[C:IS:SEWD:2015:001543]

THE HIGH COURT ON CIRCUIT

SOUTH EASTERN CIRCUIT COUNTY OF WATERFORD

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

In re Dunne (A DEBTOR)

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

JUDGMENT of Ms. Justice Baker delivered on the 6th day of February, 2017.

1. Mitchell O'Brien, the personal insolvency practitioner ("PIP") appointed to act as an independent intermediary in the process, made a proposal for a Personal Insolvency Arrangement ("PIA") under the Personal Insolvency Acts 2012 to 2015 ("the Acts") pursuant to his statutory function. Permanent TSB Plc ("PTSB"), a lender which holds security on the principal private residence of the debtor, voted against the PIA at the statutory meeting of creditors held on 5th February, 2016. The regular unsecured class of creditors supported the PIA.

2. An application to the Circuit Court under s.115A of the Acts was lodged by the PIP on 6th February, 2016. This judgment is given in an appeal from the order of Her Honour Judge Mary Enright in the Circuit Court made on 19th October, 2016 by which the application of the debtor was refused and the objection of PTSB upheld.

3. The PIA of the interlocking debtor, Ms Cathy Dunne, was also rejected at the meeting of creditors and her application under s. 115A was also refused by the Circuit Court. Her appeal, record no. C:IS:SEWD:2015:001544, was listed to be determined by me in conjunction with the present application, and as the legal and factual issues are materially identical, this judgment is intended to dispose of both appeals.

4. Section 115A was inserted by s. 21 of the Personal Insolvency (Amendment) Act 2015 and gives the relevant court power to make an order confirming the coming into effect of a proposed PIA notwithstanding its rejection at a meeting of creditors, when it is satisfied that the jurisdictional tests set out in s. 115A(9) and (10) have been met, and there is a reasonable prospect that the PIA will enable the debtor not to dispose of an interest in or cease to occupy all or part of his or her principal private residence. The Acts have been considered by me in my judgment in *Hill and Personal Insolvency Acts* [2017] IEHC 18.

5. The relevant considerations which bear on the present appeal may be stated as involving two questions: whether the PIA does, as is contended by PTSB, unfairly prejudice its interests; and whether the means of the debtor have been appropriately brought to bear on the proposals for repayment of the secured debt as envisaged by the Acts.

6. PTSB calls in aid three of the statutory criteria identified as bearing on the jurisdiction of the Court under s. 115A(9) as follows.

7. First, it argues that the proposed PIA does not satisfy the requirement in s. 115A(9)(b)(ii) in that it does not:

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

8. Second, it argues that the proposed PIA is not in compliance with s. 115A(9)(e) in that it is not:

> "… fair and equitable in relation to each class of creditors that has not approved the proposal and whose interests or claims would be impaired by its coming into effect."

9. Third, it argues that the proposed PIA does not meet the requirement in s. 115A(9)(f) that it be:

> "… not unfairly prejudicial to the interests of any interested party."

10. It is accepted that the debts that are proposed to be dealt with by the PIA include "relevant debt" within the meaning of s. 115A(18) of the Acts.

The relevant provisions of the PIA: the split mortgage.

11. The PIA proposes the retention by the debtor and his wife of their principal private residence and the restructuring of the loan secured on that premises. Briefly the financial arrangement proposed is as follows.

12. The principal private residence of Mr. Dunne and his wife is secured for the repayment of a debt of €384,381.26 (rounded up to €385,000 for certain calculations). Prior to the creditors' meeting, and following an engagement between the debtor and his spouse with PTSB, an agreement was reached as evidenced in a letter dated 7th January, 2015 by which the mortgage debt was to be "split" into two accounts, one account described as the "Main Mortgage Account", and a second account, the "Warehouse Account". The agreement to split the mortgage by warehousing the balance of the debt required the mortgagors to pay full capital and interest on the main mortgage account, and provided that they did not have any obligation to pay the warehoused balance until the end of the mortgage term unless their repayment capacity improved, and subject to review.

