[2019] IEHC 622

THE HIGH COURT

[C:IS:HC:2016:000039]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012 TO 2015
AND IN THE MATTER OF FRANK MCNAMARA (A DEBTOR)

THE HIGH COURT

[C:IS:HC:2016:000040]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012 TO 2015
AND IN THE MATTER OF TERESA MCNAMARA (A DEBTOR)

JUDGMENT of Mr. Justice Denis McDonald delivered on 20 August 2019

The applications before the court

1. In both of the above cases, Mr. James Green, personal insolvency practitioner ("*the practitioner*") has brought applications before the court under s. 115A of the Personal Insolvency Act, 2012 ("*the 2012 Act*") as amended by the Personal Insolvency (Amendment) Act, 2015 ("*the 2015 Act*"). In both cases the practitioner seeks an order pursuant to s. 115A (9) confirming the coming into effect of the interlocking personal insolvency arrangements proposed on behalf of each of the above named debtors namely Mr. Frank McNamara and Ms. Teresa McNamara.

2. The application is opposed in each case by Tanager DAC *("Tanager*") as successor in title to Bank of Scotland (Ireland) Ltd (*"BOSI"*). Tanager holds security over the family home of the debtors in County Meath. A detailed notice of objection has been filed on behalf of Tanager in each of the applications. It will be necessary, in due course, to consider the nature of the objections in more detail.

Background

3. Mr. McNamara and Ms. McNamara are husband and wife. Mr. McNamara is a musician and composer. Ms. McNamara is a barrister. When the arrangements in this case were first proposed in 2016, the ages of their dependent children were eighteen and sixteen respectively.

4. According to the background information contained in the proposed arrangements, Mr. McNamara and Ms. McNamara first encountered financial difficulties in the early 2000s when Mr. McNamara began to experience problems in collecting music royalties due to him. During this time, Mr. McNamara and Ms. McNamara borrowed money to try and get through what they believed to be a short term financial problem. They remortgaged properties and also sold a number of properties in order to try and make ends meet. At the time, Mr. McNamara believed that his financial problems would resolve themselves over a relatively short period. Up to 2007 he had been working as a music conductor in the United States and had been earning a high income. However, in 2007, Mr. McNamara devoted significant time to an unsuccessful attempt

to win a seat in local authority elections held in that year. As a consequence of the time taken to stand in the local elections, the household income was reduced significantly. Very soon afterwards, the recession hit Ireland and this compounded the financial problems of the McNamaras who, as noted above, had borrowed money to assist with what they had then believed were short term financial difficulties.

The creditors

5. According to Appendix 3 to each of the proposed arrangements, Mr. and Ms. McNamara have the following creditors: -

(a) They are jointly and severally liable to Tanager in the sum of €2,267,479 on foot of three accounts (which, where necessary, I will refer to as the 05,06 and 09 accounts). This debt is secured on the family home (i.e. their principal private residence within the meaning of s. 115A) which has a current market value of €550,000. It should be noted that, prior to the issue of the protective certificates in these cases, Tanager had obtained an order for possession against Mr. McNamara and Ms. McNamara in respect of the family home. However, the order for possession had not been executed prior to the issue of the certificates. The order for possession had been obtained on 8th April, 2014. Not long prior to the issue of the protective certificates, Tanager, on 24th October, 2016, had renewed the relevant execution order in respect of the order for possession.

(b) Mr. McNamara is individually liable to First Citizen Finance DAC (previously known as Consumer Auto Receivables Finance Ltd) in the sum of €58,705 which is secured by a judgment mortgage registered against Mr. McNamara's interest in the family home which is comprised in Folio 53047F of the register, County Meath and also against Mr. McNamara's interest in a parcel of lands comprising 5.21 acres namely the lands comprised in Folio 10051, County Meath (those lands being in the joint names of Mr. McNamara and Ms. McNamara).

(c) Ms. McNamara is indebted to the Revenue Commissioners in respect of Value Added Tax (*"VAT"*) in the sum of €9,354. Although not shown in Appendix 3 (containing the schedule of Ms. McNamara's creditors), it is included in the estimated statement of affairs contained in Appendix 1 to the proposed arrangement in her case and it forms part of the overall preferential debt of €12,836 shown in Appendix 4 (which sets out the estimated dividends to creditors under the proposed arrangement). At this point, it should be noted that there is an obvious error in Appendix 4 insofar as it suggests that the preferential debt to Revenue amounting to €12,836 represents a joint obligation of both Mr. McNamara and Ms. McNamara. On the basis of the papers available to the court, the only debtor in respect of VAT is Ms. McNamara. This is reinforced by a consideration of p. 16 of the arrangement in Ms. McNamara's case which makes clear that Ms. McNamara has a permitted debt of €9,354.34 which is owed to the Revenue Commissioners in respect of VAT and that the debt has a preferential status. In this context, it should be noted that the meaning of *"permitted debt"* is explained in s. 92 (8) of the 2012 Act. Essentially, a *"permitted debt"* is an excludable debt which has been included in a proposal for an arrangement with the consent (either actual or deemed) of the creditor concerned. In turn, s. 2 (1) of the 2012 Act explains that an *"excludable debt"* includes any liability of a debtor arising out of any tax duty levy or other charge of a similar nature owed or payable to the State. VAT plainly falls within that category;

(d) As noted above, Appendix 4 to the arrangement in both Mr. McNamara's case and also in Ms. McNamara's case refers to a preferential debt of €12,836 owed by both of them to the Revenue Commissioners. As explained in sub. para. (c) above, this is not consistent with the substantive text of the

arrangement in Ms. McNamara's case which (as noted above) makes very clear that Ms. McNamara's obligation to the Revenue Commissioners is confined to the preferential debt of €9,354.34 owed to the Revenue Commissioners in respect of VAT. Paragraph 4.4 of her arrangement expressly states that she does not have any excludable debts which are not permitted debts within the meaning of the 2012 Act. Thus, it cannot be said that Ms. McNamara has a joint obligation to the Revenue Commissioners in respect of a sum of €12,836 as suggested in Appendix 4 to the proposed arrangement in her case. Similarly, the suggestion made in Appendix 4 of the proposed arrangement in Mr. McNamara's case that €12,836 represents a preferential debt owed by him to the Revenue Commissioners is also mistaken. Again, it is clear from the substantive text of the proposed arrangement in his case that the sum of €3,482 (representing the balance of €12,836 shown on Appendix 4 to each of the arrangements after deduction of Ms. McNamara's debt in respect of VAT in the sum of €9,354) is, in fact, owed solely by him in respect of local property tax. On p. 17 of the proposed arrangement in Mr. McNamara's case, it is stated that Mr. McNamara has a permitted debt of €3,482.10 which is owed to the Revenue Commissioners of which €1,138.82 is preferential. This, however, throws up a further error in Appendix 4 to both of the proposed arrangements in that, as noted above, the arrangements suggest that a total of €12,836 (being the aggregate of the sums of €3,482.10 in respect of local property tax and €9,354 in respect of VAT) is a preferential debt. It is clear from p. 17 of the proposed arrangement in Mr. McNamara's case, that only €1,138.82 of the debt in respect of local property tax (*"LPT"*) is preferential. However, it should be noted that any amount due in respect of LPT stands secured on the property to which it relates. This is

clear from the provisions of s. 123 of the Finance (Local Property Tax) Act, 2012 ("the LPT Act") which expressly provides that any LPT, interest or penalties *"shall be and remain a charge on the relevant residential property to which it relates"*. Furthermore, under s. 124 of the LPT Act, the charge will continue to apply without any time limit until it is paid in full. In the event of any sale in the future, s. 126 of the 2012 Act requires that the vendor should pay to the Revenue Commissioners any LPT, penalties or interest. In this way, the entire of the LPT (even the non preferential part) has the status of a secured debt. Furthermore, the effect of s. 126 of the LPT Act is that any *"liable person"* who proposes to sell a residential property must pay any LPT, penalties or interest due. This would extend, for example, to a mortgagee in possession. This follows from the provisions of s. 11 (3) and (4) of the LPT Act. To that extent, s. 126 has the effect that unpaid LPT will take priority over monies due to a mortgagee. At this point, I should add that while errors of the kind described above are regrettable, I propose to deal with then in the manner outlined by me in *Donal Taaffe* [2018] IEHC 468 at para. 63 (addressed in more detail in para. 9 (d) below). In my view, the errors are obvious when read in the context of the arrangements as a whole and the corrections to be made are equally obvious. I am also of the view that the errors are inconsequential when viewed in light of the substantive provisions of the arrangements which make it very clear what the correct figures are. While the court has no power to amend the terms of the arrangements, if the arrangements are ultimately approved, the order confirming them will record the errors and the correct position. In that way, no one will be in any doubt as to what the correct position is.

(e) Mr. and Ms. McNamara are jointly and severally liable to Banco de Sabadell S.A. to the tune of €210,000. This debt is unsecured;

(f) They are also indebted on an unsecured basis to Bank of Ireland Mortgage Bank *("BOIMB")* in the sum of €534,166 on foot of four separate accounts;

(g) They also have a joint and several liability to Bank of Ireland in the sum of €548,641. This debt is also unsecured;

(h) Ms. McNamara owes a further sum of €5,578 to Bank of Ireland. This, too, is unsecured.

(i) Mr. and Ms. McNamara also owe €13,048 to Belvedere College in respect of unpaid school fees. Again, this is an unsecured liability;

(j) Mr. McNamara owes (on an unsecured basis) €35,158 to Permanent TSB *("PTSB")*;

(k) Finally, Mr. McNamara is indebted to Cabot Financial (Ireland) Ltd *("Cabot")* in the sum of €48,983. This is also an unsecured debt.

The proposed arrangements

6. The key features of the proposed arrangements are as follows:-

(a) In light of the repayment capacity of Mr. McNamara and Ms. McNamara and in light of the valuation of the family home (which was determined by an independent expert in accordance with s. 105 (3) of the 2012 Act to lie between €500,000 and €550,000 and subsequently agreed between the practitioner and Tanager to be €550,000) it is proposed to write-off €1,717,479.27 of the mortgage balance of €2,267,479.27, leaving a balance of €550,000 secured on the family home of which €520,000 would be treated as a "*live*" mortgage balance with €30,000 warehoused at a zero interest rate which will become payable from the proceeds of an insurance policy held by Ms. McNamara which will become accessible within seven years. In the

meantime, the live mortgage balance will be paid by an initial lump sum payment of €100,000 with the balance of €420,000 repaid over 228 months at an interest rate of 1% for the duration of the arrangement with the interest calculated thereafter at the ECB rate plus 1%. For completeness, it should be noted that on p. 55 of the proposed arrangement in Mr. McNamara's case, there is a statement at note 1 to the effect that it is proposed that the mortgage be written down to €540,000. This is, again, an obvious error in the terms of the proposed arrangement. It is clear from the detailed provisions on p. 54 of the arrangement in Mr. McNamara's case that the proposal is to write the mortgage debt down to €550,000. This is also clear from the terms of the proposed arrangement in Ms. McNamara's case at p.p. 52-53. Note 1 on p. 53 of the proposed arrangement in Ms. McNamara's case correctly records the correct figure of €550,000. There is also an obvious error on p. 55 of the proposed arrangement in Mr. McNamara's case insofar as note 2 suggests that the initial amount to be paid to Tanager under the arrangement is €90,000. Again, this is not consistent with the clear terms of the substantive provisions contained on p. 54 of the proposed arrangement which shows very clearly that the initial payment to be made to Tanager is €100,000. In light of the substantive provisions contained in p. 54 of the arrangement in Mr. McNamara's case and in light of the very clear provisions on pp. 52-53 of the arrangement in Ms. McNamara's case, I believe there is no doubt but that the figure of €90,000 shown in note 2 on p. 55 of the proposed arrangement in Mr. McNamara's case is an error and that the note should in fact refer to a figure of €100,000 which is what is provided for in the substantive provisions of Appendix 7 in both cases. For the reasons explained in para. 5 (d) above and 9 (d) below, I would propose that, if the arrangements are ultimately

confirmed by the court, the order will recite these errors and will also recite what the correct position is.

(b) Insofar as the write-off of €1,717,479.27 is concerned, this would rank for dividend as an unsecured debt under the proposed arrangements;

(c) With regard to the judgment mortgage registered against the lands comprised in Folio 10051, it is proposed that these lands will be sold and that the judgment mortgagee, First Citizen Finance DAC, will be discharged out of Mr. McNamara's share of the proceeds which is estimated at €29,697 with the balance being treated as an unsecured debt in the arrangement;

(d) In each case, the term of the proposed arrangement is 72 months which is the maximum duration permitted under the 2012 Act. Mr. and Ms. McNamara will make available an estimated inheritance of €182,500 together with an investment lump sum of €24,775 as well as the equity remaining from the sale of Ms. McNamara's interest in the lands comprised in Folio 10051. As noted previously, Tanager is to be paid €100,000 out of these contributions. In addition, Ms. McNamara has cashed in an Aviva pension policy which generates an annual contribution of €770. On the basis of these contributions, and on the basis of the self-employed income of Mr. McNamara and also of Ms. McNamara, a sum of €2,023.41 will be paid monthly during the 72 month term of the proposed arrangements and also thereafter to Tanager in respect of the debt secured over the family home. The Revenue Commissioners will be paid in full the total amount of €12,836 (outlined above). The remaining balance of the contributions made by Mr. McNamara and Ms. McNamara will be used to pay the fees and expenses of the practitioner and also to pay a dividend of 5 cents in the euro to the unsecured creditors (including Tanager in respect of the write-off of €1,717,479.27).

This dividend will be discharged by means of 36 monthly payments of €960 commencing in year four of the arrangement.

The comparison with bankruptcy

7. According to Appendix 5 to each of the proposed arrangements, if Mr. and Mrs. McNamara were to become bankrupt, the likely realisation for Tanager in respect of the secured element of the debt would be at the rate of 22 cent in the euro. This compares to 27 cent in the euro under the proposed arrangement. As discussed in more detail below, these figures are disputed by Tanager. Insofar as First Citizen Finance DAC is concerned, its recovery in a bankruptcy would be of the order of 45 cents in the euro. Under the arrangement, it would be 50 cent in the euro. Unlike Tanager, First Citizen Finance DAC is not confined to security over the family home of Mr. and Ms. McNamara. First Citizen Finance DAC has security over the lands comprised in Folio 10051.

8. Insofar as the unsecured creditors are concerned, in a bankruptcy, their likely recovery would be limited to 3.3 cent in the euro. Under the proposed arrangement, they will recover 5 cent in the euro. This calculation is made on the basis that there will be an additional liability of €13,500 in respect of capital gains tax in the event that Mr. McNamara and Ms. McNamara are adjudicated bankrupt. Note 6 to Appendix 5 in both of the proposed arrangements states that capital gains tax may have to be paid if property is sold in a bankruptcy in circumstances where rollover relief had been claimed at the time the property in question was purchased in 1989.

The Tanager Notice of Objection

9. A wide-ranging notice of objection has been served on behalf of Tanager. Not all of the grounds of objection were ultimately canvassed in the affidavit sworn on behalf of Tanager by Ms. Angela O'Brien or in the course of the hearing of the applications under s. 115A. The relevant grounds which were canvassed either in the affidavit or at the hearing comprise the following:-

(a) Tanager contends that there is no adequate proof of service of the s. 115A application on each of the statutory notice parties.

(b) Secondly, para. 2 of the Notice of Objection states that Tanager reserves the right to object to the s. 115A application on the basis that it has not been brought within the time prescribed by s. 115A (2) of the 2012 Act (as amended). In the course of the hearing, it was confirmed that the point made in para. 2 is essentially the same point previously addressed by me in *Thomas Finnegan* [2019] IEHC 66. In that case, I decided this point against the objecting creditor. In those circumstances, counsel for Tanager here, very properly, did not seek to argue this point again in these proceedings. However, equally properly, he reserved the right to ventilate the point on appeal in the event that these applications are decided against Tanager and Tanager decides to appeal. It will not, therefore, be necessary to address the point further in this judgment.

