at a net income figure of less than the reasonable living expenses set by the ISI as appropriate for a two adult household with three dependent children and a motor car. At the time proposals for an arrangement were drawn up in this case in 2017, the relevant figure for reasonable living expenses (measured by reference to the ISI guidelines) was €2,236.00. The total household income was (as before) €3,246.00. In circumstances where they were paying €930 every month to Bank of Ireland, that left them with no more than €2,116 by way of net income from which to meet their living costs. Having lived on that basis in 2017 and 2018, the position of the family has deteriorated further in the current year when, as noted in para. 29 above, they should have available to them income of the order of €2,447.77 per month in order to meet their reasonable living expenses as measured by

the ISI (following the further child entering secondary school). Nonetheless, they have continued to make payments at the rate of €930 per month. The very fact that the Hurley family have succeeded in living at a level less than the I.S.I. guidelines for a three-year period shows that they are clearly a very resourceful family who are well capable of economising and living within their means. As the ISI, in its Background Information document makes clear at p. 11, a reasonable standard of living may vary from one person to another. The guidelines (which have been adopted after very careful consideration by the ISI) provide an invaluable objective yardstick against which reasonable living expenses can be measured. Nonetheless, some people are capable of being more frugal and resourceful than others and the Hurley family have shown that they fall within this category.

32. In the course of the hearing, it was argued on behalf of Bank of Ireland that there is no material in the affidavits sworn by the practitioner and by Mr. Hurley which identifies which elements of the items listed in the guidelines would be foregone by the debtors. It was submitted on behalf of Bank of Ireland that it was incumbent on Mr. Hurley and Ms. Hurley to explain what specific cut-backs and economies they had made. In this context, it should be noted that the guidelines set out monthly allowances for spending on a range of items encompassing everything from food and clothing to household goods and services, transport, heating and electricity, insurance, savings and contingencies, education, communications and social inclusion and participation. It was argued in particular that it would be injurious to the family if they had to cut down on, for example, social inclusion and participation. However, there is a lack of reality to that submission. For a family in the position of the Hurleys, they have to make a choice as to whether they can, by economising, live for a three year period at a level beneath the ISI guidelines or lose their home. In his affidavit (quoted above), Mr. Hurley explains in graphic terms the stark choice facing him and his family. As noted above, they have shown, by their actions to date, that they are capable of living beneath the level of the ISI guidelines. I do not believe that it makes any difference, in the context of this case, how (or in what areas) the economies or cut-backs are achieved. The fact is that the Hurley family have been able to make the necessary adjustments to their living costs to continue making substantial payments to Bank of Ireland notwithstanding that the payments made mean that they are living on an income beneath that measured by the ISI to be appropriate. For them to lose their home would be far more injurious to them as a family unit than, for example, cutting back to some extent on social inclusion and participation or on other elements of the items specified in the guidelines. By cutting back and economising in that way, they will be able to keep their home and thereby maintain a stable family life. The uncontradicted evidence in the case is that the cost of renting a similar property in the area in which they live would be significantly higher than the repayments envisaged under the proposed interlocking arrangement. The evidence is that the cost of alternative accommodation would work out at €1,450 per month. That is manifestly not affordable to the Hurley family. If the Hurley family had to pay rent at that level, it would have a devastating impact on their disposable income. They would be left with €1,796.00 per month to discharge their ongoing living costs. This is very significantly less than the figure measured by the ISI as reasonable living expenses for a family in their circumstances. Accordingly, there is very real substance to the suggestion made by Mr. Hurley in his affidavit that, if the family were to lose their present home, they could well find it impossible to secure alternative accommodation at a rent they could afford with the result that they would be made homeless. The recent report of the Ombudsman for children (dealing with children's experience of living in family hubs) makes sobering reading. The loss of the family home would be much more injurious to the family than making cutbacks for a period of three years in their living costs.

33. As explained by Mr Hurley in his affidavit (quoted in para. 30 above), the family live modestly. He says that they have economised by, inter alia, carefully considering their shopping choices. The court does not live in a vacuum. I am aware from my own life experience that simple cost cutting measures can significantly improve a family budget. I am conscious that, for example, savings can be made on energy costs by switching utilities' suppliers on a periodic basis. More importantly, with regard to expenditure on food, significant savings can be made by taking the trouble to shop around. Similar measures can be taken when it comes to expenditure on clothes. The twice yearly sales in clothing shops also provide additional opportunities to make savings. With regard to the significant "back to school" costs incurred by families every year as children move from class to class or from primary to secondary education, the Competition and Consumer Protection Commission ("CCPC") offers invaluable advice as to the simple and straightforward steps which can be taken by families to reduce outgoings. The CCPC also offers advice on reducing the cost of after school activities. Thus, it is possible for a family to live modestly while still equipping themselves with the necessities of life and ensuring that children can participate in social activities. I therefore accept the evidence given by Mr Hurley on affidavit. I am accordingly satisfied that, when the individual circumstances of Mr. Hurley and Ms. Hurley are taken into account, they will be able to maintain a reasonable standard of living for themselves and their family under the proposed arrangements. By proceeding in this way, Mr. Hurley and Ms. Hurley will have the ability to resolve their current insolvency and secure the future for themselves and their family.

34. In these circumstances, I have come to the conclusion that there is a proper evidential basis in the present case to conclude that, even having regard to the ISI guidelines, the arrangement, in the case of Mr. and Ms. Hurley, does not contain any terms that would require them to make payments of such an amount that they would not have a sufficient income to maintain a reasonable standard of living for themselves and their three children of school-going age. I have, therefore, come to the conclusion that the requirement set out in s. 115A(8)(a)(ii) is satisfied insofar as the s. 99(2)(e) criterion is concerned.

35. It is next necessary to consider whether the same criterion is satisfied in the case of Ms. Phelan. In her case, the evidence in relation to her ability to appropriately provide for herself and her child at a level beneath the reasonable living expenses recommended by the ISI is not as detailed as in the case of Mr. Hurley and Ms. Hurley. In an affidavit sworn by the practitioner on 9th March, 2017, the following is stated:-

> *"10. … I have considered the need for the Debtor to contribute the sum of €227 per month in order to make payments under a hire purchase agreement. I say … that the motor vehicle is required in order to allow the Debtor travel to and from her place of employment and to maintain the income that she requires both to fund her reasonable living expenses and to fund contributions towards her mortgage and other creditors. I say and believe that the payment of €227 per month is not excessive and appears reasonable in the circumstances where it generates and facilitates the Debtor being an active member of the working community and being employed so as to make contributions to the arrangements.*
>
> *11. …I have considered the reduction needed in the Debtor's reasonable living expenses in light of the said payments and I am of the belief that the reduction is not sufficient as to cause either the Debtor financial difficulty or cause difficulty to the arrangement.*
>
> *12. …I have discussed… reasonable living expenses post payment of the hire purchase with the Debtor and I have been informed to my satisfaction that the sum of €1,050 is sufficient for the debtor to live on on a monthly basis.*
>
> *13. I am instructed that this is the case due to the fact that the…dependent child will be an adult and the… reasonable living expenses will reduce [as] a result of this.*
>
> *14. I say and believe that the Debtor has support from family lodgers and has provided evidence and proof of the said support to me. I say and believe that the Debtor has a history of renting the said premises and remains happy and*

content to do so in order to facilitate her repayment capacity and the retention of her family home…".

