

THE HIGH COURT

[2022] IEHC 371
[Record No. 2021/182 CA]

**IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL
INSOLVENCY ACTS 2012-2021**

**AND IN THE MATTER OF JONATHAN BOURKE OF 18 LEINSTER ROAD,
RATHMINES, DUBLIN 6**

**AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION
115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012-2021**

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 17th day of June 2022

Introduction

1. This judgment concerns an issue in relation to the conduct of an application by a personal insolvency practitioner pursuant to 115A (9) of the Personal Insolvency Acts 2012-2021 (referred to collectively herein as ‘the Act’) on behalf of Jonathan Bourke (‘the debtor’). The application was initiated by notice of motion on 25th November, 2021 by John O’Callaghan of KPMG (‘the PIP’), and was withdrawn before this Court on 4th April, 2022. I am informed that a bankruptcy petition by the Revenue Commissioners (‘Revenue’) against the debtor subsequently proceeded before this Court, and that the debtor was adjudicated bankrupt on 25th April, 2022.

2. Pepper Finance Corporation (Ireland) DAC – ‘Pepper’ or ‘the objecting creditor’ – filed a notice of objection to the application on 8th December, 2021. Prior to the application being withdrawn, counsel for Pepper indicated to the court its disquiet that the personal insolvency arrangement (‘PIA’) which had been voted upon by the creditors had proceeded on the basis that Revenue was owed a preferential debt of €558,601.66, when in fact only €351,627.22 of that debt was preferential, and that the s.115A (9) application before this Court had proceeded on the same basis. Notwithstanding that the application had been withdrawn, counsel indicated that Pepper considered that this state of affairs should be drawn to the attention of the court.

3. When this was brought to the court’s notice, counsel for the PIP immediately made it clear that the treatment of Revenue’s debt in the PIA was “an error”, and should not have happened. Counsel conveyed the PIP’s apologies to the court for the misdescription of Revenue’s debt. I indicated however that, notwithstanding that the issue was now academic in the context of the withdrawn PIA, I was concerned about what had occurred, and required an explanation from the PIP. Mr. O’Callaghan swore an affidavit of 5th May, 2022, and Revenue at my invitation also caused an affidavit of 12th May, 2022 to be sworn by Annette Gayson, an officer of the Personal Insolvency Unit of the Revenue, on its behalf. The matter came before me on 16th May, 2022, on which occasion I heard from counsel for the PIP, Revenue and the objecting creditor.

4. Given that there was a formal hearing with affidavit evidence as to what occurred, with all of the various parties represented by counsel, I took the view that I should not deal with the matter informally, but should express my findings and views in a written judgment. I do so because, firstly, it is important to acknowledge the hard work done by the PIP on the debtor’s behalf in attempting to find a solution to his intractable insolvency, and to set out the context in which he fell into error. Secondly,

as will be apparent from what follows, I consider that the concerns of Pepper were justified, and that it acted correctly in bringing the matter to the court's attention. Thirdly, I think that it is important for the court to set out its views in relation to the necessity for observance by PIPs of appropriate ethical standards when proposing an arrangement to creditors, and particularly when asking the court to review the arrangement for the purpose of s.115A(9) of the Act.

Background

5. The PIA, which is expressed to have been generated on 4th October, 2021, indicates that the specified debt creditors of the debtor amounted to €13,751,949.40. Of these, Pepper was by far the largest creditor at €12,296,391.91. Apart from judgment mortgages, the debtor had substantial equity in his principal private residence ("PPR"), which was co-owned with his wife, and had a significant monthly income. The PIA also referred to a "lump sum" of €616,017.88. This was a reference to a sum which it was hoped would accrue to the debtor arising from his shareholding in an underwriting business called "XS Direct"; it was hoped that a "flotation event" ... which would "...provide good liquidity to investors...", would yield a payout to the debtor, which could be used mainly to clear the Revenue debt.

6. At my request, I was provided with the emails between Revenue and the PIP which indicated the manner in which those parties liaised. The PIP stated as early as 7th October, 2020 to Revenue that he was formulating a PIA for the debtor and expected to apply for a protective certificate within "ten days at the most". Revenue appear to have issued a bankruptcy petition against the debtor, and to have adjourned this a number of times during 2021 while there were ongoing discussions with the PIP as to whether Revenue would "opt in" to the arrangement.

