

THE HIGH COURT
CIRCUIT APPEAL

[2019 No. 10 CA]

EASTERN CIRCUIT
COUNTY OF LOUTH

**IN THE MATTER OF THE PATRICK MATTHEWS (A DEBTOR)
AND IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012 TO 2015**

JUDGMENT of Mr. Justice Denis McDonald delivered on 11 November, 2019

1. This is an appeal from an order of the Circuit Court made on 11th January, 2019 refusing an application made by Cormac Mohan, personal insolvency practitioner (*"the practitioner"*) on behalf of the above named debtor Mr. Patrick Matthews for an order pursuant to s. 115A of the Personal Insolvency Acts, 2012 (*"the 2012 Act"*) as amended by the Personal Insolvency (Amendment) Act, 2015 (*"the 2015 Act"*) approving a proposed personal insolvency arrangement on behalf of Mr. Matthews. The application before the learned Circuit Court judge and the appeal to this Court were both opposed by an objecting creditor namely Mars Capital Ireland No. 2 DAC (*"Mars Ireland"*).
2. While a number of issues were debated in the course of the hearing of the appeal, the principal issue which falls for consideration in this case relates to the way in which the proposed arrangement deals with a property of Mr. Matthews owned by him jointly with his ex-wife which is subject to a mortgage in favour of Mars Ireland.

Relevant facts

3. Mr. Matthews is a self-employed builder. He currently resides in a three bedroomed detached property in County Louth (which I shall refer to as his family home). The practitioner contends that, for the purposes of s. 115A, the family home constitutes the principal private residence of Mr. Matthews. He has two dependent children and he shares custody of those children with his ex-wife who lives (as described further below) in Balbriggan. Before building his family home, he previously resided at a property he owns at Riverbanks Drogheda (which I shall refer to as the Drogheda property). According to an affidavit sworn by Mr. Matthews in the course of the proceedings before the Circuit Court, the Drogheda property is no longer appropriate as a family home in circumstances where it is well out of town and inaccessible for young children. Mr. Matthews explains that it is a duplex property which has approximately thirteen large concrete steps leading to the front door of the property. He says that his younger son is autistic and that, as a consequence, he has severe difficulties in trying to balance himself. Mr. Matthews is concerned that his younger son would find it difficult to cope with the flight of steps. Along with his former wife, Mr. Matthews also owns a third property at Balbriggan County Dublin (which I will refer to as *"the Balbriggan property"*). The former wife of Mr. Matthews lives at the Balbriggan property together with her two children (when not residing with Mr. Matthews).
4. The family home of Mr. Matthews is subject to a mortgage in favour of Mars Ireland. The amount due on foot of that mortgage is €639,462.70. The current market value of the family home is €220,000.00. On 10th April, 2017, Mars Ireland obtained an order for possession of the family home. However, possession has not yet been recovered.

