[2020] IEHC 23

THE HIGH COURT
CIRCUIT APPEAL
DUBLIN CIRCUIT
COUNTY OF DUBLIN

[2019 No. 63 C.A.]

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

JUDGMENT of Mr. Justice Denis McDonald delivered on 27 January, 2020

The issue before the court

1. This judgment deals with an application by an objecting creditor, Tanager DAC ("*Tanager*"), for costs against a personal insolvency practitioner in connection with an unsuccessful appeal by the practitioner from an order made by the Circuit Court on 12th February, 2019 refusing the practitioner's application under s. 115A (9) of the Personal Insolvency Act, 2012 ("*the 2012 Act")* as amended by the Personal Insolvency (Amendment) Act, 2015 ("*the 2015 Act*").

2. In summary, the application by the objecting creditor is made on the following grounds:-

   (a) In the first place, it is alleged that the practitioner did not carry out adequate due diligence to establish the income position of the debtor and did not exercise his own independent function to satisfy himself in relation to the debtor's income such that the original application before the Circuit Court was moved on a false premise as to the extent of the household income available to sustain the proposed arrangement, the subject of the s. 115A application:-

   (b) Secondly, it is alleged that the practitioner determined to pursue an appeal to this court notwithstanding that it was apparent to him (at the latest within 13 days of filing the notice of appeal) that the earnings of the debtor and his wife fell significantly short of the household income on which the proposed arrangement had been predicated. It is submitted by the objecting creditor that, in those circumstances, the appeal was doomed to fail and, manifestly, ought not to have been pursued by the practitioner.

Background

3. On 22nd June, 2017, a protective certificate was issued by the Circuit Court in respect of the debtor, Mr. Ciprian Varvari. The practitioner, Mr. Daniel Rule of McCambridge Duffy ("*the practitioner*") subsequently formulated proposals for a personal insolvency arrangement which were unsuccessfully put before creditors at a meeting on 29th August, 2017. Two creditors (representing 4.9% of the total debt owed by Mr. Varvari) voted in favour of the arrangement. However, the objecting creditor, Tanager, which holds security over the family home of Mr. Varvari (his principal private residence for the purposes of s. 115A) voted against the arrangement. The debt owed by Mr. Varvari to Tanager represents 95.1% of Mr. Varvari's overall indebtedness

4. As Appendix 2 to the arrangement makes clear, it was formulated on the basis that the entire household income (i.e. the income of Mr. Varvari and of his wife) amounted to

€3,218.00 per month. This equates to €38,616.00 per anum. This was based on what was described as the net self-employed income of Mr. Varvari of €1,458.00 per month and the net monthly income of his wife of €1,760.00 per month. In this context, although no arrangement was proposed in respect of Mr. Varvari's wife, the practitioner, quite properly, included her income in the stream of income available to service the mortgage debt owed to Tanager. This is in accordance with s. 104 (1) and s. 104 (2) of the 2012 Act. Under s. 104 (1), a practitioner is required, in formulating a proposal for an arrangement (on terms that will not require a debtor's principal private residence to be disposed of), to have regard, *inter alia,* to the ability of other persons residing with the debtor to contribute to the costs of the debtor remaining in occupation of the principal private residence.

5. In proceedings under the 2012-2015 Acts, it is crucial that accurate information is provided in relation to the means of a debtor. At the very start of the process, a debtor is required to execute a Prescribed Financial Statement ("*PFS*") in which accurate information must be provided in relation to the assets, income and liabilities of the debtor. The PFS is then circulated to the creditors of the debtor so that they can make informed judgements when considering any arrangement proposed on behalf of the debtor by a personal insolvency practitioner. In this case, according to para. 15.2 of Part IV of the proposed arrangement (dealing with the "*debtor-specific terms of the arrangement*") the practitioner stated that he had investigated certain statements made by Mr. Varvari and that he had "*verified the information provided by examining the following documentation:…Self Employed Income …*". This statement appeared in s. 15 of Part IV of the arrangement where the practitioner set out his comments on the proposed arrangement.

6. Furthermore, in para. 15.5 the practitioner stated that, from the investigations carried out by him as outlined in para. 15.2, he could:-

> *"…confirm that the Debtor's true position as to assets and liabilities does not appear in any material respect to be different from those presented…".*

7. In addition, at note 1 to Appendix 2, the practitioner stated that the income of Mr. Varvari was:-

> *"…based on information provided by the Debtor's accountant. The Debtor is currently self-employed and is projected to earn €18,000 gross in 2017".*

8. At a much later stage in the proceedings (after I had indicated at a hearing on 20th September, 2019 that the appeal would have to be dismissed) it emerged that the information relied upon by the practitioner in support of the statements summarised in paras. 5-7 above comprised a very short letter dated 31st March, 2017 issued by Mr. Varvari's accountant in the following terms:-

> *"I confirm that Ciprian Varvari … . His estimated income for 2017 from self-employment will be around €18,000."*

9. The only other investigation that was carried out by the practitioner in relation to Mr. Varvari's income involved a telephone conversation which subsequently took place between an assistant to the practitioner and Mr. Varvari's accountant on 3rd April, 2017 in which it was confirmed with the accountant that the figure of €18,000 is after tax net income. The practitioner stated that Mr. Varvari had "*declared his income*" in the PFS. This figure of €18,000 was then used in the PFS made by Mr. Varvari on 18th May, 2017 and confirmed by him in a statutory declaration in accordance with the requirements of the 2012 Act.

10. Insofar as the income of Mr. Varvari's wife is concerned, it emerged from an affidavit sworn by the practitioner in October 2019 that he had obtained weekly payslips for Ms. Varvari in respect of a sixteen-week period running from 15th September, 2016 to 2nd February, 2017. These payslips suggested that Ms. Varvari earned €1,759.97 per month which equated, in round terms, to the figure given in Appendix 2 to the arrangement.

11. It is important to keep in mind that none of the information summarised in paras. 8-10 above was known to the creditors at the time of the creditors meeting to consider and vote upon the proposed arrangement prepared by the practitioner. As it happens, the arrangement was not supported by a majority of creditors. Therefore, the only way in which the arrangement could come into effect was on the basis of a successful application under s. 115A.

