THE HIGH COURT
CIRCUIT APPEAL

[2021] IEHC 80
Record No. 2019/542 CA

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012-2015
AND IN THE MATTER OF KEITH CREMIN OF SUBULTER, CECILSTOWN, MALLOW, CO. CORK (A DEBTOR)
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 5th day of February, 2021

Introduction

1. This case concerns an appeal of a decision of the Circuit Court of 17th December, 2019, to refuse an application by Daragh Duffy ('the practitioner' or 'the PIP'), the personal insolvency practitioner acting on behalf of Keith Cremin, 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 13th July, 2020. Mr. Keith Farry BL represented the appellant debtor, and Mr. Niall Ó hUiginn BL represented the objecting creditor, Pepper Finance Corporation (Ireland) DAC ('the objecting creditor' or 'Pepper'). Both counsel made extensive submissions, although there were no written submissions as such. The parties did agree a helpful issues paper in advance of the hearing, and I will refer to this below.

3. On the day of the hearing, I reserved judgment. Before a judgment could be completed, I was informed by counsel in November 2020 that they considered it appropriate to make further submissions to address issues relevant to the present proceedings arising from the decision of this Court *Re. New Look Retailers (Ireland) Limited* [2020] IEHC 514, delivered by McDonald J. on 14th October, 2020. At the request of counsel, I directed delivery of written submissions on behalf of the parties. Submissions were duly delivered on behalf of the objecting creditor, and the debtor replied by submissions of 14th December 2020. Counsel spoke briefly to the submissions before the court on that date.

4. As will be apparent from this judgment, some unusual and novel issues arose for decision. Before examining those issues, it is appropriate to set out the context to the application, and the factual basis upon which it is advanced.

Background

5. The creditor's meeting to consider the debtor's personal insolvency arrangement ('PIA') was held on 28th February, 2019. At that time, the debtor was forty-eight years old and married with two dependent children aged eight and two. The debtor is employed by Deerpark Motors Limited as a sales executive. There was no suggestion from the debtor during the hearing that his employment since February 2019 is under threat or that his income has diminished by reason of the pandemic, or that for any other reason he is unable to perform the terms of the PIA as presented to the creditors.

6. In the PIA, the PIP sets out the circumstances in which the debtor fell into financial difficulty. In 2002, the debtor obtained planning permission for his principal private residence ('PPR') and was subsequently approved for a mortgage of €150,000. The PPR was completed in 2005. In his affidavit of 13th December, 2019, the debtor avers that it is a four-bedroom house located in Mallow approximately 35km from Cork City.

7. The debtor states that his financial difficulties

> *"…arose due to difficulties encountered when…I set up my own business 'Keith Cremin Motors' in or around 2006. At this time I mortgaged my home, which at that point was valued at €420,000.00 in order to purchase equipment for the business. The business was a success initially however as a result of the economic recession, my business suffered and encountered difficulties paying my mortgage along with other leases and loans incurred. I attempted to trade through the difficulties and reduced staff numbers however this was unsustainable and unfortunately, I was forced to cease business in August 2008. I continued to work from home however my income was insufficient to meet all creditors. I attempted to renegotiate payments and reach settlement agreements however I was unable to continue to meet the payments."* [Paragraph 37, affidavit of 13th December, 2019].

8. The PIA recounts that, in 2010, there was a court hearing in respect of liabilities of the debtor for lease and loan commitments, resulting in a settlement for a set sum for each liability to be paid monthly by him. This continued for three years, but "*due to family circumstances the payments ceased".*

The personal insolvency arrangement

9. Ultimately the PIP was appointed by the debtor to make a proposal for an arrangement pursuant to the Act. On 5th December, 2018, an application was made to the Insolvency Service of Ireland ("ISI") on the debtor's behalf for a protective certificate, which subsequently issued from the Circuit Court on 11th January, 2019. The PIP recites in the PIA that he invited creditors to make submissions as to how their debts might be dealt with as part of the arrangement and enclosed a copy of the debtor's prescribed financial statement.

10. The PIP proposes a PIA of twenty-four months duration. It is envisaged that the debtor would pay twelve monthly contributions of €690 over the first twelve months, and twelve monthly contributions of €866 over the second twelve months. These payments, in addition to cash on hand of €6,168, comprise a total sum of €24,840. It is proposed that, from this sum, fees outlays and irrecoverable VAT of €6,404 would be paid to the PIP, and that the net funds of €18,436 would be distributed to the unsecured creditors, who are owed €173,177 in total. There would thus be a dividend of 11c in the Euro for unsecured creditors.

11. The only asset to which secured creditors could have recourse is the PPR, which has suffered a precipitate fall in value since 2006. The present agreed current market value is €185,000. The mortgage balance due to Pepper, which acquired the original mortgage

and is now the first charge holder, as of February 2019 was €300,383. Everday Finance DAC ('Everyday') holds three judgment mortgages of €11,039, €4,030 and €10,046 respectively. Ulster Bank Ireland DAC ('Ulster Bank') holds a judgment mortgage of €27,034. It is accepted for the purpose of the application that these judgment mortgages have no value as security, given that the sale proceeds of the PPR would not satisfy the first charge held by Pepper.

12. For the purpose of the PIA, Everyday is treated as an unsecured creditor. Ulster Bank did not submit a proof of debt in the arrangement, and therefore receives no dividend. Bank of Ireland has judgment against the debtor – but no security – in the sum of €32,679. Given the value of the PPR and the level of mortgage debt at February 2019, the unsecured portion of the Pepper debt is €115,383. The unsecured creditors in the PIA therefore comprise the unsecured debts owed to Pepper and Everyday, together with the Bank of Ireland debt, and it is these creditors that would receive 11c in the Euro, which would be discharged by monthly payments of €690 and €866 in years one and two of the PIA respectively.

13. Appendix 7 of the PIA sets out the proposed restructure of the mortgage in detail. As presently constituted, the mortgage involves "*interest-only*" payments of €275 per month. The debtor has kept up these payments, with the result that the mortgage is not presently in arrears, a factor which, as we will see, gives rise to considerable controversy between the parties. The capital is to be discharged by a bullet payment at the end of the term in 2025, which as of February 2019, had seventy-nine months yet to run.

14. The arrangement envisages a write-down of the secured debt in respect of the PPR to the current market value of €185,000. The debtor will make interest-only payments of €170 per month for the duration of the PIA to make available funds for the discharge of the unsecured creditors. The mortgage term will be extended to 264 months. After the two-year term of the PIA, the estimated monthly payment is €859 in respect of capital and interest at the estimated tracker interest rate of 1.1%.

15. The repayments are predicated on the figures for income and household expenses. The debtor shows net income of €3,031 per month, and set costs of €1,850. With mortgage payments of €170 per month, and other expenses and allowances including a small sum for Local Property Tax, the contribution available for unsecured creditors is estimated for the first year at €690. While the set costs may vary, we have seen that the contribution to unsecured creditors for the second year of the PIA rises to €866. These figures gave rise to controversy between the parties as to the affordability and sustainability of the arrangement.

The creditor's meeting and application to the court

16. At the creditor's meeting on 28th February, 2019, Everyday, Bank of Ireland and the Revenue Commissioners voted in favour of the proposed PIA. Pepper voted against it. As the creditors have not voted in favour of the PIA in the proportions required by s.110 of the Act, the PIP applied on behalf of the debtor to the Circuit Court for an order pursuant to s.115A(9) of the Act for an order confirming the coming into effect of the PIA.

17. The Circuit Court gave judgment on 17th December, 2019, in which it refused the application. By notice of appeal of 19th December, 2019, the PIP seeks to overturn that decision.

The objecting creditor's open offer

18. The hearing for this appeal was originally listed for 10th March, 2020. The day before the hearing, Ms. Cliodhna Walsh, the solicitor acting for Pepper wrote to Ms. Nicola Nevin, the solicitor acting for the debtor by email in relation to the matter. The text of the email was as follows: -

> *"Hi Nicola,*
>
> *As you are aware, this matter is in for hearing tomorrow.*
>
> *My client would like to make the following open offer:*
>
> - *24 month PIA.*
> - *Term extended to 264 months and to remain on tracker of 1.10%.*
> - *Debt written down to €185,000 and placed on capital and interest payments.*
> - *Warehouse of €115,383 to be treated as unsecured – match payments of 58% to clear over the course of the mortgage.*
> - *Months 1-24: Payments of €170.*
> - *Months 25-264: Payments of €859.*
>
> *This is in line with the PIP's offer but rather than an upfront write-down, the match payments allow it to happen gradually over the course of the mortgage.*
>
> *I would be obliged if you would take instructions on this and revert.*
>
> *Kind regards,*
>
> *Cliodhna."*

19. In view of this offer, the matter did not proceed on 10th March, 2020. The parties however were unable to resolve the matter by agreement, and at the hearing before me on 13th July, 2020, counsel for the debtor commenced his submissions by referring to the open letter, submitting that the similarity of its terms to those in the PIA suggested that Pepper had effectively conceded that the PIA was affordable and sustainable. This assertion was strongly contested by counsel for Pepper. I will refer to this issue below in some detail when dealing with the arguments concerning affordability and sustainability.

The affidavits

20. Before considering the issues in the case, it would be appropriate to set out in summary the matters canvassed in evidence in the affidavits before the court.

