THE HIGH COURT
CIRCUIT APPEAL

[2021] IEHC 186

[Record No. 2020 223 CA]

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012-2015
AND IN THE MATTER OF AIDAN QUIRKE OF 9 KILLUCAN MANOR LAWN, RATHWIRE, CO. WESTMEATH (A DEBTOR)
AND IN THE MATTER OF TRACEY QUIRKE OF 9 KILLUCAN MANOR LAWN, RATHWIRE, CO. WESTMEATH (A DEBTOR)
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012-2015

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 16th day of March 2021.

Introduction

1. This matter concerns an appeal by Aidan Quirke and Tracey Quirke ('the debtors') from the judgment of the Circuit (Personal Insolvency) Court on the Midlands Circuit of 10th December, 2020, in which that court refused the debtors' application pursuant to s.115A of the Personal Insolvency Acts 2012-2015 (hereafter referred to collectively as 'the Act'). The applications of the debtors are interlocking applications, and there is a single creditor of each of the debtors, namely the Governor and Company of Bank of Ireland ("Bank of Ireland", or "the bank").

2. The protective certificate issued on 23rd May, 2019. The Personal Insolvency Arrangement ('PIA') was formulated in July 2019 after a process of consultation with Bank of Ireland. The PIP decided that there should be two separate applications, notwithstanding that the only debt was that owing to Bank of Ireland in respect of its secured debt over the principal private residence ('PPR'). This decision proved somewhat controversial, as we shall see. The s.111A notice was sent to Bank of Ireland on 10th July, 2019 seeking its approval of the PIA, and Bank of Ireland responded on 26th July, 2019, rejecting both PIAs.

3. What is proposed in each of the PIAs is a two-year period, rather than the more usual six-year period. The debtors have two dependent children, both of whom had turned sixteen at the time the PIA was submitted. The bank was owed €306,877.61. The parties have agreed a current market value of €176,000 in respect of this home, which is a four-bed semi-detached home in Rathwire, Co. Westmeath, jointly owned by the debtors. The current market value assigned to the property means that the unsecured balance owing to the bank is €130,877.61. The debtors have a monthly payment due in respect of their mortgage of €1,400, and pay interest at a rate of 4.49%. The term of the mortgage is expressed to be 216 months.

4. The restructure of the mortgage proposed in the PIA is as follows: -

- there will be an extended term of 300 months;
- there will be a repayment of €1,013.94, both during and post-PIA;
- the Personal Insolvency Practitioner ('PIP') expresses the view that there *"is no surplus income capacity to fund a standard PIA…";*

- the net household income between the debtors, both of whom are currently in full-time employment, is €4,312.55;

- the PIP proposes to charge fees of €3,081 and €5,270 including outlay – a total of €8,351 – which corresponds to the amount of the available contribution from the debtors after deduction of set costs for the two-year period of the PIA;

- no lump sum is being introduced.

5. The PIA, as is required by the Act, contains a bankruptcy comparison. As regards the bank's secured indebtedness, the bankruptcy comparison erroneously sets out that the bank will retrieve the full current market value ("CMV"), whereas in fact the terms of the PIA will deliver a slightly higher figure of €182,604.52. After deduction of standard costs in bankruptcy, the CMV of the PPR would in a bankruptcy situation be reduced to €158,400. The position of the debtors therefore is that there is an appreciably better outcome for the bank as a secured creditor as a result of the PIA, and it will in addition have the benefit of interest being paid on the mortgage repayments over the restructured term. The bankruptcy comparison in Mr. Quirke's case suggests that there will be no funds to discharge the unsecured element of the bank's debt, whether under the PIA or in a bankruptcy situation (although in fact the comparison exhibited to the PIA of Mrs. Quirke suggests that there would be a dividend of €937.06). However, the net effect of the bankruptcy comparisons in the two PIAs is that, on the figures given, there would be a better outcome from successful completion of the PIAs than there would be if the debtors were to be adjudicated bankrupt.

6. A notice of objection on behalf of the bank was filed on 16th August, 2019. A substantial affidavit from the objecting creditor was filed on 24th October, 2019, with the PIP responding by affidavit on 9th March, 2020. There was thereafter a full exchange of affidavits which addressed the issues exhaustively.