13. The warehoused amount was agreed to bear interest at 0%, and it was agreed that at the end of the remaining term of the main mortgage, agreed to be 348 months (29 years) options would be explored regarding the repayment of the warehoused amount, whether by way of refinancing, making a lump sum payment or sale. The letter of 7th January, 2015 from PTSB indicated that when consideration came to be had in regard to the warehoused amount that it would "endeavour to work closely" with the debtors and take into account their financial circumstances at the relevant time.

14. Both the main mortgage and the warehoused mortgage were to remain secured against the principal private residence of the debtor and his wife.

15. PTSB reserved onto itself a right to "review" the financial situation of the mortgagors during the currency of the main mortgage, and they were required to advise if their repayment capacity "materially changed", whether by the improvement or disimprovement of their financial circumstances. It was expressly said that if the repayment capacity of the mortgagors should improve, that on review PTSB could transfer funds from the warehoused account to the main mortgage account. It is a proposed limitation on this capacity to review that forms the basis of the approach of the PIP and the rejection by PTSB of the PIA.

16. The principal private residence of the debtor and his wife has an agreed market value of €230,000, calculated in accordance with the provisions of s. 105 of the Acts. The main mortgage debt is €141,000, and the warehoused element is €244,000. The proposed monthly repayment on the main account is €527.31.

17. The mortgage restructure which provided for a split mortgage was agreed between the debtors and PTSB before the personal insolvency process started and evolved from engagement under MARP. The debtors however found that the agreed repayment schedule had left them unable to service their unsecured debt, and pressure from their unsecured creditors led to engagement with the Insolvency Service of Ireland ("ISI"). A protective certificate issued on 30th November, 2015 under s. 95(2)(a) of the Acts. During the currency of the protective certificate PTSB made a submission under s. 98(1) and proposed that the split mortgage arrangement would form part of any PIA to be put to creditors. Accordingly, the split mortgage proposal was included in Part IV, Clause 2 of the standard form for a PIA under the heading "Treatment of Secured Debt".

The proposed term to govern the review

18. The statutory function of a PIP involves a consideration of the financial sustainability of a PIA. It is accepted by both parties that a debtor may seek the benefit of the Acts and achieve a resolution of debt by means of a PIA once only in a lifetime. The PIP has proposed the restriction on review of the warehoused element of the split mortgage, as he avers on affidavit that he is fearful that a review may lead to revised repayment terms that the debtors could not meet.

19. In that circumstance the PIP proposed the inclusion in the review provisions in the split mortgage agreement with PTSB a term which was the main focus of the objection by PTSB to the application before the Circuit Court and before me on appeal.

20. That term reads as follows:

> "Any review of the debtor's income and expenditure by PTSB that may occur after six years from the coming into force of this PIA to assess the debtor's capacity to address some or all of the warehoused element of their PPR mortgage will respect the debtor's RLEs as per the then current ISI RLE Guidelines, and will not result in any amount of the warehoused amount becoming serviceable by the debtors unless their income is >10% in excess of the ISI RLEs at that point in time."

21. The reference to the ISI RLE guidelines is to the guidelines in respect of reasonable living expenses published by the ISI under s. 23 of the Acts.

22. The PIP states his view that only if such a term is included in the PIA will he be able to certify that the terms of the PIA are sustainable and will achieve a return to solvency and the continuing solvency of the debtor. In his affidavit at para. 15 he states the following:

> "The term included and detailed above, means, in simple terms, that when an inevitable review of the warehoused portion of the Debtor's mortgage takes place (post PIA) that the Objector could not force the Debtor to live on less than RLE plus 10 % and/or create a situation where the Objector could choose a reviewed monthly amount that would be unsustainable and/or indeed be unaffordable, which will create a situation where the mortgage would be deemed unsustainable by the Objector and thus create an act of default".

23. PTSB objects to the inclusion of the proposed term, and argues that it unjustly and unfairly prejudices its position, and is disproportionate.

24. The Acts envisage some reasonable balance between the parties and in that context the PIP, at para. 18 of his affidavit, explains that he included the term to deal with reviews,

> "so that I could stand over the sustainability of the mortgage and the Debtor's continuing solvency post completion [of the PIA]".

