

**THE HIGH COURT**

[2021] IEHC 686

[Record No. 2020/146 CA]

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

**AND IN THE MATTER OF PETER ANTHONY GALLAGHER OF 11A MEADOWBROOK,  
TUBBERCURRY, COUNTY SLIGO**

**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 2nd day of November, 2021.**

**Introduction**

1. This matter concerns an appeal by the personal insolvency practitioner Judy Mooney of McCambridge Duffy ('the PIP') from the judgment of the Circuit (Personal Insolvency) Court (Her Honour Judge Mary Enright) of 13th August, 2020, in which that court refused an application on behalf of Peter Anthony Gallagher ('the debtor') pursuant to s.115A of the Personal Insolvency Acts 2012-2015 (hereafter referred to collectively as 'the Act'). The objecting creditor which opposes the appeal is Bank of Ireland Mortgage Bank ('the bank' or 'the objecting creditor').
2. When the appeal came before this Court for hearing, it had been flagged by counsel on both sides as being a relatively straightforward appeal, primarily concerning issues of the affordability and sustainability of the personal insolvency arrangement ('PIA'), and which did not involve complicated questions of law or require written submissions. However, during the hearing counsel for the bank, in the context of submissions on the issues of sustainability, made detailed and trenchant criticisms of the figures set out in the PIA, and particularly those relating to the debtor's income, submitting that the court could have no confidence that the debtor had sufficient income to perform the terms of the PIA. In this regard, counsel made reference to discrepancies in the documentation advanced on behalf of the debtor, and was severely critical of the way in which the PIP had purported to satisfy herself that the debtor's income figure was correct.
3. Counsel for the PIP took exception to these submissions, saying that the particular and focused points now made by the bank had never before been raised. It was submitted that the bank had accepted the income figures proffered in the PIA and had not raised any point about income during the consultation process between the PIP and the bank pursuant to s.98 and s.102 of the Act. It was suggested, that while there had been substantial issues before the Circuit Court about the debtor's payment history, and the need to substantiate proposed financial assistance from siblings, the composition of the income figure had not been a substantial issue. Counsel did not seek an adjournment, but replied in detail to the bank's submissions, defending the conduct of the process by the PIP in his reply.
4. In order to understand the context of the submissions, it is necessary to look in some detail, not just at the PIA itself, but also the prescribed financial statement ('PFS') which was sent to creditors by the PIP prior to the formulation of the PIA, and various other items of documentation offered by the debtor as corroboration of his financial position.

**The PIA**

5. This matter is of some antiquity. The protective certificate ('PC') was issued on 16th November, 2017. The PIA was put before the creditors at a meeting on 22nd February, 2018. Two minor creditors voted in favour of the arrangement. The bank, representing 95.03% of creditors present and voting, voted against the arrangement.
6. The debtor is 59 years of age. He is single, has no dependants and lives in Tubbercurry, Co. Sligo. He is a panel beater by profession, and operates his own business in Ballymote, Co. Sligo. His principal private residence ('PPR') has a current market value of €85,000. As of the date of the PIA, the mortgage balance on the PPR was €159,955 owed to the objecting creditor, leaving a deficit of €74,955.
7. The PIA states that the debtor has a net total income of €1,861. It proposes an extension of the existing mortgage term from 168 months to 180 months. The mortgage will be written down to the current market value of €85,000 with the remaining balance to be written off. The duration of the arrangement will be twelve months, with the monthly repayment reduced to €518, which includes a fixed rate of interest of 1.5%; after the arrangement, payment is on the basis of the ECB tracker rate plus 1.25%. The arrangement does not anticipate much or any difference in the monthly repayment after the arrangement has been completed.
8. In relation to the debtor's income, Appendix II of the PIA sets out the net income from the debtor's employment as €1,761. The figure of €1,861 is achieved by the addition of "family assistance" of €100 per month. Subsequent affidavits in the proceedings suggest that the debtor's brother is prepared to commit to contributing this €100 monthly to the debtor's expenses from his own resources. After deduction of set costs of €1,050, the mortgage repayment of €518 and additional expenditure items of €291, the debtor will, on implementation of the PIA, be left with a monthly surplus of €2. On these figures, the debtor would be living on the "reasonable living expenses" ('RLEs') recognised by the Insolvency Service of Ireland ('ISI') for years to come.
9. In addition to the restructure, the debtor offers a lump sum of €10,000 in full and final settlement of his unsecured liabilities. This sum, which subsequent affidavits suggest is to be provided by the debtor's sister, will represent a payment of six cent in the Euro to the unsecured creditors.
10. The PIA contains a comparison of the PIA with the estimated outcome in bankruptcy. This comparison suggests that the sale of the debtor's main asset – his PPR – would yield a dividend to the bank as the secured creditor of forty-nine cent in the Euro, as opposed to the fifty-four cent in the Euro represented by the current market value. Bankruptcy costs would be likely to swallow up the proceeds of the sale of the debtor's business premises, which is valued at €10,000. As we have seen, there is a dividend of six cent in the Euro for unsecured creditors, whereas no dividend for unsecured creditors is likely in a bankruptcy. The bankruptcy comparison therefore suggests that the PIA will yield a better outcome for the bank than if the debtor were adjudicated bankrupt.