7. In this regard, I should say that the preferential debt owed by the debtor to Revenue is an “excludable debt” within the meaning of the Act as it comprises a liability “...arising out of any tax, duty, levy or other charge of a similar nature owed or payable to the State...” [s.2]. Pursuant to s.92(1) of the Act, an excludable debt can only be included in a PIA “where the creditor concerned has consented, or is deemed to have consented...to the inclusion of that debt in such a proposal”.

8. Thus, a PIP will normally try to persuade an excludable debtor to “opt in” to the proposal, and will try to formulate the proposal in a way that will make it attractive for the excludable creditor to do so. If the excludable creditor “opts out”, *i.e.* declines to be included in the PIA, it is not bound by it, and the debtor, notwithstanding that the PIA might be approved by the creditors or the court, remains vulnerable to action taken by the excludable creditor to recover its debt.

9. It is apparent from the emails between the PIP and Revenue that Mr. O’Callaghan was making every effort to persuade Revenue to “opt in”. A “formal request” in this regard was made by email on 7th January, 2021, and in that email, the PIP outlined his suggested treatment of the Revenue debt; he proposed “...to provide Revenue with 100% of the preferential amount being repaid as described below, and a contribution of 100% to unsecured Revenue debt”. The email referred to the expected payout from XS Direct as the means by which €450,000 could be raised “to clear Revenue debt in full”. By email of 26th January, 2021, Revenue indicated that it was opting out of the PIA “at this time”, but indicated that its decision “...can be revisited once the outstanding information [sought in its email of 8th January, 2021] is provided”.

10. By email of 12th April, 2021, after extensive engagement between the PIP and Revenue, the latter indicated that it was opting in to the PIA as proposed, and attached a proof of debt. When a query was raised by Revenue in relation to the proposal on 12th

October, 2021, the PIP by email of 18th October, 2021 confirmed that "...I had the intention in this PIA to pay Revenue in full and on my notes I had done so...".

The PIA

11. The PIA was put before the creditors on 28th October, 2021. Pepper voted against the proposal, and given that it represented 91% of the total indebtedness of the debtor, the proposal was defeated. Accordingly, the debtor brought his application to this Court under s.115A (9) on 25th November, 2021.

12. It is necessary to examine how the Revenue debt was treated in the PIA. By way of summary: -

- In "Part I: Summary of PIA", under the heading "preferential debt creditors" was entered "The Revenue Commissioners" with a balance of €558,601.66;
- in its narrative under the heading "Main features of PIA", it was stated that "...The Revenue Preferential debt is repaid in full in the PIA by way of monthly payments of €1732.00 and a significant lump sum of €496,248.66...";
- in "Part IV: Debtor-specific terms of the arrangement", the specified debts are listed. Included among these are Revenue with "Revenue Preferential Debt" stated as €558,601.66;
- in paragraph 2.2 of part IV dealing with "treatment of judgment mortgages", reference is made in a table to the registration by Revenue of a judgment mortgage in respect of the sum of €558,601.66, and it is stated that "...the [monthly repayments in respect of the judgment mortgages] will be made on a monthly basis by the debtor to the secured

creditors directly by way of a standing order or direct debit with Revenue getting a further lump sum of €450,822.00 in month 36...”;

- in part IV paragraph 5.2 it is stated that “...all debts in this arrangement are permitted debts...”, and at 5.3 that “...there is a preferential debt in this arrangement – see 5.6 below...”. At 5.4 it is stated that “...there are no excludable debts which are not permitted debts in this arrangement ...”;
- at paragraph 5.6, the mechanics of how Revenue is to be paid under the proposal are set out as follows: -

“We shall pay Revenue €400 a week until the XS Direct achieve their liquidity event, which is scheduled for 2023, but I have pushed it 12 months (on paper) to allow for delays or unforeseen circumstances. The liquidity event would then provide a lump sum assuring all creditors of payment. If the liquidity event is delayed and still to happen within the 6 year PIA, we can still assure Revenue and all creditors of full payment and can manage this eventuality with a Variation of the PIA. If the Liquidity event does not happen at all, then the PIA will fail, and Revenue will have the right as all creditors will to proceed with a Bankruptcy, however in the meantime, Revenue would have received €400 a week, each week for at least 3 years (€62,400 in reduction of the debt in 36 months) in reduction of the overall debt and so will not be prejudiced in allowing the PIA to proceed – receiving a reduction of the debt at a rate of €1,732 a month.”

