[2020] IEHC 163

THE HIGH COURT
CIRCUIT APPEAL

[2019 No. 87 C.A.]

MIDLAND CIRCUIT
COUNTY OF LAOIS

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012 TO 2015
AND IN THE MATTER OF MARK FAY (A DEBTOR)

JUDGMENT of Mr. Justice Denis McDonald delivered on 6 April, 2020

Introduction

1. This is an appeal brought by an objecting creditor against an order made in the Circuit Court on 28th February, 2019 under s. 115A of the Personal Insolvency Act, 2012 (as amended) ("*the 2012 Act*") confirming the coming into effect of a personal insolvency arrangement proposed on behalf of the above named debtor, Mr. Mark Fay, by his personal insolvency practitioner, Ms. Judy Mooney ("*the practitioner").*

2. The objecting creditor, Pepper Finance Corporation (Ireland) DAC ("*Pepper*") contends that the requirements of s. 115A of the 2012 Act have not been satisfied in this case. Pepper has also, in the course of the hearing of the appeal, drawn attention to a very troubling issue (which is of great concern to me) relating to the manner in which exhibits were added to an affidavit sworn by Mr. Fay subsequent to the date of its swearing. For completeness, it should be noted that Pepper is the successor in title to ACC Loan Management DAC ("*ACC*"). Following the merger of ACC with a Dutch entity called Cooperatieve Rabobank U.A., the Circuit Court, by order dated 28th February, 2019 gave leave to substitute the Dutch entity for ACC. Subsequently, in the course of the hearing of the appeal before me, an application was made by Pepper for an order substituting itself as objecting creditor. That order was made in circumstances where the interests of the Dutch entity in the loans and security (described below) has since been assigned to Pepper.

3. It is not in dispute that, at the time the arrangement was proposed in this case, Mr. Fay was indebted to ACC in the sum of €482,149.00 which is secured over his property (situated in a midland town) pursuant to a charge duly registered in the land registry on 7th January, 2005.

4. Before outlining, in more detail, the nature of the objections raised by Pepper (including the very serious issue in relation to the affidavit evidence), it may be helpful, in the first instance, to describe the relevant facts and to summarise some key features of the proposed arrangement.

Relevant facts

5. Mr. Fay was born in February, 1966. He is divorced. He has three adult children. His only remaining property is that described in para. 3 above (and dealt with in more detail below). The value of that property has been agreed at €200,000. His only other asset is a 2013 Vauxhall motor car. His total net income is €2,630 per month. This is derived from a number of different sources. He works, on a self-employed basis, as an upholsterer. He also acts as a self-employed agent for an insurance company. He is in

receipt of a small pension and family assistance. The remainder of his income is made up of rent from a commercial unit at the front of the property where he now resides.

6. Previously, Mr Fay himself operated a shop in the commercial unit. However, he says, on affidavit, that, as a consequence of competition from larger retailers in the area, the business began to struggle in 2003. There were also a number of thefts such that, by the time the recession hit in 2008 and subsequent years, the business was already in financial difficulty. Mr. Fay says that, due to his inability to pay in advance for supplies, he was unable to continue trading.

7. The shop in question is situated to the front of the four bedroomed house in which Mr. Fay now resides together with some of his adult children. The shop is now the source of his rental income. At the time he acquired this property (incorporating the attached shop) he lived in a different property. However, Mr. Fay says that in 2007 he sold his then family home together with another property. He says this was done at the suggestion of ACC. This averment on the part of Mr. Fay is not denied in the affidavits filed on behalf of ACC in the course of the proceedings before the Circuit Court.

8. Mr. Fay has the following debts: -

   (a) He owes €482,149 to ACC (now Pepper) on foot of the loan secured over his property;

   (b) He owes BWG Foods €23,220 in respect of credit given to him when he formerly operated a shop;

   (c) He owes €16,525 to Allied Irish Banks Plc in respect of a business loan;

   (d) He also owes Cabot Financial Ireland Ltd €9,290 on foot of a loan;

   (e) A further debt is owed by him to Bluestone Asset Finance Ireland Ltd in respect of a hire purchase agreement in the sum of €7,980; and

   (f) He is also indebted to the Revenue Commissioners in the sum of €8,096.

9. The arrangement proposed by the practitioner in this case has the following features: -

   (a) Insofar as the secured debt of €482,149.00 owed to ACC (now Pepper) is concerned, it is proposed to write it down by €272,149.00 to €210,000 (which is €10,000 more than the agreed value of the property). It is also proposed to extend the mortgage term to 240 months. The amount written down (namely €272,149.00) is to be treated as an unsecured debt and receive the same dividend of 2 cent in the euro proposed for each of the unsecured creditors (as set out below). Based on the bankruptcy comparison set out in appendix 5 to the arrangement, the total return to Pepper will be 44 cents in the euro as opposed to 37 cents in the event of a bankruptcy;

(b) As a preferential creditor, the debt to the Revenue Commissioners is to be paid in full;

(c) It is also proposed to pay the hire purchase creditor (namely Bluestone Asset Finance Ireland Ltd) in full;

(d) Insofar as the unsecured creditors are concerned, they will each (with the exception of BWG Foods who did not submit a proof of debt) receive a dividend of 2 cent in the euro. According to appendix 5 to the proposed arrangement, they would receive nothing in the event of a bankruptcy.

10. A meeting of creditors took place on 7th June, 2017 to consider the proposed arrangement. According to the certificate provided by the practitioner, two creditors voted in favour of the proposed arrangement namely Allied Irish Banks plc representing 3.16% in value of Mr. Fay's debts and the Revenue Commissioners representing 2.95% of Mr. Fay's debts. ACC (representing 92.12% of Mr. Fay's debts) and Cabot Financial Ireland Ltd (representing 1.77% of Mr. Fay's debts) voted against the arrangement. The practitioner has submitted (correctly in my view) that, for the purposes of s. 115A (9) (g) and (17) of the 2012 Act, two classes of creditor voted in favour of the arrangement namely (a) the Revenue Commissioners representing the "*excludable class"* of creditors and (b) the unsecured creditors holding no security over any asset of Mr. Fay (represented by Allied Irish Banks Plc and Cabot Financial Ireland Ltd. which voted in favour by a majority in value). For completeness, it should be noted that, although ACC, in its notice of objection and supporting affidavits, argued that the latter could not be said to represent a separate class, that issue was not pursued on appeal.

The notice of objection filed by ACC

11. In its notice of objection, ACC raised the following issues: -

(a) In the first place, it contended that, when the negative equity write-off of €272,149.00 is taken into account, a majority of unsecured creditors voted against the arrangement. In other words, ACC sought to argue that, if €272,149.00 is taken into account, an overwhelming majority in value of the unsecured creditors, voted against the arrangement. In my view, that objection is misconceived. It seems to me that, for the reasons explained by Baker J. in *Douglas (a debtor*) [2017] IEHC 785, ACC was in a different class to the class comprised of Allied Irish Banks Plc and Cabot Financial Ireland Ltd;

(b) It was contended that the property over which ACC holds a mortgage is not a principal private residence within the meaning of the 2012 Act and that the ACC loan was a commercial loan such that there is no "*relevant debt*" within the meaning of s. 115A (18);

(c) It was alleged that the arrangement would "*manifestly fail to obtain a better return for the Creditor than an arrangement in Bankruptcy*". However, that is not an issue which was subsequently pursued in the affidavits filed on behalf of ACC in the

Circuit Court. No substantiation for this contention has been set out. In those circumstances, I will proceed on the basis that, as set out in appendix 5 to the proposed arrangement, the return to Pepper will be better under the arrangement than it will in the event of Mr Fay's bankruptcy. As noted in para 7(a) above the return in a bankruptcy will be 37 cents in the euro. Under the arrangement, it will be 44 cents in the euro;

(d) In the context of s. 104 (2) (d), ACC contended that the property is "*greatly in excess of what would be required for a reasonable living accommodation needs (sic)";*

(e) It was also alleged that the property "*includes*" commercial premises and that the proposed arrangement involves the "*impermissible retention of an asset*" of a commercial nature "*free from the commercial loan secured upon it, under the guise of the protections afforded a principal private residence*". It should be noted, however, that, in the first affidavit subsequently sworn by Mr Paul Shaw in support of the objection of ACC, the case was made that the property was, itself, commercial in nature.

(f) It was also alleged that there were "*operative*" differences between the Prescribed Financial Statement ("*PFS*") provided by Mr Fay in support of his application for a protective certificate and the information contained in the proposed arrangement such that, for the purposes of s. 120 (c) of the 2012 Act, there is a material inaccuracy or omission. However, it should be noted that, in the context of that subs., the material inaccuracy or omission must be contained in the debtor's statement of affairs based on the PFS. I am not sure that this element of the Notice of Objection correctly reflects the focus of s. 120 (c).

The first affidavit sworn on behalf of ACC

12. Notwithstanding the case made in ACC's notice of objection (as summarised in para 11 (e) above), Mr Paul Shaw, in the first affidavit sworn by him on behalf of ACC on 4th July, 2017, suggested that the property in which Mr. Fay resides is a commercial property and, as such, could not be classified as a "*principal private residence"* for the purposes of s. 115A. In this context, I should make clear that relief under s. 115A is only available in cases where the debtor owes a debt which is secured over his or her principal private residence and which was in arrears as of 1st January, 2015 (or where the debt had been the subject of an alternative repayment arrangement prior to that date).

13. In support of his suggestion that the property is a commercial property, Mr. Shaw quoted from the letter of loan offer dated 10 August, 2007 which described the property as a *"commercial property known as … supermarket … with attached 5-bedroom residence …*". For reasons which are unclear to me, the letter of loan offer was not exhibited to Mr. Shaw's affidavit.

14. Mr. Shaw also referred to the valuation report prepared by Heffernan Auctioneers (which valued the property at €200,000) in which the property was described as: -

"Two storey detached commercial property. The property is 100+ years old and comprises of retail unit with residential house attached".

15. The Heffernan report also indicated that the property is in poor repair. For that reason, in addition to raising an issue as to whether the property constitutes the *"principal private residence"* of Mr. Fay, Mr. Shaw also raised an issue as to the suitability of the property for Mr. Fay. In doing so, he suggested that the property has five bedrooms which he claimed is "*manifestly in excess of the requirements of the Debtor".* Mr. Shaw suggested that this is a relevant consideration under s. 104 (2) of the 2012 Act and he also suggested that no comparison appears to have been conducted by the practitioner between the costs of Mr. Fay remaining in the property as against the costs of alternative accommodation *"suitable to the needs of a single person living alone*". In para. 16 of his affidavit, Mr. Shaw suggested that it was an "*impermissible abuse of process*" to seek the retention of a commercial property "*under the guise of the protections afforded to a principal private residence under the Act"*. For completeness, it should be noted that, despite the reference by Mr. Shaw to the property having five bedrooms, the Heffernan report describes the residence as having four bedrooms together with a kitchen, living room and two bathrooms. This is also consistent with the evidence of Mr Fay.

16. In his affidavit, Mr. Shaw also raised an issue as to the rent received by Mr. Fay in respect of the commercial unit at the front of the property. In para. 17 of his first affidavit, he highlighted that, in appendix 2 to the proposed arrangement, Mr. Fay is stated to have received no more than €66.67 per month from the rental unit in the period prior to the arrangement while, at the same time, the appendix suggests that the monthly rental income will increase to €845.15 from year 1 of the arrangement onwards. Mr Shaw also drew attention to the fact that in the Heffernan report, the retail unit was stated to achieve a rental of €300 per week and he said: *"…it seems incredulous (sic) to suggest that €300 per week in rent amounts to €66.67 per month in income at present*". Although not so stated in the affidavit, this averment on Mr. Shaw's part may relate to the case made in ACC's notice of objection (summarised in para. 11 (f) above). However, a broader case in relation to alleged inconsistencies was subsequently made in the course of the submissions made on the hearing of the appeal.

The response of the practitioner and Mr Fay

17. A very short replying affidavit was sworn by the practitioner in response to the affidavit of Mr. Shaw. The affidavit does not address any of the issues described in paras. 12 to 16 above. However, a detailed affidavit was sworn by Mr. Fay on 22nd May, 2018 in which he confirmed that he has been living in the property since 2007. He also indicated that the property has four bedrooms rather than five and that the property is currently occupied by himself and his three children one of whom attends college in Cork during the week and returns home at weekends. In para. 8 of his affidavit, Mr. Fay says that he discussed the "*reasonableness*" of the property with the practitioner "*versus the costs and realities of alternative accommodation*". He indicated that, in circumstances where comparable rent would not have been manifestly different from the mortgage payment, *"it was taken that the retention of the family home and compliance with the Act was a*

more appropriate solution". In para. 19 of his affidavit, Mr. Fay said that the average rent for a similar property in the area is of the order of €1,000 per month.

The creation of exhibits subsequent to the swearing of Mr Fay's first affidavit

18. In support of the averment made in para. 19 of his affidavit, Mr. Fay exhibited a print-out from the Daft.ie website. Although the affidavit was sworn on 22nd May, 2018 and although the exhibit sheet for the relevant exhibit (exhibit "*MF4*") is dated 22nd May, 2018, the relevant extract from the Daft.ie website is dated 16th July, 2018. During the course of the proceedings in the Circuit Court, this does not appear to have been noticed by counsel for either party or by the solicitors acting on behalf of ACC at the time. However, immediately prior to the first date on which the appeal to this court was initially listed for hearing in October 2019, the solicitors acting on behalf of Pepper wrote to the solicitors for the practitioner in relation to this exhibit and also in relation to exhibit MF3 (addressed further below) expressing serious concern about the existence of exhibits which post-dated the date of swearing of the affidavit by Mr. Fay and which post-dated the signing of the relevant exhibit cover sheets. The matter was subsequently brought to my attention on the first day of the hearing of the appeal in October 2019. In light of the gravity of the issue, I gave certain directions (which are described in more detail below). At this point, it is sufficient to record that the creation of exhibits subsequent to the swearing of an affidavit raises a profound concern in relation to the presentation of the evidence in this case. It is deeply troubling. It is of crucial importance to any court proceedings that parties and their legal advisors are aware of the fundamental obligation to ensure that the evidence given to the court is truthful and presented in the correct manner. It is a basic requirement that any exhibit produced in conjunction with an affidavit should be in existence at the time the affidavit is sworn. That is why the deponent of every affidavit who refers to an exhibit always confirms, in the body of the affidavit, that he or she has signed his or her name on the exhibit "*prior to the swearing hereof"* (emphasis added). Given the significance of this issue, it will be necessary to address it in some detail at a later point in this judgment.

The balance of Mr Fay's affidavit

19. With regard to the condition of the property, Mr. Fay said that he was "*perfectly happy"* with it and that no modernisation is required. However, he also said that if any repairs are required, he would be in a position to complete those, other than repairs to the roof of the property. However, he said that he should be in a position to barter his skills as an upholsterer in return for any necessary work to the roof. In para. 15, Mr. Fay purported to exhibit an estimate of the cost of repairs to the property. This is exhibit "*MF3"* to his affidavit. However, in common with exhibit MF4, the document appended to the relevant exhibit sheet (which is stated to be signed on 22nd May, 2018, the date of swearing of the affidavit) the handwritten estimate is stated to have been prepared and signed by him on 6th July, 2018. Again, in common with the issue described above with regard to exhibit MF4, this raises an issue of very significant concern which is addressed in more detail at a later point in this judgment.