21. The PIP swore an affidavit grounding his application on 13th March, 2019. The affidavit covered the matters of which the PIP is obliged to satisfy the court in bringing such an application. In particular, in relation to the necessary requirement of establishing a "*relevant debt*" for the purpose of s.115A(18) of the Act, the PIP averred at para. 11 that "*…firstly, 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. Secondly, I say that I am satisfied that the debt is one which had arrears in compliance with s.115A(18)(b).*" While the deponent refers to "*a copy of the said proofs*", the exhibit to which he refers includes a folio for the PPR which shows the charge of Leeds Building Society – the party from whom Pepper acquired the mortgage – registered as a burden on the folio as of 15th October, 2008. There is however no separate document in the exhibit establishing that, as required by sub.18(b), "*…the debtor, on 1 January 2015, was in arrears with his or her payments…".*

22. The PIP dealt with compliance of the PIA with the requirements of the Act, averring in particular at para. 14.1 that "*…the eligibility criteria specified in Section 91 have been satisfied".* He went on to aver that the means of the debtor "*are fully maximised to ensure a full and fair return to all creditors"*, and that the arrangement was better for both the creditors and the debtor compared to the alternative of bankruptcy. He referred to the bankruptcy comparison in the PIA, and stated his belief that "*the proposal is in no way prejudicial to the interests of any creditor or any class of creditor*".

23. A notice of objection was filed on behalf of Pepper on 19th March, 2019. The objections set out in this notice formed the basis for the issues set out in the agreed issue paper, the terms of which I will set out below. The notice was grounded upon the affidavit of Caroline Loftus, a Senior Operations Manager with Pepper, of 15th July, 2019.

24. In her affidavit, Ms. Loftus complained about what she contended was the use of "*template averments which are not specific to the Debtor or to the Debtor's PIA*". She also complained of the PIP's failure to "*exhibit important corroborating documentation, such as evidence of income and expenditure, which should properly be before the Court in an application such as the present…"* [para. 4].

25. Briefly summarised, the substantive objections of Pepper to which the affidavit refers were as follows: -

    (1) As the debtor was not in arrears of his mortgage repayments to Pepper as of 1st January, 2015, the PIA did not include a relevant debt within the meaning of s.115A(18);

    (2) the debtor did not engage with Pepper in accordance with its mortgage arrears resolution process in order to arrive at a sustainable solution outside the framework of a PIA, nor could it have done so, given that the debtor was not in arrears at the time the application was made for a PIA. The debtor was therefore not in a position to comply with s.91(1)(g), which requires the debtor to make a declaration regarding cooperation with the secured creditors and the inability to agree an

alternative repayment arrangement. Further, the PIP did not avail of the alternative set out in s.91(2), whereby he can make a statement that, in his opinion, it is unlikely that the debtor would be returned to solvency within a five-year period if the debtor had entered into an alternative repayment operation of the type offered by the secured creditor concerned;

(3) the co-borrower under the mortgage, Mr. Tim Cremin, the father of the debtor, was not a party to the arrangement and no proposal had been made to restructure his liability to Pepper;

(4) the PIA is unsustainable, given that it proposes that the debtor and his family would live at a standard beneath the ISI's Reasonable Living Expenses ('RLE') guidelines "*for a protracted period of time after the PIA has completed*".

26. Ms. Loftus concluded her affidavit as follows: -

"[19] the rejected PIA aims to fundamentally alter that bargain in a manner that is prejudicial to Pepper (which would suffer a significant write-down) and to the Debtor (who would be required to forego a reasonable standard of living).

20. I say, believe and have been advised that the personal insolvency regime is not a facility to write-off negative equity or to restructure a bargain which a debtor is no longer satisfied with. It is [a] mechanism for addressing a present insolvency which arises, in whole or in part, from an inability on the part of the debtor to repay mortgage repayments as they fall due. With that in mind, I say that the present case is not an appropriate case for a personal insolvency arrangement."

27. The debtor swore a replying affidavit on 13th December, 2019. At paras. 6 and 7 of his affidavit, he avers that he "*fell into arrears*" with Friends First (from which Everyday subsequently acquired its security) and Ulster Bank in September 2009 and January 2011 respectively. Each of those entities obtained judgment against the debtor and registered it as a judgment mortgage. The use of the phrase "*fell into arrears*" may be intended to suggest an alignment of the circumstances with the requirement in s.115A(18)(b) that the debtor be, on 1st January, 2015, "*…in arrears with his or her payments…".*

28. The debtor goes on to aver at para. 8 that "*…my mortgage is interest only and whilst I have always made the payments, I have no means of covering the final balance (and thus it is unsustainable in its current format) nor both Judgment mortgages registered thereon".*

29. The debtor accepts that his co-borrower, Tim Cremin, remains liable for the debt, but that Mr. Cremin Snr. *"has been informed of the PIA, been served with the PIA, and is consenting to same whilst knowing that his liability is not affected".* The exhibited consent of Mr. Cremin Snr. however, states only that *"I am happy and give permission to restructure the mortgage that I have with Keith Cremin".* There is no acknowledgement

that he remains liable pursuant to the mortgage, or that he has received any independent advice as to his position.

30. The debtor defends the affordability and sustainability of the PIA. In particular, he makes the following points: -

- He hopes for advancement in his career, with a resultant increase in income;
- while RLE expenses may rise as his children get older, the need for full-time care for them may decrease, enabling his wife to return to employment;
- he and his wife "*budget carefully at home, socialise at home and do not drink or smoke".* The debtor sets out a number of examples of steps he and his wife take to economise in this regard;
- the margin below RLE is "*workable*", particularly given the alternative that "*the family home is at risk of repossession*". The debtor emphasises his close social and family ties to the community;
- the cost of rent of an alternative premises would be in excess of the proposed mortgage repayments. The debtor adduces evidence that the cost of an alternative premises would be €1,000;
- since the issue of the protective certificate, the debtor has been making payments in the sum of €275 per month, which are paid "*above and beyond the return specified in the PIA";*
- the comparison with bankruptcy shows a better return for creditors through the PIA, and "*has not been validly disputed and no alternative has been offered*".

31. The PIP also swore an affidavit on the 17th December, 2019 in relation to the objecting creditor's grounding affidavit. The affidavit mainly comprises a defence of the PIP's position on the affordability and sustainability of the PIA. The PIP's figures indicated, in the post-PIA situation, a margin of €57 per month left after discharge of the mortgage payment, the set costs of €1,815, special circumstance costs of €50 and a second car allowance of €250. The PIP draws attention to "*an increased safety net of €1,075.14 per month from age 66 onwards due to the State Old-Age Pension*".

32. In relation to the question of "*relevant debt*", the PIP avers at para. 11 that "*there is a debt which was in arrears prior to the 1st of January, 2015, which is secured on the PPR".* Reference is made to a s.115A(9) application in another case in September 2019 in which it is said that a judgment mortgage debt was held to be sufficient to constitute a relevant debt. As no further evidence was adduced as to the circumstances in which this alleged determination was made, and as there is no note available of the *ex tempore* judgment given in that case, I am not in a position to take this factor into account.

33. In relation to the eligibility issue, the PIP avers that "*…the MARP statement that I used was the MARP 1…I am also satisfied that I could have used the MARP override statement. I say that I have completed a new MARP statement (dated today) to ensure no issue arises"* [para. 12-13].

34. To understand these averments, and the objection to which it is a response, it is necessary to consider the terms of s.91(1)(g), s.91(2) and s.91(2A) of the Act, which are as follows: -

"91(1) Subject to the provisions of this section and this Chapter, a debtor shall not be eligible to make a proposal for a Personal Insolvency Arrangement unless he or she satisfies the following criteria –

(g) that the debtor has made a declaration in writing declaring that he or she has co-operated for a period of at least 6 months with his or her creditors who are secured creditors as respects the debtor's principal private residence in accordance with any process relating to mortgage arrears operated by the secured creditors concerned which has been approved or required by the Central Bank of Ireland and which process relates to the secured debt concerned and that –

(i) notwithstanding such co-operation the debtor has not been able to agree an alternative repayment arrangement with the secured creditor concerned, or that the secured creditor has confirmed to the debtor in writing the unwillingness of that secured creditor to enter into an alternative repayment arrangement, or

(ii) the debtor –

has entered into an alternative repayment arrangement and has, in good faith, endeavoured to comply with that arrangement, and

the personal insolvency practitioner has provided the debtor with a confirmation under subsection 2(A);

(2) the criterion referred to in subsection 1(g) shall not apply where the relevant personal insolvency practitioner confirms in writing that, having regard to the financial circumstances of the debtor as disclosed in the Prescribed Financial Statement completed by the debtor, it is the belief of that practitioner that if the debtor were to have entered into an alternative repayment arrangement with the secured creditor concerned of a type provided for in any process relating to mortgage arrears operated by that secured creditor (being a process approved or required by the Central Bank of Ireland) the debtor would be unlikely to become insolvent within the period of 5 years commencing on the date of the Personal Insolvency Practitioner giving that confirmation.

(2A) A confirmation under this subsection is a confirmation in writing by the personal insolvency practitioner that, having regard to the financial circumstances of the debtor as disclosed in the Prescribed Financial Statement completed by the debtor,

and the terms of the alternative payment arrangement referred to in subsection (1)(g)(ii), it is the belief of that practitioner that the debtor, if he or she were not to enter into a personal insolvency arrangement, would be unlikely to become insolvent within the period of 5 years commencing on the date of the personal insolvency practitioner giving that confirmation."