5. The Drogheda property is subject to a security in favour of Ulster Bank Ireland Plc ("*Ulster Bank*"). The amount owed on foot of that security is the sum of €162,527.27. The value of the Drogheda property is €175,000. The amount due by Mr. Matthews to Ulster Bank is €162,527.27.
6. In the case of the Balbriggan property, it is subject to a mortgage in favour of Mars Ireland. As noted above, it is valued at €230,000. The loan in respect of that property is not in arrears. The amount due on foot of that loan is €181,146. The loan is currently subject to an interest only arrangement and, according to the material before the court, is being serviced by payments made by the former wife of Mr. Matthews.
7. There is also a debt due to Bank of Ireland which is secured by a judgment mortgage over Mr. Matthews' family home. The amount due to Bank of Ireland is €90,732.01. There is also a debt of €11,844.25 due to a management company in respect of management fees and service charges in respect of the Drogheda property.
8. The key features of the proposed arrangement are as follows: -
 - (a) The principal sum due on foot of the mortgage in favour of Mars Ireland secured over the family home is to be reduced to market value namely €220,000. The balance of the sum due on foot of that mortgage is to be treated as an unsecured debt and a dividend paid to Mars Ireland accordingly.
 - (b) The reduced principal sum due to Mars Ireland is to be repaid over an extended term of 21 years at a five year fixed rate of 2.99% for years 2-6 of the arrangement after which the rate applicable will be the market standard variable home loan rate. There will, however, be a moratorium on mortgage repayments for the first twelve months of the arrangement when an interest rate of 0% will also apply.
 - (c) Mr. Matthews will sell the Drogheda property within six months of confirmation of the arrangement. If it is unsold after a period of six months, it will be surrendered to Ulster Bank;
 - (d) The debt due to Bank of Ireland will be treated as an unsecured debt in the arrangement and the dividend paid to Bank of Ireland on that basis;
 - (e) The debt due to the management company is an excludable debt within the meaning of the 2012-2015 Act. It will be paid from the proceeds of sale of the Drogheda property;
 - (f) In the case of the Balbriggan property, Mr. Matthews is to transfer his beneficial interest in that property to his ex-wife who is a joint borrower. According to the proposed arrangement in this case, she is not willing to sell the property and the practitioner believes that to force a sale "*could be a drawn out process resulting in legal costs and no material benefit to Mr. Matthews creditors*".

The objection of Mars Ireland

9. Mars Ireland advances a number of grounds of objection as follows:-

- (a) Mars Ireland contends that the proposed treatment of the secured debt owed to it by Mr. Matthews in respect of the Balbriggan property is contrary to the provisions of s. 103 (2) of the 2012 Act. That subsection prohibits the reduction of the principal sum due in respect of a secured debt to less than the value of the security in cases where the relevant security is not to be sold but instead is to be retained.
- (b) Mars Ireland also submits that the arrangement is unfairly prejudicial to it contrary to the provisions of s. 115A (9) (f) of the 2012 Act. In this context, Mars Ireland draws attention to the effect of the arrangement insofar as the Balbriggan property is concerned. While the loan in respect of that property is not currently in arrears, Mars Ireland submits that it cannot be compelled to accept what is, in effect, a 50% reduction in the parties liable to it on foot of the Balbriggan facility. In addition, it is contended that the restructure of the loan in relation to the family home is unfair to Mars Ireland as a consequence of the moratorium on payments for one year while at the same time no interest is to accrue on the relevant loan. It is contended that this is particularly unfair in circumstances where, at the same time, it is proposed to write down the principal sum due in respect of that loan to the market value of the family home namely €220,000. Mars Ireland also complains that the interest rate will be reduced from the present variable rate of 4.7% to just 2.99% for five years following the expiration of the moratorium period. According to para. 27 of the affidavit of Joe Carter sworn on behalf of Mars Ireland in the course of the Circuit Court proceedings, the reduced rate of interest for this period is *"commercially unviable and would certainly prove loss making to the Creditor and it is not one which is fair when one considers the uncertainty of the market going forward...."*
- (c) Mars Ireland contends that no class of creditor has approved the proposed arrangements as required by s. 115A (9) (g). Mars Ireland contests the suggestion made by the practitioner in his certificate as to the result of the vote taken at the creditors' meeting that Ulster Bank and Bank of Ireland (who both voted in favour of the arrangement) should be regarded as separate classes of creditor for this purpose.
- (d) It is also alleged by Mars Ireland that, contrary to the requirements of s. 115A (9) (d) of the 2012 Act, the costs of enabling Mr. Matthews to continue to reside in the family home are disproportionately large given his circumstances and the alternative accommodation options open to him including the option of retaining the Drogheda property in place of the family home.
- (e) Mars Ireland also makes the case that the arrangement is contrary to the provisions of the 2012-2015 Acts in circumstances where the arrangement will require Mr. Matthews to live below the minimum reasonable living expenses prescribed by the guidelines issued by the Insolvency Service (*"the ISI"*).

