THE HIGH COURT

CIRCUIT APPEAL

[2022] IEHC 496

[Record No. 2021/78CA]

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

AND IN THE MATTER OF LINDA TORPEY OF THE COTTAGE, BALLINAMONA, BALLYNEAL, CARRICK-ON-SUIR, CO. TIPPERARY

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 11th day of August, 2022.

Introduction

1. This matter concerns an appeal by Linda Torpey ('the debtor') against the refusal of the Circuit Court (Her Honour Judge Mary Enright) on 2nd June, 2021 of an application by the debtor's personal insolvency practitioner Mitchell O'Brien ('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 22nd November, 2019, Promontoria (Oyster) DAC ('PODAC' or 'the objecting creditor') objected to the coming into effect of the personal

insolvency arrangement ('the PIA') on a number of grounds. There was initially an objection that there was no "relevant debt" as required by s.115A(1)(b) of the Act; ultimately, the objecting creditor did not proceed with this objection. For the purpose of the appeal before the Circuit Court and ultimately this Court, PODAC distilled its grounds of objection to the following points as expressed in the written submissions before both courts: -

> "(a) The proposed PIA contains an 'excludable debt' which is not a 'permitted debt', in breach of section 92(7) of the Act. Further, the proposed PIA contains terms that would release the debtor from an 'excludable' debt, which is not a 'permitted debt', and therefore pursuant to s.115A(8)(a)(iii) of the Act, the Honourable court may not make an Order approving the proposed PIA, under section 115A(9) of the Act.
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> (b) For the purpose of section 115A(9)(g), no class of creditor has accepted the proposed PIA, by a majority of over 50% of the value of the debts owed to the class…
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> (c) [This objection was withdrawn during the hearing]
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> (d) For the purpose of section 115A(10), the Debtor has failed, in the two years prior to the issuing of the Protective Certificate to make such payments to Promontoria as her means would have allowed her."

The PIA

3. A protective certificate ('PC') issued on 19th August, 2019 in respect of the debtor. After consultation with the creditors as mandated by the Act, the PIP generated a proposed PIA on 9th October, 2019. This document was circulated to the creditors in advance of the creditors' meeting held on 24th October, 2019.

4. As of October 2019, the debtor was 45 years of age, with two dependent children aged 16 and 18. She was employed part-time with a bookmaker. Her principal private residence ('PPR') had an agreed current market value of €120,000. The mortgage balance at that point was €300,139.84 owing to PODAC. There was therefore negative equity of €180,139.84 in respect of the PPR.

5. The specified debt creditors were PODAC, Bank of Ireland in respect of an overdraft of €2,597.71, and the Revenue Commissioners in respect of "unpaid taxes" in the amount of €5,805.00. Of this latter amount, €2,478.24 is expressed in the PIA to be preferential. The debtor's monthly income is expressed in the PIA to be €2,288.70; after deduction of set costs, the monthly mortgage payment and some small special circumstance costs, the debtor is in a position to make a monthly contribution to her debts of €78.66.

6. The PIA is constructed as a seventy-two-month arrangement which prioritises the debtor's PPR mortgage loan payments. The mortgage is to be restructured on the basis of a capitalisation of arrears, a reduction in the interest rate, an alignment of the mortgage term with the Old Age Pension for the debtor, and – as the PIA puts it – a "rightsizing of the mortgage balance in-line with Debtor affordability". The PIA provides that the preferential debt owed to Revenue will be paid in full in years three and four of the six year term.

7. At part IV of the PIA, further detail is given in relation to how the PIA is to work. The mortgage loan is to be restructured to 276 months (23 years) from the coming into effect of the PIA. The interest rate relating to the mortgage loan is to be reduced and fixed at 3% for the full restructured term. The mortgage loan balance is to be reduced to the current market value of the house: €120,000 down from €300,139.84.

Monthly mortgage payments are to be €602.42 throughout the restructured mortgage term.

8. Paragraph 3.5 of the PIA sets out the dividends which may be expected by unsecured creditors. PODAC is to receive a dividend of €4,017.40; Bank of Ireland will receive a dividend of €57.93; and the Revenue Commissioners ('Revenue') will receive a dividend of €74.19. The bankruptcy comparison in the appendix at Part VI of the PIA suggests that there would be a 40% dividend for secured creditors under the PIA, but only 36% in a bankruptcy. The preferential amount owed to Revenue of €2,478.24 will be discharged in full and in preference to payments to unsecured creditors in the PIA; in bankruptcy, Revenue would receive nothing. It is suggested that unsecured creditors will receive a dividend of 2.2% under the PIA; in the bankruptcy, those creditors will receive a dividend of 0.1%.