## **The proceedings**

11. The PIP applied by notice of motion of 27th February, 2018 for an order pursuant to s.115A (9) of the Act confirming the coming into effect of the PIA, notwithstanding its rejection by the creditors. A notice of objection was filed by the objecting creditor on 16th March, 2018. The notice included grounds expressed in general terms relating to the affordability and sustainability of the PIA, claiming that the bank was unfairly prejudiced by its provisions. Specific complaint was made that the conduct of the debtor in the two years prior to the issue of the PC, which is required to be considered by the court under s.115A (10), did not support the granting of the reliefs sought.
12. The bank's objections were explored in the affidavit of 30th July, 2018 of Sandra Harrison, a case manager in the bank's personal insolvency unit. The affidavit concentrated on two matters: firstly, complaint was made that no evidence had been supplied by the PIP to corroborate the assertion that the debtor's sister and brother would make the contributions of €10,000 and €100 per month respectively. Secondly, the payment history of the debtor was severely criticised. It was stated that no payment whatsoever had been made by the debtor to his mortgage loan account in the seventeen-month period from December 2015 to May 2017. A payment of €400 per month had been made since May 2017, with the exception of two months in that period where no payment was made.
13. There then followed replying affidavits from the PIP of 10th December, 2018, and the debtor of 7th January, 2019. It is notable that the PIP criticised the approach of the bank to the matter: she said that the grounds of objection "were not raised in advance of the issuance of the PIA proposal when I would have had an opportunity to deal with same and potentially avoid the need for the herein application. In that regard, there was no proper engagement during the Section 98, Section 102 process, or during the leadup to the issuance of the PIA proposal" [para. 8]. It was said that no proof or documentation had been sought by the bank, nor had any questions been raised, in relation to the debtor's income during this period.
14. In response to a criticism in Ms. Harrison's affidavit that the PIP had "...failed to provide this Honourable Court or the Bank with any satisfactory evidence of the Debtor's self-employed income..." [para. 17], the PIP, having referred to the lack of inquiry on the part of the bank at any stage of the process up to the holding of the creditor's meeting, averred as follows: -  
  
"15 ...[N]onetheless I satisfied myself in relation to the Debtor's income. I say I am satisfied the Debtor's income is sustainable in circumstances where I say and believe that the Debtor's accounts have been assessed by me, verified and substantiated to my satisfaction and indeed to the satisfaction of the creditor prior to the making of the proposal. It therefore leads to a situation that the current income, current expenditure, current affordability and expected and projected affordability moving forward has been assessed and verified."
15. The PIP went on to describe in very general terms the steps she takes to ensure that the debtor's income is reliable and the PIA itself viable. She went on to point out that, as the

debtor would be in receipt of an old age pension from age 66, his ability to service the loan from that age onwards would be greatly enhanced. The PIP then set out her views at some length as to why “the payment history of a debtor is not fully indicative of their financial position nor is it indicative of their ability to sustain an arrangement moving forward...” [para. 38].

16. In his affidavit, the debtor exhibited letters from his brother and sister confirming their willingness to contribute the sums to which the PIA referred. He maintained that he had “a steady and consistent self-employed income as a panel beater”. He claimed that there had been a particular difficulty in making payments between December 2015 and May 2017; he said that insurance companies, on whose supply of work he relied, “started directing all panel beating work to the large garages in Sligo, thus ignoring the small garages like mine, which in turn resulted in a huge decrease in my weekly income...” [para. 11]. He went on however to aver that, by May 2017, this policy had been reversed, thus restoring the consistency of his income, with the result that, since September 2018, he had increased his payments to €518 per month – the amount which would be due under the restructured loan.
17. The bank responded with an affidavit of Ms. Harrison of 25th February, 2019, which criticised the letters from the debtor’s siblings as lacking in specificity and failing to provide evidence that the siblings were sufficiently in funds to make good on their commitments. There was further criticism of the debtor’s payment history, and more evidence was provided which suggested that the debtor’s problems with the bank dated back to February 2013.
18. According to a later affidavit from Ms. Harrison, the matter was first heard by the Circuit Court on 11th October, 2019, but was adjourned due to the dissatisfaction of the court with the evidence provided by the debtor regarding his income, and the financial support of his siblings in particular. The debtor was given liberty to file further affidavits in this regard.
19. There followed a number of affidavits in support of the debtor; his sister and brother swore two affidavits each, in October and November 2019, in an attempt to provide satisfactory substantiation of their offers of assistance to the debtor. The debtor himself swore an affidavit on 4th November, 2019, to which, with the object of clarifying matters, he exhibited what he referred to as a “Certificate of Income” from his accountant, a local firm offering accountancy and taxation services. As we shall see, this documentation, far from clarifying matters, had the opposite effect to that intended by the debtor.
20. The “certificate of income” to which the debtor referred in his affidavit was in fact a document entitled “Report & Accounts for the Year Ended 28-Feb-2018”. The firm in question had not audited the books and records of the debtor, but had prepared the documents from “...the books, records, information and explanations supplied by [the debtor] and we confirm that they are in accordance therewith”. There followed a trading profit and loss account and balance sheet for the debtor as at 28th February, 2018. This balance sheet has an item “Term Loans”, for which the current figure is stated to be

€69,359, the “previous year” equivalent being €70,632. The documents offer no detail or explanation of these term loans, to which no reference had been made in the PFS or the PIA.