36. In her own affidavit sworn on 11th July, 2018, Ms. Phelan says:-

> *"13. …it is correct to set out that I have a hire purchase arrangement… in relation to a small VW Polo and I entered into the hire purchase agreement in May, 2015. I say and believe that the car was necessary in circumstances where I had to have a reliable vehicle in order to commute to and from my place of work and also to bring my youngest child to and from school and to extracurricular activities. For the purpose of the arrangement, I will make a monthly hire purchase payment from [my] set living costs until the end [of the] hire purchase arrangement. I say and believe that the purchase of the car [by hire purchase] was necessary in 2015 due to the fact that I was not in a position to buy a car outright with a lump sum payment.*
>
> *14. …this payment does not impinge on the return for creditors. As can be seen from my overall circumstances I am making every effort to run a household, provide for my children, and pay my creditors".*

37. While this evidence is not as detailed as in the case of Mr. and Ms. Hurley, it must be considered in conjunction with Ms. Phelan's payment history. In the course of the hearing before me, I was provided, by agreement of the parties, with an up to date statement of the mortgage account running from December, 2015 to May, 2019. While the payment record prior to December, 2016 was extremely poor, regular payments resumed in 2016 when two payments totalling €575.00 were paid. In January, 2017, €363 was paid. In February, 2017, €491.45 was paid. In March, 2017, a total of €553.50 was paid. In April, 2017, a total of €360 was paid. In May, 2017, a total of €492 was paid. In June, 2017, €552.90 was paid. In July, 2017, a similar sum was paid. In August, 2017, €553.08 was paid. Thereafter, in each of September, October, November and December, 2017, sums of €550 or just above that figure were paid. In January, 2018, €633 was paid. In February, 2018, €533 was paid. In March, 2018, €633.23 was paid. In April, 2018, €533.17 was paid. In May, 2018, €483.00 was paid. In June, 2018, €633.30 was paid. In July, 2018, €533.37 was paid. In August, 2018, €482 was paid. In September, 2018, €510 was paid. In November, 2018, €433 and on December, 2018, €483 was paid. The only exception was October, 2018, when the only payment made was €33.64. In 2019, Ms. Phelan made payments of €422.38 in January, 2019, €422.44 in February, 2019, €22.49 in March, 2019, €472.54 in April, 2019 and €420 on 3rd May, 2019. Thus, with the exception of March, 2019, Ms. Phelan made significant monthly payments in 2019. On average, in the 30 month period between December 2016 and May 2019, Ms. Phelan made a payment of €482.98 per month.

38. In the course of the hearing, counsel for AIB drew attention to the fact that, under the proposed arrangement, Ms. Phelan, in addition to making payments of €443 per month in respect of the mortgage, will also have to pay a monthly contribution of €200, for the first five years of the arrangement (with an even larger contribution in year six of €656 per month) and in addition, she will have to continue making a payment of €227 per month in respect of the hire purchase arrangement in respect of the VW Polo. AIB has a number of complaints in relation to the hire purchase arrangement but, in the context of the issue which I am now addressing, the only relevance of the hire purchase arrangement is that €227 will require to be paid to the hire purchase company at the same time as Ms. Phelan will be required under the proposed arrangement, to pay a total of €643 per month (being the aggregate of the mortgage payment of €443.00 and the monthly contribution of €200). While, by my calculations, Ms. Phelan is currently paying €482.98 per month to AIB (which is slightly more than the mortgage payment of €443.00 required under the proposed arrangement) along with €227 per month to the hire purchase company, counsel for AIB makes the point that she will have an additional €200 to pay per month for the first five years of the arrangement and €656 per month for the final year of the arrangement.

39. In response, counsel for the practitioner argued that this concern is only in respect of the period up to 2020 when the hire purchase arrangement will be paid off. He argued that this is such a short period that neither the court nor AIB should have any concern that, for the duration of that period, Ms. Phelan will have to live below the level recommended by the ISI in its reasonable living expenses guidelines. As in the case of Mr. and Ms. Hurley, counsel for the practitioner argued that the alternative for Ms. Phelan was that she would lose her home. He drew attention, in this context, that the average rent for a similar property in the area where Ms. Phelan lives is €1,000 per month. Rent of that scale is clearly not affordable by Ms. Phelan on the basis of her total household income.

40. Counsel for the practitioner also stressed that Ms. Phelan had the support of her two eldest children (who are now adults) who reside in the family home and contribute on a weekly basis to the household expenses. While the amount currently paid per month is no more than €217.00 (which is already taken into account, in the context of the proposed arrangement, insofar as Ms. Phelan's total net income is concerned) there must be some scope for that figure to be increased in the event that, for any reason, Ms. Phelan encounters difficulty from time to time during the currency of the arrangement in funding the living expenses for herself and her dependant child. Insofar as the more significant monthly payment in year six of the proposed arrangement is concerned, counsel for the practitioner suggested that this does not create a problem in circumstances where, by that stage, Ms. Phelan will no longer have any dependant children. In accordance with the ISI guidelines, the reasonable living expenses will fall from €1,506.00 per month to €1,050.00 per month. The additional monthly contribution of €656.00 in the final year will, therefore, be affordable. In fact, as a consequence of the elapse of time since the PIA was originally proposed at the end of 2016, the youngest child (who was then 14) will reach the age of 18 in 2020 and, therefore, the reasonable living expenses will reduce to €1,050 at that time.

41. Given that Ms. Phelan is currently making payments at €482.98 to AIB together with €227 per month to the hire purchase company, this demonstrates that Ms. Phelan is in a position to live on that basis in 2020 and following years. Appendix 4 to the proposed arrangement shows that payments of that level will not require Ms. Phelan to live at a level below the ISI guidelines. The same applies in the final year of the arrangement even though the monthly contribution (leaving aside the mortgage payment of €443.00) will increase to €656.00. Appendix 4 shows that even in that year she will be able to live within the guidelines.

