[2020] IEHC 103

THE HIGH COURT

Record No. H:IS:HC:2016:000039

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

JUDGMENT of Mr. Justice Denis McDonald delivered on 2 March, 2020

1. In a judgment delivered by me on 20th August, 2019 in these proceedings and in interconnected proceedings involving Mr. McNamara's wife, I set out my conclusions in relation to the bulk of the issues which arise for consideration in these cases. However, I was unable to reach a final determination in relation to three grounds of objection which had been raised by Tanager DAC ("*Tanager*") a secured creditor, holding a mortgage over the family home of Mr. and Ms. McNamara (which is also their principal private residence within the meaning of s. 2 of the Personal Insolvency Act, 2012). The grounds of objection in question were:-

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

   (b) 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;

   (c) That the requirements of s.91 (1) (e) of the 2012 Act (dealing with the making of a complete and accurate prescribed financial statement by a debtor) have not been satisfied;

2. As noted in para. 87 of my judgment of August 2019, there is a common thread underpinning each of these grounds of objection. In support of each of these grounds of objection, Tanager drew attention to the discrepancies between (a) what was stated in a Standard Financial Statement ("*SFS*") completed by Mr. McNamara in January 2016 at the request of Tanager and (b) the information provided in his Prescribed Financial Statement ("*PFS*") completed in October 2016 in support of his application for a protective certificate under the 2012 Act. In the SFS completed in January 2016, it was stated that Mr. McNamara had a half share in his parents' house along with his sister. Opposite that entry a "*current value*" of €500,000 was given. In addition, the SFS showed a monthly rental income of €800 which represented Mr. McNamara's share of the rent in respect of his parents' home. However, when he came to make a PFS for the purposes of seeking relief under the 2012-2015 Acts, he placed a value of €182,500 on his interest in his parents' home (although this was stated to be an approximate value). In addition, on p. 4 of the PFS (dealing with income) it was stated that Mr. McNamara had no income from rent.

3. The inconsistencies between the SFS and the PFS fed into each of the three grounds of objection mentioned in para. 1 above. In the first place, Tanager argued that the SFS demonstrated that there were assets available to Mr. McNamara that were more extensive than the assets which he had disclosed in his PFS and that this meant that the

full means of Mr. McNamara to discharge the debts owed by him to creditors are not brought to bear under the proposed arrangement. Counsel for Tanager submitted that this gave rise to obvious unfairness to Tanager against a backdrop where Tanager would suffer such a substantial write-down of the debt due to it under the proposed arrangement. If Tanager was correct on either of these points, the arrangement could not be confirmed by the court. Under s. 115A (9) (f), the court must be satisfied that the arrangement is not unfairly prejudicial to the interests of a party such as Tanager. Secondly, under s. 115A (9) (ii), the court must be satisfied that the arrangement will enable the creditors to recover the debts due to them to the extent that the means of the debtor permits. Thirdly, under s.115A (8) (a) (i), the court must be satisfied that the requirements of s. 91 have been complied with. Under s. 91 (1) (e) there is a requirement that a debtor must make a complete and accurate PFS. In light of the apparent discrepancies between the SFS and the PFS, Tanager argued that this statutory requirement had not been satisfied in this case.

4. As a consequence of the discrepancy between the information contained in the SFS and the PFS (insofar as the value of the inheritance and insofar as the rental income were both concerned), I formed the view (as set out in my August 2019 judgment) that Mr. McNamara was under an obligation to explain himself. On the face of it, the discrepancy raised an issue as to whether the full means of Mr. McNamara and Ms. McNamara had been brought to bear for the benefit of their creditors under the proposed arrangement. I also expressed the view in para. 94 of my judgment that it is vitally important, in proceedings under the 2012-2015 Acts, that debtors proposing to seek relief under the Acts should comprehensively and accurately disclose all of their assets and liabilities in their PFS. That is a crucial statutory requirement and it is fair to say that the proper functioning of the system depends on full disclosure being made.

5. In those circumstances, I adjourned the matter to allow Mr. McNamara to furnish a further affidavit explaining the discrepancy between the SFS on the one hand and the PFS on the other.

The new affidavit

6. On 23rd September, 2019 Mr. McNamara swore a further affidavit. In that affidavit he exhibited, for the first time, his late father's will, the grant of probate issued to his sister on 23rd August, 2017 and the Inland Revenue affidavit sworn by his sister in support of the application for the grant of probate and also disclosing the assets of the deceased. Insofar as the value of his own inheritance is concerned, he explained that, in the SFS, he had mistakenly shown the full value of the property as distinct from his half share under his father's will. He also explained that he did not deduct legal or other expenses in relation to the realisation of the property. He also did not take account of the specific legacies made by his late father in his will which take priority over the residuary gift to himself and his sister.

7. When it came to making the PFS, Mr. McNamara relied on a valuation made by Gavigan Auctioneers and Valuers which apparently placed a value of €700,000 on the property of his late father. From that sum, a deduction of €35,000 was made to reflect an estimate

of sales costs and legal costs at 5%. In addition, the specific legacies under the will (which included not only bequests to the grandchildren of Mr. McNamara's father but also two gifts to charity) had to be taken into account. These amounted in total to €300,000. This left a net value remaining for Mr. McNamara and the other residuary legatee, his sister, of €365,000. Mr. McNamara's 50% share of €365,000 was therefore correctly represented at €182,500.00 in his PFS.

8. Mr. McNamara also explains in his affidavit that, since the PFS was prepared in October, 2016, there has been an increase in value of the property held within his father's estate. According to the Inland Revenue affidavit filed in respect of his father's estate, the gross value is now of the order of €800,237.00 and the net value is of the order of €783,153.00. When the value of the specific legacies is taken into the account, there will be an estimated balance of €483,153.00 (before payment of legal costs and other expenses) available to Mr. McNamara and his sister as the residuary legatees. On the assumption that costs and expenses will be of the order of €40,000, this would leave a balance for distribution to Mr. McNamara and his sister of €443,153.00 of which 50% (€221,576.50) would fall to be distributed to Mr. McNamara. These values are all estimated. Although Mr. McNamara's father died in 2009 and a grant of probate issued in 2017, no steps have yet been taken to realise the property the subject of the estate. At para. 29 of his affidavit Mr. McNamara says:-

> *"29. I say … that the full net realisable value from the inherited properties is going to my creditors. I say and confirm that 100% of my inheritance is going to creditors…".*