9. The treatment of the Revenue debt, both preferential and non-preferential, is clearly explained in the PIA. However, para. 5.2 of part IV of the PIA states bluntly that "there are no Permitted Debts in this arrangement". As we shall see, the objecting creditor relies heavily on this statement in support of its submission that the consent of the Revenue to inclusion of the Revenue debt in the PIA was not sought in accordance with s.92 of the Act.

10. In his s.107 report, the PIP sets out some of the debtor's background. The debtor's eldest child had in October 2019 entered third-level education, with the younger child in fifth year of secondary school. The debtor was expressed to be working part-time "and is studying Multimedia Applications in WIT having just completed her first year…". The PIP states that the debtor "had a women's/children's fashion retail business in Carrick-on-Suir which closed during the recession... Since then she has taken many part-time jobs while being the sole carer for her children. Now that they are

older, she has returned to third level education while continuing to work, with a view to increasing income in the medium to long term. Linda works part-time in a bookmakers in Waterford, she also receives social welfare assistance". It is stated that the failure of the debtor's business and resulting reduction in income impacted her ability to service her PPR mortgage.

The issues

11. The objections of PODAC on the one hand and the PIP and the debtor on the other were the subject of numerous affidavits between November 2019 and March 2021. The issues were exhaustively canvassed in these affidavits; the objecting creditor in addition delivered written legal submissions in advance of the Circuit Court hearing which were helpful in focusing the issues. The PIP and the objecting creditor were both represented by counsel in the hearing before this Court.

12. Although the parties traversed the issues in their respective affidavits in considerable detail, I will attempt to summarise their contentions in relation to the various issues in the interests of concision.

Inclusion in the PIA of the Revenue debt

13. The first ground of objection set out in the objecting creditor's written submissions as set out at para. 2 above requires a consideration of s.92 of the Act, and in particular its effect on what is deemed under the section to be an "excludable" debt. This topic was examined in some detail by me in *re Lyle Chambers, a debtor* [2022] IEHC 180, which judgment was delivered after the hearing in the present matter. The term "permitted debt" is defined in s.92(8) of the Act as "an excludable debt to which subsection (1) applies". Section 92(1) states that: -

> "(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".

14. "Excludable debt" is defined in s.2(1) of the Act. The definition includes any "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 is not contested in the present matter that the indebtedness of the debtor to Revenue is an "excludable debt" which should not be included in the PIA unless it is a "permitted debt". This is because s.92(7) of the Act provides that "…an excludable debt shall not be the subject of a Personal Insolvency Arrangement unless it is a permitted debt". As we have seen, the PIA itself states that "there are no Permitted Debts in this arrangement".

15. The objecting creditor submits that the PIA contains an "excludable debt" which is not a "permitted debt" in breach of s.92(7) of the Act, but also submits that the PIA infringes against s.115A(8)(a)(iii) of the Act. Section 115A(8) sets out strict preconditions to the exercise by the court of its jurisdiction to make an order under s.115A(9). Section 115A(8)(a)(iii) states as follows: -

> "(8) The court shall consider whether to make an order under subsection (9) only where –
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> (a) it is satisfied that –
>
> …(iii) 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…"

16. The objecting creditor submits that the write-down of the non-preferential portion of the Revenue debt "releases" and/or "affects" the Revenue debt, which is undoubtedly an excludable debt. It is therefore submitted that this precondition in s.115A(8), which must be satisfied if the court is to have jurisdiction to make an order

under s.115A(9), has not been complied with, and accordingly no order can be made pursuant to s.115A(9).

17. Mr. Colm Waters, an Asset Manager employed by Link Asset Services ('the servicer') which represents PODAC, swore an affidavit of 5th June, 2020 in which he referred to the PIP's treatment of the excludable Revenue debt. He made the point at para. 11 of that affidavit that "…no vote was recorded in relation to the Revenue Commissioners' debt. I say and believe that the failure of the Revenue Commissioners to vote reaffirms the point that its debt was not a 'permitted debt', as it never consented, nor was deemed to have consented to its debt being included in the PIA…the inclusion of the Revenue Commissioners' 'excludable debt' when it is not a 'permitted debt' also unfairly prejudices Promontoria by calling into question the validity of the vote of the 'regular unsecured creditor class of creditors'. If the Revenue Commissioners had been afforded an opportunity to vote, it would have held the deciding vote in that particular class. The Revenue Commissioners were deprived of a chance to vote as its consent was never requested for inclusion in the proposed PIA…".

18. The PIP replied in an affidavit sworn on 23rd October, 2020 to the affidavit of Mr. Waters. At para. 12 of that affidavit, the PIP avers as follows: -

> "I say however that post the issuance of the PC I did seek the consent (opt-in) of Revenue of their debt into the PIA. Revenue informed me that there were three outstanding historic VAT returns that needed to be filed. These VAT returns were Nil returns and Revenue confirmed that they would opt-in once these returns were filed. At this point Revenue confirmed the amount of their debt, and the amount they were claiming as preferential debt. I say the Debtor subsequently filed the three outstanding returns and I proceeded with the PIA process".

