DÁIL ÉIREANN

AN ROGHCHOISTE UM DHLÍ AGUS CEART, COSAINT AGUS COMHIONANNAS

SELECT COMMITTEE ON JUSTICE, DEFENCE AND EQUALITY

Dé Céadaoin, 22 Bealtaine 2013

Wednesday, 22 May 2013

The Select Committee met at 2 p.m.

MEMBERS PRESENT:

Deputy Niall Collins,	Deputy Pádraig Mac Lochlainn,
Deputy Stephen S. Donnelly,[+]	Deputy Finian McGrath,
Deputy Alan Farrell,	Deputy Alan Shatter (Minister for Justice and Equality).
Deputy Seán Kenny,	

[+] In the absence of Deputy Finian McGrath, for part of meeting.

DEPUTY DAVID STANTON IN THE CHAIR.

Business of Select Committee

Chairman: Apologies have been received from Deputy Anne Ferris. I welcome the Minister and his officials to the meeting. At the request of the broadcasting and recording services, will committee members ensure their mobile telephones are switched off completely and not just left in silent mode? They need to be switched off otherwise they will interfere with our recording system. I take the battery out of my phone to ensure it is off and members might consider doing that as well.

We will start our consideration of the Land and Conveyancing Law Reform Bill 2013.

Land and Conveyancing Law Reform Bill 2013: Committee Stage

Section 1 agreed to.

SECTION 2

Chairman: Amendment No. 1 is in the name of Deputy Mac Lochlainn. Amendments Nos. 1, 2, 3 and 7 are related, amendments Nos. 2 and 3 are alternatives to amendment No. 1 and amendment No. 3 is an alternative to amendment No. 2. Therefore, amendments Nos. 1, 2, 3 and 7 may be discussed together by agreement.

Deputy Pádraig Mac Lochlainn: I move amendment No. 1:

In page 4, to delete lines 6 to 17 and substitute the following:

> "(2) In any proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates in a case to which this section applies, and where no previous engagement with a personal insolvency practitioner has taken place the court, shall:
>
> (a) adjourn proceedings for a period of at least six months;
>
> (b) instruct the mortgagor to consult with a personal insolvency practitioner with a view to the making of a proposal for a Personal Insolvency Arrangement;
>
> (c) instruct the personal insolvency practitioner to make a proposal for a Personal Insolvency Arrangement under the Act of 2012; and
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> (d) instruct the mortgagee to cover the initial costs of the personal insolvency practitioner from its own resources, including any costs arising from consulting with the personal insolvency practitioner with a view to making an application for a personal insolvency agreement and any costs resulting for the mortgagee rejecting a proposal from the personal insolvency practitioner.".

Amendments Nos. 1 and 2 are in my name. The purpose of the amendments is to replace the current wording and extend the adjournment period from two months to six months. The amendment would oblige the borrower or holder of the mortgage to engage the services of a personal insolvency practitioner to develop a proposal to be put to the lender. The section, as

it stands, imposes a burden of financial responsibility on the borrower who will already be in financial distress. The amendment provides that the lender must take responsibility for trying to solve the difficulty.

The concern that arises in this regard is that while the Minister has given leave to the courts to suggest an adjournment, the onus would be on the borrower who is in financial distress to produce a proposal within two months. This timeframe would result in borrowers acting under duress and in a panicked manner and possibly agreeing to arrangements that are not in their interests. For this reason, the timeframe should be extended to six months and the onus of responsibility placed on the lender rather than borrower.

Chairman: I understand Deputy Stephen Donnelly is substituting for Deputy Finian McGrath who tabled the other amendments in the group.

Deputy Stephen S. Donnelly: That is correct. I spoke about the issues address in the amendments in my contribution on Second Stage. It would be great if the Minister were to accept amendment No. 3 and disappointing if he were to choose not to accept it as it is technical in nature. As I outlined on Second Stage, the guidelines for putting in place a personal insolvency arrangement provide that the timeframe for doing so must be more than three months. The issue, therefore, is that this legislation gives the borrower and personal insolvency practitioner two months to reach a personal insolvency arrangement. To produce a personal insolvency arrangement, the personal insolvency practitioner must review the case, including the financial statement and submit an application for a protective certificate to the personal insolvency service. The personal insolvency legislation stipulates that a personal insolvency practitioner has 70 days to develop a proposal, have it voted on by the creditors and submit it to the court for assessment. The personal insolvency practitioner must also ensure that creditors representing 65% or more of the total debt agree to the proposal and record the creditors' meeting results, etc. The amendments propose a technical change because the two month timeframe provided for in this legislation appears to be contrary to the current guidelines. The purpose of the amendment is to ensure that if and when the court directs the borrower and lender to develop a personal insolvency arrangement, they will have sufficient time to do so. Two months does not appear to be a sufficient period and for this reason I ask the Minister to accept the amendment.

Amendment No. 7 relates to the costs and who pays for the personal insolvency arrangement. When the judge orders the borrower and lender to draw up a personal insolvency arrangement, a question arises as to who pays the cost of engaging a personal insolvency practitioner. This issue remains unresolved. We will have to wait and see how it plays out in the normal course of a personal insolvency arrangement, for which a market price has not yet been set. It may be the case that the fees for the personal insolvency practitioner will be paid from future payments made by the borrower and, as a result, the lender will de facto take the hit as this would manifest itself in lower debt repayments.

My specific concern is that where a bank moves for repossession, it is reasonable to assume the borrower who is about to lose his or her home will be in a distressed position and have virtually no means. The chances that he or she will have sufficient income in the subsequent few years are also slim. As there is no requirement on a personal insolvency practitioner to take on the case, I am concerned that personal insolvency practitioners will refuse to engage because they will realise that the banks have a veto and do not have to agree to anything. The banks will simply state they engaged in the process before returning to court to obtain possession of the borrower's house. This is how I believe the scenario will play out in most cases. There is a real fear that personal insolvency practitioners will decide that neither the bank nor borrow-

ers will pay their costs and will refuse to draw up a personal insolvency arrangement. As a result, borrowers will either be unable to engage a personal insolvency practitioner or they will only find one who is not very good and is taking on work that others may not want to do. The proposed solution in this case is that the lender should pay the costs of the personal insolvency practitioner.

Minister for Justice and Equality (Deputy Alan Shatter): I thank the Deputies for tabling these amendments as it gives us an additional opportunity to tease out the Bill. I am afraid I am not willing to accept amendment No. 1 for a number of reasons. It attempts to replace the carefully worded proposal contained in the Bill with a much broader proposal, which seeks to substantially rewrite the relevant provisions of the Personal Insolvency Act 2012. The intention behind section 2 is to provide that a court may, of its own motion or on request, adjourn proceedings to allow a personal insolvency arrangement to be considered where, for example, none had previously been attempted, as with the requirement in bankruptcy petitions. The purpose is to make an appropriate link with the insolvency provisions contained in the 2012 Act. There is no provision, nor could there be such provision, as is suggested in the amendment, that a court should direct that a personal insolvency arrangement be considered.

On a more specific point, the proposed amendment provides that a court shall "instruct a personal insolvency practitioner to make a proposal for a Personal Insolvency Arrangement under the Act of 2012". The court cannot have the role envisaged in the amendment as such a role would run counter to the voluntary nature of the debt resolution process in the personal insolvency legislation. The court has no power of instruction in regard to a voluntary process. A personal insolvency arrangement can only be proposed by a debtor through a personal insolvency practitioner where a debtor meets the eligibility requirements for such an arrangement and there are sufficient funds available to make some payments to ground a proposal. The proposed amendment has no regard for either the context or appropriateness of such a proposal over the debtor's repayment capacity. In any event, the proposed amendment could not have any lawful effect in binding a creditor.

The amendment seems to consider the personal insolvency practitioner is an officer of the court. This is a fundamental misreading of the legislation. The personal insolvency practitioner has no role or standing in an application for repossession. There is no provision in the law to provide for the court to appoint the practitioner as an officer to essentially force a settlement on creditors. I cannot accept the provisions outlined in paragraph (*d*) of amendment No. 1, which are replicated in amendment No. 7, as they seek to impose a duty on the court with regard to the costs of a personal insolvency arrangement. There is no lawful provision to allow for such, nor could one be imposed. Again, this runs counter to the provisions of the Personal Insolvency Act.

