[2019] IEHC 659

THE HIGH COURT
CIRCUIT APPEAL

2019 No. 392 CA

BETWEEN

TANAGER DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND
RONAN RYAN

DEFENDANT

PAMELA FLOOD

NOTICE PARTY

JUDGMENT of Mr Justice Garrett Simons delivered on 7 October 2019.

SUMMARY

1. The underlying dispute between the parties to this appeal centres on the entitlement, if any, of the Defendant to avail of a protective certificate under the Personal Insolvency Act 2012 (as amended) ("*the Personal Insolvency Act*"). As explained presently, this dispute has given rise to two separate appeals to the High Court from orders of the Circuit Court. The first of these appeals came on for hearing before me on 16 September 2019. The second appeal is listed, for mention only, in the High Court Personal Insolvency List before McDonald J. on 14 October 2019.

2. Notwithstanding this complex procedural history, the compass of the dispute between the parties is actually very narrow. The Plaintiff, Tanager DAC ("*Tanager*"), is a secured creditor of the Defendant, Mr Ronan Ryan ("*the Debtor*"). Tanager holds a charge over the Debtor's interest in a dwelling house in Clontarf, Dublin. The Debtor had consented in March 2019 to the making of an order for possession in respect of the dwelling house, subject to a four month stay on execution. The Debtor, and his spouse, were to have delivered up possession of the dwelling house on 9 July 2019. In the event, the Debtor instead instituted proceedings under the Personal Insolvency Act and obtained a protective certificate from the Circuit Court on 25 June 2019. This certificate prevents Tanager from executing the order for possession pending the determination of an application for approval of a personal insolvency arrangement.

3. Tanager submits that it would be "fundamentally unfair" if the existence of the protective certificate were permitted to "derail and undermine" the efficacy of the order for possession. The Debtor should not be permitted to "go behind" the consent which he gave to the making of the order for possession in March 2019. It is further submitted that—as a consequence of the making of the order for possession—the Debtor no longer holds an interest in the dwelling house amenable to protection under the Personal Insolvency Act.

4. Tanager also maintains that the Debtor's conduct in making an application for a protective certificate represented an abuse of process. In particular, it is said that the failure on the part of the Debtor to disclose the existence of the order for possession breached the duty of candour which an applicant owes to a court when making an *ex parte* application.

5. In response, it is submitted on behalf of the Debtor that there has been no material non-disclosure, and that notwithstanding the existence of the order for possession, the Debtor met the eligibility criteria for a protective certificate.

6. The principal relief sought in the appeal the subject of this judgment is to allow Tanager to enforce the order for possession and to exercise its power of sale over the dwelling house, notwithstanding the issuance of the protective certificate. This application has been made pursuant to Section 96(3) of the Personal Insolvency Act.

7. For the reasons set out herein, I have concluded that this is not an appropriate case to grant such relief. Whereas it is unsatisfactory that the information provided at the time of the application for the protective certificate did not disclose the existence of the order for possession, the omission does not constitute a *material* non-disclosure. Even if the existence of the order for possession had been disclosed—as it should have been—this would not have affected the outcome of the application for a protective certificate. The Debtor met the eligibility criteria under section 91 of the Personal Insolvency Act in any event.

8. The existence of an order for possession—whether obtained by consent or following an adjudication by the court—is not a bar to the restructuring of the secured debt by way of a personal insolvency arrangement. The Personal Insolvency Act envisages that the principal sum of a secured debt may be *reduced* to an amount not less than the market value of the security as part of a personal insolvency arrangement. The balance will then rank as an unsecured debt. The possibility of such debt reduction persists for so long as the secured debt remains undischarged and the asset upon which the debt is secured remains in the ownership of the debtor. Thus, the mere fact that Tanager has the benefit of an (unexecuted) order for possession does not preclude the possibility of debt restructuring.

9. It would be disproportionate to the gravity of the non-disclosure to sanction the Debtor by allowing Tanager to enforce its security pending the determination of the application for a personal insolvency arrangement. It would also be inconsistent with one of the underlying objectives of the amended legislation. The Personal Insolvency Act, as a result of amendments introduced under the Personal Insolvency (Amendment) Act 2015, now makes special provision for a debtor's principal private residence, and, in particular, allows for the possibility of court approval of measures which enable a debtor (i) not to dispose of an interest in, or (ii) not to cease to occupy, all or a part of his or her principal private residence. The dwelling house in Clontarf represents the Debtor's principal private residence, and is occupied by the Debtor, his spouse and four minor children. An application pursuant to Section 115A is pending before the Circuit Court. It would be inconsistent with the legislative regime to seek to sanction the Debtor for his omission by denying him an opportunity to have his application for court approval of a personal insolvency arrangement heard and determined on its merits.

10. There will, of course, be cases where the setting aside of a protective certificate will be justified because of a material non-disclosure. It would undermine the objective of

expedition which underlies the legislation, however, if creditors were, as a matter of routine, to make applications to set aside orders based on inaccuracies or omissions which are *immaterial*. A proliferation of such applications would take up scarce court time unnecessarily, and ultimately delay the final determination of the insolvency process. The Personal Insolvency Act provides ample safeguards for creditors at the stage of an application to confirm or approve a personal insolvency arrangement. The existence of these protections will, in most cases, make a separate application to set aside a protective certificate unnecessary.

THE LEXICON OF PERSONAL INSOLVENCY

11. It may assist readers who are not familiar with the personal insolvency legislation to pause at this point, and to provide a very brief outline of some of the key concepts relevant to the dispute between the parties. This outline should, hopefully, allow for a better understanding of the legal issues addressed in the balance of this judgment.

12. The concept of most immediate relevance is that of a "protective certificate". The grant of a protective certificate represents the first formal involvement of a court in an application for a personal insolvency arrangement. The grant of a protective certificate, in simple terms, affords a debtor a breathing space in which he or she can formulate a proposal for a personal insolvency arrangement. The legal effect of the grant of the protective certificate is that creditors are precluded from enforcing their debt for an (initial) period of seventy days.

13. A debtor is not normally required to put his or her creditors on notice of the making of an application for a protective certificate. To this extent, the application can be characterised as an *ex parte* application. This is so notwithstanding that the application is made with the involvement of a third party, namely the Insolvency Service.

14. The Personal Insolvency Act provides two procedures by which a creditor may seek to mitigate—to use a neutral term—the effect of the grant of the protective certificate, as follows.

15. Section 96(3) allows a creditor to apply to court for leave *inter alia* to execute against the debtor or his or her property notwithstanding the existence of a protective certificate. There are no *express* statutory criteria prescribed by reference to which such an application is to be determined.

16. Section 97 allows an aggrieved creditor to apply for an order directing that the protective certificate shall not apply to that creditor. The criteria by which such an application is to be determined are set out as follows at sub-section 97(3).

> "(3) In determining an application under this section the court shall not make an order directing that the protective certificate shall not apply to that creditor unless it is satisfied that—
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> (a) not making such an order would cause irreparable loss to the creditor which would not otherwise occur, and

(b) no other creditor to whom notice of the protective certificate has been given would be unfairly prejudiced."

17. As explained under the next heading below, Tanager has sought to invoke both Section 96 and Section 97. This judgment is, however, confined to an appeal in respect of the application under Section 96.

18. During the seventy-day period of a protective certificate, a debtor with the assistance of his or her personal insolvency practitioner may put a proposed personal insolvency arrangement to a creditors' meeting. If, as occurred on the facts of the present case, a proposed arrangement is rejected at a creditors' meeting, then the debtor may, in certain circumstances, make an application to the court for the approval of a personal insolvency arrangement which involves his or her principal private residence. The effect of making such an application, if made within time, is that the period of protection is extended beyond the original seventy days.

