THE HIGH COURT

[2018 No. 321CA]

CIRCUIT APPEAL

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

AND THE MATTER OF

RICHARD FEATHERSTON OF 53 BOWDEN HEATH, BALLYBODEN, DUBLIN 16

AND

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

JUDGMENT of Mr. Justice Denis McDonald delivered on the 3rd day of December, 2018.

Introduction

1. This is an appeal brought by Daniel Rule, Personal Insolvency Practitioner ("the practitioner") on behalf of the above named debtor from the decision of His Honour Judge Enright in the Circuit Court of 24 July 2018 by which the learned Circuit Court Judge refused an application brought under s. 115 A of the Personal Insolvency Act 2012 (the 2012 Act) (as amended by s. 21 of the Personal Insolvency (Amendment) Act 2015) seeking an order confirming the coming into effect of a proposed Personal Insolvency Arrangement ("PIA") notwithstanding that it had been rejected at a meeting of the creditors of the debtor held on 21 September 2017.

2. At the hearing of the appeal, I was informed by counsel for the practitioner that the principal reason why the learned Circuit Court Judge refused the application under s. 115A was the poor payment history (as described below) of the debtor in the period prior to the issue of the protective certificate which, in this case, was issued on 14 July 2017. Under s. 115A(10)(a) of the 2012 Act, the court is required to have regard to the conduct of the debtor in seeking to pay debts within a two-year period prior to the issue of the protective certificate.

The proposed PIA

3. The debtor in this case is a self-employed builder. He lives in an apartment at Ballyboden, Dublin 16. Between July 2016 and March 2018 he was employed on a contracts basis by a civil engineering company and was due to be paid €750 gross per week. However, he says that these payments were intermittent and that accordingly in March 2018, he stopped working for the civil engineering company and commenced working for himself. According to his evidence, he has a number of building projects underway which vary in price from €67,000 to €113,000 with estimated profits varying from €16,000 to €35,000.

4. The current market value of his apartment is €265,000. However, there is a debt due to AIB Mortgage Bank ("the bank") of €511,763.39 secured on this property. In addition, the debtor owes money to AIB Leasing Ltd., Allied Irish Banks plc. and the Revenue Commissioners. In this case, there is a preferential debt owed to the Revenue Commissioners of €18,987. Although the debts to the Revenue Commissioners are "excludable debts" it should be noted that the Revenue Commissioners have participated in the PIA process and that they voted in favour of the proposed PIA. In fact, it is their vote in favour of the PIA that is relied upon for the purposes of s. 115A(9)(g) of the 2012 Act under which, on an application for an order under s. 115A, the court must be satisfied that the proposal has been accepted by at least one class of creditors. In the application before the Circuit Court, the Revenue Commissioners were characterised as the "excludable debt class of creditors". Although this was initially disputed by the bank, no argument was addressed to that issue on the hearing of this appeal and it appears to be tacitly accepted that the Revenue Commissioners are a separate class for the purposes of the proposed PIA. I am satisfied that they do constitute a separate class.

5. Under the proposed PIA, the secured indebtedness to the bank will be reduced to €291,500 (which is somewhat greater than the market value of the apartment). The balance of €220,263 will be treated as an unsecured debt and will rank with all other unsecured debts (other than the preferential debt to the Revenue Commissioners) for payment of a dividend which is estimated to be 3c per euro. In the case of the preferential debt due to the Revenue Commissioners in the sum of €18,987, this will be paid in full in accordance with s. 101 of the 2012 Act (which makes clear that preferential debts are to be paid in priority).

6. During the currency of the proposed PIA (which will last for the maximum permitted period of 72 months), the estimated monthly payment to the bank will be €1,126.86 (based on an interest rate of 2.25% over the ECB rate). This compares to payments of €2,696.18 which are currently due per month (based on a margin of 3.81% over the ECB rate which was agreed by the debtor at the commencement of the mortgage). Subsequent to the expiry of the PIA, it is proposed that the interest rate would revert to 3.81% over the ECB rate and that the estimated monthly contractual repayment would be of the order of €1,334.18.

7. According to Appendix 4 to the PIA, the anticipated self-employed income of the debtor will be €3,024 per month for the 72 month duration of the PIA. After deduction of amounts due in respect of reasonable living expenses, mortgage repayments and other expenses including the fees payable to the practitioner, it is envisaged that there will be net funds available of €1,369 per month in the first year and €5,068 per month in the second and subsequent years which will be used in the first instance to discharge the preferential debt to the Revenue Commissioners and which, over years 5 and 6 will see the 3% dividend paid to the unsecured creditors (including the amount due to the bank over and above the figure of €291,000 mentioned above). Under Clause 12 of the standard terms of the PIA (as set out in Part V), the debtor will be required to account for any increase in his income above the amount specified in Appendix 4. If that additional income exceeds €100 per month, 50% of the additional income will have to be made available to the practitioner for distribution to the unsecured creditors by way of an increase to the 3% dividend.