9. In his affidavit, Mr. McNamara also deals with the rent. He explains that when he met Mr. James Green, the personal insolvency practitioner in this case, he disclosed both his expected inheritance and the rent to him and also explained that the property of his father would have to be sold in the course of administration of his late father's estate. Although not so stated in Mr. McNamara's affidavit, it is obvious that the property will have to be sold if the specific legacies are to be paid and the balance distributed in accordance with his father's wishes to Mr. McNamara and his sister. In circumstances where the property is to be sold, Mr. McNamara says that the rent could not be regarded as a stream of income that was available to service debt on a long term basis or to form part of any arrangement. For that reason, it was not shown in the PFS as ongoing income. Mr. McNamara also acknowledges in his affidavit that the correct legal position is that the rent forms part of his later father's estate and that it ought to have been paid to the estate rather than to him personally. In paras. 11-12 of this affidavit, Mr. McNamara says: -

> *"11. I say … the rent was not an earned income and was more correctly part of my inheritance. …*
>
> *12. With this in mind, the rent formed part of the estate and would ultimately have to be accounted for as part of my inheritance …".*

It is important to keep in mind that, as outlined in my judgment of August, 2019, the arrangement proposed by the practitioner in this case on behalf of Mr. McNamara and Ms. McNamara always envisaged that the inheritance due to Mr. McNamara from his late father's estate would be used to make payments to their creditors. This was made clear in para. 3.2.1 of the proposed arrangement in each case where the inheritance lump sum was estimated at €182,500. This sum was also used in appendix 5 (which sets out a comparison of the estimated outcome for creditors in a bankruptcy, on the one hand, and under the proposed arrangements, on the other).

10. In addition to the estimated contribution of €221,576.50 to the arrangement representing Mr. McNamara's share of his father's estate, Mr. McNamara has now made clear that he will also make available a further sum to represent rent that should have accrued to the benefit of the estate (and thereby to the benefit of the proposed arrangement which, as noted above, is to be funded in part by the inheritance from Mr. McNamara's father's estate). In para. 13 of his affidavit, Mr. McNamara says that a sum of €28,800.00 in respect of rent is now held by Devaney & Partners, the solicitors acting on behalf of his sister in administering the estate. He says (plainly incorrectly) that this equates to 36 months' rent from the date of the SFS to the date of swearing of his affidavit in September 2019. That, clearly, is not correct given that the SFS was completed in January 2016 which is more than 36 months prior to the swearing of his affidavit in September 2019. The correct position was subsequently clarified and is described in para. 11 below.

11. Following the delivery of Mr. McNamara's affidavit, a number of queries were raised by the solicitors acting on behalf of Tanager. Regrettably, there was significant delay in responding to those queries. The questions principally related to the rent. The solicitors for Tanager wished to know when the solicitors for the estate of the late Mr. McNamara received the sum of €28,800, the identity of the person who made the payment and, if made by Mr. McNamara, the bank account from which the payment was made. In addition, the solicitors queried how it could be said that the sum of €28,800 represented the rent from the date of the SFS in January 2016. Ultimately, it was confirmed by the solicitors for the practitioner in a letter dated 31st October, 2019 that the sum of €28,800 represented the accrual of rent from the date of the protective certificate in October 2016 to September 2019. The letter also stated:

> *"... the monies or the rental monies accrued from the tenants for the benefit of the Estate, and were given into the Devaney & Partners account by family members (noting that Mr. McNamara's sister and family are ... beneficiaries).*
>
> *[The sum of €28,800 was] paid into the solicitor's account (for the Estate) from Mrs. McNamara's account (and it was put into Mrs. McNamara's account by family members ... Mrs. McNamara received the monies into her account on the 23rd September, 2019 ...*
>
> *As you will have noted, this rental income (... being an income into the Estate rather than to Mr. McNamara) was disclosed to Tanager in the SFS and there has*

been no attempt to hide it. Mr. McNamara's share of the Estate is fully disclosed in the PFS. The PIA shows the full share of the Estate being taken for the benefit of creditors. The … issue has arisen by virtue of the passage of time during the 115A process where no party expected the process to take this long … If the PIA had been approved at the Creditor's Meeting there would have been no issue whatsoever and no rent due to the sale of the property as per the terms of the PIA in effect, the issue was created by delay. However the creditor (in particular Tanager) will benefit from this delay as the share of the Estate that is being contributed into the PIA has now increased in value (both property value and accrued rent value). The full value of Mr. McNamara's share of the rent and the Estate is being taken for the benefit of the PIA …".

12. The explanations offered by the solicitors for the practitioner prompted an affidavit to be sworn on behalf of Tanager by its solicitor, Mr. Peter Bredin which was sworn on 22nd November, 2019. In that affidavit, Mr. Bredin suggested (with some justification) that it is difficult to understand why certain unidentified family members paid the rent to Ms. McNamara in the first instance who then paid the money in question to the solicitors acting in relation to the estate of Mr. McNamara's father. In response, Mr. McNamara swore a further affidavit on 4th December, 2019. In that affidavit, Mr. McNamara reiterated what he had said in his previous affidavit that he had, at the outset, disclosed the receipt of rent to the practitioner. At that time, it was envisaged that the process under the 2012-2015 Acts would be completed within a matter of months. It was never anticipated that the process would last as long as it has. Mr. McNamara is correct. This case has taken an unusually long time to be finalised. In this context, it should be recalled that, as noted in para. 10 of my judgment of August 2019, the hearing of the practitioner's application under s. 115A (9) was delayed for a significant period for a number of reasons. In the first place, in light of an objection raised by Tanager, it was necessary to await the outcome of the issue as to the proper party to prosecute a s. 115A application. That issue was determined by Baker J. in *Meeley (a debtor)* [2019] 1 I.R. 235 in her judgment delivered in February 2018. Thereafter, in accordance with that judgment, in June 2018, the practitioner brought an application to amend the notice of motion to disclose the correct moving party. That application was contested by Tanager and ultimately a hearing was held which resulted in a judgment given by me in December 2018 in which I decided that the practitioner should be allowed to amend the notices of motion. Thereafter, the application under s. 115A was adjourned on a number of occasions, at the request of Tanager, in order to give Tanager the opportunity to file a further affidavit in opposition to the substantive application. Ultimately, when no affidavit was forthcoming, I directed that the hearing of the s. 115A (9) application should proceed in the absence of any further affidavit from Tanager. The substantive hearing took place on 27th May, 2019. Judgment was given on 20th August, 2019 following which further affidavits were exchanged (as detailed in this judgment) and two further hearings took place on 9th December, 2019 and 17th January, 2020.

