THE HIGH COURT

[RECORD NO. H:IS: HC: 2016: 000053]

BETWEEN

IN THE MATTER OF PART 3 CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015

AND

IN THE MATTER OF

DONAL TAAFFE OF APARTMENT 47, BLOCK E, SMITHFIELD MARKET, DUBLIN 7 (THE DEBTOR)

AND

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

JUDGMENT of Mr. Justice Denis McDonald delivered on the 31st day of July, 2018

Introduction

1. On 29 May 2017, Mr. Ronan Duffy, Personal Insolvency Practitioner, submitted a notice of motion on behalf of the above debtor seeking an order pursuant to s. 115A(9) of the Personal Insolvency Act 2012 ("the 2012 Act") as inserted by s. 21 of the Personal Insolvency (Amendment) Act 2015 ("the 2015 Act") for an order confirming the Personal Insolvency Arrangement ("PIA") in this case notwithstanding that the PIA had not been approved by the creditors of the debtor. Section 115A of the 2012 Act permits the court, in certain circumstances, to make an order confirming a PIA even though a majority of the creditors have voted against it. The jurisdiction of the court to make such an order arises only in circumstances where the debts covered by the proposed PIA include a "relevant debt". For this purpose, s. 115A(18) defines a "relevant debt" as meaning a debt:-

> *"(a) the payment for which is secured by security in or over the debtors' principal private residence, and*
>
> *(b) In respect of which –*
>
> > *(i) the debtor, on 1 January 2015, was in arrears with his or her payments or*
> >
> > *(ii) the debtor having been, before 1 January 2015, in arrears with his or her payments, has entered into an alternative repayment arrangement with the secured creditor concerned".*

2. Having regard to the definition of a "relevant debt", the underlying intention of the Oireachtas in enacting s. 21 of the 2015 Act (which inserted s. 115A in to the 2012 Act) appears very clearly to have been to provide added protection for the principal residence of a debtor in the case of insolvency – where the debtor has fallen into arrears in respect of the mortgage debt on or before 1 January, 2015. As noted above, s. 115A has quite far reaching consequences in that it will (provided certain conditions are met) permit the court to approve a PIA even though it has been rejected by a majority of the debtor's creditors. This is illustrated very starkly in the present case.

3. In the case of the above debtor, his principal creditors are the Governor and Company of the Bank of Ireland ("the bank") the Revenue Commissioners and Pentire Property Finance DAC ("Pentire"). Each of these creditors voted against the PIA. Together, they represent 96.2% of the overall indebtedness of the debtor. Of these three, the bank is by far the largest creditor. The value of the debt owed to the bank is €2,312,157.38 and this represents 78.7% of the debtor's overall indebtedness. It should be noted that the bank is a secured creditor on foot of two mortgage accounts held by the debtor with the bank – namely account 1531270 in respect of which the current outstanding balance is €441,427.29 and account number 1549808 in respect of which the current balance owed to the bank is €70,660.33, the mortgage debt in each case is secured against a property which is jointly owned by the debtor and his partner Una Kennedy, in respect of which there is, currently, an interlocking application at present pending before the Circuit Court.

4. Two creditors voted in favour of the proposal, namely IG Markets Ltd. (which is owed €108,243.00 or 3.7% of the debtor's overall indebtedness) and Cabot Financial Ireland Ltd. (which is owed €3,551.70 or 0.1% of the overall indebtedness).

5. Both the bank and Pentire have filed notices of objection in respect of the application pursuant to s. 115 A. There are a range of objections relied upon by each of the bank and Pentire. For present purposes, it is unnecessary to consider, in detail, each of the grounds of objection. This is in circumstances where a hearing has yet to take place in respect of the substantive relief claimed in the notice of motion described in para. 1 above. It should be noted that, at an earlier stage in these proceedings, it was necessary for the court to consider a preliminary objection by creditors to the way in which the motion (described in paragraph 1 above) was formulated. This objection was common to a number of cases which resulted in a consolidated judgment given by Baker J. on 5 February 2018 in *Re: Niamh Meeley* [2018] IEHC 38. That judgment applies equally to these proceedings and it resolved the preliminary objection in question.

6. This judgment is concerned solely with a further preliminary issue raised by the bank that the debts covered by the proposed PIA do not include a relevant debt (as defined). This is on the basis that the debt secured over the debtor's home at Ballyhannon Lodge, Ballyhannon, Quin, Co. Clare was not in arrears on 1 January 2015 and there was never any alternative repayment arrangement entered into with the bank in respect of the debtor's mortgage account with the bank. In making this case, the bank relies on the description of the debtor's principal private residence in the PIA. It should be noted in this context, that there are a number of references to a principal private residence in the PIA and in the executive summary it is very clearly stated that Ballyhannon Lodge is the principal private residence of the debtor.

7. There is no dispute between the parties that as of 1 January 2015, the debtor was not in arrears with his payments to the bank in respect of the debt secured on Ballyhannon Lodge. Nor is there any dispute that there was never any alternative repayment arrangement with the bank. Thus, if Ballyhannon Lodge is the principal private residence of the debtor, there would be no basis on which to invoke the jurisdiction of the court under s. 115A.

8. However, the debtor has sworn an affidavit in support of the application under s. 115A (and in response to the objection raised by the bank) in which he says that while his family home is at Ballyhannon Lodge, his principal private residence since January 2015 has been Apartment 47, Block E, Smithfield Market, Dublin 7. This is on the basis that he ordinarily resides at this apartment, albeit that he spends his weekends at Ballyhannon Lodge. In paras. 7 – 12 of his affidavit, sworn on 21 November 2017, Mr. Taaffe says: -

"7. I say that since in or about January of 2015 I have been spending the majority of my time in Dublin, and residing in the apartment . . . I say that I used to operate a firm of solicitors, employing five solicitors, and the plan was to spend the majority of time working from Clare, just coming to Dublin when needed. . . In light of the financial collapse, and the fact that I had to make staff redundant, I found myself living and working in Dublin the majority of the time, now operating as a sole practitioner.

8. Indeed, by way of example, over the past month I say that I have been in Dublin 25 out of the last 30 days, only being in Clare for five days in total. . .

