

THE HIGH COURT

[2021] IEHC 710

[Record No. H:IS:HC:2019:000009]

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

AND IN THE MATTER OF DANIEL DREW OF 46 AVIARY LODGE, FOTA ISLAND RESORT, FOTA, CORK ('THE DEBTOR')

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012-2015

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 15th day of November, 2021

1. This matter concerns an application by the personal insolvency practitioner John O'Callaghan ('the PIP') on behalf of Daniel Drew ('the debtor') pursuant to S.115A(9) of the Personal Insolvency Acts 2012-2015 (hereafter referred to collectively as 'the Act'). The PIP seeks an order confirming the coming into effect of the personal insolvency arrangement ('PIA'), notwithstanding the rejection of the PIA by the creditors at a meeting held on 21st August, 2019. The application is opposed by the debtor's largest creditor, Everyday Finance DAC ('Everyday' or 'the objecting creditor').
2. Counsel for the debtor and the objecting creditor agreed an issue paper in advance of the hearing. While a number of issues were canvassed, at the hearing before me the issues centred around two matters: whether the debtor had established a relevant debt, and whether the means of the debtor had been fully brought to bear on the PIA. I will set out below the circumstances in which these grounds of objection were advanced.

The PIA

3. At the time of the PIA, the debtor was 45 years of age. He was single, with three dependents, two of whom were adult children. He operated a petrol station and convenience store in Turner's Cross, Cork. His address is given in the PIA as 46 Aviary Lodge, Fota Island Resort, Fota, Cork. His residential status is described as "Tenant (renting)". Among his "material retained assets" in the PIA is a property at 32 Rosemount Park, Cashel, Co. Tipperary ('the Cashel property'). The PIA states that the debtor, at the time of the PIA, paid a monthly sum of €970.69 in respect of the "Mortgage - Investment Property", i.e. the Cashel property. In addition, the debtor paid €1,485 per month in "maintenance and accommodation" in respect of certain family obligations and in particular his two adult children who resided in the Cashel property. The debtor also paid €1,490 per month in rent in relation to the Fota property.
4. Part IV of the PIA, which deals with the debtor-specific terms of the arrangement, begins with the statement "PPR in this case is a rented property. This shall not change during the PIA". The PIA goes on to state that "...the one real property (Land or Buildings) owed by Daniel Drew is 32 Rosemount Park which was Daniel's ex-partner's home...this lady passed away in 2015 and the house passed to Daniel for retention for their children". The mortgage at the time of the PIA was €8,144 in arrears, and the PIP proposes retaining the house, as "there is no benefit to other creditors to sell the property and AIB are benefitted from the retention of the mortgage as it is in order (with the benefit of the proposed revised payments) ...".

5. The debtor had specified debt creditors of €3,169,873.77 and non-specified debt creditors of €371,019.53. He proposed a six-month PIA with retention of the Cashel property where his adult children reside. His business had been assessed by the PIP, and after certain rationalisation measures and sale of certain assets, would continue as a trading entity. A lump sum of €42,000 was to be contributed by third parties and would provide a dividend for unsecured creditors of 1.1%. The PIA suggested that the unsecured creditors would get no return from a bankruptcy.

The proceedings

6. The present application issued on 28th August, 2019 and was grounded upon an affidavit of the PIP sworn on 29th August, 2019. A notice of objection was issued by the objecting creditor on 10th October, 2019. These objections were as follows: -

"Preliminary Objection:

1. The Debtor is not eligible to have his proposed Personal Insolvency Arrangement (PIA) reviewed by the Honourable Court pursuant to section 115A of the Personal Insolvency Acts 2012-2015. The debts that would be covered by the proposed PIA do not include a relevant debt as defined by section 115A (18) and section 2(1) of the Acts. In particular the Debtor has no debt the payment for which is secured by security over the Debtor's principal private residence. The proposed PIA sets out clearly that the dwelling in which the Debtor ordinarily resides (i.e. his principal private residence) is the premises at 46 Aviary Lodge, Fota Island Resort, Fota, Cork (indeed it is the address set out in the title of the Debtor's Notice of Motion which comes before the Honourable Court, wherein the debtor seeks a review of the rejection of his proposed Personal Insolvency Arrangement). The proposed PIA further sets out clearly that this is a dwelling which the debtor rents for the monthly sum of €1,490.00. The Debtor, thus, has no debt secured over this principal private residence.