20. In para. 13 of his affidavit, Mr. Fay said that the loan on the commercial unit has been paid off and that the only loan that remains due to ACC (now Pepper) is a residential

home loan. He also made the point in the same paragraph that the commercial unit is on a separate folio. In para. 29 of his affidavit, he said that ACC were aware that he had moved into the property in Tullamore as his residence in 2007. As noted above, he explained that this was in fact suggested to him by officials in ACC.

Mr Shaw's second affidavit

21. A further affidavit was sworn by Mr. Shaw on 7th December, 2018. In that affidavit, Mr. Shaw complains that the affidavit of Mr. Fay, although sworn on 22nd May, 2018 was not in fact served on ACC until October, 2018 on the day before the matter was next listed before the Circuit Court. If that is correct (and it has not been denied on affidavit by the practitioner) such conduct is reprehensible. Even if one were to take July (when exhibits MF3 and MF4 were created) as the relevant date, it is completely unacceptable that there should be such a long delay in serving an affidavit. Practitioners and lawyers should be well aware that proceedings under the 2012 Act should be conducted in a co-operative and transparent manner. They are not intended to be adversarial in the same way as normal *inter partes* litigation (not that a delay of this nature would be acceptable even in the context of fully adversarial litigation). Practitioners and their lawyers should bear in mind the observations of Baker J. in *Nugent (a debtor*) [2016] IEHC 127 where she said at para. 31 that a practitioner is : *"in a unique position of responsibility to the Insolvency Service … , the court, the creditors and … the debtor. That this imports a duty of frankness and full disclosure seems to me to be unequivocal, and while the PIP is not an officer of the court in a true sense, he is a professional engaged with a process in respect of which the court expects a full, professional and objective approach*". Given the important duties owed by solicitors and counsel to the court, those comments are applicable with even more force to lawyers acting for a practitioner. Lawyers acting for a practitioner should seek to ensure that any proceedings under the 2012 Act in which they are involved are conducted in a manner that fully respects the observations of Baker J.

22. In his affidavit, Mr Shaw also expresses surprise that Mr. Fay has said that his children reside with him at the property. Mr. Shaw suggests that Mr. Fay's affidavit is inconsistent with the proposed arrangement which states that Mr. Fay has no dependants and that his set costs are based on a single adult household with a car. Mr. Shaw also suggests that Mr. Fay's children should be in a position to pay him rent and contribute to their accommodation costs. Mr. Shaw also complains that, based on the evidence now available from Mr. Fay, the proposed arrangement would not only involve a write-down of a commercial loan and permit Mr. Fay to retain the benefit of the shop unit but the write-down would also serve to fund the cost of accommodation for Mr. Fay's adult children.

23. In para. 10 of his affidavit, Mr. Shaw suggests that the shop unit should be sold to realise the maximum potential value for Mr. Fay's creditors. He also suggests that the arrangement works a manifestly unfair prejudice to ACC and in para. 12 of his affidavit he says: -

> *"12. The effect of the proposed PIA will be to … leave the Debtor and his three children in occupation of the commercial premises from which they are deriving a rental income while the adult children, who may or may not be dependants, have their*

accommodation costs borne ultimately by the Creditor. This is unfairly prejudicial to the Creditor in all the circumstances".

Mr Fay's replying affidavit

24. A further detailed replying affidavit was sworn by Mr. Fay on 23rd January, 2019 in the Circuit Court proceedings. In that affidavit, he explained that he has no dependent children. His daughter who resides with him is still a student in part time casual employment. He has a son who is an apprentice electrician on "*minimal wages*" who cannot afford to pay a full economic rent but is paying €50 per week towards the household expenses. His younger son is an apprentice plumber who is also on minimal wages and cannot afford to pay a full economic rent but is paying €25 per week.

25. With regard to the commercial unit, Mr. Fay said in para. 14 of his affidavit that his home is attached to the commercial unit and "*cannot be separated*". He suggested that the unit cannot be sold separately to the residential property. In the same paragraph, he accepted that the unit is encumbered in favour of ACC and he sought to explain the averments in his earlier affidavit as being directed towards *"the fact that I had repaid to the Objecting Creditor, the substantial portion of my liabilities, and had paid a sum equal to more than the value of the commercial unit".*

26. In para. 16 of his affidavit, Mr. Fay suggested that the commercial unit and the dwelling are inseparable and he exhibited a copy of the relevant folio. However, the folio appears to suggest that the property was originally contained on two separate folios which were subsequently combined into one. The same exhibit also contains a land registry search which states that: *"this folio has 2 properties*". Nonetheless, in para. 16 of his affidavit, Mr. Fay maintains that the property is a "*single integrated unit. One cannot be sold without the other".*

27. In para. 17 of his affidavit, he sought to make the case that the property is not large. In this context, he exhibited material to establish that the cost of rental of an alternative property had risen to €1,200 by January, 2019. He also referred to certain health issues which are unnecessary to detail for present purposes. In para. 20 of his affidavit he suggested that, not only would a rental property be more expensive, but that he is unlikely to obtain a long term lease that would give him any degree of security or certainty. He also stressed that the rental from the commercial unit at the front of the property is the source of a substantial part of his income.

28. In the same affidavit Mr. Fay drew attention to the fact that, during the period since the protective certificate was first issued on 23rd February, 2017, he has been making payments totalling €1,030.00 per month to ACC. He also says that substantial payments were made to ACC Bank in each of 2005, 2007 and 2013. In 2005 a sum totalling €330,000 was paid; in 2007 a sum of €600,000 was paid and in 2013 a sum of €84,474.29 was paid.

The hearing in the Circuit Court

29. The application under s. 115A came on for hearing before the learned Circuit Court judge in Tullamore Circuit Court on 14th February, 2019. Subsequently, on 28th February,

2019, the learned judge delivered judgment dismissing the objections raised and, instead, made an order confirming the coming into effect of the proposed arrangement. As noted above, at the time of the hearing in the Circuit Court, no one drew the attention of the court to the issue which arises in relation to exhibits MF3 and MF4.

The appeal to this court

30. Thereafter, an appeal was filed by Pepper. The matter first appeared in the High Court Personal Insolvency List on 29th April, 2019. The hearing of the appeal was subsequently listed for Monday 7th October, 2019. The hearing, did not, however, commence until 16th October, 2019. In the meantime, the solicitors for Pepper noted, for the first time, the fact that exhibits MF3 and MF4 both post-dated the swearing of Mr. Fay's first affidavit on 22nd May, 2018. The solicitors for Pepper wrote to Holohan Solicitors (which is a related firm to Ashtown Gate, the solicitors on record for the practitioner) on 7th October, 2019 in the following terms: -

> *"Please note that in reviewing the papers in advance of the hearing before McDonald J. on October 16th we noted that in the Debtor's first affidavit …, the Debtor exhibits two documents – marked 'MF3' and 'MF4' – both of which are dated 6th July, 2018 and 16th July, 2018 respectively. The document is also stamped 3rd May, 2018, filed on 23rd July, 2018 and was served on our office on 31st October, 2018.*
>
> *This is obviously a matter of the most serious concern to us and we call upon you to explain, in writing on or before close of business on 8th October, 2019, how this came to be. In the event … that we receive no response, or the response is unsatisfactory we will have to reserve our position to bring this to the attention of the judge … as well as the Law Society.*
>
> *For the avoidance of doubt, we believe that the averments at paragraphs 15 and 19 of the Debtor's first affidavit contained perjury as well as the sworn exhibit. This is a matter of the most serious concern to us and must be addressed urgently...".*

31. On the same day, Mr. Holohan responded in the following terms: -

> *"I refer to your letter received today by email. The matter has been drawn to the attention of myself and Mr. John Lane, Managing Partner and we share your concerns in relation to this matter.*
>
> *…, in relation to the question of the exhibits, we are at a loss to explain clearly how this occurred. From a review of the file it is apparent that the affidavit was not in fact scanned to the file, until 16th July, 2018, which would appear to be the date on which the Daft search attached as exhibit MF4 was printed….*
>
> *Quite obviously, this should not have happened. Unfortunately, however, the member of staff who was dealing with this at the time in July 2018 … is no longer working with us, and therefore it is not possible to ascertain from her how the situation was allowed to occur. On logical expiration (sic) which would suggest itself*

is that for some reason the original exhibits became detached, were misplaced or lost, and consequently had to be replaced. We merely point this out as what appears to us to be the most logical explanation, but we cannot say for sure. That assumes that the affidavit was indeed sworn on 22nd May, the date which appears thereon.

That said, and while it should not have occurred as a matter of proper professional practice, and we accept that to be the case, we do not see it as having any bearing whatsoever upon the merits of the Debtor's Application or significance in relation thereto, and certainly we fail to see how you can possibly sustain an allegation of 'perjury' against Mr. Fay, a most serious allegation. The most likely explanation, as suggested above, is an inappropriate action on the part of a former employee of this office who merely substituted the exhibits, rather than having the affidavit re-sworn, as would have been appropriate….

…we have no difficulty whatsoever with you drawing the matter to the attention of the Court, nor indeed for that matter to the Law Society, as you feel necessary, though we are unclear as to what you hope to achieve in either case, in the context of the Debtor's Application".

32. In the course of the hearing which subsequently took place on 16th October, 2019, counsel for the practitioner opened the appeal in the usual way. Although the appeal had been brought by the objecting creditor, it proceeded as a full re-hearing and therefore counsel for the practitioner (as the moving party in the underlying s. 115A application) was heard first. Counsel for the practitioner completed his opening of the case without drawing my attention to the issue which arises in relation to the swearing of Mr Fay's first affidavit in May 2018 and the subsequent attachment of exhibits MF3 and MF4 created in July 2018. In response, counsel for Pepper addressed all issues and he also brought to my attention the issue in relation to the swearing of that affidavit.

33. In light of the serious concern which I had in relation to the first affidavit sworn by Mr. Fay, I decided to defer making any ruling on the appeal. Instead I directed that a full explanation would have to be provided on affidavit by the appropriate parties which should include the solicitor acting for the practitioner in the course of the proceedings in the Circuit Court and the solicitor before whom the affidavit was sworn. Echoing a concern expressed by counsel for Pepper, I expressed my own very strong concern that the court, in any application before it, must be in a position to rely on the material placed before it in the course of the evidence and that it was therefore vitally important that a full explanation should be provided in relation to this extremely troubling issue. In those circumstances, I adjourned the matter for further consideration to 11th November, 2019.

34. Remarkably, in the next appeal that was heard on 16th October (namely the appeal in *Kelly Boumenjel (a debtor)),* a similar issue arose in relation to the creation of exhibits subsequent to the swearing of an affidavit which purported to refer to them and where the deponent (like Mr. Fay) also stated on oath that he had signed his name on the exhibits "*prior to the swearing hereof*" (emphasis added) . I therefore made a similar

direction in that appeal also. Ashtown Gate solicitors had also acted in the Circuit Court for the practitioner involved in those proceedings.

35. Thereafter, the matter appeared before me on 11th November, 2019. At that point, there were two additional appeals involving similar issues. All four Circuit Court hearings involved the same firm of solicitors but the practitioner in each case was different. I ultimately fixed Friday 17th January, 2020 to resume the hearing of the appeal. In the meantime, the matter appeared before me on a number of occasions to monitor progress when counsel for the practitioner, counsel for Ashtown Gate solicitors and counsel for the relevant objecting creditors (including Pepper) all attended. In the meantime, a number of further affidavits were filed (as described below).

The further affidavits addressing the issue arising from the exhibits

36. On 24th October, 2019, Bill Holohan, solicitor, swore an affidavit in his capacity as principal of Ashtown Gate Solicitors. That firm is based in the Capel Building in Dublin. Mr. Holohan explained that, on a practical level, from 2015 onwards he was not directly or personally involved in handling personal insolvency matters in the office. On a daily basis, the work on all personal insolvency files was organised on the basis that another solicitor based in the Dublin office was in charge of such files. That solicitor was supported by two trainees and also by a legal executive (who is a foreign qualified lawyer working in Ireland). Mr. Holohan explained that, in response to the issue, both he and his partner John Lane had examined and reviewed the electronic filing system maintained by Ashtown Gate which shows the work done on the preparation of Mr. Fay's first affidavit over the course of the period running from February 2018 to July 2018. It should be recalled, at this point, that the affidavit of Mr. Fay was sworn on 22nd May, 2018. However, the electronic records for June 2018 include an email from Mr. Holohan of 13th June, 2018 sent to one of the trainees and the legal executive enquiring if Mr. Fay's affidavit had been sent to him for swearing. On the same day, he received a response from one of the trainees indicating that it was thought that Mr. Fay had *"possibly previously attended to swear the affidavit*" but that the trainee could not be certain of this as there was no copy of the affidavit on the electronic system maintained by Ashtown Gate. On the same day, the legal executive also sent an email in which she said: *"I looked in the pile of Affidavits sworn but it is without exhibits but it is there. Do you know … if the exhibits are on [the electronic filing system]?*"

37. On 18th June, 2018, the legal executive emailed Mr. Fay asking him to send her a number of documents including the estimate of the cost of supplies (which, as noted above, was dated 6th July, 2018 although it was attached to the exhibit sheet signed on 22nd May, 2018 and marked "MF3"). On the same day, Mr. Fay responded by email in the following terms: -

> *"…ok that's fine…were sent before but I will organise all … this will take a little time but I'll start on your list straight away and get back to you…".*

38. On 9th July, 2018 Mr. Fay emailed the legal executive again apologising for the delay and noting that he had been in hospital for a number of weeks. There were a number of

attachments to this email including the hand written estimate of the cost of repairs dated 6th July, 2018 which was subsequently attached to the exhibit sheet dated 22nd May, 2018 for exhibit MF3. Subsequently, on 16th July, 2018, Mr. Fay's affidavit sworn on 22nd May, 2018 and incorporating exhibits MF3 and MF4 dated respectively 6th and 16th July, 2018 were scanned to the Ashtown Gate computer system. According to Mr. Holohan in para. 37 of his affidavit sworn on 24th October, 2019: -

> *"…it is presumed that prior to the scanning of the affidavit, the Estimate of Costs from the Debtor dated 6th July, and the DAFT printout dated 16 July were both attached … as exhibits, notwithstanding that the relevant exhibit sheets were dated 22nd May. This was not on the basis of any instructions or advice given or practise condoned or facilitated by your Deponent, my partner John Lane, [the two trainees], or any other person in the office."*

39. In para. 38 of the same affidavit Mr. Holohan says that, in the event that a problem such as this had been brought to his attention, the obvious need to have a fresh affidavit sworn would have been made clear. He says, on the basis of enquiries made by him, he is satisfied that no such enquiry was made by the legal executive handling the matter. At para. 40 of his affidavit he continues: -

> *"The practice adopted by Legal Executive (sic) in terms of procuring 'replacements' for the missing exhibits, was not one which will be condoned by or approved of by any member of the Firm. The Debtor was readily available at all times and it appears in all the circumstances that it would have been very simple, given the passage of time involved before the subsequent service of the affidavit, and it appearing in this particular case that here being no particular urgency or pressure involved in terms of the delivery of the Debtor's affidavit, to have a fresh affidavit sworn".*

40. In para. 55 of his affidavit, Mr. Holohan explained that similar enquiries were now being undertaken in three other cases handled by the same legal executive and that additional affidavits would be sworn to update the court in relation to the matter and "*should the need arise, fresh affidavit(s) sworn, in order that untainted and proper evidence only, would be put before this Honourable Court*". In para. 56 of his affidavit, Mr. Holohan confirmed that all staff have been made aware of the issue and given specific instructions and warnings that were any such issue to arise again in the future, this would constitute grounds for disciplinary action. He also confirmed in para. 57 that procedures are now in place to ensure, insofar as it is possible, that, prior to the swearing of any affidavit, a solicitor is present to approve the final form of an affidavit to be sworn by any person and to review the exhibits.