19. At para. 13 of that affidavit, the PIP refers to contacting the Revenue's personal insolvency unit on 21st October, 2020 to discuss the objector's concerns, and to receiving an email of 22nd October, 2020 in which Revenue "confirm[ed]" – as the PIP characterised it in that paragraph - their opt-in, and submitted an updated proof of debt submission…". At para. 15 he expresses the view that it is not open to an objecting creditor to "…argue the interests of another creditor and claim that the other creditor is unfairly prejudiced when the other creditor does not even make that claim themselves". I should say at this point that I do not consider this averment to be a valid point. If the objecting creditor is correct in asserting that the court has no jurisdiction to make an order pursuant to s.115A(9) by virtue of a failure by the PIP to observe the terms of s.92 or s.115A(8), it is entitled to bring this to the attention of the court, as the court must be satisfied before making an order pursuant to s.115A(9) that it has jurisdiction to do so.

20. At para. 16 of his affidavit, the PIP avers that Revenue were not deprived of a chance to vote and that they "were fully afforded a right to vote". Crucially, at para. 17 he avers as follows: -

> "17. I say, in particular response to paragraph 12 of the Objector's Affidavit, that in my view Revenue supported the PIA. In my experience, Revenue (in effect) make a decision at opt-in stage whether they like/support the PIA based on the outcome and then opt-in or not. I say that in a number of smaller level Revenue cases (and this is common with my PIP colleagues) Revenue do not vote and from speaking to the case managers in Revenue their opt-in is in many ways seen by them as a vote for the PIA. Whilst the opt-in is a quasi-yes vote in my mind it is not a formal yes vote and thus it is not shown in the voting certificate".

21. Andrew Ward of the servicer swore an affidavit of 16th December, 2020 in response to this affidavit of the PIP. At para. 7 of his affidavit he placed particular reliance on Clause 5.2 of Part IV of the PIA which stated that "…[T]here are no Permitted Debts in this arrangement". At para. 8 he averred that the "view" of the PIP and his colleagues "is irrelevant; the only manner in which an 'excludable debt' may become a 'permitted debt' and thus be included in a proposed PIA is in the manner set out in section 92 of the Act".

22. This provoked a detailed response from the PIP, who swore an affidavit on 31st December, 2020. While it is clear to the reader of the affidavits in this matter that by this stage they have degenerated into quasi-legal submissions rather than statements of relevant facts, the averments of the PIP in this latter affidavit are of relevance to the question of whether or not the Revenue debt was a permitted debt. At para. 11, the PIP stated that "…Revenue always adopt the position of not opting into the PIA process until all returns and tax affairs are filed (but not paid)…", and referred to Revenue guidelines in this regard. He averred at para. 12 that "…Revenue adopted their usual position in this case in requiring the VAT returns to be filed. With that, I did not take it as a 'qualified consent' but rather I took it as full consent since the Debtor was complying with the request (which requirement existed outside of the PIA process in any event)."

23. At para. 13, the PIP avers as follows; -

> "I say that there was an outstanding unfiled tax return that the Debtor had to make. I say that this return was made by the Debtor manually after the opt-in request had been issued to Revenue and before the calling of the creditors' meeting".

24. At para. 14, the PIP avers that he was told at that point that Revenue were "opting-in, but they couldn't issue written confirmation of same until the outstanding filed return had been uploaded to their system". He avers at para. 15 that "…when it was raised by the Objector as a point of objection in the within application I checked my system and found that we had yet to receive the written confirmation of the previously verbally confirmed opt-in, and I contacted Revenue explaining the issue, and they confirmed in writing (by …their email dated 22nd October 2020 already exhibited) that they opted-in to the PIA".

25. At para. 18, the PIP avers that "…the consent from Revenue was prior to the PIA being circulated. I say that the consent was given by phone during the period after the protective certificate was issued and before the creditors' meeting was held".

26. The PIP then avers as follows: -

> "19. I say, in particular response to paragraph 7 of the Objector's Affidavit, that the correct position regarding the permitted debt is that Revenue are a permitted creditor as confirmed by their email dated 22nd October, 2020, however, at the point that PIA proposal was issued, where I had verbal confirmation that…Revenue was opting-in to the Debtor's PIA, but where I didn't have the written confirmation of same, it was correct for me to state that we neither had an excluded debt nor a permitted debt, however, it was also correct for the PIA to make provisions for the treatment of Revenue's debt.
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> 20. I say that I acknowledge that this is a non-standard situation, however, it is a fact that in a fast moving process such as the PIA application process, that non-standard scenarios arise, and must be dealt with in a fair, transparent and equitable manner."

