

**In The Matter of Part 3, Chapter 4 of The Personal Insolvency Acts
2012-2015**

And In The Matter of Lisa Parkin

**And In The Matter of an Application Pursuant to Section 115A (9) of
The Personal Insolvency Acts 2012-2015**

Judgement delivered on 9th August 2017

This application comes before the Court by way of application for an order confirming the coming into effect of the Personal Insolvency Arrangement ("the Arrangement") as proposed by the Personal Insolvency Practitioner on behalf of Ms Parkin ("the Debtor"), the proposed Arrangement having been rejected by Permanent TSB PLC ("the Objector").

The Debtor is employed as a Finance Manager [REDACTED]. Her principal private residence ("the PPR") within the meaning of the Acts is a three bed roomed house [REDACTED] where she resides with her daughter who was aged 14 at the time of the proposal. The Debtor is separated from her spouse [REDACTED]. The PPR is subject to a mortgage in favour of the Objector. The Debtor and her estranged spouse are jointly and severally liable for the mortgage debt.

A Protective Certificate issued on 20th September 2016, being the relevant date for proof of debt. The balance due on the mortgage as of the relevant date was €333,785. The remaining term on the mortgage was 234 months. The interest rate was 3.25% and the monthly payments were €1,571.66. The market value of the PPR was agreed pursuant to section 105 of the 2012 Act at €160,000 leaving a deficit of €173,785.

The Debtors specified creditors are:

The Objector who, in addition to the mortgage debt, is owed a credit card liability of €9,949 and a small balance of €20 on a current account.

Health Services Staffs Credit Union who is owed €3,816 and the Debtors sister, [REDACTED] is owed €6,200.

The terms of the Arrangement propose a write down of the mortgage debt to a live balance of €160,000 with repayments restructured at €924.06 per month, the interest rate to continue 3.25% for the duration of the Arrangement, that is to say 72 months. The total deficit is to be written off. When the Arrangement comes to an end the repayments are to continue for the remaining term at €924.06.

The Debtor's net income is €2909.47. Set costs are fixed at €1506.06 for years 1-5 and at €1050.48 in year 6. In addition provision has been made for a sum of €53.33 per month in years 1-5 to cover the cost of Irish language courses for the Debtor's daughter and a sum of €26.25 per month for LPT. Allowing for the Debtor's reduced mortgage repayments of €924.06 this leaves her with a sum of €399.77 per month in years 1-5 and €358.77 in year 6.

The fees payable to the Personal Insolvency Practitioner are €11,812.

The unsecured creditors are to receive a dividend of 8c in the €.

Voting Certificate

The secured debt has been incorrectly valued at €333,785 instead of €160,000. The net result is in effect the same. No issue has been raised with it. Liberty was given to the Personal Insolvency Practitioner to file an amended certificate.

Preliminary Issue

A preliminary issue was raised on the class of creditors. I determined that section 115A(17) of the 2015 Act allows for more than a classification of creditors into simply secured and unsecured creditors, that more than one class of unsecured creditor is provided for where the creditors concerned have similar interests or claims. In these particular circumstances, I determined that given the composition of the liabilities due and owing to the Objector, the Objector and the Health Services Staff Credit Union did not share a common interest.

Substantive Issues

No issue was raised in respect of the statutory requirements as provided for in section 115A(8) (a)(i)-(iii) nor was any issue raised in regard to compliance with the provisions of section 120 save for that at 120(e), the Objector making the case that the Arrangement does create an unfair prejudice.

The Objector in opposing this application essentially raised 3 issues as follows:

1. Unfair prejudice
2. The counter proposal represented a fair outcome that it was not properly considered by the Personal Insolvency practitioner and her rejection of it represented an error of law.
3. The existence of a co borrower

Addressing them in reverse order:

The existence of a co borrower: Mr Kieran BL for the Objector sought to distinguish the circumstances of this application from those of *JD* in the judgement of Baker j delivered on 21st February 2017 where *JD* had applied for and obtained an attachment of earnings order in the District Court. I find that the absence of an attachment of earnings order is not sufficient grounds to distinguish this application from that of *JD*.

The counter proposal represented a fair outcome that it was not properly considered by the Personal Insolvency practitioner and her rejection of it was predicated on an error of law: The counter proposal proposed as follows:

- A live balance of €236,000 @3.25%
- The warehousing of €97,785 @ 0 % with a 30% LTV write down upon maturity , if applicable
- Term extension to 312 months
- A monthly repayment of €1,121

The Objector submitted that this alternative would provide a better return to the Debtor's unsecured creditors.

Baker J in her Judgment delivered on 22nd May 2012 *In The Matter of Paula O'Callaghan* addressed the obligations of the Personal Insolvency Practitioner when presented with a counterproposal. She held inter alia that a PIP may not without some reason ignore such proposals entirely. In her affidavit the PIP swears that her initial view was that warehousing was not allowed and that remains the case now. Baker J in the *O'Callaghan* judgement determined-

"that there are no limitations in the statutory provisions that may be included in a restructure of a secured debt, and what is envisaged is any agreed alteration to the repayment terms, including ,an arrangement by which the term of the mortgage may be extended for many years ,

including to a time after the death of a debtor. There is.... nothing in ss99 or 100 of the Act which precludes the splitting of the mortgage debt and the warehousing of part of the debt....the fact that warehousing of the type and for the time proposed is not found in the list of options outlined in s.102 (6) (d) does not mean that the proposal is not permitted by Statute."

