THE HIGH COURT ON CIRCUIT

[C:IS:SEWX:2015:001313]

SOUTH EASTERN CIRCUIT COUNTY OF WEXFORD

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

AND IN THE MATTER OF JD OF COUNTY WEXFORD ("THE DEBTOR")

AND IN THE MATTER OF AN APPLICATION PURSUANT TO S. 115A(9) OF THE PERSONAL INSOLVENCY ACTS, 2012 — 2015

JUDGMENT of Ms. Justice Baker delivered on the 21st day of February, 2017.

1. This judgment is given in an appeal from an order of the Circuit Court personal insolvency judge, Judge Enright, given on 4th November, 2016 where she made an order refusing the application of the debtor under s. 115A of the Personal Insolvency Acts 2012 – 2015 ("the Acts"), and upheld the objection of the secured creditor, EBS Limited ("EBS").

2. JD ("the debtor") is a young woman who resides with her two very young children at her principal private residence at a townland in County Wexford, which she holds jointly with her former husband, MR. The couple are co-borrowers and co-mortgagors to EBS in respect of a loan obtained in September, 2007 in the sum of €300,000.

3. The loan fell into arrears in 2013, and I am satisfied that this primarily occurred following a serious illness suffered by Ms. D, and the subsequent breakdown of her marital relationship. The couple separated informally in January, 2012 and Mr. R has failed or refused to make any contribution towards the mortgage repayment since that time.

4. The couple also have unsecured loans, and while these were obtained in the sole name of Ms. D, they were incurred during the marriage and for family purposes.

5. A year or thereabouts after Mr. R left the family home he agreed to make a maintenance payment, but he reduced this voluntary payment on two occasions, in November, 2013 and March, 2014.

6. The mortgage fell into significant arrears and EBS, after engaging with Ms. D and her former husband through the MARP process, and no agreement being achieved, commenced proceedings seeking possession of the dwelling. Through the Money Advice and Budgeting Service (MABS), a short-term arrangement was put in place in 2012/13 that permitted the payment of interest only for a period of time, and by which arrangements were made with the unsecured creditors.

7. Unfortunately for Ms. D, in August, 2014 she engaged the services of a company which held itself out as being an insolvency advice service, Money Bloom, and was assured by them that engagement was being had with her creditors, including the secured creditor, and that an agreement by which the mortgage would be restructured was likely to be agreed. Ms. D engaged fully with that organisation and supplied it with financial statements and personal information.

8. Her affidavit evidence is that she was told that "my mortgage difficulties have come to an end" and that proposals put to EBS had been accepted. This evidence is uncontroverted, as is the evidence that it was not until the mortgage debt had been purchased by a company, Pepper Finance Limited, that she realised that, as she put it "something was not right". She wrote to Pepper but received no reply, and Pepper ultimately passed the resolution of her debt back to AIB/EBS which then commenced proceedings for repossession by civil bill dated 28th May, 2015.

9. It seems that Money Bloom is not an accredited or regulated insolvency agency and the principal of that entity has a large number of convictions for theft, fraud and forgery.

10. Unfortunately, the engagement that Ms. D had with Money Bloom cost her money and involved her in a loss of time and effort in her attempts to rationally resolve her debt.

11. When Ms. D realised that no arrangement had been made with her mortgage lender, she resumed monthly payments on the mortgage in the sum of €700 per month, less than the agreed amount, but relatively substantial in the context of her earnings.

12. Ms. D made application against her former husband, and a maintenance order in respect of the dependent children was made in the District Court on 27th May, 2014 in the sum of €120 per fortnight, and in December, 2014 after he had ceased making payments she sought and obtained an attachment of earnings order in respect of the maintenance liability.

13. Ms. D sought the assistance of a personal insolvency practitioner ("PIP"), Darragh Duffy, and a protective certificate issued in the Circuit Court on 12th October, 2015. Mr. Duffy presented a Personal Insolvency Arrangement ("PIA") to a meeting of creditors on 29th January, 2016 which was rejected by the secured creditor, EBS. The relevant details of the PIA are central to the objections made by EBS, and central to the appeal before me.

14. Following the rejection of the PIA at the meeting of creditors, an application was lodged in the Circuit Court for an order under s. 115A of the Acts by which the court has power to approve the coming into effect of a PIA notwithstanding the rejection of the PIA at a meeting of creditors, and the relevant provisions of that legislation will be dealt with in the course of this judgment.