42. The potential difficulty is in respect of the period between now and 2020, when the reasonable living expenses (measured by reference to the ISI guidelines) will be of the order of €1,506.00 while at the same time Ms. Phelan will have the obligation to pay €443 per month to AIB, a further sum of €200 by way of monthly contribution under the arrangement and, in addition, €227 in respect of the hire purchase payments. By making all three of these payments during that period, Ms. Phelan's disposable income (in order to fund her living expenses) will be €1,279 per month which is less than the ISI guide figure of €1,506.00, for a household comprising one adult and one dependant child and a motor vehicle. However, this must be viewed by reference to Ms. Phelan's individual circumstances. She has said, on affidavit, that she is prepared, during this period, to live below the level of the ISI guidelines in order to keep her motor vehicle which is essential to enable her to get to and from her place of work and to bring her child to and from school and to extracurricular activities. That is a very important individual circumstance to which, to my mind, appropriate consideration must be given.

43. Furthermore, in my view, the period in question is sufficiently short to enable someone in Ms. Phelan's position to weather whatever hardship may arise for her during that relatively brief period. On any view, the hardship sustained by Ms. Phelan during that

relatively brief period will be significantly less than the very severe hardship that would ensue for her and her family if the application under s. 115A were to be rejected and she was to lose her family home. In addition, it is inconceivable that her adult children (who currently reside in the home with her) would not be prepared to contribute more to the living costs of the household during this period if that became necessary. While no such commitment is recorded in the papers before the court, I believe that it is very probable that the adult children would do so in the event that the household were to suffer some level of hardship during the brief period described above.

44. As noted above, what must be considered in the context of s. 99(2)(e) is the income that will be sufficient to maintain a reasonable standard of living for Ms. Phelan and her dependant child. While I must (and I do) have regard to ISI guidelines, (in accordance with s.99(4) of the 2012 Act), the key consideration is what is a reasonable standard of living for Ms. Phelan and her child. That is what s.99(2)(e) requires. It is true that, for a period, Ms. Phelan's disposable income will dip below the guide figure set by the ISI. However, in her case, this is purely as a consequence of her need to maintain hire purchase payments for her motor vehicle so that she can get to her place of work and get her child to school. In my view, it is perfectly reasonable, in the particular circumstances of Ms. Phelan, for her to make that choice. On the evidence before the court, she needs her motor vehicle in order to maintain her job. Without her job, she would not have a sufficient income to meet her living expenses. In her particular circumstances, it is an entirely rational decision to make to live slightly beneath the guideline figures assessed by the ISI for this relatively short period of time up to 2020.

45. I was, however, troubled by one aspect of the evidence in relation to the hire purchase arrangement. The hire purchase agreement was not exhibited at any stage in the course of the exchange of affidavits in the Circuit Court. In addition, in an email exhibited by Ms. Phelan, her practitioner wrote to AIB on 26th October, 2016, stating that the VW Polo: *"currently has a finance balance of €12,673…".* In the course of the hearing, counsel for AIB drew attention to this email and suggested that it was difficult to understand how it could be said that the hire purchase payments would cease in 2020, if the balance due as of October 2016, was as much as €12,673.00 and the monthly payments made by Ms. Phelan are no more than €227 per month. Furthermore, in circumstances where the hire purchase agreement has not been exhibited, there is no information in the papers before me as to whether any balancing payment or option payment has to be made at the end of the term of the hire purchase agreement in order to secure ownership of the car. In my view, these are matters that should properly have been addressed by Ms. Phelan on affidavit. Nonetheless, having reflected further on the matter since the hearing, I do not believe that this should affect the outcome of the appeal (insofar as this issue is concerned). I have come to that conclusion in circumstances where, in the course of the Circuit Court proceedings, two affidavits were sworn on behalf of AIB and no issue was raised in those affidavits about any final payment to be made under the hire purchase agreement or as to whether it would, in fact, be paid off by 2020. Most bankers would be aware that it is a common feature of a hire purchase arrangement that there is a final payment to be made at the end of the term in order to secure ownership of the hired vehicle. In circumstances where these points were not ventilated by AIB, I believe it would be unfair, in the circumstances, for me to look behind the evidence that the payments of €227 under the hire purchase agreement will come to an end in 2020. In taking that approach, I am conscious that the onus of proof in applications of this kind rests on the practitioner. However, in circumstances where AIB has had the email in question since October 2016, and in circumstances where Appendix 2 to the proposed arrangement made clear that the hire purchase agreement would be paid off by 2020 and where neither of the affidavits thereafter sworn on behalf of AIB raised this point, it would be fundamentally unfair to Ms. Phelan to call into question at this appeal stage, the evidence before the court that the hire purchase agreement will be paid off by 2020. The evidence to that effect is set out in para. 41 of Ms. Phelan's affidavit sworn in the course of the Circuit Court proceedings on 11th July, 2018. In fairness to her, if this point was to be pursued, it should have been ventilated in the course of the Circuit Court proceedings so that Ms. Phelan would have had an opportunity (at the time she placed her evidence before the Court) to deal with the matter.

46. For completeness, I should make clear that, based on the figures in the email of 26 October, 2016, it is unlikely that the hire purchase arrangement would endure for very much longer beyond 2020. I should also make clear that, even if it were the case that the hire purchase arrangement was to continue for somewhat longer than 2020, I would still be of opinion that the additional payment of €227 per month will not have the effect of reducing Ms. Phelan's standard of living to less than what is reasonable for her and her child. The basic point is that the period in question is short and the motor vehicle is required in order to ensure that Ms. Phelan can continue working. In Ms. Phelan's particular circumstances, a vehicle is a necessity of life. It is also necessary for her child so that the child can attend not only school but also the extracurricular activities which are so important in any child's development. It is, therefore, understandable that, in the particular circumstances of Ms. Phelan and her child, a choice would be made to prioritise the payments in respect of the car over some of the other items listed in the ISI guidelines such as social inclusion and participation, public transport and household goods. Moreover, any such sacrifices are likely to be short lived in that, based on the figures in the October 2016 email, the hire purchase payments will come to an end relatively soon even if not in the calendar year 2020.

47. I am accordingly of opinion that there is a sufficient basis in this case to form the view that the payments to be made under the arrangement will not have the effect of reducing the standard of living of Ms. Phelan and her dependant child to an unreasonably low level. In circumstances where the reduction in standard of living will be temporary only, where the car is necessary to enable Ms Phelan to hold down her job and allow her to bring her child to school and to very important extra-curricular activities, and where it will secure a home for the family for the future, I have come to the conclusion that the requirements of s. 99(2)(e) are satisfied in this case.

Sustainability

48. The next issue which arises in these appeals is whether the court can be satisfied that (as required by s. 115A(9)(c) of the 2012 Act), the debtors are reasonably likely to comply with the terms of the proposed arrangements. Both Bank of Ireland and AIB suggest that, on the evidence, the arrangements are simply not sustainable and that the debtors will not be in a position to comply with the terms of the arrangements. For the purposes of the consideration of this issue, it is important to bear in mind that the test laid down by s. 115A(9)(c) is one of reasonable likelihood not certainty. There must, accordingly, be sufficient evidence available to the court to satisfy the court that it is reasonably likely that the debtors will be able to meet their respective obligations under the proposed arrangements.