13. In para. 4 of his affidavit sworn on 4th December, 2019, Mr. McNamara provides the following further explanation in relation to the rent:-

"4. the portion of the rental income received from the letting of my late father's house, while it was being received, was utilised by us for basic living expenses and nothing more. While we are no longer in receipt of that rental income, I have supplemented my income as a result of having concluded an arrangement with funeral service providers and I am now playing the piano at funerals and in recent times, I am playing at least one funeral per week, for which I receive an average €150.00-200.00, which at a minimum of four funerals per month, amounts to the €800.00 figure which we had been receiving from the rent, and possibly even more. When (sic) Objecting Creditor made an issue of the rental income in recent times, to reimburse the estate the value rent (sic) received during the period of delay, we asked for and we received a gift from family members to allow us to reconcile the account and credit back to the estate account, the necessary amount of money".

14. A number of observations must be made in light of this averment by Mr. McNamara:-

(a) In the first place, it is clear from what is said here that Mr. McNamara and his family were in fact making use of the rental income for the purposes of their basic living expenses notwithstanding that the income in question was never factored into the estimate of monthly income and expenditure set out in appendix 2 to the proposed arrangement. The income shown in that appendix is made up exclusively of the "*self-employed*" income of Mr. and Mrs. McNamara together with additional pension income in respect of Ms. McNamara. Although not expressly stated by Mr. McNamara, an implication arises that this must have been the position going back to very soon after his father's death in 2009. As counsel for Tanager observed in the course of the hearing which took place on 9th December, 2019, this would suggest that a figure in excess of €60,000 has been utilised by Mr. McNamara over the course of the period between 2009 and 2016 when the protective certificate was issued in the present case.

(b) In circumstances where the McNamara household required to use an additional sum of €800 per month (which is not factored into the income and expenditure calculation set out in appendix 2 to the arrangement) the question arises as to how the arrangement can be said to be sustainable in circumstances where that income will not be available into the future, once the relevant property is sold during the course of the completion of the administration of the estate of Mr. McNamara's late father. However, it is clear from what is said in para. 4 of the affidavit sworn on 4th December, 2019 that Mr. McNamara has now supplemented his income by providing music at funeral services. That will provide an additional source of income for Mr. McNamara over and above the income disclosed in appendix 2 to the arrangement. The current level of earnings from that source of income appears to equate in round terms with the level of income previously received from the rents. To the extent that his income from funerals or other sources exceeds the level of income disclosed in the proposed arrangement, that income will, in the event that the arrangement is confirmed by the court under s. 115A (9), fall to be dealt with in accordance with Clause 12 of Part V of the standard terms of the arrangement

under which 50% of the additional income over and above €100 per month will be distributed to the unsecured creditors of Mr. McNamara. In that way, the unsecured creditors will benefit from the proposed arrangement. Likewise, Tanager will benefit to the extent that it shares in the dividend to be paid to the unsecured creditors. In accordance with Clause 12 of the standard terms, this additional payment to creditors will be available for the duration of the arrangement.

(c) In my view, the fact that the McNamara household had been using the rental income in order to discharge basic living expenses is a fact that should have been disclosed at an early stage in the s. 115A application. It was a material fact in the context of the sustainability of the arrangement and also in the context of the extent of the income necessary to fund the day to day living expenses of the McNamara household. However, it is clear from Mr. McNamara's affidavit of September 2019 that he disclosed the receipt of rent to the practitioner. The non-disclosure of the rent to the court is therefore primarily a matter which rests with the practitioner rather than Mr. McNamara personally. It is a matter which should have been brought to the attention both of the court and of Tanager by the practitioner. It is clear from the judgment of Baker J. in James Nugent [2016] IEHC 127 that a practitioner has a duty of frankness and full disclosure. At para. 31 of her judgment in that case, Baker J. said:-

> *"All interactions that the debtor has with the Insolvency Service of Ireland, on the one hand, and the court, on the other hand are through the PIP, and this puts the PIP in a unique position of responsibility to the Insolvency Service ..., the court, the creditors and of course to the debtor. That this imports a duty of frankness and full disclosure seems to me to be unequivocal, and while the PIP is not an officer of the court in a true sense, he is a professional engaged with a process in respect of which the court expects a full, professional and objective approach. The PIP may, but does not always engage a solicitor, but the obligation of frankness must be one which the PIP bears personally by virtue of his unique role at the centre of the process, and as the person uniquely with standing to bring application to the court."*

I will consider, further below, what consequences flow from the fact that the use of the rental money by Mr. McNamara was not disclosed in the present case.

15. In para. 5 of his affidavit, Mr. McNamara explains that the sum of €28,800 mentioned in para. 10 above has been paid to the solicitors acting in the estate of his late father from funds received from family members who have provided it by way of a gift on the express agreement that they would not be identified in the course of these proceedings. Therefore, it appears to be the case that the sum of €28,800 has been collected from family members with a view to replacing an equivalent sum previously collected from tenants and which had been utilised by Mr. McNamara to discharge living expenses. In para. 6 of his affidavit, Mr. McNamara makes clear that this sum of €28,800 will be made

available in full to the creditors of Mr. McNamara and Ms. McNamara and will therefore increase the rate of dividend to be paid to the creditors. In the course of the hearing on 9th December, 2019, counsel for Tanager suggested that these arrangements are in the nature of loans and that, as a consequence, they have increased the liabilities of Mr. McNamara. Counsel argued that, accordingly, a significant question mark now arises in relation to the sustainability of the arrangement. In my view, this argument on the part of counsel for Tanager is mistaken. It is clear from Mr. McNamara's affidavit that the moneys advanced by family members were advanced by way of gift. They are not a loan. Accordingly, Mr. McNamara's liabilities are not increased as a consequence – save to the extent that there may potentially be a tax liability in respect of this gift. This is an issue which I address in para. 20. As discussed in para. 17 (c) below, counsel for Tanager, at the hearing on 9th December, 2019, also argued that Mr. McNamara must now owe monies to the estate of his later father as a consequence of the drawdown of the rent in the period between 2009 and 2016 which, as noted in para. 12 (a) above, counsel suggested was of the order of €60,000. That is a separate issue which I address in para. 17 (c) below.

16. In para. 7 of his affidavit Mr. McNamara very helpfully exhibits an updated set of tables which shows the level of dividend that will now be paid as a consequence of the provision of the sum of €28,800.00 and the expected enhanced value of the legacy to be received by Mr. McNamara from his father's estate. This shows that the dividend to the unsecured creditors is likely to increase from 5 cent in the euro to 7 cent in the euro. This compares to a dividend of 3 cent in the euro in the event of the bankruptcy of Mr. McNamara and a dividend of nil in the event of the bankruptcy of Ms. McNamara. These are obviously estimated figures in light of the fact that, until the property of Mr. McNamara's late father is sold, the ultimate distribution to Mr. McNamara from his father's estate cannot be quantified with complete precision. What is clear, however, is that Mr. McNamara has committed to make the entire of the inheritance together with the sum of €28,000.00 available to the practitioner in order to fund the dividend to the unsecured creditors and the payment of €100,000 to Tanager in accordance with the terms of the arrangement. What the updated tables show is that, having regard to the rise in property prices in the intervening period, there will be an increase in the dividend payable over and above that envisaged at the time the arrangement was first proposed.

