THE HIGH COURT

CIRCUIT APPEAL

[2022] IEHC 562

[Record No. 2021/58CA]

IN THE MATTER OF PART 3, CHAPTER 4

OF THE PERSONAL INSOLVENCY ACTS 2012-2015

AND

IN THE MATTER OF EUGENE POWER OF BALLYGLAVIN PARK,

YOUGHAL, CORK

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9)

OF THE PERSONAL INSOLVENCY ACTS 2012-2015

THE HIGH COURT

CIRCUIT APPEAL

[Record No. 2021/59CA]

IN THE MATTER OF PART 3, CHAPTER 4

OF THE PERSONAL INSOLVENCY ACTS 2012-2015

AND

IN THE MATTER OF MARY POWER OF BALLYGLAVIN PARK,

YOUGHAL, CORK

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 12th day of October 2022.

Introduction

1. This judgment concerns two appeals by Eugene Power and Mary Power ('the debtors') against the refusal of the Circuit Court (His Honour Judge Patrick Meghen) on 6th May 2021 in each of the debtors' cases of an application by their personal insolvency practitioner John O'Callaghan ('the PIP') pursuant to s.115A(9) of the Personal Insolvency Acts 2012-2015 (collectively referred to herein as 'the Act'). The debtors are a married couple, with shared domestic circumstances, and counsel for the PIP dealt with their applications at the hearing as if there were effectively a single appeal.

2. No written submissions were proffered by the parties. However, an issue paper was agreed by counsel, and the agreed issues were stated to be as follows: -

> "(1) Whether the debtors' financial position has been adequately vouched.
>
> (2) Whether the PIA is sustainable having regard to the fact that the arrangement would require the debtors to live beneath the ISI's guidelines on reasonable living expenses.
>
> (3) Whether the PIA is unfairly prejudicial to the interests of the objecting creditor."

3. There were certain other objections in the notice of objection dated 6th August 2019 filed by Promontoria Scariff Designated Activity Company ('the objecting creditor'), notably the proposition that it was not accepted that a valid class of creditors had accepted the personal insolvency arrangements ('PIAs') by a majority of over fifty percent of the value of the debts owed to the class. However, this objection

was not pursued at the hearing, and it was agreed that the only issues were those set out in the issue paper.

4. Essentially, the objecting creditor argued that, given the debtors' circumstances, the PIAs as proposed were neither affordable nor sustainable. As the onus of proof in this regard is on the PIP, particular regard must be had to the circumstances of the debtors as set out in the affidavits of the debtors and the PIP, and particularly in the PIAs themselves.

The PIAs

5. A meeting of creditors was held on 12th July 2019 to consider the terms of the PIAs. The arrangements were rejected by the creditors: in Mr. Power's case, 13.69% of creditors present and voting voted in favour of the PIA while 86.31% of creditors present and voting voted against it. Those creditors were the objecting creditor and Cabot Financial (Ireland) Limited, which is owed an unsecured debt of €175,158.75. Mrs. Power's PIA was defeated by a similar margin.

6. The debtors proffered separate PIAs, although their assets are jointly held. Their debts are for the most part also jointly held, with some minor differences: Mr. Power's specified debt creditors amount to €382,613, while Mrs. Power's specified debt creditors amount to €377,378.80. In the interests of concision and in order to avoid repetition, I propose in this judgment to concentrate on Mr. Power's PIA; where Mrs. Power's circumstances differ and require to be emphasised, this is set out below.

7. Mr. Power was born on 25th June 1975; Mrs. Power was born on 20th August 1980. At the time of writing this judgment, they are 47 and 42 years of age respectively. They are married and live in the permanent private residence ('PPR') in Youghal, County Cork with their five children who, at the time of the presentation of the PIA in July 2019, were, in terms of age, 4, 7, 9, 10 and 13. Mr. Power is a car

body repairer and driver with Barry Metal Recycling Limited; Mrs. Power is a homemaker and fulltime carer for their eldest child, who has epilepsy.