- At appendix 6 to the PIA, there is the usual comparison of the projected outcome for creditors of the PIA and in a bankruptcy scenario. It is important to note that s.107(1)(d)(i) requires the submission of a report by the PIP in relation to the outcome for creditors, and in particular “whether or not the proposed Personal Insolvency Arrangement represents a fair outcome for the creditors, and indicating, where relevant, how the financial outcome for creditors (whether individually or as a member of a class of creditors) under the terms of the proposal is likely to be better than the estimated financial outcome for such creditors if the debtor were to be adjudicated a bankrupt...” The comparison in table B to appendix 6 somewhat confusingly lists “preferential creditors” in each of the PIA and bankruptcy scenarios as “€513,174” – which may have been a figure used in a previous iteration of the PIA – and indicates that there will be a one hundred percent dividend for preferential creditors in each scenario. The dividend for unsecured creditors in a PIA is projected to be 0.5%, and the dividend for unsecured creditors in bankruptcy 0.01%.

The section 115A (9) application

13. In the notice of motion for the s.115A (9) application – which counsel for the PIP at the hearing before me on 16th May, 2022 confirmed was drafted with the assistance of solicitor and counsel – there are some features which bear upon the current issue. In satisfying the court that the PIP complies with the requirement that over fifty percent of a class of creditors have supported the arrangement, the PIP relies in the notice of motion on the “Principal Private Residence Class of Creditors” – which in this

case comprised Ulster Bank Ireland DAC with a debt in the sum of €575,407.63 voting in favour of the proposal – and the “Excludable Creditor Class of Creditors”. In respect of this latter class, the PIP stated as follows: -

“...I consider the excludable creditor to be in a separate class as their interests are so dissimilar that it would be impossible for them to consult together with any other creditor with a view to their common interest. *The said class is made up of Revenue with a debt in the sum of €558,601.66 voting for the PIA proposal*”. [Emphasis added]

14. At para. 7 of the notice of motion, the PIP set out his “reasonable grounds for the making of this application...”. These grounds included:

“(h) the Revenue debt is a specified and permitted debt (Revenue opted in) *and part of this debt is a preferential debt*. As set out above, Revenue have petitioned for the Debtor’s bankruptcy. As is clear above and from the Voting Certificate, Revenue supported the PIA.” [Emphasis added].

15. In a lengthy notice of objection of 8th December, 2021, Pepper set out its grounds of objection to the PIP’s application. Included in these grounds were the following: -

“4. The Practitioner is put on proof that the entire debt of €558,601.66 due to the Revenue [Commissioners] is a preferential debt within the meaning of section 101 of the Personal Insolvency Act 2012 and section 81 of the Bankruptcy Act 1988. In this regard, the Objecting Creditor requests:

- (a) A copy of the proof of debt submission provided by the Revenue Commissioners, as well as the particulars of the debts identified therein.
- (b) A breakdown of the judgments secured by the Revenue Commissioners against the Debtor which have been registered against

his interest in the principal private residence, to include the dates on which and the amounts in which such judgments were given, together with details of the amounts which remain outstanding on the respective judgments.

(c) A copy of all correspondence exchanged between the Practitioner and the Revenue Commissioners in respect of the proposed PIA.”

16. These objections, referred to early and prominently in the notice of objection, would have left the reader in no doubt that Pepper viewed the treatment of the preferential Revenue claim with circumspection if not suspicion, and wanted to satisfy himself that the preferential debt had been properly treated in the PIA. The PIP swore an affidavit on 8th March, 2022 which addressed the notice of objection. In relation to objection number four quoted above, the PIP simply averred that he had “no issue exhibiting the Revenue Proof of Debt and correspondence which deals with all of the queries raised”. There is no other averment in that affidavit which seeks to justify or explain his treatment of the entire Revenue debt as preferential. This is notwithstanding that the proof of debt exhibited to the PIP’s affidavit shows the “total amount of claim” as €558,601.66, but clearly identifies the preferential element of that debt as €351,627.22.