With regard to amendments Nos. 2 and 3 which propose an increase in the two month time limit for the adjournment, as I stated on Second Stage, the Bill includes a provision at section 2(4) which allows the court to consider granting a further adjournment if, by the end of the two month period, it sees real evidence of progress towards a personal insolvency arrangement. I direct the attention of members specifically to the wording of subsection (4) which prescribes the following: "On the expiry of any period of adjournment granted under *subsection (2)*, the court may grant a further adjournment of the proceedings concerned where it considers that significant progress has been made in the preparation of a proposal for a Personal Insolvency Arrangement." I urge the Deputy to think about that wording for a minute. It refers to the preparation of a proposal. In other words, the personal insolvency practitioner has been engaged

with the debtor and would have the expertise to ascertain the eligibility of the debtor. Does the debtor have any income out of which he or she can start making mortgage repayments? The practitioner can look at the overall background financial circumstances and start preparing a proposal. It is not that within two months the bank has to agree. It is not that within two months whatever engagement is required needs to be concluded. It is a two month period to engage with the personal insolvency practitioner who starts the process, effectively, of preparing a proposal for a personal insolvency arrangement. It is a further adjournment *simpliciter*. I just draw the Deputy's attention to that.

The debtor, if I can put it this way, would have, up to that point, largely ignored all of the available arrangements to try to enter into some form of resolution with a financial institution. The debtor may have ignored the MARP process. The debtor may have known that he or she was in financial difficulties. Let us project ourselves forward to a point when this legislation has been working for some months. The debtor may have ignored the possibility of engaging and just done nothing until proceedings were issued. The court can still adjourn for two months if there is some practical possibility of an arrangement being put in place. It is important to note, however, that if a debtor has not engaged, the court is entitled to exercise discretion and not adjourn. Nonetheless, let us say a debtor comes into court who has not sought to go down the insolvency route and has not engaged with a personal insolvency practitioner. That debtor has incurred substantial arrears and has not resorted to using the legislation. The court can still adjourn and instruct the debtor to consult with a personal insolvency practitioner. The practitioner must then make significant progress in the preparation of a proposal. There is no bank veto on a second adjournment. However, if it is clear at the end of the two months that there is no prospect of preparing a proposal because there is no reasonable proposal that could be presented that would facilitate the workings of a personal insolvency arrangement, clearly there will not be a second adjournment but the opportunity does exist for that to happen.

Effectively, to put it simply, the purpose of the two-month period is to enable the debtor to engage a personal insolvency practitioner with a view to the consideration of an application for a personal insolvency arrangement and, within the personal insolvency arrangement process, to apply for a protective certificate under section 96 of the Personal Insolvency Act. The effect of the protective certificate, which will operate for a period of 70 days, with a possible further extension of 40 days from the date of issue, will be to prevent the creditor, whose debts are covered by the certificate, from initiating proceedings or continuing with proceedings, even where such proceedings were initiated before the application for the protective certificate was made. Again, that is an important issue. What we are doing here is something that never existed in the law in this area in the past. The law was as it was for about 200 years until 2009, when an issue arose out of one court judgment. That judgment is now under appeal to the Supreme Court and none of us knows whether the Supreme Court will uphold the view of the High Court or take a different view. The Supreme Court may hold that, in fact, the law never changed after 2009. We simply do not know what will happen in that regard. What we are doing here is enacting a provision that provides an additional protection for home owners to bring into play when there is an application for repossession of their principle, private residence. We are introducing the possibility for the courts, rather than granting a repossession order, to adjourn the case and instruct the debtor to consult with a personal insolvency practitioner. The personal insolvency practitioner can look at the debtor's overall financial circumstances and consider whether there is a reasonable possibility of making a proposal for a personal insolvency arrangement and obtain a protective order in the courts, which gives the debtor additional protection. If a proposal is prepared or in the process of being prepared, though not necessarily finalised, proceedings to repossess can be adjourned again. This is a really important protection and a very important

reform. It is one that I undertook to introduce when we were dealing with this issue in the context of the Personal Insolvency Bill.

In that context, some of the amendments that have been tabled are unnecessary because we have a format here that is workable. When one factors in the protective certificate and the interaction with the insolvency legislation, this provides the protection necessary for anyone who has a reasonable prospect of entering into a personal insolvency arrangement. For all of those reasons, I cannot accept these amendments.

Deputy Pádraig Mac Lochlainn: The Minister's response to the amendments is the fundamental difficulty in that he is putting forward legislation that closes a loophole and thus facilitates the repossession of homes. The environment for families who find themselves in that position is extremely difficult. On the issue of the two month period, the Minister said that under section 2, subsection (4) that period can be extended but people are working within a defined process. From the get-go they are told there is a likelihood that the court will adjourn for two months if this Bill goes through as it is. They are being told that they have two months to go to a personal insolvency practitioner to try to put together a proposition that the bank can accept. Of course, the bank has a veto on these matters and that is a failing in the personal insolvency legislation.

The framework, in my view and my party's view, favours the bank, that is, the lender. The responsibility and onus is put almost entirely on the borrower to put together a proposal within a defined timeframe of two months. I cannot understand why the Minister cannot extend that and indeed, Deputy Donnelly has explained better than I have why the timeframe should be extended. The borrower will have to go back to court to get that timeframe extended. Why is the Minister putting that additional stress on the borrower unnecessarily, when he could just agree to extend the period to six months? The Minister should extend the period to six months and put the onus of responsibility onto the bank to secure the services of the personal insolvency practitioner. Why? The simple answer is the cost. This is the difficulty with the personal insolvency legislation as it is framed and the environment at the moment. The financial burden will be on the person who is already in financial distress and we have no definite clarification on whether, when it comes to a final settlement - assuming there is an agreement - the lender will have to share the burden of the costs.

The Minister is closing down a loophole. None of us likes loopholes but the difficulty is that when the Minister closes down the loophole and opens up the potential for banks to seek repossessions, the environment for those who are in financial distress is not solid. The onus of responsibility is more heavily placed on the person in financial distress than on the banks that are chasing him or her down. The bigger issue, of course, is the banks themselves. Where is the overall sharing of responsibility? We know how this crisis came about. It was caused by the recklessness of the banking sector and the failure of economists and politicians who facilitated an environment in which money was lent recklessly to people whose debts became unsustainable. Where is the sharing of responsibility between the financial institutions, along with the so-called experts who allowed that to happen, and the regular five eighths who now find themselves in financial distress? That is the fundamental difficulty and everything the Minister has said in response to our amendments points to the difficulties and the concerns we have more than anything else.

Deputy Stephen S. Donnelly: I thank the Minister for his reply. Amendment No. 7 should not have been grouped with amendments Nos. 1 to 3, inclusive. Amendment No. 7 relates to cost and is a separate issue that we have not yet addressed. Amendments Nos. 1 to 3, inclusive,

are about timing.

Deputy Alan Shatter: I will come to that.

Deputy Stephen S. Donnelly: Amendment No. 7 should not be in that grouping.

Chairman: As it is in that grouping, we need to deal with it now.

Deputy Stephen S. Donnelly: I know. I am pointing out that we have not addressed it yet. The Minister has spoken to the timing issue and not to the cost issue.

As I said on Second Stage, I greatly welcome this additional protection, which is a variation of the Bill I proposed approximately 18 months ago. That Bill sought additional protections when the banks move for possession. I am delighted to see it here. I acknowledge again, as I did on Second Stage, that it is fantastic it is in here. My amendments relate to ensuring it is correct. The Minister has not spoken to amendment No. 7 relating to cost. I will wait to hear what he has to say and then reply.

Let me talk about amendment No. 3. I take the Minister's point that the proposal takes less time than a court agreement and therefore may not need the four months envisaged through the PIP having to go through. It is a fair point that all that is being done is putting together a proposal. However, considerable work remains to be done. One can imagine the complexity of these cases, many of which do not just focus on mortgage payments but relate to multiple lenders. When the bank is going for possession, there will be equity in the house. Typically the bank will not go after the house when it is in negative equity and will just continue to try to bleed the borrower until the house goes into equity and then it will repossess the house.

This is likely to occur where a borrower or borrowers have multiple debts. There is equity in the house and they may be able to service their mortgage. I dealt with such a case in Wicklow last week. However, with the credit card, business loan, car loan, student loan or whatever it is, they cannot go after them. As a result, the bank moves in and declares it is not concerned about the borrowers' unsecured creditors, and because it has a secured loan it is taking the house from them. The idea is that the personal insolvency practitioner is given sufficient time to come back with a sensible counter-proposal. In that case, much careful negotiation probably needs to be done. Inevitably, multiple lenders with very different incentives will be involved. The secured creditor is going after its security, and the credit card company, credit union or whatever will not want to take a 50%, 60% or 70% write-down on the debt.

There is no right answer to this. Two months seems too little, based on the complexity involved. Taking the Minister's point that no agreement needs to be reached, ideally we should leave enough time for the PIP not to have a theoretical proposal but to present to the judge a proposal that has been discussed and is likely to be agreed.

Deputy Alan Shatter: We are in the process of preparing one on which we have done a certain amount of work and we need more time.

