

**THE HIGH COURT  
CIRCUIT APPEALS**

[2023] IEHC 346

[2022/CA 175]

[2022/CA 177]

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

**AND**

**IN THE MATTER OF NUALA MCCARTHY OF SLANEY ASH, BADGER'S HILL POLEHORE,  
BARTOWN, COUNTY WEXFORD**

**AND**

**IN THE MATTER OF EDWARD MCCARTHY OF SLANEY ASH, BADGER'S HILL POLEHORE,  
BARTOWN, COUNTY WEXFORD**

**("THE DEBTORS")**

**AND**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A (9) OF THE  
PERSONAL INSOLVENCY ACT 2012 TO 2015**

**JUDGMENT of The Hon. Justice Alexander Owens delivered on the 25<sup>th</sup> day of May 2023.**

1. The first issue in these appeals is whether the debtors have proved on the balance of probability that they are "reasonably likely" to be able to comply with the terms of proposed Personal Insolvency Arrangements, as required by s.115A(9)(c) of the Personal Insolvency Act 2012 (the 2012 Act).
2. The second issue is whether the proposed Arrangements have been formulated in compliance with s.104(2) of the 2012 Act, as required by s.115A(9)(a) of that Act. An issue arises as to whether the debtors have demonstrated that "the costs of enabling the debtor to continue to reside in the debtor's principal private residence are not disproportionately large": see s.115A(9)(d) of the 2012 Act.
3. Section 115A(9)(a) and (c) of the 2012 Act state as follows: "The court, following a hearing under this section, may make an order confirming the coming into effect of the proposed Personal Insolvency Arrangement only where it is satisfied that- (a) the terms of the proposed Arrangement have been formulated in compliance with section 104, ... (c) having regard to all relevant matters, including the financial circumstances of the debtor and the matters referred to in *subsection (10)(a)*, the debtor is reasonably likely to be able to comply with the terms of the proposed Arrangement..."
4. The third issue is whether the debtors should trade down and use the surplus generated by a sale of their house and an incentive payment of €15,000 to buy a new house. This is allied to the second issue.
5. The fourth issue is whether the proposed Arrangements comply with a mandatory requirement in s.99(2)(e) of the 2012 Act which precludes inclusion in any Arrangement of a term 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 dependants.”

6. The evidence establishes that the proposed Personal Insolvency Arrangements meet the criteria specified in s.115A(9) of the 2012 Act and other relevant statutory requirements.
7. This Court has not been given any detail of the current loan balance. The debtors may need to make a payment to reduce that balance to the amount specified in their proposed Arrangements.
8. These appeals will be listed for mention to the next Monday personal insolvency list on 12 June 2023 for formal orders.
9. The debtors are Edward McCarthy and his wife Nuala McCarthy. They live some 6 km outside Wexford, near the Slaney River. They own a bungalow which they built when they came back to Ireland from the UK some years ago. Nuala McCarthy is in poor health and this house has been modified to accommodate her disability.
10. Their house is mortgaged to Ulster Bank DAC (the bank). It was valued at €350,000 in July 2020. The total due on the mortgage in July 2020 was €42,784 for principal and interest. This included over €11,000 in arrears.
11. The borrowers got into difficulties in paying their mortgage loans. Their insolvency arises from lack of capacity to service their home loans because of ill health. The bank wants them to trade down and pay off these liabilities. They have no unsecured creditors. A comparison between the outcome under the proposed Arrangements and the outcome if the borrowers went into bankruptcy is not relevant. The bank would stand outside any bankruptcy and rely on its security. The bank has not sought to argue that the debtors cannot come within s.115A(9)(b)(i) of the 2012 Act.
12. The proposed Personal Insolvency Arrangements were submitted to the bank in July 2020. They were rejected. In short, these proposals envisage that arrears on the mortgage loans be capitalised to principal giving a sum of €42,782.46 which will be paid off by 156 monthly instalments (13 years) using Irish and UK pensions income totalling €2085.25 monthly as of July 2020. The State elements of these pensions are likely to be adjusted to give some cover for inflationary pressures.
13. These matters first came before the Circuit Court on 24 August 2020. The debtors applied to the Circuit Court to approve these proposals under s.115A of the 2012 Act. The Circuit Court orders were made on 21 July 2022. This Court heard appeals from the Circuit Court decisions on 16 January 2023.
14. A court must determine applications under the 2012 Act by reference to circumstances proved to exist at the date of hearing. Changes in circumstances of a debtor may occur in the period between the date when a Personal Insolvency Arrangement is formulated and date when it is considered by a court. Interest rates may change. Changes in the

cost of living may affect calculation of current and projected reasonable living expenses.