The present application

8. At the meeting of creditors which took place on 21 September 2017, the Revenue Commissioners (representing 7.11% of the unsecured debt) voted in favour of the proposal. 92.89% (predominantly made up of the bank debts) voted against the proposal. However, in circumstances where the Revenue Commissioners have (correctly) been treated as a separate class for the purposes of s. 115A, it was open to the practitioner on behalf of the debtor to make an application to the Circuit Court to confirm the coming into effect of the proposed PIA notwithstanding the outcome of the vote at the creditors meeting. Accordingly, having been so instructed by the debtor, the practitioner filed a notice of motion seeking relief under s. 115A on 27 September 2017. In turn, the bank filed a notice of objection in which a large number of issues were canvassed. However, in the course of the hearing before me, it was made clear by counsel for the bank that it was confining its objection to three points: -

(a) In the first place, it was submitted that the payment history (addressed in more detail below) was such as to persuade a court to refuse relief under s. 115 A;

(b) Secondly, it was contended that the payment history was such as to call into question the *bona fides* of the debtor;

(c) Thirdly, it was suggested that the means of the debtor (in particular in the period following the expiry of the PIA) showed that the debtor could pay more to the bank than is provided for under the PIA.

The arguments of the parties

9. Counsel for the bank very properly accepted that a poor payment history is not an absolute bar to the grant of relief under s. 115A. He accepted that there well may be circumstances where a debtor will be in a position to explain why payments were not made. However, he stressed that the payment history of a debtor in the two year period prior to the grant of a protective certificate was a matter to which the court must have regard, particularly in circumstances where the court, on an application under s. 115A, is asked to grant very far reaching relief. Counsel submitted that it was incumbent on a debtor, invoking the s. 115A jurisdiction, to fully explain any poor payment record during the relevant two-year period. he also suggested that quite apart from that two year period, the debtor owed an obligation to explain any non-payment during the protection period itself.

10. Counsel for the practitioner accepted that, on an application under s. 115A, the court must look at the payment record of the debtor. However, he submitted that, in contrast to the requirements set out in s. 115A(9) the court, under s. 115A(10) retained a discretion to approve the coming into effect of the PIA even where the payment record of a debtor within the relevant two year period was poor. He also stressed that in this case, the bank had not raised this issue as one of its grounds of objection in the notice of objection described above. He said it was very significant that it was only raised in the affidavits filed on behalf of the bank. He also drew attention to the fact that it had not been an issue which featured at all in the correspondence which had taken place (largely by email) between the practitioner and the bank during the currency of the protection period. Counsel also stressed that, in this case, the bank had made a counterproposal to the practitioner (after the creditors meeting) which he suggested showed very clearly that the bank was not in fact concerned about payment history and that the bank envisaged that the bank could, in fact, do business with the debtor.

11. Counsel for the practitioner rejected the suggestion that the payment history during the currency of the protection period was relevant to an application under s. 115A. In the first place, he stressed that it is not addressed in the text of s. 115A. Quite apart from that consideration, counsel suggested that payments made during the protection period may operate almost as a preference in favour of a secured creditor, particularly in circumstances where the secured debt greatly exceeded the value of the underlying security.

12. With regard to the argument as to affordability, counsel for the practitioner argued that the submission made on behalf of the bank was based on a mistaken premise. Counsel argued that while the means of the debtor were vitally important in considering the reasonableness of proposals during the currency of a PIA, they were not relevant when it came to the post-PIA period.

Discussion and analysis

13. Before turning to the three issues raised by the bank, it is important to consider the role of the court in a s.115A application. In *Michael Ennis* [2017] IEHC 120 at para. 39, Baker J. described s.115A in the following terms: -

> *"Section 115A . . . gives the court a far reaching power to overrule the result of a vote at a creditors' meeting if the court is satisfied that a debtor may, as a result of the proposals contained on a PIA, continue to reside in, and/or not be required to dispose of an interest in, his or her principal private residence. The court must be satisfied before engaging its jurisdiction under s. 115A that the proposal is not unfairly prejudicial to the relevant creditor."*

14. Baker J. in the same judgment made clear that the court, in the exercise of its statutory powers must consider the fairness of the proposed PIA. In considering that question of fairness, Baker J. made clear that the principal yardstick by which to assess fairness is to compare the outcome for a creditor under a PIA against the likely outcome in the event of the bankruptcy of the debtor.

15. Usually, an objecting creditor will argue that the proposed PIA is unfairly prejudicial to it. That has not been the focus of the argument in the present case. While the question of fairness is directly relevant to the third of the points raised by counsel for the bank, it is not directly in play insofar as the first two points raised on behalf of the bank are concerned. Nonetheless, fairness must always be a fundamental consideration in any application under s. 115A.

16. I now consider, in turn, the three issues which were argued before me.

The payment record of the debtor prior to the issue of the protective certificate

17. In an application under s. 115A, there are certain matters of which the court must be satisfied before the court can consider granting relief. These factors are set out in s. 115A(8) and (9). These are not the only factors that should be taken into account but they are expressly made mandatory requirements by s. 115A.

18. In contrast, s. 115A(10) sets out certain matters to which a court must have regard in considering whether to make an order confirming the coming into effect of a proposed PIA. These include the matters set out in s. 115A(10) namely: -

(a) The conduct of the debtor (within a two year period prior to the issue of the protective certificate) in seeking to pay the debts concerned; and

(b) The conduct within the same period of a creditor in seeking to recover the debts due to the creditor.