27. At this point, it is appropriate to say something about the correspondence between the PIP and Revenue in relation to the "opt-in". The PIP exhibits to his affidavit of 23rd October, 2020 a letter of 13th August, 2019 which he sent to the Personal Insolvency Unit of Revenue, in which he stated that "…pursuant to section 92 of [the Act] I formally request that Revenue consents in writing to its excludable debt owed by Linda Torpey being included in a proposal for a Personal Insolvency Arrangement…". He stated in that letter that it was his understanding that all of the debtor's tax returns had been filed. The PIP then exhibits the email of 22nd October, 2020 – almost a year to the day after the creditors' meeting – from Revenue in relation to the "opt-in". The text of this letter was as follows: -

> "Hi Mitchell,
>
> I have reviewed this case again. All returns are now on file and on that basis Revenue are satisfied to opt-in to this arrangement.
>
> Proof of Debt is attached for ease of reference.
>
> Should you require anything further please do not hesitate to contact me.
>
> Kind regards
>
> Annette Gayson"

28. This is the letter which the PIP avers was a response to his telephone call of the previous day attempting to determine the position, given PODAC's objection on the basis of the inclusion of an excludable debt in the PIA which was not a permitted debt. It is notable that the email does not identify when the returns were filed.

29. In an affidavit of 4th March, 2021 from Mr. Waters on behalf of PODAC, he avers that this consent of Revenue "…only came after the filing of the Debtor's outstanding VAT returns." He points out that the PIP "has failed to set out [the date of filing of the returns] or provide an extract from the Debtor's ROS account to corroborate

the date of filing of her VAT returns…", and at para. 6 of his affidavit, Mr. Waters avers that "…I say and believe that the Debtor's VAT returns were either filed or they were not, and a consent could not have been forthcoming from Revenue until they were filed…".

30. At para. 10, Mr. Waters avers that the Revenue's consent "must be in writing". Whether Mr. Waters is correct in this averment is debatable. Section 92(2)(b) states that the PIP must request in writing that "the creditor confirm, in writing, whether or not the creditor consents [to the inclusion of the debt in the PIA]…". Section 92(3) states that "…A creditor shall comply with a request under subsection 2(b) within 21 days of receipt of the notification under that subsection". Section 92(3) would suggest therefore that compliance with the request should also be in writing, although the subsection does not contain an express obligation on the creditor to provide confirmation in writing, such that a verbal but unwritten consent would clearly be insufficient. Section 92(4) in any event provides, that, where the 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".

31. It is important to have regard to the contact which the PIP had with Revenue in advance of the creditors' meeting. On 19th August, 2019, the PIP emailed all of the creditors – PODAC, Bank of Ireland and Revenue – with a number of documents, including a s.98 notice, a copy of the PC, the debtor's prescribed financial statement ('PFS'), the debtor's statutory declaration for the PFS, the debtor's draft PIA application form, a pro forma s.98 submission template, and a pro forma proof of debt form. It is clear that the PIP liaised with PODAC in the period after this email, in particular in relation to the agreement of a s.105 valuation of the PPR. On 9th October, 2019, the PIP served by email each of the creditors with the debtor's proposal for a PIA;

the statement of the PIP prior to the creditors' meeting; a notice of the creditors' meeting, and a blank proxy form; his s.107 PIP report; and the debtor's PFS. From the voting certificate produced by the PIP on 29th October, 2019, it does not appear that Revenue either attended the meeting or submitted a proxy form, and as such were not "present and voting" at the meeting. I am satisfied however that Revenue was served with all of the appropriate documentation in advance of the meeting, including notice of the meeting itself.

32. At the hearing before me, counsel for the PIP expressed the view that Revenue was supporting the PIA and consenting to its debt being included in the PIA; the only issue before the court was as to whether it was done in time, *i.e.* whether the Revenue debt was to be regarded as a "permitted debt" at the time of the meeting. Counsel submitted that the treatment of the Revenue debt in the PIA was not "offensive to the Debtor, the court or Revenue". It was submitted that the objection of PODAC was "at best a technical objection…". Counsel referred to the decision of McDonald J in *re Noel Tinkler, a debtor* [2018] IEHC 682. In that case, s.5 of the PIA stated that there were no "permitted debts" and no "preferential debts" and that the PIA did not include any "excludable debts".