21. In her affidavit of 10th August, 2020, Ms. Harrison avers that, when the matter came back before the Circuit Court on 9th July, 2020, the matter was adjourned once again due to confusion over the “term loans”. Once again, the Circuit Court adjourned the matter for evidence to be provided by the PIP and/or the debtor in this regard.
22. Notwithstanding that the matter had been adjourned for the PIP’s benefit, Ms. Harrison’s affidavit of 10th August, 2020, some three days before the hearing, was in fact the next affidavit to be sworn. It referred to the “Term Loans”, and also to a bank overdraft in the sum of €4,221 to which reference was made in the accounts, but which had not been mentioned in the debtor’s PFS or the PIA itself. The affidavit did however state that the debtor had had a loan agreement and overdraft facility with the bank as far back as 2011. These accounts were closed in 2015 by means of an agreement between the debtor and the bank involving payment by the debtor of a sum of €5,000. The affidavit was heavily critical of the failure of the debtor to “provide a satisfactory explanation” in relation to these bank accounts which appeared on the face of the balance sheet.
23. In an affidavit of 12th August, 2020 – the day before the resumed hearing in the Circuit Court – the debtor submitted a final affidavit in which he stated that the term loan and overdraft did indeed refer to the accounts with the bank, and confirmed that these liabilities had been settled prior to initiation of the personal insolvency procedure. This accounted for those matters not being included in the PFS. The debtor’s explanation for liabilities for the term loan and overdraft appearing in the balance sheet was “...due to the fact that my old accountant who had and continues to have serious personal problems failed to write them off the accounts...” [para. 9]. The debtor exhibited an email of 10th August, 2020 to the PIP from the person in the accountancy firm now dealing with his tax affairs, in which that person commented that “...[m]ost creditors on the balance sheet are old figures coming forward that need to be written out of the accounts...”. The writer stated that he had “only started doing the accounts in the last 2 -3 years, it was a previous employee in here that did them. It needs to be tidied up going forward”.
24. In a subsequent email of 11th August, 2020, there was a follow-up email from the debtor’s accountant to the PIP, in which it was stated that “...the liabilities on the balance sheet really have no relevance on the accounts and all need to be removed to be honest. Some figures are going back years”. Somewhat more helpfully, the accountant forwarded the debtor’s 2019 tax return, which showed his net income to be €20,269 generating a monthly income of €1,689 per month. When the €100 per month to be contributed by his brother is added, the monthly income of €1,789 is €72 less than the net income figure of €1,861 in the PIA.
25. However, given the way in which the hearing before the Circuit Court had proceeded in such piecemeal fashion, and the most unsatisfactory attempts by the applicant to address the concerns the court had expressed, it is scarcely surprising that the Circuit Court (Her

Honour Judge Mary Enright), at the resumed hearing on 13th August, 2020, upheld the bank's objection and dismissed the PIP's application.

**The reliability of the income in the PIA**

26. Counsel for the bank characterised the question as to whether the income that the PIA suggested the debtor could be expected to earn on a monthly basis was an accurate and dependable measure of his earnings into the future as "the most serious issue" of the bank's opposition.
27. Counsel submitted that "the overarching point" of the bank's position was that the court could not be satisfied by the explanations put forward by the PIP as to the verification of the debtor's income, and was simply not in a position to discern whether the debtor was capable of meeting his obligations under the PIA. The PIP had set out in her affidavit of 10th December, 2018 in very general terms the manner in which she claimed to have satisfied herself in relation to the debtor's income, and in particular made the averments at para. 15 of that affidavit quoted at para. 14 above.
28. However, there was little explanation of how the assessment and verification to which the PIP referred in that paragraph had taken place, and the accounts which were stated to have been assessed were not produced. Indeed, the accounts which were ultimately produced by the debtor were not such as to give any confidence that reliance could be placed on them. It was submitted by counsel for the bank that it would have been a simple matter for the PIP to exhibit the documents which she examined in order to assess and verify the debtor's income. However, she did not do so, despite the fact that the Circuit Court twice adjourned the matter to allow queries relevant to the debtor's income to be addressed, preferring to deal with the queries by means of evidence proffered by the debtor, much of which was profoundly unsatisfactory.
29. Counsel for the debtor, on the other hand, complained about the manner in which these points had been raised. He submitted firstly that the notice of objection of 16th March, 2018 had not raised these points. The notice of objection is expressed in fairly general terms, and while it claims that confirmation of the proposed PIA "will not enable the Bank to recover the debts due to it to the extent that the means of the Debtor reasonably permit" and that "the Debtor is not reasonably likely to be able to comply with the terms of the proposed Personal Insolvency Arrangement...", the notice does not draw attention to the specific deficiencies of proof of income raised at the hearing. The issue paper, agreed by both counsel in advance of the hearing, also is not specific as to complaints about the substantiation of income. The issues are stated to be: -
  - "(1) Is the proposed PIA sustainable?
  - (2) Is the post PIA position sustainable?
  - (3) Does the evidence support the submission that the restructure is sustainable?
  - (4) Is the proposed PIA prejudicial to the interests of the creditor?

(5) Does the Debtor conduct and payment history justify the relief being granted?"