12. After the proposed arrangement was rejected by a majority in value of the creditors of Mr. Varvari, the practitioner made an application (pursuant to notice of motion dated 11th September, 2017) to the Circuit Court seeking an order pursuant to s. 115A (9) of the 2012 Act (as amended by the 2015 Act) confirming the coming into effect of the proposed arrangement. A notice of objection was filed on behalf of Tanager. In the course of the proceedings in the Circuit Court, a number of affidavits were sworn on behalf of Tanager by Mr. Patrick Mabry in support of Tanager's objections. In Mr. Mabry's second affidavit sworn on 31st August, 2018, he suggested that, in order to assess the sustainability of the proposed arrangement, it was necessary that Mr. Varvari should furnish a copy of his audited accounts over the course of the previous three years. In para. 7 of his affidavit he said:-

> *"In light of the Debtor's repayment history and the Objecting Creditor's concerns in relation to sustainability, I say and believe that it is incumbent on the PIP or, indeed, the Debtor to furnish a copy of the Debtor's audited accounts for the past three years, as well as copies of any relevant income projections…in order to allow sustainability to be assessed. Moreover, given that the PIA is entirely contingent on repayments from the Debtor's wife, it is not unreasonable to expect that full disclosure would be made of her financial circumstances."*

13. Although Mr. Mabry's affidavit was sworn on 31st August, 2018, there was no replying affidavit filed until the eve of the Circuit Court hearing on 12th February, 2019. On the day prior to that hearing, Mr. Varvari swore an affidavit in which he suggested, in para. 8 that he had "*obtained stable employment*". However, this was not consistent with the

terms of the proposed arrangement in which Mr. Varvari was described as self-employed. At that point, there was insufficient time for Tanager to respond without putting the hearing date in jeopardy. I was informed by counsel for both sides that, at the hearing before the learned Circuit Court judge on 12th February, 2019 counsel for Tanager drew attention to material available on a "*LinkedIn*" page for Mr. Varvari which suggested that he had a number of sources of potential income. Having considered all of the evidence before her, the learned Circuit Court judge dismissed the application under s. 115A (9) and made no order as to costs. However, it was indicated in the course of the hearing that, in the event of an appeal, Mr. Varvari intended to make a further affidavit in which he would explain himself in relation to his income. Thereafter, on 21st February, 2019 a notice of appeal dated 14th February, 2019 was filed in the office of the Dublin Circuit Court. Mr. Varvari subsequently swore an affidavit on 25th February, 2019. In para. 4, he stated that the purpose of the affidavit was to "*satisfactorily evidence my income and clarify the issues raised by the Objecting Creditor"* at the hearing of the application before the Circuit Court. A copy of his tax returns for 2017 and 2018 were exhibited to his affidavit. The tax return for 2017 was prepared on behalf of Mr. Varvari and his wife. It shows two sources of income for Mr. Varvari, both a self-employed income with gross trading profit of €19,350 for the 2017 tax year and also a PAYE income of €2,369 for the same period. Those figures are not significantly out of line with the projected net income for Mr. Varvari as set out in the proposed arrangement. However, the income for Ms. Varvari was significantly less than the income set out in the proposed arrangement. The total income in the tax return for the 2017 tax year from Ms. Varvari was €7,150. The total gross income for both Mr. Varvari and his wife for the same period was €24,276 which represents a monthly income of €2,023 per month. This is substantially less than the monthly income stated in Appendix 2 to the proposed arrangement of €3,218.00 per month (on which the sustainability of the proposed arrangement was based).

14. The 2018 tax return showed increased income for Mr. Varvari and also increased income for his wife. However, their total taxable income was €33,564 which equates to €2,797 per month. This is €421 per month short of the figure given in Appendix 2 to the proposed arrangement for the total household income. However, this is on a gross basis. In fact, the net income figure for the 2018 tax year appears to be €30,770.28 (when the total tax liability of €2,793.72 is taken into account) which would equate to a net monthly household income of €2,564.19. This would mean that the total household monthly income for 2018 was €653.81 per month short of the figure of €3,218.00 set out in Appendix 2.

15. It is important to record at this point that, during the course of the Circuit Court proceedings, the practitioner, in an affidavit sworn on 21st June, 2018, confirmed, in para. 12, that Mr. Varvari's "*current income, current expenditure, current affordability has been assessed and verified*". He also said in para. 21 of his affidavit that:-

> *"Finally, I say and believe that the PIA clearly sets out that the Debtor's household income is €3,218 and expenditure is €2,328 and thereafter there is an affordability*

of €890 which clearly shows that the Debtor is in a position to comply with the terms of the PIA and make the payments as specified".

16. That was the evidence which the practitioner placed before the Circuit Court. It was also the evidence which he placed before this court for the purposes of the appeal from the Circuit Court. In light of the contents of the tax returns for the 2017 and 2018 tax years, it is quite clear that these averments by the practitioner are wrong. It is important to note that, as of the date of swearing of this affidavit by the practitioner in June 2018, the tax return for the 2017 tax year had already been filed with Revenue. It is clear from exhibit "*CV-01*" to Mr. Varvari's affidavit sworn on 25th February, 2019 that the return was submitted on 1st February, 2018. However, the 2018 return would not have been available at that time. In this context, I cannot see any date on the 2018 return in exhibit "*CV-01*".

17. That was the state of the affidavit evidence when the appeal came on for hearing before the court on 22nd July, 2019. During the course of that hearing, counsel for Tanager drew attention to the discrepancy between the figures shown in the 2017 tax return for the combined household income for Mr. Varvari and his wife and the figures shown in Appendix 2 to the proposed arrangement. Although this is an appeal from the Circuit Court (which is heard on the evidence which was before the Circuit Court) I decided, in fairness to Mr. Varvari, that an opportunity should be given to him to explain the position on affidavit. I directed that any such affidavit should be filed not later than 6th September, 2019 and that the hearing should be adjourned to 20th September, 2019. Thereafter, despite the efforts of the solicitors for the practitioner, no further affidavit was filed by Mr. Varvari. When the matter came on for further hearing before me on 20th September, 2019, I heard additional arguments from counsel for the practitioner and counsel for Tanager. In light of the fact that the 2017 and 2018 tax returns showed a significantly lower household income than that required in order to meet Mr. Varvari's obligations under the proposed arrangement, I came to the conclusion that the proposed arrangement was not sustainable. I therefore indicated that the appeal would have to be dismissed. However, I also indicated that it was crucial that the court should be in a positon to rely on averments made by a practitioner and that I was very concerned that the practitioner in this case had sworn an affidavit in June 2018 in which he had suggested that he had carried out a process of assessing, verifying and substantiating the income and that the proposed arrangement set out the household income correctly at €3,218. Given the contents of the tax return for 2017 which shows very significantly lower figures, I indicated that an explanation was required on affidavit from the practitioner to explain how, in those circumstances, he could have said, several months after the delivery of the 2017 tax return, on affidavit, that he had verified the figures and that the household income was as set out in the proposed arrangement. In the same affidavit sworn in June 2018, the practitioner had deposed in para. 16 that the payments specified under the arrangement "*are tailored to the exact means of the Debtor as they currently stand and will remain based on my assessment of their income and expenditure."* Thus, his affidavit gave the very clear impression that the figures set out in

Appendix 2 to the proposed arrangement had been appropriately assessed and verified by the practitioner.

18. In the circumstances, I deferred making any final order in relation to the appeal to await a further affidavit from the practitioner explaining what had occurred. Two affidavits were sworn by the practitioner. In fact, the first of those affidavits appears to have been in existence prior to the hearing on 20th September, 2019 although it was not produced to the court on that day. This is an affidavit sworn on 10th September, 2019. In that affidavit (which was in quite short form) the practitioner stated in para. 4 that, at the very outset of the process, Mr. Varvari had provided him with evidence of his income and his wife's income. However, the only material exhibited in support of this averment was the letter from the accountant of 31st March, 2017 which simply provided an estimate of the income for 2017 looking forward. It fell far short of evidence of income. It was no more than an estimate.