35. In purported compliance with this subsection, the debtor made a declaration in accordance with Clause 91(1)(g), which the PIP refers to as *"MARP [as in Mortgage Arrears Resolution Process] 1"*. Use of such a declaration was however inappropriate in all the circumstances. The debtor had not cooperated with a MARP or other process as required by the sub-section, not least because his mortgage had at no stage been in arrears.

36. The PIP attempted to overcome this difficulty by exhibiting to his affidavit a "*MARP 2"* statement, i.e. a statement complying with s.91(2) and s.91(2A). However, it is difficult to see how this statement can be aligned satisfactorily with the debtor's circumstances. Section 91(2) requires the PIP to confirm in writing that, having regard to the debtor's circumstances, it is the PIP's belief that, if an alternative repayment arrangement had been made "*with the creditor concerned of a type provided for in any process relating to mortgage arrears operated by that secured creditor…* [emphasis added]", the debtor would be unlikely to "*become solvent*" within five years. However, if there were no mortgage arrears to begin with, it is difficult to see how such a confirmation could be given, as an "*alternative payment arrangement*" only arises in the context of mortgage arrears.

37. Also, s.95(2)(b) of the Act states that, if the court, on receipt of an application for a protective certificate, is not satisfied that the eligibility criteria in s.91 have been satisfied, it "*shall refuse to issue a protective certificate*". Counsel for the objecting creditor relied on this section, saying that it was not open to the PIP to attempt to mend his hand at this stage; the application for a protective certificate is an *ex parte* application, and like all such applications, must be made with full disclosure and in such a manner as to enable the court to rely on the accuracy of any statement made by the applicant. As the court in considering whether or not to make an order under s.115A can only consider the making of such an order where it is satisfied that the eligibility criteria specified in s.91 have been satisfied – see s.115A(8)(a)(i) in this regard – the submission of a declaration by the debtor which was inappropriate for the purpose of s.91(1)(g) is, it was submitted, fatal to the present application.

38. The PIP averred at para. 14 of his affidavit that he was *"fully satisfied that the debtor would not be returned to solvency within 5 years without the PIA…". He stated that "…the Debtor has six other debts beyond the objector spread over four creditors. The Debtor cannot now meet his debts as they fall due and there is no known or likely change in circumstances that would lead me to the belief that this would occur in the next five years…there is little to no chance of the property being able to cover the debt on the*

expiry of the loan. I say that when the interest only term ends the full capital sum (€300,000) will be due and owing".

The agreed issues

39. In accordance with the usual practice, counsel for the parties submitted an agreed issue paper in advance of the hearing. The agreed issues were expressed as follows: -

"1. Relevant debt

(a) Does the PIA contain a relevant debt for the purposes of section 115A(18) of the Personal Insolvency Act 2012 (as amended) in circumstances where the debtor was not in arrears on his mortgage repayments on 1st January 2015?

2. Eligibility

(a) Does the debtor meet the eligibility requirements of section 91 of the Act?

(b) In circumstances where the Debtor is not in arrears on his mortgage, how did he come to make the required statement under section 91(1)(g) of the Act that he had participated in the mortgage arrears resolution process operated by his secured creditor?

3. Failure to address the liability of the debtor's co-borrower

(a) Is the PIA unfairly prejudicial to the interests of Pepper on account of the failure to propose a restructure of the joint liability of the Debtor and his father, Tim Cremin?

4. Sustainability

(a) Is the PIA sustainable in circumstances where, within 4 years, there will be a shortfall of €155 per month when the mortgage repayments and the Debtor's reasonable living expenses are accounted for?

(b) Is the PIA sustainable in circumstances where, when both children are in second level education, there will be a monthly shortfall of approximately €370?

5. Appropriateness of the PIA

(a) Is it appropriate to use a PIA for the purpose of converting a performing interest-only mortgage facility into an annuity mortgage with a significant write-down?"

Submissions generally

40. Both counsel made very detailed oral submissions at the hearing on the issues above, and in their written submissions in relation to the *New Look Retailers* judgment, have taken the opportunity to revisit some of these issues. I set out below a brief synopsis of those submissions, and I should make it clear that, in doing so, I have attempted to represent

fairly the broad thrust of both sides arguments, rather than attempt to rehearse every point and nuance. I have however considered all the submissions made, and have had the benefit of listening again to the digital audio recording of the hearing for this purpose.

The debtor's submissions

41. Counsel for the debtor commenced his submissions by referring to the open offer made by Pepper. I have referred to this issue at paras. 18-19 above. The essence of the offer was that, rather than an immediate write-down of €115,383 as proposed in the PIA, a payment would be made by Pepper in part-discharge of the €115,383 each time a repayment of the restructured mortgage of €185,000 was made, so that, if the debtor did not default at any stage in his repayments, both the restructured debt of €185,000 and the warehoused sum of €115,383 would be fully discharged at the end of the term. If, on the other hand, a default did occur, the as-yet undischarged balance of the €115,383 would remain due and owing by the debtor.

42. Counsel for the debtor contended that the repayment terms in the offer indicated an acceptance by the objecting creditor that the proposed repayments in the PIA were affordable and sustainable. He objected to an intimated three-yearly review by Pepper of the arrangement for the 264-month period, arguing that the only reason for this was to capture any further increase in affordability. While he conceded that the matched payments were "*somewhat benevolent*", he expressed the view that the offer amounted to a "*lifetime PIA"* – something which he contended was outside the confines of the Act.

43. In relation to the first issue above concerning relevant debt, counsel referred to the terms of s.115A(18), which for ease of reference are 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 secured creditor concerned."*

44. Counsel accepted that, in the overwhelming majority of cases, it is the PPR mortgage which is in arrears. He pointed out however that the definition of "*security*" in s.2 of the Act expressly includes a judgment mortgage, of which, as we have seen, there are two registered on the folio of the PPR in favour of Friends First (now Everyday) in 2010 and Ulster Bank in 2012. Counsel submitted that, as of 1st January, 2015, the debtor was *"in arrears"* with payments in respect of these judgments, and therefore complied with s.115A(18).

45. Counsel relied on the decision *in Re Ahmed Ali (a debtor)* [2019] IEHC 138, in which McDonald J. commented on s.115A(18) as follows: -

> *"9. It is obviously a critical component of the definition of 'relevant debt' that there should be arrears as of 1 January, 2015, or arrears before that date. Notably, s. 115A(18) does not go so far as to require that the debtor must reside in the property as of that date. For the subsection to operate, there must be a mortgage over the principal private residence of the debtor prior to 1 January, 2015. There must also be a 'principal private residence'. That term is defined in s.2 of the 2012 Act as meaning (insofar as relevant): 'a dwelling in which the debtor ordinarily resides.' Importantly, there is nothing in the definition of 'principal private residence' in s.2 to require that the debtor must reside in the dwelling as of any particular date…*
>
> *11. Thus, for the purposes of these proceedings, the property is Mr. Ali's principal private residence within the meaning of s.2. Furthermore, there is a debt secured over that property in favour of the bank. That debt was in arrears as of 1 January, 2015. In these circumstances, each of the express requirements set out in the definition of 'relevant debt' are satisfied. There is accordingly a 'relevant debt' within the meaning of s. 115A(18)."*

46. It was submitted that, as with the Ahmed Ali case, all of the constituent elements in a relevant debt as defined by s.115A(18) are present, notwithstanding that the debt "*the payment for which is secured by security in or over the debtor's principal private residence"* and in respect of which "*the debtor, on 1 January 2015, was in arrears with his …payments…"*, is not in fact the debt secured by the PPR mortgage but rather the judgment mortgages in favour of Friends First and Ulster Bank.

47. In relation to the eligibility issue, counsel conceded that the debtor's declaration for the purpose of satisfying s.91(1)(g) *"has to be incorrect*", in that the payments in respect of the PPR had never been in arrears, and that the question of cooperation with a process relating to mortgage arrears in respect of his PPR did not arise. It was submitted that the 'MARP 2' statement in purported compliance with the requirements of s.91(2) and 2(a), proffered by the PIP with his affidavit before this Court of 17th December, 2019, was the correct statement, and that the PIP had averred at para. 13 of his affidavit that he was *"satisfied that I could have used the MARP override statement. I say that I have completed a new MARP statement (dated today) to ensure that no issue arises".*

48. The text of this statement is as follows: -

> *"MARP – PIP override statement*
>
> *I Daragh Duffy…hereby confirm for the purposes of section 91(2) of the Personal Insolvency Act 2012 (the 'Act') that having regard to Keith Cremin's …financial circumstances it is my belief that if he/she have entered into an alternative repayment arrangement with his/her secured creditor(s) concerned of a type provided for in any process relating to mortgage arrears on his principal private*

residence operated by that/those secured creditor(s) (being a process approved or required by the Central Bank of Ireland) Keith Cremin…would be unlikely to become solvent within 5 years of the date of this confirmation.

Signed this 16 day December 2019 by [signature of PIP]." [Emphasis in Original]

49. The third issue relates to the alleged unfair prejudice arising from the failure to propose a restructure of the joint liability of the debtor and his co-borrower. Counsel for the debtor referred to the letter from Mr. Tim Cremin consenting in somewhat non-specific terms to the debtors' restructure of their joint mortgage, and submitted that the objecting debtors' position was adequately protected by s.116(6) of the Act which, in referring to the prohibition in ss.116(3) and (4) on the objecting creditor taking certain steps against the debtor in respect of a specified debt while the PIA is in effect, provides as follows: -

"(6) Nothing in sub-sections (3) and (4) shall operate to prevent a creditor taking the actions referred to in that sub-section as respects a person who has jointly contracted with the debtor or is jointly liable with the debtor to the creditor and that other person may sue or be sued in respect of the contract without joining the debtor."