- (f) It is also suggested by Mars Ireland that Mr. Matthews failed to cooperate with it for a period of six months prior to the Protective Certificate and that his repayment history within a two year period prior to the issue of that certificate was so poor that it does not display a capacity to comply with the terms of the proposed arrangement.
 - (g) Mars Ireland also draws attention to the submission made by it to the practitioner which envisaged the retention of a principal residence. Mars Ireland submits that its proposal in this regard ought to have been considered by the practitioner.
10. Of the objections listed in para. 9 above, the question which occupied most time at the hearing was that related to s. 103 (2) of the 2012 Act. I will therefore address that question first. To the extent that it is necessary to do so, I will then address any of the remaining issues to the extent that they require to be determined.

Section 103 (2) of the 2012 Act

11. Section 103 of the 2012 Act sets out a number of protections available for secured creditors in personal insolvency arrangements. Section 103 (1) deals with circumstances where an arrangement proposes the sale or disposal of property which is subject to a security in favour of a secured creditor. It requires that, in such cases, the arrangement must include a term providing for the payment to the secured creditor of an amount which is at least equal to the value of the security (determined in accordance with s. 105) or the amount of the debt (whichever is the lesser).
12. Section 103 (2) deals with circumstances where, under a proposed arrangement, there is not to be any sale or disposal of a secured asset. Section 103 (2) is in the following terms: -

“(2) A Personal Insolvency Arrangement which includes terms providing for—

(a) retention by a secured creditor of the security held by that secured creditor, and

(b) a reduction of the principal sum due in respect of the secured debt due to that secured creditor to a specified amount,

shall not, unless the relevant secured creditor agrees otherwise, specify the amount of the reduced principal sum referred to in paragraph (b) at an amount less than the value of the security determined in accordance with section 105.”

13. In order to properly understand s. 103 (2) it is necessary to have regard to a number of definitions within s. 2 of the 2012 Act. In particular, it is necessary to have regard to the definitions of “*secured creditor*” and “*secured debt*”. In the case of “*secured creditor*”, that term is defined in s. 2 (1) of the 2012 Act as follows: -

“‘secured creditor’, in relation to a debt, means a creditor of the debtor who holds, in respect of his or her debt, security ... in or over property of the debtor”. (emphasis added)

14. It seems to me to be very clear from this definition that, when the 2012 Act speaks of a "*secured creditor*", it is specifically referring to such a creditor of the debtor. That seems to me to follow from the very plain words of the definition and in particular from the words which I have highlighted in the definition set out in para. 13 above. Thus, when s. 103 (2) refers to a "*secured creditor*", it is referring to a creditor of the debtor (in this case Mr. Matthews). In turn, this has implications for the language used in para. (b) of s. 103 (2) which refers to "*a reduction of the principal sum due in respect of the secured debt due to that secured creditor to a specified amount*". In my view, that paragraph is clearly referring to a reduction in the principal sum due in respect of a secured debt of the debtor (in this case Mr. Matthews) due to the secured creditor (in this case Mars Ireland).
15. For completeness, the definition of "secured debt" in s. 2 (1) should also be noted. There, a secured debt is defined as meaning: -
- "a debt the payment for which is secured by security in or over any asset or property of any kind"*
16. There is nothing in the definition of "*secured debt*" which would cause me to form any different view as to the meaning and effect of s. 103 (2) (b) to that set out in para. 14 above. Having regard to the definition of "*secured creditor*", it seems to me that the reference in s. 103 (2) to a secured creditor must be a secured creditor of the debtor (in this case Mr. Matthews). In the case of the Balbriggan property, the debt currently owed by Mr. Matthews (along with his former wife) to Mars Ireland is a secured debt. Mars Ireland is a secured creditor of Mr. Matthews in respect of that debt. Against that backdrop, the question which falls to be determined is whether it can be said that the proposed arrangement in this case contravenes s. 103 (2).
17. As noted above, the proposed arrangement in this case provides that Mr. Matthews agrees to transfer his beneficial interest in the Balbriggan property to his former wife. The practitioner said on p. 12 of the proposed arrangement that Mr. Matthews' former wife is not willing to sell the property and "*I feel that to force this sale could be a drawn out process resulting in legal costs and no material benefit to Mr. Matthews' creditors*". Mars Ireland contends that, in effect, this involves the writing down of the debt owed by Mr. Matthews to Mars Capital on the security of the Balbriggan property to zero. In the written submissions delivered on behalf of the practitioner, it is expressly stated that the liability of Mr. Matthews to Mars Capital secured on the Balbriggan property will be extinguished and that he will surrender his interest in the Balbriggan property to his former wife. Nonetheless, an attempt is made in the submissions to distinguish the "*liability*" of Mr. Matthews to Mars Ireland from a "*debt*" due to Mars Capital. However, I do not understand how "*liability*" and "*debt*" can be distinguished in the manner suggested. In essence, a liability to make a payment to a creditor constitutes a debt. In the absence of some bar to recovery of a debt, there cannot be a "*debt*" without a corresponding liability to make a payment to the extent of the debt.
18. The case is also made in the written submissions delivered on behalf of the practitioner that the proposal in relation to the Balbriggan property makes practical, logical and