30. Counsel for the PIP makes the point that at no stage prior to the formulation of the PIA or the creditor's meeting was the PIP asked for details or verification of the debtor's income. Counsel submits that the trading income of the debtor was not questioned during the consultation process between the PIP and the bank pursuant to s.98 and s.102 of the Act, and that, in the circumstances, the PIP was entitled to assume that the income figure on which the repayment proposals in the PIA were based was accepted by the bank. During the exchange of affidavits, the bank complained primarily of what it contended was the poor payment history of the debtor, and the lack of verification of the contributions to the debtor's income of his siblings. It was accepted that the bank raised issues as to the documentation from the debtor's accountant proffered as corroboration of the debtor's income, including the specific points in relation to the "term loans" or the Ulster Bank overdraft, to which reference was made at the hearing. It should be pointed out however that, apart from a relatively brief reference at para. 17 of Ms. Harrison's first affidavit, the quantum of the trading income does not appear to have been an issue in the affidavits. It was also submitted that the issue paper, agreed by counsel in the week before the hearing before this Court, was in very general terms.

31. Counsel for the debtor submitted that the PIP had not only averred that she had checked the level and reliability of the debtor's income in her affidavit, but had referred to having done so in the PIA. In this regard, counsel referred to Clause 15.2 of Part IV of the arrangement, in which the PIP stated as follows: -

"15.2 The PIP has investigated certain statements made by the Debtor and has verified the information provided by examining the following documentation:

- 15.2.1 Accounts
- 15.2.2 Valuation for PPR
- 15.2.3 Valuation for Garage
- 15.2.4 Mortgage redemption statement
- 15.2.5 Online comparative vehicle valuation
- 15.2.6 Bank statements
- 15.2.7 Creditors' statements of accounts
- 15.2.8 Evidence of additional expenditure"

32. While it was fully accepted by counsel that the onus of proof in a s.115A application is on the applicant, the point was made that there is no obligation on the PIP to provide evidence of income in advance of the PIA. Counsel conceded that the bank had raised the issue of corroboration of the debtor's income in Ms. Harrison's affidavit of 30th July, 2018, when at para. 17 it was alleged that the PIP had "failed to provide this Honourable Court or the Bank with any satisfactory evidence of the Debtor's self-employed income which, by the nature of self-employment, is likely to fluctuate". However, counsel submitted that this was "a sustainability point rather than a proof point". Counsel pointed out further that, in an email of 16th February, 2018 from Ms. Harrison to the PIP in which the bank returned its proxy voting against the arrangement, the detailed reasons given in the email

for doing so did not refer to the quantum of the debtor's income, or any alleged failure to corroborate it. It was therefore submitted that the bank had "accepted" the debtor's income level at that point. The "live" issues between the parties, as set out in the affidavits, which ultimately gave rise to and formed the battleground for the s.115A application, were the two issues of the poor payment history of the debtor and the sustainability generally of the proposal, particularly given what the bank regarded as a failure to substantiate the proposed contributions of the debtor's siblings.

33. Counsel for the debtor laid heavy emphasis on the debtor's 2019 tax return, exhibited to his final affidavit, submitting that the "accounts don't matter", but that the debtor's tax return, being the formal declaration of his income to the Revenue Commissioners, must be regarded as the definitive statement of his income.
34. In relation to the discrepancy between the PFS and the PIA whereby a balance in fact due to Ulster Bank is shown as an asset in the PFS but as a liability in the PIA, counsel submitted that s.120(c) of the Act, which provides that a PIA may be challenged by a creditor under s.114 where "a material inaccuracy or omission exists in the debtor's statement of affairs (based on the Prescribed Financial Statement) which causes a material detriment to the creditor" suggested that, by analogy, an error in the PFS could only be relied upon in resisting a s.115A application where the creditor could show that it had suffered a "material detriment" as a result. As the Ulster Bank debt was recognised as a liability in the PIA and was being written off, no such detriment was suffered by the objecting creditor.

#### **Other issues**

35. The parties also made submissions in relation to the issues of affordability and sustainability. Counsel for the debtor submitted that the debtor had clearly committed every resource to the PIA and would likely be living on RLEs until the end of the restructured loan. While his payment history had been poor, at the time of the application before this court he had been making payments of €518 per month – the proposed monthly repayment under the PIA – for almost two years. While s.115A (10) required the court to have regard to the payment history within the two years prior to the PC, it is clear from the section that poor payment history is a matter which the court must consider, but is not conclusive as to whether the PIA should be approved. The debtor in his affidavits put forward a number of reasons by which he sought to excuse the poor payment history – a failure to agree suitable proposals with the bank, the diversion of work by insurance companies away from smaller garages such as the debtor's, an ongoing physical problem requiring treatment which kept him out of work – but maintained that his current payment record showed that, with the support of his siblings, the proposed repayments were sustainable.
36. Counsel for the bank submitted that the poor payment history, together with the issues surrounding the debtor's income, was such that the court could not have any confidence in the affordability or sustainability of the proposal. It was suggested that there was not sufficient evidence whereby the court could be satisfied that all of the assets of the debtor



had been brought to bear on the arrangement. The PIP had been given several opportunities to satisfy the Circuit Court in this regard, and had not done so.