9. I say that at the time of the application for a Protective Certificate and at the time of the making of the PIA proposal to creditors, and at the time of the making of the s. 115A application, I ordinarily resided in the Smithfield property. . .

10. I say that I do not suggest that I "ordinarily" reside in two places, nor do I suggest that I have two Principal Private Residence properties. I say and accept that I have one Principal Private Residence, being the apartment in Smithfield and that I ordinarily reside there.

11. I say that my family home is in Clare, where my partner resides with her children, the youngest of whom remains in full-time education.

12. I say that my property is a two-bedroomed apartment. It is located in Smithfield roughly a five-minute walk to both my office and the Four Courts. I say that the property is in average condition. I say that my home is suitable for my needs and appropriate in the circumstances".

The issue to be resolved

9. In the written submissions that were delivered on behalf of the bank in advance of the hearing of this issue which took place on Monday 16 July 2018, it was suggested that the issues to be determined in relation to the principal private residence (PPR) were as follows: -

(a) Is the debtor entitled to claim that he has two PPRs?

(b) Is the debtor entitled to nominate one property as his PPR for the purposes of advancing the PIA to his creditors and then, if that proposal is rejected by the creditors, nominate a different property as his PPR for the purposes of an application to the court, pursuant to s. 115A confirming the coming into effect of the PIA on different terms to those which had previously been rejected by his creditors?

10. However, in the course of the hearing before me it became clear that there was no dispute between the parties in relation to the first of those issues. Both parties accept that a debtor is not entitled to claim more than one principal private residence. In circumstances where both parties are agreed on this issue, and in circumstances where no argument was heard by me from both sides on this issue, I believe it would be wrong for me to express any view on the question. I note, however, the argument made by the bank, by reference to *Black's Law Dictionary* (10th edition) p. 1384, as to the meaning of the word "principal" – namely: -

"Chief; primary; most important"

This is consistent with the ordinary meaning of the word "principal" as recorded, for example, in the *Shorter Oxford English Dictionary* (5th edition) 2002, volume 2 at p. 2347, where the following is stated: -

"first or highest in rank; most important; foremost; greatest…"

11. While I acknowledge the force of the submission made to me by the bank on this issue, I do not believe that it would be appropriate for me to make any determination on the issue in circumstances where I have not heard any contrary argument on behalf of the debtor and where counsel instructed by the personal insolvency practitioner has confirmed that there is no dispute on this issue in these proceedings. I will therefore assume (without so deciding) for the purposes of this judgment that a debtor cannot have more than one principal private residence.

12. The real issue which therefore arises in this case is whether the debtor is bound by the description of the principal private residence in the PIA such that he is not entitled to rely on any contrary extraneous evidence as to the location of his principal private residence.

13. It should be noted at this point that s. 2 of the 2012 Act defines a "principal private residence" as meaning: -

"… a dwelling in which the debtor ordinarily resides and includes—

(a) any building or structure, or

(b) any vehicle or vessel (whether mobile or not),

together with any garden or portion of ground attached to and occupied with the dwelling or otherwise required for the amenity or convenience of the dwelling;"

14. It will be seen that the key aspect of the definition for present purposes relates to the words "*dwelling in which the debtor ordinarily resides*". This is the focus of the affidavit sworn by the debtor on 21 November 2017. As noted in para. 8 above, the debtor maintains that he ordinarily resides in the Smithfield apartment. He explained that while he spends his weekends with his partner in

Co. Clare, he spends his working week in Dublin and lives in the Smithfield apartment, during the week for that purpose. It should be noted that, in the course of the hearing before me, Mr. Bernard Dunleavy SC, counsel for the bank, suggested that the debtor was untruthful in what he said in para. 10 of his affidavit (quoted in para. 8 above) insofar as he swore that he does not suggest that he ordinarily resides in two places. Counsel also submitted that it was not true that the principal private residence of the debtor at the time of the PIA was Smithfield. As I understand it, this submission was based upon the fact that (as described in more detail below) the debtor referred to the existence of more than one principal private residence in his Prescribed Financial Statement. It is also based on the fact that (again as discussed in more detail below) the PIA undoubtedly refers to the Co. Clare property as the principal private residence of the debtor.

The submissions of the bank

15. Counsel for the bank made it clear that the bank is not suggesting that the court should engage in an inquiry, at this stage, as to where the debtor's principal private residence is located. Counsel for the bank submitted that the existence of a "relevant debt" is a "gateway requirement" and the bank says the court must look at Mr. Taaffe's own application to approve the PIA and determine whether it unlocks this gateway. Counsel submitted that for this purpose the court should not look beyond the description of the principal private residence as given in the PIA. It was also submitted that a debtor is not entitled to address the question of his or her principal private residence in a "*freestanding manner*" by additional evidence such as the affidavit evidence relied upon by the debtor in this case.

16. In making his submissions, counsel for the bank drew attention to a number of aspects of the 2012 Act, (as amended). In the first instance he drew attention to the provisions of ss. 50 and 52 of the Act. Under s. 50 a debtor is required, as soon as practicable after the appointment of a personal insolvency practitioner, to provide information to the practitioner that fully discloses his or her financial affairs. On receipt of this information the practitioner must in turn examine the information and assist the debtor in completing a Prescribed Financial Statement (PFS).

17. Under s. 50(3) there is an obligation imposed on the debtor to make a full and honest disclosure of his or her financial affairs to ensure that to the best of his or her knowledge the PFS is true, accurate and complete. The significance of the PFS is underlined by the provisions of s. 52 of the 2012 Act. Under s. 52(1) the personal insolvency practitioner is required, on the basis of the information disclosed to him by the debtor under s. 50(1), to advise the debtor of (among other things) the debtor's eligibility to make a proposal for a Debt Settlement Arrangement or a PIA (as the case may be).

18. Counsel equated the duty imposed on the debtor by s. 50(3) to an obligation of utmost good faith. As explained in para. 58 below, it seems to me that such an obligation is in fact imposed by s. 118(1) in respect of any process involving the debtor under Chapter 4 (which would include the obligation of the debtor under s. 50(3). Mr. Dunleavy also drew attention to the terms of the PFS completed in this case on 25 November, 2016. In the PFS, the apartment at 47E Smithfield Market, was given as the debtor's principal private residence, in addition, in the liabilities section of the PFS, the amount owed to Pentire was stated to be due in respect of, "*Principal private residence lender*". In contrast, the amount owed to the bank was described as being owed to "*Financial institutions*".