commercial sense. It was also submitted on behalf of the practitioner that the loan in respect of the Balbriggan property is not in arrears. All payments that are contractually due are being met in full and on time. The practitioner also draws attention to the fact that the value of the Balbriggan property at €230,000 is more than the extent of the liability (namely €181,146). The practitioner urges that Mars Ireland is not at risk in respect of the property or the loan in those circumstances. The practitioner also contends that the outcome for Mars Ireland would be no different in the event that Mr. Matthews was adjudicated a bankrupt. The existence of these factors assists in explaining how the practitioner came to make the proposal contained in the proposed arrangement in relation to the Balbriggan property. However, while I can see that these considerations, at a pragmatic level, support the position of the practitioner, the issue which falls to be determined here is purely a legal one and, in particular, a question of statutory construction. It involves a consideration of the proper interpretation of s. 103 of the 2012 Act. If the proposed arrangement is not in compliance with s. 103, the pragmatic considerations highlighted by the practitioner cannot cure the non-compliance. The court has no power to extend the terms of the statutory scheme to supplement what the Oireachtas, in the exercise of its legislative function, has chosen to enact.

19. It is therefore necessary to consider the substance of what is provided for in s. 103 (2). As outlined above, that sub-s. applies where a personal insolvency arrangement envisages two matters namely: -

- (a) The retention by the secured creditor of the security held by it; and
- (b) A reduction of the principal sum due in respect of the secured debt.

20. In the written submissions delivered on behalf of the practitioner, the case is made that the debt "*is not being reduced*" and that the asset "*is not being retained*". In those circumstances, it is submitted that s. 103 (2) is not "*invoked whatsoever*". However, it seems to me that there are a number of other aspects of the case made in the written submissions which are difficult to reconcile with the fundamental submission that s. 103 (2) is not engaged:

(a) At para. 7 (8) it is submitted that:

"The reality of being in a position to proceed to enforce a loan/security against one borrower is easier than as against two separated borrowers";

This seems to me to clearly acknowledge that the debt due by Mr. Matthews is to be extinguished under the proposed arrangement.

(b) At para. 7 (9) it is submitted that:

"Whilst the recourse is limited to one borrower under the PIA, the Debtor has no means to repay any further monies";

Again this seems to me to acknowledge that the debt due by Mr. Matthews is to be extinguished.

- (c) This conclusion is reinforced by what is said in para. 7 (11) where it is submitted that the recourse to Mr. Matthews *"would be extinguished in bankruptcy in the exact same manner of (sic) the PIA"*;
- (d) In para. 8 of the submissions, an argument is made that the arrangement proposes that the liability of Mr. Matthews: *"to [Mars Ireland] secured on the Balbriggan property be extinguished and that he surrendered his interest in the Balbriggan [property] ... to his former wife."*

The case is made that "crucially" the word "liability" is used rather than the word "debt". However, for the reasons discussed in para. 17 above, I fail to see how there can be said to be any proper basis to distinguish debt from liability in this way.