25. The debtor himself in correspondence with the PIP has also referred to his desire that the PIA would ensure the "continued occupation" by himself and his family of their home.

26. The PIP argues that were a review of the warehoused mortgage to take place on the completion of the PIA, and were the review not to be predicated on a restriction of the type suggested, that there is no present certainty that the debtor and his family could continue to occupy their principal private residence.

The arguments of the secured creditor

27. PTSB argues that the PIP in seeking to achieve the continuing solvency of a debtor after the completion of a PIA has misunderstood his statutory role. It argues that while the return to solvency is a goal recognised in the legislation there is nothing in the scheme of the Acts which requires that a PIA would ensure the continuing solvency of a debtor, or ensure the continued occupation of a principal private residence by a debtor for the balance of the mortgage term, and outside the term of the PIA, including in cases such as the present case, the ability of the debtor to perform any obligations that might from an agreement for a split mortgage.

28. PTSB also argues that the proposed term is uncertain, would involve the court engaging impermissibly in matters of policy, and is inappropriate, inequitable and not necessary to achieve the purpose of the Acts.

29. Following an exchange of correspondence PTSB engaged with the PIP with a view to reaching a compromise on a relevant protective condition and proposed the following formula:

> "Terms and conditions of restructure currently in place are to continue to apply to the debtor's PPR mortgage. Permanent TSB to commit to writing down the warehouse to 30% of the value of the property on expiry of the mortgage term, i.e. PTSB will perform a valuation on expiry of the mortgage term and the warehouse will be written down to 30% of that value."

30. PTSB presents this proposition to the court by way of illustration of the reasonableness and proportionality of its approach.

31. This varied term was not acceptable to the debtor.

The approval of a PIA by the court
32. Section 112 provides that, following the approval of a proposal for a PIA, at a meeting of creditors called for that purpose, the PIP shall notify the ISI, and each creditor concerned, of the result of the vote taken at the meeting. Section 113 provides that the ISI shall notify the appropriate court and furnish to that court a copy of the notification and document received from the PIP. Provision is made for the making of an objection to the coming into effect of the PIA and for the hearing of an objection.

33. Section 115 provides that when no objection is lodged by a creditor, or any objection lodged is determined by the court as not being allowed, the court shall proceed to consider in accordance with that section whether to approve the coming into effect of the PIA.

34. It is accepted by both parties that the court has no power to amend a PIA.

35. A PIA comes into effect only after it has been registered on the Register of Personal Insolvency Arrangements following the approval by the court of the arrangement under s. 115.

36. The effect of the approval by the Court of a PIA is that all creditors, including a secured creditor, will be bound by the arrangement.

37. The maximum duration of a PIA under the Acts is 72 months (6 years), but s. 99(2)(b) provides for extension for a further period of not more than 12 months in circumstances that may be specified in the terms of a PIA. On the completion of the performance by the debtor of his or her obligations contained in a PIA the debtor shall stand discharged from secured and unsecured debts covered by a PIA except to the extent provided for under its terms.

38. A debtor is not eligible to make a proposal for a PIA unless there is "a reasonable prospect that the debtor entering into such arrangement would facilitate the debtor becoming solvent within a period of not more than five years", s. 54(d). The PIP is required to complete a statement confirming that this mandatory requirement is met in respect of the debtor.

Return to solvency
39. Both parties accept that an overriding objective of the legislation is to give an insolvent debtor a breathing space in which proposals may be formulated and by which he or she may return to solvency. The debtor points to the Long Title of the Act of 2012 which identifies one objective of the Acts as being "to enable insolvent debtors to resolve their indebtedness…in an orderly and rational manner without recourse to bankruptcy and to thereby facilitate the active participation of such persons in economic activity in the State". I addressed this question in my judgment in *Nugent and Personal Insolvency Acts* [2016] IEHC 127 at paras. 6 & 7 and concluded at para. 59 as follows:

> " ... the purpose of the personal insolvency legislation is to avoid a debtor being made bankrupt, and that the personal insolvency regime offers a more benevolent means by which he or she can deal with indebtedness. This is envisaged by the Oireachtas as being in the common good."