19. Counsel stressed the importance of the PFS being entirely accurate and complete. In particular, he highlighted the provisions of s. 52(2)(a)(iii) under which the nature and extent of the debts owed by the debtor to his creditors must be stated and, in the case of secured debts, the PFS must also show the nature of the security.

20. In terms of the architecture of the 2012 Act, counsel for the bank then noted that under s. 53 of the 2012 Act, the debtor (having received advice from the personal insolvency practitioner under s. 52(1) that a proposal for an Arrangement should be made) is to instruct the practitioner in writing to make a proposal for either a Debt Settlement Arrangement or a PIA. In turn under s. 54, the personal insolvency practitioner, on receipt of an instruction under s. 53, is obliged to complete a statement, confirming a number of matters including that the practitioner is of opinion that the information contained in the debtor's PFS is complete and accurate. Such a statement was provided by the personal insolvency practitioner in the present case.

21. It is clear, therefore, that the 2012 Act, places significant emphasis on the need for the PFS to be complete and accurate and the Act envisages that the PFS will form the basis on which decisions will be made as to whether to proceed with formulating a proposal for a PIA.

22. Again, in terms of the architecture of the 2012 Act, counsel for the bank also placed significant emphasis upon the provisions of s. 104. Under s. 104(1) a personal insolvency practitioner in formulating a proposal for a PIA, is required, insofar as is reasonably practicable, to formulate the proposal on terms that will not require the debtor to dispose of this principal private residence or cease to occupy that residence.

23. Section 104(1) also requires the personal insolvency practitioner to have regard to the matters listed in s. 104(2). Those matters are all relevant to the ability of a debtor to continue to reside in his or her principal private residence. The matters include:-

> "*(a) the costs likely to be incurred by the debtor by remaining in occupation of his or her principal private residence…*
>
> *(b) the debtor's income and other financial circumstances as disclosed in the Prescribed Financial Statement,*
>
> *(c) the ability of other persons residing with the debtor in the principal private residence to contribute to the costs referred to in subsection (2), and*
>
> *(d) the reasonable living accommodation needs of the debtor and his or her dependants and having regard to those needs the cost of alternative accommodation…"*

24. As I understand it, the purpose of placing emphasis on these provisions was to highlight the centrality of the principal private residence in the context of a PIA.

25. Counsel for the bank also stressed that the existence of a "relevant debt" is a "gateway requirement". In the absence of a relevant debt, an application under s. 115A does not get off the ground, no matter what other debts may exist. Counsel submitted that this was consistent with the underlying purpose of the 2012 Act, which is to assist, insofar as possible debtors to remain *in situ* in their principal private residence.

26. Counsel for the bank then turned his attention to the documents before the court. With regard to the PFS, he drew attention to the way in which the Smithfield apartment was described as the principal private residence of the debtor on p. 5 of the PFS. He highlighted that on the following page of the PFS, the property in Co. Clare is described as "*2nd PPR*". However, it should be noted

that, as counsel for the personal insolvency practitioner pointed out, p. 6 of the PFS also contains the following information in relation to the Co. Clare property: -

> *"Debtor's partner lives in this property and debtor resides there at weekends"*

27. Counsel for the bank submitted that p. 6 of the PFS was directly at variance with what is said by the debtor at para. 10 of his affidavit, (quoted in para. 8 above). Counsel also stressed that when it came to the PIA the debtor here presented a case to his creditors which unequivocally identified the Co. Clare property as his principal private residence. This appears in the description of the "material retained assets" on the first page of the executive summary. Both the Co. Clare property and the Smithfield apartment are mentioned in this section of the executive summary. However, it is only the Co. Clare property that is described as the "PPR". Insofar as the Smithfield apartment is concerned, the PIA states: -

> *"The debtor resides at the property when working in Dublin."*

28. There are also a number of other references within the PIA which clearly point to the Co. Clare property as the debtor's principal private residence. For example, the amount shown as being the "mortgage balance" in respect of the debtor's principal private residence is stated to be €512,088, which represents the debt owed to the bank which is secured against the Co. Clare property. Furthermore, when the executive summary comes to deal with what was described as "income/expenditure jointly with interlocking party", the figures given in respect of the principal private residence match the payment to be made to the bank, while the payment to be made in respect of the Smithfield apartment is described as being in respect of *"Mortgage (Dublin property)".*

29. Insofar as relevant to the issue which currently falls for determination, the section of the executive summary dealing with the main features of the PIA is in the following terms:

> *"It is proposed that the Debtor's joint PPR mortgage in respect of the property at Ballyhannon Lodge… be restructured, in accordance with Appendix 7.*
>
> *It is proposed that the Debtor's mortgage in respect of the property at apartment 47… Smithfield Market… where he and his partner reside when working in Dublin, be restructured to a more sustainable level in accordance with Appendix 7. The Debtor proposes to retain this property given that he would be making a rental payment of a similar amount."*

30. It is clear from this description of the main features of the PIA that the creditors of the debtor were asked to vote on a proposal which identified the Co. Clare property as the debtor's principal private residence. Counsel for the bank argues that the debtor, in seeking relief under s. 115A of the 2012 Act, can only seek confirmation of the PIA as it stands. The bank says that the debtor, in the PIA, has very clearly identified the Co. Clare property as his principal private residence. That is the only PIA before the court. That is the only PIA that has been the subject of consideration by the creditors of the debtor. Furthermore, it is the only PIA in respect of which an application is made under s. 115A. In essence, the bank's case is that the debtor is constrained by his own application. On the basis of the PIA before the court, the only principal private residence is in Co. Clare. There is no "relevant debt" in respect of that property. Thus, the bank argues that the "gateway" provisions are not engaged and the application to confirm the PIA does not get off the ground.