(c) An issue was also raised in Ms. O'Brien's affidavit as to the practitioner's certificate setting out the result of the vote taken at the creditor's meeting. In his affidavit sworn on 13th June, 2018, the practitioner has exhibited a revised certificate of voting. However, at the hearing of the applications under s. 115A, counsel for Tanager argued that there is no facility under the 2012 Act to amend the certificate and that the errors in the certificate therefore constituted a fatal flaw. This argument proceeded on the basis that the practitioner was required under s. 115A (2) to serve the certificate with the application under s. 115A on each of the creditors and on the Insolvency Service *("ISI")*. In my view, however, this argument is based on a mistaken premise and I therefore do not intend to address it in any detail in this judgment. It is sufficient to record that, although there is an obligation on the

practitioner to serve the certificate as to the result of the vote, it is quite clear from s. 115A (15) that such a certificate is not conclusive in any way. Section 115A (15) (a) merely provides that the court *"**may** accept …the certificate of the … practitioner… as evidence…"* (emphasis added). The certificate cannot be said to be sacrosanct in those circumstances. The language of the subsection clearly envisages that the court is free to also consider other evidence. This would include, for example, evidence given on affidavit by the practitioner. In this case, the practitioner, in para. 52 of his replying affidavit has accepted that the voting table in his original certificate is incorrect in part and he has produced a new voting certificate which he says shows the correct position. While it is not ideal that an error should arise in a voting certificate furnished to creditors, I believe that the court must be entitled to receive additional evidence to correct any errors that may have been contained in the voting certificate circulated by the practitioner. The court must always be in a position to reach its own determination as to the true result of the vote and to receive evidence for that purpose. It should also be noted that, in any event, the differences between the original voting certificate and the corrected voting certificate are not significant for present purposes and I do not believe that they give rise to any material concerns as to the result of the votes. The key thing is that, in each case, the proposed arrangement was defeated by the overwhelming majority in value of the creditors concerned. In those circumstances, any errors in the precise figures do not seem to me to be of crucial importance. Moreover, I can see nothing in the text of s. 115A or in its underlying rationale that suggests that it was the intention of the Oireachtas that an error in the certificate would be regarded as

a fatal flaw in any application under s. 115A. I therefore do not propose to address this issue further in this judgment.

(d) In para. 3 of the Notice of Objection, it is contended that the duration of the proposed arrangements is uncertain and that this renders the entire arrangement *"fundamentally flawed"*. In para. 11 of her affidavit, Ms. O'Brien explained that Tanager's objection arises from a concern that it is stated in the opening box of Part 1 of the proposed arrangement that the estimated start date is February 2017 and the estimated end date is May 2018. This is very obviously less than the 72-month duration of the arrangement which is elsewhere stated throughout the document. To my mind, the reference in the opening box to February 2017 and May 2018 as the estimated start and end dates is very obviously an error. It is clear from the document as a whole that it is intended that the proposed arrangements would endure for a period of 72 months. Regrettably, under the terms of the 2012-2015 Acts, no power is given to the court to amend even obvious errors in a proposed arrangement. However, as I observed in *Donal Taaffe* [2018] IEHC 468 at para. 63, there is a practical way of dealing with an inconsequential error or inaccuracy identified in a proposed arrangement. The procedure which I have adopted in previous cases is to note, in the order confirming the arrangement, that the inaccuracy exists and to set out the correct position in the order. In my view, the errors in the first box in part one of the arrangement are both obvious and inconsequential (in circumstances where the arrangements as a whole very clearly provide for a 72-month arrangement). In those circumstances, it seems to me that the practice outlined in para. 63 of my judgment in *Donal Taaffe* should be adopted here. I therefore do not propose to say anything further in this judgement about this

ground of objection. If ultimately, the proposed arrangements in these cases are approved, I will note in the order confirming their coming into effect that these errors exist and the order will also record the correct position;

(e) It is alleged that the procedural requirements of the 2012 Act have not been complied with. This is explained in para. 12 of Ms. O'Brien's affidavit. It is suggested that there are a number of specified debts secured on property of Mr. and Ms. McNamara by means of judgment mortgages. She complains that there is no evidence that these creditors have elected to treat their *"otherwise secured debts…as unsecured debts"*. Ms. O'Brien says that in those circumstances the entire arrangement and the creditors meeting are *"fundamentally flawed"* and *"must be dismissed out of hand"*. As I understand it, the principal basis for Tanager's contention that the arrangements are defective on this ground is that there has been a failure to comply with the mandatory requirements of s. 99 of the 2012 Act. That section sets out a number of mandatory rules with which every personal insolvency arrangement must comply. It is furthermore a requirement under s. 115A (8) (a) (ii) that the court is satisfied that these mandatory requirements have been complied with. The relevant mandatory requirement in this context is that set out in s. 99 (2) (a) which provides that a personal insolvency arrangement *"shall clearly specify which debts are secured debts and which debts are unsecured debts"*. Ms. O'Brien seeks to suggest that there are debts which should properly be characterised as secured debts which are shown as unsecured debts and, furthermore, that there are a number of secured debts (secured by means of judgment mortgages against the property) which are not disclosed in the proposed arrangement. However, the position is explained by Mr. McNamara in an affidavit sworn on 12th February, 2019

(to which Tanager never responded) that the debts underlying the judgment mortgages in question have, in fact, been satisfied. Mr. McNamara explains that the relevant solicitors acting on behalf of the creditors in question had been requested to address the satisfaction of the judgment mortgages but that the relevant steps had not yet been taken in the Land Registry. In light of this evidence, I do not believe that it is necessary to consider this issue any further. There is a further related issue that arises with regard to the position of PTSB. This is addressed further in sub. para. (f) below.

(f) In the course of the hearing, some emphasis was placed by counsel for Tanager on the fact that, in the PFS made by Mr. McNamara at the outset of this process, he disclosed a secured debt in favour of PTSB in the sum of €64,905.18. Counsel also drew attention in this context to the fact that the copy folios exhibited by Ms. O'Brien showed that PTSB had registered a judgment mortgage in 2011 against the lands comprised in Folio 10051 and Folio 53047F in respect of Mr. McNamara's interest in both properties. Counsel contrasted this evidence with the description of the debt due to PTSB as set out in Mr. McNamara's proposed arrangement where it is described as an unsecured debt of €35,158 in respect of credit card obligations. This is an issue that was also raised by Ms. O'Brien in para. 49 of her affidavit. I cannot see anything in the practitioner's replying affidavit which addresses this issue. Nonetheless, it is clear from the term of the arrangement (which PTSB voted for) that PTSB has accepted that the value of the debt owed to it is €35,158 in respect of credit card facilities. If the arrangement comes into effect, PTSB will be bound by it. Crucially, PTSB vote in favour of the arrangement. In the circumstances, the only conclusion that can be reached is that the treatment of PTSB as an unsecured creditor in the total sum of

€35,158 must be correct. In those circumstances, I do not believe that it is necessary to consider this issue any further notwithstanding that, in my view, this is an issue which should properly have been addressed by the practitioner in his affidavit;

(g) Tanager also contends that the proposed arrangements unfairly prejudice its interests. This is explained further in paras. 17-22 of Ms. O'Brien's affidavit where a number of points are made by her. In the first place, she complains that the proposed write-off of €1,717,479 is so significant that it *"represents a clear unfair prejudice"*. In para. 18 she explains that the proposed arrangement is not a product offered by Tanager in the ordinary course of its business. According to Ms. O'Brien, Tanager has a suite of options to deal with debtors in financial difficulty such as mortgage to rent, voluntary sale or surrender or debt purchase. Ms. O'Brien also says that the only instance in which Tanager is prepared to offer a write down to market value occurs in circumstances where the secured property is either surrendered or voluntarily sold *"which ensures that the true market value of the property is achieved"*. Ms. O'Brien suggests that the market value used for the purposes of the arrangements is "*fictional"* and that it is reasonable to predict that the value of the secured property would appreciate at a rate of 2% per anum for the remaining terms of the mortgage resulting in a profit accruing to the McNamaras. She also complains that the arrangement converts what is currently a variable rate into a fixed rate of 1% not only for the term of the proposed arrangements but for the remainder of the lifetime of the mortgage. At para. 15 of her affidavit Ms. O'Brien confirmed that the rate applicable to the 05 and 06 accounts is the ECB rate plus 1% while the rate applicable to the 09 account is the ECB rate plus 1.25%. Ms. O'Brien explains that

Tanager does not offer fixed rate loans but she draws attention to the fact that even those institutions which do such as Bank of Ireland carry rates ranging from 3.55% to 4.2% depending on the length of the fixed rate period. Ms. O'Brien suggests that a rate of at least 5.5% would be required to fix the mortgage interest rate over a term of 19 years.

(h) The next point of objection raised by Tanager is in relation to the eligibility criteria specified in s. 91 of the 2012 Act. In this context, s. 115A (8) provides that the court may only consider an application under s. 115A (9) where it is satisfied (*inter alia)* that the eligibility criteria specified in s. 91 have been satisfied. The eligibility criterion on which Tanager relies is that set out in s. 91 (1) (e) which requires that a debtor must complete a Prescribed Financial Statement (*"PFS")* and make a statutory declaration confirming that the PFS is a complete and accurate statement of assets, liabilities, income and expenditure. In her affidavit, Ms. O'Brien suggests that the PFS completed in October 2016 is inconsistent with a standard financial statement (*"SFS")* completed by Mr. McNamara in January 2016. In para. 26 of her affidavit, Ms. O'Brien draws attention to a reference in the SFS to an instalment order taken by Bank of Ireland which would suggest that a judgment has been obtained by Bank of Ireland. Ms. O'Brien says that no reference to any such judgment is contained in the PFS. In addition, she maintains that a reading of the SFS would suggest that the value of the inheritance is significantly higher than disclosed in these proceedings. In the SFS, the value of the inheritance was stated to be €500,000 whereas in the proposed arrangement it is stated to be €182,500. Ms. O'Brien also contends that the SFS refers to a rental income from the inherited property which she says *"seems to have vanished"* from the PFS.

(i) Tanager also raised an issue as to compliance with s. 104 of the 2012 Act but that issue was not pursued at the hearing and, in my view, nothing arises in relation to it;

(j) Tanager also contends that there is no reasonable prospect that confirmation of the proposed arrangements will enable Mr. McNamara and Ms. McNamara to resolve their indebtedness without recourse to bankruptcy. In this context, under s. 115A (9) (b) (i), the court must be satisfied, if it is to approve an arrangement under s. 115A, that there is a reasonable prospect that the arrangement will enable the debtor concerned to resolve his or her indebtedness without recourse to bankruptcy. In her affidavit, Ms. O'Brien says that the repayment history of Mr. McNamara and Ms. McNamara is such that there is little prospect that they will be able to meet the projected payments of €2,023 per month payable into the future and she says that it is inevitable that there will be a default which, will trigger a bankruptcy. She also says that the proposed extension of the term of the mortgage from 96 months to 228 months will place the McNamaras in a vulnerable position by requiring them to maintain substantial mortgage repayments past the age of 70.

(k) The next issue raised by Tanager is that there is no reasonable prospect that confirmation of the arrangements will enable Tanager to recover the debts due to it to the extent that the means of Mr. McNamara and Ms. McNamara reasonably permit. Although not expressly invoked, this contention reflects the terms of s. 115A (9) (b) (ii) of the 2012 Act. In her affidavit Ms. O'Brien draws attention to the SFS (mentioned above) which suggests that there is a greater sum due to Mr. McNamara from the inheritance than is proposed under the arrangements. She contends that if this sum was made available, it

would enable a more substantial amount of the debt due to Tanager to be discharged. She further says that:

> *"Given the variety of inconsistencies disclosed ... it is incumbent upon the Debtor to disclose the Inland Revenue Affidavit and Will in respect of the Estate".*

(l) Reflecting the terms of s. 115A (9) (e), Tanager makes the case that the proposed arrangements are unfair and inequitable. The main ground for this complaint (as articulated by Ms. O'Brien) is the extent of the write-down of the Tanager debt. She also says that it is notable that on an overall basis, 97% of the creditors voted against the arrangement whereas only 3% voted in favour. Ms. O'Brien says that this *"clearly speaks for itself and confirms that the proposed Arrangement is unfair and inequitable to a variety of creditors of the Debtor".* The latter issue seems to me to be one which will require to be borne in mind when I come to consider the class of creditor issue and in particular the provisions of s. 115A (17) discussed in paras. 62-64 below.

(m) Consistent with s. 115A (9) (g), Tanager maintains that the proposed arrangements have not been accepted by at least one class of creditors by a majority of over 50% of the value of the debts owed to the class. In her affidavit, Ms. O'Brien advances a variety of arguments in support of this proposition. However, in the course of the hearing, Tanager's argument in relation to this issue was significantly refined. At this point, I should explain that, for the purposes of s. 115A (9) (g), the practitioner had sought to make the case that there were at least three classes of creditors (in Mr. McNamara's case) who had voted in favour of the arrangement namely the excludable creditor class (comprising the Revenue Commissioners), the *"Education class of creditors"* comprising Belvedere College S.J. and the judgment

mortgage class of creditors comprised of First Citizen Finance DAC. In Ms. McNamara's case, the practitioner sought to make the case that there were two classes of creditors who had voted in favour of the arrangement namely the excludable class comprising the Revenue Commissioners (in respect of the VAT debt of €9,354.00) and the *"education class of creditors"* comprising Belvedere College S.J. Ultimately, at the hearing, counsel for the practitioner focused on the excludable class for the purposes of s. 115A (9) (g). In response, counsel for Tanager argued that, for the reasons explained in my judgment in *Ahmed Ali* [2019] IEHC 138, the vote of the Revenue Commissioners in relation to its preferential debt should not have been counted. Counsel for Tanager also argued that, to the extent that any of the debt due to the Revenue Commissioners was not preferential, the fact that the Revenue Commissioners are to be paid in full create an obvious inequality or inequity between the way in which the Revenue Commissioners are dealt with under the proposed arrangements and the way in which the unsecured element of the debt to Tanager is dealt with. While the Revenue Commissioners will be paid in full, Tanager will be paid only a small percentage of the unsecured debt due to it – namely 5 cents in the euro.

(n) In its Notice of Objection and in Ms. O'Brien's affidavit, Tanager also raised an issue as to whether it had been afforded the benefit of its full voting rights but this was not an issue that was ultimately pursued at the hearing and it is therefore unnecessary to address it in this judgment;

(o) The penultimate ground relied upon by Tanager is that the bankruptcy comparison deployed by the practitioner is defective. In her affidavit Ms. O'Brien went so far as to suggest that the return in a bankruptcy would be somewhat higher than the return under the proposed arrangements.

(p) The final ground relied upon by Tanager is that, in the two-year period prior to the issue of the Protective Certificate, payments to Tanager were at a level which was significantly below the repayment obligations of Mr. McNamara and Ms. McNamara. Tanager also relied in this context on the discrepancies between the SFS on the one hand and the PFS on the other. For these reasons, Tanager argued that the conduct of Mr. McNamara and Ms. McNamara during the two-year period in question weighed against the grant of relief under s. 115A (9). In this context, s. 115A (10) (a) requires the court on any application under s. 115A (9) to have regard to the conduct, within a two-year period prior to the issue of the protective certificate, of both the debtor in seeking to pay the debts concerned and the creditor in seeking to recover the debts due.

(q) For completeness, it should also be noted that Tanager, in its notice of objection and in Ms. O'Brien's affidavit, also sought to suggest that Mr. McNamara and Ms. McNamara had unreasonably rejected a proposal that they should voluntarily surrender the property to Tanager. This was not an issue that was ultimately argued in the course of the hearing and I therefore do not propose to consider it further.

(r) In addition, in the course of the hearing, an objection was raised by counsel for Tanager that the affidavit of Mr. McNamara dealing with the satisfaction of the judgments described in sub para**.** (e) above was not admissible in support of the application in respect of Ms. McNamara. In my view, that objection is without merit. These are interlocking applications. Moreover, the affidavit of Mr. McNamara dealt with the financial difficulties which beset both himself and Ms. McNamara. It also dealt with the satisfaction of the judgments which had been registered as mortgages against the properties

owned by them jointly. The evidence given by Mr. McNamara therefore applied to both his position and Ms. McNamara's position. The fact that a separate affidavit was not sworn in Ms. McNamara's case seems to me to be of no importance in these circumstances. Mr. McNamara was not giving hearsay evidence on behalf of Ms. McNamara. He was deposing as to facts which were of relevance to both of them. I therefore do not propose to say anything further about this ground for objection which, in my view, is unduly technical. This is not a criminal trial.

