AN CHÚIRT UACHTARACH
THE SUPREME COURT

[2023] IESC 31

Supreme Court Record No.: S:AP:IE:2022:000091

High Court Record No.: 2022 No. 43 CA

Circuit Court Record Number.: C:IS:SEWX:2019:02102

Dunne J.

O'Malley J.

Baker J.

Woulfe J.

Murray J.

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

AND

IN THE MATTER OF FERGUS O'CONNOR OF BALLYGARRON, KILMUCKRIDGE, COUNTY WEXFORD ("THE DEBTOR")

AND

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

JUDGMENT of Ms. Justice Baker delivered on the 30th day of November, 2023

Introduction

1. The Bankruptcy Law Committee Report (the Budd Report), delivered to the Minister for Justice in 1972, commented that bankruptcy had a broad range of purposes and was no longer properly to be seen as merely a means of protecting creditors. As I noted in my judgment in *Re Wymes (A Bankrupt)* [2021] IESC 40, [2021] 1 I.R. 803, preventing fraud by bankrupts was the stated purpose of the first Bankruptcy Act directly applicable to Ireland, enacted in 1772. The approach to bankruptcy has evolved since then, and bankruptcy is now seen as having a much broader purpose and social effect, in that it provides for the orderly resolution of debt, fairness between creditors and the protection of both debtors and creditors. Indeed, the Budd Report noted that one purpose or object of bankruptcy was to protect bankrupts from vindictive creditors by freeing them from the balance of their debts when they were unable to pay these in full, and to thereby help to "rehabilitate" the bankrupt.

2. Nonetheless, as must be apparent from any reading of Dickens, but also modern literature or social commentary, bankruptcy still carries a degree of stigma which can endure and affect a person's creditworthiness. This is so notwithstanding the reduction to 12 months of the statutory period during which a bankrupt is excluded from ordinary economic activity in the State. As I noted in para. 17 of my judgment in *Wymes* the element of shame which finds echoes in literature and history may be less apparent now in the light of contemporary thinking on the societal impact of debt. Nonetheless, a person adjudicated bankrupt thereby acquires a status which is restrictive of the economic activities of the bankrupt for the duration of the bankruptcy, and which may have significant effects on their credit rating long after the bankruptcy has come to an end. Further, the assets of that person are immediately vested in the Official Assignee upon adjudication, and limitations are placed on the capacity to litigate. See the observations of McKechnie J. in *Murphy v. Bank of Ireland* [2014] IESC 37, where he says that bankruptcy is seen as "reflecting badly on one's character and reputation."

3. The Personal Insolvency Act 2012, as amended, ("the Act of 2012") provides a wholly new statutory scheme by which the debts of insolvent persons are forgiven or restructured in whole or in part, and provides for a far-reaching procedure intended to ameliorate the effect of indebtedness, and to so without some of the more draconian consequences of bankruptcy. A person availing of the scheme does not thereby acquire a different legal status from other persons, and the invocation of the personal insolvency process does not involve the limitations imposed as a matter of law on a bankrupt as to the ownership of property or the right to litigate.

4. The Act of 2012 reflects the societal importance of protecting debtors, not merely for the personal interest of the debtor or perhaps his or her family, but also in the interests of the common good. The Long Title of the Act recites in some detail its objectives and the interests of the common good it seeks to enhance, including the stability of the financial system in the State. The Act recites three overriding objectives, first, the need to ameliorate the difficulties experienced by debtors due to insolvency and to thereby lessen the adverse consequences for economic activity in the State; second, the need to enable creditors to recover debts due to them by insolvent debtors to the extent that the means of those debtors reasonably permits in an orderly and rational manner; and third, the need to enable insolvent debtors to resolve their indebtedness without recourse to bankruptcy and thereby facilitate the active participation of such persons in the economic activity of the State.

5. The perceived benefit to society generally and to the common good by ensuring and enhancing the stability of the financial system in the State was regarded of high value, as were the orderly and reasonable resolution of debt, on the one hand, and recovery by creditors of liabilities on the other hand. The Act rests on a formulated position that bankruptcy was to be avoided should an alternative rational and orderly means of resolution be available to the debtor and creditor.

6. In *Re Nugent (A debtor)* [2016] IEHC 127 I remarked that:

> "[T]he purpose of the personal insolvency legislation is to avoid a debtor being made bankrupt, and that the personal insolvency regime offers a more benevolent means by which he or she can deal with indebtedness." (at para. 59)

7. The innovative nature of the Act was also noted by me in the High Court in *Re McManus (A debtor)* [2016] IEHC 279.

8. When an application for approval of an arrangement to resolve debt comes for approval by the relevant court under the legislative scheme, those principles, and the express statutory conditions which reflect them, inform the assessment of the reasonableness and fairness of the arrangements which, once approved, become binding on all relevant creditors, and thereby protect the continued economic activity of the debtor and facilitates his or her return to ordinary activity.

9. To avail of the scheme of the Act a person must be insolvent. This judgment addresses the interpretation and application of those provisions identifying the test by which a person is to be regarded as insolvent. I do not at this juncture describe those statutory provisions as either gateway or qualifying provisions, as part of the argument before this Court concerned precisely that question of whether the statutory definition of insolvency is to be treated as a gateway provision, and if so whether this has any consequences for how it is to be interpreted and applied.

The Appeal

10. This is an appeal of Promontoria Oyster DAC ("the appellant") of the order of the High Court (Owens J.) on an appeal from the Circuit Court, approving the coming into operation of

a Personal Insolvency Arrangement ("PIA") pursuant to the powers contained in s. 115A of the Act of 2012. The primary question for consideration in this appeal concerns the question whether the respondent to this appeal, Mr. Fergus O'Connor ("the debtor") was insolvent for the purposes of the Act.

11. The case arose from the debtor's application to the Circuit Court for an order under s. 115A of the Act approving the coming into effect of the proposed PIA, notwithstanding that it had not been approved at the statutory meeting of creditors. The appellant objected to approval of the PIA on the ground *inter alia* that the debtor did not meet the threshold requirement under the Act that he be insolvent. The respondent has land, the value of which exceeds his debts, and the appellant argued that the sale of these lands would generate ample funds to repay the debts and restore the debtor to solvency.

12. In the Circuit Court, Her Honour Judge Enright held that Mr. O'Connor was insolvent for the purposes of the Act and that the agricultural land belonging to him was not a "readily realisable asset" for the purposes of assessing his solvency. The appeal to the High Court was dismissed. Relying on the decision of McDonald J. in *Re Nuzum (A debtor)* [2020] IEHC 164, and that of Laffoy J. in *Re Connemara Mining Co. Plc* [2013] IEHC 225, [2013] 1 I.R. 661, Owens J. held that the land and other assets of the debtor, referred to in shorthand as "tools of the trade", including his principal private residence, would take a "considerable amount of time to sell", and that to compel Mr. O'Connor to dispose of these assets to satisfy the debt would result in the loss of his livelihood, and thus fell to be excluded from the PIA under section 99 of the Act.

13. By Determination dated 22 November 2022, ([2022] IESCDET 130), this Court granted leave to appeal the decision of the High Court in that Circuit Court appeal, stating at para. 7:

> "This Court is satisfied that the issue identified by the applicant herein meets the threshold of exceptional circumstances for a further appeal to this Court. The issue raised turns on the meaning of the phrase, "readily realisable asset" as that phrase is used in the context of insolvency and, in particular, having regard to provisions of s. 99(1)(d) of the Personal Insolvency Act 2012. If necessary, the issue before this Court can be further refined in the course of case management. The Court will therefore grant leave."

Background

14. The appellant is a designated activity company limited by shares. It was incorporated in the State on 12 October 2016. The business of the appellant involves *inter alia* the acquisition of the rights and entitlements arising on foot of loan facilities and related security. The debtor is a farmer who has an address at Kilmuckridge, Gorey, County Wexford.

15. The liabilities of the debtor to the appellant arise on foot of two separate loan facilities, originally advanced to him by Ulster Bank Ireland DAC (previously Ulster Bank Ireland Limited), and since acquired by the appellant. The appellant is by far the largest creditor of the debtor and holds security over some of his lands and on the folio in which his principal private residence is situate.

16. A debt owned by the debtor to his mother, Ms. Elizabeth O'Connor ("Ms. O'Connor senior") is secured against some of his lands. There are trade creditors arising from the debtor's farming enterprise.

17. The practitioner is a licensed insolvency practitioner or "PIP" and a partner in the firm of PKF-FPM Accountants.

18. On 26 October 2019, a protective certificate issued pursuant to s. 95(2)(a) of the Act. Thereafter, on 11 March 2020, the PIP proposed a PIA.

19. The statutory meeting of creditors pursuant to s. 106(1) of the Act was held on 26 March 2020 (the "Creditors' Meeting"). The appellant returned a proxy vote and voted against the proposed PIA. The certificate of the result of the creditors' meeting issued on 2 April 2020 pursuant to s. 115A(2)(d) of the Act, and records *inter alia* that 97.18% of the creditors of the debtors (by value of debt owed) voted against the proposed PIA.

20. By Notice of Motion issued on 3 April 2020, the PIP sought an order pursuant to s. 115A(9) of the Act (the "s. 115A Application") confirming the entry into effect of the proposed PIA, notwithstanding the outcome of the Creditors' Meeting. The appellant filed a Notice of Objection in accordance with s. 115A(3) of the 2012 Act.

21. The s. 115A Application was heard by the Circuit Court on 2 March 2022. As I have noted, and by order of the same date, the Circuit Court approved the coming into effect of the PIA pursuant to s. 115A(9) of the Act.

22. By Notice of Appeal issued on 11 March 2022, the appellant appealed the Circuit Court Order to the High Court and, as I have again earlier observed, that appeal was heard by Owens J. on 11 July 2022 who delivered an *ex tempore* ruling dismissing the appeal.

23. By virtue of the foregoing, the PIA came into effect following the making of the Circuit Court Order and remains in effect subject to the outcome of this appeal.

<u>The Assets and Liabilities of the Debtor</u>

24. For the purpose of this appeal the parties have agreed the material facts as follows.

25. The PIA valued the assets of the Debtor (including those owned jointly with his estranged wife) in the total amount of €1,837,100.00 and valued his debts (including those owed jointly with his estranged wife) in the amount of €1,119,402.22, leaving a net asset position of €717,697.77. The liabilities of the debtor to the appellant were listed as €874,430.46, while the liabilities to Ms. O'Connor, the mother of the debtor, were listed as €217,932.00.