15. The primary focus of the proposed PIA is to procure the retention by Ms. D of her ownership and occupation of her principal private residence. She argues that the proposed PIA gives a better return for creditors than would be achieved in bankruptcy, enables her to retain ownership and occupation of her principal private residence where she resides with her two small children, and that the mortgage repayment arrangements proposed thereunder are capable of being sustained by her in the currency of the Arrangement such as to enable her to return to solvency.

The proposed PIA

16. The provisions of the proposed PIA deal with secured and unsecured debt and provide for a dividend payment to the unsecured creditors and for the splitting of the mortgage into three parts. The secured creditor makes no objection to the splitting arrangement as such, but has sought certain preconditions for the coming into operation of the splitting arrangement, namely the written consent of Mr. R to the proposed treatment of the secured debt, and that evidence be adduced as to his capacity to continue to meet the

maintenance payments.

17. Ms. D has unsecured debts to financial institutions of approximately €32,000 and a hire purchase agreement in respect of her motor vehicle in the sum of €17,000 in round figures.

18. The principal private residence of Ms. D has a value, assessed in accordance with s. 105(1) of the Acts, of €190,000. The secured debt at the date of the PIA was €322,227.27, leaving a deficit or negative equity of €132,227.27. It is proposed to write off uncapitalized arrears and a further €80,000, so as to leave a balance of debt of €220,000 split into two parts, a live mortgage balance of €140,000 and a warehoused loan of €80,000. The term of the mortgage is to be extended to 27 years, and to be repayable at variable interest rates.

19. The proposal is for the making of a monthly mortgage payment of €684 to the active live balance for the term of the PIA, 6 years, and a contribution from income in the sum of €338 per month to be applied to the payment of the modest fees of the PIP and by way of a dividend to unsecured creditors. At the end of the PIA it is proposed that the warehoused element of the mortgage would be brought into account and payment of interest and capital on that amount would be made thereafter.

The basis of objection
20. EBS does not object to the splitting of the mortgage, notwithstanding that this will involve a moratorium on payment of the warehoused amount, and the writing off of some of the secured debt. It objects to the PIA on a number of grounds:

> a. that the arrangement unfairly prejudices it in a number of respects, primarily because Mr. R's agreement to the proposed variation of the loan and mortgage contract is not forthcoming;
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> b. that there are insufficient grounds to be satisfied that the debtor can meet the proposed terms of the PIA, primarily because no evidence has been adduced of the income of Mr. R to enable it to be satisfied that he can continue to meet his obligations as a maintenance debtor;
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> c. that certain calculations regarding the income of the debtor are incorrect;
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> d. that the conduct of Ms. D after she fell into arrears with her mortgage showed a degree of financial imprudence, and is conduct that the court is mandated to take into account in the statutory scheme. In the context of the MARP process, in 2014 a more generous offer was made to the couple which was rejected by them, and they have since that time accumulated arrears of more than €40,000 on the secured loan. This is argued to be relevant conduct to which regard is to be had.

The mandatory preconditions in s. 115A(9)
21. Section 115A of the Acts was inserted to give the relevant court power to review a PIA rejected at a meeting of creditors and to approve the Arrangement provided the conditions in the subsection are met. It is accepted that the onus is on the debtor to establish to the satisfaction of the court that the mandatory preconditions in s. 115A (9) are met.

22. The section provides for the making of an order confirming the coming into effect of a PIA if the court is satisfied that there is a reasonable prospect that confirmation of the proposed Arrangement will enable the debtor not to dispose of an interest in or not to cease to occupy all or part of his or her principal private residence. However, the power of the court is not absolute and the jurisdiction of the court may be exercised only if it is satisfied in accordance with the statutory provisions that the proposals are not unfairly prejudicial to the relevant interested parties.

23. Provision is made for the consideration of unfair prejudice in ss. 115A(9)(e) and (f) of the Acts, and the court must be satisfied that:

> "(e) the proposed Arrangement is fair and equitable in relation to each class of creditors that has not approved the proposal and whose interests or claims would be impaired by its coming into effect,

(f) the proposed Arrangement is not unfairly prejudicial to the interests of any interested party."

