THE COURT OF APPEAL

[2016 No. 283]

H:IS:HC 2016:00003

The President
Finlay Geoghegan J.
Irvine J.

IN THE MATTER OF PART 3 OF THE PERSONAL INSOLVENCY ACTS 2012

(AS AMENDED)

AND

IN THE MATTER OF FERGAL MCMANUS OF SANTA MARIA ALACKEN,

CAVAN, COUNTY CAVAN

A DEBTOR

EX TEMPORE JUDGMENT of the President delivered on 22nd June 2016

1. There is great urgency about this matter and the court proposes to give judgment now.

2. Anyone is aware that there are perils in *ex tempore* judgments. Reports of decided cases draw particular attention to the frailties that arise in the case of *ex tempore* judgments. In this case, there are a number of exacerbating features. The first difficulty is the pressure of deciding the case today. Because of the demands on the court's work, we do not have the luxury of reserving judgment, bearing in mind the other work obligations that the court has. The second difficulty is my unfamiliarity with this area of jurisprudence. The third difficulty is the poor quality of the materials submitted. I remain critical of this, but I was particularly struck by the contrast between the quality of the written materials and the high quality of the oral submissions.

3. This case is an appeal against the judgment of Baker J. in the High Court delivered on 27th May 2016. The application was made under s. 97 of the Personal Insolvency Act 2012. The application came before the court on a notice of motion.

4. The background to the case is outlined in the judgment of Baker J. wherein she says that on 11th February 2016, the High Court issued a Protective Certificate to the Debtor pursuant to s. 95(6) of the Personal Insolvency Acts 2012 to 2015. On 18th April 2016, the period of protection was extended.

5. The application concerns the judgment obtained by the creditor, Clones Credit Union Ltd. Clones Credit Union Ltd. brought its application in circumstances where it had got liberty to enter judgment against the Debtor on 27th October 2015. This matured into a judgment mortgage on 19th November 2015. Bearing in mind the date of 11th February 2016, this judgment mortgage fell short of the three months space that was required in order to give it immunity under s. 102, sub-section (7) of the legislation.

6. In the High Court, Clones Credit Union brought an application to invoke the facility under s. 97 of the Act whereby, on satisfying the court of the requirements in the section, it could have its debt excluded from the operation of a personal insolvency arrangement entered into by the Debtor. There are a number of affidavits filed on behalf of the Credit Union, but principally the affidavits of Mr. Jenkinson and Counsel relies and relied in the High Court on the contents of that affidavit. It seems to be that there is reason to be uneasy about the materials and matters that were raised in the course of the affidavits, specifically, the materials that were put before the High Court in Mr. Jenkinson's affidavits. I think there are considerable reasons to be concerned about the contents of those affidavits.

7. It seems to me that the court is concerned, and concerned only with the provisions of s. 97. I do not agree with Counsel that the court has a parallel application of inherent jurisdiction. There was a debate about the provisions of s. 97(1) and whether the extent to which a range of grounds may be invoked in order to apply under s. 97(1) of the Act. Again, for the purpose of this application, it is not necessary to make any declaration about that. It would also be inappropriate, in a brief ex tempore judgment held urgently, to attempt to make any definitive point in that regard.

8. It seems to me that it comes down to sub-section (3) and whether Baker J. was correct in her analysis of sub-section (3). I also think that sub-section 3(b) can be excluded, not because it would not be relevant in the case, but that is not covered in the notice of appeal. The court has to be satisfied that if it did not make an order excluding the particular creditor that this party will suffer irreparable loss. Not only that, the irreparable loss has to be such that it would not otherwise have occurred. Counsel is correct in saying that he starts off as a secured creditor, but when the order is made by the High Court and he does not have a period of three months, he ceases to be a secured creditor for the purpose of this provision. The fact that he goes from secured to unsecured is not a relevant consideration in the issue. However, this is not what Baker J. decided in the High Court. From paras. 34 of her judgment, Baker J. applied two criteria. The judge said that there was a discretionary element to this, that it was logical and rational to be mindful of the disclosure or non-disclosures by the Debtor to the court in relation to the applications concerning the summary judgment. We have here a clear, definitive statutory provision in s. 97(3)(a). Is it the case that not making the order will result in irreparable loss to the Credit Union that it would not otherwise have suffered?

9. I cannot see how the circumstances are such that those two criteria can be met by the Credit Union in the present application. It is possible for the Credit Union, in the event that there is a personal financial arrangements in place, to apply under s. 114/s.120 on the grounds listed in s. 120. They do not include any challenge that they might decide to make in respect of the transactions for the purpose of providing some finance that will in turn enable the arrangement to go through. The challenge thereto is not specifically included in s. 120, but it may still be brought under different parts of the regime. I do not see the failure to attack that as being a ground for sustaining irreparable damage that would not otherwise be sustained. In other circumstances, I think the position of the

Credit Union is no different from any other creditor who may claim to be in a particular situation. It is clear that this is not what the section means.

10. I do not find that the rationale for s. 97(3)(a) is satisfied, namely, irreparable loss which would not otherwise occur. I think this appeal has to be allowed. I cannot find grounds in the materials that were before the High Court and now before this Court to establish those twin elements. On the strict application of the section, I cannot find myself in agreement with Baker J. and I would accordingly allow the appeal.

Finlay Geoghegan J.
11. I too am in agreement that this appeal should be allowed.