17. In the course of the hearing on 9th December, 2019, counsel for the practitioner submitted that the affidavits of Mr. McNamara satisfactorily explain the discrepancy which arose as between the SFS and the PFS. He therefore submitted that the court was now in a position to reach a determination under s. 115A (9) and he submitted that it was appropriate, in all of the circumstances, to make orders confirming the coming into effect of the proposed arrangement both in this case and in the interlocking proceedings involving Ms. McNamara. However, counsel for Tanager argued to the contrary. He made the following submissions:-

(a) In the first place, he argued that it was artificial and arbitrary to take the date of the protective certificate as the date from which the rental payments would be

applied for the benefit of the creditors. Counsel argued that the figure of €28,800 was an underestimate of the rents received by Mr. McNamara. He argued that it was clear that a sum in excess of €60,000 had already been applied prior to the date of the protective certificate by Mr. McNamara going back to the date of death of his father;

(b) Counsel also argued that the affidavits sworn by Mr. McNamara were very vague and lacking in detail. He suggested that they raised more questions than answers;

(c) Counsel for Tanager placed very significant emphasis upon the fact that, on the basis of what is said in these affidavits, Mr. McNamara must now owe the estate of his late father a sum in excess of €60,000 in respect of rental monies wrongly drawn down and spent by him personally. Counsel argued that this debt to the estate means that the proposed arrangement will not return Mr. McNamara to solvency since he will be left with a debt to his father's estate which is not addressed in the proposed arrangement. In order to address this issue, I adjourned the hearing for a period of one week in order to see whether the estate would be prepared to confirm in writing that it will not seek repayment of any rental monies drawn down by Mr. McNamara personally. Such a confirmation was duly received from the solicitors acting on behalf of the estate. However, following receipt of this letter, counsel for Tanager sought a further adjournment of the matter and, in the course of that adjournment, further queries were raised by Tanager which were addressed in a supplemental affidavit sworn by Mr. McNamara on 15th January, 2020. The issues raised by Tanager were the subject of a further hearing which took place on 17th January, 2020 (and which is addressed by me in para. 20 below).

(d) Counsel also criticised the fact that the family members who provided the gift of €28,800 were not identified. I am not sure, however, that this is material. What is clear is that the sum of €28,800 has been repaid to the estate and it will now form part of the assets of the estate thus swelling the value of Mr. McNamara's share in the residuary estate. Moreover, in the course of the subsequent hearing which took place on 17th January, 2020, I was informed by counsel that the names of the donors had been provided to Tanager in advance of that hearing.

(e) Counsel for Tanager further suggested that there was a clear breach of s. 118 of the 2012 Act on the basis that there had been a failure by Mr. McNamara to disclose the receipt of rental monies by him and the use of those monies. He also suggested that the monies drawn down by Mr. McNamara were a "*misallocation of funds*" of the estate. However, it seems to me that it is not necessary to spend time on the allegation that funds of the estate have been "*misallocated*". It is clear that the estate is not holding Mr. McNamara liable to repay these monies. On the other hand, the issue as to the receipt of rental monies is a matter which is relevant to the court's consideration of the application under s. 115A and is a matter which I address in more detail below. Moreover, I must bear in mind that

the only person adversely affected by the receipt of rents is Mr. McNamara's sister as the co-residuary legatee under their father's will. She is also the person responsible for the administration of her late father's estate. Given the terms of the letter from Devaney & Partners, it appears to be clear that Mr. McNamara's sister makes no complaint about the receipt of rent by him in the past.

18. Subsequent to the hearing on 9th December, 2019 and subsequent to receipt of the letter from Devaney & Partners (the solicitors acting in the administration of Mr. McNamara's late father's estate) further queries were raised in correspondence by the solicitors acting on behalf of Tanager in a letter dated 18th December, 2019. A total of eight queries were raised as follows:-

(a) In the first place, Mr. McNamara was asked to confirm the amount of rent received by him from the date of his father's death up to December, 2019;

(b) Secondly, Mr. McNamara was asked to confirm the precise amount of rent received by him prior to the date of the protective certificate;

(c) Thirdly, Mr. McNamara was asked to provide copies of the rent book for the property from the date of his father's death up to December 2019;

(d) Fourthly, Mr. McNamara was asked to confirm how he proposed to deal with *"the tax liability now arising from the gifts he received to repay the estate the rent from the date of the protective certificate*;

(e) Mr. McNamara was also asked to provide an updated breakdown of the proposed inheritance;

(f) The practitioner was asked to confirm the basis on which he *"elected to account for the rent from the date of the protective certificate only"*; and

(g) The practitioner was also asked to confirm the basis upon which he "*deemed it appropriate for Mr. McNamara to repay the rent received by him from the estate subsequent to the date of the protective certificate but not before that date*".

(h) The letter also stated that it had come to the attention of the solicitors for Tanager that Mr. McNamara is in receipt of additional income from the provision of piano lessons in his home. The letter attached an article from the "*Irish Sun*" newspaper of 16th September, 2019 which made reference to Mr. McNamara giving piano lessons in his home in order to pay off his debts. On behalf of Tanager, the letter complained that: *"this additional income has not been disclosed to the Court and you might explain why that it is*".

19. The queries raised in the letter of 18th December, 2019 from Tanager solicitors led to a further affidavit being sworn by Mr. McNamara on 15th January, 2010 in which he provided the following responses:-

(a) In response to the first two questions in the letter of 18th December, 2019 with regard to the amount of rent received by Mr. McNamara from the date of his father's death up to December, 2019, Mr. McNamara explained that the advances in the *"initial years"* were lower and the rent received by him was approximately €500 per month. He said that this arose in circumstances were: *"there were some loans to pay off including burial and other expenses"* and that *"repairs were needed to the houses and costs incurred"*. He also said that some of the advances received were used to make payments to Tanager in respect of the mortgage loan over the family home. He also drew attention in the same affidavit to the fact that, in respect of the period prior to the protective certificate, the rent was disclosed in the SFS furnished to Tanager.

