Neutral Citation: [2016] IEHC 279

THE HIGH COURT

H:IS:HC:2016:000003

IN THE MATTER OF PART 3, CHAPTER 3 OF THE PERSONAL INSOLVENCY ACT 2012 (AS AMENDED)

AND IN THE MATTER OF FERGAL MCMANUS OF SANTA MARIA ALACKEN, CAVAN, A DEBTOR

JUDGMENT of Ms. Justice Baker delivered on the 27th day of May, 2016.

1. On the 11th February, 2016 the High Court issued a protective certificate to the debtor pursuant to s. 95(6) of the Personal Insolvency Acts 2012 – 2015 ("The Acts"), and on the 18th April, 2016 the period of protection was extended for an additional 40 days from the date of the expiry of the certificate on the 21st April, 2016.

2. This judgment is given on the notice of objection filed on the 25th February, 2016 by a creditor, Clones Credit Union Limited ("the Credit Union"), pursuant to s. 97 of the Act.

3. The application came on for hearing before me on notice of motion grounded on the notice of objection and an affidavit of the objecting creditor. A replying affidavit of the debtor was sworn on the 18th April, 2016.

4. The grounds of objection are stated as being:

> (a) That the creditor suffers irreparable loss arising from the issuance of the
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> protective certificate which would not have otherwise occurred.
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> (b) That the procedural requirements of the Personal Insolvency Act 2012 as
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> amended, had not been complied with by the debtor.
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> (c) That the debtor has made material non-disclosure in his prescribed financial
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> statement placed before the High Court for the purposes of the
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> issuance of the protective certificate.
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> (d) That the proposed Personal Insolvency Arrangement unfairly prejudices the
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> interest of the objecting creditor and other creditors.

5. The notice of objection echoes the language of s. 97 of the Act, but it is also argued that the High Court has an inherent jurisdiction to set aside a protective certificate and remove the benefit of the protection thereby offered on the grounds that a debtor has failed to make full disclosure in the documents presented to the court on application for protection. That inherent jurisdiction of the court has already been considered by me in the matter of *Nugent and Personal Insolvency Acts* [2016] IEHC 127, and both the objector and the debtor rely on the principles therein stated.

Statutory scheme

6. The personal insolvency legislation offers, for the first time, a scheme by which a personal debtor may avoid some of the more unfavourable consequences of being adjuducated bankrupt, by seeking to make an arrangement with his creditors. The issue of a protective certificate affords comprehensive protection to a debtor from all action by a creditor, and during its currency a creditor may not commence or continue proceedings against the debtor, or enforce a judgment. The period of protection is a window within which a debtor seeks to put in place a proposal for a Personal Insolvency Arrangement for submission to his creditors at a formal meeting.

7. The legislation requires an applicant to complete certain prescribed documents and statements and the prescription in the Rules regulating this documentation is of a very detailed kind. The scheme of the legislation requires the debtor to engage the services of a Personal Insolvency Practitioner (a "PIP") and that the application be processed through the Insolvency Service of Ireland (the "ISI"). The degree of prescribed detail required to be given by a debtor must be seen in the context of the requirement of s. 91 of the Act that a debtor who wishes to avail of the legislation shall make a statutory declaration confirming that the documentation lodged with ISI is a complete and accurate statement of his assets, liabilities, income and expenditure.

8. Application for a protective certificate comes on before the court on notice to the ISI, and only after the ISI certifies, by means of a prescribed form, that the documentation is complete and that the application is ready to proceed. Notice is not required to be given to any other person or body, but s. 97 of the Act permits application by a creditor who has been given notice of the issue of the protective certificate to seek an order directing that the protective certificate shall not apply to that creditor.

9. The relevant provisions of s. 97 of the Act are as follows:

> "97.— (1) Where a creditor is aggrieved by the issue of a protective certificate that creditor may within 14 days of the giving of notice of the issue of the protective certificate to that creditor apply to the appropriate court for an order directing that the protective certificate shall not apply to that creditor.
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> (2) A creditor who brings an application under subsection (1) shall give notice to the Insolvency Service and the relevant personal insolvency practitioner and to such other persons as the court may direct of that fact, and the application shall be made in such form as is provided for in rules of court.
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> (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:

(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."