33. The court stated as follows at para. 14 of the judgment: -

> "(b) In the case of Mr. Noel Tinkler, the statements made in s.5 of the PIA (as summarised in subpara. (a) above) are incorrect. It is clear that the PIA does in fact include debts in that it shows a total of €261,599.20 due to the Revenue of which €145,940.56 is to be repaid to Revenue on sale of the Calligstown property on the retirement of Mr. Tinkler. The statements of s.5 of the report are therefore manifestly incorrect. As noted by me in para. 63 of my judgment in *Donal Taaffe* [2018] IEHC 468, there is no mechanism under the 2012 Act to

correct an error or this kind in a PIA. Where an error is inconsequential, it is possible, in the order of the Court confirming the PIA to note that the error exists and to set out the correct position in the order. It is open to question whether the error in s.5 of the Noel Tinkler PIA could be said to be inconsequential. However, when the PIA is read as a whole, I believe it would readily be seen by any creditor that s.5 could not possibly be correct given the detailed information which is given in s.12 of the PIA dealing with the position of creditors including the Revenue. However, the creditors may not have been aware that any aspect of the Revenue debt was preferential. Section 12 of the PIA simply identifies how much of the Revenue debt is secured and how much of it is unsecured. Section 25.5 of the PIA provides that where Revenue debt has a preferential status this will be specified in Part IV. I can see nothing in Part IV of the PIA in Mr. Tinkler's case which identifies that any part of the Revenue debt is preferential. On the contrary, there is a statement in s.5 (which is contained in part IV) that there is no preferential debt. Furthermore, s.3 of Part IV simply records the amount that will be paid to Revenue on foot of its secured debt together with the small dividend to be paid in respect of the unsecured balance."

34. Counsel submitted that the present case was "far ahead" of the decision in *Tinkler*, to the extent that, whereas in *Tinkler* there was a lack of clarity as to how much of the Revenue debt was preferential, no such lack of clarity applies in the present case. The Revenue debt is clearly divided into preferential and non-preferential elements, and the PIA provides that the preferential element is to be discharged in preference to the claims of the unsecured creditors during the course of the PIA. Counsel relies on *Tinkler* as authority for the proposition that the court, notwithstanding that there is a statement that there are no permitted debts in the PIA, is entitled to look to the reality of the PIA

and, where it is appropriate to do so, to disregard a statement such as "there are no Permitted Debts in this arrangement" when it is clear from a consideration of the totality of the PIA that such a statement is incorrect.

35. Counsel for PODAC refuted the characterisation of the objection on this ground as a "technicality"; he submitted that PODAC was simply asking the court to apply the law as it is. He points out that, in *Tinkler*, the court was satisfied that the Revenue Commissioners had filed their proof of debt in advance of the creditors' meeting, and was compliant with s.92 of the Act. This was to be contrasted with the situation in the present case, in which the text of Revenue's email of 22nd October, 2020, quoted at para. 27 above, made it clear that there was no opt-in until that point, almost exactly a year after the creditors' meeting. Counsel submitted that PODAC accepts that the Revenue consented to the inclusion of the Revenue debt in the PIA; however, this consent came a year too late.

Analysis

36. While this issue has led to much dispute between the parties, it is clear from the foregoing that the parties are not at odds over the legal issues involved. The interpretation of s.92 of the Act is not in issue. As my decision in *Lyle Chambers* makes clear, an excludable debt which is not a permitted debt cannot be included in a PIA. Although that decision post-dated the hearing in the present matter, the PIP does not contend otherwise; he submits that the Revenue debt is in fact a permitted debt, notwithstanding the statement in the PIA that there are no permitted debts in the PIA, and the terms of Revenue's email of 22nd October, 2020, which suggests that Revenue was only opting in at that stage, a year after the creditors' meeting.

37. PODAC submits that it is entitled to rely on the express statement at section 5.2 of the PIA that there are no permitted debts in the PIA. It seems to me that the question

of whether there is in fact a permitted debt in the PIA is a mixed question of fact and law: is the excludable debt included in the PIA one in respect of which the creditor in question has either consented or is deemed to have consented, in accordance with s.92 of the Act, to its inclusion in the PIA? If, as a matter of fact and law, the court is satisfied that the excludable debt included in the PIA is in fact a permitted debt, it does not seem to me that a statement in the PIA to the opposite effect, which is clearly wrong, can be deemed to prevail over the actual situation established to the satisfaction of the court. I note that McDonald J in *Tinkler* appears to have come to the same conclusion.

38. The PIP does not assert that Revenue must be deemed to have consented to the inclusion of the debt in the PIA; he avers that Revenue did in fact consent "since the Debtor was complying with the request…". He avers that the outstanding tax return "was made by the Debtor manually after the opt-in request had been issued to Revenue and before the calling of the creditors' meeting". He avers that Revenue told him that they were opting in, but that "they couldn't issue written confirmation of same until the outstanding filed tax return had been uploaded to their system".

39. As the objecting creditor has pointed out, there is no documentary confirmation of when the outstanding tax returns were filed. The PIP avers that he received "consent from the Revenue…prior to the PIA being circulated…the consent was given by phone during the period after the protective certificate was issued and before the creditors' meeting was held".