The preconditions are stated in the negative.

24. EBS argues that there is an underlying unfairness in the PIA having regard to the position of Mr. R as co-borrower and co-mortgagor, and that notwithstanding he is on notice of the making of this application, the fact that he has not engaged with the PIP or with the Circuit Court or this court on appeal means that there is considerable uncertainty as to what approach he might take in the future.

25. That any statutory scheme established with a view of enabling the return to solvency of a natural or corporate person can involve some degree of unfairness to creditors has been noted in the case law relating to examinership, and the mere writing down of debts in the context of an examinership is recognised as an inevitable but not always unfair prejudice. In the leading case of *McInerney Homes Limited & Ors. & Companies (Amendment) Act 1990* [2011] IESC 31 O'Donnell J., having noted the lack of specificity in the statutory scheme regarding the nature of what might amount to "unfair prejudice", made the following statement:

"It might be said that the Act contemplates necessary prejudice to creditors, and only prohibits prejudice which is unfair. However, it may be more correct to conceive of any scheme as being prejudicial since it requires a creditor to accept a lesser amount than is, in theory, his or her legal entitlement. For example in this case the scheme was prejudicial in that it required creditors to accept a written down amount for their debt. But it was said to be unfairly prejudicial because that was less than the banks could obtain on a receivership. The question in any particular case is whether that particular prejudice is "unfair". The essential flexibility of the test appears deliberate. It is very unlikely that a comprehensive definition of the circumstances of when a proposal would be unfair could be attempted, or indeed would be wise." (para.29)

26. The same could be said of the scheme provided in personal insolvency, and the Acts require the relevant court to look at the nature of prejudice caused to creditors by the acceptance of a scheme of arrangement, and to consider whether the proposal is "unfairly prejudicial" to the interests of that creditor.

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

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

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

30. One factor relevant to the consideration of fairness derives from the statutory context. The exercise engaged by the court in approving a scheme of arrangement in the context of examinership is conducted in the statutory context where the court is, as was described by O'Donnell J. in *McInerney Homes Limited & Ors. & Companies* (Amendment) Act 1990, "conducting a process in the public interest" and where regard is to be had to the interests, for example, of employees and other creditors.

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

32. More concretely, the amending legislation by which was added s. 115A, affords the far-reaching power of the court to approve a PIA notwithstanding its rejection by creditors. The public interest is in is the maintenance of a debtor's occupation and ownership of a principal private residence. That social and common good is concretely referable to the continued occupation by a debtor of a principal private residence, and the power contained in the section is limited by the fact that only those persons who had a relevant debt secured over his or her principal private residence which was in arrears as defined by s. 115A(18) on 1st January, 2015 could avail of this exceptional remedy. The statutory provision then must be seen as a limited protection of persons whose mortgage payments on their principal private residence fell into arrears at the height of the financial crash. Absent a "relevant debt", a debtor may not seek to engage the jurisdiction of the court to overrule the result of a creditors' meeting: see *Hill and Personal Insolvency Acts* [2017] IEHC 18.

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

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

34. Thus the court will engage its jurisdiction to enable a person to continue to occupy or not dispose of an interest in his or her family home, provided the costs of continued occupation are not excessive or disproportionate. I consider it relevant too, that s. 115A does not have as its focus the continued ownership by a debtor of his or her family home, but rather the continued occupation of that premises, and the section is concerned with enabling a debtor not to dispose of an interest in a property, rather than positively stated as enabling the debtor to continue to own the property. Thus, the perceived public interest in the continued occupation of a premises is not a focus on the acquisition of a capital asset, but rather the preservation of a right to live in a premises.

35. I accept the argument of EBS that should the proposed splitting arrangement with regard to the mortgage have the likely effect that it would render the security wholly unenforceable, and render void its claim against Mr. R, whether in debt or on foot of its security, that prejudice would be found, and arguably that prejudice would be unfair.

36. A creditor will frequently negotiate a degree of co-operation with a co-debtor or co-mortgagor who has remained outside the insolvency process, and EBS did seek to engage with Mr. R with regard to the mortgage debt, and the offer of the split mortgage made through the MARP process was an offer to the couple jointly.

37. The scheme of the Acts provides for an application by a single debtor, or by what is termed "an interlocking" debtor, and an interlocking personal insolvency arrangement can be entered into between debtors who are both insolvent.