Deputy Stephen S. Donnelly: If that is the case, may I suggest moving it to three months? I take the point that the judge can adjourn it again, but why should we incur the cost, time, stress and complexity, and the cost on the State, etc.? Perhaps the Minister would consider changing it to three months.

Deputy Alan Shatter: I will start with the issue Deputy Donnelly raised. Very careful

consideration was given to what the period should be. One could argue for two months, three months or four months. There are a range of possibilities. A number of issues were factored into the two month period. It is important that people do not find themselves in a position where repossession proceedings are issued if there is a practical possibility of them entering into an arrangement. When court proceedings to repossess are taken, I am conscious that it adds additional cost on to the debtor as well as on to the creditor.

Once the legislation is in place, I hope the publicity surrounding it and the knowledge that exists will result in any individual who could find himself or herself at the receiving end of proceedings getting help from a personal insolvency practitioner considerably before proceedings are issued. I am sure it has occurred to the Deputy that it is not a coincidence that it is reasonably likely that the personal insolvency legislation will be in operation before this legislation has completed its passage through the Houses. There may be symmetry between them, and this Bill might complete its passage by the end of June and the legislation operational by the beginning of July. This legislation will not reach the Statute Book many months ahead of the personal insolvency legislation coming into operation.

Anyone who could be the subject of repossession proceedings brought under this legislation will have the facility to consult a personal insolvency practitioner before anyone may issue repossession proceedings. If repossession proceedings are brought, somebody will not receive court papers on a Monday, be in court on Tuesday and then have two months. It usually takes a number of weeks between being served with court papers and the matter coming before a court. A person in this position receiving court papers does not need to wait for a judge to adjourn a case to go to see a personal insolvency practitioner. Anybody who seeks legal advice on his or her position will immediately be told that if he or she has the funds and is not insolvent, it would be a good idea pay the mortgage and address the arrears. If the person is not in a financial position to do so, he or she will be advised to consider consulting a personal insolvency practitioner. A lawyer not giving that advice would not be giving proper advice.

In advance of the matter first finding its way into court, there will be space for someone to consult the personal insolvency practitioner. It is important that things are not unnecessarily protracted. I would anticipate that the time between receiving court papers and the end of the two month adjournment is likely to be in practical terms not less than three months. It may end up being 11 weeks rather than 12 weeks. As the Deputy will know, there is always a time gap following receipt of court papers, and that was factored into the consideration. We need to ensure people who have been not engaged or may have tried the mortgage arrears resolution process and found it did not work for them seek with some reasonable speed whatever help they can get and do not just ignore the fact there are court proceedings. That is a factor. It is not just that there are just two months - just over eight weeks. There is also the run-in to that.

If it appears possible that an arrangement can be put in place after someone sits down with a personal insolvency practitioner, the court only needs to be satisfied that significant progress has been made in the preparation of a proposal. Then the court may want to know what length of adjournment is needed to deal with that. Initially it is to ensure people do not ignore their circumstance and address it.

Deputy Mac Lochlainn talked about closing a loophole and that we are facilitating repossessions. We need to get real about all of this. All the way up to 2009, the law was very simple and straightforward. If someone was in mortgage arrears and failed to meet repayments, the relevant financial institution could initiate court proceedings and get a repossession order *simpliciter*. That was the law throughout the 18th, 19th and 20th centuries because banks do not

lend people money to purchase homes unless they have the security of knowing that if repayments are not made, they can repossess. That is the very essence of what a mortgage is.

Of course, the last thing we want for any individual or family in financial difficulty is that they should have their home repossessed. Owing to the approach taken by the Government introducing procedures requiring banks to engage, there have been very few repossessions in this country since the property crisis hit. In fact, in normal times, one would have expected more repossessions where people simply overreached themselves financially. Even before there were property bubbles, in normal times one might have expected more repossessions to take place, but there have been very few.

This Bill is not about encouraging repossessions, it is about ensuring that a lacuna that appeared in our law as a result of a single court decision is addressed. It is not tenable to have financial institutions which have loaned money and find that it is more complex and expensive to repossess than it need be, if people simply do not make their mortgage repayments. Most people who are not making their mortgage repayments or only paying part of them, are in that position because they are in genuine financial difficulties.

In my constituency I deal with people in those circumstances. We all know of families who, a number of years ago, were in a reasonably sound place financially, but who are not in difficulties through no fault of their own. I do not think there is a Deputy on either side of the House who does not. There are also some individuals who simply decide that they will spend money on things other than their mortgage and who do have funds. There are some who may well be exploiting the current situation.

Currently, we are not in a position where banks who have lent money under the Dunne judgment are completely prevented from taking action. There are other steps that they could have taken with regard to moneys due to them, other than the simple, summary summons route to seek to repossess a house. Most of them have not done that, however, for a whole range of reasons. If this lacuna in the law was not addressed, they may decide to take alternative actions. It would be quite possible but I genuinely do not know. As a Minister, I cannot interfere in any shape or form with anything the courts may do, nor can I influence the courts in the outcome of any case. However, there is as much chance that the Supreme Court will reverse the Dunne decision as there is that it will uphold it, if I can phrase it in that neutral way, so nobody suggests that I am interfering in any way.

If we did nothing at all, we could find ourselves at some stage in the future with a court judgment where the Supreme Court states that the law is as everyone thought it was after the enactment of the 2009 Act. That would mean simply continuing the law as it was throughout the 20th century where mortgage holders did not repay their banks or other financial institutions, so there could be a repossession order.

In this legislation, we are removing any doubt or uncertainty about the security of mortgages held by financial institutions. We are doing something really important by putting in place a mechanism to try to ensure that - regarding those who either have failed to engage with the institutions concerning their financial difficulties or, to take the opposite side of this, maybe the financial institution has not been reasonable in its engagement - before there is any repossession, if there is a practical possibility of a personal insolvency arrangement, a court can adjourn matters and allow that to be explored. The initial adjournment is really about exploring whether or not substantial progress can be made in preparing a proposal.

I now want to deal with Deputy Donnelly's issue on costs. We also dealt with this matter when discussing the Personal Insolvency Bill. When it comes to dealing with the personal insolvency practitioner's costs, the fees to be paid to the personal insolvency practitioner will ultimately come out of whatever pool of money is available in the context of entering into a personal insolvency arrangement. Therefore, the fees will have to be agreed between both the debtor and the creditors. If the debtor did a deal, for example, with a personal insolvency practitioner, which was to pay him or her X at the end of the process, and the creditors were not happy with the payment of X, then X could not be paid. That is because it would be part of the arrangement as to what the fees would be. In the context of dealing with the equivalent of a debt settlement arrangement in the UK - they do not have a PIA, but have a DSA which is a look-alike - it has been found that fees settle at a particular level on average because there is a control over what the fees will be. Creditors will not agree to excessive fees because that would reduce the funds that may be available to them. We will have to see how this works out in practical terms.

In the context of this Bill, however, I cannot agree to a proposal that states that in the case of any adjournment granted under subsection (2), the mortgager will pay any costs relating to the services provided by the personal insolvency practitioner in full. One could not require the mortgager to do that. Why should the mortgager do so?

Deputy Mac Lochlainn's view is that all the financial institutions are bad, everything they have done is wrong and they should pay for everything. There is a lot the financial institutions did in the years preceding the property collapse of which I have been, and am, enormously critical. They were throwing money at people like confetti at a wedding. They were not undertaking due diligence as to people's capacity to repay. They were contributing to the explosion in property prices by being flaithiúilach with money. They were giving money not only for homes at levels that were clearly beyond the means of people to make repayments should there be any minor change in their own personal circumstances, but were also offering money for investment properties that was unrealistic to people who were not in a financial position, had due diligence been undertaken, to deal with the repayments.

I was not a Member of the Dáil between 2002 and 2007 because the electorate of Dublin South decided to send me on vacation. However, I had serious reservations from 2004 onwards as to what was happening in the property market, although there was nothing I could do about it. In the current market, we should have non-recourse mortgages for people taking up home loans. In the past, that would have ensured that the banks carried out appropriate due diligence. I believe that should currently be part of the market offering for today's home buyers.

Deputy Pádraig Mac Lochlainn: The Minister could mandate it.

Deputy Alan Shatter: It is one of the things that should be there. I do not think we should require that all loans are like that but I personally would like to see our financial institutions offering non-recourse mortgages as a product. That would guarantee responsible lending right into the future. Of course, the banks cannot be blamed for all of it. There were many people who individually borrowed way beyond their means and made the decision to do so. That is an unfortunate reality that, politically, people are somewhat sensitive to talk about because it is perceived as pillorying people who are in difficulties, which none of us wants to do.

Chairman: Can the Minister deal with the amendments?