40. The central difference between the parties to the present application is whether on a true construction of the provisions of the legislation the obligations of the PIP extend to ensuring the continuing solvency of the debtor after the expiration of the PIA.

Continuing solvency?
41. Section 107(1)(d) provides that the report of the PIP prepared for the purposes of a meeting of creditors must set out terms:

> "(i) describing the outcome for creditors, and having regard to the financial circumstances of the debtor whether or not the proposed Personal Insolvency Arrangement represents a fair outcome for the creditors, and indicating, where relevant, how the financial outcome for creditors (whether individually or as a member of a class of creditors) under the terms of the proposal is likely to be better than the estimated financial outcome for such creditors if the debtor were to be adjudicated a bankrupt (having regard to, amongst other things, the estimated costs of the bankruptcy process); and
>
> (ii) indicating whether or not he or she considers that the debtor is reasonably likely to be able to comply with the terms of the proposed Personal Insolvency Arrangement."

42. A similar provision exists in s. 115A(9)(c) which requires that the court be satisfied that the debtor is "reasonably likely to be able to comply with the terms of the proposed Arrangement". The PIP argues that in the absence of a term limiting the scope of a review of the warehoused mortgage he cannot advise that the debtor is likely to be able to comply with his obligations under the PIA.

43. The PIA under consideration in the present appeal is an "accelerated arrangement" of six months duration which provides a payment to the unsecured creditors of a lump sum within that period of six months in full satisfaction of their claims. The only element of the arrangement that will last outside the six month period is the restructured payment arrangement in respect of the principal private residence of the debtor and his spouse.

44. While the PIA will expire in 6 years, its terms envisage the repayment of the main mortgage over a period of 29 years. The PIP argues that the test under s. 115A(9)(b)(ii) that the court be satisfied that the PIA will "enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit" involves the court looking to the reasonableness of the repayment proposal over the entire of the term of the mortgage and not merely for the duration of the PIA. As the court is also required to have regard to whether there is a "reasonable prospect" that confirmation of the proposed arrangement will enable the debtor to resolve his or her indebtedness without recourse to bankruptcy, the PIP argues that the court must examine all elements of the proposed mortgage restructuring that form part of the PIA including those that continue to subsist when the term of the PIA has expired.

45. I can find no support in the legislation for the broad proposition that a PIA should seek to ensure the continuing solvency of a debtor outside the period of a PIA. The legislation cannot in my view be read as offering an umbrella protection for a debtor outside the term of the PIA, which cannot, as a matter of law be more than six years, or at most seven years in the limited circumstances provided by the Acts.

46. The mortgage on the principal private residence of the debtor and the interlocking debtor will by agreement with PTSB outlive the PIA by more than 20 years, but that does not in my view mean that the court must be vigilant to ensure that the debtor is reasonably likely to be able to meet the obligations under the mortgage for the balance of the mortgage term. While the court is obliged to enquire as to whether it is reasonably likely that a debtor will meet the terms of the PIA, the court is not required to engage the broader question as to whether the debtor is reasonably likely to be able to perform the obligations as reformulated in the PIA with regard to the repayment of a secured debt over the length of the repayment term.

Other legislative schemes: examinership under the Companies Act, 2014

47. While in *In Re O'Connor (a debtor)* [2015] IEHC 320 I considered the interplay between the Companies Acts, the Bankruptcy Act and the Personal Insolvency Acts, and noted that there was "nothing in the legislation that links any of its provisions to the Companies Acts", (para. 51), that observation was made in the context of an argument that the Companies Acts could not be called in aid to regulate the procedure at a meeting of creditors governed by the different statutory provisions in the personal insolvency legislation. That is not to say that the interpretation of the personal insolvency legislation cannot be assisted by a consideration of broadly similar provisions either in the Bankruptcy Act 1988 or the Companies Act 2014 and in that regard I noted in *Hill and Personal Insolvency Acts* that the personal insolvency legislation must be seen as arising in the context of insolvency legalisation generally, where identical or almost identical provisions are found. I noted at para. 23:

> "The word "arrangement" is found in company and bankruptcy law, for example in the examinership process created by the Companies (Amendment) Act 1990, and such arrangements often have contractual effect only if approved by the court. Indeed the PIA under the Acts is an "arrangement", and that word rather than "agreement" is used, presumably because the arrangement has force and can impact on the rights of parties only when approved by the creditors and by the court."