38. Section 89(3) provides as follows:

> "(3) Where two or more debtors are jointly party to all of the debts to be covered by a Personal Insolvency Arrangement and each of those debtors satisfies the eligibility criteria specified in section 91, those debtors may jointly propose a Personal Insolvency Arrangement and, unless otherwise specified, references in this Part to the "debtor" shall be construed as meaning such joint debtors."

39. It is clear that the Acts do not mandate that joint debtors would make a proposal for an interlocking PIA, and indeed it envisages circumstances where a debtor who has joint debts may make a proposal for a PIA without the co-operation of, or any form of involvement with, the co-debtor. That this is so is apparent from the standard statutory forms submitted to ISI at the initiation of the process, and in which a debtor is obliged to identify joint debts and the name of any co-owners of secured property or co-debtors. Further, only a person who is insolvent may bring application for relief under the scheme of the legislation, and there may be circumstances where a co-debtor is not himself or herself insolvent and therefore would not meet the eligibility criteria.

40. Furthermore, I consider that s. 115A(9)(iii) expressly envisages circumstances where a debtor does not have ownership of the entire interest in his or her principal private residence, and may not be the owner of all of the interest in the property whether subject to a mortgage or otherwise. The subsection is broadly stated as engaging the question of whether the debtor may avoid disposing of an interest and may avoid having to dispose of all or a part of his or her dwelling. (emphasis added)

41. Thus joint debts, whether secured or not, are included within the scheme of the Acts, and a debtor is not precluded from seeking relief under s. 115A on account of the fact he or she does not own the entire of the interest in the principal private residence, and is not the sole mortgagor.

The position of the joint debtor/mortgagor

42. The legislation envisages application for a PIA by a joint debtor without the involvement or co-operation of his or her co-debtor, and this general proposition applies to secured and unsecured loans. EBS argues however, that while it is prepared to agree a split mortgage arrangement, and while the amounts of the write off and the warehoused element are not in dispute, that it can agree to

the splitting arrangement only if the co-debtor and co-mortgagor agree to the revised contract. It is accepted by the debtor, that insofar as what is sought to be done is to vary the terms of the security agreement between EBS and the couple, that such a variation is required to be in writing, the contract being one of its nature requiring to be evidenced in writing pursuant to s. 51 of the Land and Conveyancing Law Reform Act, 2009.

43. However, it is not the effectiveness of the variation that concerns EBS, but whether its agreement to vary the repayment terms of the mortgage will impact upon any claim it might make against Mr. R, whether on foot of its security or in debt.

44. The Acts provide some but not a complete answer. Section 116 provides that upon registration in the Register, a PIA shall bind the debtor and, in respect of every specified debt, the creditor concerned. By its statutory nature, then, a PIA does not bind or benefit a debtor not a party thereto. Section 116(3) precludes a secured creditor from taking any steps to enforce its security against the debtor while it is in effect, i.e. while it has been completed in accordance with its terms.

45. Certain provision is made for joint debts in s. 116(6) and (7):

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

> (7) Subsection (6) does not apply where a Personal Insolvency Arrangement is also in effect as respects the other person,"

46. Section 116(10) preserves the rights of a creditor against a guarantor.

47. EBS argues that s. 116(6) is insufficiently broad in that it relates only to persons who had jointly contracted with the debtor or who is jointly liable to the creditor with that debtor, and does not import any preservation of the rights of a creditor against a debtor who is severally liable.

48. In *A.C.C. Bank Plc v. Malocco* [2000] 3 I.R. 191 Laffoy J. was considering the import of s. 17(1) of the Civil Liability Act 1961 which provides as follows:

"17. (1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged."

49. The question before her was whether an accord or settlement reached by the plaintiff bank with the co-debtor of the defendant has the effect, as a matter of law, that the agreement of the bank with the defendant was discharged. Having noted that a "wrong" as defined in s. 2 of the Civil Liability Act 1961 included a breach of contract in the form of non-payment of a debt, she considered that the matter could be dealt with by reference to s. 17 so that as she put it:

"If the settlement agreement indicates an intention that the other is to be discharged, the settlement agreement effectuates his discharge, but, if it does not, he gets the benefit of the settlement agreement and his liability is reduced accordingly." (p. 201)

50. In that case, it was accepted by the parties that the defendant and his wife were jointly and severally liable on foot of the debt, and Laffoy J. took the view that it was "immaterial whether the debtors are jointly liable or jointly and severally liable for the debt".