41. In paras. 53, 54 and 58 of his affidavit, Mr. Holohan acknowledged the significance of the failing on the part of himself and his firm in the following terms: -

> *"53. Both myself and Mr. Lane regard what has happened in this case as a serious lapse in professional standards and an example of extremely poor professional practice,*

falling far below the standards to which we seek to operate and we wish to assure the Objecting Creditor, the Solicitors for the Objecting Creditor, and the Honourable Court that the standard of professional practice displayed in this particular case is not the standard by which we operate as professionals, or to which we hold ourselves accountable and we unreservedly apologise to the Creditor, the Solicitors for the Creditor, and to the this Honourable Court that this lapse occurred in the first instance, that was necessary for the Solicitors for the Objecting Creditor to engage with us in relation to the matter in the second instance, and that it has taken up the time and attention of this Honourable Court in the third instance.

54. That said, as communicated in the response to the solicitors for the Objecting Creditor, we have no desire this would reflect poorly upon the Debtor, as it would appear that the Debtor was an entirely innocent party in that regard….

58. Again, I offer on behalf of my partner and myself, sincere and unreserved apologies for what occurred in this case".

42. At the time the affidavit of Mr. Holohan was presented to the court, I was informed by counsel that, following a comprehensive review of the files of the firm of Ashtown Gate, it had been identified that a similar issue arose in twelve cases (out of a total of 250 personal insolvency cases handled by the firm). This was addressed in a further affidavit sworn by Mr. Holohan on 9th January, 2020. Some of the relevant cases arose in the Circuit Court (in which no appeal was taken to this court). In such cases, counsel for Mr. Holohan confirmed that Mr. Holohan has undertaken to bring those cases to the attention of the relevant Circuit Court judge.

43. As part of the process of dealing with the issue which arises in relation to the affidavits of Mr. Fay sworn on 22nd May, 2018, a fresh affidavit was sworn by Mr. Fay on 30th November, 2019 which was essentially a re-swearing of the previous affidavit. In light of the issue which had been identified in relation to the affidavit of 22nd May, 2018, it was obviously necessary to re-swear that affidavit and to ensure that the affidavit to be relied upon did not pre-date the creation of the exhibits.

44. Mr. Fay also swore an affidavit on 18th December, 2019 seeking to explain the position from his perspective. In para. 3 of that affidavit he confirmed that he attended at the Capel Building on 22nd May, 2018 for the purposes of swearing his first affidavit. In the same para., he said that, to the best of his recollection, an exhibit was attached to each of the exhibits sheets as he signed them. In para. 5 of the same affidavit, he confirms that the significance of the postdating of the exhibits has been explained to him and he further says: "*I accept that it is incorrect, unacceptable, and I apologise for same*". In para. 6 he reiterated that, to the best of his recollection, an exhibit was with the affidavit when he attended to have it sworn. He then says at para. 7: -

"7. I say that this was my first attendance to swear an Affidavit and it was all very new territory to me where I did not know what to ask or expect. I say that I did read my Affidavit and I did discuss the contents thereof in considerable detail, and in

particular the reference to local rent, so I do recall and know why the exhibit was to be attached."

45. In para. 9 of his affidavit, Mr. Fay explained that, prior to attending at the Capel Building for the purposes of swearing his affidavit on 22nd May, 2018, he had supplied several documents including forms of calculations and figures but these consisted of a number of typed sheets upon which multiple handwritten amendments and comments had been made. With regard to the handwritten document which subsequently became exhibit "MF3" to his affidavit of 22nd May, 2018, Mr. Fay explained: -

> *"I do recall the comment being made at the time the affidavit was being prepared, before attending upon the solicitor for the purpose (sic) swearing the affidavit, that these pages were a bit unclear and I believe that it was because of this that I subsequently wrote out in clear handwriting the particular figures and sent them in to the office of my solicitor".*

46. For completeness, it should be noted that Mr. Fay also purported to swear a number of further affidavits dealing with some of the substantive matters that had arisen during the course of the hearing in October, 2019. However, no leave was ever sought from the court for the delivery of these affidavits and, in circumstances where the admission of those affidavits was opposed by counsel for Pepper, I was not prepared to admit them for the purposes of the further hearing of the appeal in January, 2020.

47. In light of the significant concern which I had in relation to the issue, I also directed Mr. Holohan to write to each of the solicitors before whom affidavits were sworn to request that they should swear an affidavit as to the circumstances in which the affidavit came to be sworn by the deponent and to address, more particularly, whether, at the time the affidavit was sworn, there was an exhibit attached to the exhibit sheet of any exhibit which was subsequently found to have been created subsequent to the swearing of the relevant affidavit.

48. In the present case, the affidavit of Mr. Fay sworn on 22nd May, 2018 was sworn before Ms. Aileen Gittens at the Capel Building in Dublin. Ms. Gittens swore an affidavit on 9th January, 2020 confirming that, on 22nd May, 2018, Mr. Fay signed in her presence "*four exhibit sheets to which were attached exhibits"*. However, there were in fact five exhibits to Mr. Fay's affidavit sworn on 22nd May, 2018. In those circumstances, a supplemental affidavit was sworn by Ms. Gittens on 13th January, 2020 in which she swore that the reference to four exhibit sheets was "*an unfortunate and unconscious error*" and she then continued as follows: -

> *"5. I say that I was provided in December 2019 with a copy of the affidavit sworn by Mr. Mark Fay before me on 22nd May, 2018. I do not routinely keep copies of affidavits sworn before me. As clearly appears from the copy of the affidavit, there was in fact five exhibits to that affidavit. I believe that at the time the affidavit was sworn before me by Mr. Mark Fay on 22nd May, 2018 there were in fact five exhibits attached to the five exhibit sheets signed by me. As is my usual practice,*

after a deponent has signed an affidavit and exhibit sheets containing exhibits before me, I signed each separate exhibit page containing exhibits, five in total.

6. I am satisfied that the signature attached to each of the exhibit sheets is my signature".

49. For present purposes, that completes the affidavits that were before the court for the purposes of the resumed hearing of this appeal in January 2020.

The hearing in January 2020

50. At the resumed hearing which took place on 17th January, 2020, senior counsel for Mr. Holohan emphasised that what happened here occurred at the level of very junior staff members. Counsel very properly accepted that the affidavit sworn by Mr. Fay had not been appropriately treated by the relevant staff member as a sworn court document and he highlighted the frank way in which the failings in the swearing of the affidavit had been acknowledged by Mr. Holohan. He accepted that what had occurred tainted the affidavit of 22nd May, 2018 but he noted that the affidavit had now been re-sworn by Mr. Fay which is what should have occurred in the first place prior to the hearing in the Circuit Court. Counsel also very properly accepted that the court had jurisdiction in the circumstances to impose a wasted costs order on Mr. Holohan but he suggested that this should only be in respect of the period from October 2019. He drew attention to the fact that the matter had appeared before the court on four occasions since the October hearing date namely on 18th November, 2019, 16th December, 2019, 13th January, 2020 and 17th January, 2020. He suggested that, if the court was minded to impose a wasted costs order, it should be measured and limited solely to the costs arising since October 2019. He suggested that a figure of €2,000 would be appropriate. In the alternative, he suggested that a donation to charity might be appropriate.

The submissions of counsel for the objecting creditor in Kelly Boumenjel

51. I also heard from counsel for the Objecting Creditor in the *Kelly Boumenjel* case (where, as noted above, a similar issue has arisen). Although the appeal in that case has subsequently been settled as between the Objecting Creditor and the practitioner, counsel submitted that the fact that his client had taken a benign view should not obscure the seriousness of what had occurred. Counsel submitted that the treatment of evidence in this way has the capacity to shake confidence in the legal system as a whole. He also stressed that what has happened here is indicative of a more general problem which has arisen in cases under the 2012 – 2015 Acts where affidavits are often treated as standard form documents where, time and time again, the same prolix paragraphs are replicated in affidavits sworn by practitioners without regard to the particular facts of an individual case. Regrettably, that has been my experience too in the course of a 20 month period dealing with cases under the 2012 Act. In such an environment, counsel submitted that there was no solemnity to the evidence gathering process. While he did not think that a legal executive could be blamed for treating the affidavits as no more than application forms, he submitted that what had occurred was an entirely predictable consequence of the attitude that has been adopted by practitioners in a wide range of cases. He suggested that there was a lack of appreciation by many practitioners and lawyers of

evidential requirements and that there was a failure to adhere to the standard outlined by Baker J in *Nugent (a debtor*) quoted in para. 21 above. In this context, he referred, by way of example, to what had occurred in *Tinkler (a debtor)* [2018] IEHC 682 where the debtor had sworn an affidavit contending that tenants in property owned by him would vacate that property in the event that a receiver was appointed by the objecting creditor. In support of that averment, the debtor had exhibited two letters which were both in identical form and both very obviously typed on the same machine. As noted in paragraph 58 of my judgment in that case, the documents bore "*all the hallmarks of having been pre-prepared and placed in front of the tenants for signature*". In the same paragraph of my judgment I stated: -

> *"I am deeply unimpressed by this very naked attempt to manufacture evidence to support the proposition that [the Objecting Creditor] would be worse off in a receivership than it would be under the PIA. If there was genuine evidence to support such a case, it should have been presented to the court in the usual way on affidavit and any such affidavit should be drafted on the basis of the personal input of the deponent."*

52. Counsel argued that confidence in the system requires a very high standard in terms of presentation of evidence. Unless evidence is treated with the appropriate degree of respect and care, confidence in the system will evaporate. He suggested that it would be appropriate in the *Kelly Boumenjel* case that his client should be entitled to costs but he indicated that his client would have no difficulty with an appropriate donation to charity in lieu of an order for costs.

The submissions of counsel for Pepper

53. Counsel for Pepper adopted the submissions of counsel for the Objecting Creditor in the *Kelly Boumenjel* case. He also expressed very serious concern that, although the issue in relation to the affidavit had been raised in his instructing solicitor's letter of 7th October, 2019, the appeal had opened before the court on 16th October, 2019 without any reference to the issue at all. It was not until he highlighted the issue in the course of his response to the submissions of the practitioner that it was brought to the attention of the court. He also submitted that, in any event, the response to the letter of 7th October, 2019 received from Mr. Holohan on the same day failed to properly address the matter. Counsel also highlighted the inconsistency in the first affidavit sworn by Ms. Gittens in relation to the number of exhibits. He also strongly questioned how it could be said that anything was ever attached to the exhibit sheets for exhibits MF3 and MF4 in May 2018. He suggested that, if the exhibits were mislaid, the exhibit sheets themselves would also be mislaid. He submitted that it was therefore impossible to believe that there were any exhibits in existence in May 2018 in respect of the exhibit sheets for MF3 and MF4.

54. Counsel recalled that, prior to identifying the defect in the affidavit of 22nd May, 2018, the principal objections of Pepper to the proposed arrangement were that:

(a) Mr. Fay has sought to retain a commercial asset (namely the commercial unit at the front of the property where he lives) and had thus not brought the full range of his assets to bear for the benefit of his creditors;

(b) The practitioner had failed to conduct the assessment required by s. 104 of the 2012 Act which is a mandatory prerequisite to the granting of relief under s. 115A. In the alternative, counsel suggested that there was no evidence presented to the court, in response to the issue raised by ACC (who was the relevant Objecting Creditor at the time), to substantiate the bare assertion made in the affidavit of the practitioner that she had regard to the requirements of s. 104 in preparing the proposed arrangement;

(c) There were also a large number of discrepancies in the papers before the court.

55. Counsel then addressed the consequences which flow from the very serious defects in the affidavit of May 2018. Counsel stressed that, before the court can confirm a proposed arrangement under s. 115A, it must be satisfied that the evidence presented by the practitioner and, if applicable, the debtor is reliable. The practitioner bears the onus of establishing that each of the conditions for the grant of relief under s. 115A have been satisfied. In the present case, given the state of the evidence, the court must now ask itself whether there is any basis on which it could be satisfied as to the facts. In particular, the court should ask itself why it should prefer the evidence or narrative of Mr. Fay to that of Pepper particularly in circumstances where Mr. Fay has been so "*consistently inconsistent".* In considering these questions, counsel submitted that the court should bear in mind that s. 115A constitutes a very significant inroad into the constitutionally protected property rights of a secured creditor such as Pepper. He referred, in this context, to the decision of the Supreme Court in *Reid v. Industrial Development Agency* [2015] 4 I.R. 494 dealing with the exercise of compulsory purchase powers by the IDA. In particular, counsel highlighted para. 46 of the judgment of McKechnie J. in the Supreme Court in that case where he emphasised that any interference with a property right must "*be justified or necessitated by the exigencies of the common good"* and that the impairment of such rights "*must not exceed that which is necessary to attain the legitimate object sought to be pursued. In other words, the interference must be the least possible consistent with the advancement of the authorised aim which underlines the power".*

56. In the same case, McKechnie J. referred to the observation of Keane J. (as he then was) in *Simple Imports Ltd v. Revenue Commissioners* [2000] 2 I.R. 243 at p. 250 where he said: -

> *"These are powers which the police and other authorities must enjoy in defined circumstances for the protection of society, but since they authorise the forcible invasion of a person's property, the courts must always be concerned to ensure that the conditions imposed by the legislature before such powers can be validly exercised are strictly met".*

57. Counsel submitted that, accordingly, when considering whether the requirements of s. 115A have been satisfied in any individual case, there must be reliable evidence before the court to clearly demonstrate that those requirements are in fact satisfied.

58. Counsel also drew attention to the obligation of good faith under s. 118 of the 2012 Act which he suggested was also relevant. Under s. 118, a debtor has an obligation of good faith in his or her dealings with a practitioner and also has a duty of full co-operation.