26. The debtor is the registered owner of eleven folios - all in County Wexford. These include the principal private residence of the debtor (located on Folio WX …35F), a rental property (comprised in WX…64F) and agricultural land totalling approximately 190 acres. The appellant holds first-ranking security over Folio WX…35F (the folio containing the principal private residence), Folio WX…16F and Folio WX…98F. The PIA listed the value of those properties as €80,000.00, €300,000.00, and €230,000.00, respectively.

27. In addition to his real property assets, the PIA valued livestock, three motor vehicles and farm machinery at €114,950.00.

28. The estranged wife of the debtor is not listed as a creditor, but she has registered *lites pendentes* against several of the folios. She did not participate in the proceedings before the Circuit Court or the High Court, or in this appeal.

29. The PIA provides for, *inter alia,* a restructure of the liabilities of the debtor to the appellant, by which those liabilities are to be paid in full over thirty years. The PIA is for 36 months and provides for the loan to be split, 50% of the loan is to be serviced on a capital plus interest basis at the rate of 3% for the 36 month period of the PIA, and the other 50% being warehoused until expiration of PIA. The warehoused element will be serviced in full on a capital plus interest basis post-PIA until the end of the restructured loan. The PIA does not require the debtor to dispose of any real property assets, or of his chattels and items of

personalty. Whilst there is no write down of any debt, the extension of the term of the loan owed to the appellant is significant, as the secured creditor has lost the benefit of immediate recovery, or recovery within a short period of time, in accordance with the relevant loan conditions.

30. The central question in this appeal is whether the debtor is insolvent within the meaning of the Act. The value of his assets far exceeds the amount of his liabilities. The appellant argues that the debtor is not insolvent, and that because the value of his assets far exceeds his liabilities, he cannot be in the class of persons for whom the legislative scheme was enacted, those in serious financial difficulty who are facing consequences such as a genuine prospect of the loss of their livelihood or their principal private residence, or who are facing bankruptcy. The debtor could dispose of assets and thereby discharge his liabilities in full and remain a person of substantial net worth.

The High Court Order and Ruling

31. The primary issue in contention on the appeal before the High Court was also whether the debtor was insolvent within the meaning of the legislation. Owens J. considered that in consequence three questions arose for consideration. First, the meaning of the statutory test for solvency, that a debtor be unable to pay debts as they fall due. Second, whether only readily realisable assets can be used to determine solvency. Third, whether evidence about future funding was credible. He noted from the judgment of Laffoy J. in *Re Connemara Mining* that these tests arose in corporate insolvency, which he applied by analogy.

32. Owens J. held that the debtor had been "for a very, very long time completely and utterly insolvent", and absent a restructuring of his liabilities, the only way this could change would be a sale of all, or the vast majority, of his assets. He took the view that assets such as

farmland and livestock "require considerable effort to sell," and that to restore the debtor to solvency by a sale of all the assets "would require serious disposal of virtually the entire business" of the debtor. He adopted the test that only "readily realisable" assets fell for consideration in the calculation of insolvency for the purposes of the Act, as there had to be "some source of ready cash to meet current commitments."

33. On the application of the test as he thus expressed it, Owens J. accordingly held that the debtor was insolvent and therefore met the threshold qualifying requirement under the Act. His reasoning therefore was two-fold: the debtor did meet the test of insolvency as some of his assets were not readily realisable. Second, that the Act did not contemplate the sale by the debtor of all of his farm assets in order to assess solvency.

34. Neither the Circuit Court nor the High Court judge considered that farmland in itself is excluded from the concept of "readily realisable asset," and the parties agree that no such *ex ante* rule exists, as each case must be determined on its own facts.

The Grounds of Appeal and Opposition

35. The appellant's grounds of appeal may be summarised as follows:

1. The High Court judge erred in law in construing and applying the concept of an "insolvent" debtor, for the purposes of section 91(l)(d) of the Act of 2012 in an excessively broad and inflexible manner and was inconsistent with previous decisions of the High Court, by which he was bound, in particular the decision of *Re Nuzum (A debtor)*.

2. The High Court judge erred in law in determining that agricultural land was incapable, at the level of principle, of constituting one of the debtor's “readily realisable assets”.
3. The High Court judge erred in law in failing to afford appropriate weight, or any weight, to the requirement that an asset must be “reasonably necessary for the debtor's employment, business or vocation” in order to be protected under s. 99(1)(d) of the Act of 2012, and in construing the provisions of s. 99(l)(d) of the Act of 2012 in such a manner as to permit the extinguishment of security over a real property asset, purely on the basis that the debtor derives income therefrom.

36. The respondent’s grounds of opposition to the grounds of appeal are as follows.

1. The High Court judge correctly applied the law regarding the test of what it means to be “insolvent”, and there was no error in his conclusion that the debtor was “insolvent”.
2. The High Court judge did not determine any issue of principle regarding agricultural land.
3. The High Court judge did not err in law and did construe s. 99(l)(d) of the Act of 2012 by reference to the provisions of the Act of 2012 as a whole, and to the individual facts of this case, and to the protections afforded to secured creditors under the Act of 2012. The creditor is (and was) fully secured and the security was unaffected. The debt is to be paid in full.
4. The High Court judge did afford appropriate weight to the requirement that an asset must be "reasonably necessary, for the debtor’s employment, business or vocation" (emphasis added) in order to be protected under s. 99(l)(d) of the Act of 2012.

The issues were refined in case management and in the written and oral submissions and the parties agree that the net legal issue before this Court is the meaning of "insolvent" for the purposes of the Act or precisely what is meant by the statutory definition that a person is insolvent if he or she is "unable to meet one's debts when they fall due."

The Scheme of the Act of 2012 (as amended)

37. The Act of 2012 provided three alternative types of arrangements to facilitate the resolution of indebtedness without recourse to bankruptcy. The Debt Relief Notice (DRN) is the smallest in monetary terms of these arrangements and the procedures and criteria are set out in Chapter 1 of Part 3 of the Act. A debtor is eligible to apply for a DRN in respect of unsecured debts only, and up to a limit of €20,000 in value. Certain classes of debts including taxes, other debts owed to the State, and judgment debt are excluded from the ambit of the DRN. To avail of a DRN a debtor must have assets of less than €400.

38. The second form of arrangement is a Debt Settlement Arrangement (DSA) which can deal with debt in excess of €20,000 but again is limited to dealing with unsecured debts only. The procedures and criteria are set out in Chapter 3 of Part 3 of the Act.

39. Finally, a Personal Insolvency Arrangement can include both unsecured and secured debts up to the value of €3 million unless all secured creditors agree to a larger monetary limit. The procedures and criteria are set out in Chapter 4 of Part 3 of the Act.

40. In the case of a DRN the application is made initially through an approved intermediary, often MABS. For a DSA or PIA, a PIP must be engaged. I deal later more fully with the role of the PIP in the process generally but for the present merely note that the PIP is engaged from the early stages of the application for either a DSA or a PIA, and the involvement of the PIP

endures for the entire process leading up to the approval of a PIA by creditors at a statutory meeting, and later by application to the relevant court, and thereafter, as the PIP continues to have a supervisory role, until the end of the period of protection.

41. A debtor must be insolvent within the meaning of the legislation to avail of any one of the options.

Process Leading to the Formulation and Approval of a PIA.

42. The first step in the process leading to the formulation of a PIA is an application to the Insolvency Service of Ireland (ISI) for a protective certificate. The application is commenced by the PIP who first notifies the ISI of the debtor's intention to make a proposal for a PIA and applies on behalf of the debtor for a protective certificate. The application is made by the PIP and under s. 93(3) may be withdrawn by the PIP at any time prior to the issuing of a protective certificate. Indeed, the role of the PIP as a guardian of the process begins early in that under s. 93(4) if the PIP becomes aware of any inaccuracy or omission in an application for a protective certificate, he or she shall inform the ISI of this fact as soon as is practicable.

43. The relevant court grants a protective certificate which is in force initially for a period of 70 days from the date of issue and which protects the debtor from action by a creditor during its currency. It is the ISI that lodges the documentation with the court and the ISI acts as a filtering mechanism, in that, if it is not satisfied following its consideration of the documentation lodged that the application is in order, the PIP will be notified either to submit a revised application or confirm that the application lodged has been withdrawn.

44. The relevant court in turn must be satisfied that the eligibility criteria are met, and it issues, or, if not so satisfied, refuses to issue, a protective certificate. The order for the issue of a protective certificate may be made following a hearing on notice to the ISI and the PIP.

45. The protective certificate may be extended for 40 days on its expiry on application by the PIP.

46. The issuing of a protective certificate is a matter of considerable benefit to a debtor in that it gives breathing space in which to seek to come to an arrangement with creditors and avoid the less benevolent consequences of bankruptcy. By virtue of s. 96 of the Act during the currency of a protective certificate, either for the initial period of 70 days, or as extended for a further 40 days, a creditor who has notice of the issue of the certificate shall not institute proceedings, continue proceedings already in being, take steps to secure or recover payment, execute or enforce a judgment, or take steps to enforce security, contact the debtor requiring payment of the debt, or terminate or amend or seek an accelerated payment under an agreement already reached. Further, a bankruptcy petition relating to the debtor may not be presented, and if one has already been presented it is stayed pending the completion of the personal insolvency process**.** See *Re Nugent (A debtor)* and Simons J. in *Tanager DAC v. Ryan* [2019] IEHC 659.

47. A protective certificate may be set aside by order of the court on application of an aggrieved creditor under s. 97 if the creditor establishes that its continuance would cause irreparable loss to the creditor which would not otherwise occur or that there would be unfair prejudice.

48. After a protective certificate is issued the PIP is to give written notice to creditors of his or her appointment and to invite creditors to make submissions regarding their debts and how those debts might be dealt with in the context of a PIA. The PIP is obliged to consider

submissions made by creditors and must as soon as is practicable after the issue of a protective certificate make a proposal for a PIA in respect of the debts concerned.

The Terms of a PIA

49. The legislation requires two matters relevant to the present appeal to be considered in the formulation of a PIA. Both envisage that the debtor should, insofar as this may reasonably be achieved, remain an economic actor and not dispose of those assets relied on for his or her livelihood, and also that the debtor should continue to own or occupy their home. These principles echo the objectives of the Act which I considered in broad terms earlier in this judgment.