17. The matter was listed before me in the personal insolvency list on 14th March, 2022. On that occasion, counsel for Pepper outlined its concerns in relation to the treatment of the Revenue debt. Having heard from counsel for Pepper and the PIP, I directed that Pepper’s solicitors should write to the PIP’s solicitors by close of business on Tuesday 15th March, 2022 to outline its concerns, and that the PIP through his

solicitors should have until Friday 18th March, 2022 to respond. The queries raised by Pepper were set out as follows: -

- “(a) Why does the PIA state that the Revenue’s preferential debt is €558,601.66 when Revenue proved a preferential debt of only €351,627.22?
- (b) Why did your client not address this inconsistency, which must have been obvious to him, in his affidavit of 8 March 2022?
- (c) Were any of the Debtor’s other creditors advised of the mischaracterisation of Revenue’s debt in the PIA before they exercised their vote at the creditors’ meeting on 28 October 2021?
- (d) Paragraph 12 of your client’s affidavit purports to exhibit correspondence from Revenue at ‘JOC2’ but all that is exhibited is Revenue’s proof of debt. Please forward all correspondence between your client and Revenue in relation to the debtor’s personal insolvency application.
- (e) Has your client notified any of the debtor’s other creditors, including Revenue, of the fact that XS Direct is now in receivership and has ceased taking on new business?
- (f) In circumstances where XS Direct is highly unlikely to be floated, please explain the basis on which your client continues to maintain the present application under section 115A for the approval of a PIA which is predicated on that floatation occurring.”

18. By letter of 18th March, 2022, Messrs Brady Kilroy replied on behalf of the PIP to these queries as follows: -

“(a) Revenue (as an excludable creditor with a live bankruptcy petition) outlined to the PIP that they would only ‘opt-in’ to the PIA if they got paid in full. *In effect, they outlined that all of their debt would need to be treated as preferential.* [Emphasis added]

(b) There is no inconsistency, the ‘opt-in’ was on the basis of the full 100% debt being repaid and thus the PIA is correct in that regard.

(c) There is no miscategorisation, the Revenue ‘opt-in’ was on the basis of full debt repayment.

(d) We apologise for this, we are awaiting copies of the correspondence in question and will furnish same ASAP.

(e) Yes – the PIP has notified all creditors of same. The PIP has only recently been informed of same by the Debtor and the Debtor outlined that he was going to seek alternative 3rd party funds to bridge the gap.

(f) As you are aware, the matter was lodged where this was not an issue. The situation has clearly evolved and as you are aware without prejudice communications opened on 15 March 2022 with your client and there has been no refusal/rejection to date, and thus a route to amicably resolving the matter is still live. Finally, the debtor outlined to the PIP that he was seeking to raise alternative third party finance to comply with the PIA.”

The PIP’s affidavit

19. Mr. O’Callaghan swore an affidavit on 5th May, 2022 in advance of the proposed hearing before me on 9th May, 2022, which was unavoidably postponed for one week and heard on 16th May, 2022. In that affidavit, Mr. O’Callaghan acknowledged and

apologised “for the fact that there is an error in the language I used in the PIA regarding the Revenue debt...” [para. 5]. He referred to a letter sent on his behalf by Brady Kilroy of 16th March, 2022. He exhibits this letter, and it is in fact the letter of 18th March, 2022 quoted above – the reference to 16th March, 2022 appears to be an error. He states that: “I confirm and adopt the contents [of the letter] as my evidence”. By way of further explanation, he avers at para. 7 of the affidavit that “...Revenue had a live bankruptcy petition and held all the power and leverage in this case...”. He states at para. 8 of the affidavit that “...Revenue outlined to me that they would only ‘opt-in’ to the PIA if they got paid in full...”.

20. At para. 9, he states as follows:

“[9] In effect, they told me that their entire debt had to be preferential (or the import of the preferential; as in, paid in priority and paid 100%). I know now and I did not have the benefit of legal advice at the time, that my use of language in explaining this was not correct as the word ‘preferential’ more correctly has a defined meaning. I apologise for this error on my part. I say that I did know and do know what the strict definition of ‘preferential’ was and I apologise for the error as I was simply trying to show how they were being paid as distinct to misrepresenting the position”.

21. The PIP refers to a number of judgment mortgages obtained by Revenue, and avers that, by the time these mortgages were paid and discharged, the sum of the judgments would be in excess of €500,000. The PIP points out that “there was no equity for Mr. Bourke [in the PPR] as Revenue were fully secured over this and would get paid 100% as a secured creditor for this portion” [para. 15]. He explains the basis upon which he attempted to restructure the mortgage and the investigation which he carried out of the investment made by the debtor in XS Direct. He says that the intention of the

PIA was to sort out the mortgage; clear the judgment debts; “reconcile the debt to Revenue”; and manage the outcome from the liquidity event to ensure that this windfall went to the unsecured creditors. Having given details of how it was proposed that the structure in the PIA could be made to work, the PIP stated as follows: -

“31. As the court can see there were/are a lot of moving parts to this case. I worked extremely hard to uncover all the information (including all the previous companies, investments, loans pensions *etc*) relevant to the case. I believe I did well to produce this level of information and all of what was expected of me in regard to the presentation of the case to creditors.