10. Before turning to consider the issues which arise in these applications, it is important to record that a very significant period has elapsed since the s. 115A applications were first initiated in February 2017. As I understand it, the applications were initially adjourned pending the determination of an issue which arose in a number of s. 115A applications as to the correct party to move an application under s. 115A (9). The language used in the notices of motion suggested that the applications were made not on behalf of the practitioner but on behalf of Mr. McNamara and Ms. McNamara respectively. In a number of other applications which came before the court at that time, objecting creditors contended that the only party who is entitled to bring an application under s. 115A (9) is the practitioner. That issue was ultimately determined by Baker J. in *Niamh Meeley* [2018] IEHC 38. That judgment was delivered in February 2018. Thereafter, in June 2018, the practitioner brought an application to amend the wording of the notices of motion previously filed in these proceedings. That application was contested by Tanager and ultimately a hearing was held which resulted in a judgment given by me namely *Frank McNamara* [2018] IEHC 730 in December 2018 in which I held that the practitioner should be allowed to amend the notices of motion so as to make clear that the applications were made by the practitioner on behalf of Mr. McNamara and Ms. McNamara respectively.

11. Prior to the hearing of the application to amend the notices of motion, the notices of objection described above had been filed by Tanager in February 2017. The notices of objection were followed by an affidavit sworn by the practitioner on 17th February, 2017. An affidavit of Helen Reilly as to service of the s. 115A applications was sworn on 8th March, 2017. Thereafter Ms. O'Brien's affidavit was sworn on 11th May, 2017 following which the issue determined by Baker J. in February 2018 arose for consideration. The hearing of the issues in *Niamh Meeley* took place in December 2017. The judgment of Baker J. was delivered on 5th February, 2018. Subsequent to that judgment being delivered, the practitioner filed an affidavit in these proceedings on 13th June, 2018. Later that year, the application to amend the notices of motion was heard in Michaelmas term with judgment being delivered on that issue by me on 17th December, 2018. Once that issue had been disposed of, Mr. McNamara then filed an affidavit (in response to Ms. O'Brien's affidavit) in February 2019 following which there were a number of adjournments at the request of Tanager which were granted by the court on the basis that a further affidavit would be filed by Tanager. However, notwithstanding these adjournments, no further affidavit was filed and ultimately it was necessary for me to indicate that the hearing of the application would have to proceed, in the absence of an affidavit, on 27th May, 2019.

12. At the hearing of 27th May, 2019 the principal issues raised by Tanager (and which were extensively debated at the hearing) related firstly to the question of service of the s. 115A applications on the statutory notice parties and, secondly, the question as to whether there was an appropriate class of creditors who had voted in favour of the proposed arrangements for the purposes of s. 115A (9) (g) of the 2012 Act. In light of the way in which the hearing concentrated on those issues I will address them first. At a later point in this judgment, I will consider the balance of the issues described in para. 9 above and any other issues that may arise under s. 115A.

Service

13. As noted above, in para. 1 of the notice of objection, Tanager, as a preliminary matter, required proof of service of the application on all parties in compliance with the requirements of s. 115A (2) of the 2012 Act. Under that subsection, an application under s. 115A (9) is required to be made on notice to the Insolvency Service *("ISI"),* each creditor concerned and the debtors. As noted above, an affidavit of service of Helen Reilly was sworn on 8th March, 2017. The affidavit of Angela O'Brien was subsequently sworn on behalf of Tanager on 11th May, 2017. In para. 10 of Ms. O'Brien's affidavit she indicated that neither Tanager nor its solicitor had then been furnished with any proof of service with regard to the application and that, accordingly, Tanager reserved the right to object, following receipt of the affidavit of service, to the adequacy of service. There is no information available to me as to when the affidavit of Ms. Reilly was seen by Tanager. However, at the outset of the hearing before me on 27th May, 2019, counsel for Tanager raised an issue as to the adequacy of Ms. Reilly's affidavit. It was argued that the affidavit was defective in that it was not sworn by Ms. Reilly and it was suggested that, in those circumstances, there was no proof of service before the court such that the court could not be satisfied that the requirements of s. 115A (2) have been complied with.

14. Counsel for Tanager drew attention to the jurat of Ms. Reilly's affidavit which, at first sight, appeared to suggest that the affidavit was not signed by the deponent. The signature of the deponent did not appear in the usual place to the immediate left of the jurat. I was unimpressed by this objection for a number of reasons. In the first place, counsel did not suggest that there was any substantive issue as to failure to serve the application on any particular party. On the contrary, para. 3 of the affidavit in each case make clear that all of the relevant notice parties had in fact been served. In those

circumstances, I took the view that if there was a defect in the manner in which the affidavit was sworn, that defect could be readily rectified by directing that a fresh affidavit should be sworn by Ms. Reilly.

15. Secondly, on closer examination, it became clear that, in fact, the deponent, Ms. Reilly, had signed the affidavit. Her signature appears in the body of the jurat itself. Her signature appears immediately after the words "*sworn before me by the said*" and immediately before the words *"who is personally known to me".* On inspection of the exhibits to Ms. Reilly's affidavit (which are all signed by Ms. Reilly), it is obvious that this was where Ms. Reilly had signed the affidavit. Ms. Reilly's signature on the exhibits is identical to the signature which appears in the body of the jurat. It therefore appeared to me to be clear that, rather than signing the affidavit in the traditional place immediately to the left of the jurat**,** Ms. Reilly had signed the affidavit in the place in the jurat where her name would usually be recorded. In those circumstances, it seemed to me to be clear that, contrary to the submission made by counsel for Tanager, the affidavit had in fact been signed by Ms. Reilly (albeit in the incorrect place). I was conscious that the court has power under O.40 r.15 to receive any affidavit sworn for the purposes of being used in any cause or matter notwithstanding any defect in the jurat or any irregularity in the form of the affidavit. In those circumstances, I considered that the affidavit should be admitted in evidence given that it was clear that it was sworn by Ms. Reilly and that it was equally clear that her signature had been incorrectly placed in the jurat. While this should not have happened, it did not seem to me to be a defect of such gravity as to justify refusing to admit the affidavit into evidence. Moreover, had there been a more serious defect in the affidavit, I should have been prepared to allow the affidavit of service to be re-sworn. In my view, it would be perverse to dismiss an application under s. 115A on the grounds of a technical objection of the kind advanced here. As noted previously, there was no case made at the hearing that the requirements of s.115A (2) had not been met. The sole

objection in relation to service was that the affidavit of service was defective in the manner already described.

16. In these circumstances, I do not believe that the objection put forward by Tanager in relation to service has any real substance. For the reasons already explained, I am of opinion that the affidavit of service should be admitted under O.40 r. 15.

Class of creditors

17. As noted above, if the court is to make an order under s. 115A (9) of the 2012 Act confirming the coming into effect of a proposed arrangement, the court must be satisfied *(inter alia)* that at least one class of creditors has accepted the proposed arrangement by a majority of over 50% of the value of the debts owed to that class. There is no guidance given in the 2012-2015 Acts as to the meaning of a *"class"* in this context. However, Baker J. in *Sabrina Douglas* [2017] IEHC 785 followed the same approach that is traditionally taken in the context of the constitution of classes for the purposes of voting on a scheme of arrangement under the Companies Act, 2014. In particular, Baker J. followed the approach taken by Laffoy J. in *Millstream Recycling* [2010] 4 I.R. 253 which, in turn, applied the classic test laid down in *Sovereign Life Assurance Co. v. Dodd* [1892] 2 QB 573. In essence, the test is that a class is confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. For this purpose, there have been a number of decisions, to date, which have recognised that particular groupings of creditors should be recognised as separate classes. For example, in *Sabrina Douglas* Baker J. took the view that a creditor holding security over a principal private residence of a debtor is capable of being considered as a separate class of creditor for the purposes of s. 115A. The basis on which Baker J. took that view was that the principal private residence is at the centre of the court's considerations under s. 115A. In those circumstances, the rights of a secured creditor

holding security over the principal private residence are subject to the potential application of s. 115A whereas the rights of other secured creditors are not affected in this way.

18. As noted above, in the case of Mr. McNamara, the practitioner submits that there are three classes of creditor who fall within s. 115A (9) (g). These are the Revenue Commissioners as an excludable class, Belvedere College as the *"educational class"* and First Citizen Finance DAC as the holder of security over the lands comprised in Folio 10051 (namely the judgment mortgage). In the case of Ms. McNamara, the practitioner submits that both Belvedere College and the Revenue Commissioners constitute separate classes of creditors who voted in favour of the arrangement. She is unaffected by the judgment mortgage registered by First Citizen Finance DAC.

19. Insofar as the so called *"educational class"* is concerned, I cannot see any basis on which Belvedere College can be said to constitute a separate class of creditor. According to the practitioner's affidavit, the grounds for defining Belvedere College as a separate class is:

> *"Due to their position as a unique service provider of schooling to the Debtor's children, previously retained by the Debtor and continuing until the completion of secondary education for the Debtor's children. ... I find that there is no common interest between Belvedere College…as a Catholic school under the trusteeship of the Society of Jesus with its interests defined in the school's mission statement as an interest in education…".*

20. I do not accept the case made by the practitioner that Belvedere College represents a separate class of creditor. The plain fact is that, like any other unsecured creditor, Belvedere College is owed money by Mr. McNamara and Ms. McNamara on an unsecured basis. The fact that Belvedere College is a school with a particular ethos seems to me to be entirely irrelevant. Crucially, its rights against Mr. McNamara and Ms. McNamara are the very same as any other unsecured creditor. The fact that it is a school does not affect that

conclusion. In the circumstances, I must reject the submission of the practitioner that Belvedere College comprises a separate class of creditor.

21. Insofar as First Citizen Finance DAC is concerned, it seems to me, on the basis of the decision of Baker J. in *Sabrina Douglas,* that, although it is a secured creditor of Mr. McNamara (holding a judgment mortgage) it is nonetheless in a different class to Tanager in circumstances where, in contrast to Tanager, it holds security over the lands comprised in Folio 10051 and that security is unaffected by s. 115A. Its rights are therefore different to the rights of Tanager. Tanager does not have any security over the lands comprised in Folio 10051. Its security is confined to the family home which is situated on the lands comprised in Folio 53047F. Unlike Tanager, when it came to voting on the scheme of arrangement, First Citizen Finance DAC did not have to concern itself with what might possibly happen under s. 115A insofar as its interest in Folio 10051 is concerned. It could vote on the scheme in the knowledge that the lands comprised in Folio 10051 will be sold and it will be paid the full value of Mr. McNamara's interest in those lands. In contrast, when Tanager came to vote on the scheme, they knew that their security could be affected by the outcome of an application under s. 115A. On the basis of the approach taken by Baker J. in *Sabrina Douglas,* that puts Tanager in a different position. I do not believe that it makes any difference that First Citizen Finance DAC also has security over the family home by means of a judgment mortgage. While it has that factor in common with Tanager, the fact that it also holds security over lands which are unaffected by s. 115A is, in my view, the crucial distinguishing factor.

22. Thus, insofar as Mr. McNamara is concerned, it seems to me that the requirements of s.115A (9) (g) are satisfied in his case. For this purpose, the practitioner is, in my view, entitled to rely on the vote of First Citizen Finance DAC in favour of the scheme. Accordingly, it is unnecessary, in Mr. McNamara's case, for any reliance to be placed on the vote of the Revenue Commissioner.

23. For completeness, I should record that the basis on which the practitioner suggested First Citizen Finance DAC should be considered to be a separate class (as set out in his affidavit) is not entirely consistent with the basis on which I have concluded that it is entitled to be considered as a separate class. In my view, that is not material. The court is not in any way bound by the view expressed by the practitioner. On the contrary, the court must reach its own decision in relation to the constitution of classes for the purposes of s. 115A (9) (g).

24. I should also record, for completeness, that there is no requirement under s. 115A (9) (g) that the interests of the class of creditors in issue must be impaired by the proposed arrangement. There is no equivalent provision in the 2012-2015 Acts to s. 541 (4) (a) of the Companies Act, 2014 (under which, in the context of an examinership, at least one class of creditors whose interests or claims would be impaired by implementation of the proposals must have accepted the proposed arrangement). Thus, even if First Citizen Finance DAC were to be paid in full under the proposed arrangement, that would not prevent it from being considered as a separate class of creditor. This conclusion is reinforced by a consideration of the judgment of Costello J. (as he then was) in *Pye (Ireland) Ltd* (High Court, unreported, 11th March 1985) in which he held that a favoured class of creditors (who were to be paid in full under the arrangement considered by him in that case) should be considered to be a separate class. In any event, First Citizen Finance DAC is not to be paid in full. Even after the realisation of Mr. McNamara's interest in the lands comprised in Folio 10051, there will be a shortfall for First Citizen Finance DAC.

25. As noted above, First Citizen Finance DAC is not a creditor of Ms. McNamara. In her case, there are only two classes relied upon namely Belvedere College as the "*educational class*" and the Revenue Commissioners as the excludable class. For the reasons already outlined above, there is no basis on which Belvedere College can be said to constitute a separate class. Thus, if the requirements of s. 115A (9) (g) are to be met in

Ms. McNamara's case, I must be satisfied that the Revenue Commissioners can properly be regarded as a separate class of creditors, on the facts of this case. In this context, counsel for Tanager, in reliance on my decision in *Ahmed Ali* [2019] IEHC 138 submitted that the Revenue Commissioners had no entitlement to vote on the proposed arrangements and that, as a consequence, the requirements of s. 115A (9) (g) cannot be said to be satisfied in the case of Ms. McNamara. In *Ahmed Ali,* I accepted the argument advanced by counsel for the objecting creditor there that, as a consequence of the provisions of s. 101 (1) of the 2012 Act (applying s. 81 of the Bankruptcy Act, 1988), a creditor entitled to be treated as a preferential creditor (such as the Revenue Commissioners here) will lose that status if the creditor votes in favour or against an arrangement. Counsel for Tanager argued that, since all of the VAT liability of Ms. McNamara has been treated as a preferential debt payable in priority to the unsecured creditors, there was no entitlement on the part of the Revenue Commissioners to vote for or against the scheme. Thus, in Ms. McNamara's case, counsel submitted that it cannot be said that there was any class of creditor voting in favour of the proposed arrangement. As an alternative, counsel argued that, if the Revenue Commissioners are held to be entitled to vote, it must follow as a consequence that they have lost their preferential status. In turn, if they have lost their preferential status, it must follow (so counsel argued) that Tanager has been unfairly treated insofar as the unsecured element of its debt is concerned in that it will receive only a very small dividend in respect of that debt whereas the Revenue Commissioners will be paid in full.

26. In response, counsel for the practitioner suggested that the observations made by me in *Ahmed Ali* were not based on full argument but on the basis of a concession made by counsel for the practitioner in that case and he suggested, accordingly, that I am free, following more extensive argument in this case, to take a different view. In this context, it seems to me that the principles established in *Re Worldport Communications Inc*. [2005]

IEHC 189 apply even where I am asked to reconsider a previous decision of my own. As a matter of principle, if consistency is to be maintained, I do not believe that a judge is entitled to reverse one of his or her previous decisions unless one of the relevant *Worldport* exceptions applies. In this case, having regard to the fact that the point was conceded in *Ahmed Ali* and was not argued, it seems to me that the first of the exceptions identified by Clarke J. (as he then was) in *Worldport* applies – namely that the decision in *Ahmed Ali* was not based upon a review of significant relevant authority. In particular, it was not based on a full consideration of all of the statutory provisions which were opened and debated in the course of these applications. Notably, no reference was made in the course of the hearing in *Ahmed Ali* to the provisions of s. 92 (5) of the 2012 Act (discussed below) on which counsel for the practitioner expressly relied in the course of the hearing of these applications. In these circumstances, I believe that counsel for the practitioner is correct and I can therefore consider the issue afresh.