The submissions of the practitioner

31. Counsel instructed by the personal insolvency practitioner, Mr. Keith Farry BL, strongly contested the arguments made on behalf of the bank. He submitted that the bank is incorrect in its approach and in particular in singling out the "relevant debt" requirement as a "gateway" matter that requires to be dealt with on a preliminary basis. Mr. Farry submitted that s. 115A has a number of "gateway" aspects all of which will have to be dealt with, in due course, in the substantive hearing of the application under s. 115A. He drew attention, for example, to the requirement set out in s. 115A (2) that an application under s. 115A cannot be made any later than 14 days after the creditors' meeting. Mr. Farry said that this was as much a gateway requirement as the relevant debt requirement. He also drew attention to the requirement in s. 115A(9)(g) that at least one class of creditors has accepted the proposed PIA by a majority of over 50% of the value of the debts owed to that class. Counsel suggested that in the circumstances the bank was mistaken in placing so much emphasis on the "*relevant debt*" as a gateway provision. Counsel stressed that at this stage, no hearing has taken place under s. 115A. In the course of any hearing under s. 115A the court will in due course have to consider each of the mandatory requirements that must be satisfied if s. 115A is to apply. Counsel also emphasised that the only sworn evidence before the court in relation to where the debtor resides is the affidavit sworn by the debtor himself. Counsel submitted that the affidavit (the relevant paragraphs of which are set out at para. 8 above), unequivocally established that it is in the Smithfield apartment that the debtor ordinarily resides. He stressed that there was no counterveiling evidence from the bank.

32. Mr. Farry drew attention to a number of the documents before the court. In the first place, he drew attention to the originating application for the protective certificate dated 30 November, 2016, in which Mr. Taaffe, applied for an order pursuant to s. 95(2)(a) of the 2012 Act, granting a protective certificate in this case. The application states that Mr. Taaffe is "*of 47E Smithfield Market, Dublin 7, County of Dublin*". Page 5 of the application gives the Smithfield apartment as the address of the debtor. It gives the Co. Clare address as a "previous address" of the debtor. In this context, it should be borne in mind that the form of application is a standard form and it can sometimes be difficult to adapt the form to the particular circumstances of an individual debtor.

33. Mr. Farry then drew attention to the PFS. He noted that on the cover page of the PFS, the address of the debtor was given as the Smithfield apartment. He also drew attention to the information contained in p. 3 of the PFS where both the value and the extent of the secured indebtedness in respect of the principal private residence are given. The value given for the principal private residence is €250,000. Mr. Farry explained that this relates to the Smithfield apartment. In terms of the debt due to the principal private residence lender, the amount specified is €361,245.30. Mr. Farry highlighted that this is the amount due to Pentire.

34. Mr. Farry also highlighted the unequivocal statement on p. 5 of the PFS where the Smithfield apartment is described as the debtor's principal private residence. Mr. Farry submitted that the information contained on p. 6 of the PFS (which had been the subject of criticism by Mr. Dunleavy on behalf of the bank) is not, in substance, incorrect although Mr Farry accepts that a debtor cannot have more than one principal private residence. Again, Mr. Farry stressed that the PFS is a standard form. In fact, the form of the PFS is prescribed by regulations namely the Personal Insolvency Act 2012 (Prescribed Financial Statement) Regulations 2014 (S.I. Number 259 of 2014). In addition to drawing attention to the comment on p. 6 (quoted in para. 26 above) Mr. Farry noted that the section of the PFS which deals with the Co. Clare property is headed "investment property". As I understand it, Mr. Farry was suggesting that this is a standard heading in the PFS and the debtor here was simply trying to bring himself within the requirements of the standard forms. It should be noted that p. 5 of the PFS in this case mirrors Part 1 of the Assets section of the PFS standard form while p. 6 (albeit with the addition of the words "*2nd PPR*") mirrors Part 2 of the same section of the prescribed standard form PFS.

35. Considerable emphasis was placed by Mr. Farry on what is said by the debtor in his affidavit, (As quoted in para. 8 above). He reiterated that this is the only sworn evidence dealing with where the debtor ordinarily resides (which is the relevant test for present purposes).

36. Mr. Farry also highlighted the terms of the Notice of Objection filed on behalf of Pentire which clearly signal that Pentire regards the Smithfield apartment as the principal private residence of the debtor. In s. 6 of that Notice, Pentire complains that, while the bank debt secured on the Co. Clare property would be repaid in full under the PIA, the debt to Pentire: -

> "*Which is secured on the debtor's* principal private residence at Apartment 47 Smithfield… *would be significantly written down*" (emphasis added).

37. In addition, s. 9 of the same Notice states that in the submission made by Pentire in accordance with ss. 98(1) and 102(1) of the 2012 Act, a payment schedule in respect of the Pentire debt was not only affordable to the debtor, but "*would not have required him to dispose of any an interest in or cease to occupy his principal private residence…"* Mr. Farry said that this again was a reference to the Smithfield apartment.

38. Mr. Farry submitted that the creditors of the debtor were not misled by the terms of the PIA and this is very clearly illustrated by the terms of Pentire's Notice of Objection (as set out above). Its Notice of Objection shows that, notwithstanding what was said in the PIA (where the Co. Clare property was described as the debtor's principal private residence) Pentire very clearly understood that, in truth, the principal private residence of the debtor within the meaning of the 2012 Act is the Smithfield apartment.

39. With regard to the PIA Mr. Farry submitted that this is a document that is drafted by the personal insolvency practitioner. Mr. Farry drew attention to the provisions of s. 104(1) of the Act of 2012, which contemplate that it is the personal insolvency practitioner who will formulate the proposal for a PIA.

40. With regard to the identification in the PIA of the Co. Clare property as the principal private residence of the debtor, Mr. Farry said that it has to be borne in mind that this is an interlocking application linked with the application currently pending in the Circuit Court in respect of the debtor's partner, Ms. Una Kennedy. As noted elsewhere in this judgment, there appears to be no doubt but that the Co. Clare property is the Principal Private Residence of Ms. Kennedy.

41. Mr. Farry, understandably, placed most emphasis upon the affidavit sworn by the debtor (as described above). Mr. Farry submitted that the court does not need to go beyond the affidavit. Mr. Farry submitted that the definition of a principal private residence in s. 2 of the 2012 Act is a matter of substance which requires a debtor, for the purposes of s. 115A, to prove where he or she ordinarily resides.