59. Counsel also submitted that there has been a pattern of behaviour in cases under the 2012 - 2015 Acts which shows that there is scant regard for the requirements of evidence. Not only are affidavits replete with standard form averments which are "*cut and pasted*" from one affidavit to the next but the court has also seen evidence of documents which have been forged by a debtor for the purposes of seeking to deceive the court and creditors as to the true position of a debtor. In that context, counsel referred to *Clarkson (a debtor)* in which the debtor had given evidence orally before the court about the existence of an alleged payment to an I.T. company on the south coast of England which the debtor claimed had been made to buy essential computer equipment for his daughter who suffered from a form of dyscalculia. In that case, it was subsequently demonstrated by the Objecting Creditor by reference to evidence from the I.T. company in question that the document created by the debtor was a forgery and had never been issued by the I.T. company concerned. For completeness, it should be noted that, in that case, following receipt of the evidence from the I.T. company, the relevant practitioner had, very properly, withdrawn the application under s. 115A.

60. In the course of the hearing counsel for Pepper ultimately accepted that the relevant standard of proof is the normal balance of probability test applied in civil proceedings but he suggested that it was the standard of evidence which is relevant in the present case. He submitted that it was not "*good enough*" that a moving party can proceed with the hearing of an appeal before the High Court on the basis of evidence which the moving party knew was defective. He suggested that this is what occurred in the present case. He also stressed that creditors have to be able to put their faith in the process before the court and that it is crucial that the necessary standards should be observed in adducing evidence for the purpose of any court process. He also submitted that there should be consequences where, as here, the hearing proceeded on the basis of evidence that was known to be defective (the relevant defects having been identified prior to the hearing of the appeal in his instructing solicitor's letter of 7th October, 2019). He submitted that, in order to show disfavour, the court must refuse relief under s. 115A.

61. Counsel then turned to the particular issues which had previously been relied upon by his client in the course of the hearing in October, 2019 namely the attempt by Mr. Fay to retain a commercial asset which should be realised for his creditors, the alleged failure of the practitioner to properly address s. 104, and the inconsistencies which counsel suggested existed in Mr. Fay's evidence.

Pepper's concerns in relation to alleged inconsistencies in the evidence

62. Insofar as the inconsistencies are concerned, counsel submitted that whenever Mr. Fay was challenged on an issue in the course of the proceedings before the Circuit Court he "*simply changed his evidence*". Counsel submitted that the following inconsistencies existed: -

(a) In the first place, counsel drew attention to the way in which Mr. Fay is described in the proposed arrangement as having no dependants. Yet, when he was challenged on the need to retain his current home, he gave evidence that three children resided with him in the property and regarded it as their home as they could not afford to live elsewhere;

(b) Secondly, counsel said that, at one point in his first affidavit, Mr. Fay suggested that the house does not require any repair or modernisation. Yet, in the same affidavit, he accepted that repairs are required for the roof. However, I do not accept that, when read as a whole, there is such an inconsistency in the evidence. It is true that, in para. 10 of his first affidavit Mr. Fay said that no modernisation is required. However, he made very clear in para. 12 of the same affidavit that, if minor repairs are required, they can be carried out by himself save to the extent that work is required on the roof. All of this is disclosed in the same affidavit. When read as a whole, I cannot see that there is an inconsistency. Mr. Fay accepted that work is required on the roof. Moreover, I do not believe that a concession that repairs are required to the roof is inconsistent with the suggestion that no modernisation is required. The reference to modernisation arose in the context of the Heffernan report which suggested that the residence was in need of modernisation. Separately, it suggested that roof repairs were also required. It seems to me that both the Heffernan report and Mr. Fay was speaking about two separate things when referring to modernisation on the one hand and repairs on the other. As I read the report and the affidavits, the reference to repairs is a reference to work that requires to be done; the reference to modernisation is a reference to works that might well be desirable but which is not necessary as such. I can see no inconsistency in the circumstances;

(c) Thirdly, counsel highlighted what was said by Mr. Fay in para. 15 of his second affidavit where he suggested that some of the averments made by Mr. Shaw in his affidavit of 7th December, 2018 are "*disingenuous to say the least, if not misleading*". This averment was made with reference to para. 10 of Mr. Shaw's affidavit where Mr. Shaw addressed para. 13 of Mr. Fay's first affidavit in which Mr Fay had said that the commercial unit was on a separate land folio. Mr. Shaw had interpreted this as a suggestion that the commercial unit was an unencumbered asset which was severable from the residence. Yet, notwithstanding the reference to a separate land folio in his first affidavit, Mr. Fay, in para. 15 of his second affidavit purported to say: -

"I made no such averments, nor could I do so in circumstances where there is only one single folio…a fact which must have been known to Mr. Shaw at the time of the swearing of his affidavit".

(d) Counsel also placed some emphasis on the fact that, on the one hand, Mr. Fay claimed that the costs of repairing the property are not disproportionate while, on the other hand, he exhibited a costing (namely exhibit MF3) that shows that the cost of repair will be roughly equal to the total dividend to Pepper in respect of the unsecured portion of the debt. In this context, the estimate of the cost of repairs contained in exhibit MF3 amounts to €6,250 while the dividend to be paid to Pepper in respect of the written-down balance of €272,149 will be of the order of €5,443. However, this seems to me to go to the strength of the arguments on both sides. It does not seem to me to be an inconsistency in the evidence. It is relevant to the s. 104 issue (considered below);

(e) Counsel also submitted that there was a significant inconsistency between the case made by Mr. Fay that the retail unit cannot be separated from the residence, on the one hand, and the fact that the retail unit is rented to a third party under a contract of tenancy which is subject to the usual covenant that the tenant will have quiet and peaceful enjoyment of the premises. Again, this seems to me to be an issue that goes to the strength of the parties' arguments in relation to the issue as to whether Mr. Fay should be required to realise the retail unit separately for the benefit of his creditors (in particular Pepper the secured creditor). It does not seem to me to be an inconsistency in the evidence of Mr Fay. It is not therefore relevant to the veracity of Mr. Fay's evidence.

(f) Counsel also submitted that para. 26 of Mr. Fay's first affidavit contains a "*complete fabrication*". This relates to the averment made by Mr. Fay in the first sentence of his first affidavit where he said: "*I say ACC mention that they are getting a very small return in relation to other creditors.*" Counsel for Pepper noted that this is not suggested anywhere in Mr Shaw's affidavit. I agree that no such suggestion is made in Mr. Shaw's first affidavit. Nor is any such suggestion made in the notice of objection although the case is made there that ACC should have been treated in the same way as Allied Irish Banks Plc and Cabot Financial Ireland Ltd insofar as the votes of unsecured creditors are concerned. However, I am not sure that I would use the word "*fabrication*" to describe the first sentence of para. 26 of Mr. Fay's first affidavit. It is certainly a misunderstanding of the affidavit and notice of objection filed on behalf of ACC. It is noteworthy, however, that when Mr. Shaw came to reply to Mr. Fay's first affidavit, he did not raise any objection in relation to the contents of para. 26. In these circumstances, I do not believe that much weight can be given to this complaint on the part of counsel for Pepper. If it was a matter of serious concern, I believe that it ought to have been raised as an issue in Mr. Shaw's replying affidavit so that it could then have been addressed by Mr Fay;

(g) Counsel also complained that, in para. 3 of an affidavit sworn by Mr. Fay on 13th November, 2019, he suggested that a direction had been made by the learned Circuit Court judge on 14th February, 2019 that he should file further evidence. Counsel said that no such direction was ever made. I do not, however, propose to take this issue into account. In the first place, the averment in question was made in an affidavit which was excluded by me in circumstances where it did not fall within the ambit of the direction made by me in October, 2019. Secondly, there is, in fact, no evidence before me to controvert the averment in question. I am therefore not in a position to determine that no such direction was made by the learned Circuit Court judge.

(h) Counsel also highlighted the inconsistency between the sum of €66.67 given in appendix 2 of the arrangement in respect of the monthly rent from the retail unit in respect of the pre-arrangement period and the figure of €845.15 set out in the same appendix in respect of the rent from the unit in respect of the period after commencement of the arrangement.

(i) Counsel also drew attention to an inconsistency between what was said by Mr. Fay in para. 16 of his affidavit sworn on 18th November, 2019 (which was excluded by me, at Pepper's request, as not falling within the terms of the direction given by me in October 2019) and what was subsequently said by him in paras. 5-7 of his affidavit sworn on 18th December, 2019 (which was within the ambit of the direction previously given by me). In para. 16 of the former affidavit, Mr. Fay swore that: *"I do not recall if the exhibit was there or not. I say that this was my first affidavit to swear an affidavit and it was all new territory where I did not know what to ask or expect. I say that I did read my Affidavit and I did discuss the reference to local rent so I do recall and know why the exhibit was to be attached".* However, in his affidavit sworn on 18th December, 2019, Mr. Fay said: -

"6. I say that by the best of my recollection an exhibit was with the Affidavit when I attended to have same sworn….

7. I say that this was my first attendance to swear an Affidavit and it was all very new territory to me where I did not know what to ask or expect. I say that I did read my Affidavit and I did discuss the contents thereof in considerable detail, and in particular the reference to local rent, so I do recall and know why the exhibit was to be attached.

8. I say that I have reviewed the said exhibit again and the contents are correct and they are directed at the specific averment I was making….".

63. In addition to the concerns outlined above in relation to Mr. Fay's evidence, counsel for Pepper also expressed disquiet about the manner in which Mr. Holohan dealt with the issue in relation to the exhibits. Counsel drew attention to what was said by Mr. Holohan

in para. 38 of his affidavit sworn on 24th October, 2019 where he said that, in the event of a problem arising with missing exhibits being brought to his attention, he would have seen the obvious need to have a fresh affidavit sworn. Counsel contrasted this averment with what actually happened in October 2019. When the issue was brought to Mr. Holohan's attention in Pepper's solicitor's letter of 7th October, 2019, Mr. Holohan made no attempt to arrange for a new affidavit to be sworn. Instead, he purported to say that the issue should not affect the application and he "*elected to have the application proceed based on the impugned affidavit*". Counsel drew attention to the fact that no explanation has ever been given by Mr. Holohan as to why the affidavit was relied upon in moving the application before the court in October 2019 notwithstanding that Mr. Holohan knew that it should have been re-sworn in advance of the hearing.

64. Counsel also expressed concern that it appears from the exhibits to Mr. Holohan's affidavit that he was aware in June 2018, one month prior to the new exhibits being generated, that there were exhibits missing from the affidavit of May 2018.

65. Another concern voiced by counsel for Pepper related to the inconsistency between the affidavit sworn by Ms. Gittens, the solicitor before whom the affidavit of 22nd May, 2018 was sworn by Mr. Fay. In her first affidavit sworn on 9th January, 2020, she said that there were four exhibit sheets referable to the affidavit at the time it was sworn before her. In fact, there are five exhibit sheets each dated 22nd May, 2018 and they were each signed by Ms. Gittens and Mr. Fay. As noted above, Ms. Gittens had to swear a second affidavit on 13th January, 2020 to confirm that, notwithstanding what she had said in her previous affidavit, there were in fact five exhibit sheets. In addition, she said that, to the best of her recollection, there were five exhibits attached to the five exhibit sheets signed by her. Counsel submitted that, if there were exhibits attached to the exhibit sheets as Ms. Gittens has stated, it is impossible to understand how the exhibit sheets in respect of MF3 and MF4 both dated 22nd May, 2018 were still available in July 2018 when the post-dated exhibits were attached to them. Counsel suggested that it is miraculous that the exhibit sheets dated May 2018 happened to survive while the exhibits attached to them disappeared.

66. Counsel argued that, contrary to the suggestion made by Mr. Holohan that the exhibits had been lost, it was always the intention of the legal executive to attach exhibits to the exhibit sheets sometime after the swearing of the affidavits. In this context, counsel also referred to the email sent by Mr. Fay to the legal executive concerned on 9th July, 2018 in which he said that the local authority did not have a social housing list which could be exhibited to his affidavit. Counsel submitted that, if the legal executive was requesting documentation required to reproduce or recreate exhibits that had been lost, it is impossible to understand why she would ask for a document that could never have been exhibited because it did not exist.

67. In light of the concerns summarised in paras. 62 to 66 above, counsel for Pepper submitted that the court could not be satisfied, on the basis of Mr. Fay's evidence that the requirements of s. 115A have been met in this case. Counsel submitted that, in

circumstances where creditors' rights are adversely affected by an order made on s. 115A, *"the burden for getting this right is a high one and must fall squarely on the shoulders of the debtor*". However, it is clear that (as ultimately acknowledged by counsel for Pepper in the course of the hearing) the standard of proof of relevant facts in an application under s. 115A is the ordinary civil standard. This is the same test as applies in virtually all civil proceedings. This was confirmed by the Supreme Court in *Northern Bank Finance Ltd v. Charlton* [1979] I.R. 149 where the court, in the context of an allegation of deceit, rejected an argument that a higher standard should be required. While I fully acknowledge the importance of ensuring that there is appropriate evidence before the court to prove the matters that require to be proved for the purposes of a s. 115A application, the *Northern Bank* standard applies in relation to findings of fact. I must therefore consider the evidence available to enable me to make any necessary findings, on the balance of probabilities, as to the facts and, in turn, to consider whether, on the basis of those facts, the requirements of s. 115A have been satisfied in this case, the onus being on the practitioner to establish those requirements. In taking this approach, I have not lost sight of the argument made by counsel for Pepper based on the observations of McKechnie J. in *Reid v Industrial Development Agency.* That decision relates to the exercise of powers by a statutory agency. It does not relate to the standard of proof. There is no challenge here to the constitutionality of s. 115A. Moreover, s. 115A contains a large number of conditions that must be satisfied before the court is empowered to consider the grant of relief in favour of a debtor. Those conditions were clearly imposed by the Oireachtas with the object of balancing the rights of parties such as Pepper as against the public interest in securing, where appropriate, the continued occupation by a debtor of his or her home. The ultimate issue in this case will be to decide whether those conditions are satisfied here and, in reaching that conclusion, I will, apply the tests as laid down in the language of s.115A itself.

The complaint in relation to compliance with s. 115A (9) (a)

68. As noted above, counsel for Pepper also submitted that there is no sufficient evidence before the court to demonstrate that the provisions of s. 115A (9) (a) have been complied with in this case. Under s. 115A (9) (a), the court must be satisfied that the terms of the proposed arrangement have been formulated in accordance with the requirements of s. 104. That section requires a practitioner to do a number of things. In the first place, the practitioner is required, in so far as reasonably practicable to seek to ensure that, under the proposed arrangement, the debtor can continue to reside in his or her home (or "*principal private residence*" to use the language of the 2012 Act). Secondly, the practitioner is required to consider any appropriate alternatives. Thirdly, the practitioner, in formulating an arrangement, is required to have regard to a number of matters enumerated in s. 104 (2) which include the cost of continued occupation of the family home (which covers, *inter alia*, the cost of mortgage repayments and the cost of necessary maintenance), the ability of others residing with the debtor to contribute to the costs referred to in s. 104 (2) and also *"the reasonable accommodation needs of the debtor and his or her dependants and having regard to those needs the cost of alternative accommodation".*

69. With regard to the need to establish that the terms of the arrangement comply with s. 104, counsel for Pepper submitted that there is no more than a pro forma statement to that effect in the practitioner's first affidavit. Counsel noted that, although it was expressly raised in the notice of objection and addressed in some detail in the first affidavit of Mr. Shaw, the practitioner never provided any response to the issue and never gave any detail of the extent to which (if at all) she considered any appropriate alternatives to the current home of Mr. Fay or whether she had regard to the costs likely to be incurred by Mr. Fay by remaining in occupation of his current home. Although the issue is addressed in Mr. Fay's affidavits, counsel submitted that s. 104 requires consideration of these issues by the practitioner herself.