51. As to whether an accord or agreement "indicates", within the meaning of that word in s. 17, that a co-debtor is intended to be discharged, the court will look at whether "such outcome is agreed expressly or by necessary implication", and Laffoy J. also held that the onus was on a defendant to establish such intention.

52. I adopt that statement of principle with regard to the effect of an accord, satisfaction or compromise agreement between a debtor and creditor. A PIA is precisely the class of agreement which can be characterised as an accord, satisfaction or compromise, and it is clear from its terms that the proposed mortgage restructure in the present case engages a variation in the repayment terms to be agreed by the debtor.

53. I turn now to consider whether it can be said that the proposed PIA indicates an intention on the part of the secured creditor to forgive the co-debtor.

54. The identified variation in the contractual terms contained at p. 48 of the proposed PIA refers throughout to the amount "the debtor owes" to the creditor concerning the loan. Clause 10 of the PIA, in standard form, provides that upon successful completion of the Arrangement, that the debtor will be discharged from the debts identified and at 10.3 there is an express provision as follows:

> "10.3 This Arrangement and the discharge of the Debtor from the Specified Debts upon successful completion of the Arrangement will not affect any rights that the Creditors have in respect of any liabilities owed to them by persons other than the Debtor.
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> 10.4 Clause 10.3 means that any persons who also borrowed money as a joint borrower with the Debtor or who guaranteed the payment of the Debtor's debts will continue to be liable to their respective Creditors, notwithstanding the approval of this Arrangement."

55. The protection for the creditor, therefore, is contained within the PIA itself and the express terms thereof, by which it can be readily ascertained that no inference can be drawn, or is intended to be expressed, that the creditor intends by virtue of the agreement with the debtor to discharge any co-debtor. For that reason, and having regard to the approach taken by Laffoy J. in A.C.C. Bank Plc v. Malocco, I consider that it is immaterial whether the debts of the debtor and her former spouse are joint, or joint and several, and the contractual protection expressed in the proposed PIA, and the statutory protection from s. 17 of the Civil Liability Act 1961 combine to afford protection to the creditor with regard to its claim against Mr. R, who is not a party to the restructured arrangement.

56. Similar considerations will arise with regard to the security interests that the Bank enjoys in respect of Mr. R who is a co-mortgagor.

57. I return later in this judgment to the practical effect of the PIA, but on the figures currently available, the principal private

residence of the debtor has a value well below the amount owed on the mortgage, and insofar as EBS might seek to recover possession against Mr. R it will undoubtedly be met by an argument that an order for possession has no practical import as Ms. D and her children will continue to reside in the house and may, as a matter of law, continue to do so provided the terms of the restructured mortgage are met.

58. Therefore, it seems to me that the argument of EBS that it is unfairly prejudiced with regard to the enforcement of its security interest in the premises insofar as Mr. R is concerned is not borne out by the law or the facts. The prejudice to EBS will be caused, not by the fact that Mr. R has not been brought into the restructured arrangement, but by the extent of the negative equity, and not by virtue of any unfairness arising from Mr. R's non-involvement with the process and the fact that he is not contractually bound. Therefore any consideration of the argument of unfairness arising from the revised mortgage falls to be considered on its merits, and whether it unfairly prejudices EBS in itself, and not by reason of the argument regarding the co-mortgagor.

59. I turn now to consider the relevant considerations in the question of unfair prejudice.

Unfair prejudice

60. One factor identified in the course of the hearing as relevant to the question of unfair prejudice is the comparison between the outcome under the proposed PIA and the likely outcome in bankruptcy.

61. That a court is mandated, in the context of the personal insolvency legislation, to have regard to the comparison between the likely return to creditors in bankruptcy, and that available under a PIA, is evident from the objective of the legislation, to provide a means of debt resolution by which a debtor may avoid bankruptcy: see Re *Nugent & Personal Insolvency Acts* [2016] IEHC 127. The statutory forms require that the PIA should make detailed comparisons between the PIA and the likely return on bankruptcy. Clause 3 of the standard form requires that the PIP identify the details of how it is said the Arrangement would be better for creditors than bankruptcy.