50. Section 99(2)(d) of the Act requires that the terms of a PIA not require the debtor to dispose of "assets that are reasonably necessary" for his or her trade, business, or profession within the meaning of the Act:

> "99.— (1) Subject to the mandatory requirements referred to in subsection (2), the terms of a Personal Insolvency Arrangement shall be those which are agreed to by the debtor and subject to this Chapter, approved by a majority of the debtor's creditors in accordance with this Chapter.
>
> (2) The mandatory requirements referred to in subsection (1) are:
>
> > …
> >
> > (d) a Personal Insolvency Arrangement shall not require the debtor to sell any of his or her assets that are reasonably necessary for the debtor's employment, business, or vocation unless the debtor explicitly consents to such sale;"

51. That subsection is stated in mandatory terms but Section 104, which deals with the principal private residence of the debtor, is in more flexible terms and provides that a PIP shall, insofar as is reasonably practicable, formulate a proposal for a PIA that preserves the right of the debtor to occupy or retain ownership of a principal private residence. Section 104 provides:

> "104.— (1) In formulating a proposal for a Personal Insolvency Arrangement a personal insolvency practitioner shall, insofar as reasonably practicable, and having regard to the matters referred to in subsection (2), formulate the proposal on terms that will not require the debtor to—
>
> > (a) dispose of an interest in, or
> >
> > (b) cease to occupy,
>
> all or a part of his or her principal private residence and the personal insolvency practitioner shall consider any appropriate alternatives.
>
> (2) The matters referred to in subsection (1) are—
>
> > (a) the costs likely to be incurred by the debtor by remaining in occupation of his or her principal private residence (including rent, mortgage loan repayments, insurance payments, owners' management company service charges and contributions, taxes or other charges relating to ownership or occupation of the property imposed by or under statute, and necessary maintenance in respect of the principal private residence),
> >
> > (b) the debtor's income and other financial circumstances as disclosed in the Prescribed Financial Statement,

(c) the ability of other persons residing with the debtor in the principal private residence to contribute to the costs referred to in subsection (2), and

(d) the reasonable living accommodation needs of the debtor and his or her dependants and having regard to those needs the cost of alternative accommodation (including the costs which would necessarily be incurred in obtaining such accommodation)."

Process Leading to the Approval of a PIA.

52. The PIA is formulated by the PIP with these statutory provisions in mind, and in the light of the financial position of the debtor, and the interests of creditors. The PIP has an independent role in the process to formulate a PIA that achieves solvency for the debtor and fairness for the creditor. I will deal later in this judgment of the importance of that role which must be seen as deriving from the legislative intent that an independent and financially qualified intermediary should formulate the PIA, present it to the creditors, and later to the relevant court. The proposed PIA is presented to a meeting of creditors called for that purpose by the PIP under s. 106 and in accordance with the statutory requirements contained in s. 107 *et seq*. There is no need to repeat the voting provisions of the legislation in this judgment, save to note that 65% of creditors voting at a meeting must approve the PIA in the manner provided by ss. 110 and 111, and Regulations made under s.111.

53. Thereafter the PIA is submitted to the relevant court under s. 115 for approval, and for consideration of any objections lodged by a creditor to the coming into effect of the PIA pursuant to s. 114 *et seq*. Upon the approval of the court, and registration in the Register of Personal Insolvency Arrangements, the PIA becomes binding on all participating creditors.

The Circuit Court has jurisdiction to approve any PIA where the amount of debt is less than 2.5 million euro.

54. At the expiry of the term of the PIA, usually, but not invariably, 6 years, the debtor is discharged from all unsecured debts and from secured debt to the extent provided by the PIA. The continued performance of the obligations in the PIA is subject to supervision by the PIP.

55. The Act of 2012 was amended by the Personal Insolvency (Amendment) Act 2015 and now provides for the approval of a PIA notwithstanding that it did not meet the approval of the requisite vote of creditors if certain conditions are met, and if that PIA would preserve the right of a debtor to continue to own or occupy a principal private residence. Thus, s. 115A(9)(b) provides for the coming into operation of a PIA in respect of which court approval is sought where the proposal presents a reasonable prospect that it will:

> "(i) enable the debtor to resolve his or her indebtedness without recourse to bankruptcy,
>
> (ii) enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit, and
>
> (iii) enable the debtor –
>
> > (I) not to dispose of an interest in, or
> >
> > (II) not to cease to occupy, all or a part of his or her principal private residence…"

56. The making of an order under s. 115A by which the rights of creditors are abrogated can impact on contractual rights and obligations, and also must be seen to be capable of overreaching property rights and interests when these can be adversely affected by a proposed resolution: see *Re Varma (a debtor)* [2017] IEHC 218, [2017] 3 I.R. 659 and the judgment of

McDonald J. in *Re Parkin (a debtor)* [2019] IEHC 56 where he noted that s. 115A "represents a significant intrusion into the property rights of creditors which required compliance with all of the legislative provisions"

57. The proposed PIA in the present case provides for the restructuring of the term of the secured debt to the appellant which is now proposed to be payable over 30 years, and while it does not involve the reduction in the debt due to any of the creditors, the appellant, a secured creditor owed a substantial debt, has an immediate or at least short-term right to enforce the debt by reason of holding security and the proposal is therefore one which has an obvious and far-reaching effect on its contractual rights and obligations. The arguments on the appeal in this Court did not concern whether the PIA provided a fair and reasonable return to the objecting creditor in the light of the financial position of the debtor, the value of whose assets exceeds his liabilities. Instead, those arguments were directed to the meaning and application of the test for insolvency.

The Statutory Provisions Regarding Solvency

58. The debtor's assets exceed his liabilities by a factor of 2:1 and it is argued that the legislation never intended to facilitate the making of arrangements by a person in his position where he is capable of resolving his indebtedness by the sale of some or all of his assets.

59. A debtor must be insolvent to commence the process leading to the formulation of, and later application to the relevant court to approve, a PIA. Section 91(1)(d) of the Act contains the 9 conditions to be satisfied by a debtor seeking approval of a PIA, the material one being at s. 91(1)(d):

"91.— (1) Subject to the provisions of this section and this Chapter, a debtor shall not be eligible to make a proposal for a Personal Insolvency Arrangement unless he or she satisfies the following criteria— …

(d) that the debtor is insolvent;"

60. The statutory definition of "insolvency" contained in s. 2(1) of the Act is "that the debtor is unable to pay his or her debts in full as they fall due".

61. The parties agree that the statutory test of insolvency is a so-called "cash flow" test, but how this is to operate in practice is in dispute and is far from obvious. Briefly the debtor argues that the meaning and application of the solvency test must have regard to the statutory purpose and in particular the fact that the sale of certain assets might, in some circumstances, not be appropriate, if the result would be the loss of a debtor's principal private residence or of the tools of his or her trade. It was the potential for the loss of the debtor's agricultural lands and machinery, which was the focus of the decision of the High Court judge. The argument in this Court also addressed whether the value of the principal private residence of the debtor could be treated as an asset for the purpose of the assessment of his solvency.

62. The Act of 2012 is part of a suite of legislation that deals with corporate and personal insolvency, and which includes liquidation, examinership, bankruptcy and the new statutory regime providing for a remedy of rearrangement of debt falling short of bankruptcy as established by the Act of 2012.

63. The meaning and application of the test for insolvency has been developed primarily in the corporate law sphere. Whether a company is insolvent will *inter alia* come to be determined in the context of a winding up petition, on an application by either a creditor or the company itself to defend a winding up petition, in the defence by the directors of a company to a charge

of reckless or fraudulent trading, or in the context of an application for security for costs. (S. 569(1) of the Companies Act 2014).

64. Section 570 of the Companies Act 2014 provides that a petition to wind up a company may be presented *inter alia* when the company is unable to pay its debts. The definition does not make reference to payment of debts *as they fall due*, but the following section contains certain provisions by which a company is deemed to be unable to pay its debts including where demand in writing is made which has not been satisfied, where an execution order remains unsatisfied, and where the court is satisfied that the company is unable to pay its debts.

65. Section 570(d) of the Companies Act 2014 provides that a court shall take into account contingent and prospective liabilities of the company in determining whether it is able to meet its debts. This has led to the evolution of the distinction between balance sheet insolvency and cash flow insolvency. As explained by MacMenamin J. in *Club Tivoli Ltd* [2005] IEHC 468 the tests are "interrelated", and a company may be insolvent or heading towards insolvency if realisable assets of the company will need to be used sooner or later to meet a deficiency in the ability to pay.

66. The statutory test in personal insolvency is differently expressed. It contains the proviso that the debts must be payable *as they fall due*, and insofar as it is possible to say that there is a strict line of demarcation between the balance sheet test and the cashflow test, a point which does not need to be decided in this appeal, it is clear that the Oireachtas intended the solvency of the debtor to be assessed on a cashflow basis.

67. That is not to say however, and I return to deal with this in more detail, that a person will be insolvent if he or she cannot meet his or her debts as they fall due from cash assets. That is not a necessary element of the cashflow test, and the personal insolvency legislation does not suggest such a restrictive condition. Further, it could be unfair to creditors to apply

such a narrow test and, bearing in mind the degree to which the rights of creditors may be varied or abrogated under the legislation, it must be the case that a degree of happenstance could be imported into the test were only cash assets to be taken into account in assessing solvency. For example, unfairness could result if a debtor, in anticipation of an argument regarding solvency, converted cash assets into real property or other forms of personalty which could be seen as less readily realisable or less easy to value.

68. But the distinction may not be clearcut. Indeed, in *Crawley v. Northern Bank Finance* [1981] I.R. 353 Kenny J. stated (at p.358) that the words "solvent" and "insolvent" are ambiguous words.

69. Laffoy J. in *Re Connemara Mining* chose not to express a view on the appropriateness of a cashflow test, as distinct from a balance sheet test, for the purposes of that case where she concluded that the petitioner had not discharged the onus of proving that the company was not able to pay its debts as they fell due. She concluded that the test, whatever formulation was appropriate, must involve a number of different inferences, that the court is not limited to assessing whether cash in hand is adequate to cover debts. Where other assets were resorted to, she thought it accorded with common sense to say that only readily realisable assets could be used to determine solvency. She noted also that possible future funding through borrowing or raising capital might also be a factor that could be taken into account. She noted that while those factors may be relevant "each petition must be considered on its own facts."

70. Barron J. in *H. Albert de Bury and Co. N.V. v. O' Mullane* (Unreported, High Court, Barron J., 2nd June 1992), noted the following (which was quoted with approval by Laffoy J. in *Re Connemara Mining*):

> "Insolvency is essentially a matter of assets and liabilities. If liabilities exceed assets, the position is one of insolvency. But the reverse is not necessarily true. A company is

> not solvent because its assets exceed its liabilities. It cannot for example take into account assets which it requires to remain in existence save insofar as they may be used as security to raise finance. The test is ultimately, can it pay its debts as they fall due ….”

