THE HIGH COURT

CIRCUIT APPEAL

[2023] IEHC 185

[Record No. 2021/183CA]

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

AND IN THE MATTER OF ANAS MANSOUR, 12 RIVERWOOD COPSE, CASTLEKNOCK, DUBLIN 15 (A DEBTOR)

JUDGMENT of Mr Justice Mark Sanfey delivered on the 20th day of April 2023.

Introduction

1. This judgment concerns a number of issues arising from the exclusion of judgment creditors by a Personal Insolvency Practitioner ('PIP') from the debts included in a Debt Settlement Arrangement ('DSA'), as a result of which the creditors in question, who at the time of the DSA represented 71.6% of the indebtedness of the debtor, neither participated in a creditors' meeting in respect of their indebtedness, nor participated in the resulting DSA, which was approved on a single creditor basis.

2. The present application is an appeal from the judgment of the Circuit (Personal Insolvency) Court (Her Honour Judge Verona Lambe) of 16 November 2021, at which the court approved the coming into effect of the DSA, with no order as to costs. The creditors in that case had submitted a very detailed notice of objection in

relation to what they alleged was a wholesale failure on the part of the PIP to comply with various procedural requirements specified in the Act. These grounds of objection were repeated in the hearing before me, and I shall refer to them in detail below.

3. Numerous affidavits were filed in the Circuit Court in relation to the matter, and these, together with extensive written submissions, were relied upon before this Court. While the appeal is primarily concerned with interpretation of sections of the Personal Insolvency Acts (2012-2015) (referred to collectively as **'the Act'**), it is necessary to explain the background to the matter as set out in the affidavits in some detail.

Background

4. Mr Anas Mansour ('the debtor') is a medical practitioner. The appellants, Seamus Costello and Dympna Costello ('the creditors' or 'the appellants') are creditors of the debtor due to a judgment of 11 July 2018 for €91,300 together with subsequent taxed legal costs of €43,351.58, giving a total of €134,651.58. The judgment arose from the debtor's default in relation to a commercial agreement with the appellants.

5. The creditors subsequently issued bankruptcy proceedings against the debtor. A bankruptcy petition was listed before the court on 03 February 2020. At that point, a firm of solicitors came on record for the debtor and applied for a number of adjournments to enable the debtor to engage with a PIP in accordance with s.14 of the Bankruptcy Act 1988 as amended.

6. By an email of 10 July 2020, the debtor's solicitors Staunton Caulfield & Co. wrote to the creditors' solicitors by an email which enclosed *inter alia* a "Draft Debt Settlement Arrangement" and a summary of the statement of affairs. The draft DSA showed that the judgment in favour of the creditors was included in the proposal, and

the creditors understood that the calculations at p.14 of the draft DSA meant that all creditors of the debtor, including the creditors themselves, would receive payments over five years resulting in payment of 100% of their debt. The section of the draft DSA dealing with the debt owing to the appellants specifically acknowledged that debt as "accepted".

7. The appellants found this proposal unsatisfactory. Their solicitors replied to the email of 10 July 2020 on 13 July 2020 stating that it was extraordinary that the debtor had not sought a facility to discharge the creditor's debt given his income, his disposable income and his general practitioner's practice. By an email of 07 September 2020, the debtor's solicitors enclosed copies of the debtor's Prescribed Financial Statement [**'PFS'**], application for a protective certificate and statutory declaration. The PFS acknowledged the debt owing to the creditors of €134,651.58.

8. By letter of 24 September 2020, the creditors' solicitors reminded the debtor's solicitors that the court had directed the debtor to deliver any documents relied on in the bankruptcy proceedings by 28 October 2020. The letter repeated the arguments regarding the creditors' view that the debtor had the ability to pay the debt, and referred to an inconsistency between the debtor's statement of affairs in the bankruptcy proceedings which referred to his having take home pay net of taxation per month of €11,781, and his PFS which indicated that that figure was income before tax. In a reply of October 2020, the debtor's solicitors stated:

> "The documents we sent you with our email of 07 September 2020 are complete copies of the Statutory documents submitted by our Client's PIP, Mr Niall Moran to the Insolvency Service of Ireland. He is awaiting the issue of a Protective Certificate".

9. By email of 05 November 2020, the debtor's solicitors enclosed a copy of the Protective Certificate which had issued, and sought an adjournment of the bankruptcy proceedings to enable the PIP to prepare a debt settlement arrangement and make an application to court under the Act. The creditors' solicitors consented to an adjournment for this purpose.