32. I know that the case was plausible and there was a potential for a good return to creditors if the liquidity event came off. There was no intention to mislead the Court or any creditor in regard to the debt treatment or the allocation of funds. Once the liquidity event was a definite non-runner, we engaged with Pepper to make a settlement offer – to which I did not get a reply. I also withdrew the case as soon as we were aware of the demise of XS Direct.

33. With the benefit of hindsight, I accept that the wording in regard to the Revenue debt treatment should have made it abundantly clear that Revenue were in both preferential debt and judgment debt boxes and so could have reasonably expected (from the view point of all anticipating the liquidity event) to have their debt cleared in full. This is something that I shall ensure in future drafting of cases – however I do not expect to have many cases with so many ifs and buts and moving parts as this one.

34. For full clarity, I apologise and will ensure better clarity in the future.”

22. The contrition and apologies expressed repeatedly throughout the PIP's affidavit were repeated by counsel on his behalf in the hearing before me on 16th May, 2022. Counsel readily acknowledged that the debt was wrongly categorised in the summary of the PIA and that the substantive clause in part IV dealing with the treatment of the Revenue debt – para. 5.6, quoted at para. 12 above – “...fell into errors...”. The PIP had engaged extensively with Revenue, the position of which was that they would only opt-in if Revenue was paid one hundred percent. Counsel submitted that the PIP should have structured the PIA to make it clear that the preferential debt was being paid in full, but that the non-preferential Revenue debt was also being paid in full. Counsel submitted that the PIP's “language” was “incorrect”; at all times the PIP intended to pay Revenue one hundred percent but “articulated it incorrectly”. It was submitted that this was not intentional, but was a mistake which “should have been picked up earlier”.

23. Counsel appeared for the Revenue, and referred to the affidavit of Ms. Gayson sworn on 12th May, 2022 in which she referred to the averment at para. 9 of the PIP's affidavit quoted at para. 20 above that “...in effect, [Revenue] told me that their entire debt had to be preferential (or the import of the preferential; as in, paid in priority and paid 100%...)” [this sentence is misquoted in Ms. Gayson's affidavit]. She goes on to aver “...I wish to make it categorically clear that at no time did Revenue state or import that the entirety of the debt owed to it by the Debtor was to be classed as preferential... [7] [P]referential debt has a clear statutory meaning as prescribed by section 81 of the Bankruptcy Act 1988 (as amended) and Revenue cannot decide what portion of a taxpayer's debt is preferential in order to suit its own purposes”.

24. Counsel confirmed that this was Revenue's position and that it was “somewhat surprising” that the PIP would have used the terms which he did in para. 10 above. I pointed out to counsel that, while Ms. Gayson averred that Revenue did not state that

the entirety of the debt had to be classed as preferential, the fact remained that Revenue voted for a PIA which plainly misstated the amount of its preferential debt. Counsel indicated that he did not have any instructions in that regard.

25. Counsel for Pepper indicated that its position was that it wished the matter to be brought to the attention of the court, and that it was “a matter for the court” as to the view it took in relation to the issue. Counsel confirmed that Pepper was not making any application for the excess costs which it has incurred in bringing the issue to the attention of the court.

26. Counsel submitted that the suggestion on affidavit of the PIP that the treatment of the Revenue debt was “an error in the language” was scarcely plausible; he submitted that the only conclusion to which one could come was that it was a “conscious decision” to classify what was clearly a non-preferential debt as preferential. It was suggested that someone with Mr. O’Callaghan’s experience could not have unconsciously made such an error, and the PIP’s suggestion in para. 9 that he “did not have the benefit of legal advice at the time” was unconvincing; counsel suggested that it “beggars belief” that the PIP did not understand the implications of his treatment in the PIA of the Revenue debt. It was submitted that his lengthy email to Ms. Gayson of 7th January, 2021, in which he requested an “opt-in” from Revenue, made it very clear that he needed to address the need for a “solution for the Revenue debt and unsecured debts”. Counsel also drew attention to the fact that the PIP, on realising that the notice of objection squarely raised the status of the Revenue debt, could have dealt with this issue in his affidavit of 8th March, 2022 but ignored the issue entirely.