15. Any appeal to the High Court from the Circuit Court is by way of rehearing. Admission of evidence which was not given or received in the Circuit Court may be allowed by special leave of the judge hearing the appeal: see s.37(2) of the Courts of Justice Act 1936. In general, it will be appropriate for parties to this type of appeal to apply to file and deliver affidavit evidence on the updated financial situation prior to the hearing of any appeal.
16. To give an example from the facts of these applications, the proposal formulated in July 2020 was that arrears be added to principal and interest owed to the bank. A starting balance of €42,782.46 is quoted in the "Summary of the PIAs". The Arrangements proposed that this be repaid with interest at the stipulated rate over 13 years by monthly instalments with a 12-month interest roll up to enable the debtors discharge €2,414.08 fees and costs. These monthly instalments could vary to reflect changes in the interest rate governing the loan. If the arrangement had been put in place in using interest rates applicable in July 2020 and by reference to the balance quoted at that time, the first monthly payment would have been €364.77.
17. The debtors have been making monthly payments of €341.00 towards their mortgage since their protective certificate in 2020. It is unclear whether these payments have been sufficient to keep the outstanding balance of their mortgage at €42,782.46. These payments are based on an amortization calculation from March 2020 set out in the report of the personal insolvency practitioner under s.107(1)(d) of the 2012 Act. This provides the figure of €42,782.46 and the then applicable interest rate of 3.00%. The monthly payment was specified to be €331.53.
18. A proposal can be approved based on application of any new interest rate because the Arrangements were framed on the basis that the start date is not set in stone, and it might be anticipated that interest rates may change before they became effective. However, it is necessary that a Court be provided with accurate figures for amount of outstanding principal and interest now. The Court also needs a figure for the monthly payment necessary to discharge €42,782 or any lesser sum now outstanding on the mortgage over 13 years at the current interest rate.
19. An immediate payment from the debtors may be needed to get outstanding the balance on the account down to €42,782, which is the starting point for repayment over the adjusted term.
20. Other changes of circumstances between the time of formulation of the proposal and the date when the proposal is considered may become relevant. The fortunes of debtors may improve or decline due to the occurrence of events which have not been foreseen. Effects of inflation and other factors which were not at play at the time when a proposal for a Personal Insolvency Arrangement was formulated may affect the view taken by the

Circuit Court or of the High Court dealing with an appeal. The value of assets can change.

21. If changes of circumstances since the formulation of a proposal are relevant, the parties should deliver affidavits setting out these new facts and if there is an appeal, they should seek leave to admit such evidence. Debtors should bear in mind that they must satisfy a court either at first instance or on appeal that any proposed Arrangement continues to meet the statutory criteria and that it should be approved.
22. In these applications the bank refers to changes in guidance given by the Insolvency Service of Ireland in November 2022 on what constitutes a reasonable standard of living and reasonable living expenses. This guidance is mandated by s.23 of the 2012 Act. By s.99(2)(e) of the Act "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 dependants." Section 99(1) and (2) of the Act describes the provisions set out in s.99(2) as "mandatory requirements." These requirements apply to all Arrangements, including Arrangements under s.115A of the 2012 Act.
23. By s.99(3) of the Act: "The Insolvency Service may publish a Code of Practice providing guidance on any of the matters set out in *subsection (2)*." By s.99(4) "For the purposes of *subsection 2(e)*, and without prejudice to *subsection (3)*, in determining whether a debtor would have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants under the Personal Insolvency Arrangement, regard shall be had to any guidelines issued under *section 23*."
24. The total of monthly estimated set costs of the debtors is €1897.62. This figure comes from guidelines issued under s.23 of the 2012 Act which became effective on 24 November 2022. When the Personal Insolvency Arrangements was formulated in July 2020 total reasonable living expenses were calculated in accordance with 2019 Guidelines at €1486.62.
25. The bank submits that the effect of increases in living costs which resulted in this change has eliminated eliminate capacity of the debtors make the €364.77 monthly repayments and submits that the current figures provided by the Insolvency Service are evidence that the proposed arrangement is unsustainable.
26. The bank also submits that revisions to reasonable living expenses estimates since the Personal Insolvency Arrangement was formulated have ceased to make the proposal workable and that assertions by the debtors that they can make savings of €350.00 per month on reasonable living expenses are not supported by underlying evidence. They point out that they are now 70 and 75 and may get some further State benefits after 70. They get a free TV licence and a monthly allowance for the household of €35.00 for electricity or gas. They already have free travel.