The contentious correspondence

10. At that time there was correspondence between the parties to which particular attention must be paid, as it is central to the issues currently between the parties. By an email of 04 November 2020 to Staunton Caulfield & Co, the firm of solicitors acting on behalf of the debtor, and Shanley Solicitors LLP for the creditors, Ms Corinna Nolan on behalf of the PIP stated that a protective certificate had issued in the case of Dr Mansour and asked "can you confirm you are willing to accept these documents by way of email". A reminder in this regard was sent by Ms Nolan to Shanley Solicitors LLP on 06 November 2020. The creditors' solicitors replied on that date, stating "…we can accept by email given the circumstances". Later that afternoon, Ms Nolan sent an email on behalf of the PIP stating:

> "Please find attached the Protective Certificate for Dr Anas Mansour and supporting documentation. Please note that we have also written to your clients Mr & Mrs Costello to inform them of the process.
>
> While not related to your information we must point out that on page 7 of the Prescribed Financial Statement this should state C/O Croskerrys Solicitors not Staunton Caulfield Solicitors – upon receipt of the Proof of Debt from that creditor we will make the necessary amendments and a revised Prescribed Financial Statement will be forwarded for your records.
>
> In the meantime we await the proof of debt.

Kind regards…"

11. That email attached four documents: a letter of 04 November 2020 to Shanley Solicitors (the solicitors acting for the creditors); the protective certificate issued by the Circuit Court on 03 November 2020; the debtor's application for a protective certificate of 16 September 2020, and the debtor's prescribed financial statement of 14 October 2020.

12. The letter from the PIP to the creditors "C/O Shanley Solicitors" of 04 November 2020 enclosed with the email of 06 November 2020, is of particular importance and warrants reproduction here in full:

"Dear Sirs,

I am writing to you under the provisions of section 98(1)(a) of the Personal Insolvency Act 2012, acting as a Personal Insolvency Practitioner duly authorised by the Insolvency Service of Ireland, giving notice that:

(1) I have been appointed by the above detailed debtor for the purpose of making a proposal for a debt settlement arrangement.

(2) On the [03.11.2020], a Protective Certificate was issued by the Circuit Court in relation to the above detailed debtor, and I respectfully draw your attention to the provisions of section 96 of the Personal Insolvency Act 2012 which details the effect of the issue of a Protective Certificate.

(3) Subject to section 101(2) of the Personal Insolvency Act 2012, I invite you to make submissions regarding debts owed to you by the above detailed debtor, and

(4) Under the provisions of section 98(2) and 98(3) of the Personal Insolvency Acts 2012, I request that you provide proof of the debt owed to you by the above detailed debtor.

(5) Under the provision of section 98(1)(a) of the Personal Insolvency Act 2012, I am attaching a copy of the above detailed debtor's Prescribed Financial Statement and invite you to make a submissions [sic] on the manner in which the debts might be dealt with as part of a Debt Settlement Arrangement.

Further to points 3, 4, and 5 above, I request that your proof of debt submission and any submission you intend making in relation to how the debtor's debts might be dealt with as part of a Debt Settlement Arrangement, be returned to my office not later than 14 calendar days from the date of this letter.

Yours sincerely…".

13. I pause here to comment that it is notable from this letter that the various sections to which the PIP refers are sections referrable to a Personal Insolvency Arrangement ('PIA') rather than a DSA, the relevant provisions of which are to be found in chapter 3 rather than chapter 4 of the Act.

14. In her affidavit of 04 March 2021, Dympna Costello on behalf of the creditors, at para. 15 of her affidavit, acknowledges that there was no response to this letter "…as unfortunately it was overlooked". Ms Costello avers that, while this was regrettable, it was understandable given that the email that was attached to the letter stated "[p]lease find attached the Protective Certificate for Dr Anas Mansour and supporting documentation", and did not specifically refer to a notice for the purposes of the Act. Ms Costello avers that the creditors' solicitors already had a copy of the

protective certificate which had been previously furnished to them by the debtor's solicitors. As a letter from the debtor's solicitors of 16 October 2020 had stated "…the documents we sent you with our email of 07 September 2020 are complete copies of the statutory documents submitted by our client's PIP Mr Niall Moran to the Insolvency Service of Ireland", Ms Costello avers that the creditors believed that they already had the documents sent to the Insolvency Service of Ireland.

15. Ms Costello also avers that "…the solicitors on record for the debtor in the Bankruptcy proceedings were corresponding with the Creditors' solicitors concerning the progress of the PIP's work, throughout the period from June to October 2020. It was reasonable for the Creditors to expect that they would also be informed by the Debtor's solicitors of any significant developments". [Paragraph 16].

16. At para. 17 of her affidavit, Ms Costello avers that the email of 06 November 2020 "was sent after normal close of business" on that date. Mr Adrian Shanley, the partner in Shanley Solicitors LLP, went into hospital for surgery on 12 November 2020 and Ms Costello avers that he did not see the letter of 04 November 2020.