19. In my view, it is very important to bear in mind that while the court must have regard to the matters set out in s. 115A(10) the court is not required to dismiss an application under s. 115A where the payment record of a debtor is poor. On the contrary, the court is entitled to make an order confirming the coming into effect of the proposed PIA in such circumstances. That seems to me to be clear from the structure and language of s. 115A. As I have indicated, there is a marked distinction between the approach taken by the legislature in s. 115A(8) and (9) and the approach taken in s. 115A(10).

20. That is not to say that a court should lightly excuse a debtor who has failed to make any serious attempt to repay a debt in the two year period prior to the issue of the protective certificate. The legislature has very clearly indicated that the debtor's payment

record is a factor which must be considered.

21. In cases where a debtor has demonstrated a contempt for his or her payment obligations, this factor would, in my view, weigh against the grant of relief under s. 115A. On the other hand, the debtor's circumstances may well be such that it is evident that the debtor was simply unable during that period to make any significant payments in discharge of his debts.

22. In each case, everything will depend upon the evidence placed before the court. In this context, I fully agree with the submission made by counsel for the bank that it is incumbent upon the debtor to explain why debts were left unpaid. A poor payment record requires to be adequately and comprehensively addressed by a debtor. If it has not been appropriately addressed in the evidence of the debtor, the court may well take the view that it is appropriate to dismiss the application under s. 115A. However, it would be wrong to suggest that this must happen in every case. The evidence before the court must be assessed in the round. All relevant circumstances must be taken into account. Even in cases where the explanation provided by the debtor may appear, at first sight, to be unsatisfactory, there may be sufficient material before the court to suggest that the court's discretion should be exercised in favour of the debtor.

23. In addition, as s. 115A(10)(a) makes clear, the approach taken by the creditor in the same two-year period (insofar as steps taken to recover the debt are concerned) must also be taken into account. There may well be cases where a creditor has been prepared to step back and not to pursue a debtor in that two year period. This may operate as a countervailing factor in any consideration of the issues that arise under s. 115A(10).

24. It must also be borne in mind that s. 115A is not capable of being operated unless there was a relevant default on the part of the debtor. S. 115A(18) makes this very clear. One must bear in mind that s. 115A cannot apply unless the debts covered by a proposed PIA include a "relevant debt". For this purpose, s. 115A(18) defines a "*relevant debt*" as a debt (secured over the principal private residence of the debtor) which was in arrears on 1 January 2015 or in respect of which (before 1 January 2015) the debtor had been in arrears but had entered into an alternative repayment arrangement.

25. The underlying purpose of the Act must also be borne in mind. As the long title to the 2012 Act makes clear, the Act was enacted in the interests of the common good with the objective (*inter alia*) to ameliorate the difficulties experienced by debtors and to enable insolvent debtors to resolve their indebtedness in an orderly and rational manner without recourse to bankruptcy. While there are obvious limits to the extent to which this underlying purpose can be taken into account, there may well be circumstances where a debtor has a poor payment record during the relevant two year period but who, on the evidence before the court, has demonstrated a genuine intention to deal with his or her debts under a PIA which appropriately addresses the payment of the debtor's liabilities, having regard to his or her means, and which has a real prospect of securing a better outcome for the debtor's creditors than the likely outcome on a bankruptcy of the debtor. It would be wrong, in my view, for a court to take an unduly "*box-ticking*" approach and to dismiss every application under s. 115A where the debtor has a poor payment record during the relevant two year period. In my view, that is not what s. 115A(10) has in mind.

26. That is not to say that there is not an obligation on the debtor to explain a poor payment record. As I have sought to emphasise above, there can be no doubt that there is such an obligation on the debtor. I do not intend to dilute the significance of that obligation in any way. The practitioner/debtor bears the onus of proof in applications under s. 115A. It is therefore essential that a poor payment record should be appropriately explained on affidavit by the debtor. Nonetheless, even in cases where the explanation may seem unsatisfactory or incomplete, the court retains a discretion if there are countervailing considerations that apply such as to persuade a court that, in all of the circumstances of the case, the s. 115A relief should nevertheless be granted.

The payment record of the debtor

27. Bearing the considerations outlined in paras. 19-26 in mind, I now turn to address the evidence in this case. In her affidavit grounding the objections of the bank, Ms. Christine Mooney has exhibited the statement of account between the debtor and the bank for the period 1 January 2014 to 30 November 2017. It shows that the last payment made by the debtor was a payment of €4,000 made on 9 June 2016. The protective certificate issued on 14 July 2017. In para. 11 of her affidavit, Ms. Mooney highlights that during the 2016 period, the trading position of the debtor had improved. In the year to 31 December 2015, the debtor had made a net profit of €36,929 whereas in the following year, the net profit had increased to €40,953. The 2016 accounts also show that in that year, the debtor had drawings of €51,406.

