

THE HIGH COURT

[2022] IEHC 180

[Record No. 2020 136 CA]

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL

INSOLVENCY ACTS 2012-2015

AND

IN THE MATTER OF LYLE CHAMBERS OF ARDBRACCAN, KILMESSAN,

COUNTY MEATH

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 23rd day of March

2022

Introduction

1. This matter concerns an appeal by Lyle Chambers ('the debtor') against the refusal of the Circuit Court (Her Honour Judge O'Malley Costello) on 30th July, 2020 of an application by the debtor's personal insolvency practitioner Colm Arthur ('the PIP') pursuant to s.115A (9) of the Personal Insolvency Acts 2012-2015 (collectively referred to herein as 'the Act').
2. In its notice of objection of 4th April, 2018, Bank of Ireland Mortgage Bank ('the Bank' or 'the objecting creditor'), to whom €656,661.78 was owed at the time of the protective certificate, objected to the coming into effect of the personal insolvency

arrangement ('PIA') on a number of grounds. The bank's primary objection related to the inclusion in the PIA of an amount owed by the debtor to a local authority as an excludable and/or preferential debt; providing for payment of that debt in full; and treating the application as a single creditor case in circumstances where the debtor had in fact two creditors. While other issues were raised by the bank, the focus of the submissions at the hearing before this Court was on the treatment by the PIP of this particular debt.

3. The debt in question – owed to Meath County Council and approximately €3,900 as of July 2020 – arose from an unpaid development levy. The court was informed that there was an agreement to pay this debt by way of monthly instalments of €100. The PIP argued that the debt was “an excludable debt” pursuant to the definition of that term in s.2 of the Act, in that it was a “liability of the debtor arising out of any tax, duty, levy or other charge of a similar nature owed or payable to the State...”. It was submitted that Meath County Council fell within the term “the State” as being an “emanation of the State”, and it was further argued that the debt was correctly treated as a “special status debt that of itself holds a form of security and forms a degree of preference...” [written submissions, para. 4].

4. In the course of preparing a reserved written judgment, I formed the view that s.92(7) of the Act, which was not canvassed by the parties in their submissions to the court during the hearing, could have an important and perhaps decisive influence on the court's deliberations. That subsection states simply that “...an excludable debt shall not be the subject of a Personal Insolvency Arrangement unless it is a permitted debt”. Pursuant to s.92(8), a permitted debt is one which, in accordance with s.92(1), is included in a proposal for a PIA in circumstances where the debtor has consented, or is deemed to have consented, to the inclusion of the debt.

5. I invited the parties to make supplemental submissions in relation to this potentially decisive point. The parties took up this invitation, proffering lengthy written submissions which skilfully and comprehensively addressed the issue.

6. This judgment, then, addresses original issues in the hearing, and the issues canvassed in the supplemental submissions. The main concern is the treatment of excludable debts, particularly where, as in the present case, the creditor in question “opts out” of the PIA. This decision is therefore of general importance in addressing how a PIP is to deal with an excludable debt which is not included in the PIA.

Background

7. The debtor is a farm operative from Ardraccon, Kilmessan, Co. Meath. He is married with two children. As of the date of the PIA – 12th March, 2018 – the plaintiff had two creditors. The bank was owed €656,661.78, which included mortgage loan debt of €533,533.21 which was secured on the debtor’s principal private residence (‘PPR’), the market value of which was agreed by the parties pursuant to s.105 of the Act to be €296,750. Meath County Council was described in the PIA as a “non-specified debt creditor”, and was stated to be owed €7,200 in respect of an “unpaid development levy”.

8. The PIA proposed a twelve month “mortgage moratorium”, which would be used to pay Meath County Council (‘the Council’) €7,197.34 in respect of the development levy, and to pay PIP fees of €5,103.22. The Council was expressed to have “opted out of the PIA as their debt must be addressed prior to any sale of the family home. However, to return the debtor to solvency, without recourse to selling the family home, would necessitate repaying this debt in full...” [Page 6 PIA].

9. The debtor’s wife worked part-time and it was assumed that she would contribute to reasonable living expenses (‘RLEs’) on a pro-rata basis, with the debtor

assuming responsibility for 71.01% of the RLEs. All debt above current market value was to be treated as unsecured debt and written off, save for a dividend of 0.3% payable to the bank, a total sum of €789.48, with a restructured term of 409 months, or 34 years. The debtor was 33 years of age at the date of the proposal. The debtor would pay a fixed interest rate of 2% for the term of the mortgage. The proposed monthly payment for the term would be €1,042.67.