The complaint in relation to the retention of the commercial unit

70. The final issue addressed by counsel for Pepper related to the retention by Mr. Fay of the commercial unit which counsel submitted should be realised for the benefit of Pepper. As noted above, counsel submitted that there was no basis for the suggestion made by Mr. Fay that the unit was not separable from the dwelling at the rear of the unit.

The submissions of counsel for the practitioner

71. Counsel for the practitioner stressed that the errors which occurred in the presentation of evidence in this case arose at a professional level. Counsel stressed that Mr. Fay was a lay client who had to rely upon his professional advisers in relation to the mechanics of presenting evidence to the court.

72. Counsel for the practitioner also suggested that the exhibits must have been in existence at the time the affidavit was sworn on 22nd May, 2018. In this context, he relied on the affidavits of Ms. Gittens. He also drew attention to the email from Mr. Fay to the legal executive of 19th June, 2018 in which he stated that the exhibits "*were sent before but I will organise all…*". Counsel submitted that this demonstrated that Mr Fay had provided the exhibits to the legal executive previously – most likely in advance of the swearing of the affidavit in May 2018.

73. Counsel for the practitioner also submitted that, in contrast to some other cases, Mr. Fay here had engaged with the issues raised by the objecting creditor and had provided detailed evidence to the court. With regard to the commercial unit, counsel suggested that, in the Heffernan report, there is reference to a doorway between the commercial dwelling and the residence. I cannot see any such reference. In addition, he submitted that, in any event, the bankruptcy comparison showed that Pepper would be better off under the proposed arrangement than it would in the event of a bankruptcy of Mr. Fay (which would involve the immediate realisation of both the dwelling and the commercial unit). In the circumstances, he suggested that Pepper is not unfairly prejudiced by the proposed arrangement under which Mr. Fay will continue to hold both the residence and the commercial unit. He also submitted that the rent from the commercial unit was an important element of Mr. Fay's overall income which, after discharge of reasonable living expenses, would ultimately be used to make repayments due on foot of the mortgage.

74. Counsel submitted that it was unfair of Pepper to highlight alleged inconsistencies in the evidence of Mr. Fay in circumstances where many of these alleged inconsistencies were never addressed in either of the affidavits sworn by Mr. Shaw. Mr. Fay therefore did not have an appropriate opportunity to address those issues on affidavit himself.

75. With regard to the complaints made by Mr. Shaw in respect of the inconsistencies in the figures for rent, counsel highlighted the very clear averment made by Mr. Fay in para. 16 of his affidavit that the retail unit is rented and generates a gross weekly rent of €300 per week. This equates to a net monthly income (as set out in the arrangement) of €845.15. Counsel stressed that, when Mr. Shaw came to swear an affidavit in response, he did not challenge this averment in any way.

76. With regard to the suggestion that there were inconsistencies in Mr. Fay's evidence as to whether he had dependants, counsel argued that there is nothing in the evidence before the court to support this suggestion. Mr. Fay's evidence throughout has been consistent that he has no dependants. It is true that his family live with him but it is not correct to classify them as dependents. Mr. Fay has not claimed any living expenses in relation to any of his children. However, it is clear from the proposed arrangement that Mr. Fay's income is supplemented by payments made to him by members of his family.

77. With regard to the s. 104 issue, counsel for the practitioner submitted that there was nothing formulaic in the evidence given by the practitioner. He drew attention to the averments made by the practitioner in para. 15.5 and 15.8 of her first affidavit where she confirmed that the terms of the arrangement *"has been formulated in compliance with section 104"* and "*having regard to the matters referred to in section 104 (2), the costs of enabling the Debtor to continue to reside in the …. Residence are not disproportionately large*". Counsel submitted that, when read with the detailed evidence given by Mr. Fay, these averments could not properly be characterised as "*bald assertion".*

Discussion

78. Before attempting to address the issues which arise in relation to compliance with the requirements of s. 115A, I believe it is essential to consider the quality of the evidence in this case and in particular to consider what consequences flow from the very serious failings which arose in relation to the presentation of the exhibits to the first affidavit of Mr. Fay sworn on 22nd May, 2018.

The presentation of evidence on affidavit

79. In my view, this is an extremely serious issue. The presentation of affidavit evidence to the court involves a similar degree of solemnity as arises in the case of oral evidence given to the court by a witness in the witness box. It is crucial that everyone involved in the process of giving evidence is aware of the function of evidence and of the necessity that the evidence to be given represents, in the words of the oath, the truth, the whole truth and nothing but the truth.

80. In *Mapp (a minor) v Gilhooley* [1991] 1 I.R. 253, Finlay C.J., in the Supreme Court, stressed the fundamental importance, in the common law system, that evidence is given on oath or affirmation. At p. 262, he explained that *"the broad purpose of the rule is to*

ensure as far as possible that …evidence shall be the truth by the provision of a moral or religious and legal sanction against deliberate untruth". While those observations were made in the context of viva voce evidence, they apply with equal force to the giving of evidence on affidavit.

81. The historical position in relation to the need to have witnesses sworn is addressed, in considerable detail, in the Law Reform Commission Report on Oaths and Affirmations (LRC 35-1990). It is also helpfully summarised by McGrath in "*Evidence*" (2nd ed. 2014) at para. 3-06 as follows: *"Initially, at common law, a witness could only be sworn if he or she believed in God and divine retribution if he or she lied on oath. However, that requirement was subsequently diluted so that belief in a Supreme Being, and of adverse temporal or spiritual consequences if the person lied on oath, sufficed. The giving of evidence on oath or affirmation is now governed by the Oaths Acts 1888 and 1909. A Christian takes the oath on the New Testament whereas a person of the Jewish faith takes it on the Old Testament. In the case of a person who is neither a Christian nor Jewish, the oath can be administered in any manner that is lawful. In R. v Kemble, it was held that the question of whether the administration of an oath is lawful does not depend upon what might be the considerable intricacies of a particular religion adhered to by a witness but on whether the oath is one that appeared to the court to be binding on the conscience of the witness and which was so considered by the witness* ……" (emphasis added).

82. Where a witness gives evidence orally in court, the judge is in a position to ensure that the witness makes the appropriate oath or affirmation and that the witness is therefore aware of the essential importance of telling the truth. When the oath or affirmation is administered to a witness, there will always be complete silence in the court room so that the witness is conscious of the solemnity of the moment. There is a pause in the proceedings as both the registrar and witness stand for that purpose. At different points in the hearing, a witness may also be reminded by counsel or the court that he or she has sworn (or solemnly affirmed) to tell the truth. Often witnesses will themselves, in the course of their evidence, reaffirm that they have sworn to tell the truth.

83. Affidavits are sworn in private away from the precincts of the court. However, the solemnity involved in swearing an affidavit must never be overlooked or forgotten. The evidence contained in an affidavit is capable of having the same consequences as evidence given orally in court. In particular, the court must be in a position to rely on the evidence given on affidavit in the same way as the court will rely on credible evidence given *viva voce* in the face of the court. On the basis of the evidence given in any case (whether given orally or on affidavit) the court will make determinations and orders which will have very significant consequences for the parties before it.

84. It is therefore of the utmost importance that deponents of affidavits are made aware that they are taking an oath or making a solemn affirmation which will be relied upon by a court and that the purpose of the oath or affirmation is to ensure that the evidence given by them represents the truth. The deponent should be asked to swear on the bible or on the sacred text relevant to the religion of which they are a member. If they are not a

member of any religion, it should be made clear to the deponent that the making of an affirmation has the same effect and there is the same requirement to tell the truth. The solicitor administering the oath should also satisfy himself or herself as to the identity of the deponent, ascertain that the deponent has read the affidavit and that the deponent understands the document. The solicitor should also ensure that the proper form of words is used such as *"I swear by almighty God that this is my name and handwriting, that I have read the affidavit and that the contents of the affidavit are true" or, in the case of an affirmation: "I solemnly and sincerely affirm that this is my name and handwriting, that I have read this affirmation and that the contents of the affirmation are true".*

85. The solicitor administering the oath or affirmation should ensure that the affidavit is then signed by the deponent in his or her presence and the jurat should be completed and signed by the solicitor. In addition, where the affidavit refers to documents, each of those documents should be exhibited with appropriate exhibit cover sheets each of which should be duly signed both by the deponent and by the solicitor administering the oath or affirmation. The solicitor should take care to ensure that the document attached to the exhibit cover sheet is in existence and is firmly attached to the cover sheet.

86. When affidavits are used in court, it is assumed by the court that all of these steps have been duly taken. In addition, the court assumes that the solicitor acting for the party who is placing the affidavit before the court has, prior to swearing of the affidavit, undertaken the following steps: -

    (a) In the first place, the solicitor must, before taking the deponent to another solicitor (in a different firm) for swearing, have checked that the deponent has read the document and is satisfied that the statements in the document have been accurately recorded and are true;

    (b) The solicitor should explain to the deponent the nature of the oath or affirmation and should explain that the affidavit is not simply a document that is to be signed but is intended to have the status of evidence in court proceedings. The deponent should be asked to pause and consider whether he or she is satisfied that he or she is in a position to swear or affirm that the contents of the affidavit are true;

    (c) Insofar as the affidavit refers to other documents, the solicitor should be careful to ensure that each of those documents exist and are appended to appropriate exhibit cover sheets marked sequentially and that the deponent is satisfied that the document in question is the correct document to which the deponent intends to refer.

87. It is crucially important in ensuring that justice is done in any case that the steps outlined in paras. 83- 86 above are taken. As noted earlier, the court must be in a position to rely on evidence presented to it whether orally or in affidavit. If a slipshod or casual approach is taken to the presentation of evidence, there is a very real risk that deponents of affidavits will fail to properly understand the deep significance of the step that they are

about to take in swearing an affidavit and of the absolute necessity to tell the truth. If deponents of affidavits are given the impression that the signing of an affidavit is no different to the signing of an application form, the entire process will become debased with very serious consequences for the administration of justice and, in particular, for the reliability of affidavit evidence generally. It is crucial to the maintenance of trust in the system that everyone engaged in the gathering and presentation of evidence should be aware of what is involved and of the important role which affidavit evidence plays.

The issue in relation to exhibits MF3 and MF4

88. In the present case, I do not have any details of the steps taken by the legal executive dealing with the matter but it appears to be very clear that she had no proper understanding of the importance and significance of the steps involved in swearing an affidavit and dealing with the exhibits. Nor do I have any details of the steps taken by Ms. Gittens at the time Mr. Fay came to swear his affidavit before her in May 2018. Her affidavits of 9 and 13 January 2020 are in very brief terms. I can appreciate that, at this remove, Ms. Gittens might have difficulty in recalling the detail of the swearing of the affidavit in May 2018 (although no such difficulties are expressed in either of her affidavits). Likewise, she gives no details at all of the nature of the steps that she would ordinarily take before administering an oath for the purposes of swearing an affidavit. In my view, it would have been helpful if Ms. Gittens had provided that level of detail. Nonetheless, she says that the affidavit of Mr. Fay was duly sworn before her and, notwithstanding what she said in her first affidavit, she has now deposed that there were five exhibit sheets attached to that affidavit all of which were duly signed by her. She also says that she believes that, at the time the affidavit was sworn by Mr. Fay on 22nd May, 2018, there were five exhibits attached to the five exhibit sheets signed by her. Given that a period of 18 months passed between the date of swearing of Mr. Fay's first affidavit in May 2018 and the date of swearing of the two affidavits by Ms. Gittens in January 2020, it seems to me to be inherently unlikely that Ms. Gittens could actually remember whether the exhibits were attached to the exhibit sheets at that time. I assume that this is why Ms. Gittens says in para. 5 of her second affidavit that she believes the exhibits were attached. She does not say that they were, in fact, attached.

89. I have come to the conclusion that it is more likely that there were no exhibits attached to the exhibit cover sheets for MF3 and MF4 at the time the affidavit of Mr. Fay was sworn in May 2018. I believe that counsel for Pepper is correct in suggesting that, if subsequent to May 2018 exhibits MF3 and MF4 had been lost, the exhibit sheets dated 22 May 2018 would likewise have been lost.

90. This conclusion is supported by the terms of the exchange which took place between the legal executive and Mr. Fay in June and July 2018. In her email of 18 June, 2018 the legal executive asked Mr. Fay to forward to her not only the estimate of the cost of repairs (which should have formed part of exhibit MF3) but also the social housing list for the relevant local authority. Mr. Fay's response of 9th July, 2018 shows that the social housing list for the relevant local authority did not exist. This strongly suggests that the legal executive was not simply trying to replace exhibits which previously existed and

which had been lost but she was trying to assemble the exhibits to attach to the affidavit already sworn in May 2018.

91. Secondly, the evidence of Mr. Fay in relation to whether exhibits were actually attached to the exhibit cover sheets is inconsistent. In his affidavit sworn on 18th December, 2019 he says that, to the best of his recollection, the exhibits did exist at the time the affidavit was sworn. However, in the affidavit previously sworn by him on 18th November, 2019 (which was subsequently excluded by me as going beyond the ambit of the direction given by me in October 2019) he said that he could not recall if the exhibit was there or not.

92. Fourthly, and most importantly, it appears to be very clear from the sequence of events that the legal executive (who attached the July 2018 documents to the exhibit cover sheets signed on 22nd May, 2018) had no proper understanding of the relevant requirements applicable in relation to the swearing of affidavits and the treatment of affidavits and their exhibits as evidence. If she had any such understanding, she would never have appended the documents dated 6th July, 2018 and 16th July, 2018 to the exhibit cover sheets MF3 and MF4 dated 22nd May, 2018. She would have known that that was not the appropriate course to take and she would therefore have immediately gone back to Mr. Fay to ask him to re-swear the affidavit and to re-exhibit afresh all of the relevant exhibits. The fact that the legal executive was unaware of the appropriate course to take suggests to me that she was quite likely to have thought that there was equally no impediment to creating exhibit sheets to which she would attach exhibits in the future after the relevant affidavit had been sworn by Mr. Fay. This seems to me to be much more likely than the suggestion made by Mr. Holohan in his affidavit that the exhibits in question had been lost and that the legal executive was trying to recreate them.