48. I noted too, comparison with bankruptcy in the context of the achievement of fairness to all creditors at para. 37:

> "…The statutory factors relate to the proportionality of the arrangement, the likely differences between the PIA and an arrangement on bankruptcy, and whether the PIA is fair to all classes of creditors".

49. In *In Re Tivway* [2010] 3 I.R. 49 the Supreme Court was considering whether to approve a scheme of arrangement proposed by an examiner which involved the restructuring of three companies in a group, and the separation of two discrete business undertakings, one of which would be sold and where it was anticipated that the orderly realisation of the property, work in progress and inter company balances would take approximately ten years. The schemes were considered to be likely, over time, to achieve the protection of most of the jobs in the company, and to provide a return to creditors beyond what would be achieved in liquidation, tests required to be considered by the court. One secured creditor opposed the schemes and appealed the order of the High Court by which they were approved.

50. Denham J. considered that the application to approve the scheme of arrangement had to be considered in the context of the statutory power given to the court under s. 2 of the Act, as amended, which provided that a court should not make an order to appoint an examiner to a company "unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern". As she said at para. 48, "further steps in an examinership may be taken only upon such a statutory foundation".

51. Murray J. in *In Re Vantive Holdings* [2009] IESC 68 referred to *In Re Tivway* and explained the purpose of examinership as "a process designed to facilitate the rescue or survival of companies in financial difficulties".

52. In *In Re Michael McLoughlin (Pharmacy) Limited* [2011] IEHC 28, [2011] 2 I.R. 482 Clarke J. was hearing an application to confirm a revised scheme of arrangement in an examinership where two objections were raised. What was proposed was the establishment of a residual debt fund to deal with potential liabilities and a commitment on the part of the company to pursue claims against its directors. There was doubt as to how much would actually be recovered in the process, and Clarke J. noted that the basis of the objection by the Revenue Commissioners was the absence of any guaranteed payment of any sum due by the companies to Revenue.

53. Clarke J. noted the desirability that the initial phase of the scheme of arrangement be brought to an early close *inter alia* so that the company could "face into its post-examinership future without a large contingent debt hanging over its head".

54. These authorities reflect the purpose of examinership as enabling an insolvent company to survive by rescue or restructure, but no echo of a broader aim of ensuring ongoing or continuing solvency or survival is found in the judgments.

55. I am persuaded by the approach of McCracken J. *in Re Antigen Limited* [2001] 4 I.R. 600 in which he refused to make an order modifying a scheme the effect of which was that if the company went into liquidation a creditor should be entitled to prove in the liquidation for pre-arrangement debt. The judgment of McCracken J. reflects the obvious commercial reality that a company may survive as a going concern for a period of time after a scheme of arrangement has been implemented, but still fail. McCracken J. was not prepared to make an order by which he restricted powers of a liquidator in a future liquidation. It is implicit in this approach that McCracken J. considered that a scheme of arrangement on examinership is predicated on a particular and objectively framed proposal in respect of which a reasonable belief exists that it will enable the company to survive as a going concern, but that there is no requirement that the scheme of arrangement guarantee that the company would so survive, or secure or ensure the continued survival of a company or its solvency irrespective of future contingencies.

Conclusion on approach to continuing solvency

56. I consider that the scheme of the personal insolvency legislation cannot be viewed as requiring that a PIA ensure the continuing solvency of a debtor post PIA. A PIA may fail and the legislation cannot protect against unpredicted events that give rise to the failure of a PIA in its currency, or thereafter.