27. Edward McCarthy and Nuala McCarthy can legitimately query whether some of the items which go to make up the Insolvency Service figure for current reasonable living expenses are apposite in their case. The main example which they point to is the small figure included in the set costs for "education." They claim that savings can be made if they do without some expenses estimated as associated with "social inclusion and participation." They have a free travel facility since Mrs McCarthy reached sixty-six. However, this benefit this is not going to reduce their costs significantly. because they need a car to get into Wexford to do the shopping, attend medical appointments and engage in social travel. Special circumstances costs relating to medical issues were calculated at €196.28. This would allow €37.57 spare cash flow per month in the proposed personal insolvency arrangement.
28. Having considered the evidence, this Court is persuaded that Edward McCarthy and Nuala McCarthy have capacity to make the proposed monthly payments in discharge of their mortgage of their home to the bank. Their capacity to make these payments depends on curtailing expenditure choices somewhat over the proposed period of restructured borrowing. These monthly payments were €364.77 at the time of the rejected personal insolvency arrangement. This court is also persuaded by the evidence that they can maintain a reasonable standard of living if they adhere to the terms of the proposed Arrangements.
29. Mr and Mrs McCarthy were born in 1947 and early 1953. Both are in poor health and Nuala McCarthy must use a wheelchair. She is on medication for a variety of conditions. Their dependence on each other and Nuala McCarthy's lack of mobility have a practical consequence that their opportunities for social inclusion and participation are reduced. It follows that their requirement to spend to maintain a reasonable standard of living in this area of expenditure is also reduced. The departure from current guidelines on reasonable living expenses is manageable.
30. In reaching its conclusion on affordability, this Court is influenced by fact that the debtors have demonstrated capacity to meet monthly repayment commitments in the period since they have sought protection under the 2012 Act. They have been paying the bank €341.00 per month. This represents a substantial proportion of their monthly commitment under the proposed Personal Insolvency Arrangements.
31. In examining any proposal for a Personal Insolvency Arrangement, a court is concerned with evidence of material which shows present capacity to service indebtedness. Payments of amounts which are in line with or close to those contemplated by an Arrangement may help to establish both capacity of a debtor to meet commitments and a probability that the debtor will honour the terms of the Arrangement.
32. Section 115A(10) of the 2012 Act requires a court to "have regard to....the conduct, within the 2 years prior to the issue of the protective certificate under *section 95*, of.... the debtor seeking to pay the debts concerned..."