28. In para. 6 of his affidavit sworn on 3 May 2018, the debtor responds as follows to para. 11 of Ms. Mooney's affidavit: -

> *"I have not made payments in a while now as the company for which I was doing work took an extremely long time to make intermittent and sporadic payments. Eventually I could not afford to keep working for nothing so I broke away from them (sic) and started doing smaller jobs with better prospects of payment and I am now in a much better place to start making payments every month".*

29. The debtor also said in para. 11 of the same affidavit that his payments to the bank had "decreased" over the past three years as he " . . got let down on a few jobs on final payments and could not recover a lot of money owed to me. I say any payments that I did receive had to go immediately paying contractors and suppliers".

30. In my view, this response from the debtor is entirely inadequate. It does not address in any meaningful way the very particular concern expressed on behalf of the bank in para. 11 of Ms. Mooney's affidavit. His explanation is wholly lacking in detail. In particular, he does not address the fact that his accounts show profit in the year to 31 December 2016 and significant drawings by him in that year. Yet, the only payment made to him in that year to the bank was a single payment of €4,000. This payment was made at a time when he was contractually required to make monthly payments to the bank in the sum of €2,696.00.

31. A further affidavit was sworn on behalf of the bank by Mr. Tom Walsh on 11 June 2018. Unsurprisingly, Mr. Walsh reiterated the point previously made by Ms. Mooney that the debtor's payments to the bank had decreased while the trading accounts of the business show an increasing profit trend. This resulted in one further affidavit from the debtor sworn on 26 June 2018. In that affidavit, he explains that between July 2017 and March 2018 he was employed on a contracts basis by a civil engineering company and only received intermittent payments. In para. 12 he says: -

> *"In fact, payments were intermittent and since March 2018 when I stopped working with them an outstanding sum of €6,500.00 gross remains unpaid. I have pursued them on a weekly basis without success and at this stage may have to resort to legal action to secure payment."*

32. Again, I regret to say that the approach taken by the debtor in his second affidavit is completely lacking in detail. In my view, the

debtor has failed to place any sufficient evidence before the court to explain why his payment record was so poor in the period prior to the grant of the protective certificate. I can well understand why, in the circumstances, the learned Circuit Court Judge was minded to refuse the application under s. 115A. To properly explain himself, the debtor should have provided a detailed account on affidavit to the court as to why, notwithstanding his increase in profits, he was unable to make payments to the bank during the period in question. The statement made by him in para. 12 of his second affidavit is very difficult to reconcile with his 2016 accounts. In my view, the failure of the debtor to properly explain himself weighs heavily against the grant of relief under s. 115A. However, as explained above, it does not provide an automatic basis on which the relief under s. 115A should be refused. As I have sought to explain, it must be considered in the round with all of the other evidence before the court. In particular, it seems to me that a number of factors must also be weighed in the balance in this case.

33. In the first place, it is clear from the second affidavit of the debtor that he has a number of building projects underway at the moment. His averments to that effect are corroborated by the material exhibited by him. This shows that the debtor has an ongoing income which, under the terms of the PIA, will be applied for the benefit of his creditors for the duration of the PIA. While I would not wish to suggest that this will always trump a poor payment record in the two year period prior to the issue of a protective certificate, it is nonetheless a factor that must also be weighed in the balance. In my view, the court must bear in mind the purpose of the 2012 Act (as amended in 2015). In this context, I agree with counsel for the practitioner that there is a parallel to be drawn between applications to confirm the coming into effect of a PIA and applications to confirm a scheme of arrangement in examinerships. If there are proposals for a PIA which will achieve the purpose of the 2012 – 2015 Acts, and will result in a better outcome for creditors than a bankruptcy, that is a factor that can be borne in mind even where there has been wrongdoing on the part of the debtor.

34. In this context, the observations of Clarke J. (as he then was) in *Re: Traffic Group* [2008] 3 IR 253 at p. 261 are apposite: -

> *"It seems to me, therefore, that a court should lean in favour of approving a scheme where the enterprise . . .and the jobs . . . are likely to be saved. That is not to say that the court should disregard any lack of candour or other wrongful actions. It does, however, seem to me that the court's approach to such matters should take into account the following.*
>
> *Firstly, it needs to be recognised that there may be cases where the wrongful actions of those involved in promoting the examinership are so serious that the court is left with no option but, on that ground alone, to decline to confirm a scheme which would otherwise be in order. It is necessary . . . to discourage highly wrongful behaviour."*

Clarke J. went on to say that the need to discourage highly wrongful behaviour must be balanced against the desirability of saving an enterprise rather than see it forced into liquidation. While the parallel is not a perfect one, the approach taken by Clarke J. in that case is nonetheless relevant here because it shows that improper conduct on the part of a party proposing an arrangement is not always fatal.

35. The second factor that I must bear in mind is that there is nothing in the correspondence between the bank and the practitioner which expresses any concern on the part of the bank in relation to the non-payment history prior to the grant of the protective certificate (or indeed in relation to the period after the grant of the certificate). While a significant body of correspondence is exhibited at CM 2 to the affidavit of Ms. Mooney sworn on 11 December 2017, it is striking that nowhere in this correspondence is any concern expressed on behalf of the bank in relation to the debtor's payment record. If the bank was seriously exercised about the payment record of the debtor prior to the grant of the protective certificate, one would expect that this would be evidenced in contemporaneous material.