7. The matter came before me on 1st March, 2021. There were no written submissions in the matter. However, counsel for the debtors and the bank agreed an issue paper, setting out the substantive and discretionary issues which they considered to be arising from the case. While I do not propose to reproduce the issue paper here, it is fair to summarise them by saying that they canvassed whether the arrangements were unfairly prejudicial to the creditor in a number of respects; whether the rejected arrangements return the debtors to solvency and whether they are sustainable; and whether the live balance on the debtors' home loan with the creditor "*was arrived at in accordance with law and whether the Rejected Arrangements provide for payments to the Creditor in accordance with the Debtors' future means".* There were two discretionary issues in which the debtors' repayment history in the two years prior to the issuance of the protective certificate was in issue; the creditor also referred to the fact that it had obtained an order for possession of the principal residence *"which order the debtors unsuccessfully attempted to have set aside".*

Submissions

8. I have considered carefully all of the submissions made to me by counsel and in the affidavits, which canvassed the matters of controversy between the parties at length. I have also had the benefit of listening to the digital audio recording of the hearing to clarify any aspects of the argument in respect of which I had an imperfect note or memory. What follows is a non-exhaustive summary of the respective submissions of counsel for the appellant debtors and the bank, in which I do not seek to set out every submission or nuance thereof.

Submissions on behalf of the debtors

9. Counsel for the debtor submitted that the appeal "*turns on bank policy*", in that the bank had a particular attitude to the provision in the PIA for payment of college fees in future for the children of the debtors. Counsel referred to an email of 11th July, 2019 sent from a bank official to the PIP, in which the official sought backup documentation from the PIP and made some queries and comments in relation to the PIP's proposal, including the following: -

> *"5. The Bank does not support the payment of college fees for adult dependents. As such, the debtors would have the ability to increase their mortgage repayments significantly in year three onwards…".*

10. Counsel laid heavy emphasis on this position adopted by the bank prior to the creditors meeting, stating that it was the "*start, middle and end of why we're here*". He submitted that this policy was the reason why Bank of Ireland had voted against the PIA. It was submitted that payments supporting adult children in college were long recognised as permissible, and that the Official Assignee in Bankruptcy readily permits an allowance to cover the costs of adult children in education for the purpose of calculating an appropriate bankruptcy payment order. The affidavits had expressly stated that the two children intend to go to college to study nursing and physiotherapy respectively, and the reality is that they would have to be funded to some extent. It was asserted by counsel for the debtors that the necessity to allow for the costs of college meant that there would be no funds available to fund a longer arrangement than two years.

11. It was submitted that the PIA did not involve a write-down to market value in the case of the PPR, and that the PIA had been calculated on the basis of affordability and sustainability. In doing so, the PIP had expressly considered the special circumstances which would accrue over six years, rather than the two years contemplated by the PIA. The special circumstance costs were calculated on the basis that the PIA would be accepted by the creditor in July 2019, at a time when the debtors' two daughters were sixteen (they are twins). The PIA contains an exercise in which the special circumstance costs are set out over six years. These show that there are no college costs for the first two years – when the children would still be in school – but thereafter for years, three, four, five and six, there would be monthly special circumstance costs of €1,100 attributable to a subvention in respect of college expenses. A repayments table at p.42 of the PIA in each case shows that the monthly contribution of the debtors to the arrangement, due to the special circumstance costs, reduces in years three to six to €1.26 per month.

12. Counsel submits that, given the need to allow for the costs of contributing to the college education of the debtors' children, the PIA makes maximum use of the resources of the debtors. The bank will continue to be paid interest on the PPR mortgage repayment of 4.49% as before during the course of the PIA.

13. Counsel for the debtors sought to deal with what counsel for the bank referred to as a "*significant history of default*" in repayment of the mortgage. The sequence of events as outlined by counsel for the debtors was as follows: -

- drawdown of the loan for the PPR December 2006;
- arrears first occur in February 2009;
- possession proceedings initiated by the bank September 2014;
- an order granted for possession in November 2016, with a stay of six months.

14. Counsel submitted that there had been "*ups and downs*" in relation to payment history since that point, but that repayments of €1,000 had been made consistently over the last several months. He referred to the affidavit of Mrs. Tracey Quirke of 9th March, 2020, in which Mrs. Quirke acknowledged that, in the period leading up the possession order, the debtors were "*unable to afford repayments towards the mortgage due to the unemployment of my husband*". Mrs. Quirke went on to aver however that there had been "*a change in circumstances in that my husband has now returned to full-time employment since January 2019. He is now receiving a stable income from his current occupation…",* which is as a van driver. I should say that Mrs. Quirke herself is a manager of a crèche.