The approval of the debt settlement agreement

17. In his affidavit of 11 May 2021, Mr Niall Moran, the PIP, avers that the debtor's only other creditor, BMW Financial Services Ireland DAC, proved its debt. He avers that "…the creditors were served directly by my office on 23 December 2020 with notice of the Creditors meeting by way of post at their given address…". In this regard, he refers to an affidavit of service "when produced". However, it does not appear that service in this regard was effected on the appellants; in her affidavit of 18 June 2021, Ms Costello confirms at para. 12 of that affidavit that the appellants were not invited to a creditors meeting, and that by email of 05 January 2021 "…the PIP

indicated that the creditors meeting was a single creditors [sic] meeting which had already taken place".

18. The PIP states that he served the DSA on the appellant's solicitors, and avers at para. 17 of his affidavit of 11 May 2021 that he "…chose to and needed to seek a Proof of Debt in this case (and all cases). I am unaware of any DSA or PIA case that this has not occurred in". He apologises that "…that the letter should have read section 64 and not section 98. By way of explanation, rather than excuse, this occurred since 90%-95% of all my PIP cases are PIAs and not DSAs and thus the usual documentation is under the PIA process. I say however that the same 14 days applies, and the same rules apply in terms of proving the debt. I say the Import and request was the same".

19. At para. 19 of that affidavit, the PIP avers that he would "…consent to an application for a late proof of debt submission. I have no issue or objection to the creditor participating in the process and being paid".

20. It is clear, then, that the PIP's position was that he had only one creditor proving in respect of the DSA, and that accordingly he was entitled to dispense with the creditors' meeting and to treat the process as one of "single creditor approval". In the written submissions on behalf of the appellants, they described the failure to invite the creditors to the creditors' meeting as "unreasonable and perverse, leaving aside altogether the fact that the Creditors' debt had been proved to the satisfaction of this Honourable Court – which had granted Judgment – and which liability the Debtor had already acknowledged in any event as the PIP was aware" [para. 25 written submissions].

The issues

21. Counsel for the creditors and the PIP helpfully agreed the issues to be decided by the court. They are expressed as follows:

> "1. Whether the Court is satisfied the debtor is insolvent, (and thereby eligible to avail of a Debt Settlement Arrangement under the Personal Insolvency Act 2012).
>
> 2. Whether the Debt Settlement Arrangement unfairly prejudices the interests of the Creditors to the extent that it is unjust.
>
> 3. Whether the decision by the PIP to exclude the Creditors' debt on the grounds that they had not proved their debt, was in [accordance] with the procedural requirements of the Personal Insolvency Act 2012."

The debtor's insolvency

22. The creditors contend that the debtor is not eligible to avail of a DSA, as he is not insolvent. In this regard, they refer to s.57(1) of the Act, which sets out a list of criteria which the debtor must satisfy in order to be eligible to make a proposal for a DSA, one of which is "…that the debtor is insolvent…" [s.57(1)(b)]. Under s.78 of the Act, in considering an objection lodged by a creditor to the DSA, the court must be satisfied that the eligibility criteria specified in s.57 have been satisfied: see s.78(2)(a)(i).

23. Section 2(1) of the Act defines "insolvent" as follows:

> "'Insolvent', in relation to a debtor, can be construed as meaning that the debtor is unable to pay his or her debts in full as fall due".

24. In an affidavit of 10 September 2021, Mr Adrian Shanley, the appellant's solicitor, exhibited articles from news websites of 19 July 2021 which referred to the debtor's practice as having received in 2020 "…the most money [for medical card

patients] at nearly €1.3m". This information had apparently been retrieved from freedom of information figures.

25. The PIP referred to Mr Shanley's affidavit in his "clarification" affidavit of 06 October 2021. He refers at para. 17 of that affidavit to having checked the debtor's income and position with him, and states that the DSA is based on the 2018 tax year, and further states that the 2019 position "is in line with the 2018 position, and the DSA Income verified *via* the Debtor's accounts and tax returns". He points out that the net position of Dr Mansour's practice is the relevant figure, and that the net profit from the practice less income tax is shown in his tax return. The PIP avers at para. 19 of his affidavit that "…the Debtor is clearly insolvent and this does not change the position due to *inter alia* the bad debt, the demanded debt, the monthly payment, the inability to get credit and the looming bankruptcy petition".