36. The third factor that I bear in mind is that, in this case, the bank, while voting against the proposed PIA, made a counterproposal. This is evident from the email from the bank to the practitioner of 11 September 2017 in which the bank proposed a different form of restructuring of the loan facility. This shows very clearly that, notwithstanding the previous payment record of the debtor, the bank considers that an arrangement with the debtor is feasible.

37. I must also bear in mind the position of the other creditors of the debtor. It is clear from Appendix 5 to the proposed PIA that, in the event of a bankruptcy, the unsecured creditors will receive no dividend at all. In contrast, if the PIA in this case is confirmed, the preferential debt of the Revenue Commissioners will be paid in full and the unsecured creditors will receive a very small dividend. While that dividend is tiny, it has the potential to improve in the event that the income of the debtor improves. As noted above, Clause 12 of Part V of the proposed PIA requires the debtor to account for any net increase in his income over the amount specified in Part IV and this will be to the advantage of the unsecured creditors.

38. The remaining factor which I must weigh in the balance is the fact that the Revenue Commissioners here have supported the PIA. This suggests that the Revenue Commissioners are not concerned with the past payment performance of the debtor and that they have confidence that the debtor will be in a position to meet his obligations under the PIA going forward. Given the rigorous approach usually taken by the Revenue Commissioners, this is a sign of confidence in the debtor which I believe should also be taken into consideration.

39. In my view, when all of the above factors are taken into account, the balance shifts in favour of the debtor notwithstanding his failure to explain his poor payment record (in respect of his indebtedness to the bank) in the two year period prior to the grant of the protective certificate. However, before reaching any final conclusion it is necessary to consider the remaining concerns highlighted by the bank in the course of the hearing before me.

The failure to make payments during the protection period

40. As counsel for the bank acknowledged in the course of his submissions, this point is linked to the debtor's pre- certificate payment record discussed above. While s. 115A(10) is not concerned with payment history during the protection period, counsel for the bank submitted that a failure to make any payments during the protection period was relevant to the exercise of the discretion of the court under s. 115A. Counsel cited, in this context, to the decision of Baker J. in *Michael Ennis* [2017] IEHC 120 where Baker J. referred to the obligation imposed on a debtor by s. 118(1) of the 2012 Act to act in good faith. In that case, the debtor had made a unilateral decision to cease payments without consulting the practitioner or his legal team. Nonetheless, the debtor there swore an affidavit in which he contended that he had been making monthly payments since he engaged a practitioner. Having referred to the obligation of good faith imposed on debtors under s. 118, Baker J. continued as follows at paras. 50-54 of her judgment: -

> *"50. Such an obligation [of good faith] is also implicit in any application where a litigant engages the discretion of the court, and arises from the nature of the process which affords a debtor a chance of . . . resolution of debt by the forgiveness of significant debt due to secured or unsecured creditors, or the variation of the conditions of a loan.*

51. Further, the court is required in the context of s. 115A to have regard to the relevant matters contained in s. 115, including ss. 115(9)(b) and (c), and to the grounds of challenge contained in section 120. These factors engage questions of the bona fides of the debtor. Indeed, the debtor himself recognises this and at para. 17 of his first affidavit . . . he expresses the proposition that he has been making monthly payments in excess of the payments proposed in the PIA since he met . . . the PIP, ... At the time that affidavit was sworn, [the debtor] had ceased making those payments . . .

52. Counsel for EBS suggests that the behaviour of the debtor is akin to 'holding the process to ransom', and while I do not propose to adopt that description, I am satisfied that the debtor has not engaged bona fide with the process, nor with the PIP engaged to act as financial intermediary in the process, nor with his legal team.

53. He has made it clear that the decision to cease payments was made unilaterally, and avers at para. 5 of his second affidavit that the payments were stopped without first consulting either the PIP or his legal team. Indeed, it seems that the debtor permitted his affidavit to be presented for the purposes of a notice of appeal . . . without informing his PIP or his legal advisors of that very significant discrepancy. His lack of candour is material and serious.

54. For those reasons, and in the exercise of my discretion, I propose making an order refusing the appeal and thereby upholding the objection of EBS."

41. I do not believe that this passage from the judgment of Baker J. goes so far as to suggest that non-payment of liabilities during a protection period will be sufficient of itself to persuade a court to exercise its discretion against the grant of relief under s. 115A. On the contrary, it seems to me that Baker J. was very concerned about the lack of candour on the part of the debtor in that case. He had sworn an affidavit (which he relied upon for the purposes of an appeal) in which he contended that he was making payments on a monthly basis. That averment turned out to be untrue. That was a very obvious instance of lack of candour on the part of the debtor in that case and it is unsurprising in those circumstances that Baker J. should refuse relief. There do not appear to have been any countervailing circumstances in that case which would have caused the court to excuse the lack of candour on the part of the debtor there. Moreover, it is clear from the consideration of the judgment as a whole that, in that case, there were very significant doubts as to whether it was feasible for the debtor to retain the principal private residence. The residence was in a state of disrepair. It had been broken into. The water pump, oil burner and oil tank were stolen. There was no running water. There was a significant planning issue with the property and it was questionable whether the property was, in truth, habitable at all.