27. For the purposes of this issue, there are a number of statutory provisions which are relevant. In the first place, s. 2 (1) of the 2012 Act defines an "*excludable debt"* as meaning *(inter alia)* a *"liability of the debtor arising out of any tax, duty, levy or other charge of a similar nature owed or payable to the State".* While the definition does not deal with the preferential status of any such debts, many debts due to the Revenue Commissioners will have a preferential status in a bankruptcy. This follows from the provisions of s. 81 of the Bankruptcy Act, 1988 (*"the 1988 Act")* (considered in more detail below) construed together with the provisions of s. 960P of the Taxes Consolidation Act, 1997 ("*the 1997 Act*") as amended by the Finance (No. 2) Act, 2008, the Value Added Tax Consolidation Act, 2010, the Finance Act, 2011 and the LPT Act. Generally speaking, as a consequence of s. 960P (1) of the 1997 Act, Revenue Debts within a twelve-month period prior to the issue of a protective certificate will have a preferential status in a

bankruptcy. As explained further below, the preferential status of such debts is also capable of being preserved in proceedings under the 2012-2015 Acts.

28. Section 92 of the 2012 Act deals with excludable debts in more detail. Under s. 92 (1) an excludable debt may only be included in a proposal for a personal insolvency arrangement where the creditor concerned has consented (or is deemed to have consented) to the inclusion of that debt in the proposed arrangement. Of potential significance for present purposes are the provisions of s. 92 (5) which provide that where a creditor consents (or is deemed to have consented) to the inclusion of an excludable debt in a proposal for an arrangement, that creditor "*shall be entitled to vote at any creditors' meeting called to consider that proposal".* Thus, on the face of s. 92 (5) it might appear that the Revenue Commissioners, as the holder of an excludable debt of Ms. McNamara in relation to VAT had an entitlement to vote at a creditors' meeting called to consider the proposed arrangement in her case. However, s. 92 (5) cannot be read on its own. It must be read in the context of the 2012 Act as a whole. There is a separate and subsequent provision of the Act dealing with preferential debts. S. 101 (1) specifically provides that a preferential debt (subject to certain qualifications which are not here relevant) is to be paid in priority by the debtor and where those debts are to be paid in priority the provisions of s. 81 of the 1988 Act *"shall apply with all necessary modifications".*

29. It is therefore necessary to consider the provisions of s. 81 of the 1988 Act. Section 81 (1) sets out the debts that will be treated as preferential in the context of a bankruptcy. The list enumerated in s. 81 (1) is no longer complete. As noted previously, the debts given priority in a bankruptcy have been very considerably extended by the provisions of other legislation including s. 960P of the 1997 Act. Section 960P (2) specifically provides that, for the purposes of s. 81 (1) (a) of the 1988 Act, the amounts referred to in that subs. are deemed to include capital gains tax and LPT. Furthermore, by virtue of s. 960P (3), the

priority attaching to the taxes to which s. 81 of the 1988 Act now also applies to *(inter alia)* VAT. The precise language of s. 960P (3) (a) is as follows:-

> *"The priority attaching to the taxes to which section 81 of the Act of 1988 applies shall also apply to—*
>
> *(a) any value-added tax, including interest payable on value-added tax ..., for which a person is liable for taxable periods ... which have ended within the relevant period".*

30. For this purpose, the *"relevant period"* is defined in s. 960P (1) as a twelve-month period before the date in which the order for adjudication is made in the bankruptcy. Applying that provision in the context of a personal insolvency arrangement, the relevant period would be calculated by reference to the date of the Protective Certificate. There can be no doubt that a debt which is given a preferential status under s. 960P (3) (a) is entitled to preferential status in a personal insolvency arrangement. Section 101 (5) of the 2012 Act makes that very clear. Section 101 (5) provides as follows:-

> *"In this Chapter, "preferential debt" means a debt which, if the debtor concerned were a bankrupt would be a debt—*
>
> *(a) that by virtue of section 81 of the Bankruptcy Act 1988 is to be paid in priority to all other debts, or*
>
> *(b) that by virtue of any other statutory provision is to be included among such debts".*

31. It is therefore clear from s. 101 (5) that, under the 2012-2015 Acts, the debt will be *"preferential debt"* not only when it is given priority by virtue of s. 81 of the 1988 Act but also where it is given such priority in a bankruptcy by virtue of any other statutory provision. Section 960P (3) (a) of the 1997 Act is plainly an *"other statutory provision"* which gives priority to a debt in respect of VAT incurred during the relevant twelve month period.

32. In light of the considerations discussed above, it is clear that the debt due by Ms. McNamara to the Revenue Commissioners in respect of VAT is a preferential debt within the meaning of the 2012-2015 Acts. Accordingly, having regard to the provisions of s. 101 (2), the provisions of s. 81 of the 1988 Act apply to it. The most relevant provision of s. 81 for present purposes is subs. 8 which provides as follows:-

> *"Any creditor who, in the case of an arrangement, votes in respect of any debt to which priority is given by this section for or against the acceptance of the debtor's proposal or any modification thereof ... shall by so voting be deemed to have abandoned any rights under subsection (1) and shall be remitted to such rights (if any) in respect of any of the debts therein mentioned as such creditor would have had apart from that subsection."*

33. The effect of s. 81 (8) appears to be clear namely that, where a creditor votes in respect of any debt *"to which priority is given by the section"* for or against the acceptance of a proposed arrangement, the debtor will be deemed to have abandoned "*any rights under subsection (1)"* and will, as a consequence, be treated as an unsecured debt with no priority over any other unsecured debts. In short, voting for or against an arrangement will have the effect that the creditor concerned will lose the priority which it would otherwise have under s. 81 (1) of the 1988 Act. Insofar as the debt of Ms. McNamara to the Revenue Commissioners is concerned, that debt has been treated as a preferential debt in the proposed arrangement in her case. In those circumstances, an issue arises as to whether the vote of the Revenue Commissioners can then be counted for the purposes of s. 115A (9) (g). On the face of it, there appears to be an inconsistency between the way in which it is proposed to treat the claim of the Revenue Commissioners in respect of VAT under the proposed arrangement and the terms of s. 81 (8) of the 1988 Act. In *Ahmed Ali*, I took the view, on the basis of the argument made to me in that case by counsel for the objecting creditor (and on the basis of the concession made by counsel for the practitioner in that

case) that, if the Revenue Commissioners are to be paid in full in respect of a preferential debt under a proposed arrangement, it would be wrong to take the debt in question into account in terms of the votes of creditors. However, there was no sustained consideration of the relevant statutory provisions in the course of the hearing of submissions in *Ahmed Ali*. Nor was any reference made in the course of the hearing in that case to s. 92 (5) of the 2012 Act under which, as noted above, the holder of excludable debt is expressly given an entitlement to vote at any creditors' meeting where the excludable creditor concerned has either consented or is deemed to have consented to the inclusion of the excludable debt in a proposed arrangement. It is therefore necessary to consider the potential impact both of s. 92 (5) and of the more sustained consideration that was given to all of the relevant statutory provisions which took place in the course of the hearing in this case in May 2019.

34. Insofar as s. 92 (5) is concerned, it was submitted by counsel for the practitioner that the subs. conferred an express statutory right on the Revenue Commissioners to vote in respect of the proposed arrangement and that accordingly the provisions of s. 92 (5) displace any provisions to the contrary in the 1988 Act. Having carefully considered the case made at the hearing, I have come to the conclusion that s. 92 (5) does not have this effect. While it is true that s. 92 (5) confers an express statutory right on the holder of excludable debt in the circumstances just described, there is not, in my view, any clash or inconsistency between its provisions and those contained in s. 101 of the 2012 Act and s. 81 of the 1988 Act. Insofar as debts in respect of taxes are concerned, it is clear from a consideration of s. 960 P of the 1997 Act that not every element of unpaid tax will constitute a preferential debt in a bankruptcy. In particular, insofar as VAT is concerned, the only debts that will be given a preferential status are those which were incurred in the relevant twelve month period prior to the issue of the Protective Certificate. It is therefore not unusual to find that, in the case of the Revenue Commissioners, part of a debtor's indebtedness will be entitled to a preferential status (insofar as it was incurred within the

relevant twelve month period) but much of the debt may relate to earlier periods which would not be entitled to the same status. Thus s. 92 (5) is clearly capable of operating in those circumstances in respect of the non preferential element of a claim by the Revenue Commissioners. In such a case, the Revenue Commissioners would be entitled to vote at a meeting of creditors in respect of the unsecured element of the claim but, if they wish to preserve their preferential status, would have to withhold their vote in respect of the preferential element. That is not to say that they would not have an entitlement to vote in respect of the preferential element. Having regard to the provisions of s.92 (5), they would undoubtedly have the entitlement to do so. However, should they take that course, they would lose the preferential status of the preferential element of the debt if s. 81 (5) applies to revenue debts. Accordingly, it seems to me that there is nothing inconsistent between s. 92 (5) on the one hand and s. 81 (8) of the 1988 Act on the other. In any case to which s. 81 (8) applies, it would be up to the creditor concerned to decide whether or not to exercise the express statutory right conferred by s. 92 (5). Obviously, any such creditor would need to bear in mind the consequences of so doing, having regard to s. 81 (8). The key consideration is that the creditor's right to vote under s. 92 (5) is not inconsistent with the provisions of s. 81 (8). The latter does not prohibit the creditor from voting. All it does is to set out the consequences that will flow if the right to vote is exercised in respect of a preferential debt.

35. As noted in paras. 30-32 above, there can be no doubt but that, prior to the vote on the proposed arrangement, the debt in respect of VAT was entitled to preferential status. That follows from the provisions of s. 101 (5) (b) of the 2012 Act. However, the Revenue Commissioners here exercised the right to vote. Having regard to the provisions of s. 101 (1), that seems to me to have the consequence that all of the provisions of s. 81 of the 1988 Act apply.

36. In circumstances where s. 101 (1) applies the provisions of s. 81 of the 1988 Act, it follows that s. 81 (8) must necessarily apply to the VAT debt of Ms. McNamara to the Revenue Commissioners.

37. Thus, the fact that the Revenue Commissioners have voted to accept the proposed arrangement has the result that the liability of Ms. McNamara in respect of VAT no longer has priority as a preferential debt. That is the very clear consequence of the application of s. 81 (8) of the 1988 Act. Counsel for Tanager argued that, as in the case of *Ahmed Ali*, the vote of the Revenue Commissioners should not therefore be counted. If the vote of the Revenue Commissioners is not counted, there could not be said to be any class of creditor who had approved the proposed arrangement in Ms. McNamara's case. I appreciate that in *Ahmed Ali*, I expressed the view that it would not be appropriate to count the vote of the Revenue Commissioners in that case insofar as it related to the preferential element of its debt. However, on further reflection, following the argument in this case, I do not believe that this is the approach that should strictly speaking be taken where a preferential creditor has chosen to vote in respect of a proposed arrangement. It seems to me that s. 81 (8) of the 1988 Act spells out the consequences for the creditor in voting. The subsection does not provide that the vote is to be ignored. Instead, s. 81 (8) very clearly provides that the consequences of voting is that the preferential creditor loses priority and the debt due to it ranks solely as an unsecured debt with no preferential status. This begs the question whether the Revenue Commissioners can still be treated as a separate class.

38. In my view, the practitioner is correct in suggesting that the Revenue Commissioner should nonetheless be treated as a separate class. The rights of the Revenue Commissioners are different to those of the other unsecured creditors of the debtors. In the first place, the Revenue Commissioners have the right to remain outside the proposed arrangements. The debts due to the Revenue Commissioners are plainly *"excludable debts"*. Secondly, the rights of the Revenue Commissioners under the proposed

arrangements (if they can be justified) are different to those of the remaining unsecured creditors of Mr. McNamara and Ms. McNamara. They will be paid in full (albeit without any interest or penalties) whereas the other unsecured creditors will receive no more than a small dividend. It seems to me that these differences in rights attaching to the Revenue Commissioners (both under the Acts and under the proposed arrangements) make it impossible for the Revenue Commissioners to consult with the other unsecured creditors with a view to their common interest. While the Revenue Commissioners have some incentive to vote in favour of the proposed arrangements (having regard to the extent of the payment to be made to them) this is not shared (at least to the same extent) by the other unsecured creditors who will, as previously noted, receive no more than a very small dividend. Accordingly, they do not have the same level of incentive as the Revenue Commissioners to vote in favour of the proposed arrangements. If it is justifiable that the Revenue Commissioners should receive the payment at the level proposed, their vote is likely to be swamped by the votes of the other unsecured creditors if they are all to be treated as being in the same class. In this context, it is important to bear in mind what was said by Bowen L.J. in *Sovereign Life Assurance Co. v. Dodd* [1892] 2 QB 573 at p. 583:-

> *"The word 'class' is vague, …. It seems plain to me that we must give such meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."*

39. As explained by Lord Millett (sitting as a judge of the Final Court of Appeal of Hong Kong) in *Re. UDL Holding Ltd* [2002] 1 HKC172 at p. 184, the test is based on similarity or dissimilarity of legal rights. Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. This extends to cases where the differences in right arise under the

terms of the proposed arrangements themselves. This was made clear by what Lord Millett said at p 185:-

> *"The question is whether the rights which are to be released or varied under the scheme or the new rights which the scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class".*

40. In the present case, the rights given to the Revenue Commissioners under the proposed arrangements are, in my view, so different to the rights given to the other unsecured creditors of Ms. McNamara that the proposed arrangement should be treated as being with more than one class. In other words, the Revenue Commissioners (who are to receive a much more significant return *pro rata* than other unsecured creditors) must be treated as a separate class to the remaining unsecured creditors. In view of the fact that they are to be paid the whole of the VAT debt (albeit without interest or penalties), there is a distinct and different arrangement with them to that proposed with the remaining unsecured creditors who are to receive only 5 cent in the euro. The same principle applies with regard to Mr McNamara in so far as the arrangement provides that the whole of the LPT due is to be paid to the Revenue.

41. That finding, of itself, does not dispose of the issue. As noted above, counsel for Tanager argued that, if the Revenue vote is to be counted, a further issue arises in that there is a significant difference of treatment as between Tanager on the one hand (which will receive only a dividend in respect of the unsecured element of the debt due to it) and the Revenue Commissioners on the other (who will be paid in full in respect of the VAT claim). Counsel submitted that, in those circumstances, the provisions of s. 115A (9) (e) and (f) are engaged insofar as this would lead to a marked inequality of treatment as between Tanager and the Revenue Commissioners who would both rank equally as unsecured creditors (in light of the loss of the priority which flows from the fact that the

Revenue Commissioners voted to accept the proposed arrangements). In this context, it is well settled that inequality of treatment is a facet of unfairness in the context of arrangements adversely affecting the positon of creditors. As the decision of the Supreme Court in *McInerney Homes Ltd* [2011] IESC 31 makes clear, the classic test of unfairness is that a creditor will receive less under a proposed arrangement than the creditor would receive in the event of a bankruptcy. However, unfairness is not confined to such circumstances. In *McInerney Homes Ltd,* O'Donnell J., at para. 29 stressed the "*essential flexibility"* of the test of unfairness. Subsequently in *SIAC Construction Ltd* [2014] IESC 25, Fennelly J. identified inequality of treatment as a further example of unfairness. At para. 69 of his judgment in that case he said:-

> "*There are two aspects to the notion of unfairly (sic) prejudice. The underlying assumption is that the person in question is, to begin with, prejudiced, that is to say that his interests as a creditor …are adversely affected or impaired by the proposal. It is the inevitable consequence of the Insolvency …that every creditor will, in that sense, suffer prejudice no matter what proposals are put forward. But prejudice is not enough to trigger the court's obligation to refuse to confirm the proposal. It must in addition be unfair. Unfairness, in turn, comprises two essential aspects, the general notion of injustice* ***and the more specific one of unequal treatment."*** (emphasis added).