10. The PIP certified pursuant to s.115A(2)(d) of the Act that s.111A of the Act applied to the proposal and that he had been notified on 14th March, 2018 by “the creditor concerned” – the bank – that it did not approve of the proposal. By invoking the s.111A procedure, the PIP was making it clear that the debtor’s only other creditor, the Council, was not participating in the PIA and had “opted out”. The bank took the view that the use of this procedure constituted a serious error “...in circumstances where the proposed Arrangement provides for payments to more than one creditor, in breach of section 106 of the Acts...” [para. 21, affidavit of Frank McNelis, 21st August, 2018].

11. The PIP applied to the Circuit Court for an order pursuant to s.115A (9). A long and detailed notice of objection was filed by the objecting creditor on 4th April, 2018. The parties then embarked upon a lengthy exchange of affidavits, and the matter ultimately came before the Circuit Court for hearing on 30th July, 2020. The PIP’s application was refused, and by notice of appeal of 5th August, 2020, the matter came before this Court. Both sides filed lengthy written submissions in advance of the hearing.

The issues

12. There are two major issues which require to be resolved in the PIP’s favour if he is to have any prospect of success in the appeal. They are as follows: -

- (1) Whether an excludable debt which is not a permitted debt can be included in a PIA at all?
- (2) Whether the council debt in the present case was an excludable debt within the meaning of the Act?

13. The first of these issues is the one raised by me in November 2021, and on which I invited and received detailed submissions from the parties. Although it might be more logical to deal with the second issue above first, I propose to deal firstly with the first issue above in this judgment, as it requires a consideration of the nature of excludable debts and the ways in which they may be treated in the PIA, and is thus of considerable general systemic importance. Having considered that issue, I will then address whether the Council's debt was appropriately regarded by the PIP as an excludable debt. During the hearing, counsel for the PIP very properly accepted that, if the PIP was incorrect in regarding the council's debt as an excludable debt and outside the PIA, the adoption of the s.111A procedure could not be correct as the debtor had more than one creditor, and that the appeal must accordingly fail in circumstances where a creditors' meeting should have been held, but was not.

Statutory provisions

14. In order to consider these issues, it is necessary to have regard to certain definitions of terms set out in the Act.

15. "Excludable debt" is defined in s.2 of the Act as follows: -

“ ‘excludable debt’, in relation to a debtor, means any:

- (a) liability of the debtor arising out of any tax, duty, levy or other charge of a similar nature owed or payable to the State;
- (b) amount payable by the debtor under the Local Government (Charges) Act 2009;

- (c) amount payable by the debtor under the Local Government (Household Charge) Act 2011;
- (d) liability of the debtor arising out of any rates due to the local authority (within the meaning of the Local Government Act 2001);
- (e) debt or liability of the debtor in respect of moneys advanced to the debtor by the Health Service Executive under the Nursing Homes Support Scheme Act 2009;
- (f) debt due by the debtor to any owners' and management company in respect of annual service charges under section 18 of the Multi-Unit Developments Act 2011 or contributions due under section 19 of that Act;
- (g) debt or liability of the debtor arising under the Social Welfare Consolidation Act 2005...".

16. It is also relevant to consider the definition of "excluded debt", which is defined in s.2 of the Act as follows: -

“ 'excluded debt', in relation to a debtor, means any:

- (a) liability of the debtor arising out of a domestic support order;
- (b) liability of the debtor arising out of damages awarded by a court (or another competent authority) in respect of personal injuries or wrongful death arising from the tort of the debtor;
- (c) debt or liability of the debtor arising from a loan (or forbearance of a loan) obtained through fraud, misappropriation, embezzlement or fraudulent breach of trust;
- (d) debt or liability of the debtor arising by virtue of a court order made under the Proceeds of Crime Acts 1996 and 2005 or by virtue of

a fine ordered to be paid by a court in respect of a criminal offence;
...”

17. The manner in which an excludable debt is to be treated is set out in s.92 of the Act. While subs. (1), (7) and (8) are of central importance in the present case, the whole of the section is reproduced below as it sets out the regime envisaged by the Act for dealing with excludable debts:

“92. (1) An excludable debt shall be included in a proposal for a Personal Insolvency Arrangement only where the creditor concerned has consented, or is deemed to have consented, in accordance with this section, to the inclusion of that debt in such a proposal.