(b) With regard to the rent books, Mr. McNamara said that he did not have any rent book and that he had checked with his sister, the executrix, and she confirmed that no such book exists *"going back for the period sought"*;

(c) With regard to the question in relation to the tax liability which it was suggested would arise from the gift received from family members to repay the estate, Mr. McNamara responded as follows:-

> *"I say that no tax liability arises. I say that the gifts were split individually between myself and my wife and our four children from two family members, thus each portion (a sixth) was below the tax threshold";*

(d) With regard to the updated breakdown of the inheritance, Mr. McNamara said that its estimated value was now €250,377 made up as follows:-

  (i.) The rent: €28,800;
  (ii.) Sale of assets: €221,577;

(e) With regard to the query as to why the practitioner had elected to account for the rent from the date of the protected certificate only, Mr. McNamara said:-

> *"14. I say that the rent was disclosed and discussed with my PIP. I confirmed that this had been used for ordinary living expenses and also had been used to pay my mortgage to the Objector. I say that in all reality the biggest beneficiary of the rent pre PC was the Objector via mortgage payments. I say that this is clear as my earned income was very low and this rent enabled payments to be made to the Objector.*
>
> *15. I say that there was discussion with my PIP regarding the rent and it was always made clear to me that there would be a reconciliation of the rent (post the protective certificate) for the PIA and that this would go to creditors. I say that once the PIA was put to creditors the creditors essentially became the beneficiaries of the inheritance (to which they had no recourse or entitlement previously). Indeed, it is noted that despite my*

outlining the inheritance and rent to the Objector long before the PIA they never sought more information or this inheritance/rent to be given to them";

As noted in para. 9 above, it is important to keep in mind that, under the proposed arrangements, it was always envisaged that Mr. McNamara's inheritance from his father's estate would be made available to the creditors. It should also be recalled that, as outlined in Mr. McNamara's affidavit sworn in September 2019, he had been advised that the rent was properly an asset of the estate and should not therefore be regarded as part of his ongoing income. His averment that there would be a reconciliation of the rent for the purposes of the arrangement and that *"this would go to creditors*" must be seen in that context.

(f) With respect to the query as to the basis on which the practitioner deemed it appropriate for Mr. McNamara to repay the rent received from the estate subsequent to the date of the protective certificate (but not before), Mr. McNamara said:-

> *"I say that the rent received from the date of the PC was not 'repaid' but rather it was a part of the reconciliation where it was always intended that the rent from the date of the PC and under the PIA (until the asset was sold) would be retained for creditors and given under the PIA. I say that the issue in fact only arose due to the delay in the proceedings and if the PIA was immediately approved the rent would have flowed into the PIA".*

Again, this averment must be seen in the context of the terms of the proposed arrangement under which, as noted above, Mr. McNamara's inheritance from his father's estate was to be made available to creditors. It must also be seen in light of the evidence previously given by Mr. McNamara in his affidavit of September, 2019 in which he explained that he had been advised by the practitioner at the outset of the process that the rent was properly an asset of the estate rather than part of his own income. It could not therefore be taken into account as a source of income in the proposed arrangement. However, as part of the estate, it would fall to be applied, under the arrangement, in the same way as the remainder of the inheritance. The above averment that "*if the PIA was immediately approved the rent would have flowed into the PIA"* must be seen in that light.

(g) With regard to the question that was raised in relation to the provision of piano lessons, Mr. McNamara responded as follows:-

> *"18. I say that the generation of income from teaching piano is disclosed and is referenced in my income statement. I suspect that the newspapers picked up an advertisement on my Facebook page and perhaps jumped to the erroneous conclusion that this was a new activity. I have been giving piano lessons at my home (and in other locations) for years.*

> 19. *I say that I do my best to earn and generate income. I say that I am actively seeking work and I am fully aware of my obligation to disclose same and I am (and have been) fully advised as to this income (or a part thereof) being taken for the benefit of creditors. I say that as is clear from my PIA I am living on RLE for the duration of the PIA and I still have a number of dependent children. I am contributing to the economy and working as much as I can. I say that I provide piano lessons, play at funerals, and other works in the music/dance/entertainment/composing area".*

20. At the subsequent hearing which took place on 17th January, 2020 counsel for Tanager argued that the new affidavit sworn by Mr. McNamara on 15th January, 2020 contained "*inconsistency after inconsistency*" and that it was also inconsistent with previous affidavits sworn by Mr. McNamara. However, counsel did not identify the alleged inconsistencies in the affidavit. He did not elaborate on this submission in any way. The main issue raised by counsel for Tanager at that renewed hearing was that there would be a liability for capital acquisitions tax ("*CAT*") on the gift of €28,800 and that the arrangement did not take account of the tax liability that would arise and which would have to be discharged. Counsel argued that this additional tax liability must put the sustainability of the proposed arrangement in jeopardy. I indicated that I would require to be addressed in relation to the applicable statutory provisions and, in circumstances where counsel did not have them immediately available, the hearing was adjourned to the afternoon. At that point, both counsel were agreed that, having regard to the nature of the relationship between the donors and Mr. McNamara, Ms. McNamara and their children, the relevant exemption that applied in relation to the gift was that contained in s. 69 (2) of the Capital Acquisitions Tax Consolidation Act, 2003 ("*the 2003 Act*") under which the first €3,000 of the total taxable value of a gift taken by a donee in any relevant twelve month period is exempt from tax and is not taken into account in computing tax. If the €28,800 is notionally divided as between each member of the McNamara household (which is what Mr. McNamara contends occurred), each member of the household would be entitled to the benefit of the €3,000 threshold and no CAT would be payable. In contrast, if, as counsel for Tanager vigorously argued, the entire of the €28,800 should be treated as a gift to Mr. McNamara personally, then the total amount of tax that would be payable by Mr. McNamara would be €4,100. With due respect to counsel for Tanager, I do not believe that an additional liability to that extent (if there be such a liability) is on a scale that will put the sustainability of the arrangement at risk.

Assessment and conclusions

21. In my view, the discrepancy between the PFS and the SFS has been adequately explained. It is clear that when the SFS was prepared, Mr. McNamara did not accurately evaluate the extent of his inheritance and in particular did not take into account the specific legacies which take priority to his inheritance and the usual costs and expenses which arise in the administration of an estate and the realisation of assets in an estate. It is also clear that he mistakenly included the entire value of the real property in the estate rather than his own half share.

22. The issue in relation to the rent is more problematic. In my view, the fact that the rent was being received is a matter that ought have been disclosed in the PFS. However, it is understandable that the practitioner advised Mr. McNamara not to include it in the PFS in circumstances where it was envisaged, at the time, that the property would be disposed of within a relatively short time and these proceedings under the 2012-2015 Acts would likewise be resolved within a relatively brief period. Nonetheless, in my view, the practitioner should have advised Mr. McNamara to disclose the existence of the rental income in the PFS since it was income which was, as a matter of fact, being received into Mr. McNamara's hand at that time.