42. However, inequality of treatment will not always be regarded as unfair. There may be circumstances which, in an individual case, may justify or explain the difference in treatment. This is evident, for example, in the examinership context in the decision of Costello J. (as he then was) in *Re. Holidair* (High Court unreported, 6th May, 1994) where he said at p. 3:-

> *"I do not think I can come to the view that the proposals are not fair and are in some way inequitable to the Revenue and that the Revenue are unfairly prejudiced*

in some way by them. As I have already said, this is a complex commercial situation. The Revenue have got some benefits from the scheme of arrangement which they would not otherwise have got in that they are getting paid as preferential creditors some of their debts. Under the proposals a substantial dividend will be paid. In all the circumstances of the case, including the substantial debt which the banks had to forego and the costs which they are going to have to bear, I do not think it can be said that the scheme of arrangement is unfair to the Revenue because they are disproportionately disadvantaged in comparison with the secured creditors. I agree that the Revenue would have to wait for payment but this is not unreasonable in the difficult situation presented to those preparing this scheme of arrangement. Again, I agree that they will not obtain any interest on their debt but I do not think that they are unfairly prejudiced. …"

43. In that case, Costello J. was significantly influenced by the fact that the proposed arrangement there offered the prospect that 750 jobs would be saved. The same consideration does not arise in the context of an application under s. 115A of the 2012 Act. Nonetheless, it might be suggested here that a factor to be borne in mind is the underlying policy of s. 115A which is designed to secure (subject to satisfaction of the requirements of the section) the retention of the family home (or to use the language of s. 115A itself the "*principal private residence*") of a debtor. As Baker J. observed in *Jacqueline Hayes* [2017] IEHC 657 at para. 75, the fairness of a proposal must be assessed in the context of the stated statutory objective underlying s. 115A (and also s. 104) that a proposed arrangement should, insofar as practical, seek to preserve the occupancy or ownership by a debtor of his or her principal private residence. That judgment, however, was not concerned with an alleged inequality of treatment as between classes of creditor. I am not

sure that the goal of retaining the family home can be said to be sufficient, in itself, to justify inequality of treatment as between different classes of creditor.

44. The judgment of Costello J. in *Holidair* is, nonetheless, very helpful in demonstrating that differences of treatment can, depending on the circumstances, be capable of justification in an individual case. I believe it is clear from the extract from the judgment of Costello J. (quoted above) that differences of treatment do not inevitably mean that there is unfairness. In that case, it was clear that both the Revenue as a preferential creditor and the secured creditors suffered disadvantages under the proposed scheme. They were disadvantaged in different ways but the extent of disadvantage suffered by the Revenue Commissioners, when considered in the round, could not be considered to be disproportionate when viewed against the disadvantage suffered by the secured creditors.

45. Allegations of inequality of treatment were also raised in *Antigen Holdings Ltd* [2001] 4 I.R. 600. In the examinership in that case, the banking creditors of the company argued that the proposed arrangement was unfair because they were required to forego interest notwithstanding their contractual right to be paid interest. Furthermore, they were to be repaid over a significant period of time whereas the ordinary trade creditors of the company were to be paid more quickly. McCracken J. said that the basic question to be decided was whether this difference of treatment was unfair. At p. 604 he referred to the observations of Costello J. in *Holidair* (*quoted above)* and stressed that:-

> *"… when considering whether creditors have been unduly prejudiced, the position must be considered in the light of the particular circumstances of each case. What may be unfair in one case may be fair in another."*

46. At p. 603 McCracken J. dealt with the specific complaint by the banks of unfair treatment when compared with the treatment given to ordinary trade creditors. While he accepted that there was a difference in treatment, he held that this difference in treatment was not unfair. At p. 603, he said:-

"I … have to consider whether the banks have been unfairly prejudiced. It is beyond doubt that if the company has to go into liquidation then the banks will receive considerably less than they would receive under the scheme and this is a consideration to be taken into account. But it is not the only one.

It has to be said no creditors are getting paid interest. The banks' debt of course is by far the largest proportion of the creditors and they undoubtedly are not being treated in the same way as the ordinary creditors. They are being paid off over a longer period and there is some validity in their point that interest to a bank is the equivalent to the profit made by an ordinary trade creditor on selling his goods and the trade creditors are in fact getting paid that profit. However the question is; is this unfair.

The purpose of the scheme is to ensure the viability of the company. This can only be done if there is a reasonable time span in which to discharge the debt and that there is an amount being paid which is within the capacity of the company to pay. ***Now the vast bulk of remaining creditors are trade creditors who are presumably going to continue trading with the company. I don't think it is unfair they should get some priority because they are going to keep the company going."*** (Emphasis added)

47. On that straightforward basis, McCracken J. came to the conclusion that the difference in treatment between the banks on the one hand and the trade creditors on the other was justified and was not unfair. The question which, accordingly, arises in the present case is whether there is some objective justification or sufficient explanation for the difference in treatment as between the unsecured element of the Tanager debt on the one hand and the debt of Ms. McNamara to the Revenue Commissioners in respect of VAT on the other.

48. Counsel for Tanager drew attention to the absence of any evidence on this issue. It is not addressed in Mr. McNamara's affidavit. Nor is it addressed in any of the affidavits sworn by the practitioner. Furthermore, there is no affidavit from Ms. McNamara herself. However, it is, in my view, understandable that neither Ms. McNamara nor the practitioner have addressed the treatment of the Revenue Commissioners on affidavit. The objection that was made by Tanager at the hearing before me in respect of the position of the Revenue Commissioners was not articulated in the same terms in the notice of objection or in the affidavit of Ms. O'Brien sworn in support of the objection. There was no complaint of inequality as between the Revenue Commissioners and Tanager anywhere in the notice of objection or in the affidavit of Ms. O'Brien. I therefore believe that, in terms of procedure, it is unfair of Tanager to seek to rely on the absence of evidence on this issue. Neither Mr. McNamara nor Ms. McNamara were on notice that this issue was likely to be raised. Moreover, the judgment in *Ahmed Ali* was delivered on 4th March, 2019 after Mr. McNamara had sworn his affidavit in February 2019. There was ample time available to Tanager thereafter to prepare an affidavit in response to Mr. McNamara and to raise the *Ahmed Ali* issue. Regrettably, as noted earlier, Tanager did not take up the opportunity to file such an affidavit. Had such an affidavit been filed raising the issue, Ms. McNamara would have had an opportunity to address it appropriately on affidavit.

49. In the course of the hearing before me, Counsel for the practitioner suggested that, in Ms. McNamara's case, it would be crucial that she should have a tax clearance certificate if she is to act for the State or any public body in the course of her practice as a barrister. Counsel for Tanager objected that this was not on affidavit. That is true. However, as noted above, the issue was not raised in these terms by Tanager in its notice of objection or in its affidavit evidence and it is therefore understandable that the matter was not addressed on affidavit by Ms. McNamara. Moreover, it seems to me to be obvious that someone in Ms. McNamara's positon would be unable to undertake work for the State

or public bodies without such a clearance certificate. It is equally clear that, under the law, Ms. McNamara would not be entitled to such a certificate without paying any VAT owed by her to the Revenue Commissioners. Section 1095 (4) of the 1997 Act makes this clear. It provides that a tax clearance certificate shall not be issued to a person unless that person is in compliance with the obligations imposed by (*inter alia*) the Value-Added Tax Acts. Thus, unless the VAT was paid in full, Ms. McNamara would not be entitled to a tax clearance certificate. Without such a tax clearance certificate, her ability to work for a substantial range of clients would be significantly curtailed. In turn, this is likely to have an adverse impact on her ability to meet her obligations under the proposed arrangement (in the event that it is confirmed) and to pay her ongoing obligation in respect of the mortgage repayments to be made to Tanager into the future. When seen in that light, the treatment of the Revenue Commissioners under the proposed arrangement is explicable. It is not being done with a view to preferring a creditor for some arbitrary or biased reason. It is being done for commercial reasons very similar to those which underpinned the arrangement proposed in *Antigen Holdings.* It will be recalled that, in *Antigen Holdings*, the trade creditors were given priority under the scheme over the banks because it was the trade creditors who were going to keep the company going in the future. In Ms. McNamara's case, the Revenue Commissioners are in an analogous position to the trade creditors in *Antigen Holdings.*

50. It is also noteworthy that, as Lynch-Fannon and Murphy explain in "*Corporate Insolvency and Rescue*", 2nd ed., at paras. 13.70 -13.71, in an examinership context, it is not unusual for an examiner to ensure that in a scheme of arrangement, debts to the Revenue are paid to the same extent as they would be in a liquidation or receivership notwithstanding that Revenue debts have no preferential status in an examinership.

51. It is also of advantage to the creditors of Ms. McNamara generally that the Revenue Commissioners should participate in the proposed arrangements rather than relying on

their right to treat the VAT debt as an excludable debt. Had the Revenue Commissioners remained outside the arrangement, the indebtedness of Ms. McNamara to them would still arise. Ms. McNamara would remain liable for the full amount of the VAT debt. In addition, it is likely that she would be liable for penalties and interest in relation to the unpaid VAT. Section 1095 (4) of the 1997 Act makes clear that a tax clearance certificate will not be issued unless any outstanding taxes, interest and penalties are paid. If an arrangement were proposed without the involvement of the Revenue Commissioners, the debt of Ms. McNamara to the Revenue Commissioners would still have to be factored into any consideration as to the sustainability of the arrangement. This is for the very simple reason that, in addition to the obligations to be incurred under any proposed arrangement, Ms. McNamara would be liable in respect of any excludable debts (such as the VAT liability) where the creditor concerned (in this case the Revenue Commissioners) had opted not to consent to the inclusion of the debt in the arrangement process.

52. There is also a benefit (albeit small) arising from the fact that the Revenue Commissioners are foregoing any interest or penalties under the arrangement. If the Revenue Commissioners had not participated in the arrangement and had sought payment of any interest and penalties, there would be fractionally less money available for the creditors than there currently is. I appreciate that this is a small consideration in the overall equation but it is nonetheless a further factor to bear in mind.

53. The fact that the Revenue Commissioners would be entitled to payment of the entire of the VAT debt if they had not participated in the arrangement and had remained outside the process under the 2012-2015 Acts underlines a certain lack of reality to the submission that Tanager has been unfairly treated (in comparison to the Revenue Commissioners). The fact is that, if the Revenue Commissioners had remained outside the process, they would be entitled to payment of VAT (together with any interest and

penalties that might be due) and Tanager would have no right to object to that payment irrespective of the level of dividend paid to it under the arrangement.

54. There are also strong policy reasons why it is important to encourage the Revenue Commissioners to consent to the inclusion of excludable debts in the processes under the 2012-2015 Acts. If the Revenue Commissioners agree to participate, it adds significant certainty to the process. It enables the practitioner, the creditors generally and the court to proceed on the basis that the liabilities owed by a debtor to the Revenue Commissioners have been agreed. If the Revenue Commissioners remain outside the process, there may well be significant doubt in some cases as to the extent of an individual debtor's liabilities to the Revenue and as to the potential impact which the Revenue's rights to collect that debt might subsequently have on the sustainability of a proposed arrangement. It is important to bear in mind that the Revenue Commissioners have wide ranging powers to enforce obligations owed to them including a right under s. 960L of the 1997 Act to issue a certificate addressed to a county registrar or revenue sheriff to seize goods and chattels of the tax payer without the need for any court order. The use of these powers in respect of excludable debts has the potential to undermine the ability of a debtor to make payments under a proposed arrangement. If, however, the Revenue Commissioners have participated in an arrangement, the practitioner, the creditors and the court can all be assured not only as to the *quantum* of debts owed to the Revenue Commissioners but as to how those debts are to be paid by the debtors and as to the timing of those payments. This significantly enhances the level of certainty with which a court (or a practitioner and creditors) can proceed.

55. In light of the considerations discussed above, it seems to me that there is an objective justification for the proposal that the entire of the VAT debt due to the Revenue Commissioners should be paid in full. Unlike any other unsecured creditor of Ms. McNamara, the Revenue Commissioners have the right to remain outside the process

under the 2012-2015 Acts. There would be no good reason, in those circumstances, for the Revenue Commissioners to agree to a write-down of the VAT debt. At the same time, there is a significant advantage to the creditors as a whole that the Revenue Commissioners should participate in this process so as to avoid the difficulties that could arise if the Revenue Commissioners remained outside the process. In very basic terms, there is a *quid pro quo* for the treatment of the Revenue Commissioners under the proposed arrangement. As discussed above, the fact that the Revenue Commissioners have opted to include the VAT debt in the process is of benefit to all. It is therefore understandable that they would require to be paid in full and it is equally understandable that the practitioner should agree to prepare a proposal on that basis.

56. Counsel for the practitioner was also correct, in my view, insofar as he suggests that there is a parallel with *Antigen Holdings*. If Ms. McNamara is to be in a position to continue to be free to supply services to public bodies, she will need a tax clearance certificate. As outlined above, she will not be entitled to such a certificate unless all of the outstanding VAT is payed. This seems to me to be an additional reason why the proposed treatment of the Revenue Commissioners here is justifiable.

57. In light of the considerations outlined above, it seems to me that it does not matter that the Revenue Commissioners may have lost priority under s. 81 (8) of the 1988 Act by taking the step of voting for the proposed arrangement. Even in circumstances where priority has been lost, it seems to me that there are compelling reasons why the Revenue Commissioners should be treated in the manner proposed.

58. It might be suggested that no great value can be attributed to a vote in favour of a proposed arrangement where the creditor is to be favoured in that way. However, as outlined in more detail in para. 24 above, there is no requirement in s. 115A that the interests of the class of creditors who have voted in favour of the proposed arrangement must suffer an impairment. This is in contrast to the position which operates under the

2014 Act in respect of examinerships. In any event, if impairment was a requirement, the Revenue Commissioners are likely to have lost interest and the opportunity to impose penalties as a consequence of their decision to participate in the arrangement rather than relying on their rights as an excludable creditor.

59. Of course, the court must be vigilant to ensure that, in arrangements of this kind, votes in favour of an arrangement are not procured by unfairly favouring a particular creditor or class of creditor. That would give rise to the mischief discussed by me in my judgment in *Noel Tinkler* [2018] IEHC 682 where I said at para. 40:-

> "*I cannot see any proper basis on which a practitioner could formulate proposals favourable to a particular creditor with a view to securing the approval of that creditor to the proposal. If proposals for a PIA were to be formulated on that basis, it would inevitably distort and fundamentally undermine the ability of a PIA to operate fairly and equitably in relation to each class of creditors and to ensure that the PIA is not unfairly prejudicial to the interests of any interested party*".

60. At a later point in the same judgment I said at para. 45:-

> *"…if practitioners were to formulate proposals aimed at securing the support of particular creditors or particular classes of creditors, this is a recipe for unfairness and will inevitably give rise to objections which will add enormously to the length and expense of the process and put the confirmation of the proposals in jeopardy.* "

61. For the reasons already discussed above, no issue of that kind arises here. There is an objective justification for the particular treatment given to the Revenue Commissioners and, in those circumstances, I am satisfied that there is no unfairness to Tanager arising from this difference in treatment. The argument raised by Tanager in relation to inequality of treatment is not, however, the only basis on which Tanager contends that it will be unfairly prejudiced. It will be necessary, at a later point in this judgment, to examine the

additional bases (as set out in the notice of objection and affidavit of Ms. O'Brien) on which Tanager contends it will be unfairly prejudiced by the proposed arrangement.

The requirements of s. 115A (17)

62. Before concluding on the class of creditor issue, it is necessary to have regard to the provisions of s. 115A (17). In the course of the hearing before me, counsel for Tanager also drew attention to the proportionate size of the debt due to the Revenue Commissioners by Ms. McNamara. The debt represents no more than 0.33% of her overall indebtedness. Under s. 115A (17) (b), the court is required, in deciding whether to consider a creditor to constitute a class of creditors for the purposes of s. 115A, to have regard to the circumstances of the case including the overall number and composition of the creditors who voted at the creditors' meeting and the proportion of the debts due to the creditor concerned. Counsel submitted that it would be disproportionate to regard the Revenue Commissioners (to whom such a relatively small debt is owed) as a separate class in these circumstances.