**The income issue: Analysis**

37. It is the responsibility of the PIP to verify all of the information contained in a proposal for arrangement. This information is the basis upon which the creditors will decide whether or not to vote for or against a proposed arrangement, and the PIP bears a heavy onus to ensure that the information presented to the creditors is accurate.
38. To assist PIPs with their obligations, the ISI, through its Debt Solutions Protocol Steering Group has issued a document entitled "Standard Debt Solutions Protocol Principles March 2015". This document provides guiding principles for PIPs as to how a proposal should be compiled, and is updated from time to time. The current version on the ISI website emphasises the need for PIPs to verify the value of the debtor's assets; it provides an appendix setting out the "list of documents which, where applicable, a Personal Insolvency Practitioner requires from a Debtor when seeking to understand and verify the financial circumstances of the Debtor".
39. Significantly, before listing the documents which a PIP requires, the appendix states as follows: -
- "It is not intended that the Personal Insolvency Practitioner will furnish these documents to the Creditors. Where Creditors are in possession of information which contradicts that in the proposal, they will share this information with the Personal Insolvency Practitioner and may request the Personal Insolvency Practitioner to provide them with copies of some or all of the documents listed below in order to verify the information".
40. The list of documents is lengthy and comprehensive, and applies to both employed and self-employed debtors. There is a separate list for self-employed debtors, which specifies the following documents: -
- "Most recent audited/certified accounts and management accounts for year to date – where management accounts are not signed off by qualified accountant then 'year to date' bank statements and/or latest VAT returns may be sought.
  - The financial/management accounts for at least one year, or more if appropriate.
  - Copies of Revenue income tax returns for last two years.
  - A cash flow projection of at least one year, or more if appropriate."
41. Obviously, the list is a counsel of perfection, and not all documents set out in the appendix will be relevant in each case. For instance, it is perhaps unrealistic to expect that a self-employed person with a very modest income such as the debtor will maintain audited certified or management accounts on any regular or systematic basis, or perhaps

at all. Such a person may be unlikely to have the regular assistance of an accountant or tax adviser, and may or may not be registered for VAT.

42. It is not unreasonable however to expect that such a person will keep at least a rudimentary set of books to record income and expenses, and will be able to produce documentation to substantiate the recorded figures, even where cash payments may be a substantial element of the business. The debtor will have bank statements which should record his received income and expenditure. Tax returns must also be filed, and an exercise can be conducted to establish whether the returns are consistent with the receipts and expenses recorded. There will be much other documentation which even the most rudimentary accounting system will depend upon – invoices, vouched expenditure, correspondence with creditors, logs which record the work completed, and so on.
43. In the present case, the PIA lists at para. 15.2 of Part IV – quoted at para. 31 above – the documents which she examined in order to verify the information in the PIA. This statement is clearly intended to be of comfort to creditors, who may well take the view that, where a reputable PIP has conducted this level of investigation, they can take the figures in the PIA, and in particular the income figure, as being accurate. As the appendix suggests, creditors may request to see copies of the documents used for verification, and this does often occur, perhaps particularly where the debtor's income as a self-employed person is irregular, and may ebb and flow.
44. In the present case, the bank did not request any corroborating documentation, and the PIP is broadly correct in asserting that the quantum of the debtor's trading income as set out in the PIA was not the subject of controversy in the affidavits, which were mainly taken up with the debtor's poor payment history, the alleged failure of the debtor's siblings to substantiate their proposed contributions and, after the introduction of the accounts, the "term loans" matter and the issue relating to the Ulster Bank account and the discrepancy in this regard between the PFS and the PIA. However, Ms. Harrison avers in her affidavit of 10th August, 2020 that the matter had been adjourned by the Circuit Court on 11th October, 2019 "...in circumstances where this Honourable Court was dissatisfied by the evidence provided by the Debtor in relation to his income and the proposed provision of financial support by his siblings and allowed the Debtor to file supplemental affidavits in that regard..." [para. 14]. In his affidavit of 4th November, 2019, sworn in response to the invitation to do so by the Circuit Court, the debtor avers that, "...an issue was raised [in the Circuit Court] in relation to the proof before the court in relation to my income...", and exhibited the "certificate of income" from his accountant in this regard.
45. It appears therefore that the trading income of the debtor was raised as an issue to some degree before the Circuit Court, at least to the extent that the debtor swore an affidavit exhibiting his accounts by way of response. It is puzzling that it was left to the debtor to deal with queries regarding his income. The applicant to the Circuit Court was the PIP – not the debtor – and it was her obligation to verify the income figure in the first place. It was suggested by counsel for the PIP that it was more appropriate that the debtor deal

with queries as to his income, of which he alone had personal knowledge. While that may be so, the fact is that the debtor procured and exhibited accounts which not only did not corroborate his trading income figures, but included figures in the balance sheet which cast significant doubt upon the integrity of the conduct of the entire process by the PIP and the debtor. Explanations for these figures were subsequently furnished by the debtor; however, one wonders how the PIP, whose application it was, could allow accounts to be proffered by the debtor which contained errors which, if uncontradicted or uncorrected, would only serve to tarnish her application and which in any event were damaging to the PIP's case, as they raised significant doubt as to whether the process of verification which the PIP must conduct prior to formulating the PIA was properly or effectively carried out.