- (e) In para. 15, it is contended that the arrangement *"expressly does not pay a dividend to [Mars Ireland] in relation to the Balbriggan debt, if the debt was being reduced... then there would be a dividend due and payable in relation to same"*. However, again, this demonstrates very clearly that the proposed arrangement envisages that no payment whatever will be made to Mars Ireland by Mr. Matthews in respect of the Balbriggan property debt. I cannot see how this point assists the case which the practitioner seeks to make; and
- (f) At para. 15 of the submission, it is argued on behalf of the practitioner that Mars Ireland: *"retains full recourse for the debt for the co-borrower and to the security. The debt remains fully unaffected and it is not reduced"*. Again, this seems to me to demonstrate that the intended effect of the proposed arrangement is that the debt due by Mr. Matthews to Mars Ireland will be extinguished.

21. Moreover, it is clear from a consideration of the terms of the proposed arrangement in this case, that nothing will be paid to Mars Ireland in respect of the debt owed by Mr. Matthews to it and secured on the Balbriggan property. Appendix 1 to the proposed arrangement shows the amount due in respect of the Balbriggan property at €181,146.00. Thereafter, on p. 4 of the same appendix, it is stated that Mr. Matthews will *"surrender his interest in the property to the joint owner who is his ex-wife as she is not willing to sell it..."*. Crucially, the repayment schedule on p. 5 of Appendix 1 shows no payment being made to Mars Ireland in respect of the Balbriggan property. The repayment schedule shows payments being made to Mars Ireland in respect of the mortgage over the family home, and a dividend being paid to Mars Ireland in respect of the *"negative equity write down"* on the family home together with payments being made to Ulster Bank and Bank of Ireland by way of dividend. No payment whatever is to be made to Mars Ireland in respect of the Balbriggan property.

22. It is therefore clear that the arrangement envisages that, if confirmed, Mars Ireland will be entitled to look solely to the former wife of Mr. Matthews for repayment of the debt due in respect of that property. It may seem incongruous that the joint and several debt owed by Mr. Matthews to Mars Ireland can be reduced to nil while at the same time his

co-debtor can remain fully liable in respect of the same debt. However, that is the effect of s. 116(6) of the 2012 Act. That was the view taken by Baker J. in *Re J.D.* [2017] IEHC 119. I reached a similar view in *Lisa Parkin* [2019] IEHC 56. It is therefore clear that the rights of Mars Ireland to pursue the joint borrower (namely Mr. Matthews' former wife) in respect of the joint and several debt owed in respect of the Balbriggan property could not be affected by the proposed arrangements. However, as outlined above, Mars Ireland complains that the arrangement envisages that, if confirmed, Mars Ireland will be forced to look solely to Mr. Matthews' former wife for repayment of the debt in the future and that the arrangement clearly envisages the extinguishment of the debt due by Mr. Matthews.