(Without prejudice to the above)

Reasons for Objection:

1. The proposed PIA does not satisfy the requirement in section 115A (9)(b)(ii) of the Personal Insolvency Acts 2012-2015 to enable [Everyday] to recover the debt due to it to the extent that the means of the debtor reasonably permits. The debtor is paying €1,490 per month in rent when he has the use of an investment property in which he allows some of his adult children live rent-free, if the Debtor was to move in with his adult children, the sum of €1,490 per month would be available for his creditors. If the proposed PIA were extended to a 72-month PIA, an additional €107,280 would be available from this source.
2. The proposed PIA does not satisfy the requirement in section 115A (9)(b)(ii) of the Personal Insolvency Acts 2012-2015 to enable [Everyday] to recover the debt due to it to the extent that the means of the Debtor reasonably permits. Everyday

Finance DAC has been provided with a copy of an excerpt of the debtor's personal bank account statement, a 'Personal Bank Account Plus' from the 14th May, 2019 to the 13th June, 2019. This personal bank account statement reveals that in the period of the 14th May, 2019 to the 31st May, 2019, the Debtor received payments of in or about €19,601. The Debtor has set out in his Prescribed Financial Statement that his gross monthly income is €6,457, or approximately a third of what his personal bank account statement reveals".

7. In an affidavit of 6th December, 2019 by Colm Waters on behalf of Everyday, it was suggested that there was no "relevant debt" within the meaning of s.115A (18) in that there was no debt which was "secured by security in or over the Debtor's principal private residence...". It was pointed out that the title of the notice of motion grounding the PIP's application, the PIP's certificate of the vote taken at the creditors' meeting, and the PIP's grounding affidavit all stated that the debtor's address was 46 Aviary Lodge, Fota Island Resort, Fota, Cork. Reference was made to the PIA which stated that the Cashel property was used by the debtor's adult children, and it was suggested that the PIA distinguished between the Cashel property and the debtor's "home in Fota". The PIA stated that the principal private residence ('PPR') in this case was a rented property, and that this "shall not change during the PIA". The debtor applied for his protective certificate ('PC') using the Fota address, and completed his prescribed financial statement ('PFS') also using this address.
8. As regards the second objection, Mr. Waters made the point that "...the debtor is paying €1,490 per month in rent when he has the use of an investment property in which he allows some of his adult children live rent-free...if the Debtor was to move in with his adult children, the sum of €1,490 per month would be available for his creditors. If the proposed PIA were extended to a 72-month PIA, an additional €107,280 would be available from this source".
9. The debtor swore an affidavit of 13th March, 2020, in which he replied to the matters in Mr. Waters' affidavit. In relation to the question of his residence, he averred as follows: -
 6. I say, in particular response to paragraph 11 of the Objector's Affidavit, that this has 'changed' or rather I ordinarily reside in my PPR at 32 Rosemount Park, Rosegreen, Cashel, Co. Tipperary.
 7. I say that I was living in rented accommodation as my children were in education and I was single. I say that I did not wish for my love-life interfering with the stability of the family's education and given that their mother died suddenly and at a young age I did not want to upset the kids anyway. Initially this was to be short term, but as it was convenient to work, it carried on. I say that my permanent and full-time ordinary residence was always in Cashel. I say that this is my home, it is where my children reside. I say as education progressed, there are and were less sensitivities and so I am permanently back in the home.
 8. For clarity, I ordinarily reside in my PPR at [the Cashel property]. I no longer rent.