23. With regard to the suggestion by counsel for Tanager that Mr. McNamara has spent, prior to the date of the protective certificate, a sum of the order of €60,000 on day to day living expenses, a number of points arise. In the first place, if a sum of that order has in fact been spent, it primarily relates to a period prior to the protective certificate. I should make clear that, while the conduct of a debtor prior to the protective certificate is always a matter to which the court will have regard (particularly in the light of s. 115A (10) (a) of the 2012 Act) the expenditure in question took place over a period of five years and the evidence before the court is that it was used in the discharge of basic living expenses. There is no evidence that it was spent on luxuries. I do not believe, in the circumstances, that there is any basis to suggest that Mr. McNamara should, at this stage, be required to account to his creditors for this money. There is no evidence of any preference being given to any creditor and therefore I cannot identify any statutory basis on which I could require Mr. McNamara to account to his creditors in respect of this expenditure.

24. Secondly, the evidence given by Mr. McNamara on affidavit is that most of this money was spent in making repayments to Tanager. In this context, it is noteworthy that counsel for Tanager did not argue that the money should have been applied on repayments of the mortgage due to Tanager. Instead, at the hearing on 9th December, 2019, the focus of counsel's arguments in relation to this sum was that it now represented a debt due by Mr. McNamara to the estate of his late father such that it could not be said that the arrangement proposed here will restore Mr. McNamara to solvency. In my view, that issue is disposed of by the production of the letter from the solicitors for the estate confirming that no action will be taken against Mr. McNamara. Moreover, it seems to me that these monies were no more than prepayments of monies that would have become payable to Mr. McNamara in due course out of his father's estate.

25. Nor do I believe that I can treat the retention of this rental money by Mr. McNamara as a "*misallocation of funds*" on the part of Mr. McNamara going to his *bona fides* or probity. I have already explained that, in my view, this is a matter between Mr. McNamara and the estate. The letter from the solicitors acting for the estate seems to me to put paid to this issue. Moreover, as further noted above, the money was, in substance, a prepayment of money that will become payable to Mr. McNamara in due course. In this context, it is clear that Mr. McNamara will be entitled to a significant payment from his late father's estate in due course which will significantly exceed the total amount of the rental income drawn down by him.

26. I am significantly more troubled by the suggestion that there has been a failure on the part of Mr. McNamara to make full disclosure to the court as a consequence of the failure to disclose the existence of the rental payments. As noted above, this seems to me to be a matter that ought to have been disclosed to the court. In this regard, counsel for Tanager drew attention to the provisions of s. 118 of the 2012 Act. It is, of course, crucial in any process under the 2012-2015 Acts that the debtor concerned should make full disclosure of his or her means, income, assets, and liabilities. The entire process depends on full disclosure being made. This is reinforced by the provisions of s. 50 (3) of the 2012 Act which places a statutory obligation on a debtor to make full and honest disclosure of his or her financial affairs and to ensure that, to the best of his or her knowledge, the PFS is true, accurate and complete.

27. The principal obligations imposed on a debtor under s. 118 are as follows:-

(a) Under s. 118 (1) a debtor is under an obligation to act in good faith and, in his or her dealings with the practitioner, is under an obligation to make full disclosure to the practitioner of "*all of his or her assets, income and liabilities and of all of the circumstances that are reasonably likely to have a bearing on the ability of the debtor to make payments to his or her creditors*";

(b) Secondly, the debtor is under the obligation imposed by s. 118 (2) to cooperate fully in the process and to comply with any reasonable request from the practitioner to provide assistance, documents and information necessary for the prosecution of any application under the 2012 – 2015 Acts or for the purposes of carrying out the practitioner's functions. This includes an obligation to provide all appropriate business or other financial records;

(c) Thirdly, a debtor, in respect of whom an arrangement is in effect, is under an obligation to inform the practitioner of any material change in his or her circumstances (such as an increase or decrease in the level of assets, liabilities or income) which would affect the debtor's ability to make repayments under the arrangement.

28. It is noteworthy that the obligation imposed by s. 118 (1) to make full disclosure is owed by the debtor in the first instance to the practitioner. It is clear from the evidence before the court that the practitioner was informed of the fact that rental payments had been drawn down by Mr. McNamara from his late father's estate. Having disclosed the matter to the practitioner, it seems to me that, subject to what I say below in relation to Mr. McNamara's affidavit on February 2019, Mr. McNamara cannot be said to bear personal responsibility for the failure to disclose the existence of the rental payments in his PFS. For the reasons previously explained, I am of the view that the practitioner was under an obligation to make disclosure of the issue in relation to rent at an early stage in the present application under s. 115A. It is unsatisfactory that the issue should only be addressed after the discrepancy between the SFS and the PFS had been raised on affidavit by Tanager. It is even more unsatisfactory that it was not immediately addressed by the practitioner in an affidavit after the issue was first raised. In fact, the

issue was not properly addressed until after Mr. McNamara was given an opportunity to address the discrepancy following my judgment in August 2019.

29. The consequences of non-disclosure were addressed by Baker J. in the *Nugent* case at paras. 52-55 as follows:-

> *"52. It is clear from the judgment of Clarke J. in Bambrick v. Cobley that the court has a discretion, in cases where failure to disclose has been established, as to what order it will therefore make. The extent to which an applicant is culpable in respect of a failure to disclose is one factor and as he put it:*
>
> > *'a deliberate misleading of the Court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission.'*
>
> *Clarke J. identified that there could be intermediate cases, and one factor was the extent of materiality.*
>
> *53. I regard the non-disclosure in this case as being of matters which were material in the sense in which I have explained above. I also regard the failure of full and frank disclosure to be culpable, but in that I take my guidance from the judgment of Hogan J. in Re Belohn Limited … where he accepted that the non-disclosure had come about as a result of a bona fide error and oversight and that no personal blame should attach to the petitioners or their advisors, but regarded the 'objective relevance and materiality' of the matters not disclosed as being such that it would be unjust to allow the order to stand. Blameworthiness, then, does not have to be established as personal blameworthiness, and it is to be tested objectively in the light of the materiality of the matters not disclosed.*
>
> *54. I regard the PIP as blameworthy in that objective sense. Further, I am not convinced that there was a genuine oversight on the part of the PIP, which led him not to disclose the true picture with regard to the funding for the nursing home schemes and the difficulty that he perceived with the proof of debt lodged by Danske.*
>
> *55. I accept … that I have a discretion in the order I may make as a result of a finding that there has been material non-disclosure, and that this was culpable in the objective sense. That discretion must take into account a desire on the part of the court to express its displeasure at the failure, but also must bear in mind other circumstances which might be relevant."*