23. In substance, a proposal that, in the future, Mars Ireland will look solely to the former wife of Mr. Matthews for repayment of the debt amounts, in my view, to the reduction of Mr. Matthews' debt to Mars Ireland to nil. That conclusion is borne out by the terms of the written submissions delivered on behalf of the practitioner (in particular from paras. 7 (9), 7 (11), 8 and 15 all as quoted above). While I can see that there are obvious pragmatic reasons for the approach taken by the practitioner, I fail to see how the approach can be said to be consistent with s. 103 (2). In circumstances where the arrangement envisages that, going forward, Mr. Matthews' former wife will be solely liable in respect of the Balbriggan mortgage, the arrangement clearly involves a reduction in the principal sum due by Mr. Matthews to Mars Ireland in respect of that mortgage to zero. That seems to me to necessarily follow from the fact that his liability, under the proposed arrangement, in respect of that debt is to be wholly extinguished. It is a fallacy to suggest that, under the proposed arrangement, the debt due by Mr. Matthews still exists. What once was a joint and several debt owed by Mr. Matthews and his former wife would, under the proposed arrangement, become a sole debt due by his former wife. Accordingly, it must follow that the provisions of s. 103 (2) (b) are not satisfied in this case. The principal sum due by Mr. Matthews to Mars Ireland in respect of the Balbriggan mortgage is being reduced to zero which is plainly less than the market value of the Balbriggan property.
24. Likewise, it is also a fallacy to suggest that the security is not being retained. The powers of a practitioner to deal with secured property are carefully circumscribed by the provisions of s. 103 of the 2012 Act. This is unsurprising given the extent to which the 2012-2015 Acts have the capacity to interfere with the property rights of secured creditors. While the marginal note next to s. 103 (1) of the 2012 Act is not admissible as an aid to the construction of the 2012 Act, there is no need to have regard to the marginal note to understand that s. 103 has been enacted for the protection of secured creditors. Section 103 essentially provides a practitioner with two modes of addressing secured property. Under s. 103 (1), an arrangement can provide for the disposal of such property (subject to the protections laid down in that subsection). Section 103 (2) provides for circumstances where the secured property is not to be sold. In such circumstances, the protections built into that subsection must be complied with. In formulating proposals for an arrangement, a practitioner is not given any other options. Section 100 (2) (f) makes clear that when dealing with secured debts, the arrangement is

subject to each of ss. 102-105. Thus, the provisions of s. 103 cannot be avoided. It follows, in the present case, that when the arrangement purports to provide for the transfer of Mr. Matthews' interest to his former wife, any such transfer is subject to the pre-existing mortgage in favour of Mars Ireland. In the absence of some statutory power entitling a practitioner to formulate proposals for an arrangement providing for the release of that mortgage, the mortgage remains in place. It is therefore "*retained*" within the meaning of s. 103 (2). The subsection therefore applies. It follows that the arrangement here contravenes the subsection insofar as it provides for the reduction of Mr. Matthews' liability to Mars Ireland in respect of the Balbriggan mortgage to nil.

Other matters

25. In light of the conclusion which I have reached in relation to s. 103 (2), I do not propose to address, in any level of detail, the remaining issues that were debated during the course of the hearing of the appeal. I will do no more than make a number of brief observations as set out further below.

The suitability of the family home

26. It is contended in the affidavit of Mr. Carter sworn on behalf of Mars Ireland that the family home of Mr. Matthews is a substantial four bedroomed property where Mr. Matthews resides alone save when caring for his two children. Mr. Carter also draws attention to the fact that the family home is stated to be "*unfinished*". Mr. Matthews has responded on affidavit and explained why he believes that this property is the most suitable property to be used as his family home. In particular, he has explained that, contrary to what is stated by Mr. Carter, the property is a three bedroomed property. Furthermore, he has explained that his younger child has been diagnosed with autism and that he would find it very difficult to cope with a change of family home. Mr. Matthews has also explained that the Drogheda property is not suitable for his younger son given the fact that it is situated outside the town and has thirteen large concrete steps to the front door. Mr. Matthews says that this would create difficulties for his younger son who finds it very difficult to balance himself.

27. In my view, it would be important in cases of this kind where an issue is raised about the suitability of a particular property that appropriate evidence is placed before the court to explain and, where possible, justify the retention of that property. Here, there were two properties which potentially could be used as a family home namely the home described in para. 3 above and the Drogheda property. Mr. Matthews has provided evidence which, on its face, would appear to be capable of justifying the retention of the family home. However, in my view, if this issue remained alive, it would be advisable for the practitioner to ensure that more comprehensive evidence should be placed before the court in relation to the medical condition of the younger son. I wish to make it very clear that any concerns about the confidentiality of that information could be appropriately addressed. Thus, any medical evidence could be provided in the form of a sealed up confidential exhibit which would be seen only by the court and by the objecting creditor and would not be read in open court.