62. That this approach is correct is apparent also from the authorities in examinership, where fairness is to be considered in the context of outcome.

63. Fennelly J. in *Re SIAC Construction Limited* [2014] IESC 25, [2014] I.L.R.M. 357 considered the concept of unfair prejudice from the point of view of the objector to the scheme of arrangement in examinership, and by way of a comparison to the likely outcome in liquidation. At para. 69 he stated the following:

"69. There are two aspects to the notion of unfairly prejudice. The underlying assumption is that the person in question is, to begin with, prejudiced, that is to say that his interests as a creditor (or, where relevant, a member) are adversely affected or impaired by the proposals. It is the inevitable consequence of the insolvency to a company is that every creditor will, in that sense, suffer prejudice no matter what proposals are put forward. But prejudice is not enough to trigger the court's obligation to refuse to confirm the proposals. It must in addition be unfair. Unfairness, in turn comprises two essential aspects, the general notion of injustice and the more specific one of unequal treatment."

64. That the court must look at the proposal in the round is apparent also from the approach of Fennelly J. in that case where he said:

"72. The court will need to assess any claim of a creditor to be unfairly prejudiced by proposals from all angles. There will be a wide range of potentially relevant elements in the factual circumstances of the company, some affecting the creditor adversely and some favourably. As can be seen from the cases, a court will take note of the fact that some creditors, while losing heavily in the write-down of their debts, are likely to benefit if the company is able to resume trading. A party may claim to be prejudiced by the loss of an advantage, right or benefit. On the other hand, it may be relevant to note that the same party is in a position to retain a right or benefit which is not available to other creditors."

65. This approach is consistent with the approach identified by Clarke J. and approved by the Supreme Court in McInerney Homes Limited & Ors. & Companies (Amendment) Act 1990, that the a court engage a consideration of the appropriateness of the scheme of arrangement against the likely return on a liquidation and that this was "a vital test":

> "30. In this case, the trial judge's approach to the question was to view the scheme against the likely return to affected creditors under the likely alternative in the event that there was no examinership, and no successful scheme. I agree that that is a vital test."

66. In the present case the arrangement identifies a number of factors which are said to be more beneficial than the likely result in bankruptcy as follows:

> a. The debtor proposes to make contributions of varying amounts over 6 years in final settlement of her unsecured liabilities which will produce a dividend of 9 cent in the euro, and the dividend for unsecured credit on bankruptcy is said to be nil.
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> b. The payment proposed to be made in respect of the secured loan to EBS provides for payment of the live mortgage and warehoused loan in the total sum of €220,000 to be repayable with interest over the term. On a sale at current value the property would achieve €160,000 in round figures (net of sale costs). The dividend to the secured creditors in bankruptcy is 50 cent in the euro, and under the proposed PIA, 68 cent in the euro.
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> c. The loss of the principal private residence will have the effect that the debtor's income will be reduced by the amount of any rental obligation that she occurs in accommodating herself and her children. It seems inevitable should the proposed PIA not be accepted that the EBS will continue with its repossession proceedings.

67. While some difference is apparent between the approach of the PIP and that of EBS with regard to the comparisons with a likely bankruptcy outcome, I do not consider that the evidence of EBS suggests any real dispute, and the comparative figures show a significantly better return for unsecured creditors, and a better return for the secured creditor. The primary argument of EBS is that the PIA prejudices its claim against the co-debtor and co-mortgagor, not that the likely return on bankruptcy is more beneficial to it.

68. The arrangement therefore is more advantageous than the likely outcome in bankruptcy. Accordingly, I consider that the outcome for all the creditors concerned is more beneficial under the PIA than in bankruptcy, and that the comparison with bankruptcy does not suggest any unfair prejudice to any class of creditors.