42. In my view, the position here is different. While I deprecate any failure by a debtor to make some attempt to deal with ongoing liabilities during the protection period, there is no lack of candour on the part of the debtor here in relation to his failure to make payments during the protection period. In para. 20 of his first affidavit, the debtor dealt with the position as follows: -

"In regard to [the bank] . . . , I say that for the reasons outlined above, I have not been in a position to make any payments to my mortgage for about the past eleven months. However, as things have now begun to improve following the change in my trading . . . , I am in a position to pay up to €1,500.00 per month (depending on receipts). In that regard I did go to AIB Bank in Ballsbridge in the first week of April with a view to setting up a standing order and I was advised that they would contact me about this. However, they have not done so. I previously had been dealing with Mr. Donal Daly of AIB Ballsbridge, and I did attempt to make contact with him in early April, but he is now retired. I met a lady who took all the relevant details and said it would be in contact with me, but to date I have not heard from them".

43. In response, Mr. Walsh, in para. 8 of his affidavit said that there was no impediment to the debtor setting up a standing order or to lodge funds directly to his mortgage account. Nonetheless, he does not deny that the debtor approached the bank in April 2018. However, when the debtor came to reply to that affidavit, he appeared to set up an entirely different explanation for the non-payment of the mortgage during the protection period. In para. 9 of his second affidavit, he said: -

" . . . the payment to [the bank] has represented a bona fide attempt to show a willingness to continue to engage and to make payment. I say and I understand that any payment made during the Protective Certificate period, particularly to one creditor above others, could be deemed a preferential payment and could in fact be set aside. I say and believe that I am also concerned that the PIA specifies an amount to which my loan is to be restructured and a payment from the commencement of the PIA and in those circumstances I was unsure as to whether I ought to pay a sum towards a restructured mortgage that has not yet been restructured".

44. It is very difficult to reconcile this explanation with the explanation previously given in the debtor's first affidavit that he had sought to commence repayments in April 2018. The evidence of the debtor is therefore quite unsatisfactory in relation to this issue. However, I do not believe that I can go so far as to hold that it shows a lack of candour. Moreover, while I am very definitely of the view that a debtor should seek to address ongoing liabilities (to the extent that he or she lawfully can) during the currency of the protection period, there is no statutory requirement in the 2012 Act that a debtor must meet his or her liabilities during that period.

45. Moreover, in considering this ground of objection, I must again weigh in the balance the factors outlined above in connection with the pre-certificate payment record. When those factors are taken into account, I am of the view that the failure of the debtor to address his liabilities to the bank during the currency of the protection period, is not sufficient, of itself, to persuade me to exercise my discretion against the grant of relief under s. 115 A.

The liabilities of the debtor in the post – PIA period

46. There was a sharp difference of opinion between counsel for the practitioner on the one hand and counsel for the bank as to whether the court, on an application of this kind, should have regard to the affordability of payments by a debtor in the period subsequent to the expiry of the PIA. In this context, I should explain that the bank contends that the debtor should be able to afford more significant payments to the bank than are proposed under the PIA and that this is especially so once the 72 month period of the PIA has expired. In addition, the bank is concerned that the business prospects of the debtor could improve significantly over the next 72 months and the bank complains that there is no scope under the present proposals to increase the post-PIA payments to the bank in the event that there is a substantial improvement in the profitability of the debtor's business. The matter is expressed in the following way in para. 26 of the affidavit of Ms. Mooney: -

"The . . . matter of greatest concern to the Bank in respect of the specific provisions of the [proposed PIA] is the fact that the [PIA] proposes to write off a significant portion of the Debtor to the Bank in circumstances where the financial position of the Debtor would appear to allow him to make greater repayments in respect of his home loan. The [PIA] proposes a monthly repayment of €1,126.86 . . .for the six – year period of the [PIA] and thereafter a payment of €1,334.18 until the end of the remaining 300 - month term of the mortgage. This is despite the fact that the Debtor

clearly has a greater capacity to make repayments in respect of his home loan based on his current income".

47. Counsel for the bank submitted that it was clear from the view taken by Baker J. in *Laura Sweeney* [2018] IEHC 456 at para. 56, that a court, on an application of this kind, was not concerned solely with the question of affordability to the debtor during the period of the PIA. In that judgment, Baker J. said: -

> *"A write down of a mortgage to market value is not mandated by the Act, and it may be possible in certain cases to split or warehouse part of a loan . . . The determination as to whether a mortgage debt is to be written down is to be made by reference to the affordability of payment. A draft PIA is in general more focused on ascertaining a capital figure, repayment of which is affordable by the debtor, rather than seeking to ensure that the debtor is no longer burdened with a mortgage far in excess of the value of the secured property".*

48. In contrast, counsel for the practitioner sought to suggest that the focus on an application of this kind is on the question of affordability during the currency of the PIA. He relied in particular on the following observation of Baker J. in *Clive Casey* (Unreported, 29 May 29 May 2017) where she said at para. 29: -

> *"I also accept the argument of the debtors that it is not the intention of the Act that a debtor be confined to the basic reasonable living expenses set out by the Insolvency Service . . . for the rest of his or her life*, and that the general scheme of the Act is that a debtor will in the currency of a PIA bring into account to the maximum extent possible his or her assets and income, *and that on the performance of the obligations of the assets in the PIA the debtor will be relieved of identified debt. Such an approach to post – arrangement is familiar in the scheme of bankruptcy legislation"* (emphasis added).