46. By way of summary, the following matters appear to me to be particularly relevant to the issues I have to consider:
- (1) The PIP has averred as to the substantial steps which she maintains she has taken to verify the trading income of the debtor in performing her statutory duty pursuant to s.50 (2) of the Act to examine the information proffered by the debtor in completing the PFS.
  - (2) Apart from a brief reference at para. 17 of Ms. Harrison's affidavit, the accuracy of the trading income figures was not challenged in the affidavits submitted by the bank.
  - (3) The accuracy of the income trading figure appears to have been challenged before the Circuit Court, given that that court adjourned the proceedings to allow further evidence in this regard to be submitted by the debtor, who subsequently did so. Counsel for the debtor however was adamant that the trading income figure had not been seriously challenged until the hearing before this Court.
  - (4) The bank does not appear to have sought corroboration of the trading income figure during the s.98/s.102 consultation process prior to the formulation of the PIA, nor do the affidavits filed on its behalf call for documentation to be exhibited which would demonstrate the steps taken by the PIP to verify the debtor's figures.
  - (5) However, the accounts furnished by the debtor appear to have been exhibited with a view to proving his income. The trading profit and loss account showed a net profit of €15,926 for the year ending 28th February, 2018, which would yield a monthly trading income of €1,327. A monthly trading income of €1,761 - €1,861 less the €100 contributed by the debtor's brother - was indicated in the PIA. The accounts therefore indicate a monthly trading income figure which is €434 less than the equivalent figure in the PIA.
  - (6) Explanations were furnished as to anomalies in the balance sheet relating to the "term loans" and the Ulster Bank overdraft. However, the inclusion of these items, and the acknowledgement of the accountant in his email of 11th August, 2020 to the PIP that "...the liabilities on the balance sheet really have no relevance on the

accounts and all need to be removed to be honest..." rendered the accounts utterly unreliable and unhelpful from the debtor's point of view.

- (7) The debtor did however exhibit his 2019 tax return, which shows a net monthly income of €1,728.58 per month, approximately €72 less than the equivalent figure in the PIA.
47. Counsel for the bank placed considerable reliance on the judgment of McDonald J in *In re Ciprian Varvari, a debtor* [2020] IEHC 23. In that case, the court identified shortcomings in the verification procedure relating to the income of the debtor and his wife. During the course of the exchange of affidavits in the course of the PIP's s.115A application, the objecting creditor in that case directly challenged the sustainability of the arrangement, and suggested that the debtor furnish audited accounts for the previous three years. This documentation was not forthcoming, and the Circuit Court rejected the application. The PIP appealed, and swore a further affidavit exhibiting his 2017 and 2018 tax returns. Both of these returns suggested that the true monthly income figure was substantially less than the figure indicated in the PIA. The court found that, in light of these tax returns, the averment by the PIP that the debtor was in a position to make the payments required by the PIA was incorrect. The 2017 tax return was available to the PIP when he made the averment. The court accordingly took the view that the appeal must be dismissed.
48. The court required that the PIP furnish an affidavit explaining how he could have indicated on affidavit, months after delivery of the 2017 return, that he had verified the figures and that the household income was as set out in the PIA. After two affidavits had been furnished by the PIP in this regard, McDonald J expressed the view that there was a "...complete failure in this case to take any steps to verify Mr. Varvari's income. It is deeply unimpressive that a practitioner would support an application for a protective certificate and, subsequently, put forward proposals for an arrangement on the basis of the threadbare and unverified material described in the practitioner's affidavits sworn on 10th September and 10th October, 2019" [paragraph 34]. The court was extremely critical of the PIP's averment that his firm had "'very strict' and 'considerable procedures' in place to ensure income is correctly verified", and found that, not only were these procedures not set out on affidavit, but that "...the practitioner in this case did not follow the very simple and straightforward steps envisaged under the Protocol to ascertain and verify the income of Mr. Varvari..." [also at para. 34]. The court acceded to the objecting creditor's application for costs against the PIP.
49. The analysis and exposition by McDonald J in *Varvari* of the PIP's duties and responsibilities regarding assessment and verification of the figures set out in the PIA do not require detailed repetition here. That case is a cautionary tale for PIPs, and the lessons to be learned from it require to be taken on board by all practitioners. The PIP in the present case can hardly be unaware of those lessons, as the PIP in *Varvari* is a colleague of the present PIP in *McCambridge Duffy*.
50. Counsel for the bank submits that the facts in the *Varvari* judgment closely resemble those in the present case, and that there can be no reliance on the income figure in the

PIA, as it would not appear that this figure has been verified by the PIP. It is suggested that the court has no reliable material on which to be satisfied that the income of the debtor is such that "...the debtor is reasonably likely to be able to comply with the terms of the proposed Arrangement" [s.115A (9)(c)].

51. There is one essential difference between the situation in *Varvari* and the facts of the present case. It was very clear on a perusal of the 2017 and 2018 tax returns that the total gross monthly income for both Mr. Varvari and his wife was substantially overstated in the PIA, notwithstanding the averment by the practitioner in an affidavit of 21st June, 2018 – at which point the 2017 return had been filed with the Revenue – that "current income, current expenditure, current affordability has been assessed and verified...". In the present case, it is completely unclear as to what the debtor's income is, and whether it is understated or overstated in the PIA.
52. Counsel for the PIP emphasises the averments in para. 15 of her affidavit of 10th December, 2018 which I have quoted above at para. 14, and the statement at para. 15.2 of Part IV of the PIA quoted at para. 31 above, as establishing that the PIP had assessed and verified the debtor's income. The aforementioned para. 15 of the affidavit of 10th December, 2018 – which was in response to para. 17 of Ms. Harrison's first affidavit, which complained specifically of the PIP's failure to provide, "this Honourable Court or the Bank with any satisfactory evidence of the Debtor's self-employed income..." – states that "...the Debtor's accounts have been assessed by me, verified and substantiated to my satisfaction *and indeed to the satisfaction of the creditor prior to the making of the proposal...*" [emphasis added]. This latter averment is strange for a number of reasons. Firstly, in the very same affidavit, the PIP complains that the grounds of objection relied upon by the bank were not raised in advance of the issuance of the PIA, and that there was "no proper engagement during the Section 98, Section 102 process, or during the lead-up to the issuance of the PIA proposal..." [paragraph 8]. Paragraph fourteen of that affidavit is as follows: -