Deputy Alan Shatter: I will conclude on this. In the context of amendment No. 7, it was

something that was suggested during the debate on the Personal Insolvency Bill. I cannot accept the amendment, however, because I do not think the courts could properly impose on mortgagers the costs of a personal insolvency practitioner. For example, the personal insolvency practitioner may well, having consulted with the debtor, conclude that there is no possibility of putting in place an arrangement because there is no financial base on which it would be possible for creditors to agree to a personal insolvency arrangement. One could not then require the financial institution to pay the personal insolvency practitioner's fees.

It tends to get forgotten that the legislation is not only about mortgages when one is dealing with the 2012 Act, it is also about creditors generally. I suspect that there would be serious constitutional difficulties in picking out one of the creditors simply because it was a financial institution, and saying it must pay the personal insolvency practitioner's fees, but all the other creditors have no obligation. It could well be the case - I re-emphasise that this is an insolvency Bill - that someone may have greater debts with creditors other than the creditor concerning their family home. They may be in difficulties with their family home, but they may have other creditors to whom they owe substantially greater sums of money, other than a financial institution. This particular proposal would, in those circumstances, be seen as inequitable. I do not believe the courts could travel that route.

Deputy Stephen S. Donnelly: I think it could be possible to mandate limited recourse mortgages similar to those in the US. This would solve the problem for ever.

Chairman: Perhaps the Deputy might stick to the debate on the amendment.

Deputy Stephen S. Donnelly: I was just responding to the point the Minister made and I am delighted to hear him referring to that matter. Perhaps he might assist me in respect of a particular problem. If a bank moves to repossess someone's house, it will not be interested in a PIA. If it was interested in the latter, it would have already gone down that route. The judge will then direct it to see if it can get a PIP to put a PIA together. The PIP will not be paid unless a PIA is agreed. Deeply distressed borrowers are going to be walking up and down our main streets seeking PIPs to do work in respect of which they know there is a high probability of their not being paid. That is the problem I am trying to solve. If forcing the mortgager to pay for it does not work for the Minister, that is fair enough. Does he acknowledge that this is a real problem and are there any other avenues he and his officials have considered in the context of trying to solve it?

Deputy Alan Shatter: Let us consider this matter carefully for a moment. What is terribly important is that debtors are not misled as to the practical possibility of entering into personal insolvency arrangements. One of the ways of ensuring that PIPs will be experts and will put forward practical proposals - they will put forward only proposals which are practical - is that they will not be paid unless the proposal is agreed. I am sure people will take up work in this area as personal insolvency practitioners on the understanding that if an agreement and a resolution are not brought about, they will not be paid. There will be people willing to work on that basis. Let us consider the issue raised by the Deputy in respect of inexperienced people who, perhaps, lack the capacity to resolve issues effectively as intermediaries between debtors and creditors and who simply make up proposals which have no chance of success and for which they are paid a fee. The incentive to ensure that PIPs put forward proposals that are practical and reasonable is that if they do not properly guide debtors through the process, they will not be paid.

Deputy Stephen S. Donnelly: I accept that.

Deputy Alan Shatter: There obviously will be people who will consult PIPs and for whom, because of the genuine difficulty of their financial circumstances, personal insolvency arrangements will not be a practical possibility. The only real option for them may well be bankruptcy. That will go beyond the issue of simply repossessing the family home. A well-trained PIP who is familiar with the workings of the legislation, who is doing his or her job responsibly and who is familiar with the relevant regulations should, once the debtor has furnished all the financial background information on assets, income and debts, fairly rapidly be in a position to conclude whether there is a practical possibility of putting together a proposal that has some possibility of success.

Deputy Stephen S. Donnelly: It is very important that the PIP should be able to return to the judge and state that he or she has considered the situation, that he or she has put together a proposal which meets the guidelines relating to the insolvency service, that it is the same sort of proposal being accepted by lenders X, Y and Z and that the bank to which it has been put is refusing to play ball. The latter might state that it is not interested, that the house has equity in it and that it is taking that equity and applying the veto. This also goes to another amendment we will be discussing later. It is extremely important that a PIP should be in a position to return to a judge in order to give to him or her the type of evidence to which I refer. However, no PIP is going to do that. The Minister said so himself. If a PIP is of the view that the bank will not agree to a proposal, then he or she will not spend any more time working on it. We have a problem because there will be borrowers who will be unable to gain access to a PIP. As the Minister stated, PIPs are highly-trained business people and they will know that certain banks will not accept proposals of a particular type. They will inform borrowers that they are not going to get anywhere because it will not be possible to reach agreement with the banks and then bid them goodbye. Borrowers will be stuck on the side of the street with nowhere to go. That is the problem we face and I do not see any solution to it.

I hope the number of people who will be affected in this way will be tiny but there is no doubt that it will happen. Perhaps it might be possible to establish a central fund which could be used in respect of a limited number of cases. If a judge believes it might be possible to develop a proposal, if the borrower involved tries to come up with one and if the PIP he or she approaches states that it will not be possible to provide assistance because of the threat of non-payment, surely something should be done in such circumstances. Perhaps moneys could be provided out of a central fund in order that the borrower in question might consult a PIP, have the situation explained to him or her by the latter and then go back before the judge.

Chairman: I wish to bring to members attention the fact that the buttons for their microphones are not working. They will be obliged, therefore, to switch them on and off manually. I am informed that a technical problem has arisen.

Deputy Alan Shatter: I do not know if I am on or off.

Deputy Pádraig Mac Lochlainn: There is the headline for tomorrow.

Deputy Alan Shatter: A little bit of silence would be a good thing. If only I was not being obliged to run around the Houses to deal with so much legislation today. This is the second Bill with which I have dealt today and there is a third with which I must deal later.

First, there are no moneys available to create a central fund. Second, we must wait to see how the insolvency legislation will work in practice. I cannot reframe and redraft the latter under the guise of this Bill. I have stated that if we discover that any aspect of it is not working

as intended, we will amend it. I have no difficulty in repeating that. However, I cannot start redrafting legislation and making special financial arrangements in respect of one discrete part which applies to the repossession proceedings relating to family homes but which does not apply to the remainder of it. There is no practical way of so dealing with matters. Even in the absence of the personal insolvency legislation, the courts have - with great regularity - adjourned proceedings where someone who is about to have his or her home repossessed sets out to the relevant judge a practical proposition and states that he or she will have sufficient funds in two to three months in order to allow him or her to pay his or her arrears or that he or she needs time to discuss matters with his or her bank. If banks are recalcitrant and obstruct the processing of reasonable proposals, does anyone seriously believe that members of the Judiciary will fail to exercise some degree of judicial discretion in the context of how they proceed? I am of the view that the latter will exercise a sensible approach to this matter. I cannot interfere with the individual decisions they may make. The courts have inherent powers to adjourn proceedings where they deem it appropriate to do so and none of us should forget that.

Deputy Stephen S. Donnelly: In light of his background, the Minister knows the courts and I will follow his lead in that regard. However, as a result of my background, I know the banks and I can foresee how these guys will proceed. The Minister is obviously not for turning. In such circumstances, I will let my arguments lie. I will, however, press the amendments.

Amendment put and declared lost.

Deputy Pádraig Mac Lochlainn: I move amendment No. 2:

In page 4, line 12, to delete "for a period not exceeding 2 months" and substitute "for a minimum of 6 months".

Amendment put and declared lost.

Chairman: Amendment No. 3 is in the name Deputy Finian McGrath, who has been substituted by Deputy Stephen Donnelly. The amendment has already been discussed with amendment No. 1.

Deputy Stephen S. Donnelly: I move amendment No. 3:

In page 4, line 12, to delete "2 months" and substitute "4 months".

Amendment put and declared lost.

Chairman: Amendments Nos. 4, 5, 9 and 10 are related and may be discussed together by agreement.

Deputy Stephen S. Donnelly: I move amendment No. 4:

In page 4, between lines 39 and 40, to insert the following:

"(f) whether possession is being sought of the family home as security against another property, which may be financially distressed or in mortgage arrears.".

For the record, I do not believe these amendments should be grouped. They are different issues, but we will speak to them.

Chairman: They are.

Deputy Stephen S. Donnelly: I am unsure what the solution is to this issue. I have no idea whether what I have proposed would pass the Office of the Attorney General because we do not have access to such a resource. However, I suggest the Minister would consider the issue I am raising. It relates to a situation where a family home is possessed because of bad debt in a buy-to-let scenario. We could have a situation whereby a family has decided that pension pots are not the way to go, for a variety of smart reasons, and has decided to invest in a buy-to-let. For a variety of reasons the buy-to-let is not performing, partly because PRSI is paid on the income and they do not get to net off their costs against their revenue, as in any other business, and for several other Government-created reasons thanks to this Government and the last. The family income is more than adequate to service the family home. The bank can possess the buy-to let but it can also go after the family home because the equity will be in the family home. It does not seem like a sensible social outcome for people to lose their family homes because of a distressed buy-to-let when they can pay the mortgage on the family home. It is entirely possible that the only reason the buy-to-let is in financial difficulty is because of changes that came in to the buy-to-let market through Fianna Fáil.