8. The current market value of the PPR is agreed in the PIA at €290,000. The mortgage balance, owed to the objecting creditor, is €155,062.16. There is therefore €134,937.84 equity in the house as of July 2019. There are however other liabilities. A sum of €173,845.28 is owed to Cabot Financial (Ireland) Limited, which is described as a "residual debt from KBC". Bank of Ireland has registered a judgment mortgage against both debtors in respect of a personal loan in the sum of €36,094.50. Mr. Power has a liability of €16,297.59 to Youghal Credit Union Limited, although that entity voted in favour of the PIA. Mr. Power's total liabilities are €382,613.

9. As regards income, the debtors have joint income of €3,786.59, of which 66% - €2,499.15 – is attributed to Mr. Power. His set costs are €1,648.92 – 66% of the household's set costs of €2,541.90 – and after deduction of a monthly mortgage repayment of €358.23 (total €542.78), a monthly payment in respect of the Bank of Ireland judgment, and special circumstances cost of €251.76, it is estimated that Mr. Power will have an available contribution for creditors of €174.06. Mrs. Power's PIA suggests that her available contribution will be €89.67.

10. At part III of the PIA, some background to the circumstances of the debtors is given. It appears that the debtors fell into money problems, "due to the timing of the sale of their old PPR in Castlemartyr", with that house "selling for less than they had hoped leaving a large residual with KBC". Unfortunately, the financial pressure contributed to Mr. Power suffering a suspected heart attack and as a result he was unable to work for a period of time. He avers at para. 40 of his replying affidavit of 12th February 2021 that financial stress has also "had a significant effect on my wife's

mental health". He goes on in that paragraph to say that the Castlemartyr property "was eventually sold at a significant loss leaving a large unsecured debt".

11. Mr. Power works as a car and truck repairer for Barry Metal Recycling Limited in Youghal, County Cork. That company has confirmed that Mr. Power has recently passed a specific driver's test for trucks which will allow him to work one more day a week, which will accordingly increase his earnings.

12. The PIA states that Mrs. Power is a homemaker whose only income is her carer's allowance of €293.28 per week. The debtors, as of July 2019, had recently cancelled their health cover as they realised that they could no longer afford it if the PIA were to be sustainable.

13. The proposed arrangement is a twelve-month PIA. While this does not allow much time for the PIA to be "road-tested", the PIP comments that "the family's total set costs increase in Year 2 and again in Year 4 of the PIA and the monthly surplus is not enough to cover PIP fees or pay an increased dividend to the unsecured creditors…". The debtors propose to procure a €5,000 lump sum from a family friend to pay the PIP's fees and this lump sum has been split in line with the RLE split, *i.e.* €3,000 to Mr. Power's PIA and €2,000 to Mrs. Power's PIA. The full outstanding balance of the PPR mortgage is restructured under the PIA and is to be repaid in full over the 324-month term. The debtors will make monthly payments of approximately €100 per month over a period of fifteen years to discharge the Bank of Ireland judgment in full. The PIP contends that the proposal offers a better return to unsecured creditors than would occur in bankruptcy, although it must be said that this advantage is marginal: 1% under the PIA as opposed to nothing in bankruptcy. The new extended period of 324 months – 27 years – will mean that the debtors will be making their final payments when Mr. Power is in his early 70s and Mrs. Power is in

her late 60s. The PIP fees for the arrangement are modest: €3,000 and €2,000 euro respectively, including VAT and outlay.

The objecting creditor's position

14. The implications for the objecting creditors' PPR mortgage are expressed at para. 12 of the affidavit of Graeme Whelan of 10th September 2020 (on behalf of the objecting creditor) as follows:

> "(a) The arrears on the mortgage loan, which currently stand at €27,082.81, are to be capitalised;
>
> (b) the term of the mortgage loan is to be extended from 260 months to 324 months;
>
> (c) the interest rate will be reduced from a tracker rate operating at a margin of 1.15% above the ECB rate to a tracker rate operating at a margin of 0.95% above the ECB rate;
>
> (d) capital and interest repayments on the restructured mortgage will be €542.78."