"14. I say in particular response to paragraph 17 of the Objector's Affidavit again neither during the course of the Section 98 process, Section 102 process or for the entirety of the Protective Certificate including up to the holding of the creditors' meeting no question, query or documentation was either sought or requested."
53. It is very clear from these averments, and from the documentation exhibited to the PIP's affidavit relating to such contact as there was between the bank and the PIP in advance of the creditors' meeting, that the bank was not given accounts of the debtor prior to the making of the proposal, much less that they were "...assessed...verified and substantiated" to the bank's satisfaction.
54. Secondly, the PIP does not elaborate on what accounts she says were assessed by her, and were verified and substantiated to her satisfaction. No accounts are exhibited by the PIP. However, given the calamitous errors in the balance sheet and trading profit and loss account later exhibited by the debtor, it is difficult to see how accounts from the same source would have assisted the PIP in verifying the debtor's income.

55. In fairness to the PIP, the bank's approach to the issue of the reliability of the debtor's income is open to question. The bank was aware, in the period prior to the formulation of the PIA, that its vote would be decisive as to whether the proposal would be approved by the creditors. Where a debtor is self-employed, his income is likely to fluctuate, and a creditor will usually wish to be assured that the income figure on which the proposal is based is a reliable indication of the debtor's income into the future. A creditor will often ask to see the documentation by which the PIP has satisfied herself that the income figure is reliable. None of this was done by the bank; yet when the debtor issued the present application, the bank's first affidavit complained of the failure of the PIP "to provide this Honourable Court or the Bank with any satisfactory evidence of the Debtor's self-employed income which, by the nature of self-employment, is likely to fluctuate". It is also true to say that the issue of the reliability of the income figure does not feature to any significant degree in the bank's affidavits thereafter. This caused counsel for the PIP to submit that the income figure had been "accepted" by the bank; the issue of income reliability had not featured prominently in the affidavits, nor was it specifically referred to in the notice of objection or even the issue paper for the hearing before this Court. The bank never at any stage requested the documentation or records by which the PIP verified the income figure.
56. However, the PIP accepts that the Circuit Court did adjourn the matter on 11th October, 2019 to give the debtor an opportunity to furnish further evidence regarding his income. As we have seen, the balance sheet and trading profit and loss account created confusion and gave rise to legitimate queries on the part of the bank. Specifically as regards income, the profit and loss account suggested that the debtor's monthly income was substantially less than that stated in the PIA. The only substantial evidence submitted thereafter by the debtor was the 2019 tax return, which showed the debtor's income to be €72 a month less than the equivalent figure in the PIA. In any event, there is no indication as to how, or from what records, the return was compiled, and given the infirmities in the accounts proffered by the debtor, it is impossible to know whether the return, which appears to have been compiled by the same firm of accountants, is any more reliable than the accounts.

### **Conclusions**

57. The debtor is self-employed, and like all self-employed people, his income is variable, and its reliability can only be assessed over a period of time, and by the examination of books and records of the debtor which are accurate and properly maintained. When this is so, there is a particular onus on the PIP to assess the debtor's books and records and verify the figures so that the income figure in the PFS and PIA, on which the creditors will rely when deciding whether to vote for or against the proposal, is a fair representation of the trend of the debtor's earnings which may be expected over the course of the PIA.
58. The protocol principles set out by the ISI make it clear how the PIP is to discharge this onus, and if an individual debtor is not in a position to provide the records which the ISI recommend should be assessed, in my view there is a greater onus on the PIP to be able to explain why, in circumstances where the PIP cannot satisfy herself from records which

a self-employed person would be expected to have, she is satisfied that the figures which she puts forward in the PIA for income are reliable. It should be remembered that the obligation to assess and verify the debtor's figures extends not just to the PIA, but also the PFS itself. Section 50 of the Act is as follows: -

- "50. (1) As soon as practicable after the personal insolvency practitioner has been appointed under section 49 (3), the debtor shall provide information that fully discloses his or her financial affairs to the personal insolvency practitioner.
- (2) The personal insolvency practitioner, on receipt of the information referred to in subsection (1), shall examine that information and, having regard to the obligation of the debtor under subsection (3), assist the debtor in completing a Prescribed Financial Statement.
- (3) The debtor, when completing the Prescribed Financial Statement referred to in subsection (2), is under an obligation to make a full and honest disclosure of his or her financial affairs and to ensure that, to the best of his or her knowledge, the Prescribed Financial Statement is true, accurate and complete."

59. This section illustrates the obligations on the debtor and the PIP in relation to the information which will form the basis for the PIA. While the primary obligation is on the debtor to provide "true, accurate and complete" information, the PIP is obliged to examine that information, and pursuant to s.89(2) of the Act, the proposal for the PIA is made by the PIP on behalf of the debtor. It is her responsibility to ensure that the figures are accurate and may be relied upon by the creditors.
60. All creditors have the opportunity under s.98 of the Act to make submissions to the PIP as to how their debt may be dealt with in the PIA. A secured creditor specifically has this opportunity under s.102. The appendix to the protocol principles makes it clear that, while the PIP would not normally be expected to furnish the source documents to the creditor, the creditor may request copies of the debtor's documents where it is in possession of information which contradicts the information in the proposal.
61. It is unfortunate, in the present case, that the bank did not bring to the attention of the PIP, prior to the formulation of the PIA, the concerns which it clearly had about the income of the debtor, which concerns were expressed in Ms. Harrison's first affidavit in response to the s.115A (9) application. It might have been that their concerns about the basic level of income, as opposed to concerns about payment history or the siblings' contributions, could have been assuaged at that stage, and the PIP would have been unequivocally on notice that the bank regarded the debtor's income as a serious issue.
62. Having said that, the bank did express its concerns – albeit briefly – in Ms. Harrison's first affidavit, and the PIP's response was not to address those concerns, but to assert that she had thoroughly assessed and verified the debtor's income without demonstrating that she had done so. As we have seen, the PIP verified that "the debtor's accounts have been...assessed by me, verified and substantiated to my satisfaction...". The accounts