49. In each of the appeals, the argument is essentially the same. In each case, the objecting creditor contends that, in light of the fact that the debtors will be required to live at a level below the ISI guidelines on reasonable living expenses, it is unlikely that they will be in a position to meet their obligations, under the proposed arrangements, in respect of mortgage repayments. The argument made is that, if it comes to a choice between making a mortgage repayment and discharging a reasonable living expense, debtors will, almost inevitably, prioritise the living expense over the mortgage repayment.

50. In both cases, the objecting creditors have argued that, in considering sustainability, the court should not confine itself to considering the position of the debtors during the course of the proposed arrangements. They submitted that it is also necessary to consider the circumstances of the debtors into the future. In my view, the objecting creditors are correct in this submission. Section 115A(9)(b)(i) requires the court to be satisfied that the proposed arrangements will enable the debtors to resolve their indebtedness

without recourse to bankruptcy. There would be no point in approving an arrangement if there was a reason to conclude that the debtors were likely to be unable to meet their financial commitments (including their mortgage repayments) in the future. Were that to happen, they might find that bankruptcy was the only solution. In *Jacqueline Hayes* [2017] IEHC 657 Baker J. explained the position as follows at paras. 21-22:-

> *"21. The purpose of the legislation is to facilitate the return to solvency of a debtor, and to do so in a reasonable way, so that the new-found solvency is itself sustainable. It is in that context that the legislation has permitted the writing down of secured and unsecured debt, so that at the end of the six-year period of a PIA the debtors will have a reduced debt liability, which it is hoped will be sustainable by them, having regard to known circumstances.*
>
> *22. The legislation does not expressly require the court to examine the likely circumstances of a debtor after the six-year term of a proposed PIA, but in my view the creditor is correct that a court may not, if it has the evidence before it, disregard the likely or reasonably likely circumstances that will exist at the end of the six-year period of the PIA, or of the reasonably foreseeable future thereafter. There is likely to be a spectrum of circumstances and the degree of certainty regarding future financial circumstances will usually diminish over the middle to long term."*

51. The objecting creditors also make the argument that the reasonable living expenses measured by the ISI are pitched at a level which is too low for debtors to live on for any extended period of time and that it is essential that the proposed arrangements provide for contingencies. In the submissions made on behalf of the Bank of Ireland, significant reliance was placed on p. 21 of the ISI Background Document where the ISI emphasises the need to make provision for savings and contingencies in the following terms:-

> *"In the alternative any relatively small but unforeseen event might well cause the failure of an insolvency arrangement since a person in an insolvency arrangement will likely have only limited access to credit. This savings allowance may also assist in preventing people on low incomes being cut off from sources of regulated credit."*

52. Both of the objecting creditors also rely on a number of observations made by me in my judgment in *Lisa Parkin* [2019] IEHC 56 at paras. 42 and 59. In para. 42 of that judgment, I said:-

> *"42. …it is important to bear in mind that, between now and the end of the mortgage term, Ms Parkin will continue to have to incur the ordinary expenses of life. For example, money will inevitably be required from time to time for expenses such as medical and dental treatment and for the upkeep and maintenance of the family home; and relatively large sums may need to be spent when the roof springs a leak or the windows need to be replaced or the central heating irretrievably breaks down."*

53. In para. 59 of the same judgment, I said:-

> *"The Guidelines issued by the ISI envisage that the reasonable living expenses of a single adult with a car will be €1,050.48 per month. That might appear to leave Ms Parkin with a very generous cushion even after her reasonable living expenses are taken into account. However, it must be borne in mind that those guidelines are intended to be applied for the duration of a bankruptcy, a PIA, or a debt settlement arrangement. They are not intended to be a measure of the expenses likely to be incurred over the course of a longer period and they are certainly not designed to apply for a lifetime. For example, they envisage an exceptionally modest sum of €0.97 per month for personal costs and an extremely modest sum of €31.34 per month for health. They are also based on very modest provision for contingencies and savings of no more than €43.38 per month. That figure for contingencies seems to me to be manifestly insufficient on a long term basis to deal with the costs every home owner incurs on a recurring basis in the upkeep and maintenance of property (even leaving aside the emergencies that occasionally arise requiring more substantial outlay such as roof repairs)."*

54. In addition, AIB has drawn attention to the observations of Baker J. in *Clive Casey* (Unreported, High Court, 29th May, 2017), where she said at para. 29:-

> *"I also accept the argument of the debtor that it is not the intention of the Act that a debtor be confined to the basic reasonable living expenses set out by the [ISI] for the rest of his or her life, and that the general scheme of the Act is that a debtor will in the currency of a PIA bring into account to the maximum extent possible his or her assets and income, and that on the performance of the obligations in the PIA the debtor will be relieved of identified debt. Such an approach to post-arrangement debt is familiar in the scheme of the bankruptcy legislation."*

55. It should also be noted that similar observations were made by Baker J. in a number of other decisions given by her in applications under section 115A. However, it is crucial to note that the observations of Baker J. in *Clive Casey* and my own observations in *Lisa Parkin*, were all concerned with the long term position of the debtors. The observations were not intended to capture the position of debtors during the currency of a personal insolvency arrangement. Moreover, the observations were directed at circumstances where objecting creditors had sought to argue that the debtors could afford more by way of payments to them in the future than was envisaged under the terms of the relevant arrangements under consideration. Thus, for example, in *Lisa Parkin* the objecting creditor had argued that, in the post personal insolvency arrangement period, Ms. Parkin had means significantly in excess of those required to discharge the ISI reasonable living expenses such that she could afford to pay much more to the objecting creditor in that case. What I sought to do in that judgment, consistent with my understanding of the approach taken previously by Baker J., was to draw attention to the fact that the ISI reasonable living expenses are only intended to apply during the time limited extent of a bankruptcy or a personal insolvency arrangement. As Baker J. made clear in *Clive Casey*, it is not the intention of the Acts that a debtor should be confined to the basic reasonable living expenses for the rest of his or her life.

56. It is also important to record that this does not mean that a personal insolvency arrangement is unsustainable where, on the evidence before the Court, the future income of a debtor (after payment of the mortgage instalments) is only marginally above the level of the reasonable living expenses measured by the ISI. There is nothing in the judgments previously given by the Court to support that proposition. In every case, the individual circumstances of the debtor have to be considered and there are likely to be many cases where a debtor is prepared to live frugally for many years into the future in order to keep his or her family home. There is no presumption that a debtor with a modest income above the level of the ISI reasonable living expenses is likely to default. Everything will depend on the personal circumstances of an individual debtor.