(2) Where a personal insolvency practitioner proposes to include an excludable debt in a proposal for a Personal Insolvency Arrangement, he or she shall, without delay, notify the creditor concerned of that fact, which notification shall be accompanied by—

(a) such information about the debtor’s affairs (including his or her creditors, debts, liabilities, income and assets) as may be prescribed, and

(b) a request in writing that the creditor confirm, in writing, whether or not the creditor consents, for the purposes of this section, to the inclusion of the debt in a Personal Insolvency Arrangement.

(3) A creditor shall comply with a request under subsection (2)(b) within 21 days of receipt of the notification under that subsection.

(4) Where a creditor does not comply with subsection (3), the creditor shall be deemed to have consented to the inclusion of that debt in a proposal for a Personal Insolvency Arrangement.

(5) Where a creditor consents or is deemed to have consented, in accordance with this section, to the inclusion of an excludable debt in a proposal for a Personal Insolvency Arrangement, that creditor shall be entitled to vote at any creditors' meeting called to consider that proposal.

(6) Where the debtor concerned is the subject of a protective certificate, and a creditor to whom this section applies brings an application under section 97 (1) in respect of that protective certificate, the period referred to in subsection (3) shall not commence until the date on which the appropriate court determines the application.

(7) An excludable debt shall not be the subject of a Personal Insolvency Arrangement unless it is a permitted debt.

(8) In this Chapter, 'permitted debt' means an excludable debt to which subsection (1) applies."

Issue number one: Whether an excludable debt which is not a permitted debt can be included in a PIA at all?

18. This issue was raised by me after the substantive hearing. Section 92(7) suggests that an excludable debt could not be the subject of a PIA unless it were a permitted debt, which it is clear from a combination of subs. (8) and (1) of s.92 is an excludable debt in respect of which the creditor concerned has consented, or is deemed to have consented, to the inclusion of the debt in the proposal. Assuming the Council debt to be an excludable debt – a proposition hotly contested by the objecting

creditor – it appears that the debt is not a permitted debt, in that the Council is not included as a creditor in the proposal, as the adoption of the s.111A procedure, with the bank recognised as the only creditor, suggests; yet the proposal provides for the discharge in full of the council debt as a “special circumstances cost”. It seemed to me therefore strongly arguable that the proposal infringes against s.92(7), in that the excludable non-permitted debt of the Council – if it was correctly characterised as such - which was nonetheless being discharged in full could be said to be “...the subject of a Personal Insolvency Arrangement...”, which that subsection makes clear is impermissible.

19. Both sides responded with lengthy written submissions. On behalf of the PIP, it was readily acknowledged that the Council’s debt was not a permitted debt; indeed, this is expressly stated at sub-para. 4.2 of para. 5 on page 13 of the PIA. It is submitted that the Council is “...a ‘non-specified debt creditor’ and is not subject to the PIA. Therefore, the creditor is free to take debt recovery steps and is not caught by s.116(3) ...” [which section sets out the way in which a creditor bound by the PIA is constrained in taking any further steps in respect of its debt]. The submissions suggest that the Council opted out of the proposed PIA on 14th December, 2017 even before the protective certificate was granted on 12th January, 2018, and that the Council accordingly cannot be regarded as ever having been “subject to” the PIA.

20. This however raises the question of how a PIP should deal with a creditor who is outside the process and free to pursue execution against the debtor. The PIP makes the point that every PIA must bring the “full means of the debtor to bear”, so that income or assets of the debtor cannot be left outside the PIA. However, a debtor who complies with this requirement is left without means to satisfy the creditor outside the

PIA, who may take enforcement action which might set the terms of the PIA at nought. As the PIP puts it at para. 31 of the supplemental submissions: -

“...the submission of the PIP is that a debtor would not be ‘returned to solvency’ if there was a debt excluded and untreated or ‘returned to solvency without recourse to bankruptcy’ since that excluded creditor could/would have recourse to still bankrupt the Debtor”.

21. The PIP’s position is that, in order to ensure a return to solvency, he concluded a deal with the Council for payment of the debt. However, he considered it necessary to “show” this arrangement in the PIA “to be clear and fair to all creditors...”. He has done this by providing for payment of the excludable debt as a “special circumstances cost”, to be discharged during the mortgage moratorium envisaged by the PIA.

22. The PIP points out that s.2(5) of the Act makes it clear that payment of an excludable debt cannot be a preference of the creditor concerned: -

“(5) For the purposes of ss. 26(2)(f)(ii), 87(h) and 120(h), a debtor gives a preference to another person if –

- (a) the other person is a creditor of the debtor to whom a debt (other than an excluded debt or an excludable debt) is owed, or is a surety or guarantor for any such debt...”