19. It may be helpful to say something more about such applications for court approval. As a result of amendments introduced under the Personal Insolvency (Amendment) Act 2015, a debtor who has failed to have a personal insolvency arrangement approved by a creditors' meeting can make an application to the court for approval under a new section, Section 115A. This is contingent on the debts that would be covered by the proposed arrangement including a debt secured on the debtor's principal private residence.

20. For present purposes, it is to be noted that one of the grounds upon which a creditor can object to court approval is that a "material inaccuracy or omission" exists in the debtor's statement of affairs. This would appear to allow a creditor to raise, in the context of an application for approval under Section 115A, any alleged inaccuracies or omissions in the statement of affairs or prescribed financial statement grounding the *ex parte* application for a protective certificate.

21. Finally, the insolvency legislation also introduced the concept of "specialist judges" of the Circuit Court. The role and status of a specialist judge has been described as follows by the High Court (Baker J.) in *Re Nugent (A Debtor)* [2016] IEHC 127, [21].

> "[…] The specialist judges exercising their statutory function under the [Personal Insolvency Act 2012] are constrained by the powers and functions conferred by the Act of 2012, and do not exercise the full powers of a Circuit Court judge under the Courts Acts or under the Constitution. The specialist judges for example do not seem to have any power to engage principles of equity, or common law provisions outside those powers expressly conferred. The specialist judge, while the role is not merely an administrative one, does not act with full judicial powers."

22. As discussed under the next heading below, the specialist judge who issued the protective certificate in the present case has since taken the view that her jurisdiction to set aside that certificate is confined to that provided for under Section 97.

PROCEDURAL HISTORY

23. This matter has come before the High Court by way of an appeal against an order made by the Circuit Court (Judge Linnane) in the context of the within possession proceedings. As explained presently, there is a second appeal pending before the High Court (McDonald J.) in the context of separate insolvency proceedings (High Court 2019 No. 355 CA).

24. The possession proceedings had been instituted before the Circuit Court by way of a Civil Bill for Possession issued on 25 February 2016. The principal relief sought in those proceedings was an order for possession of a dwelling house in Clontarf, Dublin. This relief was sought pursuant to Order 5B of the Rules of the Circuit Court. The application had been predicated upon a deed of mortgage and charge dated 5 February 2007 ("*the Mortgage*"). The Mortgage had been entered into between the Debtor and Bank of Scotland (Ireland) Ltd. The affidavit grounding the application for an order for possession explains that Tanager has since succeeded to the mortgagee's interest under the Mortgage. More specifically, it is explained that Tanager acquired the Mortgage in April 2014 as part of a larger transaction involving the transfer of numerous securities to it. There is no dispute between the parties as to the validity of this transfer.

25. An agreement was ultimately reached between the parties whereby the possession proceedings were to be settled on terms. The terms of settlement were executed by the parties and the Circuit Court made an order on consent that the settlement be received and made a rule of court. The settlement was filed with, and deemed to be part of, the order.

26. The Circuit Court order is dated 8 March 2019. The terms of the consent order read as follows. (The references to "the Defendant" are to Mr Ronan Ryan, who is described for the purposes of this judgment as "*the Debtor*").

> "1. An Order for Possession of the property the subject of these proceedings and known as ALL THAT AND THOSE the dwellinghouse and premises known as [Details redacted] (the 'Property') and more particularly described in the Schedule to the Civil Bill for Possession herein;
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> 2. A stay on the execution of the Order for Possession for a period of four months;
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> 3. An Order directing the Defendant, the Notice Party and any other person in possession of the Property to deliver up vacant possession of the Property to the Plaintiff's nominated agent on or before 9 July 2019 together with all keys, fobs, other electronic access devices, access codes and alarm codes in their possession, power and/or procurement of the Property;
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> 4. An Order restraining the Defendant, the Notice Party and any other person on notice of this Order from damaging the Property and/or removing any fixtures and fittings from the Property pending the delivery up of vacant possession to the Plaintiff or its nominated agent on or before 9 July 2019;

5. An Order directing the Defendant and the Notice Party to facilitate the Plaintiff's nominated auctioneer to carry out an inspection of the Property at a time to be agreed within a period of two weeks from the date hereof;

6. Subject to the Defendant's and Notice Party's compliance with the terms above, an Order that the Defendant's indebtedness to the Plaintiff the subject matter of these proceedings be limited to the sum recovered by the Plaintiff from the sale of the Property;

7. No Order as to the Costs of these Proceedings."

27. The possession proceedings were then adjourned and listed for mention before the Circuit Court on 12 July 2019. This date fell a number of days *after* the date by which the Debtor was to have delivered up vacant possession of the dwelling house (9 July 2019).

28. It seems that very shortly after his having agreed to the terms of settlement and consent order, the Debtor began to take steps in preparation for the making of an application for a personal insolvency arrangement. (See affidavit of Eugene Carley Solicitor dated 25 July 2019 filed herein on behalf of the Debtor).

29. This *volte face* occurred without the giving of any express notice to Tanager. This was so notwithstanding that the Debtor had been in contact with Tanager's servicing agent during this period. As explained in the affidavit of 23 July 2019 sworn by Mr Geoffrey Rooney, Solicitor, on behalf of Tanager, the Debtor had telephoned Tanager's servicing agent, Pepper Finance Corporation (Ireland) DAC in March 2019, and had requested details of the bank account into which he could make payments to the credit of the mortgage account. This action on the part of the Debtor appears to have been intended to address one of the issues relevant to an application for approval of a personal insolvency arrangement under Section 115A, namely, the payment history of a debtor within the two years prior to the issue of a protective certificate.

30. Certainly, the resumption of mortgage repayments in March 2019—after a period of non-payment of almost nine years—made no sense if viewed solely through the lens of the terms of settlement and consent order wherein, as noted above, the balance of the debt over and above the proceeds of a sale of the dwelling house was, in effect, to be written off.

31. At all events, an application for a protective certificate was made to a specialist judge of the Circuit Court (Judge Lambe) on behalf of the Debtor, and a protective certificate issued on 25 June 2019. There is no requirement under the Rules of the Circuit Court to put creditors on notice of the making of such an application. Tanager was subsequently informed of the making of the order by letter received on 1 July 2019.

32. There is no reference to the existence of the order for possession in the paperwork accompanying the application for the protective certificate. In particular, it is not included as a "comment" on the prescribed financial statement. It should be noted that an

amended prescribed financial statement was filed on 27 August 2019 . I will return to discuss the precise mechanics of the making of an application for a protective certificate in detail at paragraph 100 below.

33. Tanager sought to set aside the protective certificate. The first attempt to do so took the form of an application in the context of the insolvency proceedings. More specifically, Tanager issued a notice of motion on 8 July 2019 seeking to have the protective certificate set aside. This application was put forward on a number of different bases as follows: Tanager expressly invoked (i) Section 97(1) of the Personal Insolvency Act; (ii) Order 73, rule 27(1) of the Rules of the Circuit Court; and (iii) the inherent jurisdiction of the Circuit Court. In the alternative, an order was sought pursuant to Section 96(3) of the Personal Insolvency Act granting Tanager liberty to take steps to secure physical possession of the dwelling house on foot of the consent order for possession dated 8 March 2019.

34. This (omnibus) application came on for hearing before a specialist judge of the Circuit Court (Judge Lambe). Judge Lambe delivered an *ex tempore* ruling on 22 July 2019. An agreed counsel's note of this judgment has been exhibited as part of the application before me. It appears therefrom that Judge Lambe made three principal findings as follows. First, the failure to disclose the existence of the order for possession as part of the application for the protective certificate represented a breach of the requirements of Section 118 of the Personal Insolvency Act. This section, in brief, requires a debtor to make full disclosure of all circumstances that are reasonably likely to have a bearing on the ability of the debtor to make payments to his or her creditors.