40. Section 92(2)(b) requires that the PIP request the confirmation in writing of the excludable creditor's consent to the inclusion of the debt in the PIA. The PIP did this in his letter of 13th August, 2019. It would obviously have been preferable if the PIP had ensured that Revenue confirmed its consent in writing once the outstanding tax

returns had been filed. The lack of written consent has led in this case to utter confusion and uncertainty.

41. However, in view of the explicit averments by a PIP of exemplary reputation and experience that consent was intimated by Revenue prior to the creditors' meeting, and in the absence of any conflicting averments or cross-examination, I accept as a matter of fact that Revenue consented, or may be deemed to have consented, to the inclusion of the Revenue debt in the PIA in advance of the creditors' meeting. I do not consider that, in circumstances where I am satisfied on the evidence that there was a verbal consent on behalf of Revenue, that consent is necessarily rendered nugatory by virtue of the fact that it is not in writing. Even if that were the case, given the PIP's clear compliance by his letter of 13th August 2019 referred to at para. 27 above with s.92(2)(b) of the Act, and the absence of evidence of compliance by Revenue within 21 days with s.92(3) as required by s.92(4), the latter section requires that Revenue must be deemed to have consented to the inclusion of its debt in the PIA.

42. I am fortified in my conclusions by the following matters: -

(i) There is no doubt that Revenue was notified of the creditors' meeting in a timely manner, and supplied with all relevant documentation. In the circumstances, I conclude that Revenue fully understood how its debt was being treated in the PIA, and that it does not appear to have raised any difficulty with that treatment;

(ii) the treatment of the Revenue debt in the PIA was as beneficial to Revenue as could have been expected, in that the preferential debt was being discharged in full – which would not have occurred in a bankruptcy situation – and a marginally higher unsecured dividend was to be paid than it would have received on the debtor's bankruptcy;

(iii) in providing for discharge of the preferential debt in priority to the unsecured creditors, the PIA was compliant with the terms of s.101(1) of the Act;

(iv) having been properly served with notice of the creditors' meeting, Revenue declined to participate in it, which would tend to suggest that it did not disagree with or consider offensive the treatment of the Revenue debt in the PIA;

(v) although the wording of the email of 22nd October, 2020 might suggest that the opt-in only took place at that date ("…on that basis Revenue are satisfied to opt-in to this arrangement…"), the author, an official in the specialised Personal Insolvency Unit of Revenue, must have known that – the creditors' meeting having taken place a year previously – the time for opting in had long since passed. The email reads to me more like an acknowledgement "for the file" that Revenue considered the case an appropriate one in which to opt-in, rather than reflecting a decision taken on that date.

43. In the somewhat unusual and fact-specific circumstances of this case therefore, I am satisfied that the Revenue debt included in the PIA is in fact a permitted debt, notwithstanding the statement in the PIA itself to the contrary.

Class of creditor

44. Section 115A(9)(g) of the Act provides as follows: -

"(9) The court, following a hearing under this section, may make an order confirming the coming into effect of the proposed Personal Insolvency Arrangement only where it is satisfied that –

> …(g) other than where the proposal is one to which section 111A applies, at least one class of creditors has accepted the proposed Arrangement, by a majority of over 50 per cent of the value of the debts owed to the class."

45. The voting certificate produced by the PIP in the aftermath of the creditors' meeting proposes a "regular unsecured creditor class of creditors", which consists solely of the overdraft debt due to Bank of Ireland of €2,597.71. The objecting creditor points out that this debt comprises 0.86% (or 0.9% according to the certificate) of the total indebtedness of €302,737.55.

46. In his oral submissions to the court, counsel for PODAC accepted that the debt to the bank was capable of constituting a class of creditors for the purpose of s.115(9)(g). However, he submitted that this class of creditor is "so infinitesimal" in the context of the debtor's total indebtedness that it should be disregarded for the purposes of s.115A(17)(b), which is as follows: -

> "(b) In deciding under paragraph (a) whether to consider a creditor or creditors to be a class of creditor, the court shall have regard to the circumstances of the case, including, having regard to the statement of the grounds of the application referred to in subsection (2)(a) and the certificate referred to in subsection (2)(d)(i) –
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> (i) the overall number and composition of the creditors who voted at the creditors' meeting, and
>
> (ii) the proportion of the debtor's debts due to the creditors participating and voting at the creditors' meeting that is represented by the creditor or creditors concerned."

