THE HIGH COURT
CIRCUIT APPEAL

[2021] IEHC 171
[Record No. 2020 36 CA]

IN THE MATTER OF
PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012-2015
AND IN THE MATTER OF MICHAEL HORAN OF CONSPARK, RAPEMILLS, BANAGHER, CO. OFFALY
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012-2015

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 12th day of, March 2021.

Introduction

1. This judgment concerns an appeal of a decision of the Circuit Court of 23rd January, 2020 to refuse an application by Alan McGee, ('the practitioner' or 'the PIP'), the Personal Insolvency Practitioner acting on behalf of Michael Horan, the debtor in the title of these proceedings and hereafter referred to as 'the debtor', pursuant to s.115A(9) of the Personal Insolvency Acts 2012-2015 (referred to collectively as 'the Act').

2. The matter came before the court on 1st March, 2021. Mr. Keith Farry BL represented the appellant debtor, and Mr. Rudi Neuman BL represented the objecting creditor, Promontoria (Oyster) DAC ('the objecting creditor' or 'Promontoria'). Both counsel made extensive submissions, although there were no written submissions as such. There was however a detailed notice of objection of 8th January, 2019 filed by the solicitors for Promontoria, and a helpful issues paper agreed between the counsel to which I will refer below.

3. The debtor obtained a protective certificate in August, 2018, and after a process of engaging with the creditors including Promontoria in relation to the terms of the PIA, the creditors meeting was held on 7th December, 2018. On that date, the Personal Insolvency Arrangement ('the PIA') was not approved in accordance with Chapter 4 of Part 3 of the Act. By notice of motion of 12th December, 2018, the debtor made application pursuant to s.115A(9) of the Act for an order confirming the coming into effect of the PIA, notwithstanding the outcome of the creditors meeting.

4. At the date of that meeting, the debtor was 51 years of age. He is married with two dependent children who, at the time of submission of the PIA, were each four years of age. He is a director of Birr Golf Shop Limited ("the company"), which, as its name would suggest, runs a golf shop in Birr, Co. Offaly. The PIP states that he was unable to pay his debts as they fall due, and accordingly contacted the PIP in August 2018 seeking advice on how he might be returned to solvency in accordance with the Act.

5. In his affidavit of 27th March, 2019, the debtor avers at para. 15 that his financial difficulties arose due to the recession. He says that he is a golf instructor, "*who successfully ran a driving range since 1993"*. In 2006 he purchased 8.5 acres of land beside the driving range with the intention of developing and improving the entire facility. He avers that he agreed with Ulster Bank that they would lend him the sum of €500,000 to purchase the land and to deal with some tax liabilities, and that it was agreed with

Ulster Bank that further sums would be advanced to develop and improve the entire facility.

6. He states that, following the economic crash in 2007, he was unable to borrow the funds required to redevelop these lands, and that his turnover in 2008 decreased by more than half, with the result that he was unable to meet the full repayments on the loan. He asserts that, between 2007 and 2016, he made payments totalling €238,806 to Ulster Bank, but "*was unable to reach a long-term sustainable solution*". He states that he was "*I was advised in 2016 that my loan had been sold to the objecting creditor…*". Significantly, he then avers as follows: -

> *"I received no further communication until I was advised in 2018 that a Receiver was appointed. At this stage, I lost faith that any long-term deal could be reached and I was not in a position to make further payments, I received no further communication from the creditor or from the Receiver until August 2018 when a valuer appointed by the Receiver attended at the premises. At this stage I sought the assistance of my Personal Insolvency Practitioner who immediately advised me to set aside the rent payments." [Paragraph 16]*

The personal insolvency arrangement

7. Details of the debtor's proposal to his creditors are set out in the PIA. The total indebtedness of the debtor as of the date of the PIA is €976,340.43. The only significant creditors of the debtor are Bank of Ireland Mortgage Bank ("Bank of Ireland"), which is owed €233,013.37, and which indebtedness is secured on the debtor's principal private residence ('PPR'), and Promontoria, which is owed a sum of €197,716.38, which is secured on the golf shop premises, and a further sum of €542,295.82. Promontoria is therefore by some distance the largest creditor.