15. Mrs. Quirke went on to say that "…*we can and will make the payments moving forward due to a more stable income entering the household. My husband has now remained in employment full-time for the last 12 months. His receipt of a more stable income will mean that we will be more consistent in the making of repayments and an improvement in our financial circumstances… [14] I say that we do not seek a write-off as a reward or windfall but rather the reduction of the debt follows as a directive derivative of our affordability and our means to repay the debt. Put simply, we cannot afford to repay the full debt".*

16. Mrs. Quirke goes on to refer to the various alternatives to the PIA, stating that options such as trading down, social housing, mortgage to rent, renting a room to others, and moving to rental accommodation were discussed by the debtors with the PIP, but that none of these options are viable for various reasons. She emphasises the support that the debtors have received from Mrs. Quirke's parents and brother who live within 0.7k of the debtors' home. This in particular has avoided the necessity for the additional expense of childcare over the years.

17. Counsel for the debtors referred to the affidavit replying to Mrs. Quirke's affidavit of Sandra Harrison on behalf of the bank of 26th June, 2020. Counsel was especially critical of para. 7 of this affidavit, in which Ms. Harrison inter alia, avers as follows: -

> *"….The Rejected Arrangement is entirely premised upon [the special circumstances figures] with no recognition of the position when the dependent children become independent in the near future and/or when special circumstances costs reduce. This is very unusual in the context of a standard personal insolvency application which seek [sic] to deal with household set costs as same fluctuate over time in order to address debtors' liabilities in a manner which is fair, equitable and sustainable. No effort has been made in the context of either the Rejected Arrangement or the proposed restructure to assess such changing positions and accordingly there is no credible basis for asserting that the rejected arrangements bring the Debtors' full means to bear."*

18. Counsel for the debtors emphasises that the PIP specifically dealt with how the special circumstance costs would affect the repayments over a six-year period, rather than the two-year period of the PIA. He was also critical of the general approach of the bank, saying that, on the one hand, the bank's objection was that there should be a longer PIA, that the debtors can afford to make larger repayments, that they should not be allowed the third level costs, and that the PIA is unfair because a better outcome is possible for the creditors, and yet on the other hand that the PIA is not in any event sustainable even with the benefit of a write-down and that the debtors are not in a position to make the payments envisaged in the PIA. There was therefore, in the view of counsel for the debtor, a suggestion that insufficient steps had been taken to improve repayments under the PIA, while all the while maintaining that the PIA was not in any event viable. Counsel for the debtor submitted that it was clear from the decision of McDonald J in re *Lisa Parkin* [2019] IEHC 56 that debtors were not to be confined to "reasonable living expenses" ("RLE") under the ISI [Insolvency Service of Ireland] guidelines for the rest of their lives, and that they were entitled to a buffer which might result when special circumstance costs would fall away. Even if the children were to get a SUSI [Student Universal Support Ireland] grant, the buffer of €200 per child would not be unreasonable in all the circumstances.

19. It was submitted that the objections of the bank really came down to its policy decisions not to countenance a write-down of secured debt, and an insistence that an allowance for third-level costs was inappropriate, together with objections to what counsel for the debtor conceded was a poor payment history. Counsel submitted that these debtors had no other options available to them. It is not a situation such as that in re Nuzum [2020] IEHC 164, in which the debtors had a valuable property which would yield equity to provide a home suitable for their needs. Counsel for the debtors submitted that they were aware that they would require to meet the payments under the PIA, "*or be homeless".*

Submissions of the bank

20. Counsel for the bank said that the objections of the bank could be distilled down to four headings: -

(1) Affordability and sustainability of the PIA;

(2) the past conduct of the debtors;

(3) the costs of the PIA; and

(4) the manner in which the live balance had been arrived at.

21. Counsel stated that it was not accepted that, as counsel for the debtors had maintained, the allowance for college costs was where the matter begins and ends. It was submitted that the PIA was "*simply unaffordable and unsustainable*". The PIA was a once in a lifetime opportunity, as it is not possible under the Act to avail of a second PIA. Counsel submitted that, if the PIA was not approved, the debtors could "*come again*" at some future time if they considered it appropriate to do so.

