

THE HIGH COURT
CIRCUIT APPEAL

MIDLAND CIRCUIT

COUNTY OF LAOIS

[2019 No. 1 CA]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012-2015
AND IN THE MATTER OF REBECCA FORDE EGAN (A DEBTOR)**JUDGMENT of Mr. Justice Denis McDonald delivered on 20th December, 2019**

1. This is an appeal by Bank of Ireland Mortgage Bank (*"the bank"*) from an order of Her Honour Judge Mary Enright in the Circuit Court made on 20th December, 2018 in which she rejected the objection of the bank to an application under s. 115A (9) of the Personal Insolvency Act, 2012 (*"the 2012 Act"*) as amended by the Personal Insolvency (Amendment) Act, 2015 (*"the 2015 Act"*). Although not recorded in the copy order of the learned Circuit Court judge provided to me, it appears to be the case that an order was also made pursuant to s. 115A (9) confirming the coming into effect of a personal insolvency arrangement proposed on behalf of the above-named debtor, Ms. Rebecca Forde Egan, by Mr. Darragh Duffy, her personal insolvency practitioner (*"the practitioner"*). The main features of the proposed arrangement are outlined in para. 4 below. As this is a Circuit Appeal, the application of the practitioner under s. 115A (9) was fully reheard by this court together with the objection filed on behalf of the bank.

Relevant facts

2. Ms. Forde Egan is a public servant employed by the Health Service Executive (*"HSE"*). She and her husband, Mr. Larry Egan, have three children aged 14, 18 and 20 respectively. Mr. Egan was adjudicated a bankrupt in 2009. He was subsequently discharged from bankruptcy in 2014. The family lives in County Laois and there is no dispute between the parties that the family home constitutes the principal private residence of Ms. Forde Egan for the purposes of s. 115A of the 2012 Act. It was agreed, in the course of the proceedings before the Circuit Court, that the market value of the family home is €410,000.
3. Ms. Forde Egan is indebted as follows: -
 - (a) There is a sum of €624,457 due to the bank in respect of a loan account secured over the family home. Subject to Mr. Egan's bankruptcy, both he and Ms. Forde Egan are jointly and severally liable to the bank in respect of this loan. The implications which flow from the bankruptcy are considered in more detail below.
 - (b) Ms. Forde Egan has a credit card debt of €2,072 which is owed to Allied Irish Banks Plc;
 - (c) Ms. Forde Egan is indebted to the Bank of Ireland on a current account in the sum of €1,313;
 - (d) There is a sum of €11,960 owed to Close Brothers Motor Finance on a hire purchase agreement in respect of a motor vehicle.

4. The most significant features of the proposed arrangement are as follows: -
- (a) It is proposed that the arrangement will be put in place for a period of six years which is the maximum period permitted under the 2012-2015 Acts;
 - (b) The outstanding balance on the mortgage loan secured on the family home will be written down from €624,457.00 to €451,000.00 with the residual balance of €173,457.00 being treated as unsecured debt in respect of which a dividend in the total sum of €40,651.00 will be paid to the bank over the course of the proposed arrangement;
 - (c) The mortgage loan account will be restructured. The remaining term of the loan will be extended to 23 years. The interest rate is to remain at the existing tracker rate based on the ECB rate plus a margin of 0.50% resulting in a monthly mortgage payment of €1,780.00 (of which €961.00 per month will be paid by Ms. Forde Egan and the balance by Mr. Egan);
 - (d) A dividend of 23 cent in the euro will be paid to all of the unsecured creditors. The bank will share in this dividend as set out at (b) above.
5. At the meeting of creditors, the bank (together with Bank of Ireland) voted against the proposed arrangement while Allied Irish Banks Plc and Close Brothers Finance Ltd voted in favour. In percentage terms, 97.66% in value of creditors voted against the proposed arrangement while 2.35% in value voted in favour. Thereafter the practitioner brought an application pursuant to s. 115A (9) to the Circuit Court. Under s. 115A (9) the court is empowered (subject to satisfaction of a wide range of conditions) to confirm the coming into effect of a proposed arrangement notwithstanding that it has not been supported by a majority of creditors. It is unnecessary, at this point, to set out all of the conditions that must be satisfied in s. 115A. It is sufficient to note that they include the following conditions: -
- (a) One of the debts of the debtor must be secured over his or her principal private residence;
 - (b) The debt secured over that residence must have been in arrears as of 1st January, 2015 (or at minimum the debtor must have entered into an alternative repayment arrangement with the secured creditor in advance of 1st January, 2015);
 - (c) The arrangement must have been supported by at least one class of creditor.
6. A notice of objection was filed on behalf of the bank in the course of the Circuit Court proceedings. In that notice, the bank objected to the proposed arrangement on a number of grounds namely: -
- (a) It was contended that the arrangement will not enable the bank to recover the debt due to it to the extent that the means of Ms. Forde Egan reasonably permit (as required by s. 115A (9) (b) (ii) of the 2012 Act);

- (b) The case was made that the proposed arrangement is unfair and inequitable contrary to the requirements of s. 115A (9) (e);
 - (c) It was also alleged that the bank is unfairly prejudiced by the proposed arrangement (relying on s. 115A (9) (f) and s. 120 (a) of the 2012 Act);
 - (d) It was submitted that no valid class of creditors has accepted the proposed arrangement;
 - (e) Invoking s. 115A (10) (a) (i) of the 2012 Act, the bank also submitted that the conduct of Ms. Forde Egan in the two-year period prior to the issue of the protective certificate does not support the grant of relief;
 - (f) Relying on s. 115A (10) (b), the bank submitted that an alternative proposal which it made to the practitioner was affordable by Ms. Forde Egan and would have allowed her creditors to recover the debts due to them to the extent that her means would reasonably permit.
7. Although not specifically identified in the notice of objection, the principal argument made on behalf of the bank in the course of the appeal was that, if the court were to approve the arrangement by granting the order sought by the practitioner under s. 115A (9), this would have the effect of depriving the bank of its rights against Mr. Egan, the former bankrupt, under the provisions of s. 116 (6) of the 2012 Act. It was alleged that such an outcome is so self-evidently unfair and prejudicial to the rights and interests of the bank that the court is precluded by s. 115A (9) (e) and (f) from approving such an arrangement. As this was the principal argument raised by the bank on appeal, I will address this issue first. To the extent that it is still necessary to do so, I will, thereafter, consider the remaining issues which arise for consideration.

Would confirmation of the proposed arrangement deprive the bank of its rights against Mr. Egan under s. 116 (6)?