35. Secondly, the jurisdiction of a specialist (insolvency) judge to set aside a protective certificate is confined to the *statutory jurisdiction* under Section 97 of the Personal Insolvency Act. A specialist judge does not have an inherent jurisdiction to sanction a breach of Section 118.

36. Thirdly, the criteria for setting aside a protective certificate under Section 97(3), as interpreted by the Court of Appeal in *Re McManus (A Debtor)* [2016] IECA 248, were not met on the facts of the case.

37. Judge Lambe next confirmed that any application for an order pursuant to Section 96 should be made in the context of the possession proceedings.

38. Having failed in its application before Judge Lambe, Tanager then moved with expedition to make an application in the context of the possession proceedings. An *ex parte* application for short service of notice of motion was made on 23 July 2019, and the motion was made returnable for 25 July 2019. The principal relief sought in the notice of motion was an order, pursuant to the inherent jurisdiction of the Circuit Court, setting aside the protective certificate. In the alternative, an order was sought pursuant to Section 96(3) of the Personal Insolvency Act granting Tanager leave to enforce and execute the order for possession.

39. The application was heard before Judge Linnane on 25 July 2019, and the learned trial judge delivered a reserved judgment on 15 August 2019. Judge Linnane made an order pursuant to Section 96(3) of the Personal Insolvency Act giving leave to Tanager to execute the order for possession.

40. The *ratio* of the judgment is set out as follows.

> "An alternative view of course is that the legislation was not enacted to afford protection to a debtor who (i) makes no mortgage payment for almost nine years, (ii) agrees with the benefit of legal advice and after three years of legal proceedings to an order for possession being made and to vacate the property, (iii) then does a complete turn around and applies for a Protective Certificate without disclosing the material fact that a consent order for possession had been made either to the Insolvency Judge or to his PIP [Personal Insolvency Practitioner] in breach of the clear obligation imposed by s. 118 of the Act. The granting of the Protective Certificate resulted in the implementation of the consent order made by the court being frustrated and undermined.
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> Taking everything into account, in my view there was a deliberate move by Mr. Ryan to frustrate and obstruct the implementation of the consent order made on 8th March 2019 . There was also a conscious decision made by him not to disclose the existence of the consent order in his PFS [Prescribed Financial Statement], to his PIP, and to Judge Lambe. The purpose of the Insolvency legislation was not to assist persons behaving in this manner, that would not be in the public interest. Judges depend on a daily basis, particularly when an application is made on an ex-parte basis, on full disclosure being made to them. The courts often set aside orders made on an ex-parte basis if it later transpires that there was non-disclosure of any material information. I do not accept Mr. Ryan's excuse that he did not consider material the existence of the consent order. In any event it was not up to him to decide or be the judge of what was material or not. As Mr Neuman on behalf of Tanager has pointed out the consent order is still in full force and binding on Miss Flood and this application has no bearing on her obligation to comply with that order.
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> Accordingly I am granting the application and making an order pursuant to s. 96(3) of the 2012 Act giving leave to Tanager to execute the order for possession made on 8th March 2019 against Mr. Ryan."

41. The position at that stage, therefore, was that Tanager had been refused an order pursuant to Section 97 by Judge Lambe, but had been granted an order pursuant to Section 96(3) by Judge Linnane.

42. Each of the parties then brought an appeal against the order in respect of which they had been unsuccessful. Tanager brought an appeal against the refusal of an order pursuant to Section 97. That appeal has been made returnable to the High Court Personal Insolvency List, and is listed, for mention only, before McDonald J. on 14 October 2019.

43. The progress of the Debtor's appeal against the grant of an order pursuant to Section 96(3) has been more convoluted. The Circuit Court had refused to grant a stay on its order, and the Debtor then applied to the High Court for a stay during the vacation sittings. The application for a stay was listed before me when I was sitting as the Duty Judge on 10 September 2019. In circumstances where it was apparent that the hearing of the application for a stay would take almost as long as the hearing of the substantive appeal, I listed the full appeal for hearing before me on 16 September 2019.

44. The solicitors acting on behalf of Tanager, AMOSS Solicitors, very helpfully arranged to file a book of pleadings in advance of the hearing date, and counsel for both sides prepared excellent written legal submissions. The hearing of the appeal duly took place on 16 September 2019, and judgment was reserved until today's date.

45. Finally, for the sake of completeness, it should be noted that the position in respect of the substantive application for a personal insolvency arrangement is as follows. The statutory creditors' meeting has taken place and the proposal for a personal insolvency arrangement has been rejected. The Debtor has since made an application for approval of an arrangement to the Circuit Court pursuant to Section 115A. The effect of this application is that the period of the protective certificate continues beyond the original seventy-day period. (See *Re Hickey (A Debtor)* [2018] IECA 397. The Court of Appeal confirmed that the intention of the Oireachtas was that all debtors who lodged a Section 115A application within 14 days of the creditors' meeting would continue to be protected between the expiry of the seventy-day life of the certificate and the lodging of that Section 115A application).

SUBMISSIONS OF THE PARTIES

(i). Tanager's submissions

46. Counsel of behalf of Tanager, Mr Rudi Neuman, BL, submits that Section 96(3) of the Personal Insolvency Act confers a "broad" discretion on the court. The general wording of the section is contrasted with that of Section 97(3) which prescribes specific and limited criteria against which a decision as to whether to disapply a protective certificate in the case of a particular creditor is to be made.

47. Counsel then identifies the basis upon which it is said that this court should grant leave pursuant to Section 96(3) to execute the order for possession. (See paragraph 13 of the written legal submissions). There are two intertwined strands to this submission. First, it is submitted that it is "just and appropriate" to permit execution of the order for possession. It would be "fundamentally unfair" if the existence of the protective certificate were permitted to "derail and undermine" the efficacy of the order for possession. Emphasis is placed upon the fact that the order was made on consent, and upon what counsel characterises as the "sanctity of consent orders". The judgment of the Court of Appeal of England and Wales in *Brennan v. Bolt Burdon (A firm)* [2004] EWCA Civ 1017, [11] to [13] is cited in this regard.

48. It is submitted that the making of the application for a protective certificate is akin to an appeal by the Debtor against the consent order. The Debtor is said to be seeking to "go

behind" his consent. A compromise had been reached between the parties in March 2019, whereby Tanager had agreed to confine its claim to the proceeds of sale and to "write down" the balance of the mortgage debt, and the Debtor had agreed to deliver up vacant possession on 9 July 2019. The Debtor cannot now change his mind about the compromise (which had been agreed to with the benefit of legal advice), and undermine his obligations under the consent order. If consent orders are not going to be enforced by the courts, then parties will be reluctant to settle claims. This would not be in the public interest.

49. Secondly, it is submitted that the making of the application for a protective certificate amounted to an abuse of process. In particular, it is alleged that the application was so lacking in candour and accuracy as to warrant an order under Section 96(3). There must, it is said, be a consequence or sanction for an "offending party" who fails to make full disclosure as required under Section 118 of the Personal Insolvency Act.

50. Mr Neuman, BL, placed particular emphasis on the following finding of Judge Lambe (as recorded in the agreed note of her *ex tempore* judgment).

> "Given the binding nature of the March Order, that Ronan Ryan is insolvent in that there was nothing left for other creditors out of his assets, the non-disclosure of the March Order in the PFS [Prescribed Financial Statement], which is sworn by statutory declaration, to not disclose the Order being the most significant and proximate event to his Application for a Protective Certificate is extraordinary."

51. Reliance was placed, by analogy, on case law which emphasised the duty of disclosure in *ex parte* applications under the Companies Acts. Extracts from the judgments in *Re Bookfinders Ltd.* [2015] IEHC 769 and in *O'Flynn v. Carbon Finance Ltd*. [2014] IEHC 458 were opened to the court.