26. As regards submissions, the creditors' position, in the words of counsel at the hearing before me, is essentially that the debtor's disposition is that of "won't pay" rather than "can't pay". It is submitted that, having regard to the caselaw, and in particular the judgment of McDonald J in *Re Nuzum, A Debtor* [2020] IEHC 164 where the court considered the dicta of Laffoy J in *Re Connemara Mining Company plc* [2013] 1 IR 661, the court is "…entitled to apply what – for want of a more elegant phrase might be termed – common sense and to have regard to the realities of a debtor's ability to pay his or her liabilities. It is submitted that applying the test in the present case, and having regard to common sense, the Debtor is not insolvent by reason of his significant income, his future earning capacity, his lack of other significant debts, his failure to put any proposals to the creditors, his failure to explore seeking finance to pay off the debt, and his ability to pay the debt in full by instalments [para. 45 written submissions]". It is further submitted that the debtor

"…is using the Debt Settlement Arrangement under the Personal Insolvency Act 2012 for tactical reasons… [para. 48]".

27. On behalf of the debtor, it is contended that the debtor is clearly both balance sheet and cashflow insolvent. He has debts of circa €240,000 and assets of circa €55,000.00; while he has net income per month of €11,781, it is suggested that after ISI reasonable living expenses, rent and special circumstance costs, he has available funds for debt servicing of €4,867.00 per month. It is pointed out that he can certainly service his debts on an instalment basis, and that this is precisely what the DSA envisages. It is submitted however that he cannot meet a demand for €134,651.58 as and when it falls due [para. 33 written submissions]. It is submitted that – to apply "common sense" - €135,000 cannot be borrowed as an unsecured debt; the debtor rents, and has no home or assets to secure a loan. He has a "…High Court ruling against him, a judgment against him, a ruined credit rating, and a bankruptcy petition extant. Respectfully, "common sense" (to use the words of the creditor) clearly indicates that a re-finance is not possible" [para. 36 written submissions].

Unfair prejudice

28. The creditors submitted that the DSA unfairly prejudices them as it takes no account of the fact that they are owed 71.6% of the debt. They say that the DSA enables the debtor to escape his liability to them completely, whereas the draft DSA sent to the creditors on 10 July 2020 acknowledged the debt and, if accepted by the appellants, would have seen them paid in full over five years. It is submitted that the requirement for fairness and how the court should approach it is as set out by Baker J in *Re Meeley, A Debtor* [2019] 1 IR 235 at para. 55, where the court endorsed the view expressed by O'Donnell J (as he then was) in the context of examinerships in *Re McInerney Homes Limited* [2011] IESC 31, in which the court emphasised "the

essential flexibility" of the test of unfair prejudice, and the invitation to the court in the Companies (Amendment) Act 1990 "…to exercise its general sense of whether, in the round, any particular proposal is unfair or unfairly prejudicial to any interested party… [para. 29]".

29. The PIP's position is, quite bluntly, that the DSA is not unfair, and that any unfairness stems "from the failure of the creditor to prove their debt and not from any action of the PIP or the debtor…[i]f the creditor had proved their debt they would have got paid in full (100% of their debt…)" [para. 38 to 39 written submissions].

Procedural requirements

30. The creditors refer to s.64 of the Act, and in particular s.64(2) of the Act, which is as follows:

> "(2) (a) A personal insolvency practitioner may in any case request a creditor to file a proof of debt and the debt shall be proved in the same manner as a debt of a bankrupt is proved under the Bankruptcy Act 1988 and, subject to subsection (3), paragraphs 1 to 22 of the First Schedule of that Act shall apply with all necessary modifications to the proof of such debts.
>
> (b) Subject to paragraph (c), a creditor who does not comply with a request under paragraph (a) is not entitled to -
>
> (i) vote at a meeting referred to in section 72 or 82 , or
>
> (ii) share in any distribution that may be made under the Debt Settlement Arrangement concerned.
>
> (c) Where a creditor to whom paragraph (b) applies files a proof of debt in the manner specified in paragraph (a), paragraph (b) shall cease to apply, but without prejudice to anything done while that paragraph applied."

31. At para. 62 of their written submissions, the creditors set out a number of matters which they contend demonstrate that the PIP "was wrong in requiring the creditors herein to file a proof of debt…":

(1) The PIP had already prepared a draft DSA which referred to the creditors' debt;

(2) the PIP had prepared a prescribed financial statement and statement of affairs in bankruptcy on behalf of the debtor, which along with the draft DSA was sent to the creditors on 10 July 2020, all of which included the creditors' debt;

(3) the PIP was aware that the debt had been proved in the High Court and acknowledged in the bankruptcy proceedings: "…the Act provides no warrant for the PIP to insist on a judgment of this Honourable Court being thereafter proved to his satisfaction" …;

(4) the PIP through his own efforts was aware of the judgment, referring to the creditors' proceedings in correspondence of 03 July 2020;