8. Section 116 of the 2012 Act deals with the effect of an arrangement. Under s. 116 (3), while a personal insolvency arrangement is in effect, a creditor who is bound by it is prevented from taking a variety of steps in relation to a specified debt. These include the initiation of legal proceedings, the prosecution of legal proceedings already in being, or the taking of any step to secure or recover payment. Furthermore, under s. 116 (4) a creditor is prevented from applying for the issue of a bankruptcy summons under s. 8 of the Bankruptcy Act, 1988 (*“the 1988 Act”*). The same subsection prevents a creditor from presenting a petition to have the debtor adjudicated a bankrupt in respect of a debt covered by the arrangement.
9. However, there is an express saver for the rights of creditors in s. 116 (6) insofar as persons jointly liable with the debtor are concerned. Section 116 (6) expressly permits a creditor to take action against a person who is jointly liable with the debtor. Section 116 (6) is in the following terms:-

“(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.”

10. The provisions of s. 116 (6) have been considered in a number of cases. The leading decision is that of Baker J. in *J.D.* [2017] IEHC 119. In that case, the debtor was jointly and severally liable together with her former husband to a secured creditor, EBS. There was a breakdown of the marital relationship which resulted in the couple separating. Thereafter the husband failed to make any contribution towards the mortgage repayments. An arrangement was proposed on behalf of the debtor by a personal insolvency practitioner. An application was subsequently made by the practitioner concerned for an order under s. 115A (9). That application was opposed by EBS on the basis that the arrangement was proposed on behalf of one joint and several debtor only and it was alleged by EBS that it would be manifestly prejudicial and unfair to it to confirm such an arrangement in light (*inter alia*) of the implications for EBS in respect of its rights against the co-debtor husband.
11. In her judgment in that case, Baker J. very carefully and comprehensively analysed the relevant provisions of the 2012-2015 Acts in the context of joint and several debtors. In para. 39 of her judgment, she drew attention to the fact that there is nothing in the 2012-2015 Acts which requires that joint debtors may only seek relief under the Acts by means of interlocking arrangements. At para. 40, she continued in the following terms:-

“40. 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.”
12. At para. 41 of her judgment Baker J. made clear that joint debts are included within the scheme of the Acts and that a debtor is not precluded from seeking relief under s. 115A by reason of the fact that he or she does not own the entire interest in the principal private residence and is not the sole mortgagor.
13. In *J.D.*, EBS argued that, properly construed, s. 116 (6) applies solely to joint debts and does not apply to joint and several debts. This argument was rejected by Baker J. Baker J. referred to the approach taken by Laffoy J. in *ACC Bank v. Malocco* [2003] 3 I.R. 191 where, in the context of s. 17 (1) of the Civil Liability Act, 1961, Laffoy took the view that it was *“immaterial whether the debtors are jointly liable or jointly and severally liable for the debt”*. At para. 55 of her judgment Baker J. confirmed that she believed it was also immaterial in the context of the 2012-2015 Acts whether the debts of the debtor and her former spouse were joint or joint and several.

14. With regard to the argument made by EBS that it would be unfairly prejudiced by the proposed arrangement, Baker J. drew attention to the standard terms of the arrangement proposed in that case which expressly provided that any person who borrowed money as a joint borrower with the debtor would continue to be liable to the relevant creditor notwithstanding the approval of the arrangement. She also drew attention to the provisions of s. 17 (1) of the Civil Liability Act, 1961 which provides that the release of or settlement with one concurrent wrongdoer will only discharge the other concurrent wrongdoers where such release or settlement indicates an intention that the others are to be discharged. In light of the provisions of Clause 10.4 of the standard terms of the arrangement proposed in that case, it was clear that s. 17 (1) of the 1961 Act did not release the debtor's husband from his liabilities under the mortgage. At para. 55-58 of her judgment, Baker J. disposed of the unfair prejudice argument as follows: -

- “55. The protection for the creditor, ... 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 [the debtor's husband], 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 [the debtor's husband] 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 [the husband] 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 [the husband] is concerned is not borne out by the law or the facts. The prejudice to EBS will be caused, not by the fact that [the husband] 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 [his] non-involvement with the process 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.”*

15. It is clear from this extract from the judgment of Baker J. in *J.D.* that she took the view that EBS was entitled to continue to pursue the debtor's husband in respect of the debt for which he was jointly and severally liable together with the debtor. However, Baker J. pointed out that, at a practical level, EBS might not be in a position to recover possession of the property in circumstances where the property was occupied by the debtor and her children and in circumstances where the debtor was honouring the terms of the proposed arrangement. Baker J. pointed out that this practical difficulty for EBS in pursuing the debtor's husband was caused not by the terms of the arrangement but by the extent of the negative equity in the family home. The full extent of that negative equity had already been priced into the arrangement which the debtor would be obliged to implement and honour. If the debtor performed her obligations under the arrangement, it would be difficult for EBS in that case to pursue the debtor's husband since they would be met with the argument that the debtor was herself entitled to remain in the property (so long as she honoured the terms of the proposed arrangement) and, given the extent of the negative equity, no useful purpose would be served by granting relief against the husband.
16. Section 116 (6) was also considered by me in two judgments. In the first of those cases, namely *Lisa Parkin* [2019] IEHC 56 I had to consider whether a secured creditor (Permanent TSB) would be unfairly prejudiced as a consequence of an arrangement entered into solely by the debtor who, like in the present case, was jointly and severally liable together with her estranged husband on foot of the relevant mortgage loan. In paras. 67-68 of my judgment in that case, I expressed the view that s. 116 (6) makes it very clear that the arrangement will not in any way impede the ability of the secured creditor to pursue the debtor's husband. At para. 68 I said:-
- "68. In light of these statutory provisions, I can see no reason why PTSB would not be entitled to pursue a claim against Mr. Parkin, including a claim to enforce the mortgage against him. It may well transpire that if such steps are taken by PTSB, there will be an issue as to the extent of the beneficial interest of Mr. Parkin in the principal private residence. That is not an issue on which I can or should express any view at this stage. What is clear is that, even if an order is made affirming the order of the Circuit Court, PTSB will not be prevented from pursuing Mr Parkin in respect of his ongoing indebtedness to it and will not be prevented from taking enforcement proceedings in respect of any interest he may have in the family home. It will be a matter for the court in any such proceedings to determine what relief might appropriately be granted and I can neither prejudge nor predict the outcome of any such proceedings."*
17. Subsequently, in *Ahmed Ali* [2019] IEHC 138 a similar issue arose. In that case, the secured creditor had already obtained an order for possession against the debtor's estranged wife who had been adjudicated a bankrupt but was subsequently discharged from bankruptcy. In the course of her bankruptcy, the secured creditor had indicated that it wished to value its security. As a consequence, its only remedy against her was to rely on its security. It was argued on behalf of the secured creditor that the bank would

be greatly prejudiced by the arrangement since it would have the effect of preventing it from exercising its right of recourse against the security (i.e. the family home). However, I came to the conclusion that the bank would not be unfairly prejudiced. At paras. 50-51 of my judgment I said: -