69. Furthermore, I am mindful of the fact that a court may approve a scheme in circumstances even when a creditor is likely to do worse under the scheme than in bankruptcy, and there is no mandatory condition that the court be satisfied that the return on bankruptcy would be less favourable. The approach of the court in examinership is apposite: see Re *Antigen Holdings Limited* [2001] 4 I.R. 600, per McCracken J., and the High Court and Supreme Court in *McInerney Homes Limited & Ors. & Companies (Amendment)* Act 1990:

"Furthermore, as the trial judge recognised, there may well be circumstances where a creditor may be required to accept less than would be obtained in such circumstances on liquidation or a receivership, but those circumstances would normally require weighty justification."(para. 30)

The scheme of the Act
70. The Act is a considered and nuanced approach to the financial crisis and reflects a legislative choice to offer a less blunt and more flexible approach to the resolution of personal debt than was available heretofore in bankruptcy. Section 115A adds another element to the approach required to be taken by a court and the benefit of a debtor remaining in his or her private residence is a benefit to which regard is expressly to be had. The rational resolution of debt is in the legislative scheme envisaged as permitting the orderly write-down of debt, with the inevitable loss to creditors, both secured and unsecured.

71. In the context of examinership the court is mandated to have regard to considerations of the common good in the preservation of jobs and local economic activity. As O'Donnell J. said in *Re McInerney Homes Limited & Ors. & Companies (Amendment) Act 1990*, the schemes that can be approved by the court "are those which result in proposals broadly beneficial to all reasonably parties". What is broadly beneficial in that context is more than merely financial benefit, but also a broader social benefit to the community in the form of continued job activity as explained by Clarke J. in *Re Traffic Group Limited* [2007] IEHC 445, [2008] 3 I.R 353 at para. 5.5:

"5.5 It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."

72. The purpose of the personal insolvency legislation is to enable the resolution of personal debt, and the common good sought to be achieved in s. 115A is the protection of the right to continue to enjoy residence in a person's home. This focus must be kept in mind when considering the broad benefit of the PIA, and in considerations of whether a prejudice is generally unfair.

73. As I said in *Hill and Personal Insolvency Acts*, the protection of the principal private residence of a debtor is not an absolute right, and if the mandatory conditions in s. 115A(9) are not met the court may not approve a scheme of arrangement notwithstanding that the result of the arrangement would be the preservation of a person's occupancy of his or her home. Because I am satisfied that the argument that EBS will lose rights against the co-debtor and co-mortgagor is not correct, and because the return on bankruptcy is less favourable to the objecting creditor, I am satisfied that the mandatory preconditions in s. 115A(9) have been met, and no specific prejudicial unfairness exists in regard to the objecting creditor.

74. As the threshold tests are met in the present case, in the broad context of the scheme as a whole the continued occupation of the principal private residence of the debtor not only achieves a better return than bankruptcy for the secured creditor, but also ensures that the stated purpose of s. 115A is met. The objecting creditor may not elect to object to a proposed PIA under the terms of which it achieves more than in bankruptcy and by such objection avoid the purpose of the section.

75. For these reasons too, the objection under s. 120 by which my discretion is engaged is not made out.

76. Certain other factors are argued as relevant to the discretion of a court in the exercise of its jurisdiction under s.115A and I turn now to deal with these.

The conduct of the debtor
77. Section 120 of the Acts provides for a challenge to a PIA on certain grounds including s. 120(a):

> "(a) that the debtor has by his or her conduct within the 2 years prior to the issue of the protective certificate under section 95 arranged his or her financial affairs primarily with a view to being or becoming eligible to apply for a Debt Settlement Arrangement or a Personal Insolvency Arrangement;"

78. EBS argues that the debtor has, by contracting a hire purchase agreement for the purchase of a second-hand car in 2015, arranged her financial affairs with a view to becoming eligible to apply for a PIA. I will leave over to another case where it is directly in issue the question of the correct interpretation of that statutory provision, but in the present case, I consider that the evidence does not point to any financially reckless behaviour on the part of the debtor to which I might have regard. In May, 2015 the debtor contracted to purchase a second-hand motor vehicle for the sum of €17,000 with a 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 Money Bloom to resolve the difficulties with the mortgage. That occurred in the context of a full engagement between EBS and the debtors under MARP, albeit that the proposal made by EBS was rejected by both borrowers in 2014, and she could reasonably have believed that a similar split arrangement would be made available to her if she could rearrange her financial affairs to improve her income.

79. I accept that Ms. D rationally approached her finances in the circumstances as she understood them, albeit she had been led astray by her engagement with an unregulated entity. I do not consider that her conduct amounts to a ground of objection.