22. Counsel drew attention to the averment of Ms. Harrison at para. 17 of her affidavit of 26th June, 2020, in which she commented that "*…[n]o adequate or sufficient supervision of payments to the bank can be had during such a short period [of two years]…the Bank however notes that the Debtors' current repayments are sporadic and poor...*"

23. Counsel submitted that s.115A(10) requires the court to have regard to the conduct, within the two years prior to the issue of the protective certificate, of the debtor in seeking to pay the debts concerned, and the creditor in seeking to recover the debts due to the creditor, among other matters. It was submitted that, pursuant to the judgment of McDonald J in *re Featherston* [2018] IEHC 683, the court is entitled to have regard to the payments made by the debtors during the period of the protective certificate. In this latter regard, for the twenty-one months to date, if the debtors were to have abided by the payments set out in the PIA, they would have paid a total of €21,292.74, when in fact they had only paid a total of €15,400, which comprises 72% repayment for that period. At no point was the full sum of €1,013.94 due under the PIA lodged to the account, although there had been some payments of €1,000. In February, 2021, there had been a payment of €1,250, but this was the only time in which the amount of €1,013.94 had been reached or exceeded.

24. Counsel made the point that, because of the delay of almost two years since the rejection of the PIA, a decision in the debtors' favour would mean that the PIA would effectively start in year three of the PIP's repayment schedule in the PIA rather than year one, at a time when the children of the debtors are finishing school. This meant that all of the monies available to the debtors would be needed to pay the special circumstance costs arising due to attendance of the children at college. In short, there would be no money to pay the PIP's fees, and on this ground alone, the PIA was not viable.

25. Counsel estimated in fact that there would be a monthly deficit of €345.97 once the PIA was approved, due to the lapse of time since it was rejected by the bank. This amount was calculated in the following way:

- Net income of both debtors €4,312.55;
- deduct set costs year three €1,486.62;
- deduct special circumstance costs in year three of €1,810;
- deduct mortgage payment of €1,013.94;
- deduct PIP fees of €219.60 (Mrs. Quirke) and €128.36 (Mr. Quirke) (deficit €345.97).

26. It was submitted that Mr. Quirke had been unemployed from September 2016 to September 2017, but there had been two years non-payment in total which did not coincide with his period of unemployment.

27. Counsel accepted the principle set out by McDonald J in *re Hurley and Phelan* [2019] IEHC 523 that RLE guidelines are not prescriptive, and that the debtors can live below those guidelines provided they can show an ability and willingness to do so. Counsel submitted however that it was clear from the figures that they did not add up, and that there was no question of the debtors having the wherewithal to perform the PIA according to its terms.

28. In relation to the conduct of the debtors, counsel referred to the possession proceedings against them by the bank, indicating that, in May 2017, Creedon J refused an appeal to set aside the possession order. The court was informed that there is in fact a second appeal which is currently before the courts.

29. Counsel referred to the decision of Simons J in *Tanager DAC v. Ryan* [2019] IEHC 659, in which the court quoted paras. 25 and 26 of the judgment of McDonald J in *re Featherston* [2018] IEHC 683 with approval. Counsel referred particularly to para. 26, in which McDonald J stated as follows: -

> *"That is not to say that there is not an obligation on the debtor to explain a poor payment record. As I have sought to emphasise above, there can be no doubt that there is such an obligation on the debtor. I do not intend to dilute the significance of that obligation in any way. The practitioner/debtor bears the onus of proof in applications under s.115A. It is therefore essential that a poor payment record should be appropriately explained on affidavit by the debtor. Nonetheless, even in cases where the explanation may seem unsatisfactory or incomplete, the court retains a discretion if there are countervailing considerations that apply such as to persuade a court that, in all of the circumstances of the case, the s.115A relief should nevertheless be granted."*

30. Counsel for the bank submitted that the debtors had failed to explain their poor payment record, and referred to them as having a "*blasé*" attitude. She said that there were no payments at all between September 2016 and September 2018, notwithstanding that the debtor was unemployed for only a twelve-month period during that time. The payments during the period when the protective certificate applied were deficient in the manner set out above, whereas in *Featherson* the payments during this period were good. The debtors had not demonstrated their ability to the court to make the repayments. The affidavit evidence submitted by the bank suggested that the bank had in fact engaged with the debtors, but that they had adopted a particular position in relation to orders for possession and had failed to cooperate with the bank, declining to take phone calls etc. In all, it was suggested that the failure of the debtors to explain their position or account for their poor payment record suggested that they were unlikely to be in a position to perform the PIA.