23. One can understand the rationale for the approach taken by the PIP. His proposal seeks to deal with all indebtedness of the debtor, whether inside the PIA or outside, with a view, as he sees it, of returning the debtor to solvency. He has been completely transparent in his treatment of the Council debt. However, the issue is whether the Act permits him to deal with the Council’s debt in this manner.

24. The debt owed to the Council is described in the PIA as an “unpaid development levy”. Section 48 of the Planning and Development Acts 2000-2015

empowers local authorities when granting planning permission to include conditions requiring payment of a financial contribution to the local authority in respect of public infrastructure and facilities benefitting the development in the area of that local authority. This contribution is known as a “development levy”. The arrangement states at p.6 that “...Meath Co. Co have opted out of the PIA as their debt must be addressed prior to any sale of the family home. However, to return the debtor to solvency, without recourse to selling the family home, would necessitate paying this debt in full”. The PIP has however proceeded on the basis that the Council’s debt is excludable; if it is not, it is a second creditor, and the use of the s.111A procedure by the PIP was incorrect and must invalidate the PIA. I will return to this topic below.

25. The bank, without prejudice to its argument that the Council debt is not an excludable debt, submits in summary that

- section 92(1) and s.92(7) do not allow payments to be made in a PIA to an excludable creditor who has “opted out”;
- the making of any such payments would be unfairly prejudicial to the interests of creditors bound by the PIA;
- there is no provision in the Act for payment of non-permitted or excluded debt, and in any event, any such payment cannot be treated as a “living expense”;
- the payment of the debt is not required to return the debtor to solvency, where solvency is defined as the ability to meet payments as they fall due;
- in the event that the court decides that the intended payments to the Council are permitted, that the amounts of such payments should not

exceed the payments being made to creditors bound by the arrangement.

Decision on issue number one

26. The query raised with the parties by me subsequent to the hearing derived from the wording of s.92(7). It seemed to me that a plain reading of the subsection suggested that an excludable debt could not be (“...shall not be”) “...the subject of...” a PIA unless it was a permitted debt, and that the subsection therefore prohibited any proposal which contained a provision dealing with such a debt in any way. The intent of the section appeared to be that any non-permitted excludable debt must be dealt with outside the PIA, if at all.

27. The PIP attempts to side-step this issue by equating the phrase “subject of” used in the subsection with the phrase “subject to...”. The latter phrase relates to the condition of being under the rule, government, jurisdiction, control or authority of something or someone. The phrase “subject of” has quite a distinct meaning. In my view, the objecting creditor expressed the distinction correctly in the present context as follows: -

“...[I]f debt is, ‘subject to’ a PIA, the creditor is bound by its terms. If, however, a particular debt is precluded from being the ‘subject of’ an Arrangement, it is not just that the creditor is not bound by the proposal, the debt itself cannot form part of the subject matter of the PIA, *i.e.* cannot be provided for in the proposal”. [Supplemental submissions, para. 2.7]

28. It would appear, then, that s.92(7) on its face does not allow a situation where a PIA makes provision for an excludable debt. In the present case, the Council has “opted out” of the PIA and is not bound by it; in that sense, the debt is not “subject to” the arrangement. However, given that the PIA explicitly makes provision for the

payment of the debt, one must conclude in my view that the debt, which is not a permitted debt is “the subject of a Personal Insolvency Arrangement...”, a state of affairs which is prohibited under s.92(7).

29. Is there any other provision in the Act which might be deemed to authorise the inclusion of an excludable non-permitted debt in the PIA? There does not appear to be any provision which expressly does so. The PIP relies on statements given by him pursuant to s.107(c)(iv)(III) and s.112(1)(c)(iii) that “...the approved Personal Insolvency Arrangement does not contain any terms that would release the debtor from an excluded debt or an excludable debt (other than a permitted debt) or otherwise affect such a debt”. The PIP submits that these statements are consistent with the debt in question not being “subject to” the PIA. However, it is difficult to see how it could be said that the PIA, if it were to be approved by the court, does not at very least “otherwise affect” the excludable debt of the Council. Section 115A (8)(a)(iii) similarly requires the court, in considering whether or not to make an order under s.115A (9)”, to satisfy itself that the proposed arrangement “...does not contain any terms that would release the debtor from an excluded debt or an excludable debt (other than a permitted debt) or otherwise affect such a debt”. In the event that the court cannot be satisfied in that regard, it has no more jurisdiction to approve the PIA than if there had been non-compliance with the eligibility requirements in s.91 or the mandatory requirements in s.99.