33. This conduct of a debtor is relevant to whether "...Having regard to all relevant matters, including the terms on which the proposed Arrangement is formulated, there is a reasonable prospect that confirmation of the proposed Arrangement will... enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit, ..." as required by s.115A(9)(b)(ii) of the Act.
34. Payments, or the lack of them, during this 2-year period may also be evidence touching on whether "the debtor is reasonably likely to be able to comply with the terms of the proposed arrangement" for the purposes of s.115A(9)(c) of the 2012 Act. This "ability" may relate to capacity to make payments out of available means and to capacity to exercise budgetary discipline. Some debtors are incapable of exercising financial discipline and their promises count for nothing.
35. The reality of litigation in the Circuit Court and in the High Court on appeal from the Circuit Court is that expedition in the process, as contemplated by provisions of the 2012 Act, is difficult to achieve. A court considering proposals may look at payment or savings history of debtors after the issue of a protective certificate and consider whether this conduct demonstrates capacity to service loans. Has a debtor taken steps to meet commitments to creditors in anticipation of approval of a proposal? If there is an objection to that proposal, has that debtor continued to behave in a manner which demonstrates viability of that proposal if it is implemented? These are relevant considerations.
36. Debtors and personal insolvency practitioners liaise prior to the protective certificate stage of the process. In many cases they will have a fair idea of the likely structure of the proposed arrangement, including affordable loan repayments. Debtors therefore have an opportunity to demonstrate that their proposals are affordable by making payments.
37. This Court has considered submissions as to whether it is permissible to propose Arrangements which restructure loans into retirement periods of borrowers. There is no reason in principle why this type of restructuring cannot be permitted. It may be demonstrated by credible evidence that sufficient pension other income is available to enable a borrower to both maintain a reasonable standard of living and service repayment of restructured borrowing.
38. In considering evidence having a bearing on the requirement in s.115A(9)(c) of the 2012 Act, this Court refers to the approach of Baker J in *Re Dunne (a debtor)* [2017] IEHC 59, as explained in *Re Hayes (a debtor)* [2017] IEHC 657 as explained by Sanfey J in *Re Fennell (a debtor)* [2021] IEHC 297. In general, a court considering whether the evidence demonstrates that a debtor is "reasonably likely" to comply with the terms of a proposed Arrangement is concerned with the short term and the medium term.
39. This court does not consider that that s.115A(9) of the 2012 Act has a purpose of enabling debtors to remain in occupation of their principal private residences for the rest of their lives. The world does not work that way. The purpose of that provision is to

allow debtors to rearrange their affairs and return to solvency and as part of Arrangement which must satisfy a range of relevant criteria.

40. What may happen in the long term and whether future events will result in non-compliance with terms of a proposed Arrangement, will often be a matter of conjecture. Changes may take place in the long term or even in the medium term which make a projection based on repayment of a creditor during the full period of the extended term of an Arrangement irrelevant. Some events are impossible to predict.
41. It is not always necessary for a court to take a view on whether debtors will be "reasonably likely" to make payments right up to the end date of the extended term under an Arrangement. Circumstances may change. For instance, if one or other of the debtors dies prior to the expiry of the loan period, the other may wish to sell-up and move to more suitable accommodation.
42. What matters is that it is "reasonably likely" that those debtors will be able to keep promises and pay in full the amount of the liability within the period for repayment.
43. An Arrangement which runs for an excessive repayment period or envisages a mortgage for life or beyond the lifespan of a borrower is likely to be unacceptable because it is "unfairly prejudicial to the interests" of a mortgage lender, contrary to s.115A(9)(f) of the 2012 Act. A debtor may be willing to follow the terms of such an Arrangement, but it may lack any business reality. For instance, an Arrangement may not address repayment of liabilities in a manner which gives an acceptable return for a variety of reasons.
44. Given health problems of Edward McCarthy and Nuala McCarthy, it might be expected that their special circumstances requirements may increase rather than decrease with time. The application of current life average expectancy estimations to their personal circumstances may be optimistic. There is no evidence of continued capacity to pay the current €364.77 (which may have to be adjusted somewhat due to changes in interest rates) if one of the borrowers were to die. It is unclear whether in such event pension income would be sufficient to service monthly repayments. Nuala McCarthy's pension income is significantly higher than that of Edward McCarthy. Reasonable living expenses of a single person are likely to be greater than those shared by two people living together.
45. However, this Court does not accept the submission that future events such as deterioration in health or death of one a borrower before the contractual date for final repayment of loan instalments should automatically be equated with a lack of proof that a debtor is "reasonably likely to be able to comply with the terms of the proposed Arrangement." For the purposes of s.115A(9)(c) of the 2012 Act, If Edward McCarthy and Nuala McCarthy in future years find that their circumstances change, they may well decide to sell their house and repay the bank. If one of them dies the other may decide to trade down and repay the bank. These events and decisions are not breaches of their proposed Personal Insolvency Arrangements.