The allegation of unfair prejudice to the objecting creditor

28. In his affidavit, Mr. Carter raises a number of concerns in relation to the manner in which the debt due to Mars Ireland in respect of the family home of Mr. Matthews is addressed under the proposed arrangements. As noted in para. 9 (b) above, Mars Ireland submits that the arrangement is unfairly prejudicial to it in circumstances where the arrangement envisages that it would be compelled to accept what is, in effect, a 50% reduction in the parties liable to it on foot of the Balbriggan facility. Having regard to the analysis set out in paras. 17-23 above, I believe there is significant force in the submission that the extinguishment of the debt due by Mr. Matthews to Mars Ireland does give rise to unfair prejudice. In light of the view which I have formed in relation to s. 103 (2), however, I do not believe that it would be appropriate to make any finding to that effect. I should also make clear that, before any finding could be reached, it would be necessary to consider the position in the event of the bankruptcy of Mr. Matthew. In this context, it was strongly urged by counsel for the practitioner that, in a bankruptcy, Mr. Matthews would effectively lose the interest he has in the Balbriggan property.
29. It is also suggested, in para. 27 of Mr. Carter's affidavit, that the rate of interest proposed is "*commercially unviable and would certainly prove loss making...*". In my view, the evidence which has been presented on behalf of Mars Ireland in this regard is not sufficiently detailed or comprehensive to enable a court to form the view that the arrangements proposed will cause significant loss to Mars Ireland. In my view, much more comprehensive evidence would be required in order to demonstrate the extent of the loss which Mars Ireland suggests it would suffer under the proposed arrangements.

The suggestion that, under the arrangement, Mr. Matthews will be required to live below the reasonable living expenses suggested in the ISI guidelines.

30. This is an issue which I have previously addressed in my judgement in *Tadhg Hurley* [2019] IEHC 523 and I therefore do not propose to say anything further about the issue here. It is unnecessary to do so in circumstances where I have already decided this appeal against the practitioner on the basis of s. 103 (2) of the 2012 Act.

The conduct of Mr. Matthews in the period prior to the issue of the protective certificate

31. There is a significant dispute, on the affidavits, as between what is said by Mr. Carter, on the one hand, and by Mr. Matthews on the other. In these circumstances, and in light of the fact that I have already decided this case against the practitioner on the basis of s. 103 (2) of the 2012 Act, I do not believe that it would be appropriate for me to say anything further about the conduct of Mr. Matthews in the period prior to the grant of the protective certificate.

Classes of creditor

32. In my view, contrary to the case made by Mars Ireland, Ulster Bank and Bank of Ireland (both of whom voted in favour of the arrangement) should be regarded as a separate class of creditor to Mars Ireland itself. In this context, Mars Ireland holds security over the family home of Mr. Matthews which, on the basis of the evidence before the court, constitutes his principal private residence. In light of the provisions of s. 99(2) (h) and s. 104(1) of the 2012 Act (both of which make clear that, save in exceptional circumstances, a personal insolvency arrangement should seek to preserve the ability of a debtor to

remain in his or her principal private residence) the rights of the holder of security over such a property are capable of being affected in a uniquely different way to the holders of security over other property of a debtor. As the decision of Baker J. in *Sabrina Douglas* [2017] IEHC 785 makes clear, the unique way in which the holder of security over a principal private residence is affected by the provisions of 2012 – 2015 Acts has the consequence that such a creditor should be considered to fall into a different class to other creditors of a debtor.

Conclusion

33. In light of the view which I have formed in relation to s. 103 (2) of the 2012 Act, it is clear that I must dismiss this appeal. In my view, the arrangement proposed by the practitioner in this case is not consistent with s. 103 (2) of the 2012 Act and therefore is not capable of being confirmed by the court.