71. Butler J. in *In the Matter of Bayview Hotel (Waterville) Limited and in The Matter of the Companies Act 2014* [2022] IEHC 516 took a similar approach:

> “It seems logical that a company should not be readily treated as solvent if it is required to sell the substantial asset which it requires to conduct its business in order to pay its debts.” (at para. 68)

72. The observations of Laffoy J. in *Connemara Mining* usefully illustrate the fluid nature of the test, and the fact that a number of inferences must be drawn in order to assess solvency under either test. Further, the type of assets that can be taken into account and their value is not necessarily different in either test, although the use of the present tense in the statutory definition of personal insolvency would suggest that the liabilities against which the assets are to be weighed are present liabilities, or at least liabilities which are not contingent or future. I agree with the statement by McDonald J. in *Re Nuzum* at para. 38 *et seq.* that it is relevant that the 2012 Act, unlike s. 570(d) of the Companies Act 2014 makes no reference to contingent or future liabilities.

73. The cashflow test requires that a court assess the nature of the assets available to the debtor to meet his or her liabilities as they fall due, and whether, how, and when they can be realised must be an element in assessing the reasonableness of an argument regarding solvency and the appropriateness of including or excluding certain assets in the calculations.

74. The cash flow test does not engage an analysis of whether debts which are not due are to be tested against all available assets. If for example a secured loan is repayable by monthly instalments the mortgagor is not insolvent if a call for the repayment of capital is not capable of being met, unless the mortgagee is entitled to, and has called on, payment by reason of a default entitling the lender to treat a debt as having become due. In *Re Laura Sweeney* [2018] IEHC 456, I held, in the High Court, that the fact that a debtor had a negative equity in a principle private residence was not of itself determinative of insolvency and observed:

> "'Insolvency' for the purposes of the Act means that a debtor is unable to pay his or debts as they fall due, not that a capital demand could not be met." (at para. 55)

75. It should be noted however that there was no challenge by the creditor in that case as to whether the debtor was truly insolvent, and the argument concerned the day-to-day living expenses of the applicant: the issue there was the treatment of the capital due on the mortgage.

76. The concept of insolvency for the purpose of the personal insolvency legislation was the subject of extensive judicial treatment in the High Court decision of McDonald J. in *Re Nuzum (A debtor)*. McDonald J. thought that solvency must be assessed by reference to the value of "readily realisable assets." In that context, he considered it unlikely that a family home would ordinarily fall within the category of "readily realisable assets" as it cannot usually be sold readily, in particular not until the owners have found alternative accommodation, although there may well be cases where, having regard to the extent of the positive equity in a family home, it would be absurd not to treat that positive equity is relevant to solvency.

77. I return later to consider the position of a principal private residence or family home in the assessment of solvency. For the present I note that it is clear that the assessment of solvency requires scrutiny of the nature and value of available assets, and that must import a requirement on the part of the debtor, or as the case may be, the creditor, to explain and offer evidence as

to the market forces and other relevant factors so as to enable a court to form a considered view as to whether assets are capable of being realised and in what timeframe.

Caselaw From Other Jurisdictions Regarding the Meaning of "insolvent"

78. The gloss applied by Laffoy J. in *Connemara Mining* by which only "readily realisable assets" fell to be taken into account is found in the authorities from other common law jurisdictions.

79. Liquidity is not the focus of an assessment of solvency, but timing is. On a test of cash flow insolvency where what is to be ascertained is whether a debtor can meet debts as they fall due, the assessment must have regard to the immediacy of the timeframe within which the debts are due and whether the debtor is in a position to meet the debts within that time. It is for that reason that where cash assets are not sufficient to meet liabilities the assessment must include an analysis of whether other less obvious liquid assets could be available. McDonald J. in *Re Nuzum* mentioned useful examples such as saving certificates, prize bonds, or other shares which could obviously be taken into account in assessing an ability to pay debts as they fell due, even if it would take a number of days or weeks to obtain payment.

80. The test was usefully described by David Oliver Q.C. sitting as a Deputy Judge of the High Court Chancery Division of England and Wales in *Re Coney (A Bankrupt)* [1998] B.P.I.R. 333 in a judgment was dealing with the question of whether a bankruptcy order should be annulled:

> "It would not normally be right … to annul a bankruptcy order unless at least it is shown that as at the date of the order the debtor was in fact able to pay his debts or had some tangible and immediate prospect of being so able which has since been fulfilled or would have been but for the order itself. It is with regard to a 'tangible and immediate

prospect' that the assets and liabilities of a debtor and their nature will usually be of relevance."

81. That judgment was quoted with approval by the Court of Appeal of England and Wales in *Paulin v. Paulin* [2009] EWCA Civ 221, [2010] 1 W.L.R. 1057, [2009] 3 All E.R. 88, where Wilson LJ concluded that a debtor's solvency would or could extend beyond "cash resources readily available" and could extend to "monies which he can procure by realisation by sale or by mortgage or pledge of these assets within a relatively short time." The Court there also had regard to the nature and amount of the debts and to the circumstances including the business of the debtor. That approach highlights the importance of context in the personal circumstances of a debtor.

82. The jurisprudence from Australia, New Zealand and Canada shows a similar approach. In *Sandell v. Porter* [1996] 115 C.L.R. 666 a judgment of the High Court of Australia, Barwick C.J. observed that a conclusion as to whether a person is insolvent must involve a consideration of the debtor's financial position in its entirety "and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity" (p. 671). Barwick C.J. further observed that whether a debtor was insolvent was not limited to an analysis of the cash resources immediately available to him or her, but could "extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time - relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor." That judgment noted that a temporary lack of liquidity would not equate to insolvency, but rather the test was whether a debtor "utilising such cash resources as he has or can command through the use of his assets" can meet debts as they fall due.

83. The Supreme Court of New South Wales in *Hall v. Poolman* [2007] NSWSC 1330 was concerned with a question of corporate insolvency, in which context Palmer J. observed that

the "crucial question for solvency is: how soon will the proceeds of realisation be available". That judgment was quoted with approval in the New Zealand case of *Yan v. Mainzeal Property and Construction Ltd (In receivership and liquidation)* [2014] NZCA 190.

84. The Canadian 19th century decision of *Re E v. McDonald* [1886] 13 O.R. 352 suggested that the test was whether a person had enough money, goods, or estate "sufficient to pay all his debts". That may seem like a simple formulation of the test, but it is sufficiently close to the statutory definition on the Act of 2012 to merit noting that the meaning reflects a long history in the common law .

85. An analysis of the cashflow test for insolvency was also conducted in the decision *Yan v. Mainzeal* to which I have earlier referred. There, at para. 59, the judge described the test as one of "solvency, not liquidity" and noted that a temporary lack of liquidity may not equate to insolvency if a debtor is able to realise assets or borrow funds within a relatively short timeframe in order to meet liabilities as they fall due. That comment noted the temporal element of the test for cashflow insolvency which is linked to the ease of realisation within a relatively short time. The New Zealand Court considered *Sandell v. Porter* to indicate what it called a "realistic commercial approach" to the assessment of the entire financial position of the debtor was what was required.

86. When a debt falls due can sometimes be a matter of some dispute, and as has been noted in the authorities some common sense, or what was described by the Court of Appeal of New South Wales in *Hall v Poolman* as "commercial reality" would suggest that some creditors will allow latitude for the payment of debt. Accordingly, while in strict contractual terms a debt may be due on a particular day, a debtor will not always be considered to be insolvent in this sense if latitude is allowed, or is expected to be allowed, or if the debtor is and indicates himself or herself to be in a position to realise assets to meet a demand.

87. These *dicta* offer useful guidance and show the importance of timing, and the fact-specific nature of the inquiry as to insolvency, the importance of evidence to ascertaining the nature of the assets, the feasibility of sale and when illiquid assets can be realised to provide funds to discharge debts which have fallen due. The prospect that a sale or mortgage of otherwise illiquid assets could achieve funds to pay off a debt when it is due or can reasonably be expected to be paid, must be real and tangible. They also highlight the temporal element of the analysis and echo the description of Laffoy J. that what is to be ascertained is whether individual assets are "readily realisable." That phrase is in no sense a term of art but rather a description of the type of assessment that must be undertaken of the assets, their nature, and the circumstances including any practical, legal, or temporal limitations to immediate sale or mortgage, and an assessment of the market value and the likelihood of a prospective purchaser acquiring the assets in a relatively short time. In those circumstances the availability of credit and of a market for a particular asset is a crucial part of the analysis.

88. It is in my view relevant that the Oireachtas deliberately chose to define insolvency by reference to an inability to pay debts as they fall due, and thus to introduce a temporal element to the analysis, rather than testing solvency by the mathematical calculation of whether assets exceed liabilities. Because the definition imports an immediacy, and a present ability to pay debts as they fall due, it does not require an assessment of prospective and contingent liabilities or a contingent ability to pay. The test for insolvency is not so narrow as to mean that a debtor is insolvent if he or she cannot pay liabilities as they fall due from immediately accessible or available cash assets. The legislation envisages an inability to pay in the broad sense and requires an assessment of available assets and whether they can in fact be used to pay a due liability. The test is one of timing and of the nature of the assets.

89. This is in broad terms the test explained by Laffoy J. in *Connemara Mining.* Whether an asset is "readily realisable" incorporates all of these elements of a reasonable prospect of a realisation within a time that is acceptable or reasonably acceptable to a creditor or, as the case may be, to a court. It involves an assessment of value, the nature of the market, the prospect of a purchaser becoming available and whether there exists any impediment to realisation which is likely to be difficult to overcome or which makes a timeframe for realisation difficult to assess or unascertainable.

90. One difficulty that arises in the present case is that facts said to lead to the conclusion that the debtor is insolvent were not fully evidenced by the PIP or the debtor himself or interrogated by the creditor. For example, missing from the evidence are the basis on which a receiver was appointed to some or all of the lands of Mr O'Connor; the date on which demand was made when and if the debt owed to Mr O'Connor's mother has become due; and the due date for payment of the debts to the local cooperative and trade creditors. I will return later to an analysis of the factual nexus of this appeal and to the fact that less than satisfactory evidence is available to fully assess the evidential basis of the purported insolvency.

Are some Assets to be Excluded from the Analysis of Insolvency?

91. Part of the argument in this appeal concerned whether the agricultural land and chattels of the debtor and/or his principal private residence are to be excluded from the assets that could be considered available to be realised to meet his liabilities at the point in the process when his solvency was being assessed or asserted. Two separate questions arise, concerning the farmlands employed in the business of the debtor, and his principal private residence for which different statutory protections are provided. The treatment of both classes of assets requires a consideration of whether some of the principles and purposes underlying the personal

insolvency legislation must inform the definition of insolvency in the legislation and must mean that certain assets are in general to be excluded.

The Submissions on the Interpretative Approach

92. The parties agree that the relevant interpretive principles are found *inter alia* in the judgment of this Court (*per* Murray J. in *Heather Hill Management CLG v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313, at para 106, in *People (DPP) v. Hannaway* [2021] IESC 31 at para. 9 *per* Charleton J., and the rules on constitutional construction of legislation as outlined in *Callaghan v. An Bord Pleanála* [2017] IESC 60 at para 4, *per* Clarke J. (as he then was).