19. There is a further unsatisfactory aspect to the affidavit sworn by the practitioner on 10th September, 2019. In para. 6 of this affidavit, the practitioner referred to the PFS which was signed by Mr. Varvari on 18th May, 2017. As noted above, this showed monthly income of €1,500. It provided no evidence as to the overall household income. On p. 4 of the PFS the figure of *"0.00"* was shown in respect of: "*Contribution from household members"*.

20. Notwithstanding this, in para. 7 of the affidavit, the practitioner stated that:-

> *"On the basis of the evidence provided by the Debtor in respect of his household income and Prescribed Financial Statement that I prepared a proposed Personal Insolvency arrangement which was sought to be approved in these proceedings".*

21. That averment on the part of the practitioner is manifestly inaccurate in that the material exhibited at paras. 4 and 6 (described in paras. 18-19 above) did not in fact provide any information about the total household income and in particular provided no information about the income of Mr. Varvari's wife. Furthermore, the averment ignores the vital role and responsibility which the practitioner has under the 2012-2015 Acts in relation to the PFS to be completed by a debtor. In the first place, while s. 50 (1) requires the debtor to provide to the practitioner *"information that fully discloses his or her financial affairs*", the practitioner is required under s. 50 (2) to examine the information provided by the debtor and, having regard to the obligation of the debtor to make full and honest disclosure of his or her financial affairs, to assist the debtor in completing the PFS. This clearly envisages that the practitioner will scrutinise the information provided by the debtor and assist in ensuring that the debtor makes a complete and honest disclosure of his or her financial affairs. This is strongly reinforced by the provisions of s. 54 (a) under which a practitioner is required to make a statement confirming that he or she is of the opinion that the information contained in the PFS is complete and accurate. As counsel for Tanager submitted, in the course of the costs hearing, this obligation would be entirely otiose if all the practitioner was required to do was to take at face value the information contained in a debtor's PFS.

22. Remarkably, in para. 9 of this affidavit the practitioner stated:-

> *"I say that at the time of the swearing of my Replying Affidavit on the 21st June, 2018, based upon the evidence provided to me by the Debtor, that my averments in the Replying Affidavit reflected my assessment of the Debtor's income at the time of swearing of that Affidavit".*

23. It should be recalled, at this point, that in that affidavit of 21st June, 2018 the practitioner had sworn that the household income was as set out in the proposed arrangement and had given the impression that this had been verified by him as at the date of swearing of the affidavit. However, the material described in paras. 4-6 of the practitioner's affidavit does not provide any evidence of household income of that scale. As noted previously, the material comprises no more than an estimate of Mr. Varvari's future income for 2017. The material contained no information whatsoever in relation to the income of Mr. Varvari's wife. Again, it should be recalled that the affidavit suggests that an assessment had been made by the practitioner of the household income. It was impossible to see, on the basis of this affidavit sworn on 10th September, 2019 that any assessment was carried out. Furthermore, as explained in para. 21 above, it is not appropriate for a practitioner to simply rely upon the material contained in the PFS of a Debtor. On the contrary, as outlined above, the practitioner has an obligation under s. 54 (a) of the 2012 Act to consider whether the information contained in a PFS is complete and accurate.

24. In para. 12 of the affidavit sworn on 10th September, 2019, the practitioner addressed the 2017 tax return of Mr. Varvari. He said that this tax return was not provided to him prior to February 2019 when Mr. Varvari swore his affidavit of 25th February, 2019. That is also a remarkable averment. It entirely undermines the suggestion made in the practitioner's affidavit sworn in June 2018 that he had assessed the income. It seems quite extraordinary that he would not have sought any relevant tax returns prior to swearing the affidavit in June 2018. This is particularly so in circumstances where, in the next paragraph of his affidavit the practitioner extols the practices of his firm and suggests that they are superior to those of other practitioners. What he says in para. 13 is as follows:-

> *"I say and believe that this firm has very strict and considerable procedures in place to ensure income is correctly verified. I say and believe that we are one of the only PIP firms to expressly set out what documents and evidence we rely upon in the PIA. I must however note that in self-employment cases precise confirmations of monthly income is more difficult that (sic) regular capital PAYE income."*

25. This averment must be seen together with para. 16 of the practitioner's affidavit where he helpfully exhibits, for the benefit of the court, the Protocol put in place under the aegis of the Insolvency Service of Ireland ("*ISI*") in March 2015 dealing with, *inter alia*, the verification by a practitioner of information contained in a proposed arrangement. This Protocol is the result of work done by a steering group which appears to have had input

from all relevant interests in the insolvency process including creditors and practitioners. Under Clause 2.1 of the Protocol, it is expressly stated that, by accepting it, both practitioners and creditors agree to follow the processes and use the agreed documentation that forms part of the Protocol. Practitioners indicate their acceptance of the content of the Protocol by drawing up a proposal which is based on the standard documentation and which states that it follows the Protocol. The arrangement proposed in this case was expressly stated on the first page of the executive summary to be a standard arrangement following "*Protocol Version March 2015".*

26. Under Clause 11.1 of the Protocol, income for a PAYE or self-employed debtor is to be verified by a practitioner in accordance with the requirements of Appendix 3. Appendix 3 sets out a list of documents which, where applicable, a practitioner should require from a debtor when seeking to understand and verify the financial circumstances of the debtor. In the case of employees, these include the most recent P60 along with three payslips. In addition, where a person is paid weekly, it is suggested that three months' payslips should be obtained. In the case of a self-employed debtor, Appendix 3 indicates that a practitioner should obtain the most recent audited and certified accounts and management accounts for the year to date and copies of revenue income tax returns. Thus, it is clear that the practitioner, in this case, notwithstanding what he said in para. 13 of his affidavit sworn on 10 September, 2019 (quoted above), did not, in fact, verify the financial circumstances of Mr. Varvari in the manner envisaged by the Protocol under which the arrangement in this case was expressly put forward to the creditors of Mr. Varvari for approval and, subsequently, to the Circuit Court and to this court on appeal.

27. At para. 14 of his affidavit the practitioner said that he was "*unhappy that the income was not as per my verifications when the matter finally ended up before this Honourable Court." In the same paragraph he also said that he was: "firmly of the view that this should not have occurred and I operate my practice to ensure the full means of all Debtors is brought to bear on a PIA. I apologise for this having occurred*." Again, it is impossible to understand how the practitioner can say that he is unhappy that the income of Mr. Varvari was not "*as per my verifications".* There is nothing in the affidavit of 20th September, 2019 to establish that the practitioner undertook any measure of verification of the figures presented to him by Mr. Varvari. No underlying documentation (such as accounts or tax returns) were sought or obtained by him prior to formulating the proposed arrangement or placing it before creditors for their consideration.