50. Counsel referred to the thorough analysis of s.116(6) and review of the relevant case law in relation to the section by McDonald J. in *Re Rebecca Forde Egan* [2019] IEHC 889, and submitted that the sub-section clearly provides sufficient protection to the objecting creditor in that it may pursue Mr. Cremin Snr. separately in relation to the loan agreement.

51. As regards the issue of sustainability, counsel for the debtor relied on the averments of the debtor in his affidavit in relation to the steps he and his wife were taking to economise in order to ensure compliance with the repayment terms of the PIA, and his avowed determination to make the arrangement work, given what he considered to be the alternative. Counsel also referred to the averments of the PIP in this regard, citing para. 17 of the PIP's affidavit in particular:

"17. I say that this case is currently sustainable and above the RLE. I say that there is a possible 'pinch point' post PIA (but only on the basis that income doesn't increase and all matters remain the same) when the Debtor's children are both older. With an age gap of 6 years between the children this is likely to mean that one will always be sufficiently ahead that the RLE issue doesn't cause too much trouble in terms of needs/costs and it also means that ultimately that [sic] third level will be completed prior to the younger child starting. Indeed, the dynamic is such that childcare for the 8-year-old should start to ease in the short term leaving only a requirement for one child. Further, as the children get older there will be more scope for a return to employment for the Debtor's wife. In my view, there is a very small window of 'pinch point' but both now (during the PIA and directly after) there is no issue and then long term there is certainly no issue with sustainability/affordability. I fully appreciate that a contingency fund may not be

possible in those years but long term as life progresses the Debtor should be able to deal with the normalities of life. As set out elsewhere, there is third party support and funding if needed for contingencies."

52. In relation to whether or not, or to what extent, a debtor living below the standard of RLE's would be acceptable, counsel for the debtor relied heavily on the analysis of this issue in the decision of McDonald J*. Re Hurley, Hurley & Phelan* [2019] IEHC 523. In that case, the court referred to two key principles contained in the Act itself: -

"99.(2) The mandatory requirements [for a Personal Insolvency Arrangement]… are:-

(e) a Personal Insolvency Arrangement shall not contain any terms which would require the debtor to make payments of such an amount that the debtor would not have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants;

(4) For the purposes, of subsection 2(e), and without prejudice to subsection (3), in determining whether a debtor would have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependants under the Personal Insolvency Arrangement, regard shall be had to any guidelines issued under section 23."

53. Section 23(1) of the Act requires the ISI, for the purposes *inter alia*, of s.99(4), to prepare and issue guidelines as to what constitutes a reasonable standard of living and reasonable living expenses. The ISI is obliged, in preparing such guidelines, to have regard to a number of matters including "*the need to facilitate the social inclusion of debtors and their dependents and their active participation in economic activity in the State."*

54. In Hurley, the court determined – correctly in my view – that s.99(2)(e) "*does not, by its terms, prohibit an arrangement which would have the effect that a debtor would be required to live at a level below the reasonable living expenses set by the ISI pursuant to s.23 of the Act. It would have been a relatively straightforward matter for s.99(2) to so provide. Instead, what the section prohibits is an arrangement where the debtor would not have sufficient income to 'maintain a reasonable standard of living for the debtor and his or her dependents' (emphasis added). This is debtor specific. It is, therefore, necessary to consider the particular personal circumstances of the individual debtor concerned and of his or her dependents". [para. 20]*

55. McDonald J. went on to express the view, in relation to s.99(4), that the sub-section "*does not require that a 'reasonable standard of living' must be measured at the level set by the ISI in its guidelines. What s.99(4) requires is that, in determining whether a debtor would have sufficient income to maintain a reasonable standard of living for himself or herself and his or her dependants, 'regard shall be had to any guidelines issued under s. 23' (emphasis added). This plainly requires that regard should be given to the guidelines and that they must be taken into account but it does not go so far as to require that, in*

every case, the reasonable standard of living for a particular debtor and his or her family will always equate to that set in the ISI guidelines…".

56. It is for the court to determine in each case, having regard to the ISI guidelines, whether debtors will have a sufficient income under a proposed arrangement to maintain a reasonable standard of living for themselves and their dependants. Counsel for the debtor submitted that the arrangement in the present case was sufficient to satisfy this requirement.

57. As regards the final issue – the appropriateness or otherwise of the PIA – the debtor's position is that the arrangement is appropriate in all the circumstances. It was submitted that, while the debtor is not presently in arrears, there are no circumstances in which the debtor would be in a position to meet the capital repayment of €300,000 due when the mortgage term expires in 2025. The debtor is currently insolvent as he is unable to discharge the judgment mortgages, and his insolvency will come to a head when the capital payment under the PPR mortgage becomes due. Counsel submitted that the debtor was entitled to deal with the difficulty at this point, as his arrangement is in compliance with the requirements of the Act.

The objecting creditor's submissions

58. Counsel for the objecting creditor commenced by responding to the submissions of the counsel for the debtor in relation to Pepper's open offer. The suggestion that it could be inferred from the offer that the affordability and sustainability of the debtor's arrangement were accepted by Pepper was rejected. It was submitted that the essential difference between the arrangement and the open offer was that the latter did not involve an immediate write-off of the indebtedness of €115,383 over and above the value of the PPR. This sum would be gradually written-off by matched payments from Pepper over the course of the mortgage.

59. Pepper maintains its stance that the proposed PIA is neither affordable nor sustainable. However, the matched payments provide an incentive to the debtor to keep to his proposed repayment schedule for the restructured term of the mortgage, and if he does so, the warehoused debt of €115,383 will be discharged at the end of the term. If the arrangement proves unsustainable, and the debtor defaults on his payments, the remaining unpaid portion of the warehoused debt remains part of the debt, and may be recovered by Pepper if there has been an increase in value of the PPR.

60. It was submitted that the debtor needs to obtain a new protective certificate, and present a revised arrangement along the lines of the open offer. As Pepper would vote in favour of such a proposal at the creditor's meeting, the present difficulties which the objecting creditor raises regarding the relevant debt and eligibility would not arise.

61. In relation to the matters in the agreed issue paper, the objecting creditor submits firstly that there is no relevant debt. The debtor was not in arrears with his PPR mortgage payments on 1st January, 2015, and the judgment mortgage debts were one-off debts

unrelated to the PPR mortgage; it was submitted that such debts could not satisfy the requirement in s.115A(18) that the debtor was "*in arrears with his …payments…".*

62. Counsel also contended for a particular interpretation of s.115A(1)(b) of the Act. Section 115A(1) is as follows:

> *"(1) Where –*
>
> *(a) a proposal for a Personal Insolvency Arrangement is not approved in accordance with this chapter, and*
>
> *(b) the debts that would be covered by the proposed Personal Insolvency Arrangement include a relevant debt,*
>
> the Personal Insolvency Practitioner may, where he or she considers that there are reasonable grounds for the making of such an application and if the debtor so instructs him or her in writing, make an application on behalf of the debtor to the appropriate court for an order under subsection (9)."

63. Counsel submitted that s.115A(1)(b) requires the court to consider the nature of the debt that "*would be covered*" by the PIA. It was submitted that the debt that "*would be covered*" by the PIA is to be distinguished from the debt that existed before the PIA; in the present case, the judgment mortgage debts are to be treated as unsecured, so that the PIA, if approved, would not cover a debt "*the payment for which is secured by security in or over the debtor's principal private residence*…" [s.115A(18)], and in respect of which, on 1st January, 2015, the debtor was in arrears with his payments.

64. In the present case, it is proposed that Everyday (which, unlike the other judgment mortgagee Ulster Bank, proved its debt) is to relinquish its judgment mortgage as part of the PIA and receive a dividend as an unsecured creditor. In those circumstances, it is submitted that the debt of Everyday that "*would be covered*" under the PIA is an unsecured debt, and thus not capable of constituting a relevant debt for the purpose of s.115A(18).

65. In relation to the second issue, as we have seen, the debtor made a declaration pursuant to s.91(1)(g) in the following terms:

> *"Declaration of Keith Cremin*
>
> *I, Keith Cremin, hereby declare that I have co-operated for a period of at least 6 months with my secured creditor(s) in relation to my principal private residence in accordance with a process relating to mortgage arrears operated by my secured creditor(s) which has been approved or required by the Central Bank of Ireland and which process relates to the secured debt concerned and that notwithstanding such co-operation I have not been able to agree a condition, I have not been able to agree an alternative repayment arrangement with my secured creditor(s).*

I make this declaration for the purposes of the Personal Insolvency Act 2012, including, section 91(1)(g) and section 93(2)(cc) thereof.

[Signed]

Keith Cremin

Aug 29, 2018."

66. It is accepted by the PIP that this declaration was inappropriate, and the PIP has proffered a new statement in purported compliance with s.91(2). However, counsel for the objecting creditor submits that the making of this declaration, which was inaccurate and untrue is "*the beginning and end of the application*…". Section 91 makes it clear that a debtor "*shall not be eligible to make a proposal for a Personal Insolvency Arrangement"* unless he satisfies certain criteria, including those set out at s.91(1)(g). Eligibility to make a proposal for a PIA is thus assessed at the point when the debtor applies for a protective certificate. Counsel for Pepper points out that a debtor is "*guilty of an offence if he or she…knowingly or recklessly provides information which is false or misleading in a material respect*…" [s.126(1)], and this provision specifically applies to "…*an application…under s.93 for a protective certificate*…" [s.126(2)(c)].