That party took a business and did to it what has not been done to any other business in the country. It provided that when it was taxing profits, these particular businesses were no longer able to net off full costs against revenue. It was an outrageous thing to do. If one did this to any other business it would collapse. It was a preposterous thing to do but it was exacerbated greatly in the last budget when the Government decided to charge PRSI on rental income. We have a unique business sector whose rules if they were applied to any other sector would ensure that large swathes of businesses would go out of business in the morning. Landlords, for whatever reason, must deal with this nonsense. We have a bizarre scenario whereby a family could lose the family home by having invested in a buy-to-let and the only reason the buy-to-let is in financial difficulty is because two consecutive governments simply decided that it was no longer a business but some other thing.

I do not imagine that my amendment would necessarily pass muster with the Attorney General but it is an issue that I have called on the Minister to examine. I imagine the amendment will not pass but I am keen to get the thoughts of the Minister. Does the Minister agree in principle that it is a highly undesirable social outcome? Can the Minister propose something that might work to alleviate that?

Deputy Alan Shatter: I do not know whether Deputy Donnelly wishes to speak to amendment No. 5 as well, because we are taking them together.

Deputy Stephen S. Donnelly: This is a completely different issue which I alluded to when we were discussing previous amendments. Basically, I want to try to put a little responsibility back on the lenders to act in a responsible way. The Minister, his officials and several of us have gone to a great deal of effort to try to get some insolvency arrangements, a mortgage arrears resolution process, MARP, and a code of conduct in place with all types of statutory and voluntary guidelines and laws. However, the arrangements give vast scope to the lender. For example, a lender is allowed designate a borrower as non-co-operating for a variety of reasons. For example, if the borrower does not reply to a request from the lender within a given time that the bank deems reasonable, then the bank can deem the borrower to be non-co-operating and it can do so for a variety of other ridiculous reasons as well. If the borrower wants to appeal the decision of the bank, the only entity he can appeal to is the bank. There is no independent appeal or no serious oversight.

We have heard a great deal of talk about strategic defaulters and those who cannot pay ver-

sus those who will not pay as well as a complete misuse of the phrase "moral hazard", a term which many who use do not seem to understand, but remarkably little about the conduct of the banks. The banks can apply vetoes, designate people as non-co-operating and all sorts of other things. I am trying to do something simple with this amendment. I am trying to add some elements to the Bill which provide that when the judge is considering a possession order he can consider whether the bank has adhered to such things as the code of conduct.

As the Minister stated earlier, if a personal insolvency practitioner make the case that he and the client have put a proposal together and he believes it is a reasonable proposal and it is a standard proposal that is accepted by other banks, but the bank in question, for whatever reason, is unwilling to accept it, it is explicit in the legislation that the judge can take that into account. That is the thinking behind amendment No. 5.

Chairman: I suggest the Minister deals with those two amendments first and then we will come back to the amendments of Deputy Niall Collins and Deputy Mac Lochlainn.

Deputy Alan Shatter: To some extent they overlap.

Deputy Niall Collins: We are running across each other somewhat. It is fair to say we are all trying to achieve a balance of fairness in the legislation. A central core of contention between Government and Opposition has been in the area around the veto and who the balance of power would reside with. Throughout his presentation and previously the Minister has referenced differentiating between the people who cannot pay and those who will not pay. Deputy Donnelly has referred to them as strategic defaulters but I would rather refer to them as tactical defaulters. I suppose it would help to inform our discussion if we knew how many tactical or strategic defaulters there are.

I have tabled an amendment which effectively covers the power of the court to determine the rejection of a proposal for a personal insolvency arrangement as unreasonable. We are seeking to try to re-balance the system in favour of homeowners.

I wish to refer to several points covered by other amendments. The fact that the code of conduct on mortgage arrears is the rule book lenders must follow should be given more emphasis in the legislation. When a borrower is dealing with a financial institution, in many respects he will have less of a professional, financial or legal back-up and fewer resources available to him in negotiations. In many respects the bank will have endless resources available. We need to consider the area of limiting of costs which are potentially applicable as a result of these disputes.

The Minister made an interesting comment on non-recourse mortgages. Was that a personal view or is the Minister giving us an insight into potential Government policy?

Chairman: Stick with the amendments, please.

Deputy Niall Collins: It is interesting because it is relevant.

Chairman: It may be interesting but we prefer to stick to the amendments.

Deputy Alan Shatter: I will answer Deputy Collins's query by saying that it is a personal view that non-recourse mortgage should at least be an offering.

Chairman: We will invite Deputy Mac Lochlainn to speak to these amendments, seeing as they are grouped, before we bring in the Minister.

Deputy Pádraig Mac Lochlainn: Amendment No. 10 is broadly the same as the amendment of Deputy Donnelly and somewhat similar to the amendment of Deputy Collins. Essentially, we are asking that before a judge would rule for repossession, he should be mindful of several points. He should be clear that the Central Bank code of conduct on mortgage arrears has been followed and that supporting evidence of that is provided. Similarly, a judge should be mindful of whether the mortgagee has been reasonable in terms of the personal insolvency practitioner, that is, if proposals had been submitted, was it reasonable for the bank to reject those proposals. The third element pertains to whether provision was made for an appeal to the bank's decision and whether there was further engagement. The final issue concerns the impact of negative equity. I am not convinced of the point made that a bank would only seek repossession where there was not negative equity and the fourth point tries to deal with that.

Deputy Alan Shatter: I will take each amendment as it arose. On proposed amendments Nos. 4, 5 and 10, I consider these requirements already to be adequately covered in section 2(3), which provides that the court "shall have regard to such matters as it considers appropriate". The Deputies might note this point in particular because the provision continues by stating "and in particular shall have regard to the following" and then lists them out in paragraphs (*a*) to (*e*) of section 2(3). Basically, however, the court can consider any matter it determines to be appropriate. It is not limited to those which have been provided for in particular. This gives a court a broad discretion to determine to what it should have regard. Furthermore, in respect of the conduct of mortgagees, section 2(3)(*d*) already provides that the court shall have regard to "the conduct of the parties to the mortgage in any attempt to find a resolution to the issue of dealing with arrears of payments due on foot of the mortgage". As I noted on Second Stage, it already is clear that courts are taking the behaviour of the parties, including mortgagees, into account when ruling on proceedings. I made reference earlier this afternoon to the courts exercising discretion even without either this legislation or the insolvency legislation being in place, whereby judges simply adjourn cases for periods. However, in the context of taking into account the behaviour of the parties, there is the example of the recent case of Irish Life and Permanent PLC *v.* Duff, in which the High Court refused to order repossession, at least partly on the grounds that the bank had not complied with the provisions of the Central Bank code of conduct on mortgage arrears. Nothing in this Bill changes that approach if the courts regard that to be, in the context of an individual case, an appropriate matter to which have regard. Consequently, this already is occurring without the enactment of the legislation or indeed without the insolvency legislation having come into operation.

One further point I wish to make on amendment No. 10 relates to the proposal in paragraph (*c*) that the court should consider whether, when a personal insolvency arrangement, PIA, has been rejected by creditors, the mortgagor has been given adequate opportunity to appeal the substantive decision of the mortgagee to reject the proposal. This amendment completely misunderstands the way in which the PIA process works. As I have stated many times, it is a voluntary process and where the necessary approval of creditors cannot be obtained on the proposal, the process then ends. There is no appeal to the court in this regard. There exists a possibility that the mortgagor could, through his or her personal insolvency practitioner and where time permits under the protective certificate period, propose a new arrangement which could meet with the approval of creditors.

I cannot accept amendment No. 9 for a number of reasons. The amendment seeks to rewrite provisions of the Personal Insolvency Act, which is not the purpose of this Bill. Overall, the amendment is poorly drafted, confused or somewhat disingenuous as to its intentions and is not acceptable. The select committee should be aware that the protection to a mortgagor proposed

by this Bill is to require that the court allow for a personal insolvency arrangement to be considered where, for example, none previously had been attempted, as with the requirement now in bankruptcy petitions, and not that the court should direct a first or a new PIA and effectively determine its outcome. Once a PIA proposal has been rejected by the creditors' meeting and no subsequent proposal is made during the protective certificate period, the personal insolvency practitioner's role ends as a mediator or negotiator for the debtor. However, members should remember that where a proposal is rejected at a creditors' meeting and where the protective certificate period still exists, this does not stop a personal insolvency practitioner making a different proposal that creditors may accept. Therefore, once a proposal has been rejected and where there is no other proposal that can properly be made within the timeframe, the personal insolvency practitioner has no standing whatsoever in the repossession process and the law does not provide for the court to appoint him or her as an officer essentially to force a settlement on creditors as such a practitioner cannot do that.