28. When the matter next came before me on 17th October, 2019, the affidavit sworn on 10th September, 2019 was brought to my attention for the first time and presented to me as though it had been sworn in response to the direction given by me on 20th September. My attention was not drawn to the date of swearing of the affidavit. Having considered the averments made by the practitioner (as outlined above), I indicated that the affidavit was plainly unsatisfactory and did not properly explain that position. I directed that a further affidavit should be filed. Thereafter on 31st October, 2019, a further affidavit was sworn by the practitioner which addressed, for the first time, the steps taken by the practitioner to assess the income of Mr. Varvari's wife. In para. 5 of this affidavit the

practitioner explained that he was provided with sixteen weekly payslips for Ms. Varvari which showed that the average weekly income was of the order of €406.46 per week. By my calculations this would equate to a yearly income of the order of €20,845.22 which is slightly less than the yearly income shown for Ms. Varvari in Appendix 2 to the proposed arrangement (€21,120).

29. With regard to the income of Mr. Varvari, the practitioner in this affidavit again referred to the letter from the accountant to Mr. Varvari of March 2017 and to the telephone call which took place thereafter on 3rd April, 2017 (both of which have been described above). It is clear from the affidavit that no other steps were taken by the practitioner to verify the income of Mr. Varvari.

30. In para. 7 the practitioner said as follows:-

> *"I say and believe that verification of a Debtor's income who is self-employed is, by its nature, a more complex exercise than it is for a PAYE worker. I say and believe that when trying to ascertain the income of a self-employed Debtor, I am of the opinion that the best way to do this is to rely on the professional services of an accountant. When a professional accountant provides income projections, I rely on these as they are from a qualified professional. This is similar to when a valuer provides a valuation of the property, a PIP relies on the information being given to them by a professional person in their capacity".*

31. At para. 8 of his affidavit, the practitioner referred again to the PFS and said, at para. 9, that on the basis of the "*evidence*" provided by Mr. Varvari and his accountant, he prepared the proposed arrangement. In para. 11 of his affidavit, he said that, at the time of the swearing of his affidavit on 21st June, 2018, the affidavit reflected his "*assessment of the Debtor's income at the time of swearing of that affidavit*" and was based on the "*evidence*" provided to him by Mr. Varvari. However, it is clear from this affidavit sworn on 31st October, 2019 that the only materials which a practitioner had, at the time of swearing of his affidavit in June 2018 were the following:-

(a) A two-line letter from Mr. Varvari's accountant estimating a projected income for 2017 of €18,000;

(b) While there appears to have been a further telephone conversation between an assistant to the practitioner and the accountant on 3rd April, 2017, this does not appear to have elicited any further information other than to confirm that the projection was of net income as opposed to gross income. Curiously, this is not consistent with Appendix 2 to the proposed arrangement which expressly states that the figure of €18,000 was gross income rather than net income;

(c) A PFS signed by Mr. Varvari. However, as noted above, it is not sufficient for a practitioner to simply rely, without more, on the PFS. It must be borne in mind that a practitioner has the statutory obligation under s. 54 (a) to assess whether the information contained in the PFS is complete and accurate. Indeed, the verification

exercise envisaged under Appendix 3 to the Protocol is expressly stated to be for the purpose of assisting a practitioner in the necessary verification exercise;

(d) The only concrete evidence which the practitioner had was in respect of the income of Ms. Varvari in that he had sixteen weeks payslips in respect of the period between September 2016 and February 2017. He did not, however, at time of swearing of his affidavit in June 2018, have any ongoing evidence of Ms. Varvari's income. In particular, he did not have any information in relation to her income in the period between March 2017 and June 2018.

32. While the practitioner has sought to suggest that it was appropriate for him to rely upon the services of Mr. Varvari's accountant, this suggestion does not stand up to scrutiny. That is not what is set out in the Protocol. The Protocol is quite explicit as to the material which a practitioner should consider. In the case of a self-employed person, this includes tax returns and accounts. Given the role accorded to a practitioner in the processes under the 2012-2015 Act, it would make no sense that a practitioner could, in effect, delegate his role of assessing the means of a debtor to another person such as an accountant with a professional relationship with the debtor. That would entirely undermine the independent role which a practitioner has under the Acts and which is constantly highlighted by practitioners in affidavits which are sworn in the course of proceedings under s. 115 A. Obtaining a valuation from an independent valuer is entirely different to obtaining a projection of income from an accountant to a debtor. A practitioner is clearly not professionally qualified to carry out an independent valuation himself or herself. However, a practitioner is undoubtedly qualified to call for the accounts of a self-employed debtor and for tax returns of a self-employed debtor and to form his or her own view as to the extent of a debtor's means. That is a very basic inquiry and investigation that must be carried out by a practitioner in all cases under Chapter 3 and Chapter 4 of Part 3 of the 2012 Act (as amended).

33. Notwithstanding the manifest failure of the practitioner here to undertake those basic inquiries, the practitioner reiterated in para. 15 of his affidavit sworn on 10th October, 2019 what he had previously said in his affidavit sworn on 10th September, 2019. In para. 15 he said:-

> *"I say and believe that this firm has very strict and considerable procedures in place to ensure income is correctly verified. I say and believe that we are one of the only PIP firms to expressly set out what documents and evidence we rely upon in the PIA. I must however note that in self-employment cases precise confirmations of monthly income is more difficult that (sic) regular PAYE income".*

34. The "*very strict and considerable procedures in place"* are not described anywhere in the practitioner's affidavit. Regrettably, what is disclosed in the affidavit demonstrates very plainly that the practitioner in this case did not follow the very simple and straightforward steps envisaged under the Protocol to ascertain and verify the income of Mr. Varvari. Given the role which a practitioner has under the 2012-2015 Acts, the failure of the practitioner in this case to call for the underlying accounts of Mr. Varvari or to call for the

records held by Mr. Varvari's accountant is manifestly unacceptable. There is no evidence at all in this case to support the contention of the practitioner that he has "*very strict*" or "*considerable*" procedures in place to ensure income is correctly verified. There was a complete failure in this case to take any steps to verify Mr. Varvari's income. It is deeply unimpressive that a practitioner would support an application for a protective certificate and, subsequently, put forward proposals for an arrangement on the basis of the threadbare and unverified material described in the practitioner's affidavits sworn on 10th September and 10th October, 2019. The position of the practitioner becomes even less impressive when one considers what occurred when the practitioner came to swear his affidavit in June 2018. That affidavit was sworn in response to the first affidavit of Mr. Mabry sworn on behalf of the objecting creditor on 22nd February, 2018. In paras. 11-15 of his affidavit, Mr. Mabry drew attention to the poor payment history of Mr. Varvari and highlighted that neither the arrangement nor the grounding affidavit sworn by the practitioner explained whether there had been any improvement in Mr. Varvari's circumstances that could give comfort that Mr. Varvari would now be in a position to sustain monthly payments of €645 per month. It is in response to this affidavit that the practitioner confirmed, in para. 11, on oath that he had assessed Mr. Varvari's ability to make repayments "*based on his financial positon as presented to me as of the date of the swearing of the [PFS], and thereafter as reviewed and certified during the Protective Certificate process culminating in the drafting of the PIA proposal as presented to creditors….*".