9. I say, in particular response to paragraph 17 of the Objector's affidavit, that I am no longer paying rent. I say that this full €1,490 will now be contributed into my PIA".
10. In relation to the third objection raised by the objecting creditor, the debtor averred that the payments of €19,601 related to turnover that had to cover payments to staff and suppliers, and that the bank account from which these payments were made was used as a business and personal account, as the debtor did not at that time segregate his bank accounts between personal and business use.
11. The PIP swore a further affidavit on 9th March, 2020. In that affidavit, he averred that "...if the herein PIA were approved I will call a variation immediately thereafter and include the €1,490 for the benefit of creditors". This remained the PIP's position at the hearing; counsel urged the court to approve the existing PIA on the basis of an undertaking from the PIP that a variation pursuant to s.119A of the Act would immediately be formulated in this regard, with the proposed variation being put before the creditors in accordance with the section. Counsel for the objecting creditor indicated that it was opposed to this course of action, and indeed maintained that it was not permissible under the Act.

Relevant debt

12. Counsel for the PIP submitted that the evidence before the court was that, at the time of the issue of the s.115A application, the debtor's PPR was the Cashel property. He referred to a letter written by the debtor to the PIP on 26th August, 2019, instructing him to initiate the s.115A application. The letter was headed "Daniel Drew, 46 Aviary Lodge, Fota Island Resort, Fota, Cork – Appeal of Rejected Personal Insolvency Arrangement Proposal".
13. However, underneath the signature of the debtor at the bottom of the letter was the following: -

"Daniel Drew

Home address

32 Rosemount Park

Rosegreen

Cashel

Co Tipperary"
14. Counsel relies on this letter as evidence that, as at the date of issue of the present application, the debtor's PPR was the Cashel property. He relies also on the averments of the debtor in his affidavit of 13th March, 2020 quoted at para. 9 above, and his further statement at para. 14 of that affidavit that "I work in Cork and I live in Cashel as I can't afford to live elsewhere". If the Cashel property is indeed the debtor's PPR, there is no

issue as to the debtor's compliance with s.115A (18)(b), as the mortgage was clearly in arrears on 1st January, 2015.

15. It is submitted that the notice of motion and grounding affidavit, which gives the Fota address as the debtor's address, are misleading in that the debtor's address initially submitted to the Insolvency Service of Ireland ('ISI') is part of the identification of the debtor, and that the ISI administrative process does not allow for a change of address, which must be used in any subsequent s.115A proceedings. Counsel submitted that the title of the proceedings did not determine whether a residence was in fact a PPR for the purpose of s.115A (18).
16. It was not contended by counsel for the PIP that, at the start of the insolvency process and up to and including the creditor's meeting, the PPR of the debtor was other than the Fota property. Indeed, by an email on behalf of the objecting creditor of 20th August, 2019 – the day before the creditors' meeting – Everyday declined to support the proposals on the ground *inter alia*, that "...adult children of your client reside in former PPR rent free whilst he pays the mortgage to AIB of €970 per month – This money could be utilised to increase contribution to creditors...". The creditors voted for or against the proposals on the basis that the debtor's PPR was the Fota property in respect of which he was paying €1,490 in rent, while at the same time paying €970 per month in respect of the Cashel property. It was also accepted by counsel for the PIP in the course of argument that there was no express evidence as to when the debtor left the Fota property and commenced living in the Cashel property as his PPR.
17. However, counsel for the PIP relied heavily on the letter of instruction quoted at para. 13 above, and the notice of motion in the s.115A (9) proceedings. This notice, issued by the PIP, was addressed to each of the creditors, and to the debtor at the Cashel property address. Counsel submitted that the court was entitled to infer from these documents that, as of the date of issue of the s.115A (9) proceedings, the Cashel property was the debtor's PPR for the purpose of s.115A (18). Counsel also relied on the fact that the bank statements exhibited to demonstrate that the debtor was in arrears with his payments on the mortgage on the Cashel property as of 1st January, 2015 referred to his monthly repayment as "AIB Home Loan". It was submitted that this was corroborative of the statement at para. 7 of his affidavit of 13th March, 2020 quoted at para. 9 above that "...my permanent and full time ordinary residence was always in Cashel".
18. Section 115A (1) provides that an application under the section may be made *inter alia*, where "...the debts that would be covered by the proposed Personal Insolvency Arrangement include a relevant debt...". Section 115A(18) defines a relevant debt, in as far as is relevant for present purposes, as a debt "...the payment for which is secured by security in or over the debtor's principal private residence...". The term "principal private residence" is defined in s.2 of the Act as follows: -

"principal private residence' means a dwelling in which the debtor ordinarily resides and includes -

- (a) any building or structure, or
- (b) any vehicle or vessel (whether mobile or not),

together with any garden or portion of ground attached to and occupied with the dwelling or otherwise required for the amenity or convenience of the dwelling; ...”