8. The debtor's PPR has an agreed current market value of €250,000. As the mortgage balance owing to Bank of Ireland Mortgage Bank is €233,013.37, the property has equity of €16,986.63. The golf shop premises has a value ascribed to it of €70,000, but is regarded as a "*core asset*" which must be retained, as it generates the income of the debtor and his wife, Deborah Horan, who is also employed by the company.

9. The debtor has a net total income of €3,002.66. According to the PIA, he has monthly set costs of €1,815.07, a monthly payment towards the PPR mortgage of €1,150.00, a mortgage payment on the golf shop premises of €412.33, a contribution towards a second car – deemed necessary as the debtor and his wife live in a rural area some 4km from Birr – in the sum of €200, life assurance of €63, and monthly discharge of an amount owing to the Revenue of €380. The PIA indicates that the contribution available for year one of the PIA would be €429.61, with a possible contribution of €536.62 in years two to six. The PIA indicates that the debtor bears 64% of the reasonable living expenses ('RLE'), as his wife earns sufficient income to warrant bearing 36% of the RLE.

10. With the envisaged contributions, and a lump sum of €27,200, it is proposed in the PIA that there will be a total contribution of €64,553.46 over the PIA term. The fee due to the PIP, together with outlays, is €14,702.50.

11. The bankruptcy comparison, which the PIP is obliged to make available to the creditors under s.107(1)(d) of the Act, suggests that there will be a 100% return for the PPR secured creditor - Bank of Ireland Mortgage Bank – as opposed to a 91% return for that creditor under the bankruptcy process. Counsel for Promontoria pointed out during the course of argument that the usual 10% deduction to the current market value which is applied in bankruptcy to allow for the costs of realisation of the asset had not been applied in the bankruptcy comparison, with the result that the realisation in bankruptcy would be higher. Counsel for the debtor accepted that a 15% discount rather than a 10% discount had been applied, but even if the 10% deduction had been applied, there would still be a better outcome for the PPR secured creditor under the PIA as opposed to the outcome under bankruptcy.

12. As regards the commercial properties -the golf shop and the adjoining lands- valued at €115,000, it was suggested that the PIA, which would not be subject to the deduction applicable in bankruptcy, would yield a 17% dividend in respect of Promontoria's indebtedness, as opposed to a 15% dividend in bankruptcy. It appears to the court that once again this is a discrepancy; the bankruptcy comparison ascribes a value to these assets of €125,000, whereas the values attributed to the golf shop and the adjoining lands are €70,000 and €45,000 respectively. In part IV of the PIA it was suggested that the other unsecured creditors, which amount to €3,314.86, would receive a 10% dividend under the PIA as opposed to a 6% dividend in bankruptcy.

13. It was submitted by the debtor that, other than in relation to the complaint referred to above about the wrong percentage being applied to the current market value of the PPR in a bankruptcy scenario, the objecting creditor did not make any substantive criticism of the bankruptcy comparison or seriously contend that it was incorrect, and that the outcome in bankruptcy would yield a better result for Promontoria.

14. One of the main points made by the objecting creditor by way of objection related to what Promontoria contend is a discrepancy between the treatment of secured debt in Part IV of the PIA, and a subsequent appendix of the PIA which appears to suggest a different treatment of Promontoria's secured debt. I will refer to this issue below.