“50. The circumstances ... are very unusual. Ordinarily, as I sought to explain in Lisa Parkin ... the bank would not be prevented, by the existence of a PIA in respect of one joint and several debtor, from pursuing another joint and several debtor who is not a party to the same or an interlocking PIA. But, in this case, it is clear that, if the PIA proposal is approved, the bank will no longer be able to take possession of the ...property notwithstanding the order for possession already obtained against Mrs Ali. In the course of the hearing, I suggested to counsel that although the bank could clearly no longer seek possession of the ... it might be possible for the bank to pursue its claim as against Mrs. Ali by seeking a sale of the property in lieu of partition. As the decision of the Supreme Court in Irwin v. Deasy [2011] 2 I.R. 752 at p. 778, shows, a mortgagee (other than a judgment mortgagee) is entitled to pursue the remedy of partition. However, on further reflection, it seems to me to be unlikely that the bank could realistically pursue an action for sale in lieu of partitions (sic). I note from para. 52 of Mr. Baxter’s affidavit, that the bank valued its security for the purposes of the bankruptcy of Mrs. Ali at €192,200. Given that the bank will recover more than that sum under the PIA, it is difficult to see that the bank would be in a position to pursue an action for sale in lieu of partition. However, I make no finding to that effect. It will be for the bank to decide what remedy it may have in relation to the indebtedness of Mrs. Ali to it and I would not wish to prejudge in any way the outcome of any proceedings that the bank might be advised to take.

51. For the purposes of these proceedings ..., I have come to the conclusion that the bank is not unfairly prejudiced by the proposed arrangement. In the first place, as noted above, the bank will recover more, under the PIA, than it would in the event of the bankruptcy of Mr. Ali. Furthermore, if one looks at the value which the bank placed on its security in the bankruptcy of Mrs. Ali, the bank will also recover more under the proposed PIA than it would recover if it were to proceed with possession proceedings against the property (having valued its security at €192,200).”

18. Counsel for the bank submitted that in *Ahmed Ali* the issue was framed solely as a matter of unfair prejudice and there was no consideration of the effect of s. 116 of the 2012 Act. It was submitted on behalf of the bank that s. 116 does not qualify the rights of secured creditors as against non-arranging borrowers in any way and in particular does not make those rights subject to a test for prejudice. Instead, it provides a stand-alone protection for the contractual rights of creditors to rely on their security as against non-arranging debtors. I do not disagree with this submission save to note that this was not an argument that was raised in the notice of objection filed on behalf of the bank. Furthermore, in most of the cases in which an issue has arisen in relation to s. 116, the argument made on behalf of the relevant secured creditor is that the arrangement would

in some way impede its ability to exercise its rights under s. 116 (6) such as to give rise to an unfair prejudice.

19. The bank draws attention to the fact that, as a consequence of the bankruptcy of Mr. Egan, his interest and that of Ms. Forde Egan in the family home are now severed. This severance occurred as a matter of law. Under s. 44 (1) of the 1988 Act, all property belonging to Mr. Egan at the date of his adjudication automatically vested in the Official Assignee for the benefit of his creditors.
20. As Sanfey & Holohan "*Bankruptcy Law & Practice*", 2nd ed., 2010, explain at para. 9-19, the effect of the adjudication is to sever the joint tenancy in a jointly owned family home and convert it into a tenancy in common. The non-bankrupt spouse and the Official Assignee then hold separate and undivided moieties in the property. Thus, in the present case, when Mr. Egan was adjudicated a bankrupt, any interest which he had in the family home vested in the Official Assignee. However, it is important to bear in mind that there is no evidence before the court as to the extent of his equity in the property. For the reasons discussed in para. 26 below, it may have been very limited.
21. As noted in para. 2 above, Mr. Egan has since been discharged from bankruptcy. The bank submits that, as a consequence of the provisions of s. 85 (3A) of the 1988 Act (as amended) Mr. Egan now holds, on a purely several basis, the interest previously vested in the Official Assignee. The bank submits that the effect of this statutory provision is that the former joint tenancy that existed between Ms. Forde Egan and her husband remains severed. Section 85 (3A) of the 1988 Act provides that, on the 3rd anniversary of the adjudication in bankruptcy, the estate or interest of the bankrupt in the family home will re-vest in the bankrupt. Section 85 (3A) is in the following terms:-

“(3A) Subject to subsections (3B) to (3F), where on the 3rd anniversary of the date of the making of the adjudication order in respect of a bankruptcy—

(a) the unrealised property of the bankrupt referred to in subsection (3) includes an estate or interest in what was, at the date of the making of the adjudication order, the family home, shared home or principal private residence of the bankrupt, and

(b) in the case of the family home or shared home, the Official Assignee has not applied to the Court for an order for sale of that home,

that estate or interest shall, on that 3rd anniversary, stand re-vested in the bankrupt without the need for any conveyance, assignment or transfer.”

22. It might be thought that s. 85 (3A) has no application in the present case given that Mr. Egan was declared a bankrupt as long ago as 2009 and this amendment to the 1988 Act was only made in 2016 as a consequence of s. 10 of the Bankruptcy (Amendment) Act, 2015 ("*the 2015 Act*") which was commenced on 29th January, 2016 by S.I. 34/2016. However, it is clear from s. 85 (3F) that s. 85 (3A) is intended to have retrospective

effect. Section 85 (3F) provides that, where the adjudication order was made more than two years and six months prior to coming into operation of s. 10 of the 2015 Act, the reference in s. 85 (3A) to the third anniversary is instead to be taken to be a reference to the day falling six months after the day s. 85 (3A) came into operation (namely 29th January, 2016). In those circumstances, the bank submits (in my view correctly) that Mr. Egan's interest (whatever that may have been) in the family home re-vested in him by operation of s. 85 of the 1988 Act (as amended) on or about 30 July, 2016. As noted in the written submissions delivered on behalf of the bank, the 1988 Act (as amended) does not provide that the re-vesting has the effect of restoring the joint tenancy. As a consequence, the bank submits that Mr. Egan and Ms. Forde Egan now hold separate moieties in the family home as tenants in common. This seems to me to be correct to the extent of any interest held by Mr Egan in the home.

23. On the basis that Mr. Egan and Ms. Forde Egan now hold separate moieties in the family home as tenants in common, it is submitted by the bank that:

“...in circumstances where a Debtor owns only 50% of the PPR, that she cannot offer 100% of the value of the PPR as security for the mortgage loan for which she is – on foot of the co-borrower's bankruptcy – now solely liable to the Bank”.