93. In reaching this conclusion, I am conscious that this is contrary to the averments made by Ms. Gittens in her affidavit. However, as previously explained, her affidavits are extremely brief. They provide very little by way of detail in relation to what occurred in May 2018 or into the usual practice that Ms. Gittens undertakes when a deponent appears before her for the purposes of swearing an affidavit. In circumstances where Ms. Gittens was not represented at the hearing before me, I would not wish in any way to imply that Ms. Gittens was guilty of any wrongdoing in this case. Based on her affidavits, she clearly believes that, at the time of swearing of the affidavit in May 2018, there were exhibits attached to the exhibit sheets for MF3 and MF4. My conclusion has been reached on the basis of the material placed before the court by Mr. Holohan and on the basis of the application of the ordinary standard of proof in civil proceedings namely the balance of probabilities.

The consequences that flow from my finding that there were no exhibits attached to the cover sheets for exhibits MF3 and MF4 in May 2018

94. As noted above, Mr. Holohan was separately represented in the course of the proceedings which took place before me subsequent to October 2019. His affidavit demonstrates very clearly that the gathering of evidence in this case was deputed to a person with no proper

understanding of the relevant requirements. There was clearly no appropriate supervision by a solicitor of the gathering of evidence in this case. This reflects very poorly on the relevant partners in the firm who should have had a proper system in place to ensure that anyone involved in the gathering of evidence should be aware of the relevant requirements and should be appropriately supervised. The system that was in place within the firm was plainly deficient. To his credit, Mr. Holohan has fully recognised this. His affidavit very frankly acknowledges the failings on the part of his firm. While those failings cannot, in my view, be excused, I am nonetheless impressed by the very proper way in which Mr. Holohan has come before the court and accepted his firm's failings and has provided a detailed explanation of what occurred. In taking this course, Mr. Holohan has shown that he is acutely conscious of his obligations as an officer of the court.

95. At one point, it was suggested by counsel for Pepper that the relevant legal executive should have been required to place an affidavit before the court. However, I indicated that I did not believe that it was necessary to do so. In my view, the appropriate person to take responsibility in a case of this kind are the partners who are ultimately the persons at fault in allowing a system to operate in which a legal executive could act in this way without constraint.

96. More fundamentally, counsel for Pepper submitted that, in light of the issue which arises in relation to exhibits MF3 and MF4, the application under s. 115A should now be dismissed on appeal. Although he identified no authority in support of this submission, he argued that the matter is so serious that the court should show its disfavour by allowing Pepper's appeal and refusing relief under s. 115A. I have given very careful consideration to that submission. I entirely accept that, where it appears that false evidence has been adduced, a court has the power to refuse the relief claimed by the person giving that evidence. As Hardiman J. observed in *Shelly-Morris v Bus Atha Cliath* [2003] 1 I.R. 232 at p. 257: *"I wish to reiterate what was said by this court in Vesey v Bus Eireann … that the onus of proof … lies on the plaintiff who is …obliged to discharge it in a truthful and straightforward manner. Where this has not been done 'a court is not obliged, or entitled, to speculate in the absence of credible evidence'… To do so would be unfair to the defendant. Moreover, a plaintiff who engages in falsehoods may expose himself or herself to adverse orders on costs. Furthermore, as I observed in Vesey v Bus Eireann at p. 202 'there is plainly a point where dishonesty in the prosecution of a claim can amount to an abuse of the judicial process as well as an attempt to impose on the other party.' "*

97. In this case, however, I must bear in mind that Mr. Fay is a lay client with no experience of the applicable requirements relating to the swearing of affidavits and the preparation of exhibits. In the first place, in seeking relief under the 2012 Act, he put himself in the hands of a professional person namely the practitioner. He had no other alternative. Under the 2012 Act, a debtor is obliged to seek relief through the intermediary of a practitioner. Secondly, when it became necessary to seek relief under s. 115A, the practitioner retained a reputable and well-respected firm of solicitors to act in the court proceedings. Mr. Holohan is one of the foremost experts in insolvency law in the State and is a joint author of the leading text on bankruptcy law. As a lay client, Mr. Fay would

not be expected to be aware of the steps involved in swearing an affidavit and the preparation of exhibits. He was entirely in the hands of his professional advisers to ensure that he was properly advised and that all appropriate steps were taken – particularly in relation to the manner in which exhibits were to be attached to any affidavit sworn by him. That is something that would require to be organised by the solicitor who, in the ordinary course, will arrange for the typing of the affidavit and the preparation of the exhibit cover sheets.

98. Of course, Mr. Fay bore personal responsibility for the truth of what is said in any affidavit sworn by him and for the truth of anything stated on any exhibit sheet signed by him. It would also be evident even to a lay client that, in swearing an affidavit, he was taking an oath. The opening words of the affidavit make that crystal clear. Thus, when he came to swear his first affidavit in May 2018, he should have been conscious that what he said in para. 15 (when referring to exhibit MF3) and in para. 19 (when referring to exhibit MF4) was true. In each case he swore that the exhibit was signed by him "*prior to the swearing hereof*". However, in each case, he did, in fact, sign an exhibit cover sheet on 22 May, 2018. Each such sheet is duly signed by him and by Ms. Gittens and each sheet is dated 22 May. While I have found, on the balance of probabilities, that the relevant exhibit must not have been attached to the exhibit cover sheets in question, I can understand that a lay person, unfamiliar with the mechanics of exhibiting documents to affidavits, is unlikely to have been conscious that what he said in paras. 15 and 19 of his affidavit was not correct. The fact is that he contemporaneously signed the cover sheets which were duly marked MF3 and MF4 respectively and a lay person cannot be expected to know that more was required - especially when he was in the hands of a legal executive with no appreciation of her obligations or duties. I am of the view that a lay client, unused to the process, would assume that his lawyers were acting lawfully and be unlikely to think that there was anything amiss.

99. Counsel for Pepper has sought to compare what happened here and what happened in the *Clarkson* case. In my view, the cases are not comparable at all. The position of Mr. Fay is utterly different to the position of the debtor in the *Clarkson* case. There, the debtor fabricated an invoice, took an oath in the witness box swearing to tell the truth, and then gave evidence purporting to stand over the veracity of the invoice which was subsequently shown to have been a complete fabrication and a forgery. This was all done to explain away the suggestion that debits shown on his bank statement in favour of a company that appeared to be the provider of cruise holidays (an unlikely expense for a person claiming to be living at the level of the reasonable living expenses as published by the Insolvency Service) was in fact the supplier of computer equipment needed by his daughter. The falsehoods in that case were generated by the debtor himself. There was no basis on which it could be said that the debtor had been led astray by his own professional advisers. He had deliberately generated false evidence with a view to deceiving the court and his creditors.

100. As all parties accepted, the affidavit of 22nd May, 2018 was nonetheless tainted in circumstances where exhibits MF3 and MF4 were created after the affidavit was sworn. It

could not therefore be relied upon for the purposes of the s. 115A application and must be excluded from consideration by the court. However, a new affidavit has been sworn in its place and, accordingly, the material contained in that fresh affidavit can legitimately be taken into account subject to the further objection by Pepper (addressed below) in relation to alleged inconsistencies in the evidence of Mr Fay.

101. It was, nonetheless, entirely wrong that the appeal hearing was opened by counsel for the practitioner on 16th October, 2019 without drawing the defects in the exhibits to the attention of the court. Solicitors and counsel should be aware of their duties to the court and their duties to ensure that evidence is presented to the court in a lawful and appropriate manner. Indeed, the matter should have been brought to the attention of the learned Circuit Court judge at the hearing before her. Moreover, as counsel for Pepper correctly submitted (as noted in para. 65 above), on receipt of the letter of 7th October, 2019, immediate steps should have been taken to have the affidavit of 22nd May, 2018 re-sworn or, at the least, an application should have been made to the court for leave to do so.

102. While I am firmly of the view that the appeal should not have been opened in that way, I have come to the conclusion that Mr. Fay cannot be personally blamed for what occurred. Again, he was in the hands of his professional advisers who he was entitled to assume would act appropriately in their interactions with the court.

103. In the circumstances outlined in para. 98 - 102 above, I have come to the conclusion that it would be wrong in this case to dismiss the s. 115A application solely on the ground that exhibits were created after Mr. Fay swore his affidavit in May, 2018. That does not, however, dispose of all of the issues that arise in relation to Mr. Fay's affidavits. As noted earlier, I must also address the complaint made about alleged inconsistencies in Mr. Fay's evidence and that is the issue to which I turn in para. 108 below. It will also be necessary to consider what orders should be made against Ashtown Gate in relation to wasted costs.

Some general observations in relation to the quality of affidavit evidence in cases under the 2012 Act

104. Before leaving the issue of the exhibits, I believe that it is important to record that I very much regret to say that the incident which occurred here is symptomatic of a more general difficulty which has arisen in a significant number of cases which have come before the courts under the 2012 Act. Regrettably, it is all too common to find that affidavits sworn by practitioners contain formulaic averments which are repeated word for word from one affidavit to the next and which, frequently, bear no relationship to the facts of a particular case. It is almost as though practitioners around the country are all operating from the same precedent form of affidavit which they use and re-use continuously cutting and pasting the same paragraphs without any proper consideration of the facts of an individual case. Examples of this in the present case include para. 5 of the practitioner's first affidavit and paras. 6, 7 and 8 of her second affidavit. This suggests to me that many practitioners are not themselves conscious of the function of affidavits as evidence and of their importance in the court process. They are not application forms to be adapted from one case to the next. Every affidavit is required to address the

particular facts of an individual case and to put those facts before the court in language which is relevant to those facts rather than language which is drawn from a precedent on the practitioner's computer. A practitioner seeking to place evidence before the court should carefully consider what are the facts of the individual case. He or she should then set those facts out in sufficient detail to give the court the complete picture of what needs to be considered in that case. It debases the process and the weight to be given to the evidence if practitioners constantly regurgitate the same averments without regard to the individual facts. Little if any weight can be placed by the court on such averments.

105. The difficulty that arose in this case is also a symptom of the extent to which some solicitors have failed to properly consider their obligations in placing evidence before the court in cases of this kind and, in particular, the need to treat the swearing of affidavits with the necessary solemnity. I infer that the level of fees paid to solicitors by the Legal Aid Board are pitched at a level that has induced some solicitors to delegate the necessary work to a relatively junior level within their firms. If that is so, it does not justify the taking of short cuts or the delegation of work to personnel who lack the necessary experience or understanding of what is required. It is crucially important that anyone involved in the preparation of evidence is fully aware of their obligations and solicitors have a duty to properly supervise staff in order to ensure that the appropriate standards are being observed.

106. It is equally important that practitioners bear in mind their role as independent intermediaries. As Baker J. observed in *Nugent (a debtor)* [2016] IEHC 309, at para. 17, a practitioner has a burdensome obligation to the court and that a high degree of frankness is required. The relevant quotation from her judgment has already been cited in para. 21 above. It is important that practitioners understand that this requires practitioners to apply appropriate ethical standards. A practitioner is not an advocate for a debtor and is obliged to put evidence before the court in a complete and open way. It is vitally important for the success of the personal insolvency system, as a whole, that practitioners should act in this way so that courts and creditors can have confidence in the evidence placed before the court. If the system is to operate effectively, it is essential that appropriate ethical standards are adopted and applied.

107. If practitioners are seen to act correctly, this will, over time, remove the level of distrust that currently exists on the part of many creditors. It will generate confidence in the system and should reduce the extent of objections by creditors. I am glad to note that recent experience in the High Court suggests that a significant number of appeals and applications are settled but it remains the case that there are far too many legal challenges occupying the time of the courts and increasing the overall level of costs involved. I do not believe that, in enacting the 2012 – 2015 Acts, the Oireachtas ever envisaged the extent of the legal issues that would arise. It is disheartening to see how a system which was intended to be relatively simple and straightforward has become so beset with legal issues and contested cases. If greater confidence could be engendered in the reliability of the evidence given in these cases, I believe that the system could operate with much less scope for legal challenge. That will require a change of approach

by practitioners and those advising them. It is important to bear in mind the objects of the 2012 Act as set out in the preamble to the Act. Those objects remain equally valid today as they did at the time of enactment. Insolvency and intractable debt still affect a large number of people in the State and it is in the interests of the common good - and of both debtors and creditors - that the system envisaged by the Oireachtas should operate effectively and efficiently and with a minimum of legal cost. If that can be achieved, it will be possible to ensure that indebtedness can be resolved in a fair and appropriate way and adverse consequences for economic activity in the State kept to a minimum. That is particularly apposite in light of the current Covid-19 outbreak and the consequent economic cost that is likely to arise.

The alleged inconsistencies in the evidence of Mr. Fay

108. The next issue which requires to be considered is the contention of Pepper that, in addition to the issue in relation to the exhibits, there are so many inconsistencies in the affidavits of Mr. Fay, that his evidence must be treated as unreliable and not credible. The concerns of Pepper in this context are summarised in para. 62 above. I have already addressed the concerns identified in paras. 62 (b), 62 (f) and 62 (g) and have nothing further to add in relation to those complaints. With regard to the complaints summarised in paras. 62 (d) and 62 (e), I have already indicated that I will deal with the complaint recorded at para. 62 (d) when I come to consider the issue under s. 104 and s. 115A (9) (a). It may also require consideration in the context of s. 115A (9) (d). With regard to the complaint recorded at para. 62 (e), I will address that when I come to consider Pepper's objection that Mr. Fay is impermissibly seeking to retain the commercial unit which should be realised for Pepper's benefit. In this section of my judgment, I will therefore confine myself to the complaints recorded in para. 62 (a) (relating to dependants), para. 62 (c) (relating to Mr. Fay's characterisation of Mr Shaw as "*disingenuous*"), para. 62 (h) (relating to the discrepancies in appendix 2 of the proposed arrangement in relation to the monthly rent) and para. 62 (i) (relating to the inconsistencies in Mr Fay's evidence with regard to his recollection as to whether there was anything attached to the exhibit cover sheets for MF3 and MF4). I now address each of these four complaints in turn

The issue in relation to dependants

109. It is true that the proposed arrangement states in unequivocal terms on p 10 that Mr. Fay has no dependants. It is also the case that note 7 to appendix 2 says that Mr. Fay's monthly set costs have been calculated on the basis of "*a single adult household with a vehicle*". The arrangement does not reveal in terms that any of Mr. Fay's family reside with him in the family home although note 6 to appendix 2 does say that Mr Fay's son is to contribute €300 per month for the duration of the arrangement. This translates to a net figure of €240 which appendix 2 shows as part of the monthly household income during the 6 year term of the proposed arrangement.

110. ACC appears to have formed the impression from what was said in the arrangement that Mr. Fay lives on his own in the property. Thus, when Mr. Shaw came to swear his first affidavit on 4 July, 2017, he suggested in para. 13, that Mr. Fay lives alone. It was in response to that averment, that Mr Fay said, in para. 7 of his first affidavit that, in fact,

his three children live with him albeit that one son goes to college during the week and is only there at weekends. Mr. Shaw subsequently responded in strong terms to this averment in his replying affidavit sworn on 7 December, 2018 contending that this averment by Mr Fay was inconsistent with the terms of the arrangement and that: "*the two positions set out by the Debtor are mutually exclusive*". However, in my view, this is based on a misreading of the arrangement. As outlined above, it is true that the arrangement stated that Mr Fay has no dependants but it never indicated that he lived alone. That suggestion on the part of Mr Shaw is mistaken.