31. As regard the costs of the PIA, it was suggested that the repayment of just over €1,000 per month was comparable to the rental options available, and it was pointed out that the PIA itself had indicated an intention on the part of the debtors to rent in the event that the PIA was not accepted by the bank. In this sense, it was submitted that it was not in fact the case that the alternative to approval of the PIA was homelessness.

32. It was also suggested that the debtors could "*come again*" by virtue of s.91(3) if they were in a position to satisfy the terms of that subsection and obtain a protective certificate.

33. Criticism was also made of the fact that there were separate applications. Section 89(3) of the Act provides for the possibility of a joint application, which the bank submits would have been appropriate in circumstances where both debtors had only one debt, the same in each case. This had given rise to excessive PIP fees, which the bank considered should be no more than €5,000, but were in fact in excess of €8,000.

34. In relation to the live balance, criticism was made of the use by the PIP of the Central Bank rules to calculate the live balance. It was submitted that this should have been dealt with on the basis of affordability, and that it would have been open to the PIP to look at inventive solutions such as warehousing in the event that there was a problem regarding compliance with s.103(1) of the Act.

35. Particular criticism was made of the college costs, on the basis that they will fall away after a period, but that the PIA is "*premised entirely on the current specials*". It was suggested that it might be possible to look at a certain portion of debt being warehoused for, say, six years while the children were at college. It was submitted however that it conferred an excessive benefit on the debtors to allow them to retain the benefit of the special circumstance allowance for college costs even when the children were independent and no longer required such subvention.

Replying submissions of the debtors

36. Counsel for the debtors took issue with the suggestion that there was "*every reality*" to a new PIA. The bank was implacably opposed to any PIA of a type which the debtors could afford. This had been their consistent position throughout the CCMA/MARP/s.98 processes. As counsel put it, there is "*nothing less offensive to the bank than this PIA*". If there were to be a subsequent PIA, in order to make it work, the debtors would need a greater write-down, i.e. €182,000 to €176,000 for the PPR, with a lower interest rate during the currency of the PIA.

37. In any event, it was submitted by counsel for the debtors that they would be unlikely to satisfy the criteria under s.91(3) for the grant of a protective certificate without having to wait twelve months from the expiry of the previous one.

38. In relation to the conduct of the parties, counsel for the debtors stated that between September 2016 and September 2019, there had effectively been three years of inaction on the part of the bank, in which there had been no counterproposal or engagement towards putting a solution in place. He submitted that the order for possession was in place, and as a matter of law was extant and could be relied upon by the bank in the event that the debtor failed to meet payments under the PIA. In this sense, the PIA was undoubtedly a "*last chance saloon*" for the debtors if they wanted to avoid losing their home.

39. Counsel also referred to the clawback provision in the PIA whereby, if there were a default in payment, any amount of secured debt written off would be restored to the bank.

40. The suggestion that the debtors had been "*blasé*" was denied by counsel for the debtors. Mr. Quirke had been out of employment, but now had a steady income, and the affairs of the debtors were back on an even keel. Counsel submitted that the present case was not comparable to the situation in *Featherson*, where in the two years prior to the grant of the protective certificate, the debtor, who was a builder, had a significantly larger income than the debtors in the present case. Notwithstanding the poor payment history in that case, even given a larger income, the court was prepared to approve the coming into effect of the PIA. Counsel submitted that it is clear that the court has discretion to overlook even the worst payment history, if it considers that it is appropriate to do so.

41. As regards the costs of the matter, counsel submitted that it was virtually unheard of to do a joint application on behalf of debtors, and for sound practical reasons. It would often be the case that it would emerge during the course of the process that the circumstances or debts of the debtors were slightly different, and this would be likely to cause problems. It was submitted that it was considered more prudent always to do separate applications, and that this did not necessarily mean that the costs would be increased.

42. Counsel also made the point that, if there were any extra costs occasioned by the use of two applications, these costs would be borne by the debtors – not by the bank. The debtor would have to find the monies to pay the PIP's fees during the currency of the PIA.