subsequently produced by the debtor were not such as could satisfy anyone as to the debtor's income, and raised the legitimate question of what accounts had been assessed by the PIP, or whether she had carried out this assessment at all.

63. While it is true that the affidavits produced by the bank were concerned mainly with the payment history of the debtor, and the alleged lack of corroboration of the siblings' contributions, and ultimately the issues raised by the accounts exhibited by the debtor, it cannot be suggested, as was submitted on behalf of the PIP, that the bank had "accepted" the income figure in the PIA. The issue of the reliability of the debtor's income was raised in the bank's first affidavit, and the PIP did not respond in any substantive way. It appears that the question of the debtor's income was raised before the Circuit Court on 11th October, 2019, and the PIP was given an adjournment to allow her to address this issue. The PIP did not produce an affidavit in response; it seems to have been left to the debtor to get his accountant to produce a balance sheet and trading profit and loss account to address the question of income. These shoddy and ill-prepared accounts had the opposite effect of what was intended.
64. Ultimately, the application was refused by the Circuit Court, and it is difficult to see how that court could have come to any other conclusion. The PIA indicated that, even with the benefit of his siblings' contributions, the repayments would likely leave the debtor living on RLEs for the duration of the restructured loan. In circumstances where the debtor's income varied from month to month, it was all the more important, in circumstances where the PIA left no room for error, for the PIP to be able to demonstrate that a certain level of income was such that the debtor was "reasonably likely to be able to comply with the terms of the proposed arrangement" as required by s.115A (9)(c). It is very difficult to understand why the task of assuring the objecting creditor and the court that the income figure was reliable was left to the debtor, and why the obvious difficulties posed by the documents produced by the debtor's accountant were not identified, and the viability of the PIP's application not assessed at that stage. In my view, there is no evidence to suggest that the debtor's income – the most important figure in the PIA in terms of assessing the debtor's ability to honour his commitments under the proposed restructured loan – has been assessed and verified by the PIP in such a manner as would give confidence as to its accuracy. None of the documentation supplied by the debtor to corroborate the income figure – the balance sheet and trading profit and loss accounts, the emails from the accountant, the 2019 tax return – gives any comfort as to the accuracy of the figure in the PIA. The court is not in a position to infer that all of the assets of the debtor have been brought to bear on the PIA. If the income figure on which the PIA is based cannot be relied upon, this Court cannot confirm the coming into effect of the PIA.
65. This conclusion is sufficient to dispose of the matter, and it is not appropriate or necessary to deal in detail with the bank's other objections. I will say however that the affidavits sworn ultimately by the debtor's brother and sister went a long way towards satisfying the court that they would make good on their commitments to the debtor. Also, while the debtor undoubtedly has a poor payment history, he has advanced particular



reasons why this was so, and seems to have made payments of €518 monthly – the amount proposed in the PIA – for a period prior to the hearing in the Circuit Court. If he has continued in this vein, it would certainly be possible in any application to court in the future that a more benign view would be taken of his payment history than would have been likely on this occasion.

66. There is one further matter on which I should comment. I was assured by counsel prior to the hearing before me that written submissions were not required for the hearing. This is perfectly normal in circumstances where the issues in the case are those of the affordability and sustainability of the arrangement, matters which can be argued from the evidence before the court without any unusual or novel issue of law arising. However, where submissions are not exchanged prior to the hearing, it is all the more important that the issue paper, which counsel agree in advance of the hearing, identifies with precision the issues before the parties, so that both sides know exactly what matters are at issue before the court. In the present case, counsel for the PIP complained that the points raised by the bank's counsel in relation to the accuracy of the income figure had not been raised in the notice of objection, or to any significant extent in the affidavits, and that the bank had never expressly asked for evidence corroborating the income figure; this objection had come "out of the blue", as it were. While, for the reasons set out above, I do not accept that the issue had not been raised and ventilated in the course of the proceedings, and I accept that counsel for the bank was entitled at the hearing to raise the reliability of the income figure as an objection, it is regrettable that the absence of submissions and the vagueness and generality of the issue paper were such that it was not absolutely clear to counsel prior to the hearing exactly what the points of contention were between the parties.
67. It is the responsibility of counsel, in advance of a hearing where they had decided that written submissions are not necessary, to ensure that the issue paper is a focused document which makes it very clear what issues are before the court. If this is not done, the court will in future give serious consideration to refusing permission to a party who has not identified an issue of contention in the issue paper to raise that issue at the hearing.
68. In the circumstances, and for the reasons set out above, I am refusing the PIP's application. The matter will be listed in the first personal insolvency list after delivery of this judgment so that submissions may be made as to the terms of the court's order.