15. The objecting creditor is of the view that, if the PIA is approved, the debtors will be required to forego a reasonable standard of living for themselves and their dependents. It is suggested that the PIA is unsustainable and will not return the debtors to solvency, and that there is a "real risk" that the debtors and their dependents will suffer severe hardship in attempting to comply with its terms.

16. Specifically, Mr. Whelan avers at para. 24 of his affidavit of 10th September 2020 as follows:

> "In 3 years' time (when they have 3 children in primary education and two in secondary education), their set costs will be €3,108.33. When the special circumstances costs (€381.45), payments to Bank of Ireland (€100.26), and the

mortgage repayments (€542.78) are all accounted for, the debtors' monthly expenditure will be in the region of €4,133. This leaves a monthly shortfall of €346 per month. That shortfall will increase to €558.79 per month the very next year when 4 of the debtors' children will be in second level education. It is unlikely that the shortfall will be overcome in the reasonably foreseeable future, particularly if the debtors' children progress to third level education".

Reasonable living expenses

17. The objecting creditor's calculations in the paragraph above are - surprisingly, as we shall see - not challenged in the affidavits of the PIP or Mr. Power. The debtor's costs in the PIA are based on the table of reasonable living expenses ('RLEs') compiled by the Insolvency Service of Ireland ('ISI') pursuant to its obligation under s.23 of the Act. The basis for the calculation of RLEs is set out in the August 2018 guidelines, which were the applicable guidelines at the time of hearing in November 2021 (there are new guidelines as of April 2022). The legal position in relation to RLEs as regards their status and the role they play in determining the affordability and sustainability of a PIA was addressed by McDonald J. at paras. 12 to 24 of his judgment in *Re Hurley and Phelan, Debtors* [2019] IEHC 523; I agree with and gratefully adopt this analysis for the purposes of the present judgment.

18. It is necessary to address how the RLEs will affect the debtors in terms of calculating the income they will in theory have to address the family's needs and debt commitments. The figures arrived at in the August 2018 guidelines by the ISI provide, in the case of a couple with children and a car, for RLEs of €1,420.83 per month. This is the sum which the ISI considers is an appropriate guideline for what constitutes, for such a couple, "a reasonable standard of living and reasonable living expenses..." [s.23(1) of the Act]. Separate estimates are made in respect of each child. An infant of

such a couple will have a monthly attributed cost of €232.26; a pre-school child €56.27; a child attending primary school €197.12; and a child attending secondary school €409.91. Each of the third and fourth children are estimated to warrant a further €10 cost, approximately.

19. The objecting creditor's point is that costs will increase considerably as children progress from pre-school into primary school, and again from primary school into secondary school. At the time of formulation of the PIAs – July 2019 – the ages of the children were 13, 10, 9, 7 and 4. The eldest child was about to start secondary school, three children were in primary school, and one child was in pre-school. The objecting creditor contends that, as the three children in primary school will progress to secondary school, it is likely that, for at least one year, there will be four children in secondary school. This would result in - at least for that year - the monthly deficit of €558.79 to which Mr. Whelan refers in the averments at para. 16 above.

The debtors' income and expenses

20. Appendix 4 to the PIA sets out in detail the monthly income on which the debtors rely to discharge their liabilities. Mr. Power earns €878.99 from two days' work as a car dismantler per week. A recent monthly increase in wages of €433 - approximately €100 per week - is factored into his earnings. He receives family income support of €1,203.74 monthly due to his low income threshold. Mrs. Power receives a carer's allowance of €1,270.86 monthly. These sources of income come to €3,786.59, and in addition, counsel informed the court at the hearing that the debtors receive €700 in children's allowances. Their income is therefore just under €4,500 per month.