35. Furthermore, in para. 12 of the same affidavit the practitioner stated that (inter alia) the income of Mr. Varvari "*has been assessed by me, verified and substantiated to my satisfaction….it therefore leads to a situation that the current income, current expenditure, current affordability has been assessed and verified*".

36. These averments (made on oath) by the practitioner were obviously designed to give the impression that a process of verification had taken place such that the figures put forward in the proposed arrangement were reliable. Furthermore, the averments clearly suggest that the process of verification was an ongoing process and did not terminate as of the date of execution of the PFS by Mr. Varvari. This impression is reinforced by what was said in para. 21 of the same affidavit where the practitioner stated that the arrangement clearly sets out Mr. Varvari's household income and "*clearly shows that the Debtor is in a position to comply with the terms of the PIA and make the payments as specified*". That averment gives the impression that as of the date of swearing of the practitioner's affidavit, the figures set out in the arrangement remained true and correct. In light of what is now known to have taken place (as summarised in paras. 8 to 14 above) I find it impossible to understand how the practitioner could have thought it to be appropriate to swear an affidavit in the terms described above. No sufficient explanation has been provided as to how the practitioner thought it appropriate to do so. I regret to say that the averments in question are plainly misleading. They give the impression that a careful and comprehensive process of verification had taken place (which, regrettably, was not correct). Crucially, if, at the time of swearing of this affidavit in June 2018, the practitioner had sought Mr. Varvari's tax returns for 2017 (which were available at that

time) he would have seen that the arrangement was manifestly unsustainable based on the income actually earned by Mr. Varvari and his wife during the 2017 tax year. As the Protocol shows, the appropriate method of verifying the income of a self-employed person such as Mr. Varvari was to call for accounts and/or tax returns. Had that basic step been taken, it would have been plain to everyone that there was no basis on which to pursue an application under s. 115A to the Circuit Court.

37. This wholly unsatisfactory position was further compounded by the pursuit of an appeal to this court from the Circuit Court by the practitioner notwithstanding that, within days of filing of the relevant appeal, it was apparent from the affidavit of Mr. Varvari sworn on 25th February, 2019 that the true level of the household income available to Mr. Varvari and his wife for both 2017 and 2018 was significantly less than the income shown in the proposed arrangement (on the basis of which it had been suggested that the arrangement was sustainable). In light of the information which emerged from the exhibits to Mr. Varvari's affidavit (in particular the tax returns for 2017 and 2018) I find it impossible to understand how the practitioner could have considered it to be either proper or plausible to pursue an appeal to the High Court against the refusal of the Circuit Court to approve the arrangement. It was very obvious that the figures for household income on which the entire arrangement had been predicated were unreliable and that accordingly the arrangement could not be confirmed by the court. Yet, the appeal was pursued. In this context, it is important to keep in mind that there was a significant time gap between the date of filing the appeal in February 2019 and the date when the matter first came on for hearing before the court in July 2019. There was ample opportunity for the practitioner to take stock and to consider whether to seek a date for hearing or to withdraw the appeal. In my view, in light of the evidence of Mr. Varvari it was blindingly obvious that the appeal should have been withdrawn. Nonetheless, the practitioner sought a date for the hearing of the appeal; the appeal was duly listed for hearing, and the practitioner sought to proceed with the hearing as though there was a proper basis for it.

38. Remarkably, notwithstanding the matters outlined above, the practitioner has still not offered any explanation as to why he chose to pursue the appeal in circumstances where, on the evidence he himself placed before the court, the household income disclosed in the tax returns was manifestly insufficient to sustain the proposed arrangement.

39. It is in the circumstances described above that Tanager, the objecting creditor, seeks an order for costs against the practitioner in respect of the appeal. Having set out the relevant facts, it is now necessary to consider the law.

Relevant law

40. As counsel for Tanager observed, the starting point in any consideration of the costs of an application under s. 115A is s. 115A (14) which provides as follows:

> *"The court in an application under this section, shall make such other order as it deems appropriate including an order as to the costs of the application".*

41. There was a significant measure of agreement between counsel for the practitioner and counsel for Tanager in relation to the relevant legal principles. Both were agreed that s. 115A (14) can be seen as displacing, at least to some extent, what counsel for Tanager correctly described as the presumptive rule under O.99 r.1 that costs should "*follow the event".*

42. Both counsel also drew attention to the case law, in particular the decisions of Baker J. in *Re: James Nugent* [2016] IEHC 309, *Re: Darren Reilly* [2017] IEHC 558 and *Re: Niamh Meeley* [2018] IEHC 38. Those authorities make clear that, although the court has jurisdiction to award costs against a practitioner, this jurisdiction will be exercised sparingly and costs will only be awarded against a practitioner in exceptional circumstances. As Baker J. observed in *Darren Reilly* at para. 71:

> *"If a PIP lodges an application bona fide and in exercise of his or her professional and reasonable judgement, and prosecutes an appeal in a similar fashion, it seems unlikely that a PIP would be subject to an award of costs, and the usual order which has been sought by successful creditors is that an order be made against the debtor, not against the PIP."*

43. The underlying reason why an order for costs will not generally be made against a practitioner who acts in a bona fide way was described as follows by Baker J. in Re: Nugent at para. 17:

> *"The PIP does not act in a quasi- judicial manner, but does have a unique and burdensome obligation to the court in the manner in which an application is presented for protection, and a high degree of frankness and trust is required for the process to function in the manner envisaged. In those circumstances there is, it seems to me, no reason in principle why costs could not be awarded against a PIP in a suitable case, although I consider, as did Costello J. in Wogan, that such jurisdiction would be exercised sparingly and in exceptional circumstances".*

44. In deciding not to make an award of costs against the practitioner in *Darren Reilly*, Baker J. took the following into account:

    (a) The application was one of the earliest applications under the personal insolvency regime;

    (b) There was a public interest in clarifying the law in the area;

    (c) The practitioner did not stand to gain financially from the application and the scale of fees charged by the practitioner was modest;

    (d) There was no evidence of *mala fides* on the part of the practitioner.

45. Subsequently, in Niamh Meeley, Baker J. reiterated these considerations at paras. 151-152 in the following terms:

"Having regard to the particular and express public interest that is performed by a PIP in the insolvency process, and the fact that the PIP has no economic or personal interest in the outcome of an application, save for any fees which might come to accrue under a PIA which might come into effect following a making of an order of court, I consider that a costs order would not be made, unless it can be shown that a PIP acted without bona fides or dishonestly, or 'acted with any impropriety' in the language of the Supreme Court in McIllwraith v. His Honour Judge Fawsitt [1990] 1 I.R. 343 where the question concerned the award of costs against Circuit Court judge in judicial review.

…The circumstances in which a costs order against a PIP would be made would be exceptional, probably more correctly, truly exceptional".