46. A mortgage arrangement for repayment over a period of years may be terminated by a borrower who elects to sell a secured asset and use proceeds to repay the loan balance. This entitlement is a feature of mortgage lending. For instance, owners of a dwelling may decide that it is no longer affordable or is unsuitable for their needs. They sell and trade down. If they still owe some money on their mortgage, they repay their lender out of proceeds of sale. This course does not involve any breach of their loan contract. A lender is not entitled to a premium on early repayment and cannot complain if a loan is redeemed in full.
47. An Arrangement which allows debtors to retain a residence where there is substantial equity which can be used to trade down may be unacceptable. Any arrangement must comply with the requirement in s.115A(9)(b)(ii) of the 2012 Act that it "enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit...": Available means of debtors may include the equity in their principal private residence and, in some cases, trading down will be the appropriate step.
48. Section 104 of the 2012 Act is also relevant. Section 104(1) specifies that: "In formulating a proposal for a Personal Insolvency Arrangement a personal insolvency practitioner shall, insofar as reasonably practicable, and having regard to the matters referred to in *subsection (2)*, formulate the proposal on terms that will not require the debtor to- (a) dispose of an interest in, or (b) cease to occupy, all or part of his or her principal private residence and the personal insolvency practitioner shall consider any appropriate alternatives."
49. Subsection (2) of that section includes the following matters which the practitioner must have regard to: "(a) the costs likely to be incurred by the debtor by remaining in occupation of his or her principal private residence (including rent, mortgage loan repayments, insurance payments,...taxes or other charges, ....and necessary maintenance in respect of the principal private residence), (b) the debtor's income and other financial circumstances as disclosed in the Prescribed Financial Statement, (c) the ability of other persons residing with the debtor in the principal private residence to contribute to the costs referred to in *subsection (2)*, and (d) the reasonable living accommodation needs of the debtor and his or her dependants and having regard to those needs the cost of alternative accommodation (including costs which would necessarily be incurred in obtaining such accommodation)."
50. It is unfortunate that initial affidavit evidence of the personal insolvency practitioner did not address in detail how he approached these issues. The averments in his affidavit which relate to the considerations under s.104(2) of the 2012 Act are pro forma. He confined himself to stating that he was satisfied that the debtors' home was suitable for their needs. His evidence on comparative cost of alternative cost of alternative accommodation was confined to provision of the cost of renting a two-storey house in Enniscorthy which could never be suitable to their needs.



51. Further evidence submitted shows that the accommodation needs of the debtors was discussed and considered. The debtors were not willing to consider moving from their home. They had a good reason. The evidence establishes that it has been modified for the needs of Nuala McCarthy. Various alternatives were considered by the debtors such as trading down, social housing, mortgage to rent, rent a room and moving to rental accommodation and that none of these options was appropriate. they were to sell they would have to find a new single storey residence and modify it for wheelchair accessibility to all rooms. The personal insolvency practitioner considered that the debtors needed an adapted ground floor property and that this limited their choice.
52. Evidence establishes that the debtors' dwelling is not extravagant to their circumstances. They require two of the bedrooms because of their health problems, A further bedroom is available for visitors. The fourth bedroom is in fact a "box room." There is nothing disproportionate in Arrangements which permit them to retain this asset. They are not being left with a big house at the expense of their creditors. The value of the house is over seven times that of the amount outstanding on the mortgage and there is no question but that the lender will be repaid in full and get a reasonable return on capital in the meantime.
53. This Court concludes that evidence establishes that the decision to formulate these proposals for Arrangements was reasonable and that the personal insolvency practitioner complied with his obligations under s.104 of the 2012 Act. This Court also concludes that the evidence demonstrates that the costs of the debtors remaining in their dwelling are not disproportionately large. In essence, the main cost is the monthly restructured mortgage payment under the proposed Arrangements. This issue of affordability has already been considered in the context of other issues in this appeal. These payments are affordable.