21. The debtors had, in July 2019, set costs of €2,498.37. The PIP concedes that this would rise to €2,639.22 in "year two" and to €3,064.80 in "year four", when there

would be three children in secondary school and two in primary school. When special circumstance costs and discharge of mortgage payments of €530 per month, together with a monthly payment of €100 per month to discharge the Bank of Ireland judgment mortgage, are taken into account, it appears to be accepted by the PIP that there are monthly deficits in the order of the sums set out in the affidavit on behalf of the objecting creditor as set out at para. 16 above.

22. These "pinch points" are addressed by both Mr. Power and the PIP. At para. 17 of his affidavit of 12th February 2021, Mr. Power avers as follows:

> "17. I say that the sum below the RLE is manageable, being the sum of €346 per month in three years' time rising to €558 in four years. I say that I considered same, discussed it with my PIP, and in my view this sum is not sufficient to make the PIA unsustainable and I am sure I can maintain a reasonable standard of living and meet the payments as specified in the PIA. I say that my health is improving and I am hopeful that I will be in a position to work more hours during the future and increase the family income however if my income remains as is I say this will not be an issue at all but I will deal with the issue as a worst case scenario."

23. The PIP addresses the shortfall in his affidavit of 29th April 2021 as follows: -

> "20. I say that the sum below the RLE is manageable, being the sum of €346 per month in three years' time rising to €558 in four years. I say that I considered same, discussed it with the debtor, and in my view this sum is not sufficient to make the PIA unsustainable and I am sure the debtor can maintain a reasonable standard of living and meet the payments as specified in the PIA. I say that he reports that his health is improving and he is hopeful that he will be in a position to work more hours during the future and increase the family

income however if his income remains as is we (debtor and PIP) say this will not be an issue at all. I say that the PIA does not require the debtor (or others) to forego a reasonable standard of living.

21. I say that the position of concern will only arise in years 4, 5 and 6 and then drop in year 7 when the eldest moves out of fulltime education. I say that it will be for a short period of time, namely three years, manageable for the reasons stated above and thereafter it will no longer be an issue. I say and hope that matters improve and that it will not be an issue at all but I will deal with the issue as a worst case scenario."

24. It will be clear from these paragraphs that the PIP, who has had the benefit of meeting Mr. Power and discussing the debtor' circumstances, accepts what Mr. Power says and is supportive of his proposition that, even in circumstances where he is not in a position to work more hours in the future and increase the family income, the debtor will be able to make the payments under the PIA notwithstanding that the shortfall of costs rises as high as €558.79. However, something more is required. The PIP acts as an independent intermediary and has an obligation to subject the basis upon which the debtors maintain the PIA is affordable to critical analysis, and to present a reasoned view to the court as to whether reliance may be placed on what the debtors contend. Unfortunately, it is difficult to discern from the PIP's affidavit any evidence that would underpin the vague and general assertions made by Mr. Power as to the debtor's ability to meet such a shortfall.

25. Both Mr. Power and the PIP advanced reasons in their respective affidavits as to why, even in a "worst case scenario" the PIA is sustainable. Mr. Power mentions his strong motivation to make the PIA work [paras. 22 to 23] and points out at para. 24 that "…it is now 21 months since my protective certificate was issued. In that time,

I have been making payments to Promontoria Scariff in an effort to show my bona fides and the sustainability of my PIA". Indeed, it appeared at the hearing to be accepted that, as of November 2021, the debtors' repayments had by and large been consistently made.

26. Mr. Power emphasises that none of the usual options, such as trading down, social housing, mortgage to rent, or rental accommodation are appropriate given that "due to the cost of same and the size of my family…the cost of rent would be far in excess of the mortgage payments and thus if I had to rent then this would push me far below the ISI RLE…" [para. 28]. He avers at para. 8 of his affidavit that, if the PIA is not approved, "…then repossession and/or a repossession order proceedings are imminent for my family home". It was not urged at the hearing by the objecting creditor that the debtors had a more practical or obvious way of dealing with their affairs, whether by the methods referred to above or otherwise; rather, counsel for the objecting creditor suggested that it would do a disservice to the debtors to approve PIAs, which pursuant to s.90 of the Act are a "once only" accommodation, which are patently unsustainable.