The amendment ignores the fact that the personal insolvency legislation is designed to allow agreed settlements to be reached as an alternative to court-ordered settlements. It is my view this amendment would overturn this carefully calibrated approach. I must add the Deputy's proposed provision that a PIA proposal should only offer to repay the current value of a property would represent a huge interference in contractual and property rights and would be likely to be subject to swift challenge in the courts. The amendment makes no reference to the repayment capacity of the debtor, which it seems essentially would be determined by the current value of the property. This would have obvious negative consequences for banks, other financial institutions and ultimately for the taxpayer. I believe this amendment could encourage delinquent behaviour on the part of all debtors, nearly 90% of whom are repaying their mortgages, in order to get their mortgages reduced to present value. This would seriously risk a complete collapse of the property market and would threaten the solvency of the financial institutions and the economy. Finally, I consider that this amendment would run the risk of turning every proposal for a PIA into a costly preliminary to repossession.

Deputy Stephen S. Donnelly: I thank the Minister and am somewhat comforted by his reply on section 2(3) and in particular regarding section 2(3)(*d*) where reference is made to the conduct of the parties to the mortgage. I thank him for that clarification. Therefore, any of the issues outlined in paragraphs (*a*) to (*e*) of section 2(3) really are about emphasis because the headline-----

Deputy Alan Shatter: They are not exclusive.

Deputy Stephen S. Donnelly: Right, they are about emphasis and the opening paragraph, which states the court can consider anything it deems appropriate covers everything. Therefore, I presume the reason that paragraphs (*a*) to (*e*) have been included is for emphasis to back it up. Consequently, this is all a question of legal emphasis. I am not a lawyer but I presume that is the reason these provisions were included, even if everything is covered. I appreciate the Minister will not accept amendment No. 4 but I ask him to think again about where he wishes to place the emphasis. The Minister has chosen to place the emphasis in areas outlined in paragraphs (*a*) to (*e*). The reason I specifically highlighted the issue outlined in amendment No. 4, as opposed to a wide variety of other matters one could emphasise, was because of the scale of the problem. For example, one in three buy-to-let mortgages is now either in arrears or has been restructured, so-called, but actually has simply been put on the never-never. This figure is growing exponentially and is a huge problem. This is not a marginal issue as it now affects one in three such mortgages and at the current rate, it will affect one in two soon enough, probably

by the end of the year. I can forward details on this exponential growth to the Minister if he wishes, as it is absolutely terrifying. Therefore, the reason I have emphasised this issue is that I believe it affects many people who, apart from this one thing they deeply regret, namely, buying a house, apartment or whatever it was, otherwise are solvent and are fine. I believe the banks will take the house from such people because the banks will act rationally and it is rational for them to make good on their security. I ask the Minister to consider this issue, as the reason I have included it is because it is a huge problem. Were the banks to act entirely according to their own self-interest, which it is rational for them to do, one could see many people in a very tricky position. Consequently, before Report Stage, I ask the Minister to consider including a provision that emphasised this point for the courts as well. This is the reason it was put forward.

On amendment No. 5, I am satisfied the points I raised in proposing paragraphs (*f*) and (*h*) on adherence to the code of conduct and on whether an appeal was initiated and the bank ran a reasonable appeal process, respectively, are provided for as per the Minister's answer. A lawyer could point those two aspects to a judge. The one I would also like emphasis on is the proposed paragraph (*g*). It refers to "evidence that the mortgagee has refused to accept a reasonable proposal to restructure the debt, such that the family home would not be repossessed". That is something everyone in the committee room has debated at length, which is the banks have veto on the PIA and therefore they are well within their legal rights to repossess homes where it is in neither the interest of the family nor the State but it is in the bank's short-term interest. It is my belief rightly or wrongly – I hope wrongly – that some of the banks are going to take houses off people they should not, and they are going to turn down restructuring proposals from PIPs that they should not, that are not in the interest of the State nor families. Therefore, while the proposed paragraphs (*f*) and (*h*) are fine, what is important is to have that emphasis for the lawyers to point out to the judge that before the bank sought repossession it went through a PIA and the PIP tried to put a reasonable proposal together but the bank is being unreasonable in not accepting it, while the bank's position is that it does not care because it has a veto and there is equity in the property and it is taking it. I urge the Minister to consider that point very carefully. I believe it should also receive emphasis in the subsections in section 3(2).

Chairman: Does Deputy Mac Lochlainn wish to contribute?

Deputy Pádraig Mac Lochlainn: Yes, I was trying to decide where to intervene. Section 2(3)(*d*) refers to "the conduct of the parties to the mortgage in any attempt to find a solution to the issue of dealing with arrears of payments due on foot of the mortgage". Is that not very broad or vague? I presume from the Minister's first contribution that he will not consider or accept any of the amendments. Why does he not accept amendments that add extra emphasis and specificity, to paraphrase Deputy Donnelly, to what the court should consider before reaching such a serious decision that would have a profound impact on a family?

The Minister argued that we misinterpreted the intent of the personal insolvency in section 2(3)(*c*). One could argue back and forth that the borrower under existing arrangements and legislation and working with a personal insolvency practitioner has to make a case to the bank and the bank has a veto. The question is whether people had a chance and if when the bank rejected the proposal if they went back to the drawing board to try again. That is the intent. One could formalise it by referring to appeals in law but a logical point is being made as to whether every reasonable effort has been made to examine the proposal from the personal insolvency practitioner and the borrower before one would make such a major decision. I would like to know why the Minister thinks 2(3)(*d*) is adequate and that there should not be more specific guidelines for a judge before he or she would make the decision.

Deputy Alan Shatter: I will deal with the amendments in reverse order. The amendment Deputy Mac Lochlainn tabled is quite simple. The proposed section 3(*a*) is covered effectively in 2(3)(*d*) in regard to the conduct of a party to the mortgage in any attempt to find a resolution to deal with the matter. Regarding the proposed section 3(*c*), there is not an appeals system for a rejected personal insolvency arrangement proposal but, again, the conduct of the parties is covered in 2(3)(*d*).

The proposed section 3(*b*) refers to "whether a mortgagee has behaved in a manner deemed reasonable by the court. In determining whether the mortgagee has behaved reasonably the court will consider any responses". That also falls under 2(3)(*d*) and the general provision of having regard to such matters as the court considers appropriate. The language in 2(3)(*d*) is more economical but it covers all the particular instances Deputy Mac Lochlainn wants added to it. Therefore, the amendment does not actually add anything. If anything was excluded it would fall into the general provision the court considers appropriate that is referenced.

Deputy Donnelly said specifying particular scenarios added emphasis. It is one way of putting it and I do not want us to get caught up in linguistics but what it does is say those are issues to which the court should have regard, but the court could also have regard to anything else it deems appropriate. The court has very broad discretion in having regard to issues.

Deputy Donnelly is correct; there are individuals who would be in no financial difficulty with their family homes if when they purchased an investment property they had not either borrowed money on their family home to provide initial capital for the investment property or if they had not added their family home as security for the investment. There are individuals in that position. However, in the context of protecting the family home, one must not lose sight of the connectivity between the legislation and personal insolvency legislation. The personal insolvency legislation in section 99(2)(*h*)-----

Deputy Stephen S. Donnelly: The Minister will have to share that with us. I have forgotten what it says.

Deputy Alan Shatter: A personal insolvency arrangement shall not require that the debtor dispose of his or her interests in the debtor's principal private residence or cease to occupy such residence, lest the provisions of section 104(3) apply. If one takes the first principle, which involves a rental property, a family home and a proposal for a PIA, one will have to work out a proposal where it is a practical financial proposal to allow the debtor stay in his or her home, unless it is a mansion. One starts off on that premise. It cannot be the case that one forces someone to sell his or her home and the rental property and leaves them homeless. The bias and the purpose of the PIA is to protect the person in the home. That applies whether or not there is a rental investment.

Section 104(3) outlines the circumstances in which the home can be sold under a PIA. In section 104(3)(*a*) of the Personal Insolvency Act the debtor confirms in writing to the personal insolvency practitioner that the debtor does not wish to remain in occupation of his or her principal, private residence. That is straightforward. In the second case the personal insolvency practitioner has, having discussed the issue with the debtor, formed the opinion that taking account of the matters referred to in 104(2) – I can list them if members wish – the costs of continuing to reside in the debtor's principal private residence are disproportionately large. That is what I describe as a very large home, someone living in a home that is not essential for them to have a roof over their head. It is a very nice home, it is large but it is not practical in the current financial circumstances. Those are effectively the factors.