42. Mr. Farry also submitted that s. 120 of the 2012 Act limits the grounds on which a PIA may be challenged by the creditor and that it will be for the bank in due course to prove these grounds at the substantive hearing of the application brought by the personal insolvency practitioner in this case on behalf of the debtor. At a later point in this judgment I deal in more detail with s. 120.

Further submissions of the parties

43. In reply, Mr. Dunleavy, suggested that Mr. Farry had misunderstood the position of the bank. As noted above, Mr.Dunleavy said that the bank is not suggesting that the court should engage in an inquiry as to where the principal private residence of the debtor is located. Instead, Mr. Dunleavy reiterated that the court must look at the application brought under s. 115A through the lens of the PIA in which the Co. Clare property is clearly identified as the debtor's principal private residence. The case made by the bank is that, in those circumstances, the only property that can be treated as the principal private residence of the debtor for the purposes of the application to confirm the PIA is the Co. Clare property identified as the only such residence in the PIA.

44. With regard to Mr. Farry's submission that it was the responsibility of the personal insolvency practitioner to formulate the PIA, Mr. Dunleavy drew my attention to the provisions of s. 99(1) of the Act of 2012, which expressly requires that the terms of a PIA "*shall be those which are agreed to by the debtor…*". Mr. Dunleavy suggested that in the circumstances the debtor takes "*completed ownership*" of what is contained in the PIA. He suggested that this is reinforced by the provisions of s. 106(1) which provides that the creditors' meeting to consider the PIA will not be called unless the debtor has consented to the proposal for a PIA prepared by the personal insolvency practitioner. Thus, in the present case, Mr. Dunleavy said that the debtor had consented to the PIA being put forward to his creditors on the basis that the Co. Clare property is his principal private residence. Mr. Dunleavy suggested that this was conceded in the written submissions delivered on behalf of the personal insolvency practitioner at an earlier stage of these proceedings (prior to the determination of the issue described above by Baker J.). In para. 25, of those submissions, it was stated that: -

> *"The PIA is the debtor's proposal".*

45. Mr. Dunleavy concluded his submissions by suggesting that the debtor cannot, by swearing an affidavit for the purposes of the hearing under s. 115A, get around his previous nomination of the Co. Clare property as his principal private residence in the PIA.

46. One further submission by Mr. Farry should be noted. He suggested that Mr. Dunleavy could not be correct insofar as he submitted that extraneous evidence could not be relied upon in an application under s. 115A. Mr. Farry said that in any application under s. 115A, there are many matters which will require to be proved in the ordinary course. Thus, there will always be evidence from the personal insolvency practitioner proving such matters as:-

(a) The holding of the creditors' meeting;

(b) Proof that the s. 115A application was launched within 14 days after the creditors' meeting;

(c) Proof of service on all relevant parties;

(d) Proof that there is a class of creditors, at least 50% of which supported the arrangement;

(e) Proof of the outcome of the voting at the creditors' meeting.

47. Mr. Farry therefore, suggested that proof of the place where the debtor ordinarily resides is just one of several matters that falls to be proven in applications of this kind.

Discussion
48. I am very grateful to counsel for the very clear and comprehensive way in which they have argued the matter on both sides. In circumstances where the bank is not asking the court to make a determination as to the true location of the debtor's principal private residence, the issue which I have to resolve on this application boils down to whether the debtor is entitled to put forward on the hearing of the s. 115A application a different property as his principal private residence to that set out in the PIA. In other words, is the debtor bound for the purposes of the s. 115A application by what has been said in the PIA as to the identity of his principal private residence.

49. In considering this question, I do not believe that I can take the view that the debtor has no responsibility for the formulation of the PIA. While s. 98(1) of the 2012 Act contemplates that the proposal for a PIA will be prepared by the personal insolvency practitioner. Sections 99(1) and 106(1) very clearly demonstrate that the terms of the PIA have to be agreed with the debtor.

50. One of the puzzling features of this case is the discrepancy between the terms of the PFS and the PIA. While p. 6 of the PFS suggests that the Co. Clare property is a "*2nd PPR*", it is quite clear from a consideration of the PFS as a whole that the Smithfield apartment is, in fact, identified as the principal private residence of the debtor. This is reinforced, for example, by the detailed information given in relation to the debt secured on the principal private residence on p. 12 of the PFS. There, all of the information very clearly relates to the Pentire liability and the Smithfield apartment. When it comes to deal with the Bank of Ireland debt secured on the Co. Clare property at p. 14 of the PFS, no suggestion is made that this liability is secured on the principal private residence of the debtor.

51. In light of the terms of the PFS, I find it very difficult to understand why a different property was identified as the debtor's principal private residence in the PIA. This has not been explained at this stage, although I note from the submissions made by Mr. Farry on behalf of the personal insolvency practitioner, that it is intended to furnish further affidavit evidence in advance of the substantive hearing of the application under s. 115A. I also note the suggestion made by Mr. Farry in the course of his submissions that the identification of the Co. Clare property as the debtor's principal private residence in the PIA may have arisen as a consequence of the fact that the PIA was prepared in the context not merely of these proceedings in the High Court but also the interlocking proceedings in the Circuit Court in respect of the debtor's partner Ms. Una Kennedy. There appears to be no doubt but that the Co. Clare property is her principal private residence. However, in circumstances where that has not been dealt with on affidavit, there is no evidence before the court that this is the explanation for the difference between the way in which the principal private residence is dealt with in the PFS on the one hand and the PIA on the other.

52. It is particularly difficult to understand the discrepancy between the PFS and the PIA in circumstances where, as counsel for the bank correctly submitted, the architecture of the 2012 Act envisages that the PFS will form the basis on which the PIA is put forward. As noted in para. 17 above, there is a statutory obligation imposed on the debtor to make a full and honest disclosure of his financial affairs to ensure that to the best of his knowledge the PFS is true, accurate and complete. This obligation is stressed by counsel for the bank. However, nothing has in fact been submitted to me which would show that the debtor is in breach of this obligation insofar as the PFS is concerned. On the contrary, if it be the case that the Smithfield apartment is the principal private residence of the debtor, then the PFS (insofar as it relates to the identity of his principal private residence) appears to be substantially correct. I appreciate that it also refers to the Co. Clare property as the debtor's "*2nd PPR*" but both the structure of the PFS and the overall content of the PFS appear to me to point to the Smithfield apartment as the principal private residence of the debtor.