27. Mr. Power is hopeful of getting more work, particularly now that he has an extra qualification as a truck driver. Counsel expressed the view in submissions that, given the tight financial circumstances, it would surely be possible for Mr. Power to pick up casual or extra work either driving or in car dismantling which would provide the extra money required for the years when the RLEs are particularly high. As the PIP puts it at para. 24 of his affidavit: -

> "…the debtor has explained to me that they are in a position to maintain a reasonable standard of living (which is beneath the guidelines as set out) in circumstances where the debtors have engaged all costs cutting measures –

they live frugally, they have made all payments sought of them to date to show their commitment. Mr. Eugene Power works odd jobs which assist, and now has the chance to take on extra work/hours driving, to ensure that the family unit is maintained and supported…".

28. It would have been preferable if, rather than the PIP relaying what Mr. Power had said to him, there had been evidence in this regard from Mr. Power himself, with some detail as to the income to be expected from the "odd jobs" or extra work driving. I would also have expected some evidence as to what, if any, effect on the family income support payments an increase in income might have had.

29. The situation is somewhat complicated by the fact that the Circuit Court cases were not heard until May 2021, almost two years after the formulation of the PIAs, with the appeals being heard towards the end of November 2021. It is therefore over three years since the PIAs were put before the creditors, so the court must take into account that matters have moved on since the meeting of creditors.

30. The debtors submit that they have discharged the sum of €530 to the objecting creditor monthly since the grant of the protective certificate. They accept that there was some default, in specific circumstances notified to the objecting creditor, which has now been rectified, and counsel for the debtors stated in submissions, without any contradiction from counsel for the objecting creditor, that all payments in the year prior to the hearing in the High Court had been discharged. It is suggested by the debtors that, prior to the protective certificate, they paid what they could. Counsel submits that the "only true test" of the affordability and sustainability of the PIA is whether the debtors have managed to make the payments in accordance with the proposal. The debtors have managed this so far, although they now face a period in which their costs will rise: presently, the debtors have two children in secondary

school and three in primary school, with the prospect of the third child going into secondary school in a year's time.

31. The debtors maintain that there is a three year "pinch", after which things will ease considerably after the eldest child graduates from secondary school. They appear to accept the objecting creditors' contention that this will at one point give rise to a situation where they will have to find an extra €558.79 per month in order to discharge their liabilities. The objecting creditor is of the view, as set out in the excerpt from Mr. Whelan's affidavit quoted at para. 16 above, that this situation continues indefinitely as the various children wish to progress to third level education.

32. Accordingly, the objecting creditor is of the view that the PIA is obviously unsustainable. Counsel made reference to dicta of this Court in *Aidan and Tracey Quirke* [2021] IEHC 186, in which I stated 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". That comment was made in the context that the objecting creditor in that case stated that it would not support the inclusion of special circumstance costs of supporting the debtor's children at college. It was contended that the necessity to continue to incur cost for college-going dependents would ensure in the present case that the debtors were always in the region of €500 to €600 below the monthly income required to ensure the sustainability of the PIA.

33. I do not think the dicta in *Quirke* support this contention. In my view, debtors who wish to include a special circumstance cost in their PIA in respect of sending their children to college are entitled to do so. The debtors must also show that this cost does not render the PIA unsustainable. However, there is no obligation on debtors to provide for the cost of third level education for their children. In the present case, it is

not suggested that the cost of third level education for the eldest or indeed any of the children must be borne by the debtors, who are under significant pressure as it is to make their finances work.

34. Counsel for the debtors specifically submits that the RLE burden will be eased when the eldest child leaves school, as the set costs will reduce by €409.91. While it is unfortunate that the debtors will not be in a position to fund a third level education for their eldest child, it may be that this can be funded in some other way. Students often seek to pay for third level education with wages from part-time and summer jobs, scholarships and student grants. One would hope that the children's aspirations to study at third level would not be stifled because of their parents' inability to assist them.