24. On the basis of the scenario described in paras. 22 to 23 above, the bank essentially makes two submissions:-

- (a) In the first place, the bank submits that the court cannot approve the arrangement under s. 115A (9) in circumstances where it would be necessary to sell or partition part of the family home for the purposes of upholding the right of the bank to rely on its security over the family home as against Mr. Egan. This submission is made in light of the provisions of s. 104 (1) and s. 115A (9) (b) (iii) of the 2012 Act. Under the latter provision, the court cannot make an order confirming the coming into effect of a proposed arrangement unless the court is satisfied that there is a reasonable prospect that confirmation of the arrangement “*will...enable the debtor not to dispose of an interest in, or not to cease to occupy, all or a part of his or her principal private residence*”. The bank submits that this condition cannot be satisfied in the present case in circumstances where, under s. 116 (6) it must be entitled to pursue a remedy against Mr Egan under s. 31 (2) (a) of the Land and Conveyancing Law Reform Act, 2009 (“*the 2009 Act*”) under which the bank could seek an order for partition of the family home or an order for sale of the family home in lieu of partition.
- (b) Secondly, the bank draws attention to the observation made by me in *Ahmed Ali* at para. 50 that it seemed to me to be unlikely that the bank in that case could realistically pursue an action for sale in lieu of partition in circumstances where the bank was likely to recover more under the proposed arrangement in that case than it would by seeking to enforce the mortgage over the interest of the ex-wife of Mr. Ali in the family home (in circumstances where the bank had valued its security at a figure less than the amount that would be paid to it under the terms of the

arrangement). The bank argues, however, that it would be unfair and prejudicial to its interests if it were to be precluded from realising Mr. Egan's "50%" share in the family home. As set out in para. 6.5 of the bank submissions, the case made by it in this context is as follows: -

"6.5 It is a term of the proposed Arrangement that the debt due to the Bank which is secured on the PPR – which was valued at €410,000.00 – is to be written down from €624,457.00 to €451,000.00. Accordingly, in circumstances where the Debtor's interest is worth only €205,000.00, it is respectfully submitted on behalf of the Bank that it would be unfair and prejudicial for the Bank's interests if the Bank were to be precluded from realising the other 50% of its security."

25. In paras. 28 to 33 below, I deal, in turn, with these two limbs of this element of the objection made on behalf of the bank. Before doing so, I should make clear that, in my view, the bank is not correct in characterising the effect of the arrangement as an offer by Ms. Forde Egan as owner of "only 50% of the PPR" to offer 100% of the value of the PPR as security for the mortgage loan for which she is now solely liable to the bank (as a consequence of the bankruptcy of Mr. Egan). In the first place, the bank has offered no evidence to support its contention that Ms. Forde Egan owns only 50% of the family home. While the bank may argue that the onus of proof lies on the practitioner in an application of this kind, it is noteworthy that at no time in the course of the Circuit Court proceedings was any such issue raised by the bank. The notice of objection makes no reference to it. Likewise, the affidavit of John Nolan sworn on behalf of the bank in support of the objection makes no reference to it. There was therefore no reason why the practitioner or Ms. Forde Egan should address this issue in their respective evidence in the course of the Circuit Court proceedings. The issue was raised for the first time in the written submissions delivered on behalf of the bank in the weeks immediately prior to the hearing in October 2019. In these circumstances, I do not believe that it is correct to assume that Ms. Forde Egan and Mr. Egan have each a 50% interest in the family home. Given Mr. Egan's bankruptcy, Ms. Forde Egan may well have a greater equity than him in the family home to the extent that she made payments in part discharge of the mortgage during the period of his bankruptcy. In this regard, it is noteworthy that when Mr. Nolan, in his affidavit dealt with the conduct of Ms. Forde Egan in relation to payments made on foot of the mortgage, he referred only to payments made by her. He made no reference to any payments made by Mr. Egan.
26. Secondly, it has not been established that s. 85 (3A) has any application in this case. In circumstances where it is clear from Mr. Nolan's affidavit that the debt due to the bank exceeds the value of the property and where the relevant mortgage payments were being made by Ms Forde Egan, it seems unlikely that Mr. Egan had any significant equity in the property at the time of his adjudication or thereafter and it may even be the case that he had no equity in it. Accordingly, it is by no means certain that he had an equity in the property capable of forming part of the unrealised property of a bankrupt within the meaning of s. 85 (3) of the 1988 Act (as amended). That said, for the purposes of this

judgment, I am prepared to assume that he has some level of equity in the family home and that s. 85 is engaged.

27. Thirdly, and more importantly, it is simply wrong to suggest that Ms. Forde Egan “cannot offer 100% of the value of the PPR as security for the mortgage loan...”. Ms. Forde Egan is making no such offer under the terms of the proposed arrangement. The security is already in place. The purpose of the arrangement is to restructure the debt owed by Ms. Forde Egan. The arrangement does not affect the underlying security in any way. Prior to the arrangement taking effect, Ms. Forde Egan remained liable in full for the debt due to the bank. The fact that the interest in the property which forms security for that debt may be affected by the bankruptcy makes no difference to the extent of Ms. Forde Egan’s liability. As explained by Baker J. in *J.D.*, Ms. Forde Egan is entitled under the 2012-2015 Acts (through her practitioner) to propose an arrangement with her creditors under which her indebtedness would be written down to a more viable level. That is so whether her debts are secured or unsecured. It is equally so irrespective of the value of the security. In no sense is she offering anything by way of security. She is simply seeking to compromise the level of her indebtedness to her creditors without disturbing the existing security in any way.