57. The purpose of the legislation is to provide a means of orderly debt resolution, not to guarantee continued solvency outside its timeframe.

58. Further, the statutory provisions do not envisage protection of continued solvency as a correct approach. I turn now to consider the statutory criteria for approval of a PIA.

The statutory approach to mortgage debt on a principal private residence

59. Section 104 of the Acts requires a PIP to formulate a proposal for a PIA on terms that, as far as is reasonably practicable, mean the debtor will retain either ownership or the right to occupy his or her principal private residence. Section 104(2) provides as follows:

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

(a) the costs likely to be incurred by the debtor by remaining in occupation of his or her principal private residence (including rent, mortgage loan repayments, insurance payments, owners' management company service charges and contributions, taxes or other charges relating to ownership or occupation of the property imposed by or under statute, and necessary maintenance in respect of the principal private residence),

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

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

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

60. The exercise required to be engaged by the PIP in formulating a PIA requires the examination of the costs *inter alia* of meeting a mortgage loan repayment and other charges and expenses relating to ownership or occupation of the property, and these are to be balanced against the income and other financial circumstances of the debtor, and the ability of any other person residing with the debtor to contribute to those costs. The legislation does not require a PIP to formulate a PIA on the basis that it will show that the debtor will be in a position to continue to meet mortgage payments, or other costs of remaining in his or her private residence, either for the balance of the mortgage term, or for the lifetime of the debtor, or for so long as the debtor wishes to continue to reside in that premises. The obligation of the PIP is to formulate a proposal that will, insofar as it is practicable, achieve the desired result, but not guarantee that result.

61. Any consideration of the PIA in the present case must take into account the fact that the PTSB and the mortgagors agreed a split mortgage arrangement by which more than half of the capital outstanding in the mortgage is to be warehoused for 29 years. The PIA envisages a review of the warehoused element after 6 years. What is sought to be achieved by the PIP by the insertion of the disputed clause is that the review would effectively be preordained, albeit the capacity to address the warehoused element of the mortgage would take account of as yet unascertained, but presumably hoped for, increase in the income of the mortgagors.

62. I consider the term to be impermissibly broad, and one not contemplated by the Acts. Further, other difficulties are apparent and I now turn to examine these.

Problems of construction

63. The disputed clause seeks to link any review to the ISI reasonable living expenses. PTSB makes the argument that the guidelines issued by the ISI with regard to reasonable living expenses are not a statutory code, and points to the disclaimer in the ISI Guidelines of April, 2013 and updated in July, 2016 at p. 2:

> "These guidelines have been prepared and issued by the ISI for the purposes of sections 26, 65(4) and 99(4) of the Personal Insolvency Act 2012 and section 85D of the Bankruptcy Act 1988 (as inserted by section 157 of the Personal Insolvency Act 2012) and for no other purpose. The ISI does not authorise or take any responsibility for the use of these guidelines for any other purpose."

64. Certain problems have been identified by PTSB with regard to the proposed terms of review, and I consider these objections to be correct for a number of reasons.

65. The term is vague in making reference to a baseline figure of 10 % "in excess of" the RLE guidelines issued by the ISI from time to time. The creditor correctly points to the fact that it may be the case that in six years there are no ISI published guidelines, and that it is not possible to predict whether in six years time another form of statutory code will be in place for the purposes of the resolution of personal debt, or the assessment of reasonable living expenses done by another method. I consider it is not appropriate for me to approve a term which is likely to give rise to difficulties in interpretation in the future.

66. I also accept the argument of PTSB that a court should be cautious in extending the reach of the guidelines beyond the purpose for which they were expressly promulgated.

67. As counsel points out, it may be the case that future Central Bank directions to mortgage providers impose a restriction on a review or alteration of the terms of repayment, but this cannot be presumed and it would not be desirable practice for a court to approve a term that is dependent on a structure the existence, nature or purpose of which is at future date unknown and unknowable.

68. Furthermore, I agree with the argument of PTSB that the proposed term envisages some degree of supervision or monitoring of the review, presumably either by the ISI or the court, the statutory context whereof is uncertain and at best hypothetical.