57. For completeness, I should also say that, as I hope I made clear in *Lisa Parkin*, there were particular reasons in that case why I thought it would be procedurally unfair to Ms Parkin to uphold the objection of the creditor in relation to the relatively generous financial buffer available to Ms Parkin after discharge of her mortgage payments. I did not intend to suggest that a buffer of that

scale was either required or justified in every case. Nor did I suggest in that judgment that the scale of the buffer was to become a template for the future. Every case must be assessed by reference to its own particular facts and circumstances.

58. In the case of Mr. & Ms. Hurley, they have shown by their ability to maintain payments at the rate of €930 per month (even while living beneath the level of the reasonable living expenses set out in the ISI Guidelines) that they have the capacity to make significant payments on foot of the mortgage over a prolonged period. Their payment history since July 2016 demonstrates that they will be well capable of continuing to make payments in the future in accordance with the proposed arrangements and the written down mortgage loans. In essence, the complaint made by the Bank of Ireland is that there will be an insufficient margin available to them in the future over and above the level of the reasonable guidelines set by the ISI, to have any confidence that they will be able to continue to make payments in the event that, for example, significant house repairs are required or some other contingency arises which places them in a difficult position. One can never rule out the possibility that difficulties might arise in the future. That is not peculiar to personal insolvency arrangements. The same can be said for many a performing mortgage. Furthermore, Baker J., in a number of cases, has stressed that a court cannot make assumptions regarding the likely financial or other circumstances of a debtor far into the future. (See for example *Paula Callaghan* [2017] I.E.H.C. 332 at para. 79; see also *Jacqueline Hayes* [2017] I.E.H.C. 657 at paras. 22 & 29).

59. It would obviously be ideal if there was a greater financial cushion available to Mr. Hurley and Ms. Hurley into the future so as to minimise the impact of any financial shocks that may emerge. However, on the basis of the household income available to them, that extra financial cushion could only be achieved at the expense of Bank of Ireland. The practitioner, in this case, in formulating the proposed arrangements, has had to navigate a course between the interests of Bank of Ireland as a secured creditor and the affordability of any proposal for Mr. Hurley and Ms. Hurley. Obviously, if the practitioner had proposed that the loan in favour of Bank of Ireland should be written down to the current value of the family home, that would have left Mr and Ms Hurley with a greater disposable income in order to discharge their reasonable living expenses. Conversely, it would have reduced the amount to be paid to Bank of Ireland and may well have prompted a complaint from Bank of Ireland that, contrary to the requirements of s. 115A(9)(b) (ii) of the 2012 Act (as amended) Mr. Hurley and Ms. Hurley could afford more by way of mortgage payments. In such circumstances, as is so often the case, the bank might well have challenged the proposal to write down the mortgage loan to that extent. Practitioners often find themselves in a difficult position trying to balance the interests of the secured creditor on the one hand and the interests of the relevant debtor on the other. In this case, the practitioner has made a judgment that Mr. and Ms. Hurley can afford to pay more by way of a mortgage such that it is not appropriate to write down the secured debt to the current value of the family home. It is ironic that the decision to proceed in this way has now led to the attack on the sustainability of the proposed arrangement.

60. What is affordable to Mr. & Ms. Hurley is dependent on their means. In my view, their past performance since July, 2016 demonstrates that they will be in a position to continue to honour their obligations under the proposed arrangement into the future. Any financial shocks which may arise in the future cannot be predicted. What can be said is that Mr. Hurley and Ms. Hurley have shown themselves to have been very resourceful in managing their finances to date. Furthermore, as their children grow up and become adults and begin to earn a living for themselves, Mr. Hurley and Ms. Hurley will have more disposable income available to them to withstand any financial shocks that may possibly occur in the future. In these circumstances, I do not believe that there is any basis to form the view that Mr. Hurley and Ms. Hurley are not reasonably likely to be able to comply with the terms of the proposed arrangement. On the contrary, the evidence (and in particular their behaviour to date) demonstrates that they are reasonably likely to do so.

61. There was one further issue ventilated by Bank of Ireland in this context. It was argued that the eldest child in the family must be an additional drain on their resources in circumstances where the only funding available for the further education of that child is under the Student Universal Support Ireland ("*S.U.S.I.*") scheme. The bank drew attention to exhibit TH3 to Mr. Hurley's affidavit which recorded that, although the grant available in respect of the eldest child of the family provides for full payment of tuition fees in UCD, there is a modest maintenance grant of no more than €1,215.00 per year which is paid in the sum of €135.00 per month for nine months of the year. In circumstances where the student in question has to travel from the south of the country to attend UCD, it is suggested that the sum of €135.00 would not cover the entirety of his living costs and accommodation each month in Dublin. The argument made on behalf of the Bank of Ireland was that, in the circumstances, the S.U.S.I. funding was plainly insufficient to maintain a student away from home and that, as a consequence, this must necessarily increase the pressure on Mr. Hurley and Ms. Hurley in trying to budget not only for the payments to be made under the proposed arrangements but also for the demands of their children including any child in third level education. In my view, on the evidence before the court, there is no substance to that contention. The fact is that, on the basis of the income available to Mr. Hurley and Ms. Hurley, they have been able to manage their finances notwithstanding the inevitable costs that arise for a student in third level education. Moreover, it is a feature of third level education in this country that many students support themselves by part-time work and by work during the summer months.

62. Thus, the fact that the eldest child of the family is now in third level education is not a factor which would cause me to have a concern that the interlocking arrangements proposed by the practitioner on behalf of Mr. Hurley and Ms. Hurley are unsustainable. I remain of the view expressed in para. 58 above that the evidence demonstrates that, contrary to the contention advanced by Bank of Ireland, the proposed arrangements are sustainable. I am therefore satisfied that the requirements of s. 115A (9)(c) are satisfied in their case.

63. In the case of Ms. Phelan, the evidence in relation to sustainability is not as strong or as detailed as it is in the case of Mr. Hurley and Ms. Hurley. However, for the reasons outlined in paras. 41-47 above, I am satisfied that Ms. Phelan will be in a position to sustain the fee payments required under the arrangement for its duration. As previously noted, Ms. Phelan will have to live below the level recommended by the ISI in its reasonable living expenses guidelines for a relatively brief period during the currency of the proposed arrangement. Moreover, Ms. Phelan has the support of two adult children who currently reside in the home with her and make a contribution to the living costs of the household. While the evidence in relation to the arrangement with Ms. Phelan's adult children has been criticised (with some justification), there is no reason to suppose that Ms. Phelan's adult children will not be prepared to support her. Were either of them to leave the family home, it would be open to Ms. Phelan to take in a lodger. In several appeals which have come before me, objecting creditors have complained about what they perceive as failures on the part of debtors to let out rooms in their homes in order to be in a position to make more extensive payments to their creditors under personal insolvency arrangements.