The argument based on s. 115A (9) (b) (iii)

28. As noted in para. 24 (a) above, the court is precluded by s. 115A (9) (b) (iii) from making an order confirming the coming into effect of a proposed arrangement if the court cannot be 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 a part of his or her principal private residence”. The argument of the bank is that, since it cannot be prevented from taking action against Mr. Egan to enforce its security (most likely by an action for partition or for sale in lieu of partition) the condition set out in s. 115A (9) (b) (iii) cannot be satisfied in this case. The bank argues that, inevitably, its right to enforce its security against Mr. Egan must mean that the court cannot be satisfied that there is a reasonable prospect that confirmation of the proposed arrangement will enable Ms. Forde Egan to remain in the family home.
29. The first point to be made is that there can be no doubt but that the bank is entitled, notwithstanding any order made in these proceedings, to take such action as it may be advised to enforce its security as against Mr. Egan. That is clear from the decision of Baker J. in *J.D.* It is also clear from the express terms of the proposed arrangement in this case. As in *J.D.*, the proposed arrangement, here, includes standard terms 10.3 and 10.4. More importantly, even if it be the case that the liability of Mr. Egan and Ms. Forde Egan is now several rather than joint and several, the judgment of Baker J. in *J.D.* puts beyond doubt that s. 16 (6) can be relied upon by the bank notwithstanding that it refers to “a person who has jointly contracted with the debtor or is jointly liable with the debtor...” (emphasis added).
30. Given the undoubted right of the bank to pursue action against Mr. Egan, whether by partition or by an order for sale in lieu of partition, it might seem to follow, as a necessary consequence, that s. 115A (9) (b) (iii) cannot be satisfied. However, in my view, it would

be entirely wrong to reach that conclusion. I have formed that view for a number of reasons: -

- (a) In the first place, all that needs to be established is that there is a "*reasonable prospect*" that confirmation of the proposed arrangement will ensure that Ms. Forde Egan can remain in the family home. A reasonable prospect clearly does not require that there must be absolute certainty that confirmation of the arrangement will bring about that result.
- (b) Secondly, I am satisfied that there is a reasonable prospect that confirmation of the proposals will achieve that result. In this context, while the bank is undoubtedly free to pursue such action as it may be advised in relation to the realisation of any interest held by Mr. Egan in the family home, there are significant practical hurdles facing the bank in taking any such action. There is no certainty that a court will be prepared to grant relief under s. 31 of the 2009 Act. It is clear from the language of s. 31 (3) of the 2009 Act that the jurisdiction of the court to make orders for partition (or sale in lieu of partition) under s. 31 is discretionary. It is likely that, in the exercise of its discretion, the court will be influenced by the approach taken by the courts under the predecessor legislation that was in place prior to the enactment of the 2009 Act. As discussed in the judgment of Finnegan J. (as he then was) in the Supreme Court in *Irwin v. Deasy* [2011] 2 I.R. 752 at p. 780, the court would not make an order for sale in lieu of partition (under the predecessor legislation) where good reason was shown as to why such an order should not be made. While this defence was based on the language of s. 4 of the Partition Act, 1868, it is instructive to have regard to the approach taken by the Irish courts in relation to that provision. The decision of Denham J. (as she then was) in *First National Building Society v. Ring* [1992] 1 I.R. 375 (one of the authorities to which Finnegan J. drew attention in *Irwin v. Deasy*) is particularly instructive. In that case, Denham J. refused to make an order for sale in lieu of partition in circumstances where the co-owner was an innocent party who, together with her family, would suffer considerably if her part of the family home were sold.
- (c) Thirdly, there are a number of factors in the present case which seem to me to be of relevance to any proceedings that may be taken by the bank to enforce its security as against Mr. Egan. These include: -
 - (i) The fact that, under the proposed arrangement, the bank stands to be paid more than it will be paid by realising its security over any interest which Mr. Egan may have in the family home. In this context, on the basis of the case made by the bank, the most that the bank would recover through a sale of Mr. Egan's interest in the family home (based on the agreed valuation of the property) is €205,000. In contrast, the bank will be paid more than the value of the property under the proposed arrangement. It will be paid €451,000 (which is €41,000 more than the agreed value of the property) by way of capital. It will also be paid an additional €40,651 by way of dividend.

In addition, it will be paid interest under the mortgage. I find it difficult to understand why, in such circumstances, the bank would pursue an action for sale in lieu of partition. It would seem to be entirely counterproductive to do so. More importantly, I believe that it will be difficult to satisfy a court that it is appropriate to make an order for sale in lieu of partition in such circumstances (assuming that payments are being made to the bank as envisaged by the proposed arrangement). While it would be both impossible and wrong to seek to predict the outcome of such an application, it would be equally wrong to shut my eyes to the factors outlined above.

- (ii) It is also significant that the bank has not revealed what value it placed on its security following Mr. Egan's adjudication as a bankrupt. Given that the adjudication took place in 2009, it may well be the case that the value placed on the security was less than the figure of €205,000. In my view, that is an issue that should have been addressed on affidavit by the bank if it was to make the argument now pursued by it. The court should have been apprised of all relevant facts in order to form a view as to whether the pursuit of any enforcement proceedings against Mr. Egan would put in jeopardy any arrangement proposed under the 2012-2015 Acts in respect of the debts of Ms. Forde Egan. Whether Mr. Egan's interest in the property is worth €205,000 or something less than that, it seems to me that there are significant practical difficulties facing the bank in seeking to bring enforcement proceedings against Mr. Egan. I also note that the bank has, at no stage, in these proceedings explained why it has not previously taken action against Mr. Egan. In the written submissions delivered on behalf of the bank, it was suggested that the explanation for not taking action against Mr. Egan before now was "forbearance" on behalf of the bank. However, the matter is not addressed on affidavit by Mr. Nolan and the court therefore is in no position to understand why the bank did not pursue any form of action to enforce its security against Mr. Egan notwithstanding that he was adjudicated a bankrupt as long ago as 2009.

31. In all of the circumstances described in para. 30 above, it seems to me that the outcome of any proceedings to enforce or realise the bank's security as against Mr. Egan is so uncertain that it is appropriate and safe to conclude that, if the court were to confirm the proposed arrangements, there is, at minimum, a reasonable prospect (and, in truth, a likely prospect) that this will secure the continued occupation of the family home by Ms. Forde Egan and her children.

The argument that it would be unfair and prejudicial to the bank's interests if the bank were to be precluded from realising the interest of Mr. Egan in the family home

32. As noted above, the argument here is that it would be unfair and prejudicial to the bank's interests if it were to be precluded from realising its security over Mr. Egan's interest in the family home. This argument appears to proceed on the basis that, as acknowledged by me in *Ahmed Ali* (and as further acknowledged in para. 30 above), there are likely to be significant practical difficulties facing the bank in enforcing its security over Mr. Egan's

interest in the event that the arrangement proposed on behalf of Ms. Forde Egan is confirmed.

33. In my view, this argument is largely answered on the same basis as the argument addressed in paras. 28-31 above. It seems to me to be entirely unreal to suggest that the bank will be unfairly prejudiced if, for practical reasons, it is simply not feasible for the bank to pursue enforcement against Mr. Egan as a consequence of the confirmation of the proposed arrangement. This is for the very simple reason that the bank will fare much better under the proposed arrangement than it would by pursuing action against Mr. Egan (whether by way of partition or by way of sale in lieu of partition) to enforce its security over his interest in the family home. As noted above, under the arrangement, the bank will be paid €451,000 by way of capital (which represents a significant increase above the market value of the family home). In addition, the bank will be paid interest and it will also be paid a dividend of €40,651. In contrast, in the event of a bankruptcy, the bank, as appendix 5 to the proposed arrangement shows, would recover no more than €369,000. This would represent a return of 60 cent in the euro to the bank. This is to be compared with the outcome under the arrangement. As appendix 5 demonstrates, the bank will receive 72 cent in the euro under the proposed arrangement. It is therefore impossible to see how the bank will be unfairly prejudiced in the manner suggested in the submissions made on its behalf.