(5) the PIP had prepared or assisted the debtor in preparing a statement of affairs in the bankruptcy proceedings, which statement of affairs acknowledged that the creditors' debt was accepted by the debtor;

(6) in the circumstances "…the PIP's requirement to prove the debt afresh was unwarranted and unreasonable"…;

(7) "…if the PIP took the view (incorrectly) that he was required by the Act to seek proof of debt afresh, then he ought to have sent a reminder or notice informing the creditors to submit proof of debt in

circumstances he knew that he had not consent [sic] to serve such documents by email…";

(8) the decision of the PIP to impose a 14-day limit "without further notice of extension" was *ultra vires* his powers, as s.64(2)(c) does not require the debt to be proved within 14 days or any other time limit;

(9) if the PIP was minded to exclude the creditors because of the failure to file a proof of debt, "…he ought to have advised them of s.64(2)(c) of the Act, which provides that a creditor may re-enter the process upon filing proof of debt…";

(10) without prejudice to the foregoing, the email of 06 November 2020 and the attached letter of 04 November 2020, in as far as they purport to be notices under s.64(2)(a) of the Act, are invalid as there was no agreement under s.134 of the Act by the creditors' solicitor to accept service of all documents from the PIP by email; the letter of 06 November 2020 contained nothing which would suggest that it contained a statutory notice and that the failure to reply would result in the creditors losing their rights as creditors under the Act; the letter referred to s.98 of the Act, rather than the appropriate s.64 of the Act which applies to DSAs; and the letter was defective as a statutory notice as it did not contain a warning under s.64(2)(d) that a creditor who does not comply with the request for proof of debt is not entitled to vote at a creditor's meeting or share in any distribution under the DSA. Further, it did not refer to s.64(2)(c) that a debtor may re-enter the process upon filing proof of debt.

32. It was also submitted on behalf of the creditors that, with regard to the role and duties of the PIP under the Act as discussed by Baker J in *Meeney*, the PIP had acted unfairly and in breach of his duties in that he had failed to engage with both creditor and debtor and seek to achieve a solution which is satisfactory to both; that he had excluded creditors who were to his knowledge owed 71.6% of the debtor's debt from participating in a creditor's meeting; that he had failed to ensure that the interest of the creditors were taken into account; that he had failed to fashion a remedy which was satisfactory to all parties concerned; that he had failed to act as an intermediary between the debtors and the creditors; and in particular that he had "…favoured the debtor and acted as if the debtor was his client". [Paragraph 64 written submissions].

33. These submissions are strongly rejected by the PIP. It is submitted that he did comply with s.64 in all material terms, in that the creditor was properly served, the consequences of the protective certificate were outlined, and a proof of debt was sought, albeit that the section quoted (s.98) was incorrect. In this latter regard, it is submitted that the reference to s.98 of the Act rather than s.64 was immaterial, as the creditor had conceded on affidavit that the letter of 04 November 2020 was overlooked; in any event, it was submitted that the creditor had not made the case that the reference to the incorrect section had led them to misunderstand the position.

34. It was submitted on behalf of the PIP that it was unheard of in a personal insolvency case for a PIP not to seek proofs of debt in accordance with s.64 or s.98 as the case may be. It is contended that the PIP exercised his discretion in accordance with s.64, and was fully entitled to do so. The PIP does not gainsay that he was aware of the debt, or that it was acknowledged in the PFS, the statement of affairs or the draft DSA. He acknowledges that the existence of the judgment and its acceptance in

the bankruptcy was not in dispute. His position is that the debt was not proved for the purpose of the DSA process in accordance with s.64 of the Act.

35. It was submitted that the 14-day period deployed by the PIP was the standard period in all cases, and accorded with ISI practice, procedure and guidance. It was submitted that, under s.64, the PIP had a discretion to impose any period, in theory at any rate. It was contended that the 14 days allocated by the PIP did not cause the failure to submit a proof; that was due to the fact that the creditors or their representatives overlooked the notice itself.

36. The PIP stands over the validity of the notice, and notes in particular that it was received but overlooked.

37. At para. 49(x)(a) of the written submissions, it is also argued that "…the notice was sent by post to the creditor directly on the 5 November 2020. This is full and correct service under s.134. The PIP, in effect, double served, the creditor and the creditor representative." However, it is not clear to me that this is in fact the case. At para. 11 of his affidavit of 11 May 2021, the PIP avers that "…[t]he creditors were served directly by my office on 05 November 2020 with notice of the PC by way of post at their given address…", and refers to "a copy of the documents sent" which he exhibits as NM2 to that affidavit. While there is indeed a letter of 05 November 2020, the only attachment to exhibit NM2 is the protective certificate itself. The letter of the PIP to the creditors of 04 November 2020, which appears to have been sent to the creditors' solicitors by email of 06 November 2020, and which Ms Costello acknowledges was received, does not appear to have been sent with the posted letter of 05 November 2020. Accordingly, the PIP is reliant on what he contends is the agreement of the creditors' solicitors to accept service by email of the letter of 04 November 2020 requiring proof of debt.