93. Recent analysis of s. 5 of the Interpretation Act 2005 and of the common law principles regarding statutory interpretation have clarified that, while the words of the statute are to be given primacy, and to use the words of Murray J. in *Heather Hill*, they are "the sole identifiable and legally admissible outward expression" (para. 115) of the objectives of the Oireachtas, the plain meaning is no more, and perhaps no less, than a good point of departure. All legislation is enacted in a context and for a purpose, and the context and purpose may in certain circumstances displace the apparently clear language of a provision.

94. The correct approach has been, perhaps unhelpfully, described as a "text in context" interpretative exercise, where the context is the Act taken as a whole, the legislative history, and, an argument relied on in the present appeal, the broader legislative landscape in which the provision or a similar provision is found. The debtor argues that the correct approach to the interpretation of s. 2 and s. 91 must involve positioning the definition and assessment of insolvency in the context of the broad legislative purpose and context of the Act.

95. The debtor argues therefore that in order to apply a test of solvency, the court must assume that the Oireachtas intended that solvency be tested without resort being had to the value of a principal private residence, or of the business assets, because the context and purpose of the legislation supported the retention of the principal private residence and those assets of the debtor reasonably necessary to his or her business, vocation or employment.

96. The appellant accepts that the purpose of the Act is to supply a rational solution to debt with a view that the debtor would continue to engage in the economic activity of the State (See *Re JD (a debtor)* [2017] IEHC 119, *Re Nugent (a debtor)*. The appellant further argues that the approach for which the debtor contends not merely offends common sense, but potentially can lead to abuse, in that a debtor whose assets exceed the value of his or her liabilities, in this case by a significant factor, may reduce liabilities or vary the contractual terms while retaining the assets.

97. The question is whether the test of solvency must be applied by reference to the broad purpose of the Act such that regard is to be had to the desirability of retaining the principal private residence and the tools of trade or business, or whether the definition of insolvency requires no more than an application of the "cash flow" test without regard being had to these broad purposes.

Analysis of the Test for Insolvency

98. As I have noted, a debtor must be insolvent before he or she can enter the insolvency process and seek the agreement of creditors to approve a PIA, and an order approving the PIA from the relevant court under s.115 or s. 115A. McDonald J. in *Re Nuzum* held that whether a debtor is insolvent must be seen as a "hurdle" or a threshold test. There, the PIP had argued that for the purposes of coming to a conclusion as to whether a debtor was insolvent, the

possible proceeds of the sale of a principal private residence must be excluded from the calculation in the light of the statutory language in s. 115A(18)(a). McDonald J. disagreed.

99. I consider his conclusion to be correct from a reading of the scheme of the Act.

100. First, in its plain language the requirement of insolvency is a condition precedent to an the making of a proposal for a PIA. Section 91 makes insolvency a mandatory criterion in exclusionary terms:

> "91.– (1) Subject to the provisions of this section and this Chapter a debtor *shall not be eligible to make a proposal for a Personal Insolvency Arrangement unless* he or she satisfies the following criteria: … " (emphasis added)

101. As thus formulated, and in its clear terms, the Act requires that a debtor be insolvent in order to instruct a PIP to make an application for a protective certificate, and does not envisage at that stage that a particular proposal be in mind to resolve the indebtedness.

102. Second, as explained above, the process starts with an application to ISI for a protective certificate and a debtor must under s. 50 complete a prescribed financial statement (PFS) and make a declaration of insolvency. The PFS is submitted to the Insolvency Service of Ireland and on the form an applicant debtor is required to identify his or her assets and liabilities and to show whether assets exceed liabilities or not. A debtor must show his or her monthly income, reasonable living expenses, monthly payments due to each creditor and make a calculation of the deficit on a monthly basis of any deficit to meet all payments in full.

103. In the present case Mr O'Connor's assets exceeded his liabilities by a factor of 2:1, the total debts being shown as a little over €1 million and the assets at €1.6 million, giving a total of assets less liabilities of €594,359. Some of Mr O'Connor's assets were shown as unencumbered. Mr O'Connor's total monthly expenditure before debt repayment was shown

at a little over €2,000 and net disposable income as €1,700. The monthly payment due to Promontoria was shown at €14,416.67, and no payments were being made on a monthly basis. Payments were shown as being met to a hire-purchase company but not to a firm of solicitors, whose debt was €4,000. No monthly payments were being made to a grain supply company, to other business creditors and no payments being made in respect of the debt to Mrs O'Connor senior in respect of which the current monthly payment due was said to be €2,000. The shortfall was shown as close to €17,000 per month.

104. There is no place on the statutory form to add a gloss or explanation to any of these figures. On its face, some facts may be ascertained from the statutory form: the debtor's assets exceeded his liabilities by a considerable amount; the debtor's monthly repayments were not being met, the shortfall between current income and liabilities was very large, and his repayment capacity after current personal expenditure was not sufficient to meet current liabilities.

105. Whilst the forms do not provide statutory guidance as to interpretation, it emerges from the statutory provisions that the ISI is not, at the point at which an application is made to it for the issue of the protective certificate, concerned to make full inquiry as to the nature or extent of the insolvency of the debtor, whether in truth the debtor could discharge the identified debts as they fall due by the sale of assets, and ISI is not concerned to assess whether some assets are capable of meeting the liabilities. The test is whether assets and income can meet current liabilities.

106. Third, and before a PIA is formulated, the PIP must complete a statement at the commencement of the process pursuant to s. 54 that the debtor is insolvent. At that juncture, no consideration is required to be had to the possible terms by which the debt is to be resolved, and as to what assets are available to meet liabilities. Thus, no consideration is required to be

had of the possible sale of assets including of the principal private residence, farmlands or other business assets.

107. Fourth, the ISI refers an application to the relevant court for the issue of a protective certificate once it is satisfied that the proofs are in order and issues a certificate to that effect. In turn the court hearing an application for a protective certificate will issue such a certificate provided it is satisfied that the eligibility criteria specified in s. 91 have been met: s. 95(2).

108. The initiation of the process by the application for, and issue of, a protective certificate means that the ISI and the relevant court relies on the certification of the debtor and the PIP that the debtor satisfies the eligibility criteria. That assessment is done on the basis of the figures and calculations in the PFS, and most particularly the statement of income and liabilities which requires a debtor to identify liabilities which are due and remain unpaid.

109. That means that the test of insolvency to enter the process does not and could not involve an analysis of whether the retention of a principal private residence, or of the tools of a trade or business are achievable, necessary or desirable.

110. Fifth, s. 91 is stated in the clearest possible terms as setting out the mandatory conditions for eligibility, none of which is qualified by reference to a perceived need or wish to retain ownership or occupation of a principal private residence, or of the business assets of the debtor or his or her employment, trade or business.

111. Finally, and most important, is the context in which the retention of the business or employment assets and of the principal private residence comes into play in the process. In the plain language of the Act *the making of a proposal for a PIA* is to, insofar as this is practicable, not require the sale of the business or employment asserts or of the principal private residence of the debtor. That assessment happens when a PIA is proposed and submitted to a creditors'

meeting for approval. It is at the stage of the formulation of the PIA that these mandatory considerations come to have relevance, not at the earlier stage when solvency is to be certified, ascertained, and assessed.

112. It follows that, in interpreting the eligibility criteria and in making an assessment as to whether a debtor is solvent, no assumption can be made as to the possible terms that may be proposed in a PIA or that an application under s. 115A will indeed come before the Court.

113. Thus, it must be the case that "insolvency" for the purposes of admission into the process in the first place, cannot be assessed by reference to the provisions of s. 99(2)(d), s. 104, or s. 115A of the Act.

114. Therefore, it seems to me that s. 91 is to be properly seen as a threshold or gateway requirement to be met by an applicant to the satisfaction of the ISI and the relevant court by means of an assessment of valuation of assets and liabilities, income and current obligations, without any gloss that requires the ISI or the relevant court to consider those factors in the light of the general purpose of the legislation of achieving a rational resolution of debt, and one that would protect the principal private residence, the business or employment assets of the debtor and the ongoing economic activity of a debtor.

115. Whether a principal private residence is readily realisable will always be a matter of fact and will depend on factors such as the market for the property in question and the length of time that it is likely to take to sell. The existence of impediments to sale, such as a *lis pendens*, the refusal of a spouse or civil partner to consent to sale under the Family Home Protection Act 1976, may make a sale difficult or slow the process. More fundamentally the vendor will require possession to sell, and where the creditor is a mortgagee, and unless the debtor consents to deliver up possession, a mortgagee of a principal private residence will require a court order for both possession and sale pursuant to the provisions of Part 3 of the

Land Conveyancing and Reform Act 2009 as amended. The mortgagee may, depending on the manner of sale, also need to comply with the requirements of the Central Bank Code of Conduct on Mortgage Arrears. These protections created by other legislation could mean long delays in realising the value of the asset, so that the asset could not be said to be readily realisable.

116. The threshold test is solvency not reasonableness, nor the fact that the sale of a principal private residence might cause hardship to the debtor and his or her family or that alternative accommodation is not available.

117. McDonald J. in *Re Nuzum* observed that a principal private residence is not always readily realisable because the occupier may first require to find alternative accommodation. Whether this is so will depend on the facts of the individual case. The decision in *Re Nuzum* did not involve an assessment of whether the value of the principal private residence could be called into account in the assessment of solvency, but whether it was reasonable to permit an insolvent debtor to continue to own or occupy a premises of that size and value having regard to the likely prejudice to creditors and considerations of proportionality generally. That principal private residence of the debtors was valuable, and the secured debt could have been discharged from its sale.

118. A general proposition that a principal private residence may not be readily realisable is not borne out by a reading of the legislation. I do not understand the judgment of McDonald J. in *Re Nuzum* to express a proposition in such broad terms. However, for the reasons I have explained an immediate and unhindered sale of a principal private residence is in many cases unlikely to be easily achievable.

119. I conclude that the value of a principal private residence and the value of the business and employment assets of the debtor can be taken into account in assessing the value of the assets of a debtor for the purposes of assessing solvency if an objection is made by a creditor

on that basis. Such assessment will depend on the facts of the case and whether the premises or tools, equipment, or land in question are readily realisable in the sense in which has emerged from the authorities.

120. There is no express statutory requirement that the value of the principal private residence, or that of the business or employment assets of the debtor, be excluded from the determination of the jurisdictional or threshold objection, and none can be imputed. This being so, and in the light of the reasons just now explained, I conclude that, at the initiation of the process in the assessment of solvency for the purposes of deciding whether a debtor meets the eligibility criteria, no *a priori* rule exists that precludes the court from taking into account the value of a principal private residence or the value of the business or employment assets of the debtor.