The banks alternative case on unfair prejudice

34. It is also submitted on behalf of the bank that the proposed arrangement is unfair, inequitable and unfairly prejudicial to its interests in circumstances where (so the bank contends) Mr. Egan, as a former bankrupt, "*will enjoy continued residence in the PPR while refusing to make his assets available to the Bank in reduction of the debt secured on that property...*". The bank, nonetheless, acknowledges that the proposed arrangement will not work unless Mr. Egan contributes to the monthly payments to be made to the bank in respect of the mortgage debt.
35. In Mr. Nolan's affidavit, he highlights that Mr. Egan will be entitled to a pension lump sum in the amount of approximately €80,000 in 2021 which could be used in whole or in part to reduce the mortgage debt to the bank. At paras. 7.7 to 7.8 of the written submissions delivered on behalf of the bank the case is made that the effect of the proposed arrangement is to frustrate the entitlement of the bank to realise its security as against Mr. Egan while, at the same time, putting any future acquired assets including his pension beyond the reach of his creditors. The bank submits that such a proposal is "*so self-evidently unfair and prejudicial*" to the rights and interests of the bank that the court is precluded by s. 115A (9) (e) and (f) from confirming it. This submission seems to me to be based on the theory that the bank will be prevented, by this arrangement, from taking action against Mr. Egan. This is wrong. As I have sought to explain, the bank is fully entitled to take such action as it may be advised against Mr. Egan. While I believe that it may well ultimately be difficult to persuade a court that any order should be made under s. 31 of the 2009 Act, it would be plainly inappropriate to prejudge the outcome of any such application. The bank will be fully entitled, in any such proceedings, to draw

attention to any factors that may influence the exercise of the court's discretion under section 31. The bank will therefore be free to draw attention to any pension lump sum payment or other assets that may be available to Mr. Egan.

36. In the meantime, I do not believe that the pension assets of Mr. Egan are a matter to which I can properly have regard in the context of the present application. They are not assets of Ms. Forde Egan. As the decision of Baker J. in *J.D.* illustrates, Ms. Forde Egan is entitled, through the practitioner, to make her own application for relief under the 2012-2015 Acts. Moreover, Mr. Egan could not have brought an interlocking application at the same time as the application was made by Ms. Forde Egan. He was not eligible for a personal insolvency arrangement at that time. It is clear from the papers before the court that he was not discharged from bankruptcy until 2014. Under s. 91 (1) (i) (iv) of the 2012 Act, Mr. Egan would have been ineligible for a personal insolvency arrangement at the time the protective certificate was sought in this case. Under s. 91 (1) (i) (iv), a period of five years must elapse from the date of discharge from bankruptcy before a debtor can become eligible for a personal insolvency arrangement.
37. Moreover, I must bear in mind that, on the basis of the material before the court, it is clear that the arrangement proposed by the practitioner on behalf of Ms. Forde Egan will achieve a better result than the alternative of making Ms. Forde Egan a bankrupt. While that is not the only test of unfairness, it is a very important litmus test. In the context of an examinership, it was described by O'Donnell J. as a "*vital test*" in his judgment in the Supreme Court in *McInerney Homes Ltd* [2011] IESC 31 at para. 30 where he said: -
- "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. ..."*
38. Before reaching any final conclusion on the issue of unfair prejudice, I should, however, first address the case made by the bank that, contrary to the requirements of s. 115A (9) (b) (ii), the proposed arrangement will not enable the bank to recover the debt due to it to the extent that the means of Ms. Forde Egan reasonably permits. If the bank is correct in that contention, that would also provide a proper basis to form the view that the bank would be unfairly prejudiced by the proposed arrangement. On the other hand, if I find against the bank on that issue, the argument on unfair prejudice will, for all of the reasons outlined above, fall away.

Section 115A (9) (b) (ii)

39. Under s. 115A (9) (b) (ii), the court must be satisfied that there is a reasonable prospect that confirmation of the proposed arrangement will enable the creditors of Ms. Forde Egan to recover the debts due to them to the extent that the means of the debtor reasonably permit. In dealing with the bank's concerns in relation to the s. 115A (9) (b) (ii) issue, Mr. Nolan, in his affidavit, suggests that more significant payments will be made in discharge of the mortgage debt during the currency of the proposed arrangement than in the seventeen-year period thereafter. In para. 20 of his affidavit Mr. Nolan says that the

monthly payments to be made during the currency of the arrangement will rise to €2,653.00 per month in years 5 and 6 but, thereafter, only €1,780.00 per month will be paid for the remaining seventeen years. He also draws attention again, in this context, to the pension lump sum of approximately €80,000.00 which will be paid to Mr. Egan in 2021. He suggests that, in these circumstances, the resources available to Ms. Forde Egan would allow her to make more extensive monthly payments to the bank for the remaining term of the mortgage than €1,780.00.

40. In my view, the very detailed and comprehensive affidavit sworn by Ms. Forde Egan in response to the affidavit of Mr. Nolan provides an answer to the concerns raised by Mr. Nolan. In the first place, Ms. Forde Egan explains that the payments to be made to the bank during the currency of the proposed arrangement include not only the ongoing mortgage payments that will require to be made but also payment of the significant dividend that will be paid to the bank in respect of the unsecured element of the debt. Ms. Forde Egan also explains that, in order to fund the payments to the bank, Mr. Egan, notwithstanding that he has no ongoing liability to the bank for repayment of any part of the loan, is making his income available to assist in making the monthly payments under the arrangement. I should explain, at this point, that, as a discharged bankrupt, Mr. Egan has no ongoing liability to the bank in respect of the mortgage debt. The bank's only entitlement to pursue Mr. Egan is in respect of his interest (whatever that might be) in the family home. The bank is entitled to pursue that claim to the extent of that interest and subject to the value which it placed on the security at the time of Mr. Egan's bankruptcy.
41. Ms. Forde Egan also explains, in considerable detail, the particular difficulties facing the family arising from the health condition of one of the children which will require ongoing support into the future. Given the highly personal nature of the evidence that is given by Ms. Forde Egan, I do not believe that it would be appropriate to discuss it in any detail in this judgment. It is sufficient to record that, in contrast to many of the cases which come before the court, Ms. Forde Egan provides extensive detail in relation to the issue from which it is clear that two of her children will still be in third level education after the proposed arrangement comes to an end and one of them will require ongoing support and assistance into the future.
42. In the circumstances, it is understandable that this issue (although raised in the notice of objection and in Mr. Nolan's affidavit) was not pursued in either the written submissions or in the oral submissions of counsel at the hearing of this appeal.
43. It seems to me to be clear on the basis of the evidence before the court that the means of Ms. Forde Egan are fully brought to bear under the proposed arrangement. In this context, I should also record, at this point, that, as set out in appendix 2 to the proposed arrangement, the income used to fund the arrangement and the ongoing living expenses of the family has been supplemented by income from a border. In many cases which come before the court, objecting creditors have highlighted alleged failures on the part of a debtor to maximise their available income by failing to take in borders or tenants. The