69. *In Re Wogan's (Drogheda) Limited* (Unreported, High Court, Costello J., 9th May, 1992,) Costello J. was critical of a proposed agreement with investors as being "ambiguous and imprecise".

70. I consider the disputed clause is unreasonable and unfairly prejudicial on account of its lack of precision and because it is based on hypotheses.

71. It must fail for that reason also.

The statutory test: the means of the debtor

72. Section 115A(9)(b)(ii) requires that the Court assess the "means" of the debtor and enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit.

73. PTSB argues that the proposed restriction on review of the warehoused debt envisages a review in the light of the income of the debtor at the date of review, and not of his means. While income is one element of a test of means, income does not always coincide with the means of a debtor. The legislation makes provision for the inclusion in a PIA of conditions dealing with windfall or inheritance, but these will not as a matter of plain language be regarded as income, but rather as capital or assets, and would come into the reckoning in an assessment of means. The proposed provision therefore it seems to me does not properly have regard to the

statutory focus on the means of the debtor.

74. I consider that the creditor is correct in this objection. It is the means of the debtor that are to be regarded and any condition that confines a review of the warehoused mortgage to the relevant income of the debtor is not consistent with the statutory provisions and limits the scope of any review in a manner not contemplated by the Acts.

Is the proposed clause improperly discriminatory?
75. PTSB argues that the proposed clause is improperly discriminatory. It is not sought to vary the status of the secured debt, as secured, nor indeed is there any disproportionate disparity between the position proposed in relation to the secured creditor and the unsecured creditors. There is also no discrimination in the proposed treatment of a creditor or class of creditors in comparison to the proposal relating to other creditors.

76. The statutory provisions expressly provide for the approval of a scheme of arrangement which involves the reduction of a secured debt. That a PIA may involve the write down of secured debt is clear from s. 102(6)(j)(i) of the Acts by which there is provision that "the principal sum due in respect of the secured debt be reduced to a specified amount".

77. But the reduction must be "fair and equitable in relation to each class of creditors that has not approved the proposal" and not "unfairly prejudicial" to the interests of any party. The scheme of the Acts involves the court engaging a consideration of a PIA as a whole. Thus I must engage with the question of whether the proposed PIA which includes a term limiting a review of the warehoused element of the split mortgage is unfairly prejudicial to PTSB.

78. A court in considering whether to approve a PIA, and indeed the PIP in putting together a PIA for presentation to creditors, must have regard to the comparison between the likely result of a bankruptcy, and whether this would result in a better return for creditors. Section 107(d)(i) of the Acts sets out the requirements of the report by the PIP as follows:

> "(i) describing the outcome for creditors, and having regard to the financial circumstances of the debtor whether or not the proposed Personal Insolvency Arrangement represents a fair outcome for the creditors, and indicating, where relevant, how the financial outcome for creditors (whether individually or as a member of a class of creditors) under the terms of the proposal is likely to be better than the estimated financial outcome for such creditors if the debtor were to be adjudicated a bankrupt (having regard to, amongst other things, the estimated costs of the bankruptcy process);"

79. A court hearing an application for confirmation of a scheme of arrangement proposed in the examinership process is required to engage considerations of whether the proposals are fair and equitable in relation to any class of members or creditors who had not accepted the proposal, and that the proposals are not unfairly prejudicial to the interests of any interested party. The statutory tests are similar to those found in the personal insolvency legislation.

80. In *In Re SIAC Construction Limited & Ors*. [2014] IESC 25 Fennelly J. considered the question of unfair prejudice from the point of view of the objector and made a comparison between the likely results for the objector from an insolvent liquidation.

81. In my view, on the facts of the present case, PTSB is likely to fare better in bankruptcy than it might in the context of the very long proposal for the repayment of the mortgage on the principal private residence, and because the warehoused amount is almost twice the amount agreed to be the active mortgage in respect of which a monthly payment is to be made. The creditor is prepared to accept a revised mortgage repayment agreement, albeit the prospects of recovery of the entire sum secured are remote in temporal terms. It is discriminatory to require that there be imposed a further limitation on its recourse to the debtor.