35. While I have no evidence as to whether the fact of the eldest child reaching eighteen would diminish the childrens' allowance of €700 monthly, my understanding is that no such benefit is available when a child reaches eighteen years of age. As the second and successive children leave school, the costs that the debtors would have to meet will decrease, albeit that this will be matched in each case by a loss of childrens' allowance.

Re Hurley and Phelan, debtors

36. Counsel for the debtors argues that the facts in *Hurley and Phelan* are closely analogous to the facts of the present case and that the approach adopted by the court in that case should also be adopted in the present case.

37. That case also involved a twelve-month PIA. There was a write-off of a balance of mortgage loan debt on the Hurleys' family home; an option which is not open to the debtors in the present case as their mortgage is in positive equity. The mortgage was to be restructured by extending the term to twenty-nine years with a

reduction in the interest rate for the twelve-month duration of the arrangement; there were certain other terms of the PIA which are not germane to the present case.

38. In the case of the Hurley family, the parent debtors also had to deal with the problem of children passing from primary to secondary school. McDonald J. found that, for the period between 2020 and 2023, the family would have to live on €245.56 per month less than the figure of €2,660.56 set out in the ISI guidelines. The objecting creditor argued that, in these circumstances, it could not be said that the debtors Mr. and Mrs. Hurley would have sufficient income to maintain a reasonable standard of living and that, as a consequence, the requirements of s.99(2)(e) of the Act had not been satisfied in their case.

39. The court found that the Hurley family had succeeded in living at a level less than the ISI guidelines for a three-year period, and this showed that they were "clearly a very resourceful family who are well capable of economising and living within their means". At para. 32 of his judgment, McDonald J had this to say: -

> "… for a family in the position of the Hurleys, they have to make a choice as to whether they can, by economising, live for a three-year period at a level beneath the ISI guidelines or lose their home. In his affidavit (quoted above), Mr. Hurley explains in graphic terms the stark choice facing him and his family. As noted above, they have shown, by their actions to date, that they are capable of living beneath the level of the ISI guidelines. I do not believe that it makes any difference, in the context of this case, how (or in what areas) the economies or cut-backs are achieved. The fact is that the Hurley family have been able to make the necessary adjustments to their living costs to continue making substantial payments to Bank of Ireland notwithstanding that the payments made mean that they are living on an income beneath that measured

by the ISI to be appropriate. For them to lose their home would be far more injurious to them as a family unit than, for example, cutting back to some extent on social inclusion and participation or on other elements of the items specified in the guidelines. By cutting back and economising in that way, they will be able to keep their home and thereby maintain a stable family life. The uncontradicted evidence in the case is that the cost of renting a similar property in the area in which they live would be significantly higher than the repayments envisaged under the proposed interlocking arrangement. The evidence is that the cost of alternative accommodation would work out at €1,450 per month. That is manifestly not affordable to the Hurley family… Accordingly, there is very real substance to the suggestion made by Mr. Hurley in his affidavit that, if the family were to lose their present home, they could well find it impossible to secure alternative accommodation at a rent they could afford with the result that they would be made homeless. The loss of the family home would be much more injurious to the family than making cutbacks for a period of three years in their living costs".

40. McDonald J came to a similar view in respect of Ms Phelan at para 43.: "Furthermore, in my view, the period in question is sufficiently short to enable someone in Ms. Phelan's position to weather whatever hardship may arise for her during that relatively brief period. On any view, the hardship sustained by Ms. Phelan during that relatively brief period will be significantly less than the very severe hardship that would ensue for her and her family if the application under s.115A were to be rejected and she was to lose her family home. In addition, it is inconceivable that her adult children (who currently reside in the home with her) would not be prepared to contribute more to the living costs of

the household during this period if that became necessary. While no such commitment is recorded in the papers before the court, I believe that it is very probable that the adult children would do so in the event that the household were to suffer some level of hardship during the brief period described above".