30. The bank also takes issue with the proposition that it is appropriate to deal with a non-permitted excludable creditor by making payments to it by means of the “special circumstances costs”. The PIP takes the view that this is both permissible and pragmatic, and is in fact “the usual treatment by PIPs for an ‘excluded debt’”.

[Paragraph 6 supplemental submissions]. I infer from the submissions that “excluded debt” in this context includes an excludable non-permitted debt.

31. “Special circumstances costs” are not provided for in the Act. However, the objecting creditor submits that they derive from the requirement in s.99(2)(e) that the PIA 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. Section 99(4) provides that, in determining whether a debtor would have sufficient income to maintain a reasonable standard of living, regard should be had to any guidelines issued by the Insolvency Service of Ireland (‘ISI’) under s.23 of the Act. That section obliges the ISI to prepare and issue guidelines as to what constitutes a reasonable standard of living and RLEs.

32. The objecting creditor submits that the current version of the RLE guidelines, published by the ISI in August 2020, states at p.6 that RLEs have three components: set costs, housing and childcare costs, and special circumstances costs. The guidelines supply narrative as to what is comprised in these components, and have this to say about what constitutes special circumstances costs:

“5.4. Special circumstances cover instances where your family may have higher than normal expenditure due to a variety of reasons. This can include the care of an elderly relative who is financially dependent or a college-going child. It can also be utilised if you or your dependents have a requirement for additional medical costs or equipment or if you have more than six children. Normal everyday items should not be included in this category”.

33. Accordingly, the bank submits that special circumstances costs are particular living expenses over and above the set costs and housing and child care costs which a

debtor may incur. The examples given in the passage above are typical of the sort of special circumstances costs regularly approved by the court: those relating to the care of an elderly relative or expenses for a college-going child. The bank submits that special circumstances costs are exceptional living expenses, and that this category of permissible costs cannot be used as a method to make payments to a creditor who has decided not to participate in the arrangement.

34. The bank also argues that payments are not required to “return the debtor to solvency”. It submits that the established test of solvency is whether or not the debtor is able to pay his or her debts as they fall due – in this regard see *Re Laura Sweeney, A Debtor* [2018] IEHC 456 and in *Re Nuzum* [2020] IEHC 164. The bank asserts that discharge of the Council’s debt was not necessary to return the debtor to solvency, and that it is “an express feature of the Acts that a debtor may emerge from the personal insolvency process with – potentially considerable – undischarged debt, notwithstanding that the debtor has performed the terms of the Arrangement. These debts included secured debt, excluded debt and excludable debt which is not a permitted debt...” [supplemental submissions para. 5.11].

35. There was no evidence in the present case that the Council is exerting any pressure to recover its debt. The debt itself had reduced from €7,200 to €3,900 as of July 2020, and I was informed at the hearing that this has been further reduced by payments by the debtor of €100 per month. It appeared to be accepted by the parties that the development levy, whether or not it is a “security” for the purposes of the Act, would have to be discharged in advance of any sale or re-finance of the property. While it appears that the Council has made it clear to the PIP that it wishes to recover the entire amount of the development levy rather than a reduced amount under a PIA, there is no suggestion that it is likely to initiate enforcement action, particularly when

the outstanding amount may now be less than €2,500 and will ultimately be discharged on a sale or refinance of the property in any event.

36. In my view, the provisions of the Act to which I have referred above are not ambiguous or unclear. A creditor who has an excludable debt may consent to having that debt included in the PIA. A typical example of how this might occur would be where the Revenue Commissioners take a view that they should not pursue recovery of a debt in respect of unpaid non-preferential tax independently of the PIA, perhaps because of the expense or futility of doing so, and opt to participate in the PIA and thereby receive a dividend by virtue of the arrangement.

37. However, if the excludable debt creditor, as in the present case, opts to stay out of the PIA, the debt may not be the “subject of” the PIA, and the PIA cannot make provision for payment of that debt, whether as a special circumstances cost or otherwise. The non-permitted debt creditor must pursue recovery of the debt independently. It seems to me that the provisions of s.92, and the various provisions of the Act which require that the arrangement “does not contain any terms that would release the debtor from an excluded debt or an excludable debt (other than a permitted debt) or otherwise affect such a debt...”, make that clear beyond argument.