49. Counsel also submitted that, in a bankruptcy, once the bankruptcy period is over (at which point the bankrupt would be forgiven all of his or her debts) the bankrupt is free to carry on whatever business and make whatever profits he or she can and the pre-bankruptcy creditors have no recourse in those circumstances.

50. Counsel also relied on a number of observations of Baker J. in *Paula Callaghan* (Unreported 22 May 2017). In particular, he relied on the following observation at para 68 of her judgment where Baker J. said: -

> *"A court must be satisfied taking all matters into account that the proposed PIA enables the creditors to recover the debts due to them to the extent of the means of the debtor. The "means" engaged are present income and capital assets and not the projected means at a time so far into the future that the test is based on hypotheses or conjecture. There may on the other hand be circumstances where future certain or ascertainable means are to be brought into account".*

51. With regard to the last sentence in that extract, counsel suggested that one such circumstance would be where the debtor has a pension provision which will not become payable until retirement age. Counsel distinguished such an asset (which was relatively certain) from hypothetical receipts at some stage in the future which were entirely uncertain. Thus, in *Paula Callaghan*, the judge rejected a proposal to warehouse an amount for payment in the future in circumstances where there was no present expectation that the debtor would be in a position to pay the amount proposed to be warehoused. Baker J said at para. 72 of her judgment: -

> *"The Act requires a proposal to bring to reasonable account the means of a debtor. The proposal to warehouse an amount that at current figures is more than 125% of the value of the dwelling is not proportionate to, or reasonably derived from, the current income and capital assets, or any future ascertainable means. I am not satisfied that the PIA is unfairly prejudicial on account of failing to fully bring into account hypothetical or future means, for which there exists no present expectation".*

52. In my view, those extracts from the judgments of Baker J. show very clearly that there is no hard and fast rule in relation to how debt is to be treated after the expiry of a PIA. Everything will depend upon the circumstances of an individual case. That said, the court will not involve itself in speculation about what might potentially happen in the future. In my view, the principal concern of the court will inevitably be focused on what is to happen during the currency of the PIA. The approach to be taken by the court in relation to the PIA period will always be informed by what the court considers the means of the debtor will reasonably permit. This is clear from the provisions of s. 115A(9)(b)(ii). The approach to be taken is encapsulated in para. 59 of the judgment of Baker J. in *Paula Callaghan* where she said: -

> *"Section 115A(9)(b)(ii) constrains a court by considerations of reasonableness, that there be a reasonable prospect that confirmation of a proposed PIA will enable the debtor to resolve his or her indebtedness, and enable the creditors to recover their debts to the extent that the means of the debtor 'reasonably permit'. The inclusion of a requirement of reasonableness supports the argument that a margin of appreciation will be afforded to a PIP in formulating a PIA, that the court will not interfere unduly with a proposal even if another and possibly equally reasonable proposal could be formulated, and the objection of a creditor will not be upheld merely on account of the fact that it can offer an alternative proposal. Reasonableness is assessed in the context of the means of the debtor, the likely return to the creditor of a proposal, the likely return on bankruptcy as an alternative, and the reasonableness of the proposed scheme taken as a whole, and in the light of the objective of the legislation that a debtor be facilitated in a return to solvency".*

53. On the other hand, as Baker J. said in *re: Hill* [2017] IEHC 18, the court must consider whether the PIA is fair to all classes of creditors. The court must take a balanced approach. In that case, she said at para. 37: -

> *"The statutory factors relate to the proportionality of the arrangement, the likely differences between the PIA and an arrangement on bankruptcy, and whether the PIA is fair to all classes of creditors. While the intention of the Oireachtas was to offer a unique and special protection to the principal private residence, that protection did not enable the court to override the vote of a creditor holding security over such property merely on account of the fact that the property was a principal private residence, and other factors resonant of an attempt to achieve a degree of balance of each of them is found in the legislation".*

54. On the evidence available to the court in this case, I am satisfied that the entire of the debtor's means have been utilised for the purposes of the PIA. Appendix 4 to the proposed PIA demonstrates this very clearly. In particular, it shows the entire income over the six-year period of the proposed PIA being applied in discharge of set costs, mortgage payments, and additional expenses (made up of management fees and property tax). When all of these costs and expenses are set off against the net income per month, this will provide a net monthly contribution of €535 or €6,420 on an annual basis. In the first year, €5,051 of this figure will be used to

discharge part of the fee due to the practitioner, leaving a balance of €1,369 available to be paid to the Revenue Commissioners. In years 2-4, the payment to the practitioner will reduce to €1,352 per annum, and the payment to the Revenue Commissioners will increase to €5,068. In years 5 and 6 the balance due in respect of practitioners fees will be paid together with the balance due in respect of the Revenue Commissioners and the dividends to the unsecured creditors will also be paid in these years.