27. In relation to the suggestion by the PIP that Revenue’s judgment mortgages justified the Revenue Commissioners being paid in full, counsel pointed out that this was not mentioned in the Brady Kilroy letter of 18th March, 2022, which purported to

justify the classification of the Revenue debt. He suggested that the explanation in relation to judgment mortgages does not in any event “stack up”: Revenue did not, in its proof of debt form, refer to judgment mortgages at all, and the issue of Revenue judgment mortgages was not addressed in the PIP’s affidavit of 8th March, 2022. It was suggested that, while the judgment mortgages are referred to in the PIA, they appear to add up to a sum of €425,000, rather than covering the Revenue debt.

28. Counsel submitted that the clear impression to any reader of the PIA was that Revenue, as a preferential creditor, was entitled to be paid in full. This was the basis upon which creditors had voted at the creditors’ meeting. It appeared from the email correspondence between Revenue and the PIP that Revenue’s position was that it would proceed with its bankruptcy petition unless it got paid in full; the only basis upon which Revenue could claim priority for the entire debt was if it established that it was a preferential creditor. It would have had no priority in the PIA in respect of its non-preferential debt, aside from any question of its ability to recover on foot of a judgment mortgage, if that debt had been correctly categorised in the PIA.

29. Counsel submitted that treating a creditor as a preferential creditor when it is not entitled to that status distorts the unfair prejudice analysis of which examination of the bankruptcy comparison set out in the PIA is an essential part. It was suggested that any creditor would have been misled as to the potential outcome in a bankruptcy scenario by the inflation of the preferential creditors figure. Counsel emphasised, with reference to case law, the systemic implications of such a mischaracterisation, and the effect it has on the trust between PIP and creditors which is required if the system is to work properly.

Discussion

30. A perusal of the papers, and the email correspondence between Revenue and the PIP in particular, makes it very clear that the PIP worked extremely hard to find a solution for Mr. Bourke. The PIA concentrated on the issue of restructuring the PPR mortgage, and ensuring that all indebtedness on the PPR would be cleared. Thus, in addition to mortgage payments of €2,031.83 per month – this amount being 69.01% of the monthly mortgage payment, the debtor’s wife being responsible for the balance – a sum of €1,732.00 per month was to be paid by the debtor in respect of “Revenue preferential” (as it was termed in the summary in the PIA) with a lump sum from XS Direct hopefully materialising within three years to discharge the balance of preferential debt to Revenue.

31. The PIA referred to Revenue’s judgment mortgage at paragraph 2.2 of part IV, and referred to the payment of €1,732.00 as “the monthly repayment due in respect of the judgment mortgages...the payments will be made on a monthly basis by the debtor to the secured creditors...”. A monthly payment to Bank of Ireland of €797.46 on foot of a judgment mortgage was also envisaged as part of the sums that the debtor would have to discharge on a monthly basis. However, this latter sum was to be paid over seventy-two months, and would eventually discharge the judgment mortgage outstanding balance to Bank of Ireland of €57,417.22 in full.

32. A careful examination of the PIA by a creditor would have made it clear that the PIP’s intention was that the judgment mortgages would be addressed by monthly payments by the debtor and, in the case of Revenue, by the anticipated receipt of funds by the debtor from XS Direct. This I think may be the basis for the PIP’s assertion that the mischaracterisation of the entire debt as preferential was “an error in the language”. It had been his intention that the judgment mortgage debts would be discharged at least in part by regular payments to ensure that Revenue or Bank of Ireland would not act on

foot of their securities and seek the sale of the PPR; however, the PIA, and in particular the PIP's statement in the narrative of "main features of the PIA" that "...[t]he Revenue preferential debt is repaid in full in the PIA by way of monthly payments of €1,732.00 and a significant lump sum of €496,248.66..." gave the impression that a mechanism for payment in full was devised due to the entire Revenue debt being preferential and thus being required to be discharged ahead of the unsecured creditors.

33. As counsel for the PIP suggested, the PIP should have made clear in the PIA that the preferential part of the Revenue debt was being paid in full, but that the non-preferential element was also intended to be paid in full. The PIP could have explained his rationale for this, and ensured that the bankruptcy comparison showed the correct situation. The creditors, and Pepper in particular, could then have made an informed decision as to their vote, based on accurate information.