38. The accommodation afforded by the Act whereby a debtor can bring about a compromise with his creditors which will return him or her to solvency is a privilege which must be exercised in accordance with the criteria deemed permissible by the Act. The Oireachtas has decided that certain categories of debt – excludable debt – can be included in the PIA only with the consent of the creditor, and that certain other categories – excluded debt – cannot be included at all. This effectively means that such creditors must either be discharged, or an accommodation reached with them, if the possibility of independent enforcement action by such creditors is to be

forestalled. This may be achieved in a number of ways. However, it cannot be achieved by including payments to those creditors as an integral part of the PIA; this is clearly prohibited by the Act.

39. I agree with the submission that the proposed payments to the Council as special circumstances costs cannot properly be regarded as such. However, it makes no difference how the payments are characterised; they are improper and prohibited by the statutory scheme. In such circumstances, it is also immaterial whether or not the payments are required to return the debtor to solvency, although while failure to discharge the development levy may be regarded as a continuing failure to discharge an amount which has fallen due, and therefore may be regarded as suggesting that the debtor is insolvent, there is no suggestion that the Council is likely to incur the expense of recovering a debt which is being part-discharged monthly by the debtor, and must in any event ultimately be discharged before sale or refinance.

40. In the circumstances, it is not necessary to decide whether the PIA is unfairly prejudicial to the bank. Even if the debt owed to the Council were to be regarded as non-permitted excludable debt – and I set out my conclusions in this regard below – payments in respect of such debt by means of the PIA are clearly not permissible. On that ground alone, the court cannot approve the coming into effect of the PIA.

Issue number two: Whether the Council debt in the present case is an excludable debt within the meaning of the Act?

41. While my conclusions in relation to issue number one above are sufficient to decide the application, I consider it appropriate to indicate my findings in relation to issue number two, which was the subject of prolonged debate at the hearing before me.

42. The definition of “excludable debt” in s.2 of the Act is set out in para. 15 above. The PIP, in his submissions, accepts that the debt to the County Council does not fit into any of the categories set out at sub-paras. (b) to (g) of the definition. The PIP does however maintain that the debt falls under category (a): “...liability of the debtor arising out of any tax, duty, levy or other charge of a similar nature owed or payable to the State...”. As the PIP puts it in his written submissions, “...the basis for this is that the County Council is to be considered an emanation of the State”.

43. The PIP refers to s.48 of the Planning and Development Act 2000 as amended, to which I have made reference at para. 24 above, and the Development Contribution Scheme provided for in s.48(2) which provides the statutory basis for determination of a contribution. The levying of a contribution by a local authority as a condition of a planning permission is said to be part of the process of the implementation of planning policy, development control and enforcement against unauthorised development which “...are executive functions vested in the chief executive of the planning authority and delegated to an employee or official of the planning authority. The development plan is a critical component of the overall hierarchy of plans and strategies which operate at national, regional and local level and which are designed to complement each other...” [para. 18 written submissions].

44. At the hearing, counsel for the PIP submitted that each local authority, in collecting the levy, was “complying with the directive of the State”. It was submitted that, while categories (b), (c) and (d) of the definition of excludable debt did refer to amounts payable to local authorities, those categories referred to ongoing liabilities as opposed to category (a), which deals with historical liabilities. Counsel suggested that, while category (a) unlike categories (b), (c) and (d) referred to “the State” rather than a local authority, it was drafted in a way that was “purposely wide” in order to apply

to “any tax, duty, levy or other charge of a similar nature” payable to the State or, as the PIP maintains, a local authority as an “emanation of the State”.

45. Counsel relies on the decisions in *Coppinger v. Waterford County Council* [1998] 4 IR 220, *Brownfield Restoration Ireland Limited v. Wicklow County Council* [2017] IEHC 397, and the Supreme Court decision in *Farrell v. Whitty* [2015] IESC 39, which decisions respectively held that Waterford County Council, Wicklow County Council and the Motor Insurers Bureau of Ireland (‘MIBI’) were “emanations of the State”. It is thus submitted that category (a) of the definition of excludable debt should be interpreted so as to equate Meath County Council with “the State” for the purposes of the Act.

46. This argument was roundly rejected by the bank, which contended that, particularly given the explicit and separate identification of liabilities to local authorities in categories (b), (c) and (d), there was no basis for the proposition that the term “the State” would include local authorities. It was pointed out that the *Coppinger*, *Brownfield* and *Farrell* decisions all concerned whether an Irish entity – local authority or MIBI – could be regarded as an emanation of the State so as to be subject to EU directives, and that this context had no application to the present case. The bank “...accepted...that a local authority is an emanation of the State for the purposes of direct effect and that, accordingly, EU Directives can be pleaded in the Irish courts against local authorities...the concept of a local authority being an emanation of the State for the purposes of the doctrine of direct effect does not mean that a local authority enjoys the powers and rights of the State...” [written submissions paras. 3.20 to 3.21].