55. While it is true that the debtor, in para. 20 of his first affidavit suggested that he would be in a position to pay up to €1,500 per month in respect of mortgage payments, it is clear from a consideration of Appendix 4 that this is not feasible. It is, of course, the case that the income of the debtor may increase over the duration of the PIA. However, as noted above, this will be to the benefit of all unsecured creditors (including the bank in respect of the unsecured element of its debt). I cannot see that there is any unfair prejudice to the bank in relation to the payments to be made to it during the currency of the PIA. I also bear in mind in this context that, in contradistinction to many other PIA proposals, the secured debt is not being written down to the current market value of the apartment. As noted above, the value of the apartment is €265,000. Under the proposed PIA, €290,000 will be treated as secured debt. Appendix 5 also shows that the outcome for the bank in a bankruptcy of the debtor is significantly worse than under the proposed PIA. In a bankruptcy, the bank would ultimately recover 49c in the euro. Under the PIA, its total recovery will be 60c in the euro which represents a 22% improvement over its position in a bankruptcy.

56. In light of the considerations outlined above, it is unsurprising that counsel for the bank, in his submissions to the court, concentrated on the period after the expiry of the PIA. He suggested that more significant payments could be afforded by the debtor than the monthly payment of €1,334.18 provided for under the terms of the proposed PIA. Counsel argued that the improved climate for the building trade meant that it was almost inevitable that the profits of the debtor would improve over time. He also drew attention to the fact that, following the conclusion of the PIA, the debtor will no longer have to make payments in respect of the arrears of management charges which had built up in respect of his apartment complex. In this context, it should be noted that under the heading of "Additional Expenses" identified in Appendix 4 to the PIA, there is a sum of €125 per month being paid in respect of arrears of management charges. This sum will be available to the debtor once the PIA has been successfully concluded.

57. Notwithstanding the very able and impressive arguments of counsel for the bank, I do not believe that there is any basis for the court to reach a conclusion, that the debtor will, on the expiry of the PIA, be able to afford more significant mortgage repayments than those provided for in Appendix 7 to the PIA (namely €1,334.18 per month for the remaining 300 months of the mortgage term. In this regard, I entirely accept the submission made by counsel for the practitioner that, following the successful completion of a PIA, a debtor should not be confined to the reasonable living expenses published by the Insolvency Service of Ireland ("ISI").

58. A debtor who successfully completes a PIA must be given the opportunity to return to some semblance of normal life. It is normal to compare the outcome of a PIA against a bankruptcy. One must bear in mind that in the context of a bankruptcy, once the bankrupt emerges from the bankruptcy process, he or she will be entitled to the fruits of any money earned thereafter. In my view, that is a factor that must be borne in mind.

59. In addition, as the judgments of Baker J. make clear, the court cannot proceed on the basis of conjecture or hypothesis as to what might happen in the future. The court has to assess the position as of now. On the basis of the material before the court, there is nothing sufficiently concrete to suggest that the debtor will be in a position to readily afford more than the mortgage repayments post PIA which are currently envisaged in Appendix 7 to the PIA. This is not a case where the debtor has any pension provision. Nor is there any other event on the horizon which is likely to swell his assets. Furthermore, having regard to the age of the debtor, there is no foreseeable prospect that his living expenses are likely to fall in the years following the completion of the PIA. This is to be contrasted with cases where, for example, the debtor has a family that are likely to become financially independent in the years immediately after the completion of a PIA. In such cases, there may be scope to take the view that the debtor will be able to afford more in the way of repayments than that is currently envisaged here. I fully appreciate that, in this case, the debtor will no longer have to pay €125 per month in respect of the arrears of management charges. However, that is a benefit of a very modest scale. It is far from being a "*game-changer*". As I have already indicated, the debtor must be given some scope to escape from the narrow confines of the ISI concept of reasonable living expenses once the debtor has earned his ability to do so following the successful completion of a PIA.

60. In all of the circumstances, I am of the view that there is no sufficient basis, on the evidence available in this case, to suggest that the rate of payment to be made to the bank in respect of the mortgage, following completion of the PIA in this case, gives rise to unfairness to the bank or to some disproportionate benefit to the debtor. In my view, the proposed PIA in this case is fair to all of the creditors of the debtor (including the bank). Insofar as the bank is concerned, there is a significant benefit to it under the proposed PIA in circumstances where the secured debt is not written down to the value of the apartment and where, as Appendix 5 makes very clear, it will fare much better under this PIA than it would in a bankruptcy.

Conclusion

61. On the basis of all of the evidence before the court I respectfully take a different view to that taken by the learned Circuit Court Judge. In particular, I am persuaded by the evidence and the submissions that have been made to me that this is an appropriate case in which to grant the relief claimed under s. 115A(9) of the 2012 Act (as amended). In reaching this conclusion, I have, of course, had regard for the matters set out in s. 115A(10). I have also satisfied myself as to each of the matters set out in s. 115A(8) and s. 115A (9).

62. Therefore, I will make an order setting aside the order made by the learned Circuit Court Judge on the 24th of July, 2018 and, instead, I will confirm the coming into effect of the proposals for the PIA in this case in accordance with their terms.