52. Counsel disputes the characterisation of the non-disclosure as a simple omission to fill in a "comment box" or "field" in the prescribed financial statement. Counsel draws attention to the fact that when it came to providing details of the Debtor's separate debt to the Governor and Company of the Bank of Ireland, the Debtor had included a note in the "comment box" indicating that a judgment mortgage had been "placed" on 16 April 2018.

53. Counsel did not dispute that the Debtor had met the eligibility criteria for a protective certificate as prescribed under Section 91. It is submitted that non-disclosure may nevertheless represent *material* non-disclosure notwithstanding that the outcome of the *ex parte* application for a protective certificate would inevitably have been the same even had the existence of the order for possession been disclosed. This court should not, on this submission, be concerned with what potential effect proper disclosure would have had on the application. Rather, there has to be a consequence or sanction for the "offending party" for his breach of Section 118 of the Personal Insolvency Act.

54. Finally, counsel submits that there is no inconsistency in an aggrieved creditor pursuing both an application under Section 96 and Section 97. Nor does the making of the initial

application under Section 97 to a specialist judge give rise to an estoppel preventing the creditor pursuing a subsequent application to another judge of the Circuit Court.

(ii). The Debtor's submissions

55. In response, Mr Keith Farry, BL, counsel for the Debtor commenced his submission by suggesting that the principal purpose of Section 96(3) was to allow for the possibility of an *agreed* sale of property prior to the completion of the insolvency process. This might arise, for example, where the creditor and debtor agreed to the sale of a property oth*er than* the principal private residence, e.g. the sale of an investment or "buy to let" property. An order under Section 96(3) might also be appropriate where property was held by a debtor jointly with a third party, and that third party was not subject to an application for a personal insolvency arrangement.

56. Counsel next drew attention to the provisions of Section 49 of the Personal Insolvency Act which identifies the information which a debtor is required to disclose to a Personal Insolvency Practitioner ("*PIP*") as follows.

> "49.— (1) A debtor to whom section 48 applies shall submit to a personal insolvency practitioner a written statement disclosing all of the debtor's financial affairs, which statement shall include—
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> (a) such information as may be prescribed in relation to—
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> (i) his or her creditors,
> (ii) his or her debts and other liabilities,
> (iii) his or her assets, and
> (iv) guarantees (if any) given by the debtor in respect of a debt of another person,
>
> and
>
> (b) such other financial information as may be prescribed."

57. Counsel submits that the Debtor complied with these requirements. The Debtor is said to have completed a prescribed financial statement in accordance with Section 49 and the relevant regulations. The Debtor is said to have provided a complete and accurate statement of his assets, liabilities, income and expenditure. Counsel also emphasises that the Debtor meets all of the eligibility criteria prescribed under Section 91.

58. Turning to the affidavit evidence, counsel relies on an affidavit filed by the Debtor (Mr Ronan Ryan) in the insolvency proceedings dated 17 July 2019 which set out Mr Ryan's dealings in the period 2009/2010 with the company servicing Bank of Scotland's loans in Ireland, Certus. (This affidavit has been exhibited by Tanager as part of the possession proceedings). Mr Ryan avers that he was told that if he (Mr Ryan) signed an "assisted sale order" then he could cease payments on the principal private residence loan and have the balance written off. Counsel submits that this demonstrates that the Debtor is not a "strategic defaulter".

59. (It should be noted that counsel for Tanager, in his subsequent reply, drew attention to the fact that the existence of this alleged agreement had not been referred to by the Debtor in the affidavits filed in the possession proceedings *prior* to the order of 8 March 2019. Prior to that date, the Debtor had indicated an intention to fully defend the proceedings).

60. Reliance is also placed on other paragraphs of the affidavit (in particular, paragraphs 25 and 26) where Mr Ryan states that his failure to disclose the full extent of the order for possession was not done out of any deceit or unwillingness to disclose but rather because he did not know it was material.

> "25. I say that I didn't disclose to my PIP the full extent of the order as exhibited at 'KS4'. I did not do this out of any deceit or unwillingness to disclose but rather I did not know it was material to eligibility or the process. I say that I came to a PIP with a view to resolving my debt and keeping my home which was the opposite of the repossession process so I simply believed that it was obvious and did not need further detail. I apologise for this issue and any lack of disclosure. I say, and as is known to many, the very fact of the Order and the exact terms were public knowledge and published extensively in the media. I simply did not know that this was of material relevance.
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> 26. In order to remedy this, I have completed a new Prescribed Financial Statement including a comment outlining same in the comment section of the PFS regarding my Principal Private Residence. I beg to refer to a copy of same when produced."

61. Counsel suggests that Tanager itself may be culpable of a lack of candour in that the monthly payments initially demanded by Tanager were overstated by a sum of almost one thousand euro. Counsel opened the relevant correspondence from March 2018.

62. It was submitted that Tanager's reliance on case law in respect of the winding up of companies and the examinership process under the Companies Acts is misplaced. The Personal Insolvency Act was said to represent a complete and new code. Mr Farry cited the judgment of the High Court (Baker J.) in *Re O'Connors (A debtor)* [2015] IEHC 320; [2015] 3 I.R. 434.

> "[51] There is nothing in the legislation that links any of its provisions to the Companies Acts, although there are a number of express references in the body of the legislation to the Bankruptcy Act 1988. I consider that the legislation provides a complete and new code by which an insolvent debtor may make binding arrangements with his or her creditors, and the Circuit Court, and in limited circumstances the High Court, has a jurisdiction to give directions with regard to certain matters, to issue a protective certificate, and ultimately to approve the coming into effect of a PIA following the approval of a proposal for such an arrangement by a creditors' meeting.

[52] The legislation fully regulates the procedures at a creditors' meeting. It would be fair to say that the Act of 2012 and the structures that it creates are, in relative terms, less complex and burdensome than those found in either the old, and to some extent the current, bankruptcy regime or those regulating corporate insolvency. In its form the legislation is intended to be a self-contained and new insolvency regime, and it is expressly sought that the regime be rational and orderly. While there is nothing in the legislation that expressly mandates that the procedure be either cost effective or speedy, the Regulations made under the Act of 2012 prescribe the fees of the PIP, the form of prescribed financial statements, the power of the Insolvency Service of Ireland to fix levels of reasonable expenditure etc., and taken together they establish a regime the clear purpose of which is to facilitate insolvent personal debtors whose means are clearly limited. In that regard I am fortified by s. 147 of the Act of 2012 by which the court has a discretion to defer a bankruptcy petition, presumably with the aim of engaging the less burdensome procedures established by the Act of 2012."

63. Counsel placed emphasis on the judgments of the High Court and the Court of Appeal in *Re McManus (A Debtor)* [2016] IEHC 279; [2016] IECA 248. The matter had come before the High Court (Baker J.) by way of an application pursuant to Section 97 of the Personal Insolvency Act. The aggrieved creditor had alleged that the debtor in that case had been guilty of material non-disclosure in his application for a protective certificate. It was alleged that the debtor had entered into a family loan arrangement and had registered charges against the principal private residence immediately after the aggrieved creditor had obtained judgment against the debtor.

64. The High Court had found that the failure to disclose the existence of the charges and the family loan agreement to the court on an application for the protective certificate represented a material non-disclosure. The prescribed financial statement gave a "wholly wrong impression" that there was a degree of valuable equity in the principal private residence. The High Court further held that the aggrieved creditor had suffered an "irreparable loss" within the meaning of Section 97(3), over and above the ordinary statutory consequence of the issue of the protective certificate. The aggrieved creditor had suffered a particular prejudice, not by reason of the date of the issue of the protective certificate in itself, but because of the device that the debtor used to create two legal charges on his principal private residence in the period leading up to the application for protection.

65. The Court of Appeal approached the case on a narrower basis. It appears from the approved note of the *ex tempore* judgments delivered on 22 June 2016 that the appeal was determined on the basis that the application had been made to the High Court pursuant to Section 97 alone and not pursuant to the High Court's inherent jurisdiction. See paragraphs [7] and [13] of the judgments of Ryan P. and Finlay Geoghegan J., respectively. Applying the criteria under Section 97(3), the Court of Appeal found that the aggrieved creditor had not suffered any "irreparable loss" over and above the inevitable consequences which flow from the issuing of a protective certificate.