When is Solvency to be Tested or Challenged?

121. That a debtor should be insolvent may also come to be subject to scrutiny at a later stage in the process. Section 97 allows a creditor aggrieved by the issue of protective certificate to apply to the relevant court for an order directing that the protective certificate shall not apply to that creditor. The application is determined on an assessment by the relevant court as to whether irreparable loss would be caused to the creditor which would not otherwise occur, and it does not appear that the Oireachtas intended that a creditor could contend that the court would assess on that application whether the debtor has met the threshold requirement of being insolvent.

122. However, the solvency of the debtor can also come for consideration when the relevant court hears an application to approve a PIA, when a creditor may, pursuant to the provisions of s. 112(2) of the Act, lodge a notice of objection to the coming into effect of the PIA. Section

114 provides that the effect of upholding the objection is that the PIA shall be deemed to have come to an end and the protective certificate ceases to have effect.

123. Section 114 does not identify the basis on which a creditor may object to the coming into effect of a PIA, but it seems clear from the provisions of s. 115 that one such objection can be made on the basis that the debtor has not satisfied the eligibility criterion contained in s.91(1)(d) of being insolvent. That is precisely what occurred in the present case where the appellant lodged an objection which raised *inter alia* the question of insolvency.

124. At that point, the relevant court will determine on the facts whether a debtor does have assets which are readily realisable and which could meet his or her liabilities as they fall due. The court will then have far more information, argument and evidence than it had at the point at which the protective certificate was issued and will have before it a PIA which will have taken into account, by reason of the mandatory provisions in s. 104, whether it is reasonably practicable that the debtor retains an interest in or continue to occupy his or her principal private residence. The court will also have had regard to the provisions of s. 99(2)(d) that the debtor not be required to sell any or all of his or her assets that are reasonably necessary for the debtor's employment, business or vocation unless the debtor has explicitly consented to such sale. No reading of the provisions of s.114 can yield a different interpretation of the eligibility test in s.91 than that applicable at the stage of entry into the process, but the application of the test will be different as the scrutiny the relevant court may engage at that point in time, where a creditor raises what is in essence a jurisdictional objection to the coming into force of the PIA by reason of failure by the debtor to establish insolvency, involves a consideration of the nature of the assets, whether they or some of them are readily realisable, and taking all circumstances into account, whether the debtor should not be permitted to enter into a PIA because insolvency has not been established.

125. In summary, I do not consider that when a court comes to assess solvency, whether at the point at which a protective certificate issues, or at the later point at which a creditor raises a jurisdictional or preliminary objection as to the entitlement of a debtor to seek the protection of the court by the approval of a PIA, that any requirement, or discretion, exists to discount the value of a principal private residence in the assessment of solvency. The legislation does not permit such a process of calculation.

126. Lest this conclusion appear unduly harsh, it should be observed that in general the assessment of solvency on a cashflow basis requires that the relevant court look at the ability to discharge the monthly payments on a mortgage on a principal private residence, and most mortgages of private residential properties do not contain a provision that permits the mortgagee to make a capital call if mortgage payments are being met. It is therefore usually the case that only in circumstances where the mortgagee has triggered an entitlement to call for repayment of the full amount of a debt following default that it could be said that a mortgage debt on a principal private residence has "become due". Most mortgagors defaulting on a mortgage payment will in truth be unable to pay their other debts as they fall due, as most mortgagors are conscious of the consequences of failing to meet their payments and will often give priority to the discharge of a periodic instalment on their mortgage. A forced sale of a principal private residence is made difficult by various legislative and regulatory provisions, but the Act of 2012, as amended, whilst it can afford an additional protection to a principal private residence under s. 104 or s. 115A does not require that the value of such asset be excluded from the assessment of whether a debtor is insolvent and therefore competent to seek the protection of the legislative scheme.

Conduct of the Debtor

127. I pause here to observe a factor that might cause disquiet. In many of the cases concerning the application of the test of insolvency in bankruptcy or in the corporate sphere, the court is faced with a situation in which the fact of insolvency could result in the imposition on the debtor of a significant and adverse legal consequence – winding up or bankruptcy. The debtor can in some such cases avoid that consequence by selling or ageing to sell some or all of their assets, and they have an incentive to do so. The creditor in that context is entitled to argue that the debtor cannot delay the inevitable consequence of insolvency by offering to sell assets that could take a long time to sell. In the application of the test of insolvency for the purposes of the Personal Insolvency Act, a debtor may arrange, or seek to arrange, his or her financial affairs so as not to positively deal with the debt, and has a positive incentive to say that the asset cannot be realised and to decline to realise it. This construction can in practice reward the debtor who has held on to assets and can be unfair to the creditor.

128. In that context, an applicant for a PIA could, in practical terms, arrange his or her affairs in such a way as to meet the cash flow insolvency test. But s. 120 of the Act deals with a possible objection on this ground. The section identifies a number of challenges which may be mounted by a creditor to the coming into effect of a PIA. These grounds are limited to eight matters. The first of these (a) is as follows:

> "(a) That the debtor has by his or her conduct within the two years prior to the issue of the Protective Certificate under s. 95 arranged his or her financial affairs primarily with the view to being or becoming eligible to apply for a Debt Settlement Arrangement or Personal Insolvency Arrangement."

129. Another possible ground of challenge is that the debtor has entered into a transaction in the preceding three years which has materially contributed to his or her insolvency (s. 120(g)),

or that the debtor has given preference to a person which has had the effect of substantially reducing the amount available to the debtor for the payment of debts (s. 120(h)).

130. Therefore, an argument could have been, but was not, made by the creditor in the present appeal that the debtor has so arranged his affairs so as to meet the test of insolvency. That ground of objection would then have come to be determined at the application for approval of the proposed PIA. In the present case the creditor did make a general assertion that the debtor was deliberately not meeting his liabilities, but that argument was not framed as a statutory objection under s.120(1)(a), nor did the creditor advance any evidence that might have supported that ground of objection, the burden of proof of which must be seen to lie on the creditor making such objection.

The Evidence in the Present Case

131. To summarise, a debtor ought not to be considered to be insolvent, even where his cashflow does not allow him to meet his current liabilities, provided that he has assets which could be sold without legal impediment in relatively short order. This is particularly so in respect of assets for which there is an established, liquid market, such as that which exists in real property.

132. The appropriate test requires a court to have regard to the speed and ease with which an asset may be realised for the purposes of ascertaining whether the asset is "readily realisable" for the purposes of ascertaining insolvency.

133. The respondent is a farmer, and his income is derived from his farming activity, and as the farmlands, farm machinery and livestock are the tools of his trade and are therefore to be

considered as "assets that are reasonably necessary" for his trade or business within the meaning of s. 99(2)(d) of the Act.

134. The evidence was less than satisfactory to provide an answer to the threshold question of whether the debtor was insolvent. I have nonetheless come to the conclusion for the reasons I now explain that the High Court judge's finding of fact, which I believe it to be, that the debtor was insolvent for a long time, was sustainable on the evidence.

135. The cash flow of the debtor from his farming enterprise was far less than his monthly outgoings and liabilities. His farmlands were held in some cases subject to the *lites pendentes* registered by his estranged wife, and the High Court judge accepted the evidence that the farmlands were not readily realisable by reason of that fact. No sale could close as an unencumbered title could not be furnished to a purchaser without either the consent of Mrs O'Connor or the removal of the *lites pendentes* by court order. The two courts that dealt with the objection extrapolated and made an inference that either possibility would take time. They assessed solvency on the difference between income and current liabilities, and had regard to the practical reality that a sale would take time.

136. In the application of the cash flow test on that basis, the debtor was insolvent. This Court is not a court for the correction of errors and must be seen as being bound by the finding of fact by the High Court provided it was one come to on the basis of evidence before him. The High Court judge did have sufficient evidence before him on which to come to the conclusion he did, having regard to that factors I have outlined, the clear impediments to a swift sale of assets, and to that fact that current income was nowhere close to being sufficient to meet current liabilities.

The Application to Approve the PIA under s.115A.

137. I do wish however to make a number of observations regarding the evidence and the manner in which it was treated, which in my view fell short of what I consider to be the proper approach to an application for approval of a PIA, and more crucially the manner by which a PIP or debtor is to adduce evidence that would enable a court to fully scrutinise the figures, and to deal in a robust way with the objection that a debtor did not meet the threshold requirement of being insolvent. It was also, as I will further explain, insufficient to enable a court to engage the necessary assessment of the fairness of the PIA for the purposes of s. 115A.

138. An exchange of affidavits occurred in the context of the s. 115A Application being the following.

a) The first affidavit of the PIP, served in unsworn form but subsequently sworn on 28 February 2022;

b) The affidavit of Mr. Colm Waters, sworn on 6 August 2020 on behalf of the appellant;

c) The first affidavit of the debtor, sworn on 30 March 2021;

d) The second affidavit of the PIP, served in unsworn form but subsequently sworn on 28 February 2022;

e) The first affidavit of Ms. Adrienne Fitzgibbon, sworn on behalf of the appellant on 8 July 2021;

f) The second affidavit of the debtor, sworn on 27 July 2021;

g) The third affidavit of the PIP, sworn on 28 July 2021;

h) The second replying affidavit of Ms. Adrienne Fitzgibbon, sworn on 22 October 2021; and

i) The third affidavit of the debtor, sworn on 8 February 2022.

139. The creditors' meeting held on 26 March 2020 having failed to approve the PIA proposed in respect of the debtor, the PIP instituted a motion pursuant to s. 115A(9) of the Act seeking an order that the PIA be approved notwithstanding. The PIP certified his opinion in the body of the motion that the debtor satisfied the eligibility criteria for the making of a proposal for a PIA as provided in s. 91, and the appellant served a notice of objection to the coming into effect of the PIA.

140. There were a number of bases for the objection including that relevant to this appeal, that the debtor was not insolvent, and this was explained by reference to the fact that the debtor's assets exceed his liabilities, and that the assets were primarily agricultural land described in the notice of objection as a "readily realisable asset." The other grounds of objection, that the proposed PIA would be unfairly prejudicial to the interests of the objector and that there was no debt secured over the principal private residence of the debtor, did not form part of the argument in this appeal.

141. The PIP swore an affidavit in reply dealing with the various matters raised in the notice of objection. Then at para. 3 of that affidavit he confirmed in very general terms his view that the debtor had met all the statutory requirements, including one must assume the threshold requirement of insolvency.