64. It is true that, in the final year of the proposed arrangement, Ms. Phelan will be required to make more extensive monthly contributions to the arrangement namely €656. However, by that time her motor vehicle will no longer be on hire purchase. Moreover, her daughter will no longer be a minor. In those circumstances, as noted above, her reasonable living expenses (measured in accordance with the ISI guidelines) will reduce to €1,050. Given that her current monthly income is €2,149.00, she would accordingly have sufficient assets available to pay that contribution along with the monthly payment to AIB namely €443.

65. Insofar as the post arrangement period is concerned, based on Ms. Phelan's current net monthly income of €2,149.00 and the

reasonable living expenses of a single person with a motor vehicle of €1,050, Ms. Phelan will have a cushion of €1,099 from which to pay the mortgage repayments to AIB and to deal with any contingencies that may arise in the future. Based on the current level of the mortgage repayments, she should have more than €600 per month available in the future to provide for such contingency. In my view, this demonstrates that the proposed arrangement in Ms. Phelan's case is sustainable. I am therefore satisfied, in her case, that the requirements of s. 115A (9)(c) are satisfied.

Other issues
66. Both Bank of Ireland and AIB have raised a number of other issues in relation to each of the arrangements and it is to those issues that I now turn.

The Insolvency Regulation
67. During the course of the hearing, counsel for Bank of Ireland raised an issue in relation to the enforceability of the arrangement insofar as BNP is concerned. As explained in para. 4 above, Mr. Hurley and Ms. Hurley had invested in a holiday property in France which is the subject of security held by BNP on foot of a secured loan. Under the proposed arrangement, the property will be surrendered to BNP. In circumstances where BNP has not proved its debt, no dividend will be paid to it. Counsel for Bank of Ireland raised the spectre that, since BNP is a bank organised and existing under the laws of France, there was no certainty that BNP would be bound by the arrangement. Counsel submitted that the court would need to be satisfied that, under the Recast Insolvency Regulation (Regulation (EU) 2015/848) ("*the Insolvency Regulation*"), BNP would be bound by the terms of the arrangement such that it could not, at some time in the future, demand payment of any amount due to it and thereby undermine the arrangement reached in Ireland with the creditors of Mr. and Ms. Hurley. That was, however, the extent of the submission that was made. No provisions of the Insolvency Regulation were drawn to my attention. It was simply put to me that this is something about which the court needed to be satisfied.

68. I acknowledge fully that the court would need to be satisfied in relation to an issue of this kind. Nonetheless, where such an issue arises, it would be helpful for counsel to take the court through the relevant provisions of the Regulation so as to assist the court in forming a view on this issue.

69. I confirm that I have considered the terms of the Insolvency Regulation and, having done so, I am satisfied, that BNP will be bound by the arrangement, if it is approved by the court under s. 115A. For this purpose, I draw attention to the following: -

> (a) In the first place, Recital 66 makes clear that it is the law of the Member State where proceedings are opened (i.e. the *lex concursus*) that will apply save where the Regulation prescribes othewise. Recital 66 says: "*the lex concursus determines all the effects of the Insolvency proceedings, both procedural and substantive, on the persons and legal relations concerns. It governs all the conditions for the opening, conduct and* closure of the Insolvency proceedings" (emphasis added). The present proceedings are insolvency proceedings which have been opened in Ireland. Thus, Irish law will govern the closure of the proceedings and will govern the terms and effect of the proposed arrangement.
>
> (b) Recital 68 provides that rights *in rem* should normally be determined according to the *lex situs* and this should not be affected by the opening of Insolvency proceedings. Clearly, the intention of the Regulation is that a secured creditor will therefore be entitled to enforce rights against secured property in the jurisdiction in which the security is situated. This is reinforced by the provisions of Article 8. Thus, in the present case, BNP would be entitled to exercise all rights of French law over the asset of Mr. and Ms. Hurley in France. It is therefore perfectly understandable that the arrangement envisages that the asset in question should effectively be returned to BNP. That aspect of the arrangement therefore does not offend against the Insolvency Regulation.
>
> (c) Accordingly, the concern of the court in the present application is in relation to that aspect of the arrangement which envisages that BNP will not be entitled to any dividend in respect of any amount still due to it after realisation of the asset in France. In my view, that issue (consistent with what is said in Recital 66 quoted above) is dealt with in Article 32 of the Regulation which makes clear that a judgment handed down by a court concerning the closure of insolvency proceedings or concerning compositions approved by the court shall be recognised throughout the EU with no further formalities. Such a judgment will be enforceable in accordance with the Brussels Recast Regulation. It is clear, therefore, that an order made under s. 115A of the 2012 Act (as amended) constitutes such a judgment. The order will accordingly be entitled to recognition in France. In these circumstances, I am of opinion that BNP will be bound by any order I make under s. 115A confirming the coming into effect of the proposed arrangements under which no dividend will be paid to BNP. They will not thereafter be entitled to upset the apple cart and treat the unsecured element of the BNP debt as still due.

Have the requirements of s. 115A(9)(g) been complied with?
70. In the course of her submissions to the court, counsel for Bank of Ireland also raised an issue as to whether the requirements of s. 115A(9)(g) had been complied with insofar as Mr. Hurley is concerned. Under that subsection, it is necessary, save in cases to which s. 111A applies, to establish that at least one class of creditors has accepted the proposed arrangement by a majority of over 50%. For this purpose, s. 115A(17) permits the court to consider a single creditor to constitute a class.

71. No issue arises in relation to s.115A(9)(g) insofar as Ms. Hurley is concerned. She had only one creditor namely the Bank of Ireland. In those circumstances, she is entitled to rely on s.111A for the purposes of mounting her application for approval of the arrangement. However, in Mr. Hurley's case, two creditors participated in the meeting namely Bank of Ireland and AIB. Bank of Ireland is owed a total of €573,035.66 which represents 93.6% of Mr. Hurley's overall indebtedness. AIB is owed €39,024.64 which represents 6.4% of the overall indebtedness. AIB voted in favour of the proposal. For the purposes of the application under s. 115A, the practitioner characterised AIB as a separate class of creditors. In particular, he characterised them as the *"regular unsecured class of creditor".* In the course of the appeal hearing, counsel for the Bank of Ireland queried why Bank of Ireland was not included in that class also given that it is being treated, in part, as an unsecured creditor. Counsel emphasised that the burden is on the practitioner to satisfy the court in relation to this issue.