34. However, the PIP's explanation for the mischaracterisation of the Revenue debt as entirely preferential is disquieting. In his affidavit of 5th May, 2022, he expressly confirms and adopts as his evidence the Brady Kilroy letter of 18th March, 2022. That letter, together with para. 9 of that affidavit, confirms that the PIP contends that Revenue "in effect" told him that "their entire debt had to be preferential...paid in priority and paid 100%". This is "categorically" rejected in Ms. Gayson's affidavit. Wherever the truth of this lies, it suggests that the designation of "preferential" by the PIP to the entire debt was deliberate, and not an error.

35. Mr. O'Callaghan's averment at para. 9 of his affidavit, quoted above at para. 20, is particularly troubling. He appears to attribute his "error" to lack of legal advice; he says that he "now know[s]" that his use of language was "not correct as the word 'preferential' more correctly has a defined meaning...", thereby implying that he did

not know this when drafting the PIA. Notwithstanding this, he then acknowledges that “I did know and do know what the strict definition of ‘preferential’ was...”.

36. It is very difficult to believe that a PIP as experienced as Mr. O’Callaghan ever carried out the role of PIP in ignorance of exactly what “preferential” meant. Mr. O’Callaghan avers at para. 9 that he was “simply trying to show how [Revenue] were being paid as distinct to misrepresenting the position”. However, the repeated representations of the Revenue debt as preferential would have led creditors to accept without question that such a creditor would be paid in preference to the unsecured creditors; they might well have had a different, or certainly more questioning attitude, if they knew that Revenue’s unsecured debt was being paid in full, while the regular unsecured creditors were likely to get nothing. Also, the proposed discharge of Revenue’s unsecured debt of in excess of €200,000 in full would have been almost entirely at the expense of Pepper, the unsecured debt of which, according to the PIP’s certification of the vote at the creditors meeting, accounted for 99.75% of the unsecured debt present and voting.

37. There is no indication in the emails between the PIP and Revenue that the latter insisted that their entire debt had to be treated as preferential, whether “in effect” or otherwise. Revenue insisted that it had to be paid in full, a position it was entitled to adopt, in order to participate in the PIA. The attempt by the PIP to imply that Revenue in some way had a hand in the mischaracterisation by the PIP of the Revenue debt is particularly unattractive, and not supported by the evidence.

38. Counsel for Pepper drew the court’s attention to comments made by McDonald J in a somewhat different context in *Re Mark Fay, a Debtor* [2020] IEHC 163. In that case, McDonald J referred at para. 105 to the fact that “...[i]t is crucially important that

anyone involved in the preparation of evidence is fully aware of their obligations...”.

The court went on to say as follows: -

“106. It is equally important that practitioners bear in mind their role as independent intermediaries...It is important that practitioners understand that this requires practitioners to apply appropriate ethical standards. A practitioner is not an advocate for a debtor and is obliged to put evidence before the court in a complete and open way. It is vitally important for the success of the personal insolvency system, as a whole, that practitioners should act in this way so that courts and creditors can have confidence in the evidence placed before the court. If the system is to operate effectively, it is essential that appropriate ethical standards are adopted and applied.

107. If practitioners are seen to act correctly, this will, over time, remove the level of distrust that currently exists on the part of many creditors. It will generate confidence in the system and should reduce the extent of objections by creditors... If greater confidence could be engendered in the reliability of the evidence given in these cases, I believe that the system could operate with much less scope for legal challenge... .”

39. It will be apparent to any judge presiding over personal insolvency matters in the Circuit or High Court that much of the material in any PIA, and the representations of the PIP in relation to the resources of the debtor and the extent and status of his liabilities, is taken on trust by the creditors, and that the court also, in evaluating a PIP’s application under s.115A (9), takes it that the PIP has done his job in an independent and appropriate manner. The creditors and ultimately the court must be in a position to rely on the evidence presented by the PIP. No reasoned assessment can be made of a PIA which is based on inaccurate or misleading information. The PIP, in making an

application under s.115A, hopes to persuade the court that the expressed view of a statutory majority of the creditors should be disregarded, and his arrangement on behalf of the debtor approved. Such a jurisdiction could only ever be invoked on the basis of an implicit trust that the PIP has assessed the assets and liabilities accurately, has categorised them correctly, and has put forward a proposal which represents the best and fairest deal for all concerned that can be implemented in the circumstances, given the requirements and strictures of the Act.

40. This can only occur when the PIP has applied the ethical standards to which McDonald J refers in the passage above. When a failure to observe these standards is demonstrated, the “level of distrust” to which McDonald J refers is increased; when, as here, there is not a frank acknowledgement at the earliest opportunity that those standards have not been observed, the confidence of creditors and the court in the operation of the system is shaken.