46. It is accordingly clear that, although a practitioner does not have immunity from liability for costs, it will only be in exceptional circumstances that an order for costs will be made against a practitioner. I do not, however, believe that Baker J. in *Niamh Meeley* intended to exhaustively define or describe the circumstances in which a practitioner might be made liable for costs. In particular, I do not believe that Baker J. intended to suggest that a practitioner would only be made liable for costs in equivalent circumstances to those in which a judge would be made liable for costs under the principles established by the Supreme Court in *McIllwraith v. His Honour Judge Fawsitt* [1990] 1 I.R. 343. Having regard to the fact that a practitioner is actively involved as a participant in proceedings under the 2012-2015 Acts, a practitioner has a significantly different role to that of a judge of the District or Circuit Court who will only ever act in an adjudicative capacity. As Baker J. had previously observed in *Re: Nugent* (in the passage quoted in para. 43 above) a practitioner does not act in a quasi-judicial manner. In my view, the reference by Baker J. to *McIllwraith* was clearly intended to underline that it would only be in exceptional circumstances that a practitioner would be made liable for costs.

47. Counsel for the practitioner and counsel for Tanager, very helpfully, sought to identify some of the exceptional circumstances which could expose a practitioner to a liability in costs. These included:

(a) The vexatious promotion of a personal insolvency arrangement or a debt settlement arrangement. As explained by Barron J. in his judgment in *Farley v. Ireland* (Supreme Court, unreported 1st May, 1997 at p. 3), it is vexatious to pursue proceedings which have no prospect of success. Thus a practitioner would be exposed to a liability in costs where the practitioner pursues an arrangement in the knowledge that there was no legal or evidential basis for it or where the practitioner knows that the drafting of the arrangement is fatally deficient;

(b) The promotion of an arrangement where the practitioner knows that the arrangement does not include all of the debts of the debtor;

(c) Counsel also instanced circumstances where an application is made to approve an arrangement where the practitioner has no instruction from the debtor to do so.

(d) Counsel for Tanager also submitted that repeated breaches of court directions (whether by creditors or practitioners) should also be capable of being admonished through an appropriate order for costs.

48. I fully agree with counsel that, in each of the examples cited by them, a practitioner would be at risk for costs. That said, I do not believe that this list is exhaustive. It is, nonetheless, helpful in identifying the level of misconduct or impropriety that would have to exist before a practitioner would be exposed to a liability for costs. It seems to me that a practitioner will also be exposed to liability in costs where he pursues an application for approval of an arrangement where it is obvious that the figures on which the arrangement is based are incorrect and where the true figures available to the practitioner demonstrate that the arrangement is unsustainable. A practitioner who proceeds with an application in such circumstances is, in effect, misleading the court. In this context, it is well established that a high degree of frankness is required of practitioners in their dealing with creditors and the court. This duty of good faith was emphasised by Baker J in *James Nugent* at para. 17 of her judgment.

49. In *James Nugent*, Baker J drew attention, in this context, to similar observations made in the context of examinerships. While the position of a practitioner is not on all fours with that of an examiner appointed under the Companies Act, 2014, there is an obvious parallel between the position of a practitioner and the position of an examiner. In *Re: Wogans (Drogheda) (No. 2)* (High Court, unreported, 7th May, 1992) Costello J. (as he then was) emphasised the duty of good faith owed by an examiner to the court to disclose all relevant facts material to the exercise by the court of its discretion. Similarly, under s. 115A, the court is vested with a discretion as to whether to grant relief. While s. 115A sets out a large number of statutory requirements which must be fulfilled, there is a residual discretion in the court as to whether or not to grant relief under s. 115A even where all the statutory requirements are fulfilled. It is therefore the duty of any practitioner, as an independent professional, to fully disclose to the court all of the facts (whether good or bad) relevant to the fulfilment of the statutory conditions or relevant to the residual discretion vested in the court. In his subsequent decision in the same case *(Re: Wogans (Drogheda) Ltd (No. 3),* High Court, unreported, 9th February, 1993), Costello J. refused to sanction a payment of fees to the examiner in that case by reason of the examiner's failure to disclose to the court a number of matters which were clearly material to the issues which the court had to decide. These included the fact that the examiner was aware of the failure by the directors of the company in question to make full disclosure to the court at the time they petitioned the court for the appointment of an examiner on an interim basis. At p. 25 of his judgment, Costello J. said:

> *"I think the breach by the examiner of his duty to the court arising from his knowledge of the abuse of the courts processes by the directors was a most serious one and disentitles him to be remunerated for the work he performed or to be reimbursed for the costs and expenses he incurred. I must so hold (a) because the Court must ensure the fulfilment of duties owed to it by professional persons in the interests of justice, and should not condone what happened by the order the*

examiner now seeks and (b) because in this case it is highly probable that had the Court been informed of the fraud which had taken place and which was compounded in the petition an order for protection would not have been made. In such circumstances it would be unjust to require the company's creditors to remunerate the examiner or indemnify him for services which, had this duty been fulfilled, would not have been performed".

50. The importance of full disclosure was subsequently emphasised by Finlay Geoghegan J. in her judgment in *Re: Camden Street Investments Ltd* [2014] IEHC 86. In that case, having referred to the judgments of Costello J. in *Wogans*, Finlay Geoghegan J. said at para. 58:

> *"58. Costello J. also referred to the necessity for compliance with these obligations [to disclose all relevant facts material to the exercise by the court of its discretion] because, inter alia, the Court must depend to a considerable extent on the truth of what it is told by, in the first instance, the company, … and thereafter, by an interim examiner or examiner. I respectfully agree. In many examinerships, unlike the present one, there may be no creditor or other interested party who takes an active role in opposing any aspect of the applications before the Court. The Court is required to make decisions, either at a petition hearing or subsequently on an application to confirm a scheme which may have an immediate and sometimes adverse impact on creditors, employees and others who are not present and not represented before the Court. The Court is absolutely dependent upon being able to rely upon petitioners, in the first instance, and thereafter, examiners and their professional advisors giving to the Court a full, frank and clear picture with all the objectively material or potentially material facts relevant to any decision which it is required to take, or to the exercise by it of its discretion."*

51. Finlay Geoghegan J. subsequently concluded, at para. 61 of her judgment, that the examiner in question had acted "*…in breach of his duties to act with fullest candour in putting all material matters before the Court in connection with this application for confirmation of his proposals for a scheme of arrangement…*".

52. While the observations of Costello J. and Finlay Geoghegan J. were made in the context of examinership, they apply, in my view, with equal force in the context of proceedings under the 2012-2015 Acts. The court must be in a position to rely on practitioners, in the exercise of their independent professional role in the processes under the Acts, to place all material facts before the court (whether those facts tend to support or undermine the case for relief under the Acts) so that the court can make a fully informed decision, in the exercise of its jurisdiction under s. 115A (or any other relevant provision of the 2012-2015 Acts that may be in issue in any individual case).

53. Similarly, if a practitioner states that a proposed arrangement has been prepared in accordance with the Protocol, this constitutes a representation to the creditors (and also the court) that the practitioner, in the absence of any indication to the contrary in the terms of the proposed arrangement, has taken the necessary steps to verify the debtor's

income in accordance with the requirements of Appendix 3 to the Protocol. If that process of verification has not taken place then, in the absence of some statement to that effect in the arrangement, a practitioner would be misleading the court and the creditors if he or she were to proceed with an application to the court based on the arrangement in question.