53. The link between the PFS and the PIA is to be found in the provisions of s. 54. As recorded in para. 20 above, under s. 54, the personal insolvency practitioner - on receipt of an instruction from the debtor under s. 53 to proceed with a proposal for a PIA - is obliged to complete a statement confirming (*inter alia*) that the practitioner is of opinion that the information contained in the PFS is complete and accurate. In that way, the Act very clearly envisages that the PFS will form the basis for moving forward with a PIA. One would therefore expect that the terms of the PIA should reflect what was said in the PFS and be consistent with the PFS.

54. The identification in the PIA of the Co. Clare property as the principal private residence of the debtor is all the more puzzling when one considers the terms of the debtor's affidavit sworn on 21 November 2017. While I have not been asked to make a determination at this stage as to where the debtor's principal private residence can be said to be, the evidence in that affidavit (if admissible) tends to support the view that the information given on pp. 5 and 12 of the PFS (to the effect that the Smithfield apartment is his principal private residence) is, in fact, correct. On the face of it, it is therefore very surprising that the PIA identifies the Co. Clare property as the principal private residence of the debtor.

55. I am in no position to form a view as to how the discrepancy between the PIA and the PFS arose. That is not something which is explained anywhere on affidavit. For the purposes of this application, I must proceed on the basis that the discrepancy exists. I must also proceed on the basis that on the face of the PIA, it is the Co. Clare property that is clearly identified as the principal private residence of the debtor.

56. In this context, it is important to consider the effect of a PIA. As discussed in the submissions of counsel, the proposal for the PIA is voted on by the creditors at the creditors' meeting. That is clear from s. 109(1). There is an opportunity under s. 109(3) to modify the proposal before the vote for the purposes of addressing an ambiguity or rectifying an error. That obviously did not occur in the present case. Instead, the creditors were asked to consider and vote on the proposal which is embodied in the PIA and which identifies the Co. Clare property as the principal private residence of the debtor.

57. It is instructive to consider what happens thereafter where a PIA is confirmed by the court. In the case of its confirmation under s. 115A, the PIA will be registered with the Insolvency Service. If a PIA is registered by the Insolvency Service, it takes effect according to its terms. Essentially, the terms become legally binding. This is reinforced by the provisions of s. 117(1) which expressly provides that the PIA:-

> *"shall operate according to its terms and the debtor and creditors concerned shall perform their obligations in accordance with the Arrangement".*

58. In addition, it is also necessary, in my view, to bear in mind that under s. 118(1) of the 2012 Act, a specific obligation is imposed on a debtor who participates in any process under Chapter 4 (which deals with PIA) to (a) act in good faith and (b) to make full disclosure to the personal insolvency practitioner of (*inter alia*) all of his or her assets, income and liabilities. It seems to me that this obligation to act in good faith extends to all steps involving the debtor under Chapter 4 of the 2012 Act. This obligation would accordingly extend to the requirement under s. 99(1) and s. 106(1) to agree the terms of the PIA and to consent to the proposal for the PIA being put before the meeting of creditors.

59. Having regard to the statutory provisions described in paras. 57 to 58 above, a significant question arises in this case as to whether the debtor - subsequent to the meeting of creditors, after he had previously agreed the terms of the proposal for the PIA, and in circumstances where no attempt was made to modify those terms pursuant to the provisions of s. 109(3) - can be said to be entitled to thereafter nominate a different property as his principal private residence to that described in the PIA. As noted in para. 57 above, the Act clearly envisages that the PIA is intended to take effect in accordance with its terms. Equally, the debtor is required to act in good faith. The question therefore arises how, in an application under s. 115A, the debtor can seek to suggest that in fact his principal private residence is different to that described in the PIA.

60. In other words, a question arises as to whether a court can properly approve a PIA, in circumstances where one of the details of the PIA is apparently incorrect and where, once registered with the Insolvency Service, the PIA (incorporating details which are known to be incorrect) will take effect in accordance with its terms pursuant to s. 117(1). At this point, I should make it clear, that I do not know (and have not been asked to make a finding) that the location of the debtor's principal private residence as given in the PIA is in fact incorrect. However, on the basis of the affidavit evidence of the debtor, the address given in the PIA may well be incorrect. If so, a similarly troublesome question arises as to how a court, on an application under s. 115A, can be satisfied that a debtor has acted in good faith where the PIA is known to be incorrect (again assuming that the information in the PIA is incorrect).

61. Before attempting to address those questions (to the extent that it is appropriate to do so in advance of any substantive hearing), it seems to me that the provisions of ss. 120 and 122 may potentially be relevant and should be considered. Section 120 of the 2012 Act, sets out the grounds on which a PIA may be challenged by a creditor. For the purposes of this issue, it is not necessary to consider all of the grounds. The potentially relevant ground for present purposes is that contained in s. 120(c) which is in the following terms: -

> *"(c) a material inaccuracy or omission exists in the debtor's statement of affairs (based on the Prescribed Financial Statement) which causes a material detriment to the creditor"*

62. This very clearly suggests that if no material detriment is caused to the creditor, a material inaccuracy or omission in a debtor's statement of affairs based on the PFS will not be a ground of challenge. The provision therefore appears to envisage that there may be material inaccuracies in a statement of affairs which would not give rise to a ground of challenge. The language of s. 120(c) is echoed in the provisions of s. 122 of the 2012 Act which deal with circumstances where, after a PIA takes effect, a creditor (or the personal insolvency practitioner) may apply to the court to have the PIA terminated. One of the grounds on which such an application can be made is that set out in s. 122(1)(a) which is in identical terms to s. 120(c). Again this suggests that a material inaccuracy in a debtor's statement of affairs which does not cause detriment to a creditor was not regarded by the legislature as sufficient to give a creditor a basis to attack a PIA.