72. While I entirely agree that the burden lies on the practitioner to satisfy the court in relation to the compliance of all of the conditions set out in s.115A, I am nonetheless surprised that this issue should be ventilated on behalf of Bank of Ireland in this case. It is an issue which was addressed in *Lisa Parkin* (on which Bank of Ireland relied in relation to its argument with regard to reasonable living expenses). The issue is addressed by me in paras. 25-33 of my judgment in *Lisa Parkin* and it is therefore unnecessary to repeat the same analysis here. However, it seems to me that what I said in para. 30 of that judgment is equally applicable (*mutatis mutandis*) here:-

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

73. It seems to me that similar considerations apply here. AIB was purely an unsecured creditor. Bank of Ireland was both a secured creditor and a creditor in respect of an unsecured element of its debt (particularly in circumstances where the market value of its security was significantly less than the extent of the debt). It follows that the rights and interests of AIB on the one hand (as an unsecured creditor) and Bank of Ireland (being both a secured and unsecured creditor) on the other, were so dissimilar as to make it impossible for them to consult together with a view to their common interest. They therefore formed separate classes.

74. I have not lost sight of the fact that, under s. 115A(17)(b) the court must have regard to the number and composition of the creditors who voted and the proportion of the debts due to those creditors. In my view, it could not be said that the debt owed to AIB was so insignificant as to make it disproportionate to regard it as a separate class of creditor. In these circumstances, I am satisfied that the requirements of s. 115A(9)(g) have been satisfied insofar as Mr. Hurley is concerned.

The concerns of AIB in relation to the hire purchase agreement put in place by Ms. Phelan

75. In its notice of objection under s. 115A(3), the complaint made by AIB in relation to the hire purchase arrangement was put in the following terms:-

> *"The … Arrangement is unfair and inequitable to the Creditor contrary to s.115A(9)(e)…in circumstances where the Debtor seeks to retain a high value vehicle the subject of a hire purchase arrangement, acquired at a time when she was making no repayments whatsoever to the Creditor and where the retention of this asset will force the Creditor to live beyond her Reasonable Living Expenses as prescribed by [the ISI] and where the Debtor has displayed no capacity to do so".*

76. However, in the affidavit of Matt Grimes sworn on 26th January, 2017 in support of the objection, AIB went somewhat further. In para. 23 he said (insofar as relevant):-

> *"…the Bank … within two years prior to the issue of the protective certificate…[sought] to recover the debts due by the Debtor and it did enter into a number of short term solutions with the Debtor including mortgage moratoriums to assist the Debtor …. Of acute concern to the Banks is the fact that during 2015 when the Debtor enjoyed mortgage moratoriums from the Bank she acquired a new and valuable motor vehicle taking out significant debt. The Debtor has … made monthly repayments on the motor vehicle to her hire purchase provider in the sum of €227.00. There appears to be no arrears on that … agreement. This transaction must be viewed at a time when in 2015, whilst having a moratorium for six months, the debtor did not contribute towards her home loan at all and whilst having a three month moratorium in 2016 a total of only €995.00 was paid by her towards her home loan. The motives of the Debtor in this regard are difficult to understand however it is quite clear that she preferred her hire purchase creditor above the Banks in terms of payments made by her since 2015…."*

77. In a subsequent affidavit sworn by Mr. Grimes on 31st March, 2017 he explained that AIB would have no issue with Ms. Phelan owning, retaining and running a car. However, Mr. Grimes made the point that a less valuable car would place less financial strain on Ms. Phelan's "*already constrained income*". Mr. Grimes indicated that AIB does not in general raise an objection to the retention by an insolvent debtor of a motor vehicle valued under €5,000. Mr. Grimes also reiterated the significant concern of AIB about the manner in which the motor vehicle was acquired at a time when AIB had agreed a moratorium on repayments of the mortgage debt in order to give some breathing space to Ms. Phelan. Mr. Grimes suggested that the manner in which the car had been acquired behind AIB's back called into question Ms. Phelan's *bona fides*.

78. In the course of the hearing of the appeal on 13th May, 2019, counsel for AIB re-emphasised the concern of AIB at the manner in which the motor car was acquired by Ms. Phelan. I can well understand why AIB would be concerned about this issue. The issue is relevant in at least two respects:-

> (a) In the first place, the court is required under s.115A(10)(a), when considering whether to make an order under s.115A(9), to have regard to the conduct of the debtor within two years prior to the issue of the protective certificate. In this case, the motor vehicle was acquired by Ms. Phelan within that two-year period;
>
> (b) Secondly, although no case was made by AIB in its notice of objection that the payments made to the hire purchase company constituted a "*preference*" within the meaning of s.120(h), I am required as part of my obligations under s.115A(8) to consider whether, having regard to the information before the court, any of the grounds specified in s.120 might be said to apply to Ms. Phelan or to the proposed arrangement in her case. In light of the information provided by Mr. Grimes in his affidavits, it seems to me that I must therefore consider whether the hire purchase arrangement (and the payments made under it) could be said to constitute a "preference" within the meaning of s.120(h).

79. Insofar as the first of those issues is concerned, I am of opinion that Ms. Phelan should have informed AIB of her intention to acquire the motor vehicle during the moratorium agreed with AIB. In circumstances where AIB was agreeing a moratorium on repayments of the mortgage, it clearly behoved Ms. Phelan to disclose to AIB her intention to acquire a motor vehicle by hire purchase. The question which now arises is whether this conduct on the part of Ms. Phelan (which arose during the relevant two year period specified in s.115A(10)) is sufficient to persuade me that it would not be appropriate to allow the appeal and make an order confirming the coming into effect of the proposed arrangement.

80. A somewhat similar issue arose in *J.D.* [2017] IEHC 119. In that case, the debtor had acquired a motor vehicle on hire purchase terms at a time when she understood from advice given to her by an insolvency advisor (who was subsequently discovered to be acting without accreditation) that proposals put to a secured creditor had been accepted. On the evidence before her, Baker J. came to the conclusion that the behaviour of the debtor was not reckless. At para. 78 she said:-

> *"78….I consider that the evidence does not point to any financially reckless behaviour on the part of the debtor ….in May, 2015 the debtor contracted to purchase a second-hand motor vehicle for the sum of €17,000 with the hire purchase repayment obligation of €315 per month, which will end in year 5 of the PIA. Her uncontroverted evidence is that she needed a reliable car for the purposes of her employment, and that she entered into the hire purchase agreement at a time when she believed that while EBS had made demand on foot of the mortgage, that an agreement had been made through [the unaccredited insolvency advisor] to resolve the difficulties with the mortgage. …"*