142. At para. 15 of the affidavit the PIP averred to the fact that the debtor "presented with unsustainable debt, mortgage arrears and no route to solvency". It was said there was no short or medium term likelihood of a change in income or of reasonable living expenses of the debtor

as identified in the PFS. It explains that the proposed PIA restructures the secured debt based on an affordability criterion and that the result of the proposal would be an 87 per cent return to the secured creditor, more than the 80 per cent that would be achieved in bankruptcy. The unsecured creditors were to be repaid in full. It was said that the proposed PIA would enable the debtor to continue to occupy his principal private residence with a sustainable mortgage repayment.

143. The folio on which the principal private residence of the debtor is contained was exhibited and showed that Promontoria did have security over that folio and at para. 36 of the affidavit to the PIP avers that that debt was in arrears on 1 January 2015. The affidavit avers that “proof” of the arrears and security were exhibited earlier in the affidavit. The closest to clarity that can be discerned regarding this debt is that the secured creditor submitted a proof of debt in the sum of €874,430.43, had a first charge over two of the folios, a solicitor’s undertaking in relation to a different folio, and a receiver had been appointed in respect of that folio and WX…16F. Three separate freehold folios are identified, one of which contains the principal private residence of the debtor and is solely owned by him. The other two folios are jointly owned by the debtor and his estranged wife. The current market value is described as €730,000, comprising a negative equity of €144,430.46. The receiver was appointed on 17 September 2019 over two of the folios but not the folio on which the principal private residence was situate. There are charges or judgment mortgages registered by Ulster Bank over six other folios.

144. In addition, secured debt no. 2 is said to be owed to Elizabeth O’Connor, the mother of the debtor and is secured over eight folios, including the folio on which is situate the principal private residence of the debtor. The appellant did not mention these folios in their proof of debt.

145. As to insolvency para. 40 of the affidavit says that demand was made by the appellant and the debts are in default. No documentation is exhibited, no dates identified, and no details given of the amount claimed and any details regarding payments, interest accruing etc. There is also an averment that the debtor had defaulted on his debt to his mother and that he could not meet this debt "as and when it falls due." Again, no exhibits are provided, no details given, no dates, details of demands etc. are identified. The same is true of the averment that the debtor had defaulted on his trade debts.

146. Having regard to the fact that the objector raised the issue of insolvency and challenged the assertion that the debtor was insolvent, and having regard to the obligation of the PIP to the insolvency process, to the creditor body as whole and to individual creditors, and to the obligation that the PIP must be said to owe to the court to clarify, explain and deal with the factual elements that are said to lead to a conclusion of insolvency, the averments of the PIP in the affidavit are less than satisfactory. It is not clear for example the basis on which the debts are said to have become due, whether they were due on demand or sometime after demand, and the possible variations on when and how a debt becomes due and how and when it was demanded, if demand was necessary.

147. These are essential elements in understanding the fact of insolvency, the extent of that insolvency, and whether that insolvency is a true insolvency or one that was as a result of exceptional circumstances, or stemmed from an unwillingness, rather than an inability, to pay, whether there is a solution to the payment of the debt that could otherwise have been achieved, and whether in all the circumstances the proposed PIA is reasonable, brings the means of the debtor to account and is fair to the creditors .

148. The imperative to identify and explain the debts of the debtor, and how and when they became due, and were not met, and whether they could be met in the current financial

circumstances of the debtor, was particularly acute in the context of objection 5 raised by the appellant that, despite having an excess of assets over liability, and despite the fact that it had registered judgment mortgages over six parcels of his lands since October 2015, that the debtor had made no effort since 2015 to discharge the debts giving rise to these judgment mortgages, and in particular has made no effort in the years prior to the issuing of his protective certificate. The notice of objection refers to a "refusal to address his debts despite having the means to do so" and posits that this conduct of the debtor was such to which the court ought to have regard for the purposes of s. 115A(10)(a)(i) of the Act. The objection goes on to say that the judgment mortgage registered against the folio in which is situate the principal private residence of the debtor stems from a High Court judgment of 17 July 2013 and that the debtor has "had almost seven years to address same, and despite having the means to do so has failed to do so". In stark terms the notice of objection says that "this is not a case where the debtor has an inability to pay his debts. This is a case where the debtor has the means to discharge his debts but has chosen not to […]."

149. The PIP's affidavit replies by saying that the objection in its essence "confirmed" that a debt does exist over the principal private residence of the debtor and that it is and has been in arrears. Nowhere does it deal with the fact that it is suggested that the arrears were either deliberately or voluntarily ignored or were not a genuine consequence of an inability to pay. The amounts are not identified, the demands are not identified, the judgments on foot of which judgment mortgages were registered are not identified or explained.

150. Further, objection 7, which argues that the debtor does not have the resources to discharge the payments in the proposed PIA, is met with a similar generalised response that "the projections clearly demonstrate the availability of cash to fund a payment to Promontoria".

It is suggested that the creditor was either “looking in the wrong place, didn’t look or didn’t understand the PIA.”

151. The sole exhibits to this affidavit are a 2015 bank statement from Ulster Bank showing an overdraft and “GD2”, the proof of debt furnished by Promontoria.

152. Thereafter Colm Waters, asset manager of the servicer of Promontoria loans and security, in his affidavit which deals with the various objections and much of which is in the form of argument. It makes the point that the judgment mortgage, the sole security held by Promontoria over the folio on which the principal private residence of the debtor is situate, is not a “relevant debt” within the meaning of the legislation as no payments are required on foot of the judgment mortgage, and that therefore it could not be said that the payment was in arrears in respect of a relevant debt as is required by the Act. The affidavit put the debtor on full proof of the loan to his mother secured by a second legal charge as well as on full proof of arrears. It makes the point that the PIA makes no proposal to deal with the judgment mortgage registered over the folio containing the principal private residence of the debtor.

153. Critically, at para. 12 of this affidavit, the deponent notes that in the farm accounts of the debtor he values his land and buildings as having a net book value of €2,264,026 in December 2018, €841,931 greater than that identified in the PFS. It said that if the debtor were to sell even a portion of his agricultural land, he would not be insolvent. The accounts are exhibited. Paragraph 13 of the affidavit repeats the allegation that the debtor has chosen not to discharge his debts notwithstanding that he has the ability to do so.

154. The PIP Mr Digney replies in his second affidavit, the early paragraphs of which are pro forma and repeat in broad terms those in his first grounding affidavit. With regards to the question of whether the debtor is insolvent and whether he had a relevant debt he makes general reference to the security that Promontoria has over the freehold folio and states that it was “in

arrears on 1 January 2015". With regard to the argument that a judgment mortgage could not strictly speaking be said to be in arrears, at para. 22 he says that a judgment mortgage is a "novel entity that exists on its own", and it is "simply the mechanism used to secure a debt", which Mr Digney says is "clearly dealt with under the PIA". He avers that demand has been made by the objector and the debts are they are in default and then makes the general statement that the debtor cannot meet "this payment" as and when it falls due. Again, there is no exhibit of correspondence, letters of demand or breakdown of the liabilities.

155. Paragraphs 24, 25, and 26 deal with the debt to Elizabeth O'Connell and two trade debts which merely avers that the debtor has "defaulted" on those debts and cannot now meet them.

156. Paragraph 27 repeats without gloss or explanation that the debtor is "fully insolvent" and needs the PIA to return him to solvency.

157. The replying affidavit does not deal at all with the contents of para. 12 of the affidavit of the objector which identifies a significant discrepancy between the net book value of the real assets of the debtor as identified in his farm accounts for December 2018 and those contained in the PFS dated2 months thereafter.

158. The affidavit exhibits without explanation Bank of Ireland statements for a current account which is broadly speaking not overdrawn, some of the folios, and the farm accounts for the year ended 31 December 2018.

159. Mr O'Connell then himself swears a replying affidavit on 8 February 2022. He swore this further affidavit to explain some matters arising on the folios not relevant to this judgment, but he does again state at para. 15 of this affidavit that he cannot sell his land as it is needed to "farm and run a viable farm", that as a practical reality nobody or very few people would purchase it because the sale would be a "distress sale", that any sale would be below value. He

goes onto then say that the land is not "readily realisable," and it is needed to generate income to pay his living expenses and his debts. He says that the sale of some lots would affect the viability of the farm as would selling the sheds, farm produce etc. He makes the general statement that the "whole unit is needed to run a viable farm." He does explain here for the first time the discrepancy between the valuation given for the lands in his annual accounts and that in the PFS by reference to the fact that he gives in his accounts the historical cost of the land and included stamp duty, costs and fees, the land he says was purchased at the height of the market.

160. At para. 16 of his affidavit he says that he is unable to pay his debts as and when they fall due and that therefore he is insolvent, and he says that demand has been made both by the objector and in respect of two identified trade debts. He says somewhat elusively that he has defaulted on "most if not all other debts". He describes himself as "fully insolvent."

161. In summary then the PIP swore three affidavits, the debtor himself also swore three affidavits. There were three affidavits made on behalf of the objecting creditor. What is remarkable about the affidavit evidence given by or on behalf of the debtor is the lack of detail and scrutiny regarding the liabilities, when debts fell due, and when they were demanded if demand was required, and when the arrears accrued and what interest if any accrued thereafter. A similar comment can be made with regard to the affidavits of the PIP, who, whilst he is not an agent of the debtor, must in the context of his statutory role respond to the critique and objections made by the objecting creditor as regards the solvency of the debtor

162. The PIP has an obligation in regard to the threshold requirement that the debtor be insolvent. The burden of proving insolvency lies on the debtor and the PIP in turn must certify to the ISI and to the relevant court that the debtor is indeed insolvent. This is no empty formula, and the PIP is a guardian of the process and has an obligation in taking on the role of

independent intermediary to engage with the facts of the case, an obligation that is owed to the ISI, the relevant court, to the debtor and the creditors. That obligation extends to the statutory requirement to notify ISI should there be change of circumstances that makes compliance with the eligibility criteria doubtful.

163. The PIP is a statutory construct, and the PIP's involvement is mandatory: *Re Meely*, *Re Nugent*, the costs ruling in *Re Nugent* [2016] IEHC 309, in *Re Darren Reilly* [2017] IEHC 558, [2018] 1 I.R. 357 and the judgment of McDonald J. in *Re Varvari (A debtor)* [2020] IEHC 23. The PIP must have financial expertise and skills and is required to undergo an examination and to apply for registration as a PIP before he or she can operate within the State. The Oireachtas envisaged that the commencement of the process, the formulation of a PIA and the engagement with creditors was required to be done by an independent person with financial knowledge and expertise who would understand and interpret the financial circumstances of a debtor with sufficient skills and understanding to formulate a PIA which may be acceptable to creditors. As was said in *Re Darren Reilly* at para. 56, a PIP:-

> "… cannot be said to act merely on instructions, but is required at all times to seek to achieve the resolution of debt, to do so in the exercise of professional judgement, and to engage his or her knowledge or experience in financial matters to fashion a remedy which is satisfactory to all parties concerned. The PIP is an intermediary therefore in a true sense, and neither the creditor nor the debtor can be said to be his or her client."