38. The PIP submits that, while the section quoted in that letter was incorrect, the letter itself is in identical form and substance to an equivalent notice pursuant to s.64, and reiterates that the letter was in fact overlooked, which is why there was no response to it, rather than any misunderstanding as to the nature or legitimacy of the notice.

39. As regards the role of the PIP, it is submitted that the creditor "…is actually suggesting that the PIP should not follow the statutory process, should ignore the rules and/or operate this case differently to every other case in the system…" [para. 51 written submissions]. The suggestion that the PIP did not engage with the creditor and debtor is rejected. The PIP contends that "…[n]o submission was made by the creditor to the PIP. No solution has been proposed by the creditor. The creditor was invited in writing and via oral submissions to engage with the PIP. The creditor was invited in writing and via oral submissions to prove their debt, and this was intimated by the Circuit Court. No step or progress has been made by the creditor" [para. 54(i)].

40. In essence, it is submitted on behalf of the PIP that he followed all of the necessary procedural requirements, and that any difficulty the creditors are now experiencing is due to the fact that they failed to observe the procedures themselves and prove their debt.

The issues: Analysis

41. As regards the issues agreed by the parties set out at para. 21 above, I propose to deal firstly with the third issue *i.e.,* the question of whether the decision to exclude the appellants from the DSA was in accordance with the procedural requirements of the Act. It will only be necessary to consider the first and second issues, *i.e.,* whether the debtor is insolvent for the purpose of the Act, and whether there was unfair

prejudice to the appellants, in the event that the third issue is not decided in their favour.

Compliance with procedural requirements

42. Section 64(1) of the Act relates to the actions to be taken by the PIP following issue of the protective certificate. It states as follows: -

> "(1) Where a protective certificate has been issued, the personal insolvency practitioner shall as soon as practicable thereafter—
>
> (a) give written notice to the creditors concerned that the personal insolvency practitioner has been appointed by the debtor for the purpose of making a proposal for a Debt Settlement Arrangement and, subject to section 67 (2), invite those creditors to make submissions to the personal insolvency practitioner regarding the debts concerned and the manner in which the debts might be dealt with as part of a Debt Settlement Arrangement, and such notice shall be accompanied by the debtor's completed Prescribed Financial Statement,
>
> (b) consider any submissions made by creditors in accordance with paragraph (a) regarding the debts and the manner in which the debts might be dealt with as part of a Debt Settlement Arrangement, including any submission made by a creditor with respect to previous or existing offers of arrangements made by the creditor to or with the debtor, and
>
> (c) make a proposal for a Debt Settlement Arrangement in respect of the debts concerned."

43. Section 134(1)(a) of the Act sets out provisions in relation to service of notices on a natural person such as the creditors or their solicitor as follows:

> "(1) If, under this Part, a notice is required or permitted to be given to a person, then unless an alternative (including any electronic alternative) is agreed in advance between the person giving and the person receiving the notice or the appropriate court otherwise directs or permits, it may be given -
>
> (a) where a person is a natural person -
>
> (i) by giving it to the person personally, or
>
> (ii) by sending it by prepaid post, or otherwise delivering it, in a letter addressed to the person at the person's usual or last known place of residence or business."

44. Counsel for the debtor submitted at the hearing before me that it was "crystal clear" that the PIP had got the agreement of the creditors' solicitor under s.134 to serve the documentation required by s.64 by email. It is submitted that this consent was sought by email at 16.19 on 04 November 2020, and by the further reminder of 06 November 2020, and obtained by the email at 14.53 from Mr Shanley to Ms Nolan: see para. 10 above.

45. While the latter email does suggest an acceptance by the creditors' solicitor of some communication by email, the question arises as to exactly what was being accepted. The email at 16.19 on 04 November 2020 from Ms Nolan stated as follows:

> "A Protective Certificate has issued from the courts today in relation to the case for Dr Anas Mansour – can you confirm you are willing to accept these documents by way of email?" [Emphasis in original]

46. This email begs the question of what was intended by the phrase "these documents". The subsequent email from Ms Nolan of 16.26 on 06 November 2020 states, in its opening sentence, "…please find attached the Protective Certificate for Dr Anas Mansour and supporting documentation". Ms Dympna Costello avers at para.

13 of her affidavit of 04 March 2021 that the email "enclosed four documents: a letter dated 4 November 2020 to Shanley Solicitors; the Protective Certificate issued by the Circuit Court on 03 November 2020; the Debtor's application for a Protective Certificate on 16 September 2020; and the Debtor's Prescribed Financial Statement 14 October 2020".