fact that, in this case, the family has taken in a border provides additional evidence to demonstrate that the means of Ms. Forde Egan are being brought to bear for the purposes of the proposed arrangement.

44. As noted above, Mr. Nolan, on behalf of the bank, also draws attention, in the context of s. 115A (9) (b) (ii) to the lump sum pension to be paid to Mr. Egan in 2021. I do not, however, believe that a pension payment to a person who is not himself or herself the debtor can be taken into account under s. 115A (9) (b) (ii). That subsection is concerned with the means of the debtor and with no one else. Moreover, it must be borne in mind that Mr. Egan, as a consequence of his bankruptcy, has been relieved of his personal liability for the debts in respect of the mortgage. While the bank is clearly aggrieved that Mr. Egan will receive this payment, his entitlement to receive it free of any ongoing liability to the bank arises as a matter of law. He has borne the pain of bankruptcy and, like every other discharged bankrupt, he is now free from his pre-existing indebtedness. In the meantime, it remains open to the bank, pursuant to s. 116 (6) of the 2012 Act, to seek to enforce its security over whatever interest he may have in the family home.
45. It is noteworthy that the bank did not raise any objection under s. 115A (9) (a) under which the court must be satisfied that the terms of the proposed arrangement have been formulated in compliance with s. 104. Although this point has not been raised by the bank, it is one which I must, nonetheless, consider for the purposes of determining this appeal. It is one of the preconditions to the making of an order under s. 115A (9). The significance of s. 104 of the 2012 Act is that, in formulating a proposal for an arrangement, the practitioner must have regard to the matters described in s. 104 (2). Among the matters described in s. 104 (2) is that set out in s. 104 (2) (c) namely: -

“the ability of other persons residing with the debtor in the principal private residence to contribute to the costs [of, inter alia, mortgage loan repayments...and necessary maintenance in respect of the principal private residence]”

46. As Mr. Egan is living with Ms. Forde Egan, his ability to contribute to the cost of the mortgage repayment is a matter that the practitioner was required to take into account in formulating the proposed arrangements.
47. In para. 9 of her affidavit, Ms. Forde Egan explains that Mr. Egan supports the arrangement proposed here and is happy to make all his income available to assist in the arrangement. It is further acknowledged in para. 7.2 of the bank’s written submissions that a contribution will be made under the arrangement by Mr. Egan. It is therefore clear that the proposed arrangement does have regard to the ability of Mr. Egan to contribute to the cost of the mortgage loan repayments. It is, however, equally true, that the arrangement does not envisage that any part of the lump sum pension payment to be made in 2021 to Mr. Egan will be applied in discharge of the mortgage debt or in discharge of any of the other debts of Ms. Forde Egan. It is also clear from the papers before the court that Mr. Egan will contribute, on an ongoing basis, to the reasonable living expenses of the household.

48. With regard to the lump sum pension payment to be made in 2021 to Mr. Egan, I do not believe that it would have been appropriate, in the particular circumstances of this case, to take that into account in formulating the proposed arrangement. I have come to that conclusion for a number of reasons: -

- (a) In the first place, this represents the payment of pension to Mr. Egan to provide a source of income into the future after Mr. Egan's working life comes to an end. While I do not exclude the possibility that it would be appropriate, in some cases, to take a pension payment to be made to a person living in the same home as the debtor into account, I do not believe that it is appropriate to do so in this case given the particular circumstances of the family as described by Ms. Forde Egan in her affidavit;
- (b) It also has to be borne in mind that Mr. Egan has no ongoing liability to make any payment to the bank himself. He has been relieved of that liability as a consequence of his discharge from bankruptcy. Given the particular family circumstances facing his family, it is understandable that he would not wish to make the lump sum in question available in part discharge of the mortgage debt now owed solely by his wife, Ms. Forde Egan;
- (c) Most importantly, as noted above, it is clear that Mr. Egan will, under the proposed arrangement, make contributions to the ongoing cost of the mortgage repayments and of the household expenses. There has accordingly been compliance with s. 104 (2) (c). In the circumstances, I do not believe that it would be open to me to conclude, on the particular facts of this case, that there has been a failure to comply with s. 104. It seems to me to follow that no issue arises in this case under s. 115A (9) (a).

It also seems to me to follow that, for the respective reasons outlined in paras. 38 and 43 above, the bank's case on unfair prejudice (discussed in paras. 34 – 38 above) must fall away.

Was the proposed arrangement supported by a valid class of creditors for the purposes of s. 115A (9) (g)?

- 49. This was not an issue that was canvassed in the written submissions or in the oral submissions of counsel on behalf of the bank. It was, however, raised in the notice of objection and in the affidavit of Mr. Nolan. It is also a matter that I must consider for the purposes of this appeal.
- 50. Section 115A (9) (g) requires the court to be satisfied that at least one class of creditors has accepted the proposed arrangement by a majority of over 50% of the value of the debts owed to that class. In this case, the practitioner suggested that there were two classes who had voted in favour of the arrangement namely the "*regular unsecured creditors*" (comprising Allied Irish Bank Plc) and the "*hire purchase class of creditors*" (namely Close Brothers Motor Finance). In my view, neither of these constitute classes in themselves. However, it seems to me that both Allied Irish Banks Plc and Close Brothers Motor Finance together form a separate class of creditors from the bank and the Bank of

Ireland. Neither the bank nor Bank of Ireland can be placed in the same class as Allied Irish Banks Plc and Close Brothers Motor Finance. In the first place, the bank is the holder of a mortgage over the principal private residence of Ms. Forde Egan. It is well established that such a creditor is in a different class to the remaining creditors of a debtor. This was established in the decision of Baker J. in *Sabrina Douglas* [2017] IEHC 785. Both the bank and Bank of Ireland are related companies. It seems to me that, in those circumstances Bank of Ireland cannot be placed in the same class as the remaining unsecured creditors of Ms. Forde Egan. As a related company of the bank, it was inevitable that it was going to vote in the same way as the bank. Even if I am wrong in treating Bank of Ireland in that way, this would make no difference. It is clear that the value of the debts owed to Allied Irish Banks Plc and Close Brothers Motor Finance significantly exceed the debt of €1,313.43 owed to the Bank of Ireland. In those circumstances, it seems to me that, whether or not one includes Bank of Ireland as a creditor with the other unsecured creditors of Ms. Forde Egan, the requirements of s. 115A (9) (g) are satisfied in this case. More than 50% in value of the unsecured class of creditor have voted in favour of the arrangement.