164. The Oireachtas intended to put an independent person with financial knowledge and expertise at the centre of the process, and to thereby ensure that the financial difficulties of an insolvent debtor and the interests of relevant creditors are fully brought to bear in the process. The PIP also acts as a filter to ensure that a PIA is sustainable, brings the means of a debtor fully into account, and deals with all relevant debts in a coherent and fair manner, and acts as

a professional exercising independent judgment in regard to the financial aspects of the PIA, and in the case where a proposed PIA is rejected at the statutory meeting of creditors, to ensure that the statutory requirements under s. 115A are met.

165. The effect of the statutory scheme means that both the PIP and, depending on the facts in issue, the debtor must adduce evidence to support an applicant to approve a PIA and must respond to the substance of an objection by adducing evidence to satisfy the court. The affidavits in the present case did not contain evidence of sufficient detail nor did they support with evidence the general assertions made and repeated in the affidavits. An analogy may be drawn with summary summons proceedings, in this regard, where a court may be required to examine assertions of fact put forward by a party seeking leave to defend by way of plenary hearing. A party must assert facts that will allow it to establish a defence to the proceedings, however, those asserted facts must rise above the threshold of a mere assertion.

The Assessment of the Reasonableness and Fairness of a Proposed PIA

166. The approval of the PIA means that Mr O' Connor retains all of his assets and repays his debts in full, albeit over a generously extended term. It is useful before concluding this judgment to assess the argument made with some force by the appellant that this result offends common sense as the paper value of Mr O'Connor's assets far exceed his liabilities.

167. That argument is one that is assessed when the PIA comes before the relevant court for approval under s. 115, or on an application under s. 115A.

168. On an application to the relevant court to approve a PIA once it has been agreed by creditors, the statutory requirements envisage a balancing of rights and obligations and the affording of due recognition to the contractual, common law, and constitutional rights of the

parties, more particularly those of the creditor, whose rights are in general negatively impacted. The assessment of what was loosely termed "common sense," reasonableness or proportionality, comes to be considered in the context of the approval of a PIA at a number of stages. First, the PIP must discuss with, negotiate, and persuade the body of creditors to accept a proposed PIA. Second, the PIA must be approved by the court. Third, notwithstanding a failure by the creditors' meeting to approve a PIA the court has an overreaching jurisdiction to approve the coming into operation of the PIA, but only under the strict conditions set out in s. 115A which does of necessity require an assessment of fairness, proportionality, and reasonableness.

169. The word "reasonable" and its cognates appears six times in s. 115A. The court must furthermore be satisfied that the proposed arrangement is not "unfairly prejudicial to the interests of any interested party." Thus, the exercise of the judicial function involves a balancing of interests, and an assessment of reasonableness and proportionality. Nothing in s. 115A mandates the absolute protection of the principal private residence, and the section is rather one which permits the continued protection of ownership or occupation of a principal private residence provided that it is reasonable, and not unfairly prejudicial to the creditors.

170. Equally, the Act does seek to preserve the business and employment assets of a debtor, so that he or she may continue to be an economic actor in the State, but the protection available to the debtor to resolve debt *inter alia* by a rescheduling or reduction in liabilities, and the rights and interests of creditors, including property interests, requires an analysis of whether the proffered solution is proportionate, not excessive and affords protection to the creditor by not being unduly prejudicial.

171. There is in the present appeal no useful evidence regarding the possibility that the lands of the debtor could be sold or that part of his lands could be sold. There was no proper analysis

of, or details concerning, the substantial loan to the mother of the debtor and when this was said to have become due and to have fallen into arrears. The liabilities are not vouched. Because s. 105 provides that the market value of the security to be determined either by agreement or in accordance with the provisions in the Act, the valuations must be seen as binding on the parties. But the argument here was not about valuation but about severability, and demanded some useful evidence from an auctioneer or farm accountant that the lands were not readily realisable or were severable. There was no analysis of the effect, if any, of the registration of the *lites pendentes* and/or of the judgment mortgages. Such evidence could have been adduced by the creditor, but the affidavits on its behalf read more like pleadings containing denials and broad statements that the debtor had deliberately not paid his debts, which put the debtor on proof, rather than themselves adducing evidence to meet the arguments that the lands could not be sold in separate lots, or evidence that the farm enterprise could be viable with a smaller land holding.

172. None of this is satisfactory. At its height, the debtor avers that he is insolvent, the PIP makes no observations and offers no evidence regarding the severability of the lands, and reliance is placed on the fact that liabilities have fallen due to trade creditors and to the objecting creditor who has registered a judgment mortgage on several folios none of which have been discharged. The PFS does not show an ability to pay the capital due, but no useful evidence is available to deal with the objection by the objecting creditor that Mr O'Connor has chosen to ignore his liabilities and has chosen not to sell or otherwise deal with his land in order to discharge his liabilities.

173. The farming enterprise is conducted over ten folios, and although it is the case that they were purchased in various lots over the years, it was not possible on the evidence to make any assessment of whether a sale of some of the lots would be achievable, nor is it be possible to

anticipate the time that this might take. On a superficial glance it would seem possible at least that the residential rental property could be sold either with the benefit of the tenancy or after it has been determined, but there is no information available regarding this property, save a rather elusive and unhelpful comment from the debtor that this property was retained with a view to it unlocking possible future negotiations in the matrimonial proceedings.

174. Some or all of these factors, and the lack of evidence supporting the bald assertion regarding the state of the market, the saleability or severability of the lands, and the timeframe in which they could be sold, ought to have come for scrutiny before the Circuit Court and High Court in the assessment of the application under s.115A to approve the PIA notwithstanding that it did not have the approval of the creditors.

175. The application for approval of the proposed PIA was heard on affidavit and those affidavits contain in large part "mere assertions". This, as I have noted above, is the language used in the context of similarly constituted applications for summary judgment, where a "mere assertion" has been clarified to mean an assertion that is unsupported either by evidence or by any realistic suggestion that evidence might be available, or facts which are in themselves contradictory and inconsistent with uncontested documentation, to borrow the language of Clarke J. (as he then was) in *Irish Bank Resolution Corporation (in special liquidation) v. Gerard McCaughey* [2014] IESC 44, [2014] 1 I.R. 749 at p. 759.

176. The responsibility lay with all of the parties to adduce sufficient evidence to deal with the issues regarding the possible sale of some or all of the assets of the debtor. This was an unusual case where the assets were complex, the farming lands having been assembled by the purchase of various folios over a number of years. The *lites pendentes* were also a complicating factor. It would not normally be the case that the assessment of solvency, or of the fairness for the purpose of an application under s. 115A, would require the evidence of a farm expert or

expensive valuation evidence. The Act intends that the valuation of real assets be ascertained by an agreed valuer or in default of agreement, by a valuer appointed pursuant to the provisions of s.105. Nonetheless this appeal did require that the relevant court be informed as to the possibility of the sale of some of the farmlands, and of the viability of the farming enterprise should this occur. No such evidence was provided by either side, and that left the Circuit Court judge and the High Court on appeal in the difficult position of being unable to fully engage with the facts. The solution each of them took was reasonable and perhaps even inevitable, and each took the view that the insolvency threshold was reached by reason of the very significant excess of current debt obligations over income, and that the sale of the assets in a relatively short timeframe was not realistic in the light of the nature of the holdings, the position of the co-owner of some of the lands and the existence of *lites pendentes* which would have delayed any prospective sale.

177. This appeal did not in the oral argument engage the issue of the reasonableness or fairness of the proposed PIA. It was however suggested that this Court could form its own view and conduct its own analysis under s. 115A. For the reasons I have explained there is insufficient evidence analysis or argument on which this could be done. I am of the view however that a robust analysis of the facts was not conducted to properly balance the competing rights and obligations of the parties, nor was there a sufficient and robust assessment of whether the proposed PIA was sustainable, fair and equitable. The statutory scheme contains safeguard for creditors. The primary provision is s. 115 which sets out the mandatory criteria to be considered when an application is made to approve the coming into effect of the PIA. This happens whether an objection is lodged or not. The ultimate jurisdiction is with the Court to consider whether the PIA should be approved.

178. Section 115A was inserted into the legislation by the Act of 2015 and subsequently amended in 2021. This allows the approval by the relevant court of a PIA when the creditors have not voted in favour at a creditors' meeting. The section provides at subsection (9) that the court may make an order confirming the coming into effect of the proposed PIA only when certain conditions are satisfied including that the PIA enables the creditors to recover the debts due "to them to the extent that the means of the debtor reasonably permit". Also, to be considered is the financial circumstances of the debtor and that the proposed arranged is "fair and equitable" in relation to each class of creditors that has not approved the proposal.

179. Section 115A and the requirement that the relevant court be satisfied as to the fairness and appropriateness of the PIA bring into account the question of whether certain lands could be sold and whether the debtor would still have a sustainable farm, and would also require an analysis of the position of the former wife or the debtor and the debt to his mother.

180. The court approving a PIA, whether under s.115 or s.115A, is not engaged in a wholly adversarial process and must itself be satisfied as to the fairness, appropriateness, reasonableness, and sustainability of the PIA. It cannot abrogate that decision to the parties, or to the PIP. That obligation on the court to engage scrutiny of the proposed PIA is underlined in the case of an application for approval under s.115A by the fact that s.115A(8) requires a hearing of the application, and such is done on notice to ISI, the PIP and each creditor concerned. The conditions under which approval may be granted for the coming into operation of a PIA in these circumstances are constrained by the statutory provision that approval may be granted "only" where the court is satisfied inter alia that the proposed arrangement is "fair and equitable" to the classes of creditors whose interest are affected thereby, and that the creditors are thereby enabled to recover the debts due to them "to the extent that the means of the debtor reasonably permit".

181. I am not satisfied in the present appeal, and for the reasons I have explained, that the proposed PIA was adequately assessed in the manner for which the Act provides.

182. In consequence, whilst I would dismiss the appeal from the finding that the debtor was insolvent, I am not persuaded that the High Court properly assessed the PIA in the performance of its statutory role under s.115A. There was no argument before that court that engaged the mandatory criteria in s.115A(9), and the balancing of competing rights was not done. This Court could not in those circumstances itself be satisfied that the process for which s.115A provides has been performed. For the reason earlier explained in the light of the absence of proper scrutiny of the facts and the gaps in the evidence, we cannot ourselves make an assessment of the fairness of the PIA. I would therefore remit the matter for assessment to the High Court on that aspect of the appeal.