67. Furthermore, it appears that the difficulty in this regard was pointed out to the PIP in advance of the creditor's meeting. By email of 22nd February, 2019, Pepper pointed out to a representative of the PIP that "…*the debtor did not engage with Pepper as per s91(G) [sic] – the account is up-to-date and has not entered the MARP process*…". Notwithstanding this, the PIP continued to maintain, at para. 14.1 of his grounding affidavit of 13th March, 2019 before the Circuit Court, that the eligibility criteria in s.91 had been satisfied.

68. Counsel submitted that, in these circumstances, the question of an *"override statement"* under section 91(2) does not arise, and that the integrity of the insolvency process demanded that the court could rely on the truth, accuracy and compliance with statutory requirements of applications for protective certificates.

69. Counsel for Pepper submitted that the "MARP override statement" the text of which is at para. 48 above, does not suffice to satisfy the requirements of the Act in any event. The debtor could never have "*entered into an alternative repayment arrangement…of a type provided for in any process relating to mortgage arrears on his principal private residence…*", for the simple reason that there were no such arrears. The final capital payment of €300,000 did not fall within five years of the commencement of the insolvency process by application for a protective certificate, and counsel for the objecting creditor submitted that the debtor was solvent, with no danger of becoming insolvent within five years of the date of the "*MARP 2*" statement.

70. In relation to the third issue regarding the alleged failure of the debtor to address the liability of Mr. Cremin Snr., it is submitted that the debtor does not explain or justify why

he was not "*brought into the process".* The present situation was wholly different to circumstances such as arose in Re JD [2017] IEHC 119, in which the debtor and her co-borrower husband had separated and the husband had failed or refused to make any contribution towards the mortgage repayment since the separation in 2012. In the present case, there was no indication as to the assets of Mr. Cremin Snr. As the mortgage repayments are currently being made, Mr. Cremin Snr. was unlikely to be in default as regards mortgage payments until 2025. While s.116(6) of the Act would permit Pepper to proceed against Mr. Cremin Snr. if he defaulted on the capital payment of €300,000 due in 2025, there was no visibility from the objecting creditor's point of view as to what Mr. Cremin's assets are or would be in 2025. As an interlocking debtor, he would have had to set out details of his assets and liabilities, and an informed decision could be made as to whether his assets could satisfy any amount due at that time. Accordingly, it was submitted that the PIA was unfairly prejudicial to the interests of the objecting creditor in that it did not propose a restructure of the joint liability of the debtor and Mr. Cremin Snr.

71. In relation to the fourth issue, counsel reiterated the objection expressed by Ms. Loftus in her affidavit that the debt was neither affordable nor sustainable given that it required the debtor and his family to live below RLEs for a considerable period of time. Counsel drew attention to the judgment of McDonald J. in *Re Lisa Parkin* [2019] IEHC 56, in which the court considered what the secured creditor in that case submitted was the failure of the proposals to take account of the full extent of the income which would be available to the debtor in that case after the PIA came to an end.

72. It was estimated that Ms. Parkin would have a monthly "*surplus*" in the final year of the PIA and the first post-PIA year of €358.77 after payment of "*set costs*", the mortgage repayment, local property tax and college costs for her daughter of €549.91 – see para. 56 of the judgment in this regard. In relation to the "*set costs*" of €1,506.66 which were based on the ISI RLE guidelines, McDonald J. commented as follows:

> *"…it must be borne in mind that those guidelines are intended to be applied for the duration of a bankruptcy, a PIA, or a debt settlement arrangement. They are not intended to be a measure of the expenses likely to be incurred over the course of a longer period and they are certainly not designed to apply for a lifetime. For example, they envisage an exceptionally modest sum of €0.97 per month for personal costs and an extremely modest sum of €31.34 per month for health. They are also based on very modest provision for contingencies and savings of no more than €43.38 per month. That figure for contingencies seems to me to be manifestly insufficient on a long term basis to deal with the costs every home owner incurs on a recurring basis in the upkeep and maintenance of property (even leaving aside the emergencies that occasionally arise requiring more substantial outlay such as roof repairs) …" [para. 59]*

73. It was suggested on behalf of Pepper in the present case that the PIA made no provision for common contingencies and expenses which could be expected over a 264-month

term, and that a consistent requirement to live below RLEs in order to make the monthly mortgage repayment indicated that the proposed payments of €859 per month were not affordable or sustainable.

74. In relation to the appropriateness of the PIA, the objecting creditor submitted that the PIA was "*pre-emptive*", in that it sought to forestall a specific problem which had not yet arisen, and re-write a loan contract which was performing according to its terms. There had been no engagement by the debtor with Pepper prior to his applying for a protective certificate. It was submitted that the purpose of the PIA was to achieve a dramatic and immediate write-down of the mortgage debt, rather than to deal with a genuine case of inability to discharge a mortgage debt. Counsel submitted that there was a danger of debtors, in cases of interest-only mortgages, waiting until the housing market is at its lowest point, and then seeking an *"anticipatory write-down*" by means of a PIA, rather than dealing with the mortgage debt as it falls due according to the agreement of the parties.

The 'insolvency' submissions

75. The parties in December 2020 made both oral and written submissions in relation to the interpretation, for the purpose of the Act, of the term 'insolvency'. Counsel wished to address the implications of the decision of McDonald J. in *Re New Look Retailers (Ireland) Limited* [2020] IEHC 514. In that case, the court examined the issue of whether the company was insolvent for the purposes of s.509 of the Companies Act 2014, and whether the court should exercise its discretion to refuse the appointment of an examiner. The interpretation of insolvency is relevant to the statement which the PIP now proffers under s.91(2), which is reproduced at para. 48 above.

76. In fact, it became apparent from the respective submissions of the parties that there is no difference of substance between them as to what constitutes insolvency. The Act defines the term 'insolvent' in s.2(1) of the Act as a situation where "*the debtor is unable to pay his or her debts as they fall due".* The objecting creditor submits that this definition implies "*a current inability to pay the debts*" [para. 9 written submissions]. This may be contrasted with s.509 of the Companies Act 2014, of which McDonald J. remarked in the *New Look* case at para. 64 as follows: -

> *"Section 509 (1)(a), by its own terms, expressly envisages debts that may fall due in the future. As noted in para. 49 above, s.509(1)(a) does not require that a company must be insolvent as of the date of the petition. It explicitly envisages that an application might be made in respect of a company which is likely to become unable to pay its debts. That necessarily involves an element of looking into the future. Having regard to the generally accepted meaning of the word 'likely', it seems to me that, a petitioner seeking an order under s. 509 in respect of a company, on the basis that it is likely to be unable to pay its debts as they fall due, must show that the Company concerned will probably…be unable to pay its debts at some point in the future."*

77. Counsel for the debtor does not disagree with the position set out by counsel for the objecting creditor. He submits that the appropriate test of insolvency is a "*cash flow-test*" rather than a "*balance sheet*" test, and refers to the endorsement of McDonald J. in *Re Nuzum* [2020] IEHC 164 of the cash-flow test – whether or not the debtor is unable to pay his or her debts as they fall due – in a personal insolvency context. In fact, counsel for the debtor in his written submissions expressly accepted the objecting creditor's submission that "…*there was no possible basis for the Practitioner to declare that the Debtor was facing an insolvency, attributable to his mortgage loan, in 5 years*…" [para. 13 written submissions].

78. However, the debtor does not reply on any purported insolvency due solely to his mortgage debt. His point is that, in addition to his mortgage debt, he owes some €85,000 to his creditors – Everyday, Ulster Bank, Bank of Ireland and the Revenue Commissioners – and cannot meet these debts, in addition to his monthly interest-only mortgage payment, as they fall due. On this basis, it is submitted that the debtor is "*hopelessly insolvent*", and "…*has no means of addressing this insolvency and these debts without the PIA and will not become solvent within 5 years (or at all) without the PIA*". [Paragraph 12 written submissions].

79. Counsel both referred in their written submissions to some matters already addressed in the affidavits and their oral submissions. I have taken these submissions into account in the views I express below.

Analysis of issues

80. I propose to deal with each of the issues in the order in which they are set out in the agreed issue paper at para. 39 above.

Issue No. 1: Relevant debt

81. The terms of s.115A(1), set out at para. 62 above, make it clear that the proposed PIA must include a "*relevant debt*". A relevant debt is defined at s.115A(18), the text of which is at para. 43 above. The need for the debtor to establish a relevant debt is therefore what has been termed a "*gateway*" requirement; if there is no relevant debt, the coming into effect of the PIA cannot be confirmed by the court.

82. Section 115A was inserted into the Act by s.21 of the Personal Insolvency (Amendment) Act 2015 to provide for court review of proposed Personal Insolvency Arrangements in certain circumstances. The section must be seen in the context of the obligations on the PIP in formulating a PIA as set out in s.104(1) of the Act:

> "*(1) In formulating a proposal for a Personal Insolvency Arrangement a personal insolvency practitioner shall, insofar as reasonably practicable, and having regard to the matters referred to in subsection (2), formulate the proposal on terms that will not require the debtor to –*
>
> *(a) dispose of an interest in, or*
>
> *(b) cease to occupy,*

all or a part of his or her principal private residence and the personal insolvency practitioner shall consider any appropriate alternatives."