The issue paper

15. In advance of the hearing before the court, counsel agreed a helpful issue paper, which summarised the agreed issue papers as follows: -

> *"1. Approvability of the PIA*
>
> *Part IV (Treatment of Secured Debt) specifies a particular treatment of the Objector's debt, including a write-down. Appendix 6 of the PIA outlines a different treatment of the same secured debt.*

The creditor argues:

(a) The PIA is not capable of approval;

(b) the PIA is fatally internally inconsistent;

The issues to be determined are:

1. Is the PIA approvable;

2. is the PIA unfairly prejudicial;

3. Is there a valid ground of objection to the coming into effect of the PIA due to the inconsistency."

16. The first issue relates to an internal inconsistency in the PIA, which the objecting creditor contends renders the PIA incapable of approval. Part IV of the PIA deals with the debtor-specific terms of the arrangement. As regards the PPR secured creditor, the treatment suggested in the PIA is that "*payments will continue as per current repayment schedule*". In relation to the mortgage debt of €197,716.38 attaching to the golf shop premises, it is suggested that the term of the mortgage will be for 20 years, with a monthly mortgage amount of €412.33. The mortgage debt is to be written-down to €80,000. The land acquired for development in conjunction with the golf shop, in respect of which Promontoria is owed €542,295.82, is to be surrendered and sold.

17. The inconsistency arises out of the write-down of the golf shop mortgage debt to €80,000. Part VI of the PIA sets out various appendices, of which Appendix 1 is "*Amendment of Repayment Terms of Secured Debt (Mortgages)".* The purpose of this appendix appears to be to set out in more detail the terms of the restructured mortgage debts, and the consequences in terms of monthly payment. In respect of the mortgage debt on the golf shop premises of €197,716.38, this appendix states as follows: -

"The Arrangement and this Appendix changes the term of the Existing Loan Offer Letters in the following respects: The mortgage loan will be split into two parts;

Active: €100,000.00

Reclassified as unsecured debt €97,716.38".

18. The appendix goes on to state that the payment due for "*the active part of the mortgage*" of €100,000 will be €515.41 monthly. Clearly, this conflicts with Part IV of the PIA, in which the write-down of the active part of the mortgage is to a figure of €80,000. While there is no reference to this discrepancy in the affidavits before the Circuit Court, I am informed that the issue was raised when the matter came on for hearing, and that it had a significant effect on the court's decision not to accede to the PIP's application.

The objecting creditor's submissions

19. Counsel for Promontoria made submissions in relation to three issues in particular which he said should move the court to refuse the PIP's application. Those issues were, firstly, the payment history in the matter; the second issue related to what counsel contended was the preferential treatment by the debtor of other creditors; and the final issue was what counsel contended was a number of inconsistencies in the PIA's approach to the debtor's affairs, the most significant of which was the inconsistency between Part IV of the PIA and Appendix 1 in relation to the write-down of Promontoria's secured debt, to which I have referred above.

20. Given that I have just set out the nature of that objection, I propose to deal with that issue first. It is certainly the case that Part IV of the PIA suggests that Promontoria's debt in respect of the golf shop be written down to €80,000, whereas Appendix 1 suggests that the write-down is to €100,000. That this discrepancy occurred is regrettable. However, it is not clear to what extent, if any, it gave rise to confusion. There is no averment from Promontoria in which it alleges any lack of understanding on its part as to what it was voting against when it cast its vote at the creditors meeting. There is no suggestion that it was an issue at all between the parties until the day of the hearing in the Circuit Court.

21. That is not to say that an inconsistency in the PIA itself is a trivial matter. There must be clarity in the PIA as to the terms of the offer, as otherwise neither the creditors, nor any court on a subsequent s.115A(9) application, will know exactly what has been accepted or rejected at the creditors meeting.

22. As it happens, the PIA itself caters for such a situation. At Clause 3 of Part II of the PIA, which deals with the terms of the arrangement, the various parts are set out, from Part I (summary of PIA) to Part VI (appendices to the arrangement…). The Clause goes on to state as follows: -

> *"In the event of conflict between the terms of the arrangement in Part IV (Debtor-Specific Terms of The Arrangement) and the terms of the Arrangement in any other part, the terms in Part IV will prevail".*

23. It is clear from this Clause that the write-down of the Promontoria debt to €80,000 was the measure being proposed. A careful reading of the terms of the PIA would have made this clear, and if any confirmation were necessary, this could have been sought from the PIP in advance of the hearing in the Circuit Court.