54. In my view, having regard to the importance of the duty of disclosure to the court, any attempt by a practitioner to mislead the court or any failure to make full disclosure to the court must, subject to any countervailing circumstances which may exist, expose a practitioner to a potential liability in costs. Such behaviour on the part of a practitioner seems to me to be so serious as to fall within the exceptional category of cases contemplated by Baker J. as justifying an award of costs against a practitioner. Whether the court, in any individual case, will impose a liability for costs will obviously depend on the circumstances and whether the practitioner is in a position to offer any plausible explanation or justification for what has been done or what he or she has failed to do.

55. In making the observations in para. 54 above, I am conscious that in both *Wogans* and in *James Nugent*, Costello J and Baker J declined to make orders for costs notwithstanding that, in each case, there had been failures on the part of the examiner and the practitioner respectively to make full disclosure to the court. However, in *Wogans* a very effective admonition was delivered by the court in that the examiner was denied payment in respect of the work done by him. That represented a significant sanction to mark the breach of duty on the part of the examiner in that case. That sanction is not available to the court in proceedings under the 2012-2015 Acts.

56. In the case of *James Nugent,* the application for costs was made by an affected creditor on the basis of alleged non-disclosure on the part of the practitioner in relation to an *ex parte* application under s. 95(6) of the 2012 Act for an order extending the protection period. While Baker J declined to make an order for costs against the practitioner in that case, it is clear from para. 22 of her judgment that this was in circumstances where the practitioner did not actively mislead the court in the evidence presented by him in support of the s. 95(6) application. In that case, there had been a failure by the practitioner to properly scrutinise the information made available by the debtor on which the practitioner had relied. While that was unsatisfactory, this failure did not arise as a consequence of any *mala fides* on the part of the practitioner. The information relied on was not known to be incorrect by the practitioner and Baker J held that the primary blame for what occurred lay with the debtor personally. It seems to me to follow from what is said by Baker J in para 22 of her judgment that if the practitioner had been personally responsible for misleading the court, a costs order would have been made against him.

57. To my mind, where parties such as objecting creditors have been put to expense as a consequence of steps of the kind summarised in paras. 47-48 above or where costs have been incurred as a consequence of a failure by a practitioner to make full disclosure to the court or where costs have been incurred as a consequence of misleading conduct or statements by a practitioner, it is difficult to see why an order for costs should not be

made against the practitioner concerned unless the practitioner is in a position to offer an acceptable explanation for what occurred or where there are other excusing circumstances. In such cases, it seems to me that the onus must lie on the practitioner to justify why an award of costs should not be made.

58. Equally, it seems to me that similar issues arise where a practitioner decides to proceed with an appeal in circumstances where the evidence available to the practitioner, in advance of the hearing of the appeal, clearly and undeniably demonstrates that the arrangement is no longer viable. In my view, a practitioner, in such circumstances, has an obligation to bring that to the attention of the court and to withdraw the appeal. If a practitioner proceeds with the hearing of an appeal in the teeth of evidence available to him or her which clearly shows the arrangement to be unsustainable, that would, in my view, expose the practitioner to a liability for the costs of the appeal. It would be totally unacceptable that a practitioner would proceed with an appeal in such circumstances. By proceeding with such an appeal, a practitioner is exposing the objecting creditors to wholly unnecessary legal costs and is also taking up valuable court time that could otherwise be made available to a more deserving case. In my view, such conduct on the part of a practitioner is, in the absence of an acceptable justification or excuse, of such a serious nature as to warrant an award of costs in favour of the objecting creditor. To my mind, such behaviour on the part of a practitioner very obviously falls within the rubric of exceptional circumstances as contemplated by Baker J. in her judgment in *Niamh Meeley*.

59. It is nonetheless very important to emphasise that this does not mean that a practitioner will be exposed to a liability in costs merely because a practitioner fails to persuade a court (either at first instance or on appeal) to grant relief under the 2012-2015 Acts. The judgments of Baker J. make that very clear. I reiterate what was said by Baker J in *Darren Reilly* at para. 71 that: *"if a PIP lodges an application bona fide and in exercise of his or her professional and reasonable judgment, and prosecutes an appeal in similar fashion, it seems unlikely that a PIP would be subject to an award of costs…".*

60. That judgment was delivered in 2017. Since then, there have been a very significant number of cases under the 2012-2015 Acts both in this court and in the Circuit Court. In only a very small number of cases has any attempt been made by an objecting creditor to seek costs against a practitioner and, in so far as I am aware, none of those attempts has been successful. This demonstrates very clearly that, in light of the guidance given by Baker J in *James Nugent, Darren Reilly* and *Niamh Meeley*, there is a recognition and understanding on the part of all participants in the process that an application for costs against a practitioner will only be entertained in exceptional circumstances and that the "*costs follow the event*" principle is of no application in cases where a practitioner's application for relief under the Acts fails either on the merits or on a point of law.

61. It is only in what should be very exceptional circumstances of the kind outlined in paras. 42-54 above that a practitioner will have any reason to fear that he or she may find themselves exposed to a liability for costs. If a practitioner behaves honestly responsibly and professionally, the practitioner will have nothing to fear. Practitioners should be

aware that it is their duty to make full disclosure and to satisfy themselves, insofar as practicable, that the debtor has made appropriate disclosure. Appendix 3 to the Protocol provides extensive guidance as to the steps which should be taken for this purpose. In the case of applications under s. 115A, it is important that practitioners understand that they are independent professionals and they have a duty to place all facts before the court which are relevant to any of the statutory conditions in s. 115A and any facts which may be relevant to the exercise of the discretion of the court.

62. In the case of appeals, s. 37 of the Courts of Justice Act, 1936 ("*the 1936 Act*") envisages that appeals from the Circuit Court to the High Court proceed by way of rehearing on the basis of the same evidence that was before the Circuit Court. Section 37 (2) provides that no new evidence can be given in the High Court for the purposes of the appeal "*without the special leave of the judge hearing such appeal*". However, it seems to me that it is crucial for the purposes of any appeal to the High Court that the court should have available to it up to date information in relation to the debtor's financial position. Given that the High Court, on any such appeal, is required to consider the matter afresh and satisfy itself that all of the statutory preconditions to the grant of relief under s. 115A have been satisfied and that there are no circumstances which would cause the court to refuse relief on discretionary grounds, the court must have available to it up to date information in relation to the debtor's financial circumstances. Otherwise, if the debtor's financial circumstances have changed materially since the hearing in the Circuit Court, this could lead to the High Court dealing with the matter on the basis of an entirely false or incomplete premise. It therefore seems to me to be essential that, in advance of the hearing of an appeal, the practitioner should make appropriate enquiries to satisfy himself or herself as to whether there has been any material adverse change in the debtor's financial position or whether there are any other material circumstances which should be brought to the attention of the court. In cases where there has been a material adverse change in circumstances or where additional relevant material has come to light, it seems to me that it must be the obligation of the practitioner to place the necessary additional evidence before the High Court for the purposes of that appeal. While s. 37 (2) of the 1936 Act envisages that special leave will be required for doing so, it seems to me that the High Court should readily admit such evidence so as to be in a position to make an informed decision on the basis of the best financial information available as to whether relief should be granted.