47. In *re Ahmed Ali, a debtor* [2019] IEHC 138, this issue arose in relation to a debt owed to the Revenue Commissioners in respect of local property tax, which debt comprised less than one percent of the total indebtedness. McDonald J addressed this issue as follows: -

> "…it is to be noted that, although s. 115A(17)(b)(ii) requires the court to have regard to the proportionate size of the debt due to the Revenue Commissioners, the subsection does not rule out the possibility that the court may still conclude that a creditor in their position should be treated as a separate class notwithstanding that the amount due may only be a very small fraction of the overall indebtedness. In my view, the court remains free to do so, if, notwithstanding the proportionate size of the creditor concerned, the court is nonetheless of the view that there is a proper basis to treat that creditor as a separate class." [para. 35]

48. The court went on to express the view that the case was one in which there was a proper basis to treat the Revenue Commissioners as a separate class, and attributed some importance in this regard to the fact that there were only two creditors, one of which was the Revenue Commissioners, who had "long experience of assessing schemes of arrangement…there can be no doubt that one of the purposes of requiring that at least one class of creditor should have approved of a proposed PIA is to give a measure of assurance to a court that the terms of the arrangement are commercially acceptable. The Revenue Commissioners have unparalleled experience of making such assessments". [Paragraph 36].

49. Exactly a month prior to that judgment, McDonald J addressed the issue in *re Lisa Parkin, a debtor* [2019] IEHC 56, a case in which the class of creditor relied upon by the debtor represented 1.1% of her indebtedness. At para. 31 of his judgment,

McDonald J expressed the view that, under s.115A(17), "the role of the court in relation to this issue is not circumscribed by the approach taken by the practitioner. The court is free to reach its own view…" and in the following paragraph, stated: -

> "… in the context of Ms Parkin's means, a debt of €3,816 is not insubstantial. It represents more than one month's income after tax. The credit union is also the only totally unsecured creditor to vote and, in those circumstances, its voice is important. Accordingly, I am of the view that it is appropriate that it should be regarded as a separate class."

50. The cases reflect a rule of thumb which has come to be applied in practice that a class of creditors which represents less than one percent of the total indebtedness may be regarded as not satisfying the requirement of s.115A(17)(b). Counsel for the objecting creditor readily and fairly acknowledged this dividing line as "somewhat arbitrary", and it is clear from the dicta of McDonald J in *Lisa Parkin*, with which I fully agree, that the court is free to form a view as to whether a class should be treated as a class of creditor for the purpose of s.115A.

51. I accept that cases in which the class relied upon by the debtor dips below the one per cent mark should be treated with caution by the court. As McDonald J points out, the purpose of requiring at least fifty per cent of a class of creditors to approve the PIA is to give some assurance that the arrangement is commercially viable. A situation cannot be permitted whereby a creditor who has no real commercial interest in the arrangement, or whose debt has been contrived for the purpose of satisfying the s.115A(9)(g) requirement, constitutes a class upon which a debtor relies so that the rationale behind that subsection is circumvented.

52. However, I do not believe that the present matter is such a case. The debt relied upon is close to the admittedly arbitrary threshold of one per cent, and the creditor in

question is a commercial entity which is owed a *bona fide* debt. That creditor - Bank of Ireland – is foregoing future interest and charges on the debt if the PIA is approved. The debt itself comfortably exceeds the debtor's monthly net income of €2,228.70, and would be a very significant burden on the debtor if it required to be discharged, impairing her ability to deal with the mortgage repayments.

53. I am also mindful that the arrangement is likely to have a better outcome for creditors, albeit marginal. Bank of Ireland is in my view entitled and indeed well placed to take a commercial view that the arrangement suits it better than the debtor's adjudication in bankruptcy.

54. There is one further consideration. If the debtor had foreseen the objection on the basis of "class of creditor", she could quite possibly have made some arrangement with the bank which would have discharged the debt, so that her arrangement would have been on a "single creditor" basis, dealt with under s.111A of the Act, in which case the "class of creditor" issue would not have arisen. Such a course of action might well have involved a preference of Bank of Ireland, and been open to challenge by the objecting creditor. However, the debtor did not embark upon such a dubious course of action, and has faced up to her indebtedness in a frank and open manner.

55. In all the circumstances, I am satisfied that there is a basis upon which the court may form a view that the Bank of Ireland debt constitutes a class of creditors for the purpose of s.115A(9)(g).

Payment history in two years prior to PC

56. Section 115A(10)(a) of the Act provides as follows: -

> "10. In considering whether to make an order under subsection (9), the court shall have regard to:

(a) The conduct, within the 2 years prior to the issue of the protective certificate under section 95, of –

(i) the debtor in seeking to pay the debts concerned, and

(ii) a creditor in seeking to recover the debts due to the creditor…".

57. The PC in the present case issued on 19th August, 2019. The objecting creditor complains that the debtor made no payment on her mortgage account between 4th April, 2017 and 28th September, 2018. It appears that the debtor began making payments after her first consultation with the PIP on 30th July, 2018. The objecting creditor infers accordingly that, between April 2017 and August 2018, the debtor was in a position to make payments in respect of her mortgage, but chose not to do so. The objecting creditor submits that the onus to explain the poor payment history is on the debtor, and that the explanation proffered by her in her affidavit of 24th November, 2020 is manifestly unsatisfactory.