Section 104(4) outlines that personal insolvency arrangements should not contain terms providing for the disposal of the debtor's interest in the principal family residence – this is even where they agree to it - unless the debtor has obtained independent legal advice on such disposal or having been advised by the personal insolvency practitioner to obtain legal advice and declined to do so. One also has to have regard to the protections for family homes that apply under the Family Home Protection Act and the Civil Partnership Act 2010.

I will conclude on this point. In Deputy Donnelly's example, the particular provision he suggested be included is not needed because the protections are within the insolvency legislation. Where there are difficulties with an investment property and there is a family home and where the background indicates there is a reasonable PIA that can be entered into, it may produce a sale of the investment property but it will not produce the sale of the family home unless it is extraordinarily large and then clearly the arrangement will envisage some funds being made available to the debtor for a smaller home.

Deputy Stephen S. Donnelly: That is great for the PIA but this legislation comes after the PIA.

Deputy Alan Shatter: They are being taken together.

Deputy Stephen S. Donnelly: I know. I understand that they are linked but this is the repossession legislation. This is what will come into play when the personal insolvency arrangement has not worked. One would hope that by the time a bank and a home owner are in court for repossession, they have already tried to look at a PIA. It is great it is in that legislation for that eventuality, but it is not in this Bill for this circumstance. All I am asking is that the emphasis the Minister has so eloquently read out is included here. This legislation will only come into play when the bank exercises its veto on a PIA. It would be a strange situation for a family to be in court on a repossession order if they had not already approached the bank to sort this out. In many cases, the process the Minister outlined will already have happened and the personal insolvency practitioner will have considered all of those issues. All that is a matter of emphasis. As the Minister has already said in section 2(3), the court can consider anything it wants. I am asking that two very important issues are given emphasis in the same way the Minister has given them to the five that are in there.

Deputy Alan Shatter: I cannot add to what I have said other than that Deputy Donnelly has misunderstood. I do not want to open this unnecessarily because the purpose of the adjournment is to allow people to see if they can enter a PIA. If there has been a process that has not worked, unless there is something about that process, people are unlikely to revisit it. If there is something about that process that indicated there is now a different or alternative arrangement, a person can go ahead with it and the issue is still dealt with in the personal insolvency legislation. It is not necessary. We must agree to disagree.

Chairman: We have given this a good airing so if members are satisfied, we will move on.

Deputy Stephen S. Donnelly: I would not say satisfied.

Chairman: Satisfied to carry on and deal with the amendments, I mean.

Amendment put and declared lost.

Deputy Stephen S. Donnelly: I move amendment No. 5:

In page 4, between lines 39 and 40, to insert the following:

"(f) the adherence of the mortgagee to the Code of Conduct on Mortgage Arrears;

(g) evidence that the mortgagee has refused to accept a reasonable proposal to restructure the debt, such that the family home would not be repossessed;

(h) whether an appeal by the mortgagor was initiated, and the rigour and independence of the mortgagee's appeal process if it was.".

Amendment put and declared lost.

Deputy Alan Shatter: I move amendment No. 6:

In page 5, between lines 1 and 2, to insert the following:

"(5) Where the court adjourns proceedings under this section, the court may, where it considers it appropriate to do so, direct that the proceedings stand adjourned to another venue within the same circuit of the Circuit Court.".

I have tabled this amendment to address a possible shortcoming in the original draft of the Bill. Normally a case before a Circuit Court is adjourned until the next sitting in the same location. This could have implications for the two month time limit in section 2. This amendment will enable the court to take account of the next sitting dates within the circuit and allow the court to hear the case, if necessary, in a different location.

Amendment agreed to.

Amendment No. 7 not moved.

Deputy Pádraig Mac Lochlainn: I move amendment No. 8:

In page 5, between lines 7 and 8, to insert the following:

" "court" means Circuit Court;".

It is clear what I want to achieve with this amendment. The explanation that "court" means "Circuit Court" will prevent the cost implications of the High Court being involved. It might not be necessary, and perhaps the Minister can reassure me on this. However, we have to include it to ensure we are talking about the Circuit Court.

Deputy Alan Shatter: I thank Deputy Mac Lochlainn for tabling this amendment. This was an issue on which we had some exchanges on Second Stage. I fully appreciate the intention behind the amendment. All repossession cases relating to housing loan mortgages created after 1 December 2009 must, under section 101(4) of the Land and Conveyancing Law Reform Act 2009, be commenced in the Circuit Court. There is a logic to the argument that the same limitation should apply to similar mortgages created before that date. From my discussions with the Office of the Attorney General, however, it might not be sufficient to insert a definition of court meaning Circuit Court as suggested in the amendment. Discussions with the Attorney General's office are continuing and I hope to be in a position to address this issue with an appropriate amendment on Report Stage, which will have the effect of ensuring repossession cases involving the family home or principal private residence are always commenced in the Circuit Court. In these circumstances, perhaps Deputy Mac Lochlainn would agree to withdrawing the

amendment. He is obviously welcome to resubmit it on Report Stage, and in the intervening period, any issue that remains to be considered by the Attorney General's office will have been addressed.

Deputy Pádraig Mac Lochlainn: I look forward to a solution on Report Stage.

Deputy Alan Shatter: We are agreed on the objective. We just want to do it the correct way.

Amendment, by leave, withdrawn.

Section 2, as amended, agreed to.

NEW SECTIONS

Deputy Niall Collins: I move amendment No. 9:

In page 5, between lines 17 and 18, to insert the following:

"**Power of Court to determine the rejection of a proposal for a Personal Insolvency Arrangement as unreasonable**

3. (1) Where in an application by a mortgagee for repossession of a property to which *section 2(1)* applies, a proposal for a Personal Insolvency Arrangement made pursuant to section 98(1)(c) of the Act of 2012 which included the debt of the property had been rejected by reason, in whole or in part, of a vote by the mortgagee at a creditors meeting held pursuant to section 109 of the Act of 2012, the Court shall, with the consent of the mortgagor, direct the Personal Insolvency Practitioner concerned to provide to it a report in writing which shall include the content of the proposal, and any amendments made thereto, for a Personal Insolvency Arrangement.

(2) The Personal Insolvency Practitioner shall cooperate in providing the written report to the Court within a period prescribed by the Court to be not more than 2 months. In making the report to the Court under this section the Personal Insolvency Practitioner shall provide an opinion as to whether the rejection by the mortgagee of the proposal for a Personal Insolvency Arrangement was reasonable.

(3) In providing an opinion pursuant to *subsection (2)* the Personal Insolvency Practitioner shall have regard to whether the proposal of a Personal Insolvency Arrangement constituted an offer to repay an amount, whether on a restructured basis or not, equal to the current value of the property and any other matter considered relevant by the Personal Insolvency Practitioner having regard to his or her experience in the proposing of Personal Insolvency Arrangements.

(4) The Court on receipt of the written report from the Personal Insolvency Practitioner shall cause to be made available to the mortgagor and to the mortgagee a copy of the report and shall provide a reasonable period of time for any response in writing to be provided by either party such period not to exceed one month.

(5) On receipt of any response provided by the parties the Court shall proceed to fix a date of a hearing for the purposes of determination by the Court of the reasonableness or unreasonableness of the rejection by the mortgagee of the mortgagor's proposal for a Personal Insolvency Arrangement.

(6) Any creditor being the subject of the proposal for the Personal Insolvency Arrangement shall be notified in advance of the hearing and shall, on request, be provided with a copy of the report of the Personal Insolvency Practitioner and any responses provided by the mortgagee or mortgagor and shall be entitled to make submissions at the hearing under this section.

(7) In determining whether or not the rejection of the proposal for a Personal Insolvency Arrangement was reasonable or unreasonable the Court may have regard to the following matters:

(a) the report of the Personal Insolvency Practitioner and any responses received by the mortgagee or mortgagor;

(b) the submissions of any creditor;

(c) whether the proposal of the Personal Insolvency Arrangement constituted an offer to repay an amount, whether on a restructured basis or not, equal to the current value of the mortgaged property;

(d) the housing needs of the mortgagor and his or her dependants;

(e) the conduct of both parties including the conduct of the mortgagee in underwriting the loan/s secured by the mortgage;

(f) any other circumstances or matters that the Court considers relevant.

(8) If the Court determines that the mortgagee's rejection of the proposal for a Personal Insolvency Arrangement was unreasonable the Court may do any one or more of the following:

(a) adjourn the application for repossession for such time as is necessary to enable the mortgagor to make another proposal for a Personal Insolvency Arrangement and for a vote on such proposal to be taken pursuant to section 109 of the Act of 2012;

(b) stay the coming into effect of the Order of repossession for a period not exceeding 24 months;

(c) without prejudice to the Courts discretion as to any order for costs it might make order that the mortgagee pay the costs or part costs of and incidental to the following, such costs to include the reasonable costs of the Personal Insolvency Practitioner:

(ix) the making of the proposal for a Personal Insolvency Arrangement;

(ii) the application for the Order of repossession;

(iii) the hearing under this section.