81. In para. 79 of her judgment in that case, Baker J. accepted that the debtor rationally approached her finances in the circumstances as she understood them albeit that she had been led astray by her engagement with an unregulated entity. In those circumstances, the debtor's conduct was excusable. In contrast, in the present case, Ms. Phelan has not put forward any evidence that would explain why she did not discuss her proposed acquisition of a motor vehicle with AIB prior to entering into the hire purchase agreement. Accordingly, the evidence in this case is not on all fours with the evidence available to Baker J. in *J.D.* Nevertheless, there is a very clear explanation given by Ms. Phelan as to why it was necessary to acquire the motor vehicle. The evidence in relation to the acquisition of the vehicle has already been set out in para. 45 above. As I sought to make clear in para. 46 above I am of opinion that a motor vehicle is a necessity of life for Ms. Phelan, having regard to her need to get to and from work and to bring her child to and from school. It should also be noted that, as Ms. Phelan explains in para. 39 of her affidavit, she did not have the funds to purchase outright a roadworthy motor vehicle. She therefore had no alternative but to go for the more expensive option of a hire purchase arrangement which, from her perspective, had the significant advantage that she did not have to make any significant upfront payment but instead could make the hire purchase payments monthly over several years. Thus, while I am firmly of the view that Ms. Phelan should have disclosed her intentions to AIB in advance of entering into the hire purchase agreement, I accept that it was necessary for her to acquire the vehicle in the circumstances. I also accept that there was no other realistic means of doing so available to Ms. Phelan other than by hire purchase. In addition, I accept that, as Ms. Phelan says in para. 39 of her affidavit, if she ceased to have a motor car, she would not be able to continue working. In all of the circumstances, while, in the absence of an explanation from Ms. Phelan, I cannot condone her failure to inform AIB of her intention to acquire the vehicle by hire purchase, I have come to the conclusion that it would not be appropriate to dismiss the appeal and refuse the application under s. 115A on this ground alone.

82. Insofar as s.120(h) is concerned, it provides that a creditor may challenge a proposed arrangement on the ground that:-

> *"The debtor had given a preference to a person within the preceding 3 years that had the effect of substantially reducing the amount available to the debtor for the payment of his or her debts (other than a debt due to the person who received the preference)".*

83. I was not addressed in any detail at the hearing in relation to this provision and in particular in relation to what is meant by a "*preference*" in this context. In the absence of full argument, it would not be appropriate for me to seek to make any definitive findings as to the ambit and effect of s.120(h). However, on the evidence before the court, I am satisfied that no issue arises under s.120(h). In the first place, there is no evidence to suggest that the making of payments to the hire purchase company has substantially reduced the amount available for the payment of Ms. Phelan's debts. That is an essential aspect of the applicability of s 120 (h). On the contrary, on the basis of the evidence before the court, Ms. Phelan would not be in a positon to make any payments toward her debts were she not able to continue her employment. As she explains on affidavit, if she is to continue that employment, she needs to be in a position to have a motor vehicle. As she did not have the funds to buy a motor vehicle outright, she had no alternative but to proceed in the way that she did. Crucially, the fact that she has the motor vehicle allows her to maintain her employment. In turn, that will enable her to make the payments contemplated by the proposed arrangement. I therefore cannot see any basis on which it can be said that the conditions set out in s.120(h) has been met in this case.

The "*unencumbered" land adjoining Ms. Phelan's home*
84. AIB raised an issue in relation to a small strip of land to the rear of Ms. Phelan's home that is not contained within the folio in which the principle private residence appears. This was not an issue that was ultimately debated in nay detail at the hearing. It appears to be clear that the strip of land is of no value whatever. The matter is dealt with as follows in para. 33 of Ms. Phelan's affidavit where she said:-

> *"33….there is a small parcel of land that is situated to the rear of my Principal Private Residence that for reasons unknown to me are not contained within the same Folio as my capital PPR. I say and believe that this land is worthless and has no value and does not represent visible land … or in any way represents an omission from my Prescribed Financial Statement. There is no access to the piece of land and all that the land contains are water pipes and shrubbery".*

85. Although that affidavit was sworn in July 2018 and the Circuit Court hearing did not subsequently take place until November 2018, AIB did not place any further evidence before the Circuit Court to controvert what was said by Ms. Phelan (as quoted above). In the circumstances, it seems to me that this issue has been satisfactorily addressed by Ms. Phelan and does not require any further consideration from me. For completeness, I can see no basis, on the evidence before me, to suggest that there was any material omission from the Prescribed Financial Statement made by Ms. Phelan in this case.

Unfair prejudice
86. I have carefully considered all of the arguments and evidence in these three appeals. I have come to the conclusion that neither Bank of Ireland nor AIB will suffer any unfair prejudice in the event that the proposed arrangements are confirmed by the court. In each case, the objecting creditor will do better under the proposed arrangements than it would in the event of a bankruptcy. In the case of Mr. Hurley and Ms. Hurley, the Bank of Ireland will obtain a return of 64c in the euro under the proposed arrangement. In a bankruptcy, the return would be no more than 52c in the euro. While counsel for the bank has argued that the bankruptcy comparison is speculative insofar as the outcome is dependent on Mr. and Ms. Hurley being in a position to comply with their obligations going forward, I have already expressed the view that, on the basis of the evidence before the court, I am satisfied that Mr. and Ms. Hurley are reasonably likely to be able to comply with the terms of the proposed arrangement and with their ongoing obligations thereafter on foot of the mortgage. In those circumstances, it is entirely appropriate to have regard to the bankruptcy comparison which is always a very useful litmus test to be undertaken in any consideration as to whether a proposed arrangement could be said to be unfairly prejudicial.

87. Insofar as Ms. Phelan is concerned, counsel for the practitioner confirmed that the figure set out in Appendix 5 to the proposed arrangement in her case needs to be adjusted. In the course of the hearing, it was explained that the expected dividend to AIB would be no more than 53c in the euro in a bankruptcy whereas it will be 59c in the euro under the proposed arrangement. I am therefore reinforced in my view that, in the circumstances of Ms Phelan's case, the proposed arrangement will not be unfairly prejudicial to AIB.

Conclusion
88. I confirm that in each of these appeals, I have carefully considered, in the light of the evidence and information before the court, whether each of the requirements of s.115A have been met. While this judgment has concentrated on the issues that were debated in the course of the hearing, I confirm that I have considered all of the requirements of s.115A in each case. I am satisfied that all of the conditions for the grant of relief under s.115A have been satisfied in each case. I therefore believe that it is appropriate in each case to make an order confirming the coming into effect of the proposed arrangements in accordance with their respective terms.

89. I am very conscious that I am taking a different view to that taken by the learned Circuit Court judges at first instance. I have sought to explain my reasons for doing so in this judgment. In the circumstances, I will allow the appeal in each case, set aside the orders made by the Circuit Court and, in lieu thereof, I will make an order confirming the coming into effect of the proposed arrangement in the case of each of the three appeals addressed in this judgment.