24. While the discrepancy should not have occurred – and I would urge all PIPs to take infinite pains to ensure that this sort of thing does not happen – I do not think, for the reasons set out above, that it is fatal to the PIA at this stage.

25. It was submitted on behalf of Promontoria that there were various other discrepancies in the figures submitted in both the prescribed financial statement ('PFS') and the PIA itself. It was suggested that the original PFS did not include a figure for rental income from the golf shop. The rental income was in fact included in the debtor's income figure– although

this may not have been obvious – a fact which was quickly clarified by the PIP on inquiry from Promontoria prior to the creditors meeting. Other alleged discrepancies raised by the objecting creditor in relation to the differences between the PFS and the company's 2018 accounts in respect of rental payments, and between those accounts and an averment by the debtor as to the amount due from the company to the debtor in respect of director's loans, appear to me to be attributable to the figures being snapshots taken at different times, rather than an attempt to mislead.

26. The objecting creditor also complained that "*significant advances were made and amounts repaid during the 2018 Financial Year which clearly contradicts the Debtor's evidence that the Company has not been in a position to repay the loans to him…"* [para. 9, affidavit of David Geraghty, 8th May, 2019]. However, this is denied by the debtor, who avers that he took a loan of €15,000 out from Birr Credit Union in January 2018 *"…for the purpose of assisting the Company whilst it was struggling financially".* While some repayments were made by the company, the debtor avers that the company is "*is not able to repay the loan in full"*. It does not seem to me that these transactions are indicative of anything other than the debtor doing his best to enable the company, the source of his livelihood, to discharge its liabilities, while retrieving such repayments from the company as its affairs would allow to enable him to address his own liabilities. They certainly do not suggest to me any attempt to hide assets or make payments which the debtor was not entitled to make.

27. While the objecting creditor sought to complain about certain other aspects of the financial information provided by the debtor, in particular in relation to monies advanced by the debtor to the company for the acquisition of a vehicle, I do not consider that these matters suggest other than an attempt by the debtor to juggle his own liabilities and the liabilities of the company in order to ensure the viability of the company and thus the preservation of his own source of income.

Payment history and alleged preference of Bank of Ireland

28. The objecting creditor has perhaps a more fundamental objection to the PIA. Promontoria took over the loan from Ulster Bank in 2016, and counsel stated that no payment whatsoever had been made by the debtor to Promontoria since it acquired the debt. As we have seen from the debtor's own averments, he was making payments to Ulster Bank, but simply stopped making any payments after the transfer of the debt to the objecting creditor. Essentially, counsel submitted that, while the objecting creditor owned the loan which financed the asset – the golf shop – which enables the debtor to pay his liabilities, the debtor had taken a conscious decision to pay the PPR mortgage and other creditors at the expense of Promontoria. By way of explanation of his failure to make payments to the objecting creditor, the debtor makes the averments set out at para. 6 above.

29. It emerged during the hearing before me that the debtor has indeed been setting aside payments of rent received from the company during the insolvency process. On an inquiry from the court as to the amount of any such funds set aside, the court was informed that the debtor holds over €15,000 in rent. Counsel indicated to the court that, if the court confirmed the coming into effect of the PIA, the PIP and the debtor both

accepted that the sum set aside had to be paid to Promontoria, and would give undertakings to this effect to the court.

30. Counsel for Promontoria had a number of things to say about this suggestion. He drew attention to the fact that, while the debtor certainly acknowledged in his first affidavit that he was setting aside, on the advice of the PIP, rent received from the company, there was no evidence as to the amount set aside, or even as to its existence. Counsel suggested that it was akin to a "*ransom*"; in order to get payment of the monies set aside, Promontoria would have to withdraw its objection to the PIA.

31. Secondly, counsel for Promontoria objected to the linkage between the rent payable by the company to the debtor, and the debt to be discharged by the debtor to Promontoria in respect of the golf shop premises. In particular, he submitted that there was no basis upon which it could be asserted that the payment of mortgage debts was in any way dependent upon the company being able to discharge rent to the debtor.