63. Of course, neither ss. 120(c) nor s. 122(1)(a) are directly applicable in the case of an inaccuracy in a PIA other than where the inaccuracy is contained in the statement of affairs (which will, as in this case, be annexed in an appendix to the PIA). There is in fact no provision in the 2012 Act which provides a mechanism, after proposals for a PIA have been voted upon, to deal with errors or inaccuracies contained in the PIA. In my limited experience as a judge dealing with personal insolvency matters, the only practical way of dealing with an inconsequential error or inaccuracy which is identified in a PIA, is to note, in the order confirming the PIA, that the inaccuracy exists and to set out the correct position in the order. So far, the only inaccuracies which I have encountered are ones which are truly inconsequential and which do not affect the payment terms or the other operative provisions set out in Part IV of the PIA form.

64. Nonetheless, although ss. 120 and 122 are not concerned with inaccuracies in a PIA (as such) it is significant that the legislature was only concerned to provide a remedy to a creditor in respect of material inaccuracies or omissions which give rise to a material detriment. It is clear from ss. 120 and 121 that, in the case of inaccuracies in a statement of affairs (based on the PFS), the legislature does not regard inaccuracies as giving rise to a remedy unless they are material and unless detriment can be shown. In this context, it is important to bear in mind that, as Mr. Dunleavy acknowledged, the PFS is intended to be the foundation on which the PIA is built. It would seem to me to be extraordinary that an inaccuracy (which does not give rise to detriment) in such an important document as a statement of affairs could be forgiven, but that an inaccuracy in other parts of the PIA would be incapable of exoneration even where no detriment is suffered by anyone.

65. I must, however, bear in mind that, notwithstanding the importance of the PFS (or a statement of affairs based upon it), the PIA has the binding status outlined in para. 57 once it has been voted on by the creditors, approved by the court and registered with the Insolvency Service. I must also bear in mind that a PIA once voted on by the creditors, is not capable of amendment. In these circumstances, great care should be taken by those involved in the preparation of a PIA to ensure that it is accurate in all respects.

66. Moreover, if a creditor has voted in favour of arrangement in a particular form and organised its affairs on that basis, it would be difficult to see any circumstance in which the debtor could thereafter seek to suggest that, in respect of such a creditor, he or she is not bound by the way in which the material terms of the arrangement have been expressed. Thus, in cases where creditors have accepted the PIA by voting in favour of the proposals contained in the PIA, it may be difficult for a debtor, at the subsequent hearing to confirm the PIA, to resile from the express terms of that arrangement (at least in so far as they are material) or even to suggest that there is an error in any of its material terms.

67. Nonetheless, I am of opinion that there is a significant difference between the scenario described in para. 66 above, and the present case. In the first place, the bank has not signed up to the proposal. It is true that the bank voted on the proposal but, crucially, the bank never accepted the proposal. On the contrary, it voted against the proposal. There is in fact nothing in the evidence before the court which suggests that the bank would have voted in favour of these proposals even if a different location had been given as the debtor's principal private residence. To judge from its notice of objection, its opposition to the proposal is based largely on the grounds that its interests are impaired by the proposal and that the terms of the arrangement are unfair and inequitable and unfairly prejudicial to it.

68. Secondly, it is open to question that the description of the principal private residence in the PIA is in fact material to the operative provisions of the PIA. In this context, I must bear in mind that, notwithstanding the centrality of the principal private residence in the context of the rationale for the proposals for a PIA under the 2012 Act, the description of the PIA (at least in the present case) does not in fact affect the payment proposals or any of the other substantive proposals which are contained in the PIA. On the contrary, it seems to me that the payment proposals and all of the other operative parts of Part IV of the PIA can still be operated in this case even if it transpires that the principal private residence of the debtor is incorrectly stated in the PIA.

69. It is important in my view to have regard to the structure and the terms of the PIA. The PIA is in the standard form. It contains in Part I an executive summary. This is where the Co. Clare property is very plainly identified as the debtor's principal private residence.

Part II contains the definitions which will be used in the PIA. Part III provides information in relation to the "debtor background, reasonable living expenses and confirmations". This section opens with the words: -

"The Debtor Donal Taaffe, of Apartment 47, Block E, Smithfield Market, Dublin 7 . . ."

Part III also sets out the claimed advantages of the arrangement and the debtor's living expenses. It also contains a number of important confirmations and warranties on the part of the debtor. However, it is in Part IV that the PIA spells out the specific terms of the arrangement under which payments will be made to the creditors. This section refers to and effectively incorporates a number of appendices. For example, Appendix 3 contains a schedule of creditors including the secured creditors and unsecured creditors and also the preferential creditors. Appendix 4 is especially important. It sets out the estimated dividends to creditors. Appendix 5 sets out a comparison of the estimated outcome under the proposed arrangement as against the outcome in the event of a bankruptcy of the debtor and of his partner, Ms. Kennedy. Appendix 6 sets out the estimated voting rights to be accorded to creditors at the meeting to vote on the proposals. Appendix 7.1 deals with the proposed restructure of the Ballyhannon mortgage loan. Appendix 7.2 deals with the proposed mortgage restructure of the mortgage in respect of Apartment 47, Smithfield Market. For completeness, it should be noted that each of the bank and Pentire are unhappy with the terms proposed in Appendix 7 and their objections will fall to be considered at the substantive hearing of the s. 115A application.

70. It is thus in Part IV of the PIA and the appendices described above that the creditors find the terms on which it is proposed the debts due to them will be dealt with. Of course, some of the other terms of the PIA (including the confirmations and warranties given by the debtor in Part III) are also very important. So, too are the standard terms set out in Part V of the PIA. The creditors will wish to rely on these standard terms and on the warranties and confirmations. However, it is in Part IV and the attached appendices that one finds the "*meat*" of the proposal.