12. I would echo what has been said by the President as to the assistance given by both Counsel to the court in their oral submissions in understanding the legislative intent and the structure of this new form of personal insolvency procedure to the High Court. I am in agreement that the matter must be determined as an appeal against an order made pursuant to s. 97, as it was in the High Court, and the application to the High Court on the notice of motion was for an order pursuant to s. 97 against the continuation of the Certificate against the individual creditor and the actual order made was an order pursuant to s. 97 that the Certificate is not to apply to the Clones Credit Union Ltd.

13. I am also in agreement that this appeal must be determined within the confines of s. 97 and that any parallel application which might be made pursuant to an inherent jurisdiction of the court was not made in the High Court and is a separate matter. It does appear to me that the legislation potentially distinguishes, as was referred to in the Nugent judgment, an application to set aside in its entirety the Protective Certificate, and the much more limited application envisaged by the legislature under s. 97 that a Protective Certificate shall not apply to the individual objecting creditor. Like the President, I do not propose making any observations about what grounds may be permissible to be relied upon under s. 97(1), that should be left over for another day because irrespective of what grounds a creditor may seek to put before the court under s. 97(1), it appears to me from the clear wording of s. 97(3) that a court must be satisfied of the matters set out in (a) and (b). It is, on this appeal, the appeal against the finding of the High Court judge under s. 97(3)(a).

14. In my judgment, the High Court judge, at para. 34 of her judgment, correctly observed, in relation to the section "I consider that for a creditor to seek relief under s. 97, it is necessary to show that something other than the ordinary statutory consequence of the issue of the Protective Certificate has occurred". In my judgment, where she fell into error was in para. 35 of her judgment where she considered that the particular prejudice, and I think by that she meant the irreparable loss to the Credit Union was that it may not bring the proceedings to set aside the securities which had been granted and registered in favour of the parents and Mother-in-law of Mr. McManus on a date that was prior to the date of registration of the judgment mortgage in favour of the Credit Union and she observed that if Mr. McManus is in a position to put before his creditors an acceptable proposal for a personal insolvency arrangement, the Credit Union loses any right or entitlement to move to set aside the charges and that the value of the debt will suffer a significant diminution.

15. In submission, Counsel on behalf of the Credit Union, made essentially two submissions but one part fell into three different parts in relation to what he said was the irreparable loss. The first was that the Credit Union, by reason of s. 102, sub-section (3), for the purposes of the personal insolvency procedure is to be treated as an unsecured creditor. Secondly, that it cannot sue, not just in respect of the charges, but it cannot execute its judgment against any property of Mr. McManus or may be delayed in the execution and that arises by reason of the provisions, he submits, of s. 96(1) of the Act. I would simply observe that s. 96(3) does permit of an application to the court, but any leave would have to be granted in the context of the legislative purpose of this entire scheme.

16. On any of those bases, the detriments which Counsel relies upon before this Court are precisely the ordinary statutory consequence of the issue of the Protective Certificate in this instance. It appears to me that the Oireachtas, in specifying in s. 97(3)(a) that a creditor who makes an application under s. 97 (for an order that the Certificate should not apply to that individual creditor) must satisfy the court that not making such an order would cause "irreparable loss" envisages loss of a nature which goes beyond the ordinary statutory consequences of the issue of a Protective Certificate. I consider that interpretation is reinforced by the entire legislative scheme of putting in place what is really a breathing period by the issue of the Protective Certificate and then giving creditors the ability to object to a personal insolvency arrangement, albeit that it has been voted in favour of by virtue of s. 114 on the grounds set out in s. 120 and the matters which Counsel really wants to bring to the attention of the court are matters which are capable of, at that point in time, if it is though appropriate, being brought to the attention of the court.

17. For those reasons, I too would allow this appeal.

Irvine J.
18. Like my colleagues, I will also allow the appeal and I would do so because I am satisfied that the trial judge fell into error when she concluded that the applicant had discharged the statutory burden which is imposed on it when it seeks relief under s. 97(3)(a) of the 2012 Act. I agree with Finlay Geoghegan J. that when the trial judge relied upon or looked for the existence of irreparable loss, she relied upon the fact, at para. 35 of her judgment, that the Credit Union would be denied the opportunity to bring proceedings to set aside the security to be afforded to Mr. and Mrs. McManus on foot of the agreement of 2nd November 2015. It is very clear to me that the Credit Union is debarred from making that challenge by virtue of the provisions of s. 96(1) of the Act. In my view, their loss of that right is an inevitable consequence of the provisions of the Act itself and it is precisely what the Oireachtas intended to flow as a consequence of the issuance of a Protective Certificate. Again, like Finlay Geoghegan J., I note that arguments have been raised in relation to other prejudice by Counsel, namely the fact that he has suffered irreparable loss because he has been moved from a position of secured creditor to unsecured creditor. However, that occurs again as an inevitable consequence of the Act under s. 102, sub-section (7). As to the prejudice alleged to arise from his inability to sue out on foot of his judgment, simpliciter or otherwise execute his judgment that flows from s. 96(1). Finally, the delay upon which he relies, namely the 150 days during which he is to some extent neutered in terms of his rights that applies to all other creditors and again, is an inevitable consequence of the Act. In my view, he did not discharge the burden imposed on him under s. 97(3)(a) of the Act, and for those reasons I am satisfied that the trial judge erred such that I would allow the appeal.