47. The latter two documents are undoubtedly "supporting documentation" required by s.59 of the Act for the grant of a protective certificate where a DSA is concerned. The letter of 04 November 2020, quoted in full at para. 12 above, is clearly intended to satisfy the provisions of s.64(1) and (2) of the Act, although it cites the incorrect statutory provisions, those appropriate to a PIA rather than a DSA. However, the letter is not "supporting documentation" for the protective certificate as such; the creditors argue that "…if the PIP was to rely on its contents as a statutory notice then specific attention ought to have been drawn to it" [para. 22 written submissions].

48. In the debtor's written submissions, some context on the issue of email service at the time is provided:

> "…In November 2020 Ireland was between level 4 and level 3 Covid restrictions. There were no indoor events, travel was not allowed outside your own county, and work from home was directed. The PIP was clearly seeking to work with the solicitor to correspond via email (an assistance to the creditor). Indeed, whilst the creditor now seeks to resile from the email service agreement it was understood that this was agreed. In any event, the creditor admits that the notice was overlooked…" [written submissions para. 49(x)(a)].

49. The debtor also relies on the letter of 05 November 2020 sent directly to Mr & Mrs Costello. However, it does not appear from the affidavits that this letter contained

anything other than the protective certificate. It is not suggested it attached the letter of 04 November 2020 expressly requesting a proof of debt submission.

50. It seems to me that a request by a PIP to a creditor to file a proof of debt falls within the provisions of s.134 of the Act, even though, unlike s.64(1)(a), s.64(2)(a) does not expressly require "written notice" to be given. Subsection 2(b) makes it clear that serious consequences ensue for a creditor who, having been requested to do so by the PIP, does not comply with that request. A "notice" of the request is required, and an "electronic alternative" to service in accordance with s.134(1)(a) must, under s.134(1), be "agreed in advance between the person giving and the person receiving the notice…".

51. The email from the PIP at 16.19 on 04 November 2020, referring vaguely as it did to "these documents", did not expressly or otherwise seek agreement to service by email of the notice required under s.64(2). The reminder email of 06 November 2020 likewise did not specify such a notice. While the email at 14.53 from Shanley Solicitors LLP on 06 November 2020 ("we can accept by email given the circumstances") could be read as an acceptance, particularly in the unusual circumstances of the prevailing pandemic, of service by email of any documentation to be sent to that firm by the PIP, there is nothing in that short email which would suggest that Shanley Solicitors LLP were expecting, or were given to understand that a notice pursuant to s.64(2) was on its way from the PIP. Indeed, the email of 04 November 2020 would tend to suggest, in my view, that "these documents" would be those relevant to the grant of the protective certificate, and the wording of the email from the PIP of 06 November 2020 ("protective certificate…and supporting documentation…") would probably have suggested the same thing to a reader who did not closely examine the attachments.

52. The letter of 04 November 2020 sent with the email of 06 November 2020, in which a proof of debt is requested within 14 days, is clearly written with a view in the present case to comply with the requirements of s.64 which govern a DSA rather than a PIA. Unfortunately, the letter refers throughout to s.98 of the Act, which is solely concerned with a PIA, and not a DSA. The sections are very similar, and if the PIP's letter had simply refrained from referring to sections of the Act at all, it might well have sufficed as a "notice" pursuant to s.64 of the Act.

53. I accept completely that the reference to s.98 in the letter was inadvertent, and caused by the fact that PIAs are far more common than DSAs. The letter probably derives from a template, from which the references to s.98 and s.101 of the Act should have been removed and replaced by s.64 and s.67 respectively. However, I consider the reference to the incorrect section to be a significant defect in the notice. The first sentence, which is written with a view to identifying and establishing the jurisdiction invoked in the email, expresses the PIP to be "writing to [the creditors] under the provisions of s.98(1)(a) of the Personal Insolvency Act 2012…". If the letter had been seen by the creditors' solicitor, he might well have queried the notice immediately and brought the error to the PIP's attention. He was, from previous correspondence, expecting a DSA; he would surely have been puzzled by a statutory notice invoking a procedure exclusively appropriate to a PIA.

54. As it happened, the email of 06 November 2020 attaching the documentation was overlooked by the creditors' solicitor. The PIP argues that, accordingly, the fact that the notice cited the wrong provision is immaterial; the solicitor was not misled, did not query the error, and he and the creditors simply failed to respond at all to the PIP's request. It is argued that the request for a proof of debt was clear, notwithstanding the incorrect attribution of the section; as counsel put it in the written

submissions at para. 44: "…Where the creditor expressly admits that no harm or foul occurred due to the wrong section [being cited] then no issue can arise".