111. In his second affidavit sworn on 23 January, 2019, Mr Fay explained the position in some detail. It is clear from that affidavit that the three children are not dependants of Mr. Fay in that they each try to eke out a living of their own while continuing their studies or apprenticeships. It is also clear from that affidavit that the €300 monthly contribution mentioned in note 6 to appendix 2 to the proposed arrangement comes from the combined contributions of two sons rather than from one but I do not regard that as a significant issue. In terms of the court's consideration of the proposed arrangement, what matters is the amount of the receipt rather than whether it comes from two sons or one son.

112. In these circumstances, I cannot see any inconsistency in the case made on behalf of Mr. Fay in so far as this issue is concerned. The issue appears to me to have arisen as a consequence of the impression erroneously formed on the part of ACC, that the arrangement stated that Mr. Fay lives alone. That said, it will be necessary in due course, as part of the overall consideration of the s. 115A application, to address the question of whether any account can be taken of the fact that the property provides a home not just for Mr. Fay but for three of his children. Section 104 (2) (d) envisages that some consideration should be given to the position of dependants of a debtor. There is no equivalent provision in relation to adult children who are no longer dependants. This is an issue that may also be relevant to the question as to whether the requirements of s. 115A (9) (d) have been satisfied in this case.

Mr. Fay's characterisation of Mr. Shaw as "disingenuous"

113. The issue here is that, in characterising Mr. Shaw as "*disingenuous*", Mr. Fay, in para. 15 of his second affidavit directly contradicted what he had said in para. 13 of his first affidavit. The issue arose in the following way. In para. 16 of his first affidavit, Mr. Shaw suggested that the only occupied portion of the property was the commercial unit and he said in trenchant terms that "*the retention of a commercial property under the guise of the protections afforded to a principal private residence … would be an impermissible abuse of process such that it would constitute a violation of one of the general duties expected of a Debtor under s. 118 of the Act".*

114. Mr. Fay responded to this contention in para. 13 of his first affidavit in which he highlighted that he resided in the property. He also sought to make the case that he had already paid off the commercial element of his loans from ACC and the para. then concluded in the following terms: "*The commercial part, on a separate land folio is already paid. Originally, the … property was a commercial loan but the loans were*

continually restructured as I sold all the other properties and eventually being left with [this property] as my only residential property …" (emphasis added).

115. In turn, Mr. Shaw, in para. 10 of his second affidavit, noted that: *"the Debtor claims at paragraph 13 that the 'commercial part' of his loan has been paid in full and relates to 'a separate land folio'…*". This led to the response by Mr. Fay in para. 15 of his second affidavit in which he suggested that the contents of para. 10 of Mr. Shaw's affidavit "*are disingenuous to say the least if not misleading"*. He then sought to justify that statement in the following terms: "*Mr. Shaw suggests that my previous affidavits were 'suggesting that it is an unencumbered asset and is severable from the PPR.' I made no such averments, nor could I do so in circumstances where there is only one single folio … a fact which must have been known to Mr. Shaw at the time of swearing of his affidavit"* (emphasis added).

116. In my view, there is an obvious and stark inconsistency between the passage highlighted in para. 114 above, on the one hand, and the passage highlighted in para. 115, on the other. I read para. 13 of his first affidavit as very clearly suggesting that the commercial unit should be treated as debt free. Furthermore, there can be no doubt that, in that affidavit, Mr. Fay plainly says that the commercial unit is on a separate folio. That is directly contradicted by what is said by Mr. Fay in his second affidavit. This is a clear and unexplained inconsistency in Mr. Fay's evidence. It calls into question the reliability of his evidence on this issue. It also demonstrates that he made a baseless suggestion that Mr. Shaw was disingenuous if not misleading.

117. I would not, however, consider that it would be appropriate to exclude all of his evidence on this basis. I have come to that conclusion for a number of reasons. In the first place, I believe it is clear from the folio that has been exhibited that the commercial unit and the home are all on one folio. There is accordingly objective evidence before the court on this issue that what is said in Mr. Fay's second affidavit is correct. That leaves unexplained the inconsistent averment previously made that the commercial unit is on a separate folio although it would appear from the current folio that it is made up of lands drawn originally from two separate folios. That might possibly provide some explanation for confusion on Mr. Fay's part but I cannot conclude that this is probably so. I am, nonetheless mindful that no opportunity was given to Mr. Fay to explain this inconsistency. It was not raised on affidavit by Mr. Shaw. Nor was it raised in Pepper's solicitors' letter of 7 October, 2019. I therefore do not know whether Mr, Fay might have been able to provide some explanation for the inconsistency. I bear in mind, in this context, the principle in Browne v Dunn (1893) 6 R. 67 (discussed by Laffoy J. in the Supreme Court in her judgment in *McNamee v the Revenue Commissioners* [2016] IESC 33 at paras. 41-43) that the evidence of a witness should not be impeached without giving the witness an opportunity to provide an explanation. While that principle arises principally in the context of cross-examination, it appears to me to have some resonance here by way of analogy.

118. I also bear in mind that there are inconsistencies on Mr. Shaw's side also. For example, he sought to make the case in his first affidavit that the entire property is a commercial

property. This was inconsistent with the case made in the notice of objection (as summarised in para. 11 (e) above) that the property includes commercial premises. Yet, when Mr Fay responded drawing attention to the fact that he lives there and that this had been suggested to him by ACC itself several years previously, Mr. Shaw, in his second affidavit, reverted, without explanation of the case made by him in his first affidavit, to the position that the property includes a commercial unit. By way of further example, Mr. Shaw referred to the property as having five bedrooms notwithstanding that the Heffernan report, on which he expressly relied, said (correctly) that it has four bedrooms. Thus, the inconsistencies are not solely on Mr. Fay's side.

119. What is clear is that there is no basis to suggest that Mr. Shaw was in any way misleading or disingenuous in his evidence on this issue. It is equally clear that I must reject the contention made by Mr, Fay in his first affidavit that the commercial element of the loans has been paid off or that the commercial unit is on a separate folio. In light of the objective evidence provided by the folio itself and in light of the inconsistencies in Mr. Fay's evidence on these issues, these elements of his evidence will be disregarded by me in my assessment of the issues which require consideration under s.115A.

The discrepancies in relation to the figures given in the proposed arrangement with regard to the rent derived from the commercial unit

120. In para. 17 of his first affidavit, Mr Shaw draws attention to the fact that, in appendix 2 to the proposed arrangement the net figure for rent from the commercial unit is given as €66.67 per month in the period prior to the coming into effect of the arrangement while it is shown as €845.15 thereafter. He also highlights that in the Heffernan report, the rent is stated to be €300 per week. He suggests that it is impossible to reconcile these figures. As noted previously, this averment may also be intended to ground the point made in the notice of objection about s. 120 (c) of the 2012 Act.

121. In my view, it is obvious that a mistake has been made in appendix 2 to the proposed arrangement in so far as the pre-arrangement period is concerned. The Prescribed Financial Statement ("*PFS*") made by Mr. Fay, at the outset of the process under the 2012 Act, shows the rental income (net of expenses but before tax) to be €1,100 which, on an annual basis, appears to approximately equate to €300 per week (if expenses are taken into account). That is a gross figure. The net figure given in appendix 2 for the rent in respect of the period after commencement of the arrangement is €845.15. It is unsurprising that this is different to either €300 per week or €1,100 per month because those are gross figures. The calculation of the net figure is also complicated by the fact that, as note 4 to appendix 2 records, Mr. Fay claims interest expenses for the rental property which have been added back to the net income.

122. What is abundantly clear is that €66.15 given as the net figure for the rent in the pre-arrangement period must be an error. I am not concerned about that error because it relates to the pre-arrangement period. On this appeal, I am concerned principally with the figure that will be available under the arrangement and into the future. I am not concerned with an historical figure which is demonstrably incorrect. The position is confirmed by Mr. Fay in para. 16 of his first affidavit and this averment is corroborated

both by the independent report prepared by Heffernan auctioneers and by the figures in appendix 2 in respect of the critical period for present purposes namely the term of the proposed arrangement.

123. Nor can I see any issue in relation to s. 120 (c). That subs. is concerned with "*a material inaccuracy or omission*" in a debtor's statement of affairs based on his or her PFS which "*causes a material detriment to the creditor*". Even assuming that appendix 2 forms part of Mr. Fay's statement of affairs, I do not consider that the error is material since it does not affect the calculation of the future position under the arrangement. Even if I am wrong to take that view, it seems to me to be manifestly clear that the error does not cause any material detriment to Pepper. It is noteworthy that, notwithstanding the length and detail of the submissions made to me in the course of the appeal, no detriment to Pepper arising from the misstatement of the pre-arrangement rent receipts was ever identified to me.

124. For completeness, I understand from the submissions of counsel for Pepper that Mr. Fay has sought to explain this issue further in an affidavit sworn by him without leave of the court. In circumstances where that affidavit was excluded by me, I have not read that explanation and have reached my conclusions on this issue by reference solely to the material discussed above.

Mr. Fay's recollection about the existence of documents attached to the exhibit cover sheets for exhibits MF3 and MF4

125. As set out in para. 62 (h) above, there is a contradiction between what is said by Mr. Fay in an affidavit sworn by him on 18 November, 2019 about the existence of documents attached to the exhibit cover sheets for exhibits MF3 and MF4 and what is said by him in his subsequent affidavit sworn on 18 December, 2019. In the first of those affidavits, he said that he could not recall whether the exhibits were there or not. In the second, he said that "*by the best of my recollection an exhibit was with the Affidavit when I attended to have same sworn*". There is an obvious contradiction.

126. In fairness to Pepper, I have allowed counsel for Pepper to highlight this contradiction notwithstanding the fact that the affidavit of 18th November, 2019 has not been allowed into evidence (at Pepper's request) as it addressed matters that went beyond the direction given by me on 16th October, 2019. In light of the seriousness of the issue relating to the exhibits, I consider that Pepper should be entitled to raise the issue. Nonetheless, in fairness to Mr. Fay, I must also bear in mind that he has not had an opportunity to explain the contradiction. Again, the *Browne v Dunn* principle seems to me to have some relevance in this context, if only by analogy.

127. In my view, the inconsistency certainly suggests that Mr. Fay has no reliable recollection of the position at the time his first affidavit was sworn in May 2018. That is unsurprising given the length of time which has elapsed. I do not regard this inconsistency as evidence of the unreliability of Mr. Fay's evidence as a whole. In my view, that would be a disproportionate and unwarranted position to adopt. However, it does mean that no reliance can be put on the evidence given by Mr. Fay in relation to whether the exhibits

were or were not attached to the MF3 and MF4 exhibit sheets at the time the affidavit was sworn. For that reason, as set out in para. 91 above, I did not take this element of Mr. Fay's evidence into account in reaching the conclusion (set out in para. 89 above) that exhibits MF3 and MF4 were not in existence at the time the affidavit was sworn.

128. For all of the reasons discussed in paras. 108 to 127 above, I have come to the conclusion that it would be wrong to reject the entirety of the evidence of Mr. Fay given on affidavit and it would be equally wrong to dismiss the s. 115A application on that basis. Some of the inconsistencies may, however, be relevant when I come to consider particular issues which arise in relation to satisfaction of the individual requirements of s.115A. It is to those issues that I now turn.

The issue which arises in relation to s. 104 and s. 115A (9) (a)

129. As noted in paras. 68 – 69 above, s. 115A (9) (a) requires the court to be satisfied that the terms of the proposed arrangement have been formulated in accordance with s. 104. The latter requires the practitioner, when formulating an arrangement, to ensure, in so far as reasonably practicable, that the debtor should remain in occupation of his or her home. No issue arises in relation to that element of the s.104 requirements because the arrangement here seeks to keep Mr. Fay in his home.

130. Section 104 also requires that the practitioner, in formulating an arrangement, to consider appropriate alternatives and also to have regard to the matters enumerated in s. 104 (2). As noted in para. 68 above, these include the costs that will be incurred if the debtor is to remain in his or her home (such as the costs of mortgage repayments and the cost of necessary maintenance), the debtor's income and financial circumstances, the ability of others residing with the debtor to contribute to those costs, the reasonable accommodation needs of the debtor and his or her dependants, and, having regard to those needs, the cost of alternative accommodation. Pepper argues that there is no evidence that the practitioner has taken these matters into account when she came to formulate the arrangement in this case. To the extent that anything has been said on affidavit by the practitioner, Pepper submits that there is nothing more than formulaic averments which are wholly lacking in necessary detail.

131. I agree that, notwithstanding the arguments of counsel for the practitioner (as recorded in para. 77 above), the averments made by the practitioner go no further than asserting that s. 104 has been complied with and that the costs of enabling Mr. Fay to remain in his home are not disproportionately large. These averments are wholly lacking in detail and, if they stood on their own, I would have no hesitation in holding that the requirements of s. 115A (9) (a) have not been satisfied in this case. However, the averments do not stand on their own. They must be seen in the context of the evidence placed by the practitioner before the court, as a whole. That includes the evidence of Mr. Fay. It was argued by counsel for Pepper that such evidence can only come from the mouth of the practitioner herself and thus only an affidavit from her will suffice. It was argued that Mr. Fay cannot give this evidence. I agree that it would be preferable for the practitioner to provide the necessary detail on affidavit. But it must be borne in mind that the practitioner is the moving party on a s. 115A application and, thus, any evidence she places before the court

is evidence filed by her in support of her application. That is no different to the position that applies to any other moving party in an application before the court. The moving party is entitled to rely on the evidence of any person who is in a position to give relevant evidence.

132. I must therefore consider the evidence of Mr. Fay on this issue. In para. 8 of his first affidavit, Mr. Fay says that he discussed the reasonableness of the property with the practitioner "*versus the costs and realities of alternative accommodation. I say in the circumstances where comparable rent would not have been manifestly different from the mortgage payment then it was taken that the retention of the family home and compliance with the Act was a more appropriate solution*". It might be argued that this is hearsay evidence. If so, I do not agree. As Mr Fay participated in such a discussion with the practitioner, he is entitled to give evidence of that fact. Furthermore, the fact that such a discussion took place demonstrates that consideration was given by the practitioner to the issue of alternative accommodation and its cost.

133. Mr. Fay also confirms, on affidavit, that there is no social housing available in his locality. At the hearing in October, 2019, I was surprised that counsel for Pepper objected to this evidence as hearsay. Strictly speaking that may be true, However, it is a matter of some notoriety that there is a significant lack of social housing throughout the State and I find it difficult to accept that this objection was well made.

134. In the same affidavit, Mr. Fay provides significant detail in relation to how he is in a position himself to carry out necessary maintenance work other than the repairs to the roof and he also explains how he will be in a position to barter his own skills in return for the assistance of a roofer to carry out the roof repairs. Accordingly, the issue of the cost of maintenance has also been addressed.