66. Counsel submits that notwithstanding the outcome of the appeal to the Court of Appeal, the approach adopted by the High Court (Baker J.) to material non-disclosure remains valid. Counsel cites the following passages from the High Court judgment.

> "36. The jurisprudence of the High Court and Supreme Court would suggest that the court may exercise its jurisdiction arising from a material non-disclosure merely on account of a desire to express displeasure or to effectively punish the person guilty of non-disclosure. However, the exercise by the court of its jurisdiction to order that a protective certificate not impact on a named creditor ought to be exercised cautiously having regard to the long title in the Act which characterised the legislation as one seen to be in the common good, as it could be said that the court ought to be positively disposed towards the granting of a protective certificate if such will permit the continued engagement of a debtor in the economic life of the State. Further, the provisions of s. 97 are expressed in the negative and therefore the onus is on the creditor to establish the non-disclosure.
>
> 37. I consider in those circumstances that the court would be unlikely, save in exceptional circumstances, to make an order under s.97 merely on account of its desire to express its displeasure, and that the court in exercising its jurisdiction must weigh the various factors, and must also take the interests of all parties into account. This is the essence of the discretionary power of a court, namely that the court will not exercise its discretion on rigid grounds but will do so in the context of all of the factors which it considers to be relevant."

67. Attention is drawn to the fact that the grounds upon which a personal insolvency arrangement may be challenged include the following at Section 120 (c).

> "(c) a material inaccuracy or omission exists in the debtor's statement of affairs (based on the Prescribed Financial Statement) which causes a material detriment to the creditor".

68. It is submitted that this supports the argument that there must be *material* non-disclosure before a protective certificate could be set aside.

69. It is suggested that, at its height, Tanager's complaint is that the "comment box" in the prescribed financial statement did not include a comment or a note in relation to the order for possession. This did not amount to material non-disclosure.

70. Without prejudice to his primary submission that there was no material non-disclosure, counsel submits—in the alternative—that even if there had been material non-disclosure, then it would not be appropriate to "sanction" the Debtor by allowing the order for possession to be executed pending the determination of the application for a personal insolvency arrangement.

DETAILED DISCUSSION

71. Tanager's application for leave to execute the order for possession—notwithstanding the existence of the protective certificate—is predicated upon two intertwined arguments as

follows. The first argument is that the "sanctity" of a consent order must be respected. The Debtor should not be permitted to undermine the order for possession by applying to enter into a personal insolvency arrangement, and thereby availing of the benefit of a protective certificate pending the determination of that application. The second argument is that the Debtor's failure to disclose the existence of the order for possession at the time of the *ex parte* application for a protective certificate represents a material non-disclosure. It is said that the appropriate sanction for this non-disclosure would be to deny the Debtor the benefit of the protective certificate as against Tanager.

72. I propose to address each of these two arguments under separate headings below.

(1). ORDER FOR POSSESSION MUST BE RESPECTED

73. The first argument can be disposed of shortly. This is because it is premised on an apparent unwillingness on the part of Tanager to face up to the reality of the amended insolvency legislation. The Oireachtas has chosen to put in place a detailed legislative regime for "orderly and rational" debt resolution. One of the objectives of this regime, as reflected in the Long Title to the Personal Insolvency Act, is to allow insolvent debtors to resolve their indebtedness and thereby facilitate "the active participation of such persons in economic activity in the State". The regime expressly envisages that "secured debts", such as a mortgage on a family home, may be reduced to an amount not exceeding the market value of the security. Put colloquially, the Personal Insolvency Act allows for the possibility of "writing down" mortgage debt, and of a debtor remaining in their family home on the basis of a reduced principal sum. The balance will rank for a dividend, if any, as an unsecured debt.

74. One of the key features of the legislative regime is the creation of a "breathing space" whereby a period of time is afforded to a debtor and his or her personal insolvency practitioner to formulate a proposal for a personal insolvency arrangement. This breathing space is achieved by the grant of a protective certificate under Section 95 of the Personal Insolvency Act.

75. The legal consequences of the issuance of a protective certificate are set out as follows at Section 96(1).

> "96.—(1) Subject to subsections (3), (4) and (5), a creditor to whom notice of the issue of a protective certificate has been given shall not, whilst the protective certificate remains in force, in relation to a specified debt:
>
> (a) initiate any legal proceedings;
> (b) take any step to prosecute legal proceedings already initiated;
> (c) take any step to secure or recover payment;
> (d) execute or enforce a judgment or order of a court or tribunal against the debtor;
> (e) take any step to enforce security held by the creditor in connection with the specified debt;

(f) take any step to recover goods in the possession or custody of the debtor, whether or not title to the goods is vested in the creditor;

(g) contact the debtor regarding payment of the specified debt, otherwise than at the request of the debtor;

(h) in relation to an agreement with the debtor, including a security agreement, by reason only that the debtor is insolvent or that the protective certificate has been issued—

(i) terminate or amend that agreement, or

(ii) claim an accelerated payment under that agreement.

76. The purpose and effect of a protective certificate has been described as follows by the High Court (Baker J.) in *Re Nugent (A Debtor)* [2016] IEHC 127.

> "5. Section 95 of the Act of 2012 makes provision for the grant of a protective certificate to a debtor who establishes the statutory proofs. The effect of the grant of a certificate is that during its currency the debtor is protected from any action or enforcement proceedings by his creditors, and by virtue of s. 96 of the Act a creditor to whom notice of the issue of a protective certificate has been given shall not initiate or continue legal proceedings, nor take any steps to secure or recover payments or judgment, or on foot of any security. Whilst a protective certificate remains in force a bankruptcy petition may not be presented, or, in a case where a petition for bankruptcy has already been presented, may not be processed. The issuing of a protective certificate is a matter of considerable benefit to a debtor in that it gives breathing space in which to seek to come to an arrangement with creditors, and avoid the less benevolent consequences of bankruptcy."

77. Crucially, the protection against creditors afforded by a protective certificate extends even to judgments or orders of a court. This is provided for under Section 96(1)(h): a creditor shall not execute or enforce a judgment or order of a court against the debtor whilst the protective certificate remains in force.

78. If an application for a personal insolvency arrangement is ultimately successful, the final arrangement may include provision inter alia for a debtor to retain their principal private residence and for a reduction in the principal sum. A practical example of this is provided by the very recent judgment of the High Court (McDonald J.) in *Re McNamara (A Debtor)* [2019] IEHC 622. On the facts of that case, a secured creditor (as it happens, Tanager) had obtained an order for possession against the debtors in respect of their principal private residence in April 2014. Notwithstanding this, the debtor *subsequently* made a successful application for a personal insolvency arrangement. The arrangement was ultimately approved by the High Court in August 2019 pursuant to Section 115A. As part of the arrangement, a sum of excess of €1,700,000 was to be written off the mortgage debt and would rank instead for a dividend as an unsecured debt.

79. Having regard to this legislative regime, the complaint made by Tanager in the present proceedings, i.e. that it would be "fundamentally unfair" were the protective certificate permitted to "derail and undermine the efficacy" of the order for possession, rather

misses the point. The precise purpose of the insolvency legislation is to provide for debt resolution in the interests of the common good. In some instances, this purpose will have precedence over other aspects of the common good such as the public interest in ensuring the finality of litigation and the enforceability of court judgments and orders. Section 96(1) (cited at paragraph 74 above) is comprehensive in its terms, and ensures that a protective certificate is sweeping in its effect. Relevantly, it precludes a creditor who has the benefit of a judgment or order from executing or enforcing that judgment or order during the period of protection.