82. I consider that the disputed clause improperly discriminates against the secured creditor and creates an unfair prejudice in regard to its future approach to the warehoused element of the mortgage.

Protection of the PIP
83. The PIP has averred on affidavit his concern that, should he not include a clause providing for a restriction on the right of review of the warehoused debt, he could find himself met with a claim in negligence.

84. In *In Re Michael McLoughlin (Pharmacy) Limited & Anor*. [2011] IEHC 28, [2011] 2 I.R. 482, Clarke J. considered a proposed clause providing for immunity from suit in favour of the examiner and held that the court had no competence to include such a clause. He said that as the primary duty of the examiner was to the court and to comply with his statutory obligation *inter alia* to formulate and bring forward proposals for a scheme of arrangement, there was nothing in the Companies Act 1990 which suggested that the Oireachtas considered that an examiner should be immune from suit for negligence. He did point out that the statutory function of an examiner might well determine the precise way in which a court would interpret the duty of care that an examiner might owe, and to whom it might be owed, and might provide an answer, or perhaps a complete answer, to a claim in negligence in the future. He concluded that he had no jurisdiction to approve the inclusion of such a clause.

85. I adopt that approach to the suggestion by the PIP that the disputed clause must be inserted in the PIA as he cannot otherwise safely and without fear of suit certify the sustainability of the PIA. The PIP engages in a role somewhat akin to that of a legal representative as an officer of the court, and he is an independent intermediary in the process who has regard to the respective interests of creditors and debtor. I considered this question in *Nugent and Personal Insolvency Acts*, where I said the following at para. 31:

> "A Personal Insolvency Practitioner is in a unique role, not equivalent to the role of an examiner or a liquidator appointed by the court under the Companies Acts, although some similarities can be noted. The PIP is required to be interposed between the Insolvency Service of Ireland and the debtor."

86. A PIP has the added protection of court approval of a PIA.

87. It is difficult to envisage circumstances in which personal liability might arise should the PIP engage his role with independence and professional competence. It is not the role of the court to protect him should he fail to achieve the standard required of his office.

88. I do not consider that the protection of the PIP from future suit is a matter that must engage my consideration of the fairness of the PIA, and I have no jurisdiction to approve a term in a PIA which has this purpose or effect.

Summary

89. In summary, I consider the objection of the creditor be upheld with regard to the proposed inclusion by the PIP of a term restrictive of review. The following elements of the objection are relevant:

> a. The proposed PIA unfairly prejudices the objecting creditor in that it restricts its right to review in the context of the future means of the debtor, is vague and uncertain, and is an unnecessary and unjustifiable fetter upon the right of the secured creditor to renegotiate the repayment of the warehoused mortgage.
>
> b. The proposed restrictive term is not one contemplated by the legislation, and not one that I am permitted to sanction.
>
> c. The purpose of the Acts is to achieve a return to solvency by an insolvent debtor and not to guarantee or ensure his or her continuing solvency.

Further observations

90. Counsel for the debtor makes the argument that the particular focus of s. 115A which enables the court to approve a PIA, notwithstanding that it was rejected at a meeting of creditors if to do so would enable a debtor to continue to reside in or continue to own his or her principal private residence, should be regarded as a guiding principle in the interpretation of the section. I have already considered the overall purpose of the legislation in a number of judgments, most recently in my judgment in *Hill and Personal Insolvency Acts*.

91. The legislation does not envisage a court approving a PIA it considers to be unfairly prejudicial to a creditor, and the imperative to have regard to the statutory factors is not outweighed by the clear purpose of the legislation that regard be had to the desirability of permitting a debtor to continue to reside in his or her home. The mandatory statutory tests must be satisfied, and while the court may exercise its jurisdiction in aid of a continuance in occupation by a debtor of his or her home, the court may do so only if it is satisfied that the statutory tests are met.

92. I therefore dismiss the appeal from the order of the Circuit Court.