63. It is true that, relative to Ms. McNamara's overall indebtedness, the debt due to the Revenue Commissioners in respect of VAT is very modest. However, it is important to bear in mind that Ms. McNamara has a total number of five creditors. Three of those, namely Tanager, the Bank of Ireland and Bank of Ireland Mortgage Bank are banking creditors. The remaining two creditors are Belvedere College S.J. and the Revenue Commissioners. In these circumstances, it seems to me that the voice of the Revenue Commissioners is important, notwithstanding the size of the debt due to it which represents no more than 0.3% of the overall indebtedness of Ms. McNamara. In this context, it seems to me that the observations I made in *Ahmed Ali* at paras. 35-37 are relevant. In that case, I said:-

> *"35. ... it is to be noted that, although s. 115A (17) (b)(ii) requires the court to have regard to the proportionate size of the debt due to the Revenue Commissioners, the*

subsection does not rule out the possibility that the court may still conclude that a creditor in their position should be treated as a separate class notwithstanding that the amount due may be only a very small fraction of the overall indebtedness. In my view, the court remains free to do so, if, notwithstanding the proportionate size of the [debt] concerned, the court is nonetheless of the view that there is a proper basis to treat that creditor as a separate class.

36. In my view, there is a proper basis, here, to treat the Revenue Commissioners as a separate class. In the first place, I bear in mind that there are only two creditors in this case namely the bank and the Revenue Commissioners. In such circumstances, it seems to me that the voice of the Revenue Commissioners is important. I am also conscious that the Revenue Commissioners have long experience of assessing schemes of arrangement (both at a corporate and an individual level). There can be no doubt that one of the purposes of requiring that at least one class of creditor should have approved of a proposed PIA is to give a measure of assurance to a court that the terms of the arrangement are commercially acceptable. The Revenue Commissioners have unparalleled experience of making such assessments.

37. It might be suggested that, in this case, the Revenue Commissioners were hardly likely to vote against an arrangement under which they are ultimately to be paid in full. However, this ignores the fact that the Revenue Commissioners will not be paid interest or penalties and furthermore that the payment to be made to them will be made over a period of time by monthly instalments. It could not plausibly be suggested in those circumstances that the Revenue Commissioners are unaffected by the terms of the proposed PIA. In all of these circumstances, it seems to me that, notwithstanding the relatively small sum due to the Revenue Commissioners, it is

appropriate to treat the Revenue Commissioners as a separate class for the purposes of section 115A."

64. While Ms. McNamara has slightly more creditors in this case than Mr. Ali and while the arrangements envisage that the Revenue Commissioners will be paid in year one in this case, those observations are nonetheless apposite here. There is only a small pool of creditors. The debt due to the Revenue Commissioners (although modest in size) is significant insofar as the work and career of Ms. McNamara is concerned. Furthermore, the voice of the Revenue Commissioners has, traditionally, been of considerable assistance to the courts in reviewing arrangements (whether of an individual or corporate nature). In addition, the fact that the Revenue Commissioners have voted in favour of the scheme provides a measure of reassurance to the Court that the Revenue Commissioners do not regard Ms. McNamara as a problematic tax payer. To that extent, it is a vote of confidence in Ms. McNamara and her ability to honour her obligations under the proposed arrangement. In these very particular circumstances, while I have, of course, had regard to the proportionate size of the VAT debt, I do not believe that it would be appropriate to discount the Revenue Commissioners as a separate class of creditors. There are sufficient considerations which arise in this case to persuade me that the Revenue Commissioners should be treated as a separate class of creditors. Accordingly, I am of the view that the requirements of s. 115A (9) (g) are satisfied in Ms. McNamara's case. As previously explained, I have already reached a similar conclusion in relation to Mr. McNamara. In my view, no serious issue arises under s. 115A (17) with regard to the debt due by him to First Citizen Finance DAC. While the debt in question (€58,705) is relatively small when compared with the debt owed to Tanager, it is, by any standard a significant debt, and it also has to be borne in mind that it is a secured debt which gives it a particular status.

<u>The sustainability of the proposed arrangements</u>

65. Under s. 115A (9) (b) (i), the court must be satisfied, if it is to approve an arrangement under s. 115A, that there is a reasonable prospect that the arrangement will enable Mr McNamara and Ms. McNamara to resolve their indebtedness without recourse to bankruptcy. As noted in para. 9 (i) above, Ms. O'Brien, in the affidavit sworn by her on behalf of Tanager, maintains that the repayment history of Mr. McNamara and Ms. McNamara is such that there is little prospect of the projected payments of €2,023 per month being met. Ms. O'Brien suggests that it is inevitable that there will be a default which will trigger a bankruptcy. She also contends that the proposed extension of the term of the mortgage from 96 months to 228 months will place the McNamara's in a vulnerable position by requiring them to maintain substantial mortgage repayments past the age of 70. In the course of the hearing before me, counsel for Tanager stressed that, under the proposed arrangements, Mr. McNamara will be 78 before the projected end of the term of the mortgage while Ms. McNamara will be 75. He submitted that these ages were a significant "*step beyond the new 70-year retirement age"* albeit that they are both self-employed.

66. In my view, Appendix 2 of each of the proposed arrangements (containing the summarised estimated monthly income and expenditure before, during and subsequent to the proposed arrangements) shows that, during the course of the arrangements, there will be a small surplus available each month following discharge of the obligations of Mr. and Ms. McNamara including the proposed repayments of the mortgage over their family home. In year one, there will be a monthly surplus of €140.71. In years two to three, there will be a monthly surplus of €130.71. This will drop to almost nothing in years four to six (where the surplus will be no more than €0.53). However, after the six-year arrangement comes to an end, the monthly surplus available will be €960.53. These figures have been calculated on the basis that the McNamara household comprises two adults with two dependent children aged eighteen and sixteen respectively. Appendix 2 shows that, on the

basis of the ISI reasonable living expenses for a household of that kind (together with an additional allowance for a second car, college expenses for the two children and additional clothing expenses due to the nature of the professions held by Mr. McNamara and Ms. McNamara respectively), there will be sufficient funds available (out of the overall household income) to discharge the sum of €2,023.41 per month in respect of the mortgage repayments together with the distribution to be made to the Revenue and the dividend to the unsecured creditors. While Appendix 2 shows a very tiny monthly buffer in respect of years 4-6, that is likely to have improved as a consequence of the passage of time since the arrangement was prepared. In this context, more than two years have passed since the arrangement was prepared. In that time, the ages of the children will have increased accordingly and the household living expenses (calculated in accordance with the ISI reasonable expenses guidelines) will have reduced.

67. Insofar as the future is concerned, the monthly buffer of €960.53 predicted in respect of the period after the arrangement seems to me to provide a significant measure of reassurance that, insofar as future mortgage repayments are concerned (i.e. those repayments that will arise after the arrangements come to an end), there will be a sufficient household income available to ensure that these repayments can be met. The buffer is of a sufficient size to deal with the fact that there are likely to be additional expenses incurred in the future of the kind outlined by me in *Lisa Parkin* [2019] IEHC 56 at paras. 42, 59 and 104. That buffer is also important in circumstances where, as explained below, the rate of interest will increase after the expiry of the proposed arrangements in the event that there is an increase in the underlying ECB rate.

68. Counsel for Tanager is, of course, correct to draw attention to the fact that, under the arrangements Mr. McNamara will be 78 by the time the mortgage term comes to an end while Ms. McNamara will be 75. I am mindful that age 70 is generally regarded as the upper limit on extensions of mortgage terms. However, I am also mindful that, over the

past number of years, the retirement age has moved upwards. I also bear in mind that both Mr. McNamara and Ms. McNamara are self-employed. There is in fact no retirement age for either barristers or musical directors. As I complete this judgment in August 2019, I am conscious that, for example, Ricardo Muti (who is now 78) is slated to conduct the Vienna Philharmonic Orchestra in a number of concerts in Vienna, having recently completed a series of concerts with the Chicago Symphony Orchestra. Just last month, Burt Bacharach performed a series of concerts in Ireland at age 93. I also note that, in July of this year, Zubin Mehta retired at age 83 as musical director of the Israel Philharmonic Orchestra. Insofar as barristers are concerned, it is not unusual for barristers to continue in practice long after normal retirement age. It is also the case that some barristers only commenced practice at the Bar after they have retired from positons in the civil service and elsewhere. Given the very particular circumstances which apply in the context of their professions, I believe that there is a proper basis in this case to take the view that it is not inappropriate that the mortgage term should continue until age 78 in the case of Mr. McNamara and until age 75 in the case of Ms. McNamara.

69. Insofar as past performance is concerned, it is true that in the years immediately preceding the issue of the protective certificates, the payment history of Mr. McNamara and Ms. McNamara was poor. While payments were made by Mr. McNamara and Ms. McNamara, these payments fell below what was payable under the terms of the mortgage. However, it is clear from the evidence before the court that significant payments have been made on a monthly basis since July 2017. Mr. McNamara in para. 36 of his affidavit sworn in February 2019 has made the uncontroverted averment that he has been making payments in the sum of €2,000 per month to Tanager on foot of the mortgage. In the course of the hearing, the court was provided with a statement of the payments made on a monthly basis since July 2017 in respect of each of the three accounts (namely the 05,06 and 09 accounts). This statement shows that in July 2017 a total of €1,000 was paid. In

August 2017 a payment of €1,500 was paid. Thereafter, in each of the months between September 2017 up to and including December 2018 (both dates inclusive) the total sum of €2,000 was paid per month by Mr. and Ms. McNamara with the exception of March 2018 when the payment fell short by €100. The account provides a basis to be confident that Mr. McNamara and Ms. McNamara will be in a position to sustain payments into the future. In circumstances where Mr. McNamara and Ms. McNamara are currently making payments of €2,000 per month, there is no reason to suppose that they will not be in a position to make payments of €2,023.41 during the course of the arrangement or thereafter. In these circumstances, I believe that there is a sufficient basis to form the view that the arrangements are sustainable and that, accordingly, the requirements of s. 115A (9) (b) (i) have been satisfied**.**

Conduct in the two-year period prior to the issue of the protective certificates

70. As noted in para. 9 above, it has been argued on behalf of Tanager that the conduct of Mr. McNamara and Ms. McNamara during the two-year period prior to the issue of the protective certificates weighs against the grant of relief under s. 115A (9). In this context, the court is required under s. 115A (10) to have regard to the conduct of the debtors in the two-year period prior to the issue of the protective certificates insofar as the payment of their debts are concerned. This is an issue which I addressed in my judgment in *Richard Featherston* [2018] IEHC 683. In paras. 19-22 of my judgment in that case, I sought to summarise the effect of s. 115A (10) insofar as debtor conduct is concerned as follows:-

> *"19. In my view, it is very important to bear in mind that while the court must have regard to the matters set out in s. 115 A (10), the court is not required to dismiss an application under s. 115 A where the payment record of a debtor is poor. On the contrary, the court is entitled to make an order confirming the coming into effect of the proposed PIA in such circumstances. That seems to me to be clear from the structure and language of s. 115 A. As I have indicated, there is*

a marked distinction between the approach taken by the legislature in s. 115 A (8) and (9) and the approach taken in s. 115 A (10).

20. That is not to say that a court should lightly excuse a debtor who has failed to make any serious attempt to repay a debt in the two – year period prior to the issue of the protective certificate. The legislature has very clearly indicated that the debtor's payment record is a factor which must be considered.

21. In cases where a debtor has demonstrated a contempt for his or her payment obligations, this factor would, in my view, weigh very heavily against the grant of relief under s. 115 A. On the other hand, the debtor's circumstances may well be such that it is evident that the debtor was simply unable during that period to make any significant payments in discharge of his debts.

22. In each case, everything will depend upon the evidence placed before the court. In this context, I fully agree with the submission made by counsel for the bank that it is incumbent upon the debtor to explain why debts were left unpaid. A poor payment record requires to be adequately and comprehensively addressed by a debtor. If it has not been appropriately addressed in the evidence of the debtor, the court may be left with no alternative but to dismiss the application under s. 115 A. However, it would be wrong to suggest that this must happen in every case. The evidence before the court must be assessed in the round. All relevant circumstances must be taken into account. Even in cases where the explanation provided by the debtor may appear, at first sight, to be unsatisfactory, there may be sufficient material before the court to suggest that the court's discretion should be exercised in favour of the debtor."

At a later point of the same judgment I also indicated that the underlying purpose of the Act must also be borne in mind. At para. 25 of my judgment in that case I said:-

> *"25. As the long title to the 2012 Act makes clear, the 2012 Act was enacted in the interests of the common good with the objective (inter alia) to ameliorate the difficulties experienced by debtors and to enable insolvent debtors to resolve their indebtedness in an orderly and rational manner without recourse to bankruptcy. While there are obvious limits to the extent to which this underlying purpose can be taken into account, there may well be circumstances where a debtor has a poor payment record during the relevant two-year period but who, on the evidence before the court, has demonstrated a genuine intention to deal with his or her debts under a PIA which appropriately addresses the payment of the debtor's liabilities, having regard to his or her means, and which has a real prospect of securing a better outcome for the debtor's creditors than the likely outcome on a bankruptcy of the debtor. It would be wrong, in my view, for a court to take an unduly "box-ticking" approach and to dismiss every application under s. 115 A where the debtor has a poor payment record during the relevant two -year period. In my view, that is not what s. 115 A (10) has in mind."*

At para. 26 of my judgment I emphasised that this does not mean that there is not an obligation on the debtor to explain a poor payment record. On the contrary, there is a positive obligation to do so. I also emphasised that the practitioner bears the onus of proof in applications under s. 115A and it is therefore essential that a poor payment record should be appropriately explained on affidavit by the debtor.

71. In this case, Ms. O'Brien, in her affidavit, has highlighted that, in the two-year period prior to the issue of the protective certificate, the payments made to Tanager were at a level far below that required by the loan agreement. She also drew attention in this context to what she described as the material inaccuracies in the S.F.S. submitted to Tanager. However, it seems to me that any issues in relation to the discrepancies that exist as between the information contained in the S.F.S. on the one hand and the P.F.S. on the other is not a matter which falls for consideration under s. 115A (10). That subsection is

concerned with the debtor's payment history. While the discrepancies in question undoubtedly require further consideration by the court, they do not arise in the immediate context of s. 115A (10). Therefore, it seems to me that it is more appropriate to address Tanager's concerns in relation to the discrepancies at a separate point in this judgment.

72. Insofar as the payment record is concerned, it is undoubtedly the case that Mr. McNamara and Ms. McNamara did not meet their obligations to Tanager in full during the two-year period prior to the issue of the protective certificate. That is a factor to which regard must accordingly be had. However, this is not a case where Mr. McNamara and Ms. McNamara showed contempt for their liabilities to Tanager. It is clear from the statements of account that, for much of the period in question, payments were made to Tanager albeit at a level which was significantly below the contractual obligations of Mr. McNamara and Ms. McNamara respectively.

73. This is not a case where the failure to meet their obligations has not been addressed on affidavit by the debtors. Mr. McNamara in his affidavit, has explained the financial difficulties which have arisen for himself and his wife. While the affidavit does not address the issue in detail, it nonetheless provides an explanation for the inability of Mr. McNamara and Ms. McNamara to honour their liabilities. Again, it is noteworthy that, notwithstanding the opportunity given to Tanager for this purpose, no replying affidavit was ever filed on behalf of Tanager.