43. As regards the inclusion of the college costs, while it is true that these would fall away once the children graduated from college and became independent, counsel submitted that this was simply how the personal insolvency process worked. The debtors would get the benefit of not having to discharge college costs, and this would give them more disposable income. However, this is a normal incident of the process whereby some expenses fall away after a while, with the result that the debtors have an increased buffer to be able to deal with expensive events which occur in life which they may not have been able to address up to that point. Counsel pointed out that, if there had been a six-year PIA, the situation would have been exactly the same.

44. Counsel indicated to the court that he had express instructions from the PIP that, if it were the case that, due to the delay in having the PIA approved, the monies which would have been available to the debtors to discharge his fees would now have to be used to discharge college costs, he would not insist on payment of his fees in accordance with the PIA. In short, while he was not waiving his entitlement to fees, he was expressly authorising counsel to inform the court that his fees would not be the cause of defeating the debtors' ability to perform the PIA.

Discussion and Decision

45. The bank makes particular complaint in relation to the poor payment history of the debtors, particularly between September 2016 and September 2019. It further contends that, as the debtors have not, since the issue of the protective certificate, made payments in accordance with the payments which would be due under the PIA, they have not demonstrated that those payments are affordable. In addition, the bank complains that the debtors have not always shown a proactive attitude towards dealing with their debts.

46. As against that, there can be no doubt that the debtors have had particular difficulties in seeking to deal with their debts. Mr. Quirke was unemployed for some time, and only relatively recently obtained full time stable employment. Mrs. Quirke, who is the main earner in the family, has had interruptions to her earnings due to restrictions consequent upon the Covid-19 pandemic. The debtors make the argument that they are now both employed and ready to embark on the discharge of their liabilities in accordance with the PIA, although it must be said that this would be a more convincing proposition if their payment record had been better during the protective certificate period.

47. I do not accept the submission of counsel for the debtors that the bank was inactive in its dealings with the debtors. The bank sought and obtained a possession order, and did engage in the s.98 process, albeit not very helpfully from the debtors' point of view. However, I think it is true to say that the bank has set its face against the structure of the PIA as proposed by the PIP in the present case. While the complaint was made about there not being a six-year PIA, there was nothing in the affidavit or submissions of the bank which would suggest that such an arrangement would be any more acceptable than the present one. While counsel suggested that the debtors could reformulate the PIA and "*come again",* possibly obtaining a protective certificate under s.91(3), there was no engagement by the bank during the process to suggest how the debtors might circumvent the need to write-down the secured debt significantly.

48. It is abundantly clear that the bank is firm in its view that the PIA is not affordable. However, I do not accept that the costs of the PIP are excessive, or that his decision to make two applications rather than a joint application was incorrect. While there must be occasions in which a joint application is more suitable, I accept the submission that such occasions are extremely rare, and that any extra costs caused by separate applications are to be borne by the debtors rather than the bank.

49. As we have seen, the bank in its email of 11th July, 2019 to the PIP – at which point the PIA was being formulated, and the bank's input was being sought – made the statement to which I have referred at para. 9 above, intimating that the bank would not support the inclusion of the special circumstance costs of supporting the debtors' children in college.

50. Counsel for the debtors understandably – for rhetorical purposes – led off his submissions with this. Counsel for the bank, very prudently and skilfully in my view, concentrated her submissions as regards the college expenses on what she contended was the inability of the debtors to afford them, rather than on a justification of the bank's policy, as stated in black and white by the bank.

51. Let me make it clear that this Court regards sending one's dependent children to college as a special circumstance which fully justifies an allowance to be accorded to a debtor in a PIA. There may be circumstances where an allowance is inappropriate, e.g. where the child is for whatever reason not in fact dependent. It may be that the allowance cannot be stretched so far as to facilitate post-graduate studies which could otherwise be funded. The allowance should not be an encouragement to the "*perpetual student*". However, the notion that the bank in the present case is of the view that the debtors should not use their income to discharge college fees or expenses because *"the debtors would have the ability to increase their mortgage repayments significantly in year three onwards"* is a startling and disquieting one. Effectively, it is proposed that these debtors, already hard pressed to discharge their liabilities but understandably anxious to ensure that their daughters have an opportunity to receive educational and vocational training commensurate with their abilities, should instead refrain from sending them to college in order to make increased payment for a period to the bank.