135. It is also clear from the terms of the arrangement itself that, in formulating it, the practitioner took account of the ability of Mr. Fay to fund the ongoing mortgage payments and the ability of others in his household to contribute to that cost. Appendix 2 (discussed elsewhere in this judgment) makes this plain. Appendix 2 provides significant detail relating to Mr. Fay's sources of income and his financial circumstances.

136. There is also uncontradicted evidence before the court that Mr. Fay has been making monthly payments of the order of €1,030 to ACC (as it then was) which demonstrates that Mr. Fay has the ability to meet the mortgage repayments which will require to be made under the terms of the proposed arrangement.

137. In addition, there is evidence before the court as to the cost of alternative accommodation. Mr. Fay has exhibited material which shows that the cost of renting what I would describe as a standard three bedroom property nearby would be of the order of €1,050 per month. He has also exhibited material relating to a four bedroom property but I have not considered this for present purposes as I do not consider that a four bedroom property is an appropriate comparator for a single person with no dependants. Given the

cost of rental of a standard three bed property, the monthly mortgage payment of €1,029 is not excessive.

138. Accordingly, there is significant material available in the evidence in this case to corroborate and support what would otherwise be nothing more than bare assertions on the part of the practitioner in paras. 15.5 and 15.8 of her first affidavit. In these circumstances, I am satisfied that the arrangement was formulated in accordance with s. 104. In turn, I am satisfied that the requirements of s. 115A (9) (a) are met in this case. However, that does not dispose entirely of the issue relating to the retention of the current property. Issues in relation to s. 115A (9)(d) and the retention of the commercial unit remain.

Have the requirements of s. 115A (9) (d) been satisfied?

139. Under s. 115A (9) (d), the court must itself be satisfied, having regard to the matters referred to in s. 104 (2) that the costs of enabling a debtor to remain in his or her home are not disproportionately large. As noted above, s. 104 (2) requires that regard be had to the costs likely to be incurred by Mr. Fay by remaining in occupation of his home (to include the cost of maintenance and the cost of mortgage loan repayments), his income and financial circumstances, the ability of those residing with him to contribute to the mortgage and other costs, the reasonable living needs of Mr Fay and his dependants and the costs of alternative accommodation.

140. In this context, I have already drawn attention to the evidence that Mr. Fay is currently making payments of €1,030 per month. This shows that the mortgage payment to be made to Pepper under the arrangement is within his means and not disproportionate.

141. I have also drawn attention to the evidence that Mr Fay will be able to carry out necessary repairs to the property himself and that he will be able to barter his skills to have the roof repaired. In those circumstances, I do not believe that the costs of maintenance of the property are excessive or disproportionate. As noted in para. 62 (d) above, Pepper has suggested that the estimate of the cost of necessary repairs at €6,250 is plainly disproportionate given that the extent of the dividend to be paid to Pepper in respect of the written-down element of its debt will be no more than €5,443. I can understand why counsel might make that point. It has a rhetorical resonance. However, I do not accept that the extent of the dividend has any relationship to the cost of repairs. In the context of a property which is independently valued at €200,000, I do not believe that a repair bill of €6,250 could be considered to be excessive or disproportionate.

142. Pepper makes a more fundamental point that the retention of a four bedroom property is itself disproportionate in circumstances where, on Mr. Fay's own case, he has no dependants. Pepper has strongly argued that it is difficult to accept that a single person with no dependants should retain a house of that size. In my view, there is considerable force to that submission. It is a factor that must be given significant weight in the assessment of the s. 115A (9) (d) requirement. That said, it is not the only factor. There are also countervailing considerations which must be weighed in the balance.

143. In the first place, the cost of alternative accommodation must be borne in mind. The evidence shows that the cost of renting a three bedroom property would roughly equate to the cost of the mortgage repayments to be made under the proposed arrangement. It might be argued that a three bedroom property is not an appropriate comparator for a single person with no dependants. However, while Mr. Fay has no dependants, as such, he has family and the reality is that most parents will want to be able to provide some level of accommodation to their children until their children reach a stage where they can acquire their own home.

144. More importantly, even if one were to take the view that a smaller property at lower monthly rental cost would be a more appropriate comparator, the fact remains that such a property would not provide certainty and security of home ownership. While the s. 115A is not concerned solely to secure the maintenance of home ownership, security of tenure appears to be an underlying objective of the provision. A rented property would not be capable of providing anything like the level of security of tenure which the proposed arrangement will provide to Mr. Fay.

145. It also has to be borne in mind that the extent of the debt to Pepper means that, if Mr. Fay is not permitted to retain his current home, there will be nothing available to him from a sale of the property that would allow him to acquire a more modest home.

146. A further factor to weigh in the balance (and this is a factor specifically enumerated in s. 104 (2)) is the fact that there are others living with Mr. Fay who have the ability to contribute to the cost of the monthly mortgage payment to be made. Appendix 2 to the arrangement shows that €300 will be contributed by family members. In terms of the monthly mortgage payment of €1,029, that is a worthwhile contribution. As noted previously, appendix 2 suggests that it will come from one son only but the affidavit evidence makes clear that this represents a combined contribution from two sons. As his children finish their further education or apprenticeships, they may move away but, if that occurs, the fact that there are four bedrooms will enable Mr. Fay to rent out a room to a lodger. Objecting creditors frequently complain that debtors do not take that step so as to maximise their ability to meet mortgage repayments. Here, Mr Fay will be in a position to do so.

147. In my view, when one takes account of the countervailing factors discussed in para. 143 – 146 above, the balance tilts in favour of the retention of Mr. Fay's home. In light of these factors, I believe that the cost of retention of the family home is not disproportionate in all of the circumstances. I have therefore concluded that the requirements of s. 115A (9) have been satisfied in this case. That does not completely dispose of the issue about retention of the property. The issue about retention of the commercial unit remains to be considered.

The retention of the commercial unit

148. The issue which arises in relation to the commercial unit is whether it is severable from the property as a whole such that its value could be realised for Pepper's benefit. As noted in para. 118 above, I have rejected the suggestion made by Mr. Fay that the

commercial element of the loan has been repaid. The commercial unit is therefore subject to the mortgage in favour of Pepper.

149. As a consequence of the matters discussed in paras. 116 -118 above, I believe that I should treat the evidence of Mr. Fay on the issue of severability with some caution other than to note that, in his affidavits, he seeks to suggest that the premises are not severable. I must also bear in mind that, in so far as Mr. Shaw is concerned, he has not seen the premises and is not therefore in a position to give positive evidence that the commercial unit is severable from the residence. He has, however, highlighted that the commercial unit has been let on a 4 year 9 month lease. This is significant because such a lease would carry with it an implied covenant on Mr. Fay's part that the tenant will have quiet and peaceable enjoyment of the unit. That would suggest that it should be possible to separate the unit from the residence.

150. In my view, the existence of the lease is an objective factor to which the court can have regard. There are also a number of other pieces of objective evidence before the court. In the first place, as Mr. Shaw notes in para. 10 of his first affidavit, the original loan offer made by ACC in 2007 records that the commercial unit is attached to the residence. This is confirmed both by what is stated in the Heffernan report and by the photographs attached to that report. There can be no doubt that, to that extent, the commercial unit and the residence are conjoined.

151. As shown in the photographs, the commercial unit is a flat roofed one story extension to the front of the residence. This extension does not extend across the entire of the façade of the residence. The extension appears to have a separate entrance to the residence. The extension does not appear to interfere with the original front door to the residence. However, there is a yard to the rear of the residence which the Heffernan report notes is used for the storage of fuel/gas cylinders. There is a photograph of the yard which shows a large number of gas cylinders one frequently sees for sale in rural or semi-rural areas of the country without a town gas supply. I believe that it is reasonable to conclude that the yard is used by the tenant of the commercial unit even though the Heffernan report notes that no rent is being received as such for the yard.

152. The Heffernan report describes the extension as comprising a retail unit and store. It says that the residence comprises a kitchen, living room, four bedrooms and two bathrooms. Curiously, when it comes to set out the size of the respective parts of the property, it measures the area of the kitchen and the store as one unit. That suggests that there is some element of crossover between the commercial part of the premises and the living accommodation. It sets out separate measurements for the area of the retail unit and the residence.

153. Crucially, the report provides a single valuation for the property as a whole. The report does not suggest that separate values can be ascribed to the commercial unit on the one hand and the residence on the other. Nor has Pepper (or ACC before it) placed any evidence before the court as to the separate value (if it is capable of being separately valued) of the commercial unit. In my view, the fact that the Heffernan report has

proceeded solely on the basis of a single valuation for the entire property strongly suggests that the property cannot be severed in the manner now suggested by Pepper.

154. On that basis, I have come to the conclusion that the house and commercial unit are not severable. Even if I am wrong in that conclusion, it is clear from the bankruptcy comparison contained in appendix 5, that, under the proposed arrangement, Pepper will do better than if there was an immediate sale of Mr. Fay's property in the event of his bankruptcy. As outlined in para. 9 (a) above, the return to Pepper under the arrangement will be 44 cents in the euro. In a bankruptcy, it will be 37 cent in the euro. In this context, if the commercial unit were capable of being sold separately, a bankruptcy of Mr Fay would be very likely if not inevitable since he would be left without a substantial part of his income which is currently derived from the rent received from the tenant of the commercial unit. Without that source of income, it would not appear possible on the figures set out in appendix 2 to the proposed arrangement for Mr. Fay to meet his mortgage repayments and his ordinary living expenses. It would therefore be counterproductive for the commercial unit to be realised, even if it is capable of being severed. If anything, Pepper is likely to be worse off in that scenario than it will be under the proposed arrangement.

The remaining requirements of s.115A

155. I do not propose to go through each of the remaining individual requirements that arise under s. 115A. It is clear, on the basis of appendix 2 to the proposed arrangement, that the arrangement will be affordable to Mr. Fay even though he may have to live, for its duration, at the margins of the reasonable living expenses recommended by the Insolvency Service. Appendix 2 shows that, after the arrangement comes to an end, Mr. Fay will have a modest monthly surplus. It is noteworthy that, in contradistinction to the vast majority of contested cases that come before the court, no argument was addressed to me on behalf of Pepper that the arrangement is not affordable or sustainable or that it is unlikely to avoid Mr. Fay's future insolvency.

156. The bankruptcy comparison also demonstrates that Pepper will not be unfairly prejudiced by the proposed arrangement since it will achieve a better return for Pepper than a bankruptcy. The comparison with the outcome in bankruptcy is a very useful litmus test when considering the issue of unfair prejudice. While Mr. Shaw has complained in para. 11 of his second affidavit that ACC (as it then was) is unfairly prejudiced by the application of s. 115A to a loan which he says was provided for commercial purposes, Pepper has never contradicted the evidence given by Mr. Fay that it was ACC itself who originally suggested to Mr. Fay that he should give up his previous family home (in order to realise assets to pay off ACC debt) and instead to move into the property which is now the subject of this application. I cannot therefore identify any unfair prejudice to Pepper.

157. In so far as the balance of the s. 115A requirements are concerned, I confirm that I have considered each of them and am of the view that each of them has been satisfied.

Conclusion in relation to s.115A

158. In the circumstances, I have reached the conclusion that the appeal must be dismissed and the decision of the learned Circuit Court affirmed. The only remaining issue is to consider the applications made both by Pepper and the objecting creditor in the Kelly Boumenjel case for costs orders against Ashtown Gate solicitors.

The orders to be made against Ashtown Gate

159. Counsel for Mr. Holohan and Ashtown Gate was right to concede that this is an appropriate case in which to make wasted costs orders against his clients. That concession was undoubtedly made in recognition of the fact that there was a manifest failure on the part of Mr. Holohan's firm to apply appropriate professional standards in relation to the preparation of the evidence in 2018. In my view, it is necessary in this case to make such an order. The failings on the part of the firm are so significant that such an order is justified.

160. In considering the approach to be taken, I bear in mind the gravity of the failing. I must also weigh in the balance the fact that, once the matter was raised by the court, Mr. Holohan behaved entirely properly and undertook a comprehensive review of his firm's records. Most importantly, he was entirely frank with the court and accepted his own failings in not having an appropriate level of supervision over the personnel dealing with the swearing of affidavits. It is clear that he has now taken steps to ensure that failings of this kind will not recur in the future.

161. At the same time, I cannot overlook the fact that, notwithstanding the Sherwin O'Riordan letter of 7 October, 2019, Mr. Holohan did not, thereafter, ensure that the defects in the affidavit of May, 2018 were immediately drawn to the attention of the court, or at the very least, brought to the court's attention at the outset of the hearing of the appeal on 16 October, 2019. It is odd that he did not do so, since it is evident from his response to the Sherwin O'Riordan letter that he accepted the lapse in professional standards and was clearly aware that it would come to the attention of the court at the hearing of the appeal. It is equally odd that he did not ensure that a fresh affidavit was sworn in substitution for the tainted affidavit of May, 2018.

162. On the one hand, I must therefore bear in mind the gravity of the issue and the failure to draw it to the attention of the court. On the other hand, I must give credit to Mr. Holohan for (relatively) promptly accepting that there had been a failing on his firm's part and, even more so, for addressing the matter in such a responsible and comprehensive way, once the issue was raised by the court.

163. Rather than sending the matter for adjudication by the Legal Costs Adjudicator, I believe that it would be preferable to exercise my powers under O. 99 r. 7 (2) (a), and to measure a sum in gross. Counsel for Mr. Holohan suggested that a figure of €2,000 would be appropriate. In my view, that does not properly reflect the extent of court time spent on the issue or, for that matter, the gravity of the issue. In my view, in Pepper's case, the amount to be paid by Ashtown Gate to Sherwin O'Riordan solicitors on behalf of Pepper should be €6,000 plus VAT or, at Pepper's option, a donation of €6,000 to a charity of Pepper's choosing. I appreciate that this figure will not compensate Pepper in full for all of

the additional costs that have arisen in dealing with this issue subsequent to the hearing in October, 2019. However, in arriving at that sum, I have given credit to Mr. Holohan for his very proper attitude in response to the concern expressed by the court at the conclusion of the first appeal hearing in October, 2019. If a less helpful attitude had been adopted, I would have no hesitation in measuring a sum that would compensate Pepper on a solicitor and client basis for all of the additional costs incurred since October 2019.

164. In the case of *Kelly Boumenjel*, I propose to measure a lower sum to be paid by Ashtown Gate. I do so, not because I think the issue was any less serious in that case, but because the issue did not occupy so much time of the court. I will direct that the sum of €2,000 plus VAT be paid to Dillon Eustace Solicitors on behalf of the objecting creditor, or at the latter's option a donation of €2,000 to a charity of its choosing.

Final directions

165. With a view to finalising the terms of the order to be made in this case, I will direct the practitioner and Pepper to confer together (by telephone or by email) within 10 days from today in relation to the costs of the appeal *inter se*. If they are able to agree the issue of costs *inter se*, they should immediately after the expiration of that period notify the registrar by email of the order to be made. If they are unable to reach agreement within that period, the parties are to forward by email to the registrar within 21 days from today, short written submissions on the issue of costs (as between Pepper and the practitioner), following which I will make a ruling on the issue in writing.