47. It is necessary to consider what it is meant by the phrase “the State” in the definition in category (a) of “excludable debt”. The term “the State” is not defined in

the Act. The Constitution of Ireland deals with “the State” at Articles 4 to 11, and Article 6 states as follows: -

“(1) All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

(2) These powers of government are exercisable only by or on the authority or organs of State established by this Constitution.”

48. By the 20th Amendment of the Constitution Act 1999, Article 28A was introduced into the Constitution. Sub-Article 1 of Article 28A is as follows: -

“The State recognises the role of local government in providing a forum for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interests of such communities.”

49. The rest of Article 28A provides for the election of local authorities “as may be determined by law and their powers and functions shall, subject to the provisions of this Constitution, be so determined and shall be exercised and performed in accordance with law” [Article 28A (2)]. The remaining sub-Articles provide for elections of members of such local authorities, and provides for the right to vote of every citizen who has the right to vote at an election for members of Dáil Éireann in relation to such local authorities.

50. It is clear from Article 28A that local authorities are creatures of statute which exercise and perform “at local level” ... “powers and functions conferred by law...”, whereas the powers of Government are exercisable “by or on the authority of the organs of State established by this Constitution”. There appears therefore to be a

distinction which may be drawn between the “powers of government” which may be exercised by the “organs of State established by this Constitution”, and the “powers and functions conferred by law”, which are to be exercised and performed “at local level” by local government.

51. In relation to the definition of “excludable debt” the bank points out in particular that categories (b) (c) and (d) all refer to liabilities owed to local authorities, and argue that if the State had intended development levies to be an excludable debt, it could have included development levies specifically in the definition of the term, as it has done in relation to the liabilities owed to local authorities in categories (b), (c) and (d).

52. For a development levy to be considered an excludable debt, the court must be persuaded that the term “the State” should be interpreted so as to include a local authority. The only basis advanced for doing so is that it is suggested that a local authority should be regarded as an “emanation of the State”.

53. One cannot read the line of authority on which the PIP relies without being conscious of the narrow context in which those cases were decided. The court was not being asked in any of the cases to consider whether a local authority – or the MIBI – was an emanation of the State for general purposes. It was considering whether the local authority or the MIBI must be considered an emanation of the State for the purpose of an EU directive having direct effect in relation to its activities. In this narrow context in *Coppinger* and *Brownfield*, a local authority was deemed to be an emanation of the State.

54. I do not accept that these decisions are authority for a general proposition that the term “the State” should be regarded as encompassing a local authority. Such a proposition is not what these cases establish. There is no other basis suggested for

interpreting “the State” as including debts to local authorities. I do not think that the term “the State” would usually be considered to include local authorities, which derive their powers and authority from statute and are to a large degree autonomous in their operation. It would have been an easy matter for the Oireachtas to include the phrase “or any local authority” in category (a) after the phrase “the State”; it did not do so. The fact that specific reference is made to liabilities owing to local authorities in categories (b), (c) and (d), but not in category (a), does suggest that the legislature wished to differentiate between “the State” on the one hand, and local authorities on the other.

55. One must also consider the purpose for which a category of excludable debt was created. It would appear that the Oireachtas created a list of debts which can only be included in a PIA, and the creditor thereby prevented from exercising a creditor’s normal enforcement rights, if that creditor consents or is deemed to have consented to the inclusion of that debt. The Oireachtas has therefore conferred a particular privilege on certain creditors to whom liabilities in the enumerated categories are owed. Such creditors can participate in the PIA, or they can remain outside it, thereby forcing the PIP to deal with them in respect of those debts to their satisfaction. If a PIP is not able to mollify such a creditor, thereby leaving the debtor open to enforcement procedures outside the PIA, it may be that it becomes futile to attempt to propose a PIA at all.

56. The existence of an excludable debt can therefore be an impediment to a debtor proposing an Arrangement with his creditors. The debts set out in s.2 as “excludable” are debts which, in the opinion of the Oireachtas, warrant such exceptionality notwithstanding that their status as such may make it more difficult for the debtor to propose an Arrangement which will resolve his or her difficulties. It seems to me that the court should be slow to interpret category (a) in such a way that

will extend the category by interpreting “the State” as including local authorities, particularly when the category could easily have been drafted to read that the enumerated liabilities are “owed or payable to the State *or any local authority...*”, and when amounts or liabilities in categories (b), (c) and (d) are clearly and unambiguously payable to local authorities.