52. If the debtors adjudicated themselves bankrupt, the evidence suggests that the Official Assignee in Bankruptcy would readily accept an allowance in support of dependent children attending college when calculating the appropriate amount of a bankruptcy payment order. It has long been accepted in personal insolvency applications that college expenses are a special circumstance warranting an allowance in the PIA. The decision in *re Lisa Parkin* [2019] IEHC 56 amply demonstrates this.

53. In my view, the bank's attitude in this regard is indicative of a policy of non-engagement with the normal course of the insolvency process, which may of necessity require allowances to be made to the debtors for the normal events of life, and which may require the writing-down of debt to bring about a viable and workable PIA which will yield a better outcome for both debtors and creditors. This attitude has been prevalent in the present

case, in which the bank has been very clear about what it will not tolerate, and not at all forthcoming with proposals which would indicate what would be acceptable.

54. If the PIA is to be approved, due to the delay of almost two years since the PIA was first rejected, what was "*year three*" in the six-year projection of repayments by the PIP in each of the PIAs will now be "*year one*". The entire of the debtors' income will be subsumed in paying the mortgage, the various set and special circumstance costs, and the reasonable living expenses, given the increased special circumstance costs attributable to the children's college expenses which will be incurred in what will now be "*year one*". Counsel for the bank contends firstly that these expenses are not affordable, particularly given that the PIA also envisages, in year one and year two, discharge of the PIP's fees, and secondly, that the debtors will get a considerable benefit when they no longer have to maintain their children in college. The bank's argument is that the extra income which will accrue to the debtors when this expense disappears should in some manner be applied to an increased reduction of the mortgage debt.

55. A similar argument was made in *re Lisa Parkin*. In that case, a surplus of €358.77 per month would increase when monthly college costs of €549.91 per month for Ms. Parkin's child would cease, notionally at age 23. It was suggested that this surplus should be applied to the warehoused amount which the creditor, PTSB, proposed should be incorporated in the PIA, as opposed to the PIA put forward by the PIP, which involved the write-off at the end of the PIA of secured debt over and above the current market value of the PPR.

56. At para. 59 of his judgment, McDonald J said as follows:

> *"At first sight, this submission by PTSB appears to have significant force particularly in relation to the period after Ms. Parkin's daughter will be able to support herself. It is clear from the judgments of Baker J. that affordability is key in determining what is an appropriate write-down of secured debt. This was emphasised by her in Laura Sweeney at para. 56. If the PIA is approved, the result will be that, even if Ms. Parkin's net salary were to be frozen at €2,909.47 for the rest of her life, only €924.06 of that sum would have to be paid in mortgage costs every month leaving Ms. Parkin with a figure of almost €2,000 per month available to meet her ordinary living expenses and to cover the occasional emergency expense that arises from time to time in everyone's life. That might appear to be an overly generous margin but it has to be borne in mind that, out of that sum (or any enhanced sum in the event that Ms Parkin secures an increase in salary) her ordinary expenses of life will have to be discharged. The Guidelines issued by the ISI envisage that the reasonable living expenses of a single adult with a car will be €1,050.48 per month. That might appear to leave Ms Parkin with a very generous cushion even after her reasonable living expenses are taken into account. However, it must be borne in mind that those guidelines are intended to be applied for the duration of a bankruptcy, a PIA, or a debt settlement arrangement. They are not intended to be a measure of the expenses likely to be incurred over the course of a longer period*

and they are certainly not designed to apply for a lifetime. For example, they envisage an exceptionally modest sum of €0.97 per month for personal costs and an extremely modest sum of €31.34 per month for health. They are also based on very modest provision for contingencies and savings of no more than €43.38 per month. That figure for contingencies seems to me to be manifestly insufficient on a long term basis to deal with the costs every home owner incurs on a recurring basis in the upkeep and maintenance of property (even leaving aside the emergencies that occasionally arise requiring more substantial outlay such as roof repairs). Moreover, while the PTSB analysis has proceeded on the basis that Ms. Parkin's daughter will no longer be dependent after age 23, experience shows that parents continue to have to support children after that age and this is particularly so in the years where a child is trying to establish a new career or where, as sometimes happens, a bright student will remain in university at post-graduate level for a number of years after obtaining a primary degree. In those circumstances, I believe that PTSB is taking an overly optimistic approach in suggesting that Ms Parkin will no longer have to support her daughter once she reaches 23."