83. The courts have considered the import of s.115A on a number of occasions, albeit in slightly different contexts. The scope and intent of the section was expressed by Baker J. in *Re JD* [2017] IEHC 119 as follows: -

> *"32 the amending legislation by which was added s.115A, affords the far-reaching power of the court to approve a PIA notwithstanding its rejection by creditors. The public interest is in is [sic] the maintenance of a debtor's occupation and ownership of a principal private residence. That social and common good is concretely referable to the continued occupation by a debtor of a principal private residence, and the power contained in the section is limited by the fact that only those persons who had a relevant debt secured over his or her principal private residence which was in arrears as defined by s.115A(18) on 1st January, 2015 could avail of this exceptional remedy. The statutory provision then must be seen as a limited protection of persons whose mortgage payments on their principal private residence fell into arrears at the height of the financial crash. Absent a 'relevant debt', a debtor may not seek to engage the jurisdiction of the court to overrule the result of a creditors' meeting: see Hill and Personal Insolvency Acts [2017] IEHC 18."*

84. Every practitioner, legal or otherwise, involved in applications pursuant to s.115A(9) knows that such applications almost invariably involve indebtedness in relation to mortgage repayments to the entity who owns or who has acquired the mortgage securing the loan used by the debtor to acquire the PPR. The issue which arises in relation to relevant debt in the present case is whether the section is concerned exclusively with debtors who are in arrears in respect of mortgage repayments to the PPR lender, or whether the concept of relevant debt may be extended to debtors who have other security, such as judgment mortgages in the present case. In order to reach a conclusion on this issue, one must examine the text of s.115A(18).

85. Section 115A(18)(a) requires firstly that there must be a debt *"…the payment for which is secured by security in or over the debtor's principal private residence…".* As counsel for the debtor pointed out, the definition of "*security*" in s.2 of the Act includes a judgment mortgage. Moreover, para.17.1 of the standard terms of the PIA states that *"… subject to s.102(7) [which has no application in the present circumstances], a Creditor who has registered a Judgment Mortgage against the Debtor is a Secured Creditor for the purposes of the Arrangement"*. It appears therefore that the judgment mortgages in favour of Everyday and Ulster Bank each constitute a debt *"the payment for which is secured by security in or over the debtor's principal private residence…*".

86. Section 115A(18)(b)(i) requires that, in addition to complying with s.115A(18)(a), the debt must be one in respect of which *"the debtor, on 1 January 2015, was in arrears with his or her payments*". The option in s.115A(18)(b)(ii) relating to participation in an alternative repayment arrangement does not arise in the present case.

87. According to the debtor's affidavit evidence, Friends First obtained judgment against him in July 2010, and registered the judgment as a mortgage against the PPR on 8th December, 2010. Ulster Bank obtained judgment against the debtor on 30th August, 2012, and registered that judgment as a mortgage against the PPR on 6th December, 2012. In the certificate submitted by the PIP pursuant to s.115A(2)(d)(i) which records the result of the vote at the creditors' meeting, it is indicated that Everyday, which has succeeded to the interest of Friends First in the judgment mortgage, voted in favour of the PIA. The certificate records Everyday as having voted as an unsecured creditor, although it describes Everyday as belonging to the "*judgment mortgage class of creditor*". It appears that Ulster Bank did not prove for its debt, and did not participate in the creditors' meeting.

88. Bank of Ireland did prove for its debt of €32,678.70, and appears to have voted as an unsecured creditor. However, it is also described in the certificate as having belonged to the "*judgment mortgage class of creditors",* and the PIP at para. 12 of his grounding affidavit refers to Bank of Ireland also as comprising part of the "*judgment mortgage class of creditors".* It would appear that this is incorrect; the folio for the PPR is exhibited by the debtor to his affidavit, and there is no indication on the folio or anywhere else that Bank of Ireland is a secured creditor.

89. The statement pursuant to the requirements of s.115A(2)(a)(ii) in which the PIP indicates the class of creditors which, pursuant to s.115A(9)(g), "*…has accepted the proposed arrangement by a majority of over 50 per cent of the value of the debts owed to the class…"*, is therefore incorrect in including Bank of Ireland in the "*judgment mortgage class of creditors".* However, no exception has been taken by the objecting creditor to this error, and it does appear that if only Everyday constitutes the "*judgment mortgage class of creditors",* it satisfies the requirements of s.115A(9)(g) in any event. There is also no challenge to the PIP's characterisation of the Revenue debt as constituting *"the excludable creditor class of creditors".*

90. Although Everyday appears to have participated in the creditors' meeting as an unsecured creditor, there was no evidence of compliance with s.108(4) of the Act which is as follows: -

> *"(4) Where a secured creditor consents in writing to the inclusion of terms in the Personal Insolvency Arrangement providing for the surrender to the debtor of his or her security upon the coming into effect of the Arrangement, that creditor shall be treated as an unsecured creditor for the purposes of this section (other than this subsection), section 110 and regulations made under section 111 and shall only be entitled to vote at a creditors' meeting as an unsecured creditor."*

91. The effect of this subsection appears to be that, once having elected in writing to surrender its security for the purpose of the PIA, the secured creditor is bound by his election and can only participate in the meeting as an unsecured creditor. No such election from Everyday was exhibited by the PIP. However, notwithstanding having the

"*judgment mortgage class of creditors*" ascribed to it, Everyday appears to have participated in the meeting as an unsecured creditor.

92. I referred above at paras. 62 to 64 to the argument on behalf of Pepper that Everyday's debt, being treated as an unsecured debt for the purpose of the PIA, is not a debt that "*would be covered*" by the PIA, and therefore that the debts that "*would be covered*" by the PIA do not include a relevant debt.

93. It is of course highly unusual that the debt which the debtor identifies as the "*relevant debt*" is to be treated in the PIA as unsecured. In the overwhelming majority of cases, the relevant debt is that owed to the creditor whose loan financed the purchase of the PPR and is secured on the PPR as a first charge. There would normally be no circumstances in which such a creditor would entertain a PIA which proposed to treat it as unsecured for the purpose of the arrangement.

94. As we have seen, the Act expressly provides at s.108(4) that a secured creditor can consent to being treated as an unsecured creditor for the purpose of voting at the creditors' meeting. We can infer from the fact that Everyday voted in favour of the PIA that it agrees to the PIA's treatment of it as an unsecured creditor. Does this treatment prevent the Everyday debt from constituting a "*relevant debt*" for the purpose of s.115A(1)?

95. The objecting creditor urges that the phrase "*would be covered by the proposed Personal Insolvency Arrangement*" should be read as referring to the character of the debts as set out in the PIA, rather than in the Prescribed Financial Statement which identifies the debts of the debtor at the outset of the insolvency process, in assessing whether or not there is a relevant debt. While this interpretation is certainly arguable, on balance I do not think it is correct. In my view, the phrase "*the debts that would be covered*" is intended to refer simply to the debts which are included in the PIA and covered by its terms. The Ulster Bank debt is an example of a debt which would not be covered by the PIA, as it was not proved by the creditor and therefore was not included in the PIA proposals, and thus would not be eligible to be considered a relevant debt. The Everyday debt however is "*covered by the proposed Personal Insolvency Arrangement*", and is treated in the PIA as an unsecured debt, a course of action recognised under s.108(4).

96. There is no express provision in the Act which prohibits a secured debt, which is to be treated for the purposes of the PIA as an unsecured debt, from constituting a relevant debt. It is clear from the definition of "*security*" in s.2(1) of the Act that a judgment mortgage is capable of constituting a relevant debt in accordance with s.115A(18).

97. It seems to me that the purpose of s.115A(1)(b) is to make clear, at the beginning of the lengthy section that sets out the mechanism for applying to court for an order which will effectively overturn the will of the statutory majority of creditors, that such an application is only available in the circumstances in which there is a relevant debt as defined in s.115A(18). I do not think that it is intended to bring about a situation where a debt that falls within the definition of "*relevant debt*" at the time of the application for the

protective certificate, subsequently ceases to comply with the definition by reason of its treatment in the PIA.

98. It would have been a relatively straightforward matter for the definition of relevant debt in s.115A(18) to make it clear that the relevant debt must be established from among the debts as they are characterised in the PIA. No such clarity is provided. In these circumstances, I am not satisfied that the presence or absence of a relevant debt must be assessed with regard to the manner in which the debts are treated in the PIA.

99. It then falls to be decided whether or not the debtor was "*in arrears with his …payments*" in respect of the Everyday debt as of 1st January, 2015. It might be thought that this phrase connotes a debtor having fallen behind in the discharge of a series of periodic payments, rather than a failure to make a single payment, such as the discharge of a judgment debt. However, having consulted four separate dictionaries as to the meaning of "*in arrears*", it seems to me that this phrase means no more than – as one dictionary defined it – "*late in paying a debt or meeting an obligation*". Neither do I consider that the use of the plural in the word "payments" necessarily signifies a periodic payment, rather than the notion of payments which may be attributable generally to one's debts.

100. I am satisfied, then, that the Everyday debt, notwithstanding its treatment in the PIA as an unsecured debt, is a debt in respect of which the debtor was in arrears as of 1st January, 2015, and that it is capable of constituting a relevant debt for the purpose of the Act.