41. While the circumstance in Ms Phelan's case of adult children contributing to the family's expenses does not arise in the case of Mr. and Mrs. Power, it is clear from the judgment that the court took into account the fact that the alternative for both the Hurley family and the Phelan family was that they would lose their family homes. There is not however any suggestion in the judgment of McDonald J that the requirement in s.99(2)(e) of the Act 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…", does not apply. The debtor is still required to comply with the requirement of s.99(2)(e), and s.115A(8)(a)(ii) makes it clear that the requirements of s.99 are mandatory.

Reasonable standard of living?

42. The issue, then, is whether or not the debtors have proved to the satisfaction of the court that they will have sufficient income to maintain a reasonable standard of living for themselves and their dependents, notwithstanding that the income falls below the level envisaged by the RLEs as being necessary to provide such a standard.

43. Having had the opportunity to review the calculations of set costs set out in the PIA and in the objecting creditor's affidavit, it seems to me that there is considerable confusion as to what exactly the correct figures are. As I have mentioned above, the PIP appears to accept the identification of the shortfall set out at para. 24 of Mr.

Whelan's affidavit and quoted at para. 16 above. However, these figures appear to conflict with the PIP's own figures as set out in the PIA.

44. By way of illustration, the PIP at para. 3 of part III of the PIA sets out a projection of set costs, using the ISI's RLEs, for five years into the future as follows: -

Total Set Costs							
Couple dependents		€1,420.83	€1,420.83	€1,420.83	€1,420.83	€1,420.83	€1,420.83
21/09/05 – boy in 1st year – has epilepsy	13	€409.91	€409.91	€409.91	€409.91	€409.91	€409.91
10/03/08 – boy in 4th class	10	€197.12	€197.12	€197.12	€409.91	€409.91	€409.91
10/04/09 – girl in 4th class	9	€197.12	€197.12	€197.12	€409.91	€409.91	€409.91
20/08/11 – boy in 1st class	7	€197.12	€197.12	€197.12	€197.12	€197.12	€197.12
14/04/2014 in pre-school Sept 19	4	€56.27	€197.12	€197.12	€197.12	€197.12	€197.12
Extra 3rd and 4th child		€20.00	€20.00	€20.00	€20.00	€20.00	€20.00
		€2,498.37	€2,639.22	€2,639.22	€3,064.80	€3,064.80	€3,064.80

45. There are discrepancies between this table and the figures in Mr. Whelan's affidavit. He states that, in three years' time when there are three children in primary education and two in secondary education, the set costs will be €3,108.33. The PIP does not identify any year in which there are three children in primary school and two in secondary school; he does however accept that when the eldest child is in fourth year of school, there will be three children in secondary school and two in primary school: see the fourth to sixth column in the table above. That situation will continue until the eldest child leaves school at the end of his sixth year. The PIP calculates the set costs for this situation – correctly according to my calculations – at €3,064.80, whereas Mr. Whelan's calculation of set costs for three children in primary school and

two in secondary school is €3,108.33. This could hardly be correct, as there is greater cost in supporting a secondary school-attending child (€409.91) than a primary school student (€197.12), according to the RLEs.

46. The special circumstance costs, payments to Bank of Ireland and the mortgage repayments to the objecting creditor are identified by Mr. Whelan as €381.45, €100.26 and €542.78 respectively. In appendix 4 of the PIA, these figures are identified as €359.80 – consisting of €259.80 counselling and €100 "general medical" – and €530 for the mortgage repayment. No figure is identified in the appendix for repayments to Bank of Ireland, but the summary of the arrangement at the outset of the PIA identifies that figure as €100.26. If one takes the figures proffered in the PIA to establish the maximum monthly shortfall arising from there being three children in secondary school and two children in primary school, one arrives at the following calculation: -

Set costs	€3,064.80
Special circumstances costs	€359.80
Bank of Ireland repayment	€100.26
Mortgage repayment	€530.00
Total cost:	€4,054.86
Income	(€3,786.59)
Surplus of cost over income	€268.27

47. The PIP's table at para. 44 above does not recognise a situation where there are four children in secondary school at the same time, contrary to Mr. Whelan's averment at para. 16 above. Once again, this appears to be correct: when the eldest child is eighteen, commencing his final year in school, his siblings will be fifteen, fourteen, twelve and nine. On the basis of the information in the table set out at para.