32. Thirdly, counsel pointed out that there had been no default in relation to the PPR mortgage, even though the income with which to discharge payments due under this mortgage was generated by the asset which had been funded by the loan owned by Promontoria, which received no payment whatsoever from the point at which it acquired the loan from Ulster Bank. It was now being suggested that Promontoria's debt be written-down from €197,716.38 to €80,000 notwithstanding the failure to receive any payments since 2016, in circumstances where the debtor's liability to the PPR mortgage holder had been discharged to date, and would continue to be discharged in the future. Counsel submitted that this was clearly unfairly prejudicial to Promontoria's interests.

The debtor's submissions

33. Counsel on behalf of the debtor accepted that the failure to pay monies to Promontoria for a two-year period prior to the application for a protective certificate was a factor to be taken into account by the court in the exercise of its discretion. It was submitted however that a poor payment record must be weighed against a number of factors, one of which is whether a reasonable explanation of the failure has been given.

34. The particular difficulty for the debtor in the present case is the fact that Promontoria has received no payments whatsoever from the debtor since it took over the loan in 2016, notwithstanding that, according to the debtor, he had paid €238,806 to Promontoria's predecessor, Ulster Bank, between 2007 and 2016. As regards the failure of the debtor to make payments to Promontoria prior to entering the insolvency process, the debtor's explanation is set out above at para. 6 – essentially, that he had "lost faith that any long-term deal could be reached", and that the new owner of the loan had made no demand of him. As regards the period after the grant of the protective certificate, the debtor, on the advice of the PIP, "set aside" rental payments from the company to the debtor, which now amount to over €15,000 and, I am assured, will be paid over to the objecting creditor.

35. In response to criticisms that there was no reference to rent set aside in the debtor's PFS, counsel pointed out that the accumulation of rent had not begun at that stage. The debtor had referred to the setting aside of rent in his first affidavit of 27th March, 2019, and had not made any secret of the fact that he was doing so, and on the specific advice of his PIP.

36. Counsel submitted that it was well established that a poor payment record was not of itself a sufficient reason not to approve the coming into effect of a PIA. Promontoria had not pressed for payment at any time between 2016 and the appointment of the receiver in 2018, a period in which the debtor's finances underwent severe stress. The debtor would pay to Promontoria all the rent monies which he had set aside. Any suggestion that this money was withheld by way of "ransom" was simply incorrect: the debtor had been open about his intention to set aside rental payments from the company, averring to it on affidavit.

37. It was submitted by counsel that both Promontoria and the debtor would objectively be far better off if the debtor's application were successful. The substantive thrust of the bankruptcy comparison had not been disputed by the objecting creditor, which in addition would receive a sum of over €15,000 in further reduction of the indebtedness of the debtor. If the receiver obtained possession of the golf club premises, valued at €70,000, the incomes of the debtor and his wife, and thus their ability to continue to make payments for the discharge of the loans due to Promontoria, would be taken away. This in turn would inevitably cause the debtor and his wife to be unable to discharge the PPR mortgage, so that the debtor and his family would be rendered homeless.

38. In these circumstances, counsel submitted that the poor payment history and the failure to make any payment to Promontoria should be seen in context. The outcome of the PIA was beneficial for all parties, and should be approved by the court.

Relevant debt

39. As in every s. 115A (9) application, it is a "gateway" requirement that the debtor establish that "the debts that would be covered by the proposed Personal Insolvency Arrangement include a relevant debt" [Section 115A (1) (b)]. This is a strict jurisdictional prerequisite, without which the court cannot consider the debtor's application. The onus of proof that the debts include a "relevant debt" is on the debtor. "Relevant debt" is defined at s. 115A (18) as follows:

> *"(18) In this section –*
>
> *'relevant debt' means a debt –*
>
> *(a) the payment for which is secured by security in or over the debtor's principal private residence, and*
>
> *(b) in respect of which –*