30. In the following paragraphs of her judgment, Baker J. analysed the circumstances that arose in that case and came to the conclusion that the non-disclosure there had been both material and culpable. In the course of so doing, Baker J. emphasised, at para. 59 of her judgment that:-

> *"… a PIP charged with the role of engaging with the court, the creditors and the … Insolvency Service … must do so with the greatest of solemnity and candour, and he is not in my view to see his role as being one of an advocate presenting in an adversarial system an argument in support of his client, but rather as a person who has responsibility and obligations to all elements of the system."*

31. In my view, those observations of Baker J. are of crucial importance. It is the duty of a practitioner, as an independent professional person performing a very important statutory function under the 2012-2015 Acts to disclose to the court all facts relevant to the issues which arise for consideration under an application under s. 115A or which may be material in any respect to the exercise by the court of its discretion under s. 115A. As Finlay Geoghegan J. observed (in the context of examinerships) in *Re: Camden Street Investments Ltd* [2014] IEHC 86 at para. 58:-

> *"The Court is required to make decisions, either at a petition hearing or subsequently on an application to confirm a scheme which may have an immediate and sometimes adverse impact on creditors, employees and others who are not present and not represented before the Court. The Court is absolutely dependent upon being able to rely upon petitioners, in the first instance, and thereafter, examiners and their professional advisors giving to the Court a full, frank and clear picture with all the objectively material or potentially material facts relevant to any decision which it is required to take, or to the exercise by it of its discretion."* (emphasis added).

While those observations of Finlay Geoghegan J. were made in the context of examinership, they apply, in my view, with equal force in the context of proceedings under the 2012-2015 Acts. As I have previously observed in my judgment in *Varvari* [2020] IEHC 23 at para. 52:-

> *"The court must be in a position to rely on practitioners, in the exercise of their independent professional role in the processes under the Acts, to place all material facts before the court (whether those facts tend to support or undermine the case for relief under the Acts) so that the court can make a fully informed decision, in the exercise of its jurisdiction under s. 115A (or any other relevant provision of the 2012-2015 Acts that may be in issue in any individual case)."*

32. However, it seems to me that the circumstances of this case are different. Although I am of the view that the practitioner ought to have disclosed what has now been disclosed in relation to the receipt of rent, it is clear that the practitioner (albeit erroneously) formed the view that the rent should not be disclosed in circumstances where it was not believed to be an ongoing source of income for Mr. McNamara and his family. The practitioner also believed that the rent was an asset of the estate pending distribution by the estate. In my view, it is understandable that these views were formed by the practitioner. He was absolutely correct in suggesting that the rent was an asset of the estate but, at the same time, it is clear that Mr. McNamara was, as a matter of fact, in receipt of the rent and therefore, the fact of its receipt should have been disclosed. I do, however, bear in mind

that it was never contemplated at the outset of the s. 115A application that it would take so long before it was ultimately heard.

33. On the other hand, I must also bear in mind that the issue as to the discrepancy between the PFS and the SFS was raised in the affidavit of Ms. O'Brien sworn on behalf of Tanager as early as May 2017 and there was, in my view, an obligation on the part of the practitioner to deal with the issue in his replying affidavit of 13th June, 2018. Surprisingly, the discrepancy between the PFS and the SFS in relation to the receipt of rent was not addressed by the practitioner in that affidavit. The matter was, however, addressed very briefly and incompletely in the affidavit of Mr. McNamara delivered in February 2019 where he said very perfunctorily that the PFS was true and accurate and that "*no actual discrepancy or incorrectness has been identified by the Objector*". Had the issue in relation to rent and in relation to the discrepancies between the PFS and the SFS been appropriately addressed by the practitioner and by Mr. McNamara in the response to Ms. O'Brien's affidavit, it would not have been necessary for the exchange of affidavits subsequent to the delivery of judgment by me in August 2019 or to have two further hearings before the court in December 2019 and January 2020.

34. In my view, the approach taken by the practitioner and by Mr. McNamara in response to Ms. O'Brien's affidavit does not reflect well on either of them. Nonetheless, I do not believe that it would be appropriate to dismiss the s. 115A application on this ground. In the first place, I am conscious that the principal issue raised by Ms. O'Brien in her affidavit in relation to the difference between the PFS, on the one hand, and the SFS, on the other, related to the value of the inheritance. The approach taken by the practitioner and by Mr. McNamara must be seen in that light. From their perspective, they believed that the figure set out in the PFS was in fact accurate for the reasons set out in para. 8 above. The averment made by Mr. McNamara in para. 18 of his affidavit sworn in February 2019 must be seen in that context.

35. Secondly, I bear in mind the considerations outlined in para. 9 above that the rent was not considered by the practitioner to form part of Mr. McNamara's income. Instead, it was considered to form part of the estate of Mr. McNamara's late father and it was envisaged that it would form part of the inheritance to be made available to creditors under the proposed arrangement. If there had not been a delay in these proceedings between 2016 and 2019, the rent would not have become a major issue. While that is not a complete answer to the failure to disclose the receipt of rent, it is a factor to be borne in mind.

36. Thirdly, in light of the evidence now before the court, I do not believe that the sustainability of the proposed arrangements is put in jeopardy by the fact that Mr. McNamara has previously used the rent in order to meet household expenses. Although the rent is no longer available to Mr. McNamara, it is clear from his affidavit sworn on 4th December, 2019 that he has been able to make up the difference by providing music at funeral services. Mr. McNamara will therefore have sufficient funds to discharge the family's ordinary household expenses even though he will no longer have access to the

proceeds of the rents. In these circumstances, the termination of access to the rents will not, in my view, adversely affect Mr. McNamara's ability to discharge his household expenses and his ongoing obligations under the proposed arrangements and also under the mortgage over the family home.

37. Fourthly, the evidence in relation to the receipt of rent has now been put before the court. While, in my view, it should have been placed before the court at a much earlier time, it has nonetheless been disclosed in advance of any final determination of the issue. This is a significant point of distinction between this case and the facts considered by Baker J. in the *Nugent* case.

38. Fifthly, I am impressed by the way in which, through the efforts of family members of Mr. and Ms. McNamara, additional funds have been provided in the sum of €28,800 which will now be available for distribution to the unsecured creditors by means of an enhanced dividend over and above the level of dividend that was originally envisaged in the arrangement as first proposed. Having regard to all of those factors, it seems to me that it would not be appropriate, in this case, in the exercise of my discretion, to go so far as to refuse the application under s. 115A as a consequence of the failure to disclose the relevant information in relation to rents at an earlier stage in these proceedings.