It is not therefore correct to form a view that warehousing is not permitted within the statutory regime. A warehousing proposal should be given due consideration in the context of the particular circumstances. In this matter the PIP goes on to swear that the counterproposal was put to and considered by the Debtor and the PIP and that PIP did not see it as affordable, sustainable or in compliance with the Acts. Therefore the PIP did comply with her statutory obligations insofar as she has sworn that she did give it consideration and did not see it as either affordable or sustainable.

Mr Kieran BL submitted that the counterproposal was very generous; the Judgement of Baker J in *O'Callaghan* provided for a warehousing of 125% of the market value whereas the proposed percentage here was 61% and the counterproposal provided for a loan to value write down of 30% on maturity depending on the market value at the time. The extended term also assisted the Debtor.

It was accepted that at the end of the term, the warehoused sum will be due and owing. However, it was submitted that the Debtor will have the option to downsize; that she will have her pension from the HSE and that her daughter will have left college at the end of the Arrangement.

The test to be applied is one of reasonableness, referring to paragraphs 59 and 60 of the *O'Callaghan* judgement-

"reasonableness is assessed in the context of the means of the debtor, the likely return to the creditor of a proposal, the likely return on bankruptcy as an alternative, and the reasonableness of the proposed scheme taken as a whole, and in the light of the objective of the legislation that a debtor be facilitated in a return to solvency....A creditor may not defeat an application by merely on account of an argument that a better outcome can be achieved."

When considering the warehousing proposed the Court must have regard to the fact that this debtor is now 45. Under the terms of the counterproposal she will be 71 at the end of the extended mortgage term

as proposed in the counterproposal. She will be faced with a liability of €97,785 with a 30% write down "if applicable". Her pension is for the purpose of providing her with an income on her retirement. The Court cannot speculate as to what her income might be aged 71 nor can it speculate on whether or not she will have capital assets such as will enable her to clear the balance which will become due and owing and still have sufficient income to provide support and accommodation suitable to her future needs.

In determining the reasonableness of the Arrangement the Court must have regard to the current income and assets which are ascertainable and available to the Debtor. This leads us into the third issue raised by the Objector that of unfair prejudice.

3. Unfair prejudice

In determining this issue it is of relevance to note that no issue has been taken with the Bankruptcy Comparison in the Arrangement and that it has not been suggested that the Debtors PPR is disproportionate to her needs.

The elements which the Objector has raised as giving rise to unfair prejudice are the rejection of the counterproposal which I have addressed; the writing down of the mortgage to the current market value and the means of the Debtor which the Objector submits are not being fully brought to account to the extent that the Arrangement enables the creditors to recover debts due to them to the extent that the means of the Debtor permit.

On the writing down of the mortgage debt to the current market value: The Objector accepts that the valuation of €160,000 was agreed pursuant to section 105 of the 2012 Act. However, it has been submitted that the property market is such that this sum is very conservative and that €160,000 is now likely to be less than the current market value. The value of the secured debt has been agreed. It is not simply an arbitrary figure. It is not unreasonable for a Personal Insolvency Practitioner to have written down the live balance of the mortgage to the market value as agreed under section 105 in the particular circumstances. The valuation agreed pursuant to section 105 is not intended to be a notional or arbitrary figure. I find that the Objector is not unfairly prejudiced by the write down of the live balance to the agreed market value.

The issue as to whether a write down of €173,785 represents an unfair prejudice depends on the particular circumstances and whether the Court is satisfied that the Arrangement enables creditors to recover debts due to them to the extent that the means of the Debtor reasonably permit.

The Objector submitted that the restructured mortgage repayments of €1,121 per month as provided for in the counterproposal represent a reduction of €450 in the Debtors monthly outgoings. This restructuring would place the Objector in a more favourable position whilst preserving a warehoused element of €97,785. However, as provided for in *O'Callaghan* a more favourable outcome does not of itself displace the Arrangement. The Court must look at the means of this Debtor.

According to *O'Callaghan*

"The "means" engaged are present income and capital assets and not the projected means at a time so far into the future that the test is based on hypotheses or conjecture. There may on the other hand be circumstances where future certain or ascertainable means are to be brought into account."

Having regard to this Debtors net income and costs as summarised in Appendix 2, I am satisfied that the Arrangement does enable the specified creditors to recover debts due to them to the extent that the means of this debtor reasonably permit.

Whilst it is fair to say that college costs are finite, these are likely to continue for a period post the Arrangement. Further it was accepted in the *ex tempore* judgement of Baker J *In The Matter of Clive Casey* that a debtor cannot be confined to the basic reasonable living expenses as set out by the Insolvency Service of Ireland for the rest of her life. Furthermore, the Court cannot speculate as to what the Debtors pension entitlements might be relative to her needs at the age of 71 when she is now 45.

I therefore find that the Arrangement does not unfairly prejudice the Objector. I am satisfied that the Arrangement complies with the provisions of section 115A and accordingly I make an order confirming the coming into effect of the Arrangement as proposed.

09/08/2017