57. In any event, both parties appeared to accept that a development levy pursuant to s.48 of the Planning and Development Act 2000 as amended “attaches” to the property, so that in practical terms it must be discharged if the beneficial interest in the property is to be sold, charged or mortgaged. This is notwithstanding that the amount of the levy together with any interest may be recovered as a simple contract debt in a court of competent jurisdiction (s.48(15) (c)). The local authority can facilitate phased payments of the contribution, or require the giving of security to ensure payment of the contributions. It can also initiate enforcement action under the Planning and Development Act 2000 as amended in respect of unpaid development contributions. The contribution is refundable in circumstances where works to which the contribution relates have not been commenced or completed within certain time periods set out in s.48(12) (b).

58. Counsel for the PIP submitted that the development levy in fact constituted “security”, which in as far as is relevant is defined by s.2 of the Act as “...a mortgage, judgment mortgage, charge, lien, pledge, hypothecation or other security interest or encumbrance or collateral in or over any property...”, and that the debtor’s property was in breach of the condition of planning permission requiring payment of the development levy. The PIP, in arranging for the discharge of the development levy as a special circumstances cost, was therefore preserving the value of the bank’s

security. If the bank were to realise its security, it would in any event have to discharge any outstanding development levy.

59. However, it seems to me that there is nothing in the architecture of s.48, or of the system generally by which development levies are charged or paid, which would suggest that it was intended in the definition of “excludable debt” in s.2 of the Act that “the State” should include local authorities. The Planning and Development Act 2000 as amended contains detailed provisions concerning the manner in which a development levy is to be calculated and paid. That Act is clear as to the consequences if there is default in relation to such contributions. Development levies are an inherent part of the planning control and enforcement system, but there is nothing in that system which suggests that it was intended that such levies be included in the definition in the Personal Insolvency Act of excludable debt; nor can I infer any intention from the scheme of the Act that the legislature intended, in the definition of category (a), to confer the exceptional status of “excludable creditor” on local authorities.

Conclusions

60. I do not consider that the term “the State” is “obscure” or “ambiguous” in the sense intended in s.5(a) of the Interpretation Act 2005. The term is certainly an “umbrella” term, and the legislature has for understandable reasons preferred to use this term rather than attempt to supply an exhaustive list of the entities that comprise “the State”. However, the term would not in my view normally be considered to include local authorities created by statute, operating under sophisticated legal provisions, and which are largely autonomous in their operation.

61. The only basis upon which the PIP suggests that the Council comes under category (a) of “excludable debt” is that it is an “emanation of the State”. I do not

consider that it is appropriate to consider a local authority an “emanation of the State” for the purpose of a domestic statute. If the Oireachtas had intended category (a) to apply to a local authority, it could easily have made this clear. The court must be wary of extending the categories of excludable debt beyond their bounds, given that creditors to whom such debts are owed have the privilege of “opting out” of a PIA, a factor which typically inhibits a debtor’s chances of proposing a PIA acceptable to the creditors. It seems to me that amending legislation would be required to apply the category (a) definition to local authorities as well as “the State”.

62. For the reasons set out above, I do not consider a development levy owed to a local authority to be an excludable debt. As the PIP accepts, it follows from this conclusion that the “single creditor” procedure under s.111A was inappropriate, and that a meeting of creditors should have been convened to vote on the proposal. As the procedure followed by the PIP was flawed, the court cannot approve the coming into effect of the PIA.

63. The conclusions to which I have come on “issue one” and “issue two” above may be stated as follows: -

- (1) An excludable debt may not be “the subject of” a PIA unless it is a permitted debt; that is to say, it cannot be addressed by the Arrangement, and may not, as in the present case, be discharged in whole or in part as a special circumstances cost;
- (2) a development levy owing to a local authority is not an excludable debt within the meaning of category (a) of that term as defined in s.2 of the Act; the term “the State” does not include a local authority.

64. These conclusions mean that the court cannot approve the coming into effect of the PIA, and the PIP’s application pursuant to s.115A (9) must be refused. In the

circumstances, I do not propose to deal with the other objections raised by the bank in its lengthy notice of objection.

65. However, I think it is appropriate, before making any formal orders, to give the parties an opportunity to consider their respective positions and see whether any progress can be made with a view to resolving the debtor's difficulties. I would urge the PIP and the bank to work together to find a pragmatic and mutually tolerable solution which would enable the debtor and his family to remain in the family home – while dealing as best he can given his resources with his indebtedness – if at all possible. In this regard, I will list the matter for mention on the first Monday list after delivery of this judgment.