80. The fact that the order for possession had been made *with the consent* of the parties in March 2019 does not alter the legal analysis. First, Section 96 makes no distinction between judgments and orders arising following an adjudication on the merits by a court, and those arising as a result of the consent of the parties. The section refers to judgments and orders *simpliciter*. Its provisions thus apply to both types.

81. Nor can such a distinction be "read into" the section. It is clear from the structure and language of Section 96 that it is intended to be comprehensive in its terms and captures every conceivable step which a creditor might take to enforce a debt.

82. Secondly, there is no rational justification for distinguishing between (i) orders made following adjudication, and (ii) orders made on consent. The public interest in ensuring the finality of litigation and the enforceability of judgments applies with equal force to both. In each instance, the Oireachtas has ordained that the finality of court orders must yield in certain circumstances to the common good in ensuring orderly and rational debt resolution.

83. In summary, Tanager cannot rely on the existence of the order for possession *per se* as a ground for avoiding the protective certificate, or more generally, to defeat the application pursuant to Section 115A which is currently pending before the Circuit Court. (The *separate* complaint that the omission of reference to the order for possession in the *ex parte* application for a protective certificate represented material non-disclosure is addressed under the next heading below).

84. Tanager has also sought to rely on what it alleges is the poor payment history of the Debtor. This allegation that the Debtor had not made payments pursuant to the mortgage for a period of almost nine years certainly seems to have struck a chord with the Circuit Court judge (as reflected in the passages from her judgment cited at paragraph 40 above).

85. Any characterisation of the Debtor as a "strategic defaulter" is challenged by his counsel. As summarised at paragraphs 58 to 60 above, counsel drew particular attention to the explanation offered on affidavit for this period of non-payment.

86. It is unnecessary for the purposes of this appeal to make any determination on this issue. This is because the conduct of a debtor in making or failing to make payments falls to be determined at a *later stage* of the insolvency process. More specifically, the issue arises

for consideration in the context of the application for approval pursuant to Section 115A. Sub-section 115A(10)(a) provides as follows.

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

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

(i) the debtor in seeking to pay the debts concerned, and
(ii) a creditor in seeking to recover the debts due to the creditor;"

87. The nature of the consideration required under this sub-section has been discussed in detail in the judgment of the High Court (McDonald J.) in *Re Featherson (A Debtor)* [2018] IEHC 683.

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

26. That is not to say that there is not an obligation on the debtor to explain a poor payment record. As I have sought to emphasise above, there can be no doubt that there is such an obligation on the debtor. I do not intend to dilute the significance of that obligation in any way. The practitioner/debtor bears the onus of proof in applications under s. 115A. It is therefore essential that a poor payment record should be appropriately explained on affidavit by the debtor. Nonetheless, even in cases where the explanation may seem unsatisfactory or incomplete, the court retains a discretion if there are countervailing considerations that apply such as to persuade a court that, in all of the circumstances of the case, the s. 115A relief should nevertheless be granted."

88. These are all issues which can only properly be addressed in the context of an application under Section 115A. They do not arise in the context of an initial application for a protective certificate nor in an application for leave to execute pursuant to Section 96(3).

The complaints made by Tanager in this regard are thus premature, and must await consideration at the proper time in the context of the pending Section 115A application.

89. Finally, there is no merit in the separate argument that the Debtor, as a consequence of the order for possession, no longer holds an interest in the dwelling house amenable to protection under the Personal Insolvency Act. The existence of an unexecuted order for possession does not have the legal effect of divesting the Debtor of his interest in the dwelling house. Tanager had not entered into possession prior to the grant of the protective certificate, still less had it purported to exercise its power of sale. There is no evidence before the court that Tanager has complied with Section 100 of the Land and Conveyancing Law Reform Act 2009. In all the circumstances, the ownership of the dwelling house remains with the Debtor.

(2). MATERIAL NON-DISCLOSURE

90. Tanager's complaint that the Debtor was culpable of material non-disclosure gives rise to two potential issues as follows. The first issue is whether or not there has been material non-disclosure. In the event that this first issue is resolved in favour of Tanager, then this presents a second issue, namely, what is the appropriate remedy for the material non-disclosure. This requires consideration both of the procedural route by which the complaint should be brought before the court—for example, whether by way of an application pursuant to Section 96, Section 97 or the courts inherent jurisdiction—and the nature of the *substantive* remedy to be provided—for example, should the protective certificate be set aside for all purposes or only insofar as it affects the aggrieved creditor.

91. This second issue, obviously, only arises for consideration if the first issue is resolved in favour of Tanager, and, for this reason, it is proposed to address the issues in strict sequence.

(i). Has there been material non-disclosure?

Materiality

92. Before turning to a consideration of the nature of the non-disclosure alleged to have occurred in the present case, it may be useful to say something about the concept of "material" non-disclosure. The leading case on non-disclosure in the context of the Personal Insolvency Act is that of the High Court (Baker J.) in *Re Nugent (A Debtor)* [2016] IEHC 127. The judgment reviews the relevant authorities—including, in particular, *Bambrick v. Cobley* [2005] IEHC 43; [2006] 1 I.L.R.M. 81 and *Re Belohn Ltd*. [2013] IEHC 157; [2013] 2 I.L.R.M. 407—with enviable clarity. Baker J. then adopted a test which emphasises the *materiality* of the non-disclosure, i.e. in the sense of its objective potential to have *influenced* the court's determination of the relevant *ex parte* application.

> "51. It is not necessary for the purposes of this application that I should take a view as to whether the PIP, or the debtor, deliberately sought to present the matter to me in a way that points to a lack of *bona fides*. As a matter of law the test before me is whether there was a significant and material failure to disclose matters which should have been disclosed and the test is an objective one as to what could have

influenced me in the exercise of my jurisdiction in making the order *ex parte*. I am satisfied that the test is met."

93. A similar approach has been adopted by McDonald J. in *Re Halpin (A Debtor)* [2019] IEHC 87 wherein the court held that the omission to exhibit certain correspondence was not "material" in that it did not have the potential to have affected the outcome of the *ex parte* application for an *extension* of the duration of the period of the protective certificate.

94. (For the sake of completeness, it should be noted that the range of relevant considerations governing an application for a first or second *extension* of the period of protection are broader than those governing the initial application for a protective certificate. More specifically, on an application for an extension the court must consider matters such as whether the debtor and the personal insolvency practitioner have acted in "good faith and with reasonable expedition", and whether the proposed arrangement is likely to be accepted by the creditors. It follows as a consequence of the court's enlarged discretion on an application for an extension that the range of information which will be "material" will be greater than in the case of the initial decision to issue a protective certificate).

95. That non-disclosure must be *material* before it could provide a basis for setting aside the grant of a protective certificate is confirmed by a consideration of the role of the court in confirming or approving a personal insolvency arrangement. In contrast to its limited role on an application to issue a protective certificate, the court has a significant role to play in circumstances where either (i) a minority creditor is objecting to an arrangement approved by a qualified majority at a creditors' meeting, or (ii) a debtor is applying to have an arrangement involving his or her principal private residence approved by the court. Relevantly, in each instance one of the grounds of objection which may be relied upon by a creditor is that there is a "material" inaccuracy or omission in the debtor's statement of affairs. This is provided for under Section 120(c) as follows.

> "120. The grounds on which a Personal Insolvency Arrangement may be challenged by a creditor under section 114 are, without prejudice to section 122, limited to the following matters:
>
> […]
>
> (c) a material inaccuracy or omission exists in the debtor's statement of affairs (based on the Prescribed Financial Statement) which causes a material detriment to the creditor;"

96. (Section 120 is applied to an application under Section 115A by sub-section 115A(8)(b)).

97. These provisions confirm that not every inaccuracy or omission in a debtor's statement of affairs or prescribed financial statement is to have the consequence of disentitling a debtor from obtaining a personal insolvency arrangement. Rather, an inaccuracy or

omission must be "material" and cause a "material detriment" to a creditor before same will redound against the debtor.