(9) A copy of the Personal Insolvency Practitioner's report together with any responses received and any Order made under this section shall be provided to the Insolvency Service of Ireland.".

Amendment put and declared lost.

Deputy Pádraig Mac Lochlainn: I move amendment No. 10:

In page 5, between lines 17 and 18, to insert the following:

"3. In any proceedings brought by a mortgagee seeking an order for possession of land to which the mortgage relates in a case to which this section applies the court, when making its decision whether to grant a possession order shall consider:

(a) whether a mortgagee has fully complied with the Central Bank's Code of Conduct on Mortgage Arrears;

(b) whether a mortgagee has behaved in a manner deemed reasonable by the court. In determining whether the mortgagee has behaved reasonably the court will consider any responses by the mortgagee to proposals from the mortgagor or a personal insolvency practitioner aimed at resolving outstanding arrears;

(c) whether, in cases where the mortgagee has rejected a proposal from a personal insolvency practitioner, the mortgagor has been given adequate opportunity to appeal the substantive decision of the mortgagee to reject the proposal; and

(d) the intentions of the mortgagee with respect to the residual portion of the debt that remains after any possession and sale of the property and the impact this plan may have on the financial circumstances of the mortgagor.".

Amendment put and declared lost.

Chairman: Amendments Nos. 11 to 14, inclusive, are related and will be discussed together.

Deputy Pádraig Mac Lochlainn: I move amendment No. 11:

In page 5, between lines 17 and 18, to insert the following:

"3. Where the court grants an order of possession the court shall instruct the mortgagee to abide by the full terms of any tenancy agreement in place with respect to the property and for the mortgagee to assume the full responsibilities of the landlord as stipulated in that tenancy agreement.".

The buy-to-let sector is the concern in amendment No. 11. We are seeking that any tenancy agreement in place for the property would be honoured. Whatever the outcome, the tenants' rights must be secured for the duration of the tenancy. Amendment No. 12 would give people at least six months, where adults are involved, and at least nine months, if children are involved, to make new arrangements to find a new home. Amendment No. 13 relates to the concern that a house in negative equity would be sold and the family in financial distress would be left to make up the shortfall. That is a very serious issue. Amendment No. 14 would seek the mortgagee to assume responsibility for that gap.

Deputy Alan Shatter: The purpose of section 2 is to provide that the court may adjourn proceedings to allow personal insolvency arrangements to be considered where none had been attempted. It is not intended to deal with the outcomes of repossession hearings, which is an entirely different issue. Amendment No. 11 refers to situations where there are tenancy agreements in place and seeks to invest the court with the power to require mortgagees to abide by the terms of the tenancy agreement. Where rents are being paid, the mortgagee may opt to appoint a receiver of rents rather than seek repossession. This may be viable in certain cases.

Where, however, the mortgagee wishes to sell the property, the mortgagee is under an obligation to obtain the best price reasonably attainable, which would normally require vacant possession of the property. Amendment No. 11 would therefore work to the disadvantage of the borrower and impede operation of the terms of the mortgage contract between the borrower and the mortgagee. For that reason I cannot accept amendment No. 11.

Amendment No. 12 seeks to instruct the court in relation to the orders it may make in reaching its judgement on a repossession action. I think it is important to point out that the court has a general power to stay proceedings, and on a regular basis the courts stay orders for possession for a period of time to enable people to reorder their lives, obtain alternative accommodation or, as happens on occasion, allow children to sit examinations. I do not think it necessary to legislate on this issue as proposed in the amendment and therefore I will not be accepting it.

With regard to amendment No. 13, I believe if we were to go this route, we would encourage strategic default and compound our current difficulties. This would create even more serious difficulties for both financial institutions and the State. I cannot accept the amendment for that reason.

Amendment No. 14 seems to indicate that the Oireachtas should legislate to provide that the cost of the repossession should be paid by the mortgagee. Again I cannot agree that such a provision should be enshrined in primary legislation and cannot accept the amendment.

Deputy Pádraig Mac Lochlainn: I do not think we will have a meeting of minds on this. We have a fundamental difficulty with the decision of the Government to proceed with the legislation. We are in agreement on the closing of loopholes, but when this loophole is closed, it facilitates repossessions by the banks in circumstances in which people are not protected and the balance of interest lies with the banks.

The Minister made a point earlier on the reason that interest rates on mortgages are lower because they are secured debts and that is a reasonable principle of lending and financial transactions. As it is a secured loan, interest rates will be lower and it will be easier for people to purchase their own homes. We are after coming through an extraordinary mess that is ongoing, in which people have significant personal debt due to the recklessness of financial institutions, facilitated by the regulator and the Department of Finance. There are many families in financial distress and are renting accommodation. They need their rights protected. The difficulty is that the Minister's refusal to accept our amendments can only be in the interests of the banks which have contributed and played a significant role in the crisis we face. I intend to press my amendments.

Deputy Alan Shatter: In amendment No. 13, Deputy Mac Lochlainn is effectively turning all mortgages into non-recourse mortgages. I made the point that this could produce strategic default. When people entered into the mortgages they were not non-recourse mortgages. One cannot, through legislation, turn every mortgage in the State into a non-recourse mortgage. That is the implication of what the Deputy is proposing in his amendment No. 13. That would create considerable difficulties and would create additional difficulties within the banking system. It is not a practical proposal.

I made the point earlier that I believe that in the future, non-recourse mortgages should be one of the offerings of certain financial institutions. I emphasise that this is a personal view but I think it ensures the financial institutions exercise due diligence. At present, the financial institutions are exercising due diligence and some would complain that they are making it unneces-

sarily difficult for first-time borrowers to borrow money for a home. There is always the risk that one goes from one extreme to the other, but let us project ourselves 15 to 20 years ahead and assume the world is completely settled and we have solved our difficulties and the historical memory of what occurred is forgotten. I see advantages in a non-recourse mortgage being offered. We cannot, by dint of this legislation, turn every mortgage in the country into a non-recourse mortgage. That could, in effect, be the consequence of what the Deputy is proposing.

Amendment put and declared lost.

Deputy Pádraig Mac Lochlainn: I move amendment No. 12:

In page 5, between lines 17 and 18, to insert the following:

"3. Where the court grants an order of possession the court shall provide for a stay of at least six months where there are adults living in the property and of at least nine months where there are children resident in the property.".

Amendment put and declared lost.

Deputy Pádraig Mac Lochlainn: I move amendment No. 13:

In page 5, between lines 17 and 18, to insert the following:

"3. Where a possession order is granted by the court to land which is the principal private residence of the mortgagor the mortgagee assumes full liability for all debts relating to the mortgage on that property and agrees not to pursue the mortgagor for any outstanding liabilities on that mortgage.".

Amendment put and declared lost.

Deputy Pádraig Mac Lochlainn: I move amendment No. 14.

In page 5, between lines 17 and 18, to insert the following:

"3. Where a possession order is granted by the court to land which is the principal private residence of the mortgagor the mortgagee assumes full liability for all costs related to the repossession of the property and any costs related to the subsequent sale of the property.".

Amendment put and declared lost.

SECTION 3

Deputy Alan Shatter: I move amendment No. 15:

In page 5, line 20, to delete "the Minister" and substitute "the Minister for Justice and Equality".

This is a technical amendment to ensure the commencement provision in section 3 can be exercised by the Minister for Justice and Equality.

Amendment agreed to.

Question proposed: "That section 3, as amended, stand part of the Bill."

Deputy Alan Shatter: I thought we were just dealing with section 2. Am I right or wrong

in that?

Chairman: No. Section 2 is done.

Deputy Alan Shatter: May I make one comment on section 2 as I wish to bring the following to the attention of members? In relation to section 2, it has been brought to my attention in recent days that it may be necessary on Report Stage to amend section 2(1) to supplement the reference to the Family Home Protection Act 1976 with a reference to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, especially since section 2(5) means that this section will apply to mortgages created both before and after 1 December 2009. At present the provision is worded to allow for situations where the mortgage on the property is in the name of one person only but that person has, for whatever reason, ceased to live in the house to which the Family Home Protection Act 1976 applies. The proposed amendment will make it clear that the provisions also apply to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. It is important that there is no unintended omission in the legislation. The amendment is currently being drafted and I hope to table it on Report Stage.

Question put and agreed to.

Title agreed to.

Bill reported with amendments.

Message to Dáil

Chairman: In accordance with Standing Order 87, the following message will be sent to the Dáil:

> The Select Committee on Justice, Defence and Equality has completed its consideration of the Land and Conveyancing Law Reform Bill 2013 and has made amendments thereto.

The select committee adjourned at 3.50 p.m. until 9.30 a.m. on Wednesday, 19 June 2013.