71. Crucially, it seems to me that these terms are all capable of being performed and enforced even if it transpires that the location of the principal private residence of the debtor has been incorrectly described in the executive summary. In fact, the terms would all be capable of being applied and enforced whether the executive summary had described the principal private residence as the Smithfield apartment or the Co. Clare property. While, as a matter of law, the identity of the principal private residence is critical to the potential application of s. 115A, it does not appear to me to be critical to the operation of the arrangement contained within the PIA. In my view that arrangement would be capable of taking effect and would be legally enforceable (if confirmed by the court under s. 115A) irrespective of the identification of the Co. Clare property as the principal private residence of the debtor. In this context, I do not see anything in ss. 99 or 104 that would cause me to alter this view. S. 99 sets out in detail the mandatory requirements concerning PIAs but does not make any provision that the address of the principal private residence must be stated either accurately or at all. S. 104 is the statutory provision which places the principal private residence at the centre of the PIA process but, again, it contains no specific provision requiring that the PIA should record its address in any particular way. Nor does it contain any provision which suggests that any adverse consequences should flow from a failure to correctly identify the address.

72. However, it is clear that court confirmation could not be forthcoming unless the court can be satisfied that some property other than the Co. Clare property constitutes the principal private residence of the debtor. This is for the simple reason that there is no relevant debt within the meaning of s. 115A in respect of the Co. Clare property, such that this particular gateway requirement could not be satisfied.

73. That brings me to the question of how the gateway relevant debt requirement should be addressed on a s. 115A application. In this context, it seems to me that, for the purposes of any contested application under s. 115A, neither the court nor the objecting creditors can be bound by the description of the principal private residence given in the PIA. In my view, given the critical importance of the "relevant debt" requirement in the context of s. 115A, the relevant factual constituents of the "relevant debt" would require to be proved by appropriate evidence at the hearing under s. 115A.

74. Furthermore, it seems to me that, having regard to the debtor's obligation of good faith, the debtor would be required to disclose to the court on the hearing of the s. 115A application where, in truth, he or she ordinarily resides even if this is different to the address given for the principal private residence in the PIA. At the substantive hearing, the court would have to be satisfied by appropriate evidence that there was a relevant debt. Of necessity, this would involve the debtor giving evidence on affidavit as to where he or she ordinarily resides and any objecting creditors who disagreed with the debtor's evidence as to where he or she ordinarily resides must be entitled to place their own evidence before the court to the contrary. It would then be a matter for the court to make a substantive finding on the issue based on the evidence before it.

75. I therefore believe that in every contested case under s. 115A, the debtor is bound to put evidence on affidavit to deal with the location of his principal private residence. For this purpose, I do not believe that a debtor is necessarily bound by the description of the principal private residence given in the PIA. I do not go so far as to suggest that a debtor will never be so bound. There may be cases where there would be adverse consequences for the debtor if it transpires, at the stage of the s. 115A application, that his or her principal private residence is different to that stated in the PIA. In my view, the debtor and the practitioner must take all appropriate care to ensure that a PIA is accurate in all respects before placing it before the creditors. Thus, for example, if a creditor voted in favour of a proposed PIA on the premise that the property described in the PIA as the debtor's principal private residence was correctly so described, that creditor may well have a basis to complain if it subsequently transpires that its vote was procured on a mistaken premise.

76. Furthermore, it seems to me that, if the address of the principal private residence given in the debtor's affidavit is different to that stated in the PIA, this is a matter which will have to be very fully explained on affidavit by the debtor concerned. To the extent that the discrepancy arises as a result of the input from the personal insolvency practitioner, then the practitioner would also have to provide an explanation on affidavit. It would then be a matter for the court to consider the evidence and to determine the appropriate course to take in any individual case..

77. In addition, as stated in para. 73 above, the objecting creditors must equally be entitled to adduce their own evidence on the true location of the principal private residence of the debtor and to challenge the evidence of the debtor including any of the evidence explaining the discrepancy.

Decision

78. In the present case, for the reasons outlined above, I am of the view that the PIA is capable of taking effect even if the court ultimately determines that the Smithfield apartment is the principal private residence of the debtor. However, this is subject to a number of contingencies.

79. In the first place, it is dependent upon the evidence to be adduced. As noted above, the bank will be free to furnish its own

evidence on this issue.

80. Secondly, in light of the discrepancy between the debtor's affidavit and the PIA as to the correct identity of his principal private residence, it will be necessary for the debtor – and possibly also the personal insolvency practitioner – to place evidence before the court explaining how this discrepancy arose. The discrepancy has the potential to call into question whether the debtor is in breach of his good faith obligation. As stated in paragraph 76 above, the court will therefore require that the debtor should fully explain on affidavit how the inconsistency between the PIA and his current evidence came about. In due course, at the substantive s.115A hearing, the court will have to consider that evidence and will hear submissions from both sides as to whether there has been a breach of any good faith obligation and, if so, what are the consequences that potentially flow from any such breach. If there is a basis to suggest that there has been a breach of such an obligation, it may be necessary to debate whether this is a factor that can or should be taken into account by the court in the exercise of its powers - and any discretion it may be said to have - under s.115A.

81. Thirdly, the bank will be free, should it wish to do so, to place its own evidence before the court as to the true location of the debtor's principal private residence and as to whether any prejudice arises to it as a consequence of the inconsistency between the PIA and the debtor's affidavit or as a consequence of the fact that the PIA (if confirmed by the court) will continue to show the Co. Clare property as the principal private residence of the debtor. While I cannot at present see how any material prejudice could arise for the bank, I do not believe that it would be appropriate to shut out the bank from making such a case if there is, in truth, a basis for it. If the bank wishes to make a such a case, it seems to me that it would be necessary for the bank to address how any prejudice could be said to arise in circumstances where it has at all times opposed the terms set out in the PIA.

82. If ultimately, the court is persuaded to confirm the PIA, it seems to me that the misdescription of the principal private residence of the debtor in the PIA (if the court determines that it had been misdescribed) should be dealt with by an appropriate recital or note in the order.

83. In the meantime, I do not believe that any finding could properly be made at this stage of the proceedings that the debtor is bound by the description of his principal private residence as set out in the PIA. Any such issue will fall to be considered at the substantive hearing on the basis of the evidence and submissions of the parties in relation to the matters outlined in paras. 79-81 above. At this point, it would be premature to make any determination on this issue. All that can be said at this stage is that, for the reasons outlined above, I do not believe that the debtor is ipso facto bound by the description given in the PIA.

Denis McDonald