98. These provisions also indicate that the appropriate time at which to raise an objection that there has been a material inaccuracy or omission is at this stage when an arrangement comes before the court for confirmation or approval. It can be inferred from this that such matters should not normally be raised by way of an application to set aside a protective certificate. This is because the nature of the consideration which the court gives to the matter, and the actual consequences for a creditor, are less than those arising at the final stages of the insolvency process.

99. The statutory position might be summarised as follows. The legislation envisages court involvement both at the commencement of an application for a personal insolvency arrangement, i.e. at the time of the application for a protective certificate, and at the conclusion of the process, i.e. at the time of the hearing of objections to, or an application for the approval of, an arrangement. The procedure governing each type of application, i.e. *ex parte* or *inter partes*, and the range of matters to be considered by the court, reflect the gravity of the respective decision which the court is making. The legal consequences of a decision to grant a protective certificate on a temporary basis are less severe than those of a decision to approve an arrangement which might, as in the example of *Re McNamara (A Debtor)* [2019] IEHC 622 referred to earlier, involve the reduction of a secured debt in excess of one million euro. It is unsurprising, therefore, that a decision of the latter type should be heard *inter partes* and require consideration of a wide range of factors.

100. The point of highlighting this—perhaps obvious—distinction is not to suggest that the issue of a protective certificate does not impinge on the contractual and property rights of creditors (especially secured creditors). It plainly does. Rather, the point is to explain why it is that the hurdle to be met by a debtor in securing a protective certificate is less than the hurdle at the final stages of the insolvency process. There will, of course, be cases where the setting aside of a protective certificate will be justified because of a material non-disclosure. It would undermine the objective of expedition which underlies the legislation, however, if creditors were, as a matter of routine, to make applications to set aside orders based on inaccuracies or omissions which are *immaterial*. A proliferation of such applications would take up scarce court time unnecessarily, and ultimately delay the final determination of the insolvency process. The Personal Insolvency Act provides ample safeguards for creditors at the stage of an application to confirm or approve a personal insolvency arrangement. These protections will, in most cases, make a separate application to set aside a protective certificate unnecessary.

Assessment of materiality

101. An assessment of whether or not there has been material non-disclosure in the context of any particular type of *ex parte* application necessitates identifying the criteria which govern the determination of that *ex parte* application. On the facts of the present case, it is necessary to rehearse the mechanics of an application for a protective certificate in order to identify the relevant considerations governing the determination of the

application. This exercise will, in turn, illuminate the nature of a debtor's duty of disclosure.

102. The starting point for this analysis is Section 49. This section regulates the initial interaction between a debtor and a (prospective) personal insolvency practitioner ("*PIP*"). The debtor is required to submit a written statement disclosing all of their (i.e., the debtor's) financial affairs. This written statement then provides the basis for an initial meeting between the PIP and the debtor. The form of written statement is prescribed under the Personal Insolvency Act 2012 (Written Statement Disclosing All of the Debtor's Financial Affairs) Regulations 2015. There is no *express* requirement under the 2015 Regulations to disclose the existence of court proceedings, orders or judgments.

103. Once the PIP has been appointed under Section 49(3), the debtor is required under Section 50 to provide information that fully discloses his or her financial affairs. The PIP can then assist the debtor in completing a prescribed financial statement ("*PFS*").

104. The form of a PFS is prescribed under the Personal Insolvency Act 2012 (Prescribed Financial Statement) Regulations 2014. Again, there is no express requirement to disclose the existence of court proceedings, orders or judgments.

105. These various provisions should be read in conjunction with Section 118 which sets out the general duties and obligations of a debtor arising under Chapter 4 of the Personal Insolvency Act. Relevantly, sub-section 118(1) provides as follows.

> "118 (1) A debtor who participates in any process under this Chapter is under an obligation to act in good faith, and in his or her dealings with the personal insolvency practitioner concerned to make full disclosure to that practitioner of all of his or her assets, income and liabilities and of all other circumstances that are reasonably likely to have a bearing on the ability of the debtor to make payments to his or her creditors."

106. The procedure for making the application for a protective certificate is prescribed under Section 93. One of the unusual features is that the application is made via the Insolvency Service. The application is submitted by the PIP to the Insolvency Service. The Insolvency Service examines the application, and, if satisfied that the eligibility criteria have been met, the Insolvency Service will then refer the application to court for the issue of a protective certificate.

107. The court—in this case, a specialist judge of the Circuit Court—is required to consider whether the requirements of Section 91 have been met. These include, in particular, consideration of the domicile or ordinary residence of the debtor; and confirmation of the existence of a "secured creditor"; and confirmation that the debtor is insolvent and that the debtor has completed a prescribed financial statement and has made a statutory declaration confirming that the statement is a complete and accurate statement of the debtor's assets, liabilities, income and expenditure.

108. In practice, the application is normally determined on the basis of the papers as filed, i.e. there is no oral hearing. The court does, however, have discretion to hold a hearing where it requires further information or evidence for the purpose of its arriving at its decision. Any such hearing is on notice to the Insolvency Service and the personal insolvency practitioner concerned.

109. There is no requirement to put creditors on notice in advance of the application for a protective certificate. To this extent, the application can be characterised as an *ex parte* application notwithstanding that it involves a third party, i.e. the Insolvency Service. See the judgment of the High Court (Baker J.) in *Re Nugent (A Debtor)* [2016] IEHC 127, [29].

> "29. The PIP argues that the application before me for the extension of the period of the protective certificate was not truly an application *ex parte* as it was made on notice to the Insolvency Service of Ireland. The fact that the application was not on notice to the creditors does not, it is argued, make it an *ex parte* application. I do not consider this submission to be well founded, as the application for the extension may properly be described as *ex parte* in that the persons affected or likely to be affected thereby were not on notice. An *ex parte* application is not merely one to which no person or body is on notice, but one of which the person whose interests are impacted is not on notice. I accept that the legislation and the Rules providing for the making of an application were formulated in a way that permitted, or perhaps even required, the application to be made *ex parte* to the court, but the jurisprudence which I have referred to leads me to the inevitable conclusion that any person whose interests are affected by the order may have a right to seek to set aside such an order, even if that person might not be required by the statute or the rules to be on notice. This result flows from the approach identified by Hogan J. in *Re Belohn Limited and Merrow Limited*, where he held that the making of an order *ex parte* without the availability of a remedy to set aside could not be constitutionally sanctioned."

110. See to similar effect the judgment of the High Court (McDonald J.) in *Re Halpin (A Debtor)* [2019] IEHC 87, [79].

111. The allegation of material non-disclosure in the present case centres largely on the manner in which the section of the prescribed financial statement headed "Liabilities – Detail" had been completed on behalf of the Debtor. The form is prescribed under the 2014 Regulations.

112. Relevantly, there are a series of "fields" to be completed in respect of the "Principal Private Residence Lender" as follows.

> 1.1 Account number
> 1.2 Account name
> 1.3 Contact details (note 2)
> 1.4 Current monthly payment to

1.5 Monthly repayments – actual
1.6 Remaining term (months)
1.7 Balance outstanding
1.8 Is the liability joint and several?
1.9 If no, state % liability
1.10 Amount of debtor's liability (derived field)
1.11 Restructured? If yes, please provide details
1.12 Current interest rate
1.13 Comment

113. The prescribed financial statement filed in advance of the June 2019 application for a protective certificate identifies an outstanding balance on the Mortgage of €1,250,457, and a current market value of the dwelling house of €800,000. It also recites monthly repayments of €3,777.

114. The complaint made by Tanager is that there is no reference at all to the fact that proceedings had issued and an order for possession had been granted on consent by the Circuit Court in March 2019. (As it happens, the non-disclosure extended to a factor which might be thought to be in *favour* of the Debtor, i.e. the agreement on the part of Tanager to "write down" the balance over and above the proceeds of any sale).