(i) *the debtor, on 1 January 2015, was in arrears with his or her payments, or*

(ii) *the debtor, having been, before 1 January 2015, in arrears with his or her payments, has entered into an alternative repayment arrangement with the secure creditor concerned."*

40. In dealing with the procedural requirements under the Act in his affidavit of 12th December, 2018, the PIP averred *inter alia* as follows:

"9. I say that the debts that are covered by the proposed personal insolvency arrangement include a relevant debt, within the meaning of s. 115A (18) of the Personal Insolvency Acts. 2012 – 2015. In that regard, I say from a review of the file and from my knowledge of the case I am satisfied that there is a debt secured on the Principal Private Residence of the Debtor and that the Debtor having been before the 1st January, 2015 in arrears on his mortgage and has entered into an alternative repayment arrangement [sic]."

41. In this regard, the PIP refers to an exhibit to his affidavit which he contends supports his averment. The exhibit consists of two pages. The first page contains an exchange of emails between the PIP and a Bank of Ireland official in September 2018. It is clear from the exchange that the PIP was at that time engaged in the preparation of the PIA for the purpose of the creditors meeting, which took place subsequently in December 2018.

42. The first email, on 13th September, 2018, was from the Bank of Ireland official, Neasa Halpin, to the PIP as follows:

"Hi Alan

In relation to debtor Michael Horan please note the debtors mortgage is performing.

Thanks

Neasa"

The PIP replied on the same day shortly after receipt of this email as follows:

"Neasa

I know the mortgage is performing at present and my intention would be to make no change to the PPR mortgage but my instructions are that it was the subject of arrears previous to 2015 and an ARA ["alternative repayment arrangement", the phrase used in s. 115A (18) (b) (ii)] was entered into at the time and that it therefore meets the criteria for an appeal if Promontoria unreasonably reject a PIA proposal.

Can you please confirm.

Alan."

On 17th September, 2018, Ms. Halpin replied as follows:

> *"Hi Alan*
>
> *From the notes on the debtor's account I can see there was forbearance put in place in May 2014, nothing since.*
>
> *Thanks*
>
> *Neasa."*

43. The second page of the exhibit is the first page only of a letter from Bank of Ireland at its branch in Tullamore, County Offaly to the PIP and his wife, Mrs. Deborah Horan, at their home address. The letter is dated 14th April, 2014. Before the salutation, a number of details are set out in relation to the mortgage account held by the debtor and Mrs. Horan. Included among these details are the following:

> ***"...Date mortgage fell into arrears:*** *1/11/2013*
>
> ***Number of Missed Payments:*** *2.03 [sic]*
>
> ***Total of Missed Payments:*** *€2,363.52*
>
> ***Current Outstanding Arrears:*** *€2,363.52"*

44. The letter goes on to state as follows:

> *"Dear Mr. Horan and Mrs. Horan,*
>
> *We note that the most recent payment due on your mortgage loan no. [number given] was not paid in full on the due date.*
>
> *If you have already cleared the arrears, made an alternative repayment arrangement with us or are finalising arrangements with us to bring your mortgage loan up to date, please disregard this letter. If you have not yet been in touch with us in relation to your arrears, it is important that you make contact with our Arrears Support Unit on [number given] so we can understand why you are in arrears and to agree a plan to rectify the position."*

45. The debtor also made reference to the criteria for establishing a relevant debt. At para. 6 of his affidavit of 12th December, 2018, he avers as follows:

> *"6. I say that I fell into arrears on my Principal Private Residence mortgage and I was in arrears on the 1st January, 2015…"*

46. Counsel for Promontoria pointed out that this averment is factually incorrect, in that there is no suggestion anywhere in the papers that the debtor was in arrears in respect of the PPR mortgage on 1st January, 2015. Counsel referred to the exhibited letter from Bank of Ireland to the debtor of 14th April, 2014, and the email from Bank of Ireland indicating

that "forbearance" was put in place in May 2014. On the court asking counsel for the debtor how a relevant debt was established on the basis of these averments and exhibits, counsel submitted that two months of arrears – which appear to be established by the letter of 14th April, 2014 – and an ARA to accommodate those arrears satisfied the requirements of s. 115A (18). Counsel emphasised that there is no minimum requirement as regards amount or length for an ARA, and effectively submitted that the bank's "forbearance" to which Ms. Halpin referred in her email, constituted compliance with s. 115A (18) (b) (ii).