19. It is well established in the case law that the requirement in s.115A (1) for a relevant debt is what is called a “gateway requirement”, in that the existence of a relevant debt is a prerequisite of the court’s jurisdiction. The onus of proof in this regard is on the PIP; if there is no relevant debt established by the PIP, the court simply has no jurisdiction to entertain the s.115A (9) application. As the definition of “principal private residence” means “a dwelling in which the debtor ordinarily resides...”, the question arises as to the point at which the debtor must establish that he “ordinarily resides” in the PPR. There are a number of possibilities in this regard, such as the date of presentation of the PFS, the date of issue of the PC, the date on which the PIA is circulated to creditors, the date of the creditors’ meeting, the date of issue of the s.115A(9) application, or the date of hearing of that application. As McDonald J pointed out in *re Ahmed Ali, A Debtor* [2019] IEHC 138, the definition of “principal private residence” does not require that the debtor reside in the dwelling as of any particular date. It falls to the court to decide at which point the requirement of showing that the debtor “ordinarily resides” in the property must be established.
20. Counsel for the PIP expressed the view that the point at which the debtor must establish that he “ordinarily resides” in the property is the point at which the s.115A(9) application issued. This was a very proper and helpful submission, made by counsel in circumstances where a later date such as the hearing of the application might have better suited the PIP’s case. I have no doubt that counsel was correct in this regard. The concept of “relevant debt” relates only to the s.115A (9) application. It has no relevance to the process commencing with submission of the PFS and ending in the creditors’ vote. As it is a fundamental requirement of the court’s jurisdiction to entertain a s.115A (9) application, it must be that the PIP must show a relevant debt at the commencement of that process, i.e. at the time of issue of the application. The issue of a s.115A (9) application has serious consequences: prior to the enactment of the Personal Insolvency (Amendment) Act 2021, it was the position that, under s.115A (5), where the application was made under s.115A before the expiry of the PC, the PC remained in force until, *inter alia*, the appeal had been determined. This protection applied even where the PC had expired, but the PIP had issued a s.115A (9) application within fourteen days of the creditors’ meeting as required by s.115A (2): see the judgment of Baker J in *re Hickey (A Debtor)* [2018] IEHC 313, upheld on this point by the Court of Appeal (Peart J) [2018] IECA 397. This position has now been acknowledged and incorporated in the Act: see s.14(b) of the Personal Insolvency (Amendment) Act 2021. Given the serious consequences for creditors following the issue of a s.115A(9) application, it could not be the case that the court could lack jurisdiction to entertain the s.115A(9) application when it issued, but somehow acquire jurisdiction along the way, as it were.