Conclusion

39. For the reasons outlined in para. 21, it seems to me that the discrepancies have now been appropriately explained. Although, for the reasons outlined in para. 33 above, the approach taken by Mr. McNamara and more particularly by the practitioner (who is the person responsible for prosecuting the application under s. 115A) in their affidavits sworn in advance of the hearing in May 2019 was unsatisfactory, I have come to the conclusion (for the reasons outlined in paras. 34 – 38) that the unsatisfactory nature of this approach should not result in the dismissal of the application under s. 115A. Subject to any further submissions that may be made by the parties, there may possibly be costs consequences arising from the fact that these proceedings were unnecessarily prolonged as a consequence of the failure to disclose the true position in relation to rents (and to explain the approach that had been taken in relation to rents) in advance of the hearing which took place in May 2019. That said, any application for costs against the practitioner would have to surmount the significant hurdles identified in the judgment of Baker J. in *Meeley (a debtor*) [2019] 1 I.R. 235 and in my judgment in *Varvari (a debtor*) [2020] IEHC 23. I will hear the parties in due course in relation to costs.

40. With regard to the three grounds of objection noted in para. 1 above, it seems to me, in summary, that:-

(a) In the first place, the approach taken by Mr. McNamara in his PFS in relation to the value of his inheritance (other than in respect of the rent) was, in fact, correct. It is clear from a consideration of the will of his late father (which is now before the court), that Mr. McNamara's interest in his late father's estate is subject, in the first instance, to payment of the specific legacies. Mr McNamara was therefore correct to take the legacies into account in putting a value in his PFS on his expected

inheritance. He was also correct in taking account of the costs and expenses that would be incurred in the administration of his father's estate. It is well settled that all legacies are subject to the costs and expenses of the administration of the estate of the deceased. In such circumstances, it seems to me that the approach taken by Mr. McNamara in his PFS in relation to the value of his interest in his late father's estate was correct. In circumstances where the rent was not an asset of Mr. McNamara and formed no part of his income, it seems to me to be understandable that it was not included in his PFS. That said, for the reasons outlined above, in circumstances where Mr McNamara was, as a matter of fact, in receipt of rent at the time the PFS was sworn, I am of the view that it should have been disclosed in his PFS. To that extent, it might be said that the requirements of s. 91 (1) (e) of the 2012 Act have not been complied with in this case. However, I take the view, in the particular circumstances of this case, that there has been substantial compliance with the requirements of the subsection. In this context, having regard to the decision of the Supreme Court in *Monaghan UDC v Alf-a-Bet Productions Ltd* [1980] ILRM 60, it is well settled that where a statutory obligation has been substantially complied with, a failure to comply with the obligation to the letter will not constitute a breach of the obligation. In this case, it seems to me that not only was the failure to disclose the receipt of rent entirely understandable, it was also insubstantial in real terms given that the rent was not, at that time, an asset to which Mr McNamara was then legally entitled. As explained above, the failure to address the issue of the rent became more blameworthy after the issue was raised by Ms O'Brien in her affidavit in May 2017. I have already explained that, at that point, there was on onus on the practitioner and Mr McNamara to make full disclosure to the court. However, that is not a matter that arises in the context of s. 91. As I have already explained that is an issue which may be relevant to costs. In the particular circumstances of this case, I do not believe that it should result in a dismissal of the application under s. 115A;

(b) With regard to the allegation that the arrangements will not enable Tanager to recover the debts due to it to the extent that the means of Mr. McNamara reasonably permit, I am satisfied that, contrary to the contention made by Ms. O'Brien in her affidavit sworn on behalf of Tanager, the assets of Mr. McNamara and Ms. McNamara have been brought to bear for the benefit of their creditors under the proposed arrangement. As noted above, Ms. O'Brien, in her affidavit, relied on the inconsistencies between the SFS, on the one hand, and the PFS, on the other, to suggest that full disclosure of assets had not been made by Mr. McNamara. However, for the reasons outlined above, it seems to me that the inconsistencies have been adequately explained and there is no evidence to suggest that there are assets in existence which have not been disclosed.

(c) I am also satisfied that the proposed arrangements do not unfairly prejudice the interests of Tanager. It is very important to bear in mind in this context that Tanager will fare better under the proposed arrangements than it would in the event of the bankruptcy of Mr. McNamara and Ms. McNamara. While, on the basis

of the SFS, it had been suggested that the assets of Mr. McNamara and Ms. McNamara had not been fully brought into account for the purposes of the arrangement, I have concluded, for the reasons set out above, that the SFS was not correct. There is accordingly no unfair prejudice to Tanager in approving an arrangement which is more beneficial to it than a bankruptcy and, under which, the available assets of Mr. McNamara are made available for the benefit of creditors.

The order to be made

41. Subject to confirmation that the estate of the late Mr. McNamara senior will now be administered and the assets realised within a relatively short period, I propose to confirm the coming into effect of the proposed arrangement both in this case and in the interlocking proceedings involving Ms. McNamara. I will, however, postpone making a formal order to that effect pending an indication being given as to when it is expected that the assets of the estate of the late Mr. McNamara will be realised. It seems to me to be important that this information should be available to the court so that the court can be assured that the arrangement can proceed and be given effect.

Dealing with the errors in the proposed arrangements

42. In addition, it will be necessary in any order confirming the proposed arrangements in this case and in Ms. McNamara's case to record the errors which appear in the terms of the proposed arrangements (as summarised in paras. 5 (d) and 9 (d) of my August 2019 judgment). I will direct that counsel should prepare a draft order for that purpose. The draft order should contain appropriate recitals setting out the correct position so that there can be no doubt in the future as to the terms of the proposed arrangements. While the court has no power under the 2012-2015 Acts to amend even obvious errors in a proposed arrangement, it seems to me, for the reasons outlined in my judgment in *Taaffe (a debtor*) [2018] IEHC 468 at para. 63, that there is a practical way of dealing with obvious or inconsequential errors or inaccuracies identified in a proposed arrangement. In the case of each such error, it seems to me to be obvious that an error has been made. It seems to me to be equally obvious that correction needs to be made to correct the error. The correction of errors in this way is consistent with the approach taken in relation to the correction of obvious errors in contractual documents as outlined in the judgment of Clarke J. (as he then was) in *Mooreview Developments Ltd v. First Active Plc* [2010] IEHC 275 at paras. 3.5 to 3.6 and by Haughton J. in *Knockacummer Wind Farm Ltd v. Cremins* [2016] IEHC 95.