Decision

63. In the present case, there are a number of areas of concern:

(a) In the first place, it is clear that, although the practitioner purported to propose an arrangement in accordance with the March 2015 version of the Protocol, he did not take the necessary steps to verify the income of Mr. Varvari in accordance with Appendix 3 to the Protocol. As noted in paras. 5-6 above, he also wrongly represented in paras. 15.2 and 15.5 of the arrangement that he had investigated and verified the income of Mr. Varvari. However, he did disclose in note 1 to Appendix 2 to the proposed arrangement that the income of Mr. Varvari was based

on information provided by Mr. Varvari's accountant. Thus, anyone who closely read the arrangement may have realised that the figure for Mr. Varvari's income was not based on Mr. Varvari's accounts or his tax returns and that, accordingly, his income had not been verified by reference to the steps outlined in Appendix 3 to the Protocol. While I am strongly of the view that the practitioner was entitled to proceed in that way and while, for the reasons outlined in para. 34 above, I believe that the letter from the accountant came nowhere near the level of verification that was required to be undertaken by the practitioner, I do not believe that this failing on the part of the practitioner would, of itself, come within the rubric of exceptional circumstances as envisaged by Baker J. in *Niamh Meeley*. In my view, it was on the margin and I would be prepared, in light of the terms of note 1 to Appendix 2 to the proposed arrangement, to give the practitioner the benefit of the doubt;

(b) The second area of concern relates to the practitioner's apparent unquestioning reliance on the PFS made by Mr. Varvari. I have already set out my views on the practitioner's failings in this regard in para. 21 above. In my view, the practitioner was plainly not entitled to proceed in this way but, again, while his conduct was unacceptable and while it comes close to the margin of exceptional circumstances, I do not believe that, taken on its own, it could be said to give rise to a liability in costs;

(c) The next area of concern arises in relation to the swearing of the practitioner's affidavit in June 2018 which, as outlined in paras. 34 to 36 above clearly gave the impression that the practitioner had, by that stage, taken active steps to verify the income of Mr. Varvari and his wife. The averments made by the practitioner in paras. 11,12 and 21 of his affidavit (as summarised in paras. 34-36 above) clearly conveyed the impression that, as of the date of swearing of the affidavit, the figure for household income set out in the arrangement remained true and correct. As observed by me in para. 36 above, I find it impossible to understand how the practitioner could have thought it to be appropriate to swear an affidavit in those terms. In my view, these averments by the practitioner in his affidavit are misleading and give the false impression that a careful and comprehensive process of verification had taken place. While the application to the Circuit Court ultimately failed, the averments in question were clearly designed to dispel any concern that might exist as to the veracity of the income. The true position was entirely different. The practitioner had not taken any sufficient steps to verify the income. To make matters worse, had he done so, he would immediately have seen that the income actually earned by Mr. Varvari and his wife fell far short of the figure used by him to justify the sustainability of the proposed arrangement. The entire costs of the Circuit Court hearing and of the appeal to the High Court could have been avoided if, at the time of swearing of this affidavit in June 2018, the practitioner had sought Mr. Varvari's tax returns for 2017 (which had been available since February, 2018 four months prior to the swearing of the affidavit). Instead, the practitioner chose to deploy the affidavit in the proceedings notwithstanding that he was aware that, as at the date of swearing of the affidavit, he had not undertaken

any steps to verify the up to date income position of Mr. Varvari or his wife. In all of the circumstances, the misleading impression created by the affidavit of June 2018 is clearly within the *Niamh Meeley* rubric and is of sufficient gravity to merit an award of costs being made against the practitioner - subject to the existence of any countervailing circumstances that might justify a different outcome;

(d) Fourthly, the pursuit of the appeal, notwithstanding the evidence available from the 2017 and 2018 tax returns (which the practitioner very properly placed before the court) is a further serious cause for concern which, again, in my view, falls within the *Niamh Meeley* rubric. The costs of the appeal and the time taken in hearing the appeal could all have been avoided. The tax returns plainly demonstrated that the arrangement proposed by the practitioner in this case was unsustainable. In those circumstances, the practitioner has pursued an appeal to this court which was bound to fail and, moreover, which he must have known was bound to fail. As I observed in para. 37 above, it was blindingly obvious that the appeal should have been withdrawn. The pursuit of the appeal was accordingly vexatious. In my view, this undoubtedly exposes the practitioner (subject to consideration of any countervailing circumstances) to a liability in costs for the appeal.

64. Before deciding whether to impose liability for costs, I must also consider whether there are any countervailing circumstances that are relevant to the exercise of the court's discretion under s. 115A (14) of the 2012 Act. Regrettably, as noted previously, the practitioner has not put forward any satisfactory explanation for proceeding in the way that he did. I am, however, conscious that this is the first time that an issue of this kind has come before the court. I also bear in mind that, although the practitioner has not satisfactorily explained his conduct, he has shown genuine remorse and regret and I am satisfied that, in dealing with the matter since October, 2019, the practitioner has been frank and has very properly and acknowledged his own failings. I also believe that it is important to acknowledge that the practitioner very properly disclosed the evidence in relation to the tax returns albeit that he did not take any steps thereafter to bring the appeal to an end and instead continued to maintain the appeal. However, I do not believe that these considerations are of sufficient weight to prevent an order for costs being made against the practitioner in this case. They are, however, relevant to the extent of the liability to be imposed. In this context, the court has power under O.99 r.5 to direct that a sum in gross be paid in lieu of taxed costs. That rule must now be read subject to the provisions of Part 10 of the Legal Services Regulation Act, 2015 under which costs are now subject to adjudication rather than taxation.

65. While the conduct of the practitioner in this case (highlighted in paras. 63(c) and (d) above) well justifies an order for costs being made against him, I propose, in this case, having regard to the fact that this is the first such order to be made, and having regard to the other considerations outlined in para. 64 above, that the appropriate course to take is to make an order that the practitioner should pay to Tanager the objecting creditor within a period of time to be fixed by the court, the sum of €6,000 together with VAT (if applicable). That sum represents two thirds of the fees (excluding VAT) that the

practitioner would have earned had the arrangement been confirmed by the court. I will hear the parties in due course in relation to the period to be given to the practitioner to make this payment.

66. I fully appreciate that the sum of €6,000 represents no more than a fraction of the cost which Tanager has incurred. However, in circumstances where this is the first case in which such an order has been made (following full argument) I believe that it would be inappropriate, on this occasion, to fix the sum at a higher level. The amount which I have fixed should not be taken as a precedent for future cases. Now that the issue has been fully debated, practitioners will henceforth be more fully aware of the circumstances in which they may find themselves liable for costs. Accordingly, subject to any countervailing circumstances that may exist in any particular case, there is no reason in the future why practitioners should not be fixed with a more significant liability for costs of proceedings which would never have been incurred had they acted properly.