47. The first difficulty, then, with the debtor's attempt to establish a relevant debt is that the debtor and the PIP, in affidavits sworn on the same day, each offer a different basis on which to establish a relevant debt. Counsel for the debtor appeared to accept that the debtor's averment that he was in arrears on 1st January, 2015 is incorrect, and it is certainly not established or corroborated in any way. It falls to be decided whether the averment of the PIP in his affidavit of 12th December, 2018, quoted at para. 40 above, establishes a relevant debt.

48. In *Re. Sarah Hill* [2017] IEHC 18, the question arose as to what constituted an "alternative repayment arrangement" for the purpose of s. 115A (18). The debtor in that case had failed to make the monthly payment on five separate occasions before 1st January, 2015. Baker J. set out in her judgment the circumstances of each failure, and the efforts made by the debtor to address the non-payment in each case. After considering at length what was meant by the word "arrangement", the court concluded that an arrangement "*…can connote a degree of informality not found in the contractual context …"* [para. 22], but that an arrangement "*… is not a mere indulgence on the part of the lender, or a mere acceptance of a breach of the terms of repayment which could be said to give rise, at best, to an estoppel …"* [para. 24].

49. Applying her analysis to the facts of the case, Baker J. stated as follows:

> *"40. Ms. Hill most certainly has shown diligence in meeting her mortgage payments, and made effort on each of the five occasions when she encountered financial difficulties to meet her payments by another means, albeit in each case she was a few days late. The lender, equally, cannot be said to have failed to respect her diligence and good faith, and on each occasion accepted late payment, as a forbearance or tolerance.*
>
> *41. There was not however, in my view, an alternative payment arrangement entered into between Ms. Hill and the Bank such as to bring her within the type of arrangement envisaged as the gateway or precondition to the making of an application under s. 115A. The words of s. 115A (18) (b) (ii) are expressed in such a way as suggests that the Oireachtas required that there be more than a series of ad hoc or one-off acceptance of breach**, but that there be an arrangement as a result of which some alternative terms and conditions as to the repayment of a secured loan were agreed to govern the repayment obligations of the borrower**. [Emphasis added]*

…

45. It is clear … that in each of the five occasions when the mortgage payments were made late, and by a different method from that provided in the contractual arrangement between borrower and lender, that no arrangement was made by which the contractual terms and conditions of the mortgage were varied by agreement, save in regard to the individual payment in question. There was, for example, no agreement that the amount of the payment be reduced, that the debtor be entitled to make payments on an interest only basis for an identified period, or that there be a moratorium on full payments for a time.

…

48. I am not satisfied therefore that the ad hoc acceptance of breach could be called an alternative arrangement, and Ms. Hill did not reach an arrangement for amended terms and conditions of repayment."

50. In the present case, the objecting creditor does not make the case that there is no relevant debt. However, the court cannot proceed on the basis that no specific objection in this regard has been made. Irrespective of the views of the parties, the court requires to be satisfied that there is a relevant debt, and thus that it has jurisdiction to entertain the application.

51. The first difficulty in this regard is the two different bases proffered in their respective affidavits of 12th December, 2018 by the debtor and the PIP. There is no objective evidence before me that the PPR mortgage was in arrears on 1st January, 2015. The only evidence of an ARA put before the court is Ms. Halpin's statement that "…*from the notes on the debtor's account I can see there was forbearance put in place in May 2014, nothing since …".* These notes are not exhibited, and no further details given as to what form this "forbearance" took, or for how long it lasted. There is no suggestion anywhere that any formal procedure or protocol was invoked, or that the debtor's terms of repayment were changed in any way.