74. I am satisfied that a sufficient explanation has been provided on behalf of Mr. McNamara and Ms. McNamara in relation to their failure to meet their contractual obligations in respect of the repayment of their debts. For completeness, I should add that, even if the explanation had not been satisfactory, this is not a case where I believe it would be appropriate on this ground to reject the proposed arrangement. In this context, I am influenced by the fact that, notwithstanding their previous repayment history, real efforts have been made since August 2017 to make substantial monthly payments to Tanager. As

noted above, Mr. McNamara has stated on affidavit that €2,000 per month is currently being paid to Tanager. This statement of Mr. McNamara is reinforced by a consideration of the statement of account (showing the total monthly payments made by Mr. McNamara and Ms. McNamara in the period between July 2017 and December 2018. I also bear in mind what is said by the practitioner in paras. 48 and 49 of his affidavit where he stated as follows:-

> "*48….I understand that the payments that were made were to the maximum of the Debtor's ability in the circumstances and means that could be achieved at that point in time. I say however moving forward, the onus is on me both presently in the presentation of the within PIA and throughout the duration of the PIA to ensure that the Debtor's maximum means are brought to bear for the benefit of creditors.*
>
> *49….There has been a change of circumstances in that the Debtor has presented to my offices and sought professional, independent and appropriate financial and insolvency advice in relation to their financial position. I say and believe that this advice brings about a situation that the Debtor has a plan and structure which enables the Debtor to both live sustainably, maintain a reasonable standard of living, and make payments to me as their Personal Insolvency Practitioner for the benefit of their unsecured creditors leading to a discharge and finalisation of same and also specified payment to their secured creditor in discharge of the mortgage balance.*"

75. While that averment is in quite general terms, the underlying point is, in my view, well made. In this case, as the payment history since August 2017 demonstrates, the commencement of proceedings under the 2012-2015 Acts has had a salutary effect. Monthly payments of €2,000 are now being made. Rather than burying their heads in the sand, Mr. McNamara and Ms. McNamara are facing up to their liabilities and their practitioner has put forward a sophisticated and detailed arrangement which, if the

requirements of s. 115A are satisfied, will see the debtors return to solvency. Obviously, that is not always a governing criterion. Thus, for example, if debtors show a contempt for their creditors, that is a factor that would weigh heavily with the court in any consideration of an application under s. 115A. In this case, however, I can see no basis to suggest that Mr. McNamara and Ms. McNamara have shown contempt for their creditors. At worst, they have delayed in facing up to the consequences of their insolvency. However, in these proceedings, they have now faced up to the consequences of their insolvency and have acted appropriately. Accordingly, I have come to the conclusion that the past payment performance of Mr. McNamara and Ms. McNamara should not operate to prevent an order being made under s. 115A (9).

The bankruptcy comparison

76. This was not an issue on which any significant time was spent in the course of the hearing. However, it is an issue that was raised in the notice of objection and, in more detail, in Ms. O'Brien's affidavit. In those circumstances, I will address it for completeness. In her affidavit, Ms. O'Brien makes a number of points as follows:-

(a) She contends that the comparison with bankruptcy is: *"a matter more appropriately dealt with and decided upon by [Tanager] as opposed to either the Debtor or indeed the PIP."*. I have to say that I do not understand this contention. The bankruptcy comparison is ultimately a matter for the court but it is also essential that the practitioner should put a bankruptcy comparison before the creditors and before the court so as to allow creditors and the court to form a view as to the relative benefits of a proposed arrangement as against a bankruptcy (and *vice versa*);

(b) Ms. O'Brien objected to a 15% devaluation being applied to the realisable value of the family home in respect of the estimated costs of realisation in a bankruptcy. She quite properly drew attention to the fact that under the

guidelines published by the ISI, the appropriate adjustment is 10% of market value rather than 15%;

(c) She also maintained that, in any event, even a 10% adjustment would, at €55,000, represent an overestimate of the costs of a forced sale of the property;

(d) She made the point that the judgment mortgages (addressed in para. 9 (e) above) distorted and tainted the comparison of estimated outcomes. In light of the evidence given by Mr. McNamara on affidavit, this point no longer arises;

(e) Ms. O'Brien placed particular emphasis on the contention that no discount rate reflecting the time value of money had been applied in the calculations prepared by the practitioner and that, if a reasonable discount rate of 5% was properly applied to the comparison of outcomes, then the calculations would show a better outcome in bankruptcy than under the proposed arrangement. She took the figure of 5% from the rate of return prepared by the Society of Actuaries in Ireland in accordance with 2006 Regulations relating to occupational pension schemes.

77. In his replying affidavit, the practitioner disputed that 10% is the correct discount rate to be applied to the value of the principal private residence. Nonetheless, for the avoidance of any doubt, he prepared a revised bankruptcy comparison using a discount rate of 10% which still shows a significantly better outcome than bankruptcy for the creditors of Mr. McNamara and Ms. McNamara. In my view, it is this comparison which is the relevant one for present purposes. In circumstances where the ISI has issued a protocol providing for a 10% discount rate, I agree with the observation made by Ms. O'Brien on behalf of Tanager that the 15% rate previously used by the practitioner is not correct.

78. The revised bankruptcy comparison (prepared on the basis of a discount rate of 10% to reflect the costs of a forced sale) shows that, in a bankruptcy, Tanager would receive a dividend of 22 cent in the euro whereas under the arrangement, the return will be of the order of 27 cent in the euro. Insofar as the unsecured creditors are concerned, they would receive a dividend of 3.3 cent in the euro in a bankruptcy. Under the proposed arrangement they will receive 5 cent in the euro.

79. I appreciate that Ms. O'Brien suggests that the 10% discount rate is an overestimate of the costs of a forced sale. However, she does not support this assertion by any hard evidence. Notwithstanding the experience which Tanager must have in the context of forced sales, no empirical evidence is provided by her to demonstrate that the 10% discount rate is an overestimate. I have to bear in mind, in this context, that the 10% rate has been confirmed by the ISI in its protocol. The ISI is an expert body in this context and, if the discount rate proposed by it is to be challenged in any case, I believe it would be necessary for the objecting creditor to place sufficient evidence before the court to demonstrate that the rate results in an overestimate of the costs of a forced sale. On the other hand, I am conscious that, in this case, an Order for possession of the family home had already been obtained by Tanager against Mr. McNamara and Ms. McNamara prior to the commencement of the proceedings under the 2012-2015 Acts. In those circumstances, I agree that it is unlikely that the costs of a force sale would be as much as €55,000. This is an issue which was addressed by Baker J. in *Jacqueline Hayes* [2017] IEHC 657 at para. 66 where she said:-

> *"66. A dispute arose ... regarding a discount of 10% proposed by the PIP ... and the PIP said that a discount of 10% is recognised by the ISI and by the Official Assignee in Bankruptcy as accurately representing the likely costs in bankruptcy. I accept the argument of the objecting creditor that it is not correct to assess the likely return on bankruptcy on the basis that it is likely that in the present case the*

secured creditor will incur legal costs in pursuing possession of the premises having regard to the fact that proceedings are already in train and have been stayed pending this process. I consider the correct approach is for the court to calculate the likely return on bankruptcy on the basis that the costs are to be assessed without exceptional factors such as the costs of repossession proceedings."

80. However, even if one were to entirely remove any costs of realisation or a forced sale from the equation, there would still, by my calculations, be a better return for Tanager under the proposed arrangement than there would be in a bankruptcy. If one wholly removes the €55,000 costs from the equation, the dividend to Tanager, as a secured creditor in a bankruptcy, would increase from 22 cent in the euro to 24 cent in the euro. This is still less than the return under the proposed arrangements which is forecast to be 27 cent in the euro. Insofar as the dividend to unsecured creditors is concerned, the swelling of the fund available to them by a further sum of €55,000 would, by my calculations, lead to a dividend to them of the order of 5 cent in the euro which equates to the dividend forecast by the practitioner to arise under the proposed arrangement. That suggests that the bankruptcy comparison is neutral insofar as the unsecured creditors are concerned (which also, of course, includes Tanager itself). This would suggest that there is no advantage to the unsecured creditors under the proposed arrangements when compared with a bankruptcy. That said, it is important to bear in mind that this calculation proceeds on the basis that no costs whatsoever arise in respect of a forced sale. This seems to me to be unrealistic. While I accept, in the circumstances, that it is unlikely that costs of the order of €55,000 will arise, it would be implausible to think that no costs whatever will arise. Moreover, as Baker J. explained in *Jacqueline Hayes* [2017] IEHC 657 at para. 71, a mathematical difference between the outcome in a bankruptcy and the outcome under an arrangement does not of itself make an arrangement unfair. Baker J. said:-

"71. I do not consider a mathematical difference taken alone may create an unfair prejudice. Unfairness is tested in the light of all the circumstances, and the primary loss to the creditor arises from the loss of market value in the principal private residence and the fact that the debtors have a significant negative equity as a result. I am not persuaded that the question of fairness is to be tested wholly on a mathematical basis, and even if it were, the differential would not justify the rejection of the proposed PIAs having regard to the stated objective of s. 115A and s. 104 that a PIA should endeavour to contain a term that protects the principal private residence insofar as this is reasonable and not unfair."

81. At para. 74 of her judgment Baker J. (having carefully considered the relevant provisions of s. 115A (9) (b) of the 2012 Act and the judgment of Clarke J. (as he then was) in *Re. McInerney Homes Ltd* [2011] IEHC 4) explained, at para. 74 that:-

"74. …What is unfair will depend on the circumstances, including the likely return on bankruptcy, but a test of fairness invokes a comparison or comparative analysis and the principles of proportionality. A proposal in a PIA which disproportionally prejudices a creditor is likely to be unfair, and disproportion could be found if the likely result in bankruptcy, would be not just marginally better than under a proposed PIA, but materially so. It could arise for example if a principal private residence was of a size, value or condition that could not justify its retention."

82. In the present case, even if no costs are included in respect of a forced sale in bankruptcy, the outcome for Tanager is better under the proposed arrangement than it is in a bankruptcy. As noted above, the dividend in respect of the secured element of its debt is higher under the proposed arrangement than it will be in the event of a bankruptcy. While there is no significant difference between the dividend available to Tanager in respect of the unsecured element of its debt, this does not affect the overall conclusion that it will do

better under the proposed arrangements than in a bankruptcy. The extract from the judgment of Baker J. in *Jacqueline Hayes* demonstrates that if the outcome in a bankruptcy was somewhat better than under the proposed arrangements, that would not, of itself, necessarily result in a finding of unfair prejudice.

83. With regard to the Society of Actuaries 5% discount rate, the practitioner, in para. 59 of his replying affidavit, says that this suggestion on the part of Tanager is incorrect for many reasons. In the first place, the underlying cost of funds to Tanager is a relevant consideration and this has not been provided or disclosed by Tanager. Furthermore, the practitioner suggests that there is no scope for a discount for the time value of money in circumstances where the arrangement envisages that, in the future, Mr. McNamara and Ms. McNamara will be paying and maintaining a mortgage payment based on a variable rate equating to the ECB rate plus 1%. He also makes the point that a personal insolvency arrangement is a debt resolution mechanism whereas net present value calculators are used in circumstances where there is a need to value a future investment. He also highlights that the Society of Actuaries report in question was drawn up in 2006 in the context of pension schemes at the height of the housing boom and that it is not appropriate or accurate in light of the subsequent recession. The practitioner also draws attention to the statement in the Society of Actuaries report which stresses that the assumptions in the report are purely for the purpose of providing advice to trustees of occupational pension schemes in relation to the preparation of statements of reasonable projections.

84. I agree with the observations made by the practitioner in his replying affidavit. The bankruptcy comparison which has been prepared in this case follows the template recommended by the ISI. While I do not believe it was appropriate to break down the rate of return as between Mr. McNamara and Ms. McNamara in the bankruptcy comparison, it is clear that, on an overall basis, it does follow the ISI template. In my experience, this is also the approach which is generally taken, in the context of examinerships, when

comparisons are made between the outcome of a scheme of arrangement proposed by an examiner and the outcome for creditors in the event of a liquidation.

85. If some new approach is to be taken in the manner in which the outcome of a bankruptcy is to be compared with the outcome of a personal insolvency arrangement, this would require very extensive debate and appropriate evidence. None of that occurred in the present case. In the circumstances, I do not believe that there is any proper basis for the court to form the view that the revised bankruptcy comparison put forward by the practitioner in this case (as exhibited to his replying affidavit) is not reliable subject to the removal (as discussed above) of the cost of a forced sale at €55,000.

The remaining grounds of objection

86. It is convenient to deal with the remaining grounds of objection together. These are:-

(a) That the proposed arrangements unfairly prejudice the interests of Tanager and are inequitable;

(b) That the requirements of s. 91 (1) (e) of the 2012 Act have not been satisfied in this case. This ground of objection is principally based on the discrepancies which Ms. O'Brien says exist as between the SFS on the one hand and the PFS on the other which she suggests calls into question whether the PFS completed by Mr McNamara can be said to be a complete and accurate statement of assets, liabilities, income and expenditure.

(c) That there is no reasonable prospect that confirmation of the arrangements will enable Tanager to recover the debts due to it to the extent that the means of Mr. McNamara and Ms. McNamara reasonably permit.

87. There is a common thread underpinning each of these grounds of objection. In each case, Tanager draws attention to the discrepancies between what was stated in the SFS provided to Tanager prior to the commencement of these proceedings and what is

subsequently stated in the PFS made by Mr. McNamara and by Ms. McNamara respectively at the outset of the proceedings under the 2012-2015 Acts. Insofar as unfair prejudice is concerned, Tanager also relies on the additional matters summarised in para. 9 (g) above. As noted in that sub. para, Ms. O'Brien, in her affidavit explains that the proposed arrangement is not a product offered by Tanager in the ordinary course of its business. This was an issue which counsel for the practitioner turned on its head in the course of the hearing before me. He drew attention to the fact that, as para. 18 of Ms. O'Brien's affidavit makes clear, Tanager is only interested in short term solutions which fail (so he submitted) to recognise that the arrangement which Tanager acquired from BOSI was in the nature of a long term arrangement.

88. In her affidavit, Ms. O'Brien also contended that the sheer extent of the proposed write-off of €1,717,479 is so significant that it clearly represents an unfair prejudice to Tanager. She also complained that the arrangement converts what is currently a variable rate into a fixed rate of 1% not only for the term of the proposed arrangements but for the remainder of the lifetime of the mortgage. In addition, she complained that the arrangement failed to take account of the likelihood (so she suggested) that the value of the family home was likely to appreciate in the future.

89. I deal in more detail, below, with what I have described as the common thread underlying each of the grounds of objection summarised in para. 86 above. Insofar as the complaints raised by Ms. O'Brien (as summarised in para. 88 above) are concerned, I have come to the conclusion that none of these grounds of complaint give rise to unfair prejudice. I have reached that conclusion for the following reasons:-

(a) Insofar as the extent of the write-down is concerned, I appreciate that this is a very significant write-down in absolute terms. However, subject to what I say in para. 93 below, the write down reflects two factors namely (a) the current value of the family home (which has been valued by an expert in

accordance with s. 105 of the 2012 Act) and (b) the means of Mr. McNamara and Ms. McNamara. As discussed above (in the context of sustainability) the household income is clearly not in a position to sustain payments at a higher rate than that proposed. While, after the six-year term of the arrangement comes to an end, there will be a monthly "*buffer*" available of €960.53, that buffer only exists if the family continued to live at the level set by the ISI in its reasonable living expenses guidelines and if, after the arrangements come to an end, the ECB interest rate remains at its current level. In a number of judgments of Baker J. and of my own, attention has been drawn to the fact that the guidelines in question are based on relatively short term periods (relating to the duration of a bankruptcy or the duration of an arrangement). They are not intended to represent a comprehensive guide to all of the expenses that will be incurred over the course of a person's lifetime. In those circumstances, the monthly *"buffer"* of €960.53 above the guidelines is, in my view, acceptable. I believe that it reflects the fact that, during their lifetime, Mr. McNamara and Ms. McNamara will inevitably have to incur expenses in relation to house repair, health and other contingencies which everyone has to face in the course of their lifetime. It is also important that there should be a buffer in the event that the ECB interest rate should increase materially above the current level. As explained in more detail in sub. para. (b) below, it has been confirmed by the practitioner that the interest rate of 1% *simpliciter* is to be applied for the duration of the arrangements only. After the arrangements come to an end, the interest rate will equate to the ECB rate plus 1%.

(b) Insofar as the interest rate is concerned, it clear from Appendix 2 to the proposed arrangements in both cases, that, for the duration of the

arrangements, the fixed monthly payments of €2,023.41 are as much as can be afforded by Mr. McNamara and Ms. McNamara during that period. There is therefore no scope to provide for a higher rate of interest during the currency of the proposed arrangements than the proposed 1% rate. Insofar as the period after the arrangements is concerned, one might get the impression from reading Appendix 7 to the arrangement in both cases that the practitioner intends that the interest rate would remain at 1% even after the arrangements come to an end. However, it is made clear in para. 13 of the practitioner's replying affidavit (to which Tanager never filed a response notwithstanding that it was sworn as long ago as June 2018) that, following the completion of the arrangements, the interest rate will be a tracker rate of ECB plus 1%. Furthermore, the practitioner, in para. 24 of his replying affidavit suggests that this is the rate that currently applies to the mortgage. This is not entirely correct. It is clear from Ms. O'Brien's affidavit that the relevant rate for the 05 and 06 accounts is the ECB rate plus 1%. However, in respect of the 09 account, the rate equates to the ECB rate plus 1.25%. Nonetheless, it seems to me that this slight divergence in rate as between the rate provided for in the proposed arrangements and the rate applicable to the 09 account is not sufficient to demonstrate that Tanager will, as a consequence, suffer an unfair prejudice. This is particularly so in light of the fact that, as explained in sub. para. (c) below, Tanager has provided no sufficient evidence of the cost of funds to it. For the avoidance of any doubt as to the rate of interest to be applied after the expiry of the arrangements, in the event that the court ultimately makes an order under s 115A (9) confirming the coming into effect of the arrangements, the order will

expressly record that the rate of interest, post arrangement, will equate to the ECB rate plus 1%.