21. As regards the present matter, it follows that the PIP must establish a relevant debt on 28th August, 2019, the date of issue of the s.115A(9) application. I am invited to infer ordinary residence from the letter of instruction of 26th August, 2019, which refers to the Cashel property as the debtor's "home address"; the fact that the s.115A notice of motion was directed to the debtor at the Cashel property; and the averment by the PIP in his affidavit of 13th March, 2020 that the arrangement of living in the Fota Island property was "short term", and that his "permanent and full time ordinary residence was always in Cashel".
22. The debtor, in the course of the PIA, asserted that the "PPR in this case is a rented property. This shall not change during the PIA". He averred in his affidavit of 13th March, 2020 that his position in this regard "...has 'changed', or rather I ordinarily reside in my PPR at [the Cashel property] ...". He goes on to aver, in somewhat contradictory fashion, that "...my permanent and fulltime ordinary residence was always in Cashel".
23. What is notable from these averments, made over six months after the issue of the s.115A application, is the absence of any indication of when exactly this "change" took place. It is significant that all of the averments are in the present tense: "...I ordinarily reside...", "... [the Cashel property] is my home, it is where my children reside...", "...I am permanently back in the home...", "...I am no longer paying rent...". It would surely have been possible for the debtor to aver as to the exact date and circumstances of his disengagement from the Fota Island property, and his return to the Cashel property, and perhaps to adduce some evidence to corroborate his position in this regard. The fact that he has not done so, and avers only as to his current circumstances in March 2020, suggests to me that he is not in a position to demonstrate that he "ordinarily resided" in the Cashel property prior to 28th August, 2019.
24. There is no ambiguity in the requirement of a PPR in s.2 of the Act that it be a dwelling "in which the debtor ordinarily resides...". Actual residence in the PPR as of the appropriate date – in the present case, 28th August, 2019 – is necessary, and the word "ordinarily" connotes an element of permanence or at least continuity in that residence; for instance, it might not be sufficient for a debtor to occupy the dwelling solely on the day of issue of the s.115A application, not having resided there previously. As McDonald J stated in *re Taaffe* [2018] IEHC 468, "...given the critical importance of the 'relevant debt' requirement in the context of s.115A, the relevant factual constituents of the 'relevant debt' would require to be proved by appropriate evidence at the hearing under s.115A". [Paragraph 73].
25. In my view, the PIP in the present case has not adduced any evidence which establishes that the debtor, as of the date of issue of the present application, "ordinarily resides" in the Cashel property. Neither the letter of instruction to the PIP of 26th August, 2019 nor the fact that the motion was directed to the PIP at the Cashel property come anywhere close to establishing the required residence as of 28th August 2019 in that property. The affidavit of the debtor of 13th March, 2020 does not provide any evidence as to his ordinary residence in the Cashel property as of 28th August, 2019. His averment in that

affidavit that his “permanent and full time ordinary residence was always in Cashel” is simply untrue, and is flatly contradicted by the terms of the PIA, and indeed in the very paragraph in which that statement appeared. The averment should not have been made.

Conclusions

26. As Baker J remarked in re JD [2017] IEHC 119 at para. 32, “...absent a ‘relevant debt’, a debtor may not seek to engage the jurisdiction of the court to overrule the result of a creditors’ meeting: see *Hill and Personal Insolvency Acts* [2017] IEHC 18”. In the present case, the PIP has not established a relevant debt for the purpose of s.115A. This Court therefore has no jurisdiction to entertain the PIP’s application, which must be refused.
27. It is somewhat disappointing to have to come to this conclusion. Much effort has been expended by the parties in ventilating the issues raised by the application, and the PIP has demonstrated a willingness to engage with the objections of Everyday, going so far as to suggest a variation to the PIA which would accommodate the introduction of the rent of €1,490 which is now not being incurred in respect of the Fota Island property, and the extension of the PIA to a 72-month period. Hopefully this might provide the basis for negotiation of a mutually satisfactory arrangement in the future. However, the court must always satisfy itself that it has jurisdiction to entertain any application made to it, and refuse to do so when it is clear that the constituent elements which establish jurisdiction have not been proved. It was entirely a matter for the applicant to ensure that he was in a position to satisfy the court as to its jurisdiction, and in the present case, the objection of the creditor in this regard is well founded.
28. In these circumstances, it is not necessary, and possibly inappropriate, for me to make any comment on any other matter put to me in the course of the application, and in particular the PIP’s application for approval of the PIA on the basis of an undertaking by him to bring a proposal pursuant to s.119A of the Act for variation of the approved PIA before the creditors to accommodate the concerns of the objecting creditor. Whether it is permissible for a PIP to ask the court to “make an order confirming the coming into effect of [the PIA]...” [s.115A(9)] when the court is informed that the approved PIA will not in fact be implemented, but that the creditors will as soon as possible be asked to endorse a very substantial variation of it, is a very interesting question on which I express no view, and which must be left until another day.
29. For the reasons set out above, there will be an order refusing the PIP’s application. The matter will be listed in the first personal insolvency list after delivery of this judgment for submissions as to the appropriate orders to be made.