52. In these circumstances, I must hold that the debtor has signally failed to establish a relevant debt, and that his application must fail on that ground alone.

The setting aside of rental payments

53. While my conclusion regarding the failure to establish a relevant debt is sufficient to decide the matter, I consider that I should address the complaints of the objecting creditor in relation to the debtor refusing to make any payment to it after the PC issued, but instead purporting to "set aside" rental payments to him from the company, and while acknowledging in his first affidavit that he had done so, giving no indication or commitment in the affidavit that the monies would be paid to the objecting creditor.

54. The way in which this matter was approached in the affidavits on behalf of the debtor was profoundly unsatisfactory, and Promontoria is justified in its complaints. No indication was given as to the amounts being set aside. Indeed, if the amount now held by the

debtor is approximately €15,000, and the monthly rent from the company to the debtor was €1,250, it is clear that not all monthly rent has been set aside. No schedule setting out the monies saved in this way was exhibited, nor was any bank account statement exhibited to prove the debtor's assertion.

55. In *Re. Richard Featherston, a Debtor* [2018] IEHC 683, McDonald J. considered the circumstances in which a debtor might be expected to use funds accruing after the issue of the PC to address his ongoing debts, commenting that

> *"… while I am very definitely of the view that a debtor should seek to address ongoing liabilities (to the extent that he or she lawfully can) during the currency of the protection period, there is no statutory requirement in the 2012 Act that a debtor must meet his or her liabilities during that period." [para. 44].*

There is course a statutory requirement that the court have regard to, *inter alia*, the matters set out in s.115A(10):

> *"In considering whether to make an order under subsection (9), the court shall have regard to:*
>
> *(a) The conduct, within the 2 years prior to the issue of the protective certificate under section 95, of –*
>
> *(i) the debtor in seeking to pay the debts concerned, and*
> *(ii) a creditor in seeking to recover the debts due to the creditor; …"*

56. It is in my view understandable that the objecting creditor, having not received any payment in the two years prior to the issue of the PC, found the purported setting aside of rental payments objectionable, if not downright suspicious, particularly in circumstances where the PPR mortgage was being discharged in full, and Promontoria was the only other significant creditor. While the repayment obligation under the mortgage is independent of the receipt by the debtor of the rent from the company, in the sense that the debtor is not contractually obliged to pay the rent in discharge of the mortgage, the objecting creditor is justified in complaining that, notwithstanding that it is the mortgagee of the asset which generates all of the income for the debtor and his wife, no repayment from that income was made to it for – at this stage – almost five years.

57. The failures to explain the detail of the amounts set aside, to exhibit documentation corroborating this course of action, and to give an unequivocal commitment in the affidavits to pay these monies to Promontoria, indicate to me a lack of candour in dealing with Promontoria and with the court. While the monies withheld may not have been intended as a "ransom", this was not an unreasonable apprehension on the part of Promontoria, given the uncommunicative way in which the issue was addressed. Even if the debtor had established a relevant debt, I would have dismissed the application on the basis of this issue alone.

58. Having said that, I do accept the *bona fides* of the assurance of the debtor and the PIP, given on their behalf by counsel, that the monies would be paid to Promontoria if the arrangement came into effect, and appropriate undertakings given in this regard if necessary. I did not infer this assurance to indicate that, if the court did not order the coming into effect of the PIA, the money would not be paid to Promontoria, and the debtor would do well to consider carefully what should be done with this fund, particularly if there is to be any further application to this court in the matter.

Conclusion

59. In all the circumstances, and for the reasons set out above, I do not consider it appropriate to make an order confirming the coming into effect of the proposed personal insolvency arrangement. There will be an order dismissing the debtor's application.

60. As this judgment is being communicated electronically, I will list the matter for the first personal insolvency list after the expiry of seven days from the date of the judgment, at which point I will hear the parties as to the terms of the order to be made.