44 above, when the eighteen-year-old is starting his sixth year, the twelve-year-old, six years younger, will be in final year of primary school. The following year, one assumes that the eldest child will have left school when the fourth child has started in secondary school. There will still be three children in secondary school, but no RLE cost in respect of the eldest child, who hopefully at that stage will either find gainful employment or support himself in third level education.

48. The "worst case scenario" therefore as regards RLEs would appear to be that, for three years, when there are three children in secondary school and two in primary school, there is a shortfall of €268.27 per month. The figures however do not take account of the monthly childrens' allowances of €700, which may be claimed until each of the children reaches eighteen.

Conclusions

49. The concern in approving a PIA where the arrangement envisages the debtors living at a level below RLEs is that the debtors will be embarking on an arrangement that is not sustainable, and that if the arrangement fails, they will have lost their only opportunity to reach an accommodation with their creditors. While it is clear from the judgment in *Hurley and Phelan* that the court's obligation is to take the ISI's RLEs into account rather than insist on them being strictly observed, the court must consider carefully any case in which the debtor's income dips below RLEs and other costs to satisfy itself that there is "sufficient income to maintain a reasonable standard of living for the debtor and his or her dependents" … [s.99(2)(e)], and that the debtor is "reasonably likely to be able to comply with the terms of the proposed arrangement…" [s.115A(9)(c)].

50. Counsel for the objecting creditor seems to me to be correct when he submits that sympathy for the debtor cannot be a factor which affects the court's

consideration. Counsel readily conceded that the present instance was a "sympathetic case" in which the debtors are doing their best in very difficult circumstances. However, the fact that there may not be any other attractive options for the debtors cannot deflect the court from insisting on compliance with the provisions of the Act to which I have referred in the preceding paragraph.

51. It is also the case, as counsel agreed, that the greater the departure from the RLEs, the greater the onus on the debtor to satisfy the court that the departure is manageable. In this regard, I found the evidence of the debtors somewhat vague and aspirational; it was lacking in detail or calculations to support Mr. Power's contention as to the possibility of picking up extra work, or the effect of earning more income on existing income supports.

52. Having said all that, it seems to me that the debtors have a very powerful incentive indeed to ensure that the PIA succeeds. The prospect of losing their home will, I am sure, focus their minds on the necessity to ensure that monthly payments are met. In this regard, it is not unreasonable to assume that Mr. Power can pick up extra work as he suggests. As the stress of the possible loss of the family home recedes, it is to be hoped that the need for counselling, of which Mrs. Power has availed since 2019, will diminish or no longer be necessary. The affidavits suggest that the debtors are very conscious of the need, and the means by which, to cut their cloth according to their measure. The excellent payment records since obtaining the protective certificate, and the fact that friends are prepared to advance a lump sum of €5,000, show that the debtors have the discipline to adhere to the arrangement, and the support of people close to them.

53. None of this would avail the debtors if, as the objecting creditor suggested, there was a shortfall in excess of €500 per month for several years. It would not be

fair to the debtors to impose an unattainable goal on them. However, it seems to me that, for the reasons set out above, the shortfall is significantly less than the objecting creditor contends, and at €268.27 per month for three years at its worst point, is in the range of the sort of shortfall which McDonald J. considered permissible in *Hurley and Phelan*. It seems to me that, as in that case, the debtors have established that notwithstanding that the arrangement may cause them to live below RLEs at certain points, they will be able to arrange their affairs so that they and their children can generate sufficient income to maintain a reasonable standard of living.

54. That being so, I consider both applications by the debtors to be appropriate cases in which to grant the relief claimed under s.115A(9) of the Act. I will therefore make orders setting aside the orders made by the learned Circuit Court judge on 6th May 2021 and will confirm the coming into effect of the proposals for the PIAs in each case in accordance with their terms.

Approved

12.10.2022