(c) In my view, it is very significant that Ms. O'Brien has provided no evidence dealing with the cost of funds to Tanager. In support of her contention that a rate of 1% is insufficient, Ms. O'Brien says nothing about the cost of funds to Tanager. Instead, her evidence highlights that Tanager does not offer fixed rate loans but that "*other unrelated financial institutions have performed the relevant calculations to model the potential variants of interest rates over a term of years. I note that the longest readily available fixed interest rate on the Irish market is over 10 years, which is offered by Bank of Ireland. That rate is 4.2%...which reflects the market risks of fixing for a term that is circa half of the proposed fixed term under the Arrangement.*" However, it is clear from the judgment of Baker J. in *Jacqueline Hayes* [2017] IEHC 657 that what is required in cases of this kind is evidence as to the cost of funds to a party in Tanager's position. In particular, at para. 51 of her judgment in *Jacqueline Hayes*, Baker J. drew attention to very similar evidence given by the objecting creditor in that case (which, like Tanager, was not an original lender but a purchaser of a basket of loans and related security). At para. 53 of her judgment Baker J. (having previously reviewed the relevant provisions of the 2012-2015 Acts dealing with the fixing of interest) dismissed the evidence given by the objecting creditor in the following terms:-

> *"I am not satisfied that the test for which the objecting creditor contends is based on a correct assumption. The objecting creditor is not a bank but an investment fund, and while the affidavit evidence of Mr. Johnston refers to the risk that 'a lender' might suffer loss were interest rates to be set at a low level over a long period and not be fixed in relation to, or in*

> *some other way track, ECB base rates, the affidavit of Mr. Johnson does not say or suggest as a matter of fact that the objecting creditor will require to return to the market to meet its capital needs in the future or fund the investment. The terms on which the asset was purchased or how it was financed are not identified."*

At paras. 54-55 of her judgment, Baker J. highlighted that a restructuring of mortgage debt is not to be equated to circumstances where a mortgage debt is refinanced. In circumstances where the objecting creditor is not itself a lender involved in the provision of loans to borrowers, the interest rate proposed under any arrangement is to be tested in the context that the objecting creditor is an investor not a lender. The evidence that had been given on behalf of the objecting creditor on the issue was therefore not directly relevant to the position of the objecting creditor itself. At para. 57 of her judgment Baker J. made a finding which, in my view, is equally applicable here. She said:-

> *"57. … I am not satisfied that the objecting creditor has shown me sufficient evidence that the proposed fixing of interest would, over the balance of the extended term of 27 years, be unfairly prejudicial to it merely on account of the interest rate, and the evidence adduced on the part of the objecting creditor … is predicated on a treatment of the objecting creditor as a lending bank, and not as an investment fund. I have insufficient evidence on which I could conclude that the proposal to fix the interest rates for the proposed extended term is unfairly prejudicial to the objecting creditor having regard to its status."*

I know that Ms. O'Brien's affidavit was sworn before the judgment of Baker J. in *Jacqueline Hayes* had been delivered. However, as previously noted, Tanager had every opportunity to supplement its evidence in this case but chose not to do so.

(d) With regard to the complaint that the arrangement takes no account of the potential for the value of the family home to appreciate in the future, this seems to me to overlook two important considerations. In the first place, it is

impossible to predict what will happen to house prices in the future. They may rise or they may fall. There is no evidence before the court that they have risen since the valuation was first determined by the expert under s. 105. Nor is there any evidence placed before the court that values are likely to rise in the future. Moreover, as Baker J. observed in *Paula Callaghan* [2017] IEHC 332 at para. 68 (albeit in the context of a debtor's means:-

> *"[68] A court must be satisfied taking all matters into account that the proposed PIA enables the creditors to recover the debts due to them to the extent of the means of the debtor. The 'means' engaged are present income and capital assets* ***and not the projected means at a time so far into the future that the test is based on hypotheses or conjecture.*** *There may on the other hand be circumstances where future certain or ascertainable means are to be brought into account."* (emphasis added).

While those observations were made in the context of a debtor's means, it seems to me that they are equally applicable in terms of the future value of the family home. The suggestion put forward by Ms. O'Brien in her affidavit that the value of the family home is likely to appreciate in the future is not based on any empirical evidence or any valuation evidence from a valuer. It is simply conjecture on Ms. O'Brien's part.

Secondly, Ms. O'Brien, in making this case, fails to take account of the very real consideration that the household income is limited. On the figure set out in Appendix 2, there is no scope to provide for additional payments to reflect the possibility that house prices might rise in the future.

(e) For these reasons, I am of the view that the complaints made by Ms. O'Brien (as summarised above) do not withstand scrutiny. I also bear in mind in this

context that Tanager will recover more under the proposed arrangement than it will in a bankruptcy.

90. With regard to the Tanager's objections based on the discrepancies between the SFS and the PFS, there are, undoubtedly, inconsistencies between both documents. In particular, in the SFS, it is stated that the value of Mr. McNamara's half share in his parents' house is of the order of €500,000 and that Mr. McNamara is in receipt of monthly rent from that property of the order of €800 per month. In contrast, the PFS says nothing about any rental income. Furthermore, the PFS suggests that the value of the inheritance is significantly less than €500,000. The value given for the inheritance in the PFS is €182,500. This is also the figure which is subsequently utilised in the proposed arrangements. Given that the SFS was completed in January 2016 and the PFS was completed in October 2016, it is difficult to understand why there should be such an obvious discrepancy between both documents. This is highlighted by Ms. O'Brien in para. 26 of her affidavit and reiterated by her in para. 34 of her affidavit. In my view, Ms. O'Brien was entirely justified in raising this issue.

91. Furthermore, in the course of the hearing, counsel for Tanager contended that there is no reference in the SFS to the Revenue debt or to the judgment mortgages. Counsel submitted that the SFS was a *"grossly misleading"* document. He also contended that it *"beggars belief"* that the value of the inheritance would drop, in such a short space of time, from €500,000 to €182,500. While the latter point is certainly made in Ms. O'Brien's affidavit, I cannot see anything in her affidavit which makes a complaint in relation to the SFS in respect of the revenue debt or the judgment mortgages.

92. In fairness to Mr. McNamara and Ms. McNamara, I believe that I should confine myself to the issues raised by Ms. O'Brien in her affidavit insofar as the discrepancies between the SFS and the PFS are concerned. As noted previously, Mr. McNamara swore an affidavit in response to Ms. O'Brien's affidavit. Thereafter, Tanager did not choose to reply to Mr. McNamara notwithstanding the opportunity given to Tanager to do so.

93. Nonetheless, given the discrepancy between the SFS and PFS insofar as the value of the inheritance and insofar as the rental income is concerned, Mr. McNamara is, in my view, under an obligation to explain himself. On the face of it, the discrepancy raises an issue as to whether the full means of Mr. McNamara and Ms. McNamara are being brought to bear for the benefit of their creditors under the proposed arrangement. Section 115A (9) (b) (ii) requires that the court, on an application of this kind, must be satisfied that there is a reasonable prospect that confirmation of the proposed arrangements will enable the creditors of Mr. McNamara and Ms. McNamara to recover the debts due to them to the extent that the means of Mr. and Ms. McNamara reasonably permits. In turn, if their means have not been brought to bear, this would raise a question as to whether Tanager (which suffers such an extensive write-down of debt under the proposed arrangements) will suffer an unfair prejudice.

94. Furthermore, it is absolutely crucial in proceedings under the 2012 - 2015 Acts that debtors proposing to seek relief under the Acts should comprehensively and accurately disclose all their assets and liabilities in their PFS. The proper functioning of the system depends on full disclosure being made. Creditors, practitioners and the court must each be in a position to assess the true financial position of any debtor so as to make informed decisions and to determine whether the relevant statutory requirements are satisfied in any individual case. That is why s. 118 of the 2012 Act imposes an obligation on debtors to act in good faith in their dealings with practitioners and to make full disclosure to practitioners of their assets, income and liabilities and of all other circumstances that are reasonably likely to have a bearing on their ability to make payments to their creditors. For similar reasons, s. 91(1) (e) makes clear that a debtor will not be eligible to propose a personal insolvency arrangement unless the debtor has first completed a PFS and has made a statutory declaration confirming that the PFS is a *"complete and accurate statement of the debtor's assets, liabilities, income and expenditure".* The reason why a statutory declaration is required is in order to impress upon the debtor the solemn importance of fully disclosing all relevant information in the PFS. The apparent discrepancies between the SFS and the PFS raise a doubt as to the accuracy of the PFS here and it is therefore important that the position should be clarified.

95. In light of the considerations outlined in paras. 93-94 above and in light of the matters raised by Ms. O'Brien in her affidavit, I am of opinion that there is an obligation on Mr. McNamara to explain the discrepancies between the SFS and the PFS on affidavit. It is true that in para. 18 of his replying affidavit Mr. McNamara says that the PFS is *"true and accurate"* but he also maintains that: *"no actual discrepancy or incorrectness has been identified by the*

Objector". The latter statement is not correct. There is an obvious discrepancy between the SFS and the PFS insofar as the value of the inheritance and insofar as the rent from the inherited property is concerned. That discrepancy has yet to be explained by Mr. McNamara.

96. I am conscious that there may well be a very good explanation for the difference between the SFS on the one hand and the PFS on the other (insofar as the inherited property is concerned). While Ms. O'Brien has very properly raised an issue in relation to the discrepancy, the fact that there is a discrepancy does not *ipso facto* mean that the PFS is inaccurate. It may well be the case that there is a good explanation for the difference in value. In these circumstances, an issue arises as to whether it would be appropriate to dismiss the applications given Mr. McNamara's failure to properly address the discrepancies. In the course of the hearing, counsel for the petitioner argued that there was no need to address the issue at all in circumstances where, if it transpired that the value of the inheritance turns out to be greater than €182,500, the "*windfall assets"* provisions of the proposed arrangements would be triggered. In this context, clause 9 of Part IV of the proposed arrangements provide that the McNamaras will be required to introduce an amount of not less than 75% of the net proceeds of any inheritance received by them during the term of the proposed arrangements. However, it seems to me to be inappropriate to leave the matter to be dealt with in that way. As noted above, the issue of the discrepancy between the information contained in the SFS and in the PFS was very properly raised by Ms. O'Brien in her affidavit and, in my view, Mr. McNamara was under an obligation to explain the difference. Furthermore, given the very significant write down of debt proposed in this case, it is difficult to see why 100% of the inheritance should not be deployed in part repayment of Mr. McNamara's debts.

97. In light of the failure of Mr. McNamara to explain the apparent discrepancies highlighted by Ms. O'Brien in her affidavit, the question which now arises is whether that failure to explain the position should lead to the dismissal of the present applications or whether, instead, Mr. McNamara should be given a further opportunity to fully and accurately explain the discrepancy. With some considerable misgivings, I have come to the conclusion that I should give Mr. McNamara a further opportunity to address the issue on affidavit. In this context, I bear in mind the consequences for Mr. McNamara and Ms. McNamara in the event that the present applications are refused. They will lose possession of the family home. They will also lose the opportunity to reach an appropriate arrangement with their creditors notwithstanding that, in all other respects, the proposed arrangements appear to meet the requirements of s. 115A. I also

bear in mind the legislative purpose underlying s. 115A which was explained, as follows, by Baker J. in *Jacqueline Hayes* [2017] IEHC 657 at para. 75:-

> *"75. Whether a proposal is unfair must also have regard to the stated statutory objective which is contained in s. 115A but also in the earlier s. 104, that a proposed PIA should insofar as this is practical, seek to preserve the occupancy or ownership by a debtor of his or her principal private residence. The purpose of the amending legislation, in particular s. 115A, and the purpose of s. 104 which was found in the original Act of 2012, was to protect the interest of a debtor in the principal private residence, and no such protection is found in respect of other property."*

This does mean that unlimited indulgence will be given to debtors by a court. Nor does it mean that debtors should readily be given an opportunity to mend their hand even after a full hearing has taken place under s. 115A. As a consequence of the sheer number of cases coming before the courts, only a limited time can be given to the hearing of any one case and there is an obligation on all parties participating in the process to place all of their evidence before the court well in advance of any scheduled hearing. There is also an obligation on parties to comprehensively address the issues that fall for consideration in any individual case. Regrettably, all too often, in cases of this kind, one finds that some parties rely on general or template averments which fail to properly address the specific issues that arise in any individual case. I previously made observations to this effect in *Lisa Parkin* [2019] IEHC 56. That said, I am conscious that the judgement in *Lisa Parkin* was delivered only a few days prior to the swearing of Mr. McNamara's affidavit in February 2019. I am concerned that Mr. McNamara may have been under the impression that it was a sufficient answer to the concerns expressed by Ms. O'Brien to say (as he did in para. 18 of his affidavit) that the PFS is *"true and accurate*". As already explained, such a response is manifestly not sufficient. The specific issues raised by Ms. O'Brien required individual attention. Nonetheless, the averment must be seen against a backdrop where some parties previously appear to have proceeded on the basis of very general averments. Mr. McNamara may therefore have been under the mistaken impression that such an averment was sufficient. I am also conscious that the pace at which these proceedings progressed was remarkably slow in light of the issues which arose in relation to the identity of the moving party and in relation to whether the applications filed by the practitioner could be amended subsequent to the decision of Baker J. in *Niamh Meeley* [2018] IEHC 38. This may have led to a loss of focus on the part of Mr. McNamara and the practitioner. For all of these

reasons, I have come to the conclusion, on balance, that it is appropriate, on this occasion, to give Mr. McNamara an opportunity to explain the position.

98. I therefore propose to adjourn the matter for a brief period to give Mr. McNamara an opportunity to explain the position in relation to the inheritance, its value, and the rent payable in respect of the inherited property. I will not direct proofs for Mr McNamara and the practitioner but it would be appropriate to support whatever is said in the affidavit by any relevant exhibits. If an adequate explanation can be given for the differences between the SFS and the PF in relation to the inheritance and the rent, then this should dispose of the three grounds of objection summarised in para. 86 above. On the other hand, if the affidavit is incomplete or unsatisfactory, further argument may be required as to whether the applications should be refused in the circumstances.

99. For completeness, I should record that Ms O'Brien, in her affidavit, also raises other issues in relation to alleged discrepancies between the information disclosed in the SFS on the one hand and the PFS on the other. However, these seem to me to be adequately addressed in Mr McNamara's affidavit. Thus, for example, she refers to an indication in the SFS that an instalment order is being sought by Bank of Ireland. However, this is explained in para. 19 of Mr McNamara's affidavit where he confirms that it did not proceed. I therefore do not believe that these issues require further consideration.

Conclusion

100. But for the need for a new affidavit to address the matters outlined in para. 98 above, I would be of opinion that the present applications under s. 115A (9) should be allowed. However, in circumstances where a further affidavit is now required, it will be necessary to await the affidavit in question before proceeding further. In the absence of such an affidavit, I cannot be satisfied that the means of Mr McNamara have been sufficiently brought to bear on the proposed arrangement as required by s 115A (9) (b) (ii). If the means of Mr McNamara have not been sufficiently brought to bear, I would be unable to conclude that Tanager (which will be subject to such a significant write-down of secured debt under the proposed arrangements) has not been unfairly prejudiced by the proposals. Nor can I be satisfied at this

stage that a satisfactory PFS has been made by Mr McNamara. That said, these concerns may well be capable of being fully addressed by a further affidavit from Mr McNamara.