51. I must, of course, have regard to the provisions of s. 115A (17) under which I am required, to consider the overall number and composition of the creditors who voted at the creditors meeting and the proportion of the debts of Ms. Forde Egan due to those creditors. I appreciate that, in percentage terms, the total debts owed to the unsecured creditors is a very small fraction of the amount owed to the bank. Nonetheless, it seems to me that it would be wholly wrong to ignore the views of the majority of the purely unsecured creditors of Ms. Forde Egan. The fact that a majority of the unsecured creditors has voted in favour of the proposed arrangement seems to me to be very important and I therefore do not believe that it would be appropriate under s. 115A (17) to disregard their vote. Given that Ms. Forde Egan has only four creditors in total, it seems to me that notwithstanding the relatively modest proportion of the debts due to them, the unsecured creditors should be treated as a valid class for the purposes of s. 115A (9) (g) and s. 115A (17).

The conduct of Ms. Forde Egan

52. Again, this was not an issue that was ventilated in the course of the hearing. However, some reliance is placed on this issue in Mr. Nolan's affidavit and in the notice of objection. Under s. 115A (10) (a) (i) the court, on an application of this kind, is required to have regard to the conduct of a debtor within a two-year period prior to the issue of a protective certificate and in particular to the attempts made by the debtor to seek to pay his or her debts. In Mr. Nolan's affidavit he says that the total payments made by Ms. Forde Egan in the relevant two-year period running from June 2015 to June 2017 was no more than €393.75 per month on average which represented only a small fraction of the total amount due per month during that time of €2,800. This is an issue which I addressed in *Richard Featherston* [2018] IEHC 683. In para. 19 of my judgment in that case, I drew attention to the language of s. 115A (10) which requires the court to have regard to the payment record of the debtor but does not require the court to dismiss an application under s. 115A where the payment record is poor. In para. 21 of my judgment

in that case, I suggested that, where a debtor has demonstrated a contempt for his or her payment obligations, this factor would weigh against the grant of relief under s. 115A. On the other hand, where the debtor is in a position, through appropriate evidence, to demonstrate that there was an inability to make significant payments during the relevant two-year period, the court might be persuaded to grant relief under s. 115A notwithstanding the poor payment record.

53. In this case, Ms. Forde Egan has very fully and comprehensively addressed the family circumstances and it seems to me that there is sufficient evidence before the court to take the view that, notwithstanding the poor payment record of Ms. Forde Egan during the relevant two-year period, this would not, of itself, justify the court refusing the application under s. 115A. Moreover, in the period since the protective certificate was granted in this case, Ms. Forde Egan (as confirmed in para. 33 of her affidavit) has been making payments in the sum of €1,780 per month towards the mortgage debt. This also provides a very useful indicator of the sustainability of the proposed arrangement which envisages monthly payments being made on that scale into the future.

The counter proposal made by the bank

54. The final issue raised by the bank in its notice of objection and in Mr. Nolan's affidavit relates to a counterproposal made by the bank for the treatment of its secured debt. The terms of the counterproposal are described in para. 26 of Mr. Nolan's affidavit. The most material terms can be summarised as follows: -

- (a) The term of the mortgage would be extended by nine years to 23 years (i.e. when Ms. Forde Egan would be 65 years of age);
 - (b) The monthly repayments in respect of the loan would be €2,200 for the first three years of a six-year arrangement;
 - (c) Normal repayments would resume in respect of the fourth and subsequent years of the arrangement and for the remaining terms of the loan;
 - (d) The fees of the practitioner would be paid in even instalments over a six-year period;
 - (e) The special circumstances costs in the sum of €142 per month in respect of motor insurance for Ms. Forde Egan's eldest child would not be allowed. Nor would the special circumstance costs of €230 per month in respect of childcare.
55. The counter-proposal is addressed by the practitioner in his replying affidavit sworn on 25th July, 2018 in the following terms: -

"...the counter-proposal was not appropriate, sustainable or fair in circumstances where the debtor would be required to give up on necessary additional expenditures including childcare and medical costs. Such a proposal is unfair and inequitable as consideration of same would risk the debtor's return to solvency. I say that the debtor felt that the bank's counter-proposal was not within the

affordability of her household. The debtor also believed the bank's alternative was unsustainable. The debtor identified that she will continue to have educational costs for the next ten years as well as medical costs as she does not have a medical card or health insurance."

56. In addition, the practitioner said, in his replying affidavit, that the only feasible way in which the bank could receive payments into the future of €2,653 per month would be to remove all additional expenditure including the provision for a vehicle hire purchase agreement and childcare costs and instead to apply those monies towards repayment of the mortgage. Given the particular circumstances of this family, I believe that the practitioner is right in what he says. It is clear from the evidence of Ms. Forde Egan that this family will have to incur additional expenditure over and above what one would normally find in a two-parent household with three children. It is also clear, having regard to the special needs of the second child in the family that the additional expenditure will continue into the future. In the circumstances, I do not believe that the counter-proposal represents a sustainable or affordable option.
57. It is nonetheless striking that the counter-proposal was made in the terms described by Mr. Nolan in his affidavit. Notwithstanding what the bank has said about the alleged unfairness and prejudice to it as a consequence of Mr. Egan remaining in the property, the counterproposal shows that the bank was prepared to deal with Ms. Forde Egan in relation to repayment of the mortgage loan and it gives the lie to the suggestion that the bank will suffer very significant prejudice as a consequence of an arrangement solely with Ms. Forde Egan.

Conclusion

58. For all of the reasons set out above, I reject the objections which have been made on behalf of the bank to the application under s. 115A. On the contrary, it seems to me that all of the requirements of s. 115A are satisfied in this case. Although I have not dealt, in this judgment, with each of the individual requirements of s. 115A, I confirm that I have considered each one of them and I am of opinion that they have all been satisfied. I therefore believe that the appeal of the bank must be dismissed and the order of the learned Circuit Court judge affirmed. I will hear the parties as to whether any consequential orders are required.