115. As appears from the earlier summary of the content of a prescribed financial statement as *per* the 2014 Regulations, there is no express requirement upon a debtor to provide information in respect of the existence of legal proceedings, judgments or orders relating to his or her indebtedness. It is submitted on behalf of Tanager, however, that this information should have been included as part of the "comment" field. Attention is drawn to the fact that, within the same prescribed financial statement, the Debtor disclosed the existence of a judgment mortgage in favour of Bank of Ireland. The court is invited to draw the inference from this that the Debtor understood that the existence of court orders and judgments should be disclosed.

Findings of the court on alleged material non-disclosure

116. For non-disclosure to be material, it must be capable of influencing the determination of the *ex parte* application. The principal matter to be considered by the specialist judge of the Circuit Court in determining the application in this case was whether the eligibility criteria under Section 91 had been met. It is accepted by Tanager that these criteria were met. In particular, it is accepted that the Debtor is "insolvent" and that there is a "secured debt" (as defined).

117. Had the existence of the order for possession been disclosed, therefore, this could not have affected the outcome of the application for the protective certificate. As explained in detail at page 22 *et seq.* above, a personal insolvency arrangement can prevail over existing judgments and orders. The existence of the order for possession *per se* is not, therefore, fatal to the Debtor's application for a protective certificate, nor, ultimately, to his application for the approval of a personal insolvency arrangement pursuant to Section 115A. Strictly speaking, the existence or otherwise of a judgment or order is not a

relevant consideration for the purposes of an application for a protective certificate. In the circumstances, it cannot be said that there had been material non-disclosure.

118. It would be disproportionate in the absence of material non-disclosure to accede to Tanager's application for leave to execute the order for possession. The omission to disclose the existence of the order for possession did not result in the Debtor obtaining a benefit, namely the protective certificate, to which he was not otherwise properly entitled. It is common case that the Debtor does, in fact, meet all of the eligibility criteria under Section 91. The only purpose which granting leave to execute would fulfil would be to sanction or punish the Debtor for his omission.

119. For reasons similar to those identified by the High Court (Baker J.) in *Re McManus (A Debtor)* [2016] IEHC 279 (cited at paragraph 66 above), a court should be slow to punish a debtor in this way. This reflects the public interest, as identified by the Oireachtas under the personal insolvency legislation, in providing for "rational and orderly" debt resolution, and the retention where reasonably practicable of the family home. It also reflects the impact on innocent third parties, including, in this case, the Debtor's four minor children, and other creditors who might fare better in a personal insolvency arrangement than in bankruptcy.

120. To grant leave to execute would result in a potential windfall to Tanager which is not justified by the conduct of the Debtor. It is obvious from the approach adopted by Tanager to these proceedings that it has a preference to realise its investment by way of an immediate sale of the mortgaged property rather than to recoup its investment over time by way of the receipt of monthly repayments in accordance with an approved personal insolvency arrangement. There may well be good commercial reasons which would justify such an approach. However, it is not necessarily the result envisaged by the insolvency legislation. The Personal Insolvency Act, as amended in 2015, put in place a legislative regime which allows for the possibility of a debtor seeking court approval of a personal insolvency arrangement which would facilitate the retention of his or her principal private residence. It is not a matter for this court to determine in the context of the appeal under Section 96(3) whether, in the particular circumstances of this case, such an arrangement is justified. The function of this court, in hearing this appeal, is confined to the narrow question of determining whether the Debtor is entitled to the benefit of the protective certificate pending the determination of the insolvency proceedings.

121. For the reasons outlined, I am satisfied that the omission of any reference to the order for possession does not disentitle the Debtor to the interim protection provided by the protective certificate. Nor does it disentitle him to the opportunity to have a determination on the merits of his application under Section 115A, which application is currently pending before the Circuit Court. Tanager will have an opportunity, if it so wishes, to object to the proposed personal insolvency arrangement. Its grounds of objection can, in principle, include complaint as to the manner in which the Debtor dealt with his obligations in accordance with Section 115A(10).

(ii). Jurisdictional issues

122. Given my finding that the Debtor was not culpable of material non-disclosure, it is not, strictly speaking, necessary for the purposes of this judgment to address the jurisdictional issues which arise. For the sake of completeness, however, I should record my agreement with the approach adopted by the High Court in *Re Nugent (A Debtor)* [2016] IEHC 127, [22]. More specifically, I agree that the High Court would have an inherent jurisdiction to set aside a protective certificate which had been granted on the basis of material non-disclosure. Alternatively, the court could exercise its statutory jurisdiction under Section 96(3) to allow a particular creditor to enforce its security notwithstanding the existence of the protective certificate. I reiterate that the non-disclosure complained of on the facts of the present case comes nowhere close to justifying such a course of action.

BREACH OF SECTION 118

123. Notwithstanding my finding that there has been no *material* non-disclosure, it is nevertheless a cause of concern that the Debtor did not disclose the existence of the Circuit Court proceedings and the order for possession to his personal insolvency practitioner *prior* to the making of the application for the protective certificate. These matters should have been brought to the express attention of the practitioner. The failure to do so represents a breach of the Debtor's obligations under Section 118. This section, it will be recalled, imposes an obligation to disclose to a PIP "all other circumstances that are reasonably likely to have a bearing on the ability of the debtor to make payments to his or her creditors". Had the Debtor disclosed this information to the PIP, then it seems almost inevitable that the PIP would have ensured that reference to same was included as part of the prescribed financial statement submitted in support of the application for the protective certificate.

124. The appeal before me is confined to the question of whether the protective certificate should, in effect, be set at naught by granting Tanager leave to execute the order for possession. The observation below is therefore strictly by way of *obiter dicta*.

125. It would be unsatisfactory if there were to be no adverse consequences for a breach of Section 118. Yet an order setting aside a protective certificate would be disproportionate in the case of a non-disclosure which is not material. Perhaps a breach might be addressed by way of an appropriate costs order. It might also be something which the court might consider in the exercise of its discretion under Section 115A.

PROCEDURAL COMPLEXITY

126. Finally, I wish to say something as to the procedures adopted by the parties in the present case. As appears from the procedural history set out at the beginning of this judgment, Tanager's complaint as to the manner in which the application for a protective certificate was made has spawned a series of applications and appeals. The upshot of this is that the complaint will, ultimately, have been considered by two judges at the Circuit Court level and two judges at the High Court level.

127. Matters were further complicated by the refusal of the Circuit Court (Judge Linnane) to grant a stay on her order of August 2019, and the subsequent refusal of Tanager to

consent to a stay before the High Court. This resulted in the necessity of an application to the High Court for a stay during the August vacation sittings. This could have been avoided had Tanager taken a more reasonable approach to the application for a stay. It is difficult to understand how there could have been any valid objection to a stay in circumstances where (i) there were self-evidently good grounds of appeal; (ii) the Debtor continued to make monthly repayments pursuant to the Mortgage; and (iii) the related appeal had an early listing (14 October 2019), and the present appeal could have been adjourned to that date to be case managed in the High Court Personal Insolvency List.

128. It is inconsistent with the objectives of the insolvency legislation that what was, in truth, a net point of law, should give rise to such procedural complexity. As explained by the High Court (Baker J.) in *Re O'Connors (A Debtor)* [2015] IEHC 320; [2015] 3 I.R. 434, it is implicit in the legislative scheme that it be cost effective and expeditious. What occurred in this case is the antithesis of that.

CONCLUSION AND PROPOSED ORDER

129. The appeal against the judgment and order of the Circuit Court of 15 August 2019 is allowed in full. The order granting leave to execute the order for possession of 8 March 2019 will be set aside. The protective certificate continues in force.

130. I will hear counsel as to the appropriate costs order to be made.