58. The principles governing the court's approach to the payment record of the debtor prior to the issue of the PC are set out with admirable clarity in paras. 17 to 26 of the judgment of McDonald J in *re Richard Featherston, a debtor* [2018] IEHC 683. These principles may be summarised as follows: -

- The court is not required to dismiss an application under s.115A where the payment record of a debtor is poor. On the contrary, the court is entitled to make an order confirming the coming into effect of the proposed PIA in such circumstances;
- a court should not lightly excuse a debtor who has failed to make any serious attempt to repay a debt in the two-year period prior to the issue of the PC;

- the debtor's circumstances may well be such that it is evident that the debtor was simply unable during that period to make any significant payments in discharge of his debts;
- it is incumbent upon the debtor to explain why debts were left unpaid. A poor payment record requires to be adequately and comprehensively addressed by the debtor. All relevant circumstances must be taken into account. Even in cases where the explanation provided by the debtor may appear, at first sight, to be unsatisfactory, there may be sufficient material before the court to suggest that the court's discretion should be exercised in favour of the debtor;
- the approach taken by the creditor in the same two-year period must be taken into account;
- it must be borne in mind that s.115A is not capable of being operated unless there was a relevant default on the part of the debtor; the underlying purpose of the Act must also be borne in mind.

59. In this latter regard, paragraph 25 of the judgment is particularly apposite: -

"…as the long title to the 2012 Act makes clear, the Act was enacted in the interests of the common good with the objective (inter alia) to ameliorate the difficulties experienced by debtors and to enable insolvent debtors to resolve their indebtedness in an orderly and rational manner without recourse to bankruptcy. While there are obvious limits to the extent to which this underlying purpose can be taken into account, there may well be circumstances where a debtor has a poor payment record during the relevant two-year period but who, on the evidence before the court, has demonstrated a genuine intention to deal with his or her debts under a PIA which appropriately addresses the payment of

> the debtor's liabilities, having regard to his or her means, and which has a real prospect of securing a better outcome for the debtor's creditors than the likely outcome on a bankruptcy of the debtor. It would be wrong, in my view, for a court to take an unduly '*box-ticking'* approach and to dismiss every application under s. 115A where the debtor has a poor payment record during the relevant two-year period. In my view, that is not what s. 115A(10) has in mind".

60. McDonald J stressed the significance of the obligation of the debtor, and stated that it was "essential that a poor payment record should be appropriately explained on affidavit by the debtor…", but that "the court retains a discretion if there are countervailing considerations that apply such as to persuade a court that, in all of the circumstances of the case, the s.115A relief should nevertheless be granted". [Paragraph 26].

61. In her affidavit of 24th November, 2020, the debtor states that she tried to engage with PODAC "in particular *via* the MABS office in Clonmel. I say agreement was reached with the objecting creditor where payments of €135.00 per week were made for a six-month trial period…during this time I made payments in accordance with the agreement each week however following from this trial period, the objecting creditor advised that they were proceeding with an application for possession of my home…" [para. 10]. The records of mortgage payments exhibited by PODAC confirm that the debtor made payments of €135.00 per week from October 2018 until July 2019, when she increased her weekly repayment to €145.00. She has continued to make repayments at this level; if the PIA were approved, she would have slightly smaller payments of €602.00 per month.

62. The debtor avers at para.11 of her affidavit of 24th November, 2020 that she made payments in accordance with her means, and that she could not make payments

for the first year of the two-year period prior to the PC because she "…was working part-time and barely getting by…". She says that there was an improvement in her circumstances, including securing employment with a local bookmaker which enabled her to make payments. While the objecting creditor points out that the employment was only part-time, and had a gross monthly salary of €915.28 at the time of her personal financial statement, the debtor's net monthly income in her PIA is stated to be €2,288.70, which, according to the PIP's s.107 report, includes Social Welfare assistance of €944.67 per month, and maintenance of €433.33 per month.

63. While the proffered explanation therefore for the absence of payments prior to September 2018 is somewhat light on detail, it does appear that the debtor's circumstances were improved by entering into employment with the bookmaker, which contributed to her ability to make repayments. She has been proactive in dealing with her debts, firstly with MABS, then with the PIP, and her payment record has been consistent since September 2018. In the circumstances, it does not appear to me that the debtor's conduct and payment history in the two years prior to issue of the PC is such as to persuade the court that an order pursuant to s.115A(9) should not be made.

Conclusion

64. Having taken all of the evidence before the court into account, together with the helpful submissions of counsel, I am persuaded that this is an appropriate case in which to grant the relief claimed under s.115A(9) of the Act, for the reasons set out above.

65. I will therefore make an order setting aside the order made by the learned Circuit Court judge on 2nd June, 2021 and will confirm the coming into effect of the proposals for the PIA in accordance with their terms.