41. In the present case, I am particularly concerned by the fact that the question of the mischaracterisation of the Revenue debt was not addressed immediately once it became an issue. Mr. O’Callaghan did not address the issue in any meaningful way in his affidavit of 8th March, 2022; he surely cannot have expected that Pepper would not pursue an objection to which it had got no satisfactory answer. The PIP owed it to the objecting creditor and to the court to “front up” to the issue and address it squarely, rather than firstly to ignore it, and then offer explanations or rationalisations which raised more questions than they answered.

42. One can readily understand – and indeed applaud – the determination of a PIP to find a solution to a debtor’s plight which yields a better outcome for the creditors than would emerge through bankruptcy or other execution processes. In two and a half years as judge of the personal insolvency list in the High Court, I have seen PIPs work

tirelessly, with great ingenuity and often for little monetary reward, to deliver beneficial outcomes which have found favour with the court.

43. However, this can only ever be achieved within the confines of the Act, and in circumstances where all of the debtor's information placed before the court has been verified and may be regarded as reliable. It is incumbent on a PIP to ensure that the creditors and ultimately the court may depend upon the truth and accuracy of the facts and figures put forward on the debtor's behalf. As McDonald J states, the evidence must be presented "in a complete and open way". This means that queries on behalf of creditors must be addressed effectively; it also means that, when a creditor raises a specific objection to a s.115A (9) application, the objection must be met squarely and frankly. A failure to do so – apart from constituting a lack of candour before the court – will usually suggest that the objection is well-founded, and that the PIP is declining to address it in the hope of negotiating a compromise of the application, rather than in any genuine expectation of being able to answer the objection when it comes before the court.

Conclusions

44. I do not doubt that Mr. O'Callaghan is a dedicated and skilled practitioner who does his best for his clients. However, personal insolvency practitioners must always carry out their duties in accordance with their obligations, not just to their client, but to the creditors of that client and ultimately the court. They must bring independent judgement to their role, which must always be exercised in accordance with the provisions of the Act.

45. It is evident from the correspondence that Mr. O'Callaghan worked diligently to reach an agreement with Revenue with a view to persuading it to "opt-in" to the PIA. As the arrangement clearly envisaged that Revenue and Bank of Ireland, as secured

creditors, would be paid in full, the discharge of Revenue's debt was not dependent on the designation of the full Revenue debt as a preferential creditor. Nonetheless, the mischaracterisation of the Revenue debt gave the impression to creditors that Revenue was entitled to be paid ahead of the unsecured creditors in respect of its entire debt. Had Pepper not insisted on seeing the Revenue proof of debt, this impression would have remained uncorrected.

46. I was not impressed by Mr. O'Callaghan's explanation of what had occurred. His attempted rationalisation at para. 9 of his affidavit, as quoted at para. 20 above, was garbled and contradictory, and the description of the mischaracterisation of Revenue debt as "an error" and "incorrect use of language" does not address what occurred in any meaningful way. The apparent attribution of blame at least in part to Revenue ("[i]n effect, they told me that their entire debt had to be preferential...") is unsupported by the evidence and rejected by Revenue.

47. Pepper's position was that it considered that these matters should be brought to the attention of the court, but that it is entirely a matter for the court as to what, if any, action is to be taken in respect of them. Although Pepper has incurred extra cost in bringing these matters to the attention of the court, it was made clear that it does not seek its costs. There is therefore no application as such before me, and I am not required to make any order, nor do I consider that I should take any further action in the matter.

48. However, I am of the view that in providing misleading information to the creditors, in neglecting to engage with the justified objections formally notified by Pepper, and in failing to provide an appropriate intelligible explanation of his actions to the court, Mr. O'Callaghan has on this occasion fallen well below the appropriate ethical standards to be expected from a personal insolvency practitioner. This is particularly regrettable, as Mr. O'Callaghan is clearly an experienced and highly

regarded practitioner whose applications to this Court have in the past been unexceptionable and well presented.

49. While no order from this Court is necessary, I would expect Mr. O’Callaghan – and indeed, all personal insolvency practitioners – to reflect carefully on their obligations to creditors and the court, and to the dicta of McDonald J cited above, and also to those of Baker J in *Re James Nugent, a Debtor* [2016] IEHC 309 in which the court stated that 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...” [para. 17]. The proper and effective operation of the personal insolvency process depends upon PIPs observing their duties and obligations in this regard.