The sustainability of the arrangement
80. EBS also argues that there is insufficient evidence of the ability of the debtor to meet the proposed PIA. Specifically, the PIA provides for a mortgage payment of €684 per month, which will increase at the expiration of the 6 year term when the warehoused amount is brought into account to €1,104 per month, calculated in each case on the basis of the present variable interest rates. Included in the estimated monthly income figures is child maintenance, and assistance from a family member which has been confirmed in writing as being regular and substantial for the currency of the PIA.

81. EBS argues that there is insufficient evidence that the means of the debtor are sufficient to meet the PIA, primarily because no

evidence is available as to the means of the maintenance debtor, and the loss of the maintenance calculated at €519.60 a month (€120 per week, rounded up) would have a significant and prejudicial effect on the ability of Ms. Do to meet the arrangement. It is pointed out that Ms. D fell into arrears in her mortgage payments after her former spouse ceased to pay maintenance, and that there is a risk that this will happen again.

82. In this regard, I cannot ignore the fact that Ms. D has obtained a court order for maintenance and an attachment of earnings order. She has taken all rational steps to secure the payment of maintenance on an ongoing basis. Just as a court cannot engage the viability of a PIA by reference to hypothetical and unknown future events, and just as the court is not required to have regard to whether the PIA will guarantee the return to solvency of a debtor, the test of the sustainability of a PIA is one which must engage the question of reasonableness. The court must be satisfied that the debtor is "reasonably likely to be able to comply with the terms of the" PIA, as provided in s. 115A(9)(c). In ascertaining what is reasonably likely a court must have regard to the extent to which a debt is secured, and security by means of a court order and an attachment of earnings is sufficient security in my view to characterise the payment of child maintenance as being reasonably secure or reasonably certain into the future.

83. In Hill & Personal Insolvency Acts, I rejected the argument of the PIP that his role, and by implication that of the court, was to examine a PIA with a view to ascertaining whether it would guarantee or ensure the continued solvency of a debtor. The same analysis applies to the test of whether the means of a debtor are reasonably likely to be able to meet the PIA. What is reasonably likely to occur is not to be equated with what is certain to occur. The court cannot be expected to engage in hypothetical concerns, or to consider the likely consequence of unfortunate and unexpected events that might have a catastrophic effect on the means either of the debtor, or of any person, including his or her employer or maintenance debtor, on whom the debtor's income depends in whole or in part.

84. I reject that ground of opposition.

The evidence of income

85. Certain argument was had in the course of the application before me as to the accuracy of the income figures of Ms. D. The PIA proposes that certain voluntary AVC payments and an employer sponsored health plan will be discontinued. This will involve an increase in the income of the debtor. While it is the case that a PIA must set out in an accurate and reliable form the details of the income and expenditure, both present and anticipated, of a debtor, certain assumptions are made by the PIP, namely that the debtor will discontinue the AVC payment and the health plan payment. It is said that these have continued to be paid notwithstanding the application to the Circuit Court and this appeal.

86. I consider it reasonable and proper that Ms. D did not discontinue her AVC and health cover until the PIA was approved by the relevant court, and this is particularly so having regard to the fact that she was relying on the discretionary power of the court to override the result of a creditors' meeting. The AVC and health plan are of benefit to her financially, and she must know that to discontinue those might involve a financial prejudice which in my view she was reasonable not to engage until it was absolutely necessary.

87. Further argument was made regard to payments being made by Mr. R to deal with Christmas and back-to-school expenses for the children. At most these amount to a €50 per month in two lump sum payments. They are not included in the income figures for the debtor. While I consider that these payments ought to have been included in the calculation of income, I regard the omission as de minimis and indeed the added €50 per month in anticipated income shows a greater likelihood of the PIA being met over its terms.

88. I reject this ground of opposition.

Conclusion

89. I propose making an order that the appeal be allowed and in summary the following are my reasons:

(a) The proposed PIA is not unfairly prejudicial to EBS.

(b) The proposed PIA contains repayment provisions which are reasonably likely to be met by the debtor.

(c) The proposed PIA preserves the entitlement of the debtor to continue to reside with her young children in her principal private residence and does not deprive the secured creditor of any claims against a co-debtor or co-mortgagor.

90. Accordingly, I will exercise my jurisdiction under s. 115A and approve the proposed PIA in respect of this debtor notwithstanding that it was rejected at the meeting of creditors on 29th January, 2016.