Issue No. 2: Eligibility

101. Both parties accept that the declaration by the debtor in purported compliance with s.91(1)(g) – set out at para. 65 above – was inappropriate. Counsel for Pepper submits that the "*MARP 2*" statement now proffered by the PIP in replacement of the inappropriate declaration is also inapplicable and inappropriate for the reasons summarised at para. 69 above. It is also submitted that presentation of an inappropriate and wrong declaration to a court relying on the truth, accuracy and compliance with statutory requirements of applications for protected certificates is of itself sufficient reason to dismiss the present application.

102. I agree that both the debtor's declaration and the PIP's statement in purported compliance with s.91(2) are inapplicable and inappropriate, given that both s.91(1)(g) and s.91(2) are clearly intended to relate to situations where the debtor is in arrears in relation to mortgage arrears due to secured creditors in respect of the PPR. It is in my view absolutely clear that neither subsection could be said to apply to an outstanding judgment mortgage debt, particularly given the reference in both subsections to the "*process relating to mortgage arrears*" operated by or with the secured creditors concerned which has been "*approved or required by the Central Bank of Ireland…".*

103. As the eligibility criteria set out in s.91 appear to be mandatory *("…a debtor shall not be eligible to make a proposal for a PIA unless he or she satisfies the following criteria…*), it would appear at first sight that non-compliance with s.91(1)(g) or its alternative at

s.91(2) is fatal to the present application. However, such a conclusion would suggest that a PIA is only ever permissible in circumstances where there are the sort of mortgage arrears in relation to the PPR envisaged in those sub-sections. It does not seem to me that such a conclusion could be correct. A debtor may be grossly insolvent, and yet be in compliance with his mortgage home loan. One can easily envisage a scenario whereby a debtor has multiple unsecured debts which he is unable to satisfy, such as negative equity debts on investment properties which have been sold and the proceeds transmitted to the unsecured creditor, or credit union loans or credit card debt. If such a debtor maintained up-to-date payments on the loan secured on the family home, he is not in a position to furnish the declaration pursuant to s.91(1)(g) or the statement pursuant to s.91(2), despite the fact that, by any measure, he is clearly insolvent and without the means to discharge his debts.

104. The following objectives of the Act are set out in the long title to the Act: -

> *"(a) The need to ameliorate the difficulties experienced by debtors in discharging their indebtedness due to insolvency and thereby lessen the adverse consequences for economic activity in the State,*
>
> *(b) the need to enable creditors to recover debts due to them by insolvent debtors to the extent that the means of those debtors reasonably permits, in an orderly and rational manner, and*
>
> *(c) the need to enable insolvent debtors to resolve their indebtedness (including by determining that debts stand discharged in certain circumstances) in an orderly and rational manner without recourse to bankruptcy, and to thereby facilitate the active participation of such persons in economic activity in the State…."*

105. Bearing those objectives in mind, I would find it impossible to accept that only debtors who are in arrears in respect of their PPR loan mortgages can avail of a PIA. A debtor who is clearly insolvent and otherwise in compliance with the eligibility requirements of the Act cannot, in my view, be prevented by a strict interpretation of s.91 from availing of the means of alleviating his debt and returning to solvency in accordance with the objectives of the Act.

106. It seems to me therefore that, as far as the debtor in the present case is concerned, given that he has no arrears presently in relation to his PPR mortgage, compliance with the requirements of s.91(1)(g) or s.91(2) cannot be regarded as a necessary prerequisite of his entitlement to avail of the personal insolvency process if he is otherwise insolvent within the meaning of the Act.

107. I am urged by counsel for Pepper to take a very serious view of the submission by the debtor of a declaration pursuant to s.91(1)(g) which was plainly incorrect and untrue, and to regard the debtor's actions in this regard as "*the beginning and end of the application".* I share counsel's view as to the seriousness of the matter for the reasons set out at paras. 66 to 68 above. In normal circumstances, submission of an untrue statement,

even if this were unintended, at the stage of applying for a protective certificate when the eligibility requirements are assessed, would justify an immediate dismissal of the application.

108. However, given my finding that neither the debtor's declaration nor the PIP's statement were appropriate prerequisites of eligibility in the unusual circumstances of this case, I am inclined to take a perhaps unduly lenient view, and, while not excusing or approbating the submission of an incorrect statement, take the view that I should not dismiss the debtor's application on this ground alone.

Issue No. 3: The debt of the co-borrower

109. It is clear from the submissions that the objecting creditor accepts that there is no legal obligation on either the debtor or Mr. Tim Cremin, the debtor's father and co-borrower, to submit an interlocking application. Pepper does not dispute that s.116(6) of the Act entitles it to proceed against Mr. Cremin Snr. under the terms of the loan agreement.

110. However, as we have seen, there has been no default in relation to this loan, although the debtor claims default is inevitable when payment of the capital sum becomes due in 2025. No information whatsoever was made available to the court as to Mr. Cremin Snr's assets and liabilities, and Pepper complains that the proposed PIA marshals the assets of the debtor only, in circumstances where Mr. Tim Cremin is equally liable for the debt.

111. It seems to me that Pepper's complaint has some validity. However, as the Act does not compel the co-borrower to bring an interlocking application, and as there is no indication that Mr. Cremin Snr. is insolvent, the court should not refuse the debtor's application on the basis of a failure to include Mr. Tim Cremin in the process. However, it is in my view a factor which needs to be taken into account in the exercise of the court's discretion under s.115A(9) whether or not to confirm the coming into effect of the PIA – in effect, a matter which is relevant to the fifth of the agreed issues, which I will discuss below.

Issue No. 4: Affordability and sustainability

112. The question of whether the debtor will have sufficient income under a PIA to maintain a reasonable standard of living for himself and his dependents is a question of fact to be assessed in each case. Both the debtor and the PIP set out in detail the basis upon which they each contend that the PIA is, as the debtor puts it, "*workable*".

113. The arrangement envisages a payment of €690 per month for the first twelve months of the PIA to discharge the PIP's fees, outlay and expenses and to provide a dividend to unsecured creditors. This sum represents the entire of available income after discharge of set costs, interest-only mortgage payment, local property tax arrears, and other expenses. For the second twelve months of the PIA, this sum rises to €866 per month, an increase of €176 per month. It is not clear to me exactly how the debtor will be in a position to afford the discharge of this sum every month for twelve months.

114. At para. 21 of his affidavit, the debtor characterises "*the sum below the RLE*" as "*very slight, being the sum of €155 per month*". After outlining in detail the factors which he maintains will enable him to sustain himself and his family notwithstanding this deficit,

and emphasising the familial and social factors which the debtor maintains provide a powerful incentive to ensure the arrangement is sustainable, the debtor makes the same averments in summary at para. 35 of his affidavit as those made by the PIP at para. 17 of his affidavit, and set out at para. 51 above.

115. In his affidavit, the PIP does not address the question of how the increased payment of €866 for the second twelve months of the PIA would be met. However, he proffers a calculation of the situation post-PIA which suggests that monthly affordability would be €916, with a monthly capital and interest mortgage payment of €859, leaving a cushion of €57 per month. The PIP refers to a number of other factors which may ease the debtor's position in the future, such as an increase in income, the possibility of the debtor's wife returning to the workforce as children's requirements lessen, and the receipt at age 66 of the State Old-Age Contributory Pension.

116. The PIP summarises the perceived advantages of the PIA for both the debtor and the objecting creditor as follows: -

> *"32. If the PIA is approved, then the Debtor's 'last chance' and once in a lifetime PIA restructure has been utilised, resolving the mortgage arrears case, but also on one hand (based on the clear figures in the PIA) returning a better outcome to the creditor than bankruptcy/repossession, but also in the long run returning a performing and profitable loan to the objector, but crucially with the added protection of knowing that the Debtor can not avail of another PIA (or any adjournment of possession proceedings to meet a PIP) and with the benefit of a clawback provision to ensure that if the creditor repossesses and sells the property in the future that any of the debt written off will be still secured and protected for the objector".*

117. The term "*clawback provision*" in this averment refers to Clause 37 of the standard terms of the arrangement, which incorporates the statutory provisions of s.103(3) of the Act, which provides for the recovery by a secured creditor of the capital written off in the arrangement in the event of a sale of the secured property. The PIP urges that the PIA provides a better outcome than bankruptcy and "*…is in line with the intention and desire of government, and the overall need to resolve the mortgage arrears crisis*".

118. Section 99(2)(e) of the Act provides that "*…a Personal Insolvency Arrangement shall not contain any terms which would require the debtor to make payments of such an amount that the debtor would not have sufficient income to maintain a reasonable standard of living for the debtor and his or her dependents…".* Assessing whether or not a proposed arrangement satisfies this requirement is not a precise science. The debtor's circumstances are not set in stone, and will be subject to events and changes over the years which may improve or disimprove his prospects of adhering to the terms of the arrangement.

119. In *Re Dunne (a debtor),* [2017] IEHC 59, Baker J. stated as follows: -

"56. I consider that the scheme of the personal insolvency legislation cannot be viewed as requiring that a PIA ensure the continuing solvency of a debtor post PIA. A PIA may fail and the legislation cannot protect against unpredicted events that give rise to the failure of a PIA in its currency, or thereafter.