55. The request for a proof of debt "may" be made by the PIP in accordance with s.64(2)(a). Once the request is made, the debt "shall" be proved in the manner set out in that subsection. The consequences of not proving the debt are severe; the creditor cannot vote at a meeting under s.72 or s.82, or share in any distribution under the DSA [s.64(2)(b)].

56. In these circumstances, it seems to me that the notice requiring proof of debt must be properly served, and compliant with the section itself. If derogation is sought by the PIP from the method of service set out in s.134(1)(a), so that service of the notice by email may be made, this must be "agreed in advance".

57. In the present case, there was no such agreement in relation to the s.64 notice. Indeed, there was no indication at all from the PIP that such a notice would be forthcoming in advance of its actually being sent. Receipt of such a notice was a significant development in dealings between the creditor and the PIP; as far as the creditors were concerned, the PIP was already well aware of the judgment debt and had included it in the documentation proffered to secure the protective certificate in the first place. Had the creditors' solicitors been aware of it, the request that the debt be proved afresh would surely have given rise to more correspondence and possibly some controversy between the parties.

58. In the absence of such agreement, the notice was not properly served, a fact which I am not prepared to overlook, given the extremely serious consequences of the notice for the creditors. The notice was in any event defective in relying on the wrong statutory provision in a different chapter of the Act, as grounding the PIP's authority to make the request. The defect was not trivial, peripheral or insubstantial. If the

recipient of the notice were one of the relatively few solicitors who was extremely well versed in personal insolvency matters and very familiar with the statutory provisions and the distinction between DSAs and PIAs, and who indeed might have been anticipating receipt of a notice requiring proof of the debt, one might have been more inclined to view the error as *de minimis*; there is no evidence which would suggest that the creditors' solicitor fell into this category.

59. If the service of the document had been appropriate, and the request itself not defective, the fact that the creditors' solicitor, through inadvertence or oversight, did not see the notice would be unlikely to have availed him in an argument that s.64(2)(b) should not apply. Equally, the debtor cannot call in aid of an argument that the defective notice and service of it should be overlooked that the creditors' solicitor did not see the defective notice and was not misled by it. The defects in service and the notice itself are in my view fatal to its validity, and the PIP's purported request to the creditors to prove their debt is accordingly invalid.

60. In the circumstances, the appellants were not included in the creditors for the purposes of the creditors' meeting normally convened to vote on the DSA, notwithstanding that the debt owed to them was the grounding debt for a bankruptcy petition against the debtor and had been previously "accepted" in the draft DSA. The absence of the appellant's debt resulted in a "single creditor approval" procedure, instead of a creditors' meeting in which the appellants probably would have voted against approval of the DSA. The procedure leading to the approval of the DSA was therefore fatally flawed, and cannot be allowed to stand.

The role of the PIP

61. This conclusion is sufficient to decide the present application, and the creditors' appeal must succeed. However, I wish to make it clear that I do not accept

the criticisms, both express and implicit, of the actions of the PIP in requiring the creditors to prove their debt in circumstances where they had a judgment that was included in the PFS and the draft DSA. The PIP was in my view entitled to do so under the Act, and would have been bound by the strictures of s.64(2)(b) not to include the creditors in the DSA process had the request been made appropriately. The request was made in accordance with the usual practice of PIPs who determine the liabilities of the debtor, and I do not see any difficulty in principle with the 14-day limit imposed by the PIP.

62. The PIP's letter of 04 November 2020, while citing the wrong section, was an attempt to bring the appropriate provisions to the creditors' attention. In circumstances where the PIP was aware of the judgment debt, he could perhaps – before the expiry of the 14-day period – have reminded the creditors' solicitors that they were required to file a proof of debt in order to be able to vote for or against the DSA. However, he was under no obligation to do so, and when no proof was received, would probably have considered himself bound by the terms of s.64(2)(b). The creditors are also bound by the Act, and it is for them to ensure that they comply with its provisions.

Insolvency and unfair prejudice

63. Substantial arguments were made to the court in respect of the other two issues. In view of my findings above, I do not require to express a view on these issues.

64. In particular, I consider that it would be unhelpful to express views in respect of the "unfair prejudice" issue, given that the parties may re-engage with a view to resolving their differences.

Conclusion

65. In the circumstances, the appeal of the creditors must succeed and their objection to the DSA upheld. I will give each of the parties 14 days from delivery of this judgment to make a written submission of not more than 1000 words in relation to the issue of costs, or the form of the order. I shall thereafter make a final order without further reference to the parties, although I reserve the right to convene a short hearing to address the final order if I consider it necessary.