57. The approach of the court set out in the foregoing comments appears to me to be correct and applicable to the present case. The key issue regarding write-down of the secured debt is affordability. The debtors will be under significant strain during the period when the children are in college to pay the bills. It will be extremely difficult for the debtors to address any exceptional costs arising, for instance, from the maintenance and upkeep of the debtors' home. They may well have to support their children to some degree even after four years in college.

58. In all the circumstances, it does not seem to me that the benefit the debtors would receive from the decreased expenses when their children no longer require subvention would be unfair or disproportionate. The extra monies may well be badly needed to cover essential expenses which the debtors have not been able to afford up to that point, such as the repair of a boiler, a new fridge-freezer or the replacement of a car. The debtors, if they have adhered to the terms of the restructured debt by that stage, will have earned the benefit of a decrease in their expenses. In my view, the fact of no longer incurring those expenses does not confer an undue or undeserved benefit on the debtors.

59. Is the PIA affordable? Section 99(2)(e) of the Act provides that *"…a Personal Insolvency Arrangement shall not contain any terms which would require the debtor to make payments of such an amount that the debtor would not have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependents…".* In my decision in *re Cremin* [2021] IEHC 80, I endorsed the test set out by Baker J as regards the obligation on the PIP in formulating the PIA in relation to affordability as follows:

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

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

60… [T]he legislation does not require a PIP to formulate a PIA on the basis that it will show that the debtor will be in a position to continue to meet mortgage payments, or other costs of remaining in his or her private residence, either for the balance of the mortgage term, or for the lifetime of the debtor, or for so long as the debtor wishes to continue to reside in that premises. The obligation of the PIP is to formulate a proposal that will, insofar as it is practicable, achieve the desired result, but not guarantee that result".

60. The question is whether or not the PIP has met this standard. There is no doubt that the debtors have a difficult task ahead of them in adhering to the payment schedule for the duration of the restructured term. This will be particularly difficult while their children are at college. However, the debtors are aware of the necessity to make the restructured terms work, given that it is their expressed view that the alternative is homelessness, or at best rental accommodation which they may be equally hard pressed to afford.

61. It seems to me that the terms of the PIA will not be affordable if the debtors have to discharge the PIP's costs as well as college costs for the two years of the arrangement. However, I have through counsel received the solemn assurance of the PIP that he will not allow his fees to be the reason by which the arrangement becomes unaffordable. By this I take to mean that he will not, during the term of the arrangement, oblige the debtors to discharge his fees if by doing so, they are unable to discharge their other costs, and the mortgage repayments in particular.

62. The court must also consider whether, in the exercise of its general discretion, the PIA should be approved, and in particular whether it is unfairly prejudicial to the objecting creditor. It does not seem to me that the banks will obtain any better result through bankruptcy of the debtors or executing the order for possession than would accrue if the PIA is performed according to its terms. Both the clawback provision in the PIA and s.103(3) of the Act provide for the recovery by the bank of any capital written off in the arrangement in the event that the PIA fails and the PPR is sold. The bank has a subsisting order for possession against the debtor's PPR. It will continue to get the benefit of payments both during and after the PIA for a period of 300 months at an interest rate of 4.49%.

63. In all the circumstances, I do not consider that the PIA is unfairly prejudicial to the interests of the bank. While the payment history of the debtors is not impressive, I believe that they understand the importance of adhering to the repayment terms and the consequences if they do not. Both debtors are now in full time employment, and will hopefully face their obligations in the future with renewed determination to make the arrangement work.

64. I consider that the costs set out in the PIA are appropriate, including the costs of the PIP. I do not consider that he acted inappropriately in deciding to make two applications rather

than a joint application. I am satisfied that the live balance of the loan was arrived at appropriately by the PIP.

65. Lastly, I am satisfied that the payments in the PIA are affordable and sustainable. In so holding, I am taking into account the assurance of the PIP to which I have referred above. While the arrangement will require considerable discipline and vigilance on the part of the debtors, particularly while their children are at college, it seems to me that the arrangement is viable and that the debtors can, with prudent and careful budgeting, keep to the terms of the PIA and the restructured payments.

66. In the circumstances, there will be an order confirming the coming into effect of the PIA. The matter will be listed for the first personal insolvency list after delivery of this judgment so that submissions may be made as to the terms of the court's order.