57. The purpose of the legislation is to provide a means of orderly debt resolution, not to guarantee continued solvency outside its timeframe…

60. …[T]he legislation does not require a PIP to formulate a PIA on the basis that it will show that the debtor will be in a position to continue to meet mortgage payments, or other costs of remaining in his or her private residence, either for the balance of the mortgage term, or for the lifetime of the debtor, or for so long as the debtor wishes to continue to reside in that premises. The obligation of the PIP is to formulate a proposal that will, insofar as it is practicable, achieve the desired result, but not guarantee that result."

120. I have reviewed the affidavits and submissions of the parties in the light of these dicta, which appear to me to express succinctly the obligation on the PIP in formulating the PIA. There is no doubt that the task of organising the family's finances to comply with the proposed schedule will be a challenging one. While there are circumstances which can occur which would increase the family's income, there is presently little or no provision for unexpected expenses which occur in any household, such as the need to replace a boiler or repair a roof. There are "*pinch points*" not just when the children are at an expensive school-going stage, but also it seems to me in the second year of the PIA itself. I am concerned that the proposed €859 per month is considerably more than any payment made by the debtor in respect of his mortgage to date.

121. As against that, there is no doubt that the debtor and his family are deeply involved in the local community, and that the debtor is committed to making the arrangement work. It appears that third-party support is available to the family in case of need or unforeseen events. It may well be that, in exercising prudent economy in the household budget in the manner set out in the debtor's affidavit, the envisaged "*cushion*" in the post-PIA situation of €57 per month may be improved, and in this way it may be possible for the debtor to develop a contingency fund which will enable the family to deal with the expense of unforeseen events.

122. I should say that I do not accept the submission on behalf of the debtor that the open offer made by the objecting creditor suggests that it has accepted the affordability and sustainability of the proposed terms. Pepper is prepared to accept these terms, but only on the basis of a "*matched payments*" system which would avoid the need for a write-off. This system would preserve the Pepper debt, whereas the PIA envisages an immediate write-off of the balance over and above the agreed valuation. I think that Pepper is entitled to maintain its objections on the grounds of affordability and sustainability if the consequence of approval of the PIA is the immediate write-off of a substantial portion of its debt. On the other hand, I am entitled to have regard to the fact that Pepper makes

an offer which involves the same payments by the debtor which it now maintains are neither affordable nor sustainable.

123. It seems to me that the implementation of the proposals will require considerable discipline and vigilance on the part of the debtor and his family in managing their finances. However, on balance I am satisfied that there is sufficient evidence before me to hold that the terms of the PIA have been formulated in compliance with s.104, and that the debtor is "*reasonably likely to be able to comply with the terms of the proposed arrangement".*

Issue No. 5: Appropriateness of the PIA

124. Section 91(1)(d) of the Act provides that a debtor is not eligible to make a proposal for a Personal Insolvency Arrangement unless he or she is insolvent. As we have seen above, s.2(1) defines "*insolvent*" as a situation where "*the debtor is unable to pay his or her debts as they fall due".*

125. In the present case, the debtor cannot argue that he is insolvent by reason solely of his liabilities under the PPR loan. He argues that he is insolvent by reason of the totality of his liabilities, amounting to approximately €85,000.

126. Of those creditors, Everyday obtained judgment against the debtor in 2010. It is owed a total of €25,115, and under the proposals will receive a dividend of €2,673. Ulster Bank is owed €27,034 in respect of the judgment it obtained in 2012, but did not prove its debt, and so will receive no dividend. Bank of Ireland is owed €32,678.70, and under the proposals will receive a dividend of €3,479. The Revenue Commissioners are due €509 in respect of arrears of Local Property Tax which will be discharged in full over the course of the PIA. Pepper itself would receive a dividend of €12,283 in respect of the unsecured portion of its debt of €115,383.

127. Of the two creditors who have judgment mortgages, Everyday's debt, owing since 2010, will be discharged under the PIA by payment of a fraction of that debt. Ulster Bank's debt, owing since 2012, will be discharged without payment. It seems clear that both creditors were not disposed to take enforcement action in respect of their debts, but were content to await a sale or refinance of the property at some point to have their debts paid and judgment mortgages discharged. There is no suggestion in the papers before me that either these creditors or Bank of Ireland, whose debt was not secured, were exerting any pressure on the debtor to discharge the debts.

128. Obviously, the debts to Everyday and Ulster Bank in particular 'fell due' a very long time ago. If the PIA is not confirmed, it would certainly appear that, in theory, steps could be taken by those creditors and Bank of Ireland to execute against the assets of the debtor, and he does not have the resources to discharge those debts. In that sense, it would appear that the debtor is indeed insolvent.

129. However, it is evident that Everyday and Bank of Ireland are willing to have their debts discharged in return for 11c in the Euro. The debt to Ulster Bank, whether by oversight

on that entity's part or otherwise, will be discharged with no dividend. One is left to infer that, if the debtor had engaged with these creditors outside the insolvency process with a view to settling his liabilities with them, it is quite likely that he could have done so for very modest sums which would have been compatible with his resources.

130. One can easily imagine a situation where a debtor has no arrears in relation to his PPR mortgage, but has crushing debts to creditors who are exerting overbearing pressure on the debtor to make repayments which he does not have the means to satisfy. In such a situation, one can readily envisage such a debtor seeking the protection of the court in order to see whether proposals could be made to alleviate his situation. However, the debtor in the present case is under no such pressure, and this gives rise to the suspicion that, while he may technically be insolvent, his historic debts are being used to contrive a situation where he can achieve a sizeable write-down of the PPR debt in circumstances where he is not in arrears as regards the PPR loan, and any apprehended default is in the future.

131. In this regard, it is significant that no approach appears to have been made prior to the application for a protective certificate by the debtor to Pepper to explore the concerns which he undoubtedly held in relation to what he saw as the inevitability of being unable to discharge the capital sum of €300,000 in 2025. It may be that a 'cards on the table' approach from a debtor genuinely concerned about default in the future would have met with a sympathetic response, and discussions or proposals for a more manageable structure for repayment. In fact, counsel for Pepper made it clear that, while implacably opposed to the proposals as presently constituted, Pepper remains willing to investigate with the debtor ways in which his perceived problem can be alleviated, and that the open offer which it made remains available for agreement or negotiation.

132. I also regard it as significant that no interlocking proposal has been made by Mr. Tim Cremin, the co-borrower, or that his solvency or assets and liabilities are not otherwise addressed. While, as I have noted above, confirmation of the arrangement would not affect Pepper's rights as against Mr. Cremin Snr. pursuant to s.116(6), Pepper cannot assess the debtor's application with regard to the position of Mr. Cremin Snr. in relation to his assets and liabilities, notwithstanding that he is a co-borrower and equally liable under the loan. The debtor proposes a very substantial write-off of the debt to Pepper, in circumstances where there is no visibility as to the means of the co-borrower, or his ability to contribute to or underwrite the proposed repayments.

133. Pepper considers that the proposals are premature, in that no default in respect of the PPR loan has yet occurred, and that the debtor wants to re-write a loan contract which is performing according to its terms in order to achieve a substantial write-off of debt, in circumstances where Pepper does not consider that the proposals under which the debtor seeks to repay the written-down balance of €185,000 are affordable or sustainable. Pepper submits that the proposed arrangement is not fair or equitable, and that it is unfairly prejudicial to the interests of Pepper.

Conclusions

134. It will be apparent from the foregoing that I am satisfied that the debtor has established a relevant debt, and that he is eligible to make a proposal for a PIA. I have also formed the view, despite some misgivings, that the debtor is reasonably likely to be able to comply with the terms of the arrangement.

135. However, it seems to me that the complaints of the objecting creditor in relation to the appropriateness of the arrangement are justified. The debtor is in compliance with the terms of his loan with Pepper. He has other debts, although there is no evidence of any pressure exerted by the creditors concerned to collect those debts. The debtor may be said to be insolvent, but the PPR loan has not caused or contributed to this insolvency.

136. The objecting creditor will suffer a very significant write-off of its loan amount if the proposals are approved, notwithstanding that there is no default in repayments. In this way, it is affected by the proposals in a manner, and to a degree, in which no other creditor is affected. The proposals appear to have been put before the creditors without any prior consultation with the creditor whose rights were to be most significantly diminished as a result of the proposals, and entirely without regard to the position of the co-borrower who is equally liable for the PPR debt.

137. I should perhaps emphasise that I do not suggest that the debtor has acted improperly or in bad faith. There is no doubt that the debtor is genuinely concerned at what he sees as the inevitability of being unable to meet the capital repayment of the PPR loan in 2025, and wishes to take steps to get his finances under control.

138. However, it seems to me that there is a fundamental unfairness in imposing on the objecting creditor a very substantial write-off of a loan which is performing and in respect of which no default arises, particularly where there are no other pressing insolvency issues. The debtor's application is at best premature; if indeed he defaults in payment of the capital sum in 2025, the PPR loan will at that stage be causative of his insolvency and an application for the protection of the court to see if proposals can be formulated may well be appropriate at that stage. As Mr. Cremin Snr. would also then be in default, it may be that his situation could usefully be addressed at that time.

139. It is in the interests of all parties that a solution to the debtor's financial difficulties be found, and I welcome the assurance of counsel for the objecting creditor that it remains open to negotiating a restructure of the PPR loan with the debtor. I think it would not be appropriate for me to express any view in relation to the open offer that was made by Pepper, but it may be that it could form the basis for negotiation between the parties.

140. In all the circumstances, I do not consider it appropriate to make an order confirming the coming into effect of the proposed arrangement. As this judgment is being communicated electronically, I will list the matter for the first Monday 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.