10. Section 97 allows the court, on application by an aggrieved creditor, to direct that the protective certificate shall not apply to that creditor. An order under the section does not inure for the benefit of all the creditors and it does not of itself mean that the personal insolvency process cannot continue. The section is stated in the negative such that the court shall not make such an order unless it is satisfied, not merely that irreparable harm will be done to the creditor were the order not made, but that that irreparable harm would not otherwise occur. This suggests that the burden is on the applicant creditor.

Main grounds of objection

11. The primary complaint of the applicant relates to certain transactions surrounding the interest of the debtor in his principal private residence which he owns jointly with his wife, Eithne Doyle. I have been informed that Ms. Doyle has commenced proceedings under the Acts which are at present adjourned before the Circuit Court.

12. The Credit Union obtained liberty to enter final judgment against the debtor in the sum of €203,983.22 together with measured costs, by order of the Master made on the 27th October, 2015. The debtor was represented at the hearing before the Master and sought an adjournment, principally on the basis that he intended to seek a protective certificate under the personal insolvency legislation. The Master refused an adjournment and gave liberty to enter judgment.

13. The debtor then made application to set aside the order of the Master which remains listed in the non-jury list pending the determination of the within application.

14. On the 3rd November, 2015 the debtor made application to Barr J. for a stay on the entry of judgment, and Barr J. refused a stay having heard argument from the Credit Union that it would be prejudiced by a stay, as it would prevent it from registering a judgment mortgage.

15. Following on the refusal of the stay, the solicitors for the Credit Union took steps to mark judgment in the Central Office of the High Court.

16. The solicitor for the defendant in the meantime had written to the Central Office of the High Court, directly and without notice to the Credit Union, by letter of the 30th October, 2015, asking that the marking of judgment be delayed until the application for a stay and/or an appeal was determined. By a further letter of the 5th November, 2015 and after Barr J. had refused a stay, the solicitor for the defendant wrote to the Central Office of the High Court, and again did so without notice to the Credit Union, making scandalous suggestions with regard to certain actions taken by the solicitor for the Credit Union, and also suggesting that certain irregularities were apparent in the paperwork of the plaintiff, and that the plaintiff had failed to file an affidavit of debt. The letter suggested that judicial review of the decision to enter judgment was being contemplated.

17. Mr. McManus says in his replying affidavit that this correspondence with the Central Office of the High Court was to "properly protect and defend my position", but he accepts now that he was mistaken in his belief that "something untoward had occurred" on account of the fact that the judgment papers were presented with "speed". He says that he expected that several weeks would pass before the judgment would be entered and that he had engaged in the correspondence "to protect his position".

18. Mr. McManus is a solicitor who says he does not in his professional practice deal in litigation in any manner whatsoever, and that the mistake was "genuinely" made. He fails to adequately explain how he permitted his own firm to act for him if he believed it, or he, did not have the requisite knowledge of practice and procedure to deal with the matter. I regard his letter to the Central Office as unusual, and not in accordance with good professional practice. That his correspondence did not in the events prejudice the objector, in that it did not delay entry of judgment, does not excuse him.

The registration of priority interests

19. On the 19th November, 2015 the Credit Union lodged with the PRA the relevant documentation for registration of its judgment as a judgment mortgage on the principal private residence of the debtor, being the property in Folio CN 13881F County Cavan. The PRA notified the solicitor for the Credit Union by letter of the 6th January, 2016, that on the 14th December, 2015, five days before the judgment was lodged for registration as a judgment mortgage, two legal charges had been lodged for registration, and that, as these were protected by a priority entry registered on the 3rd November, 2015, it was proposed that the charges be registered on the Folio to rank in priority to the judgment mortgage. The two charges were lodged on the 14th December within the 44 day period of protection offered by virtue of Rule 162 of the Land Registration Rules 2012, following registration of a priority entry.

20. It is apparent, therefore, that the priority entry was registered on the 3rd November, 2015, the day on which the application before Barr J. for a stay on the entry of the judgment obtained by the Credit Union came on for hearing. It is also apparent that the two charges lodged with the PRA on the 14th December, 2015 had already been created before the Credit Union received the notice pursuant to s. 98(2)(b) of the Act, served on it as a creditor. Barr J. was not informed of these facts, nor were details of the charges or the debt secured thereby included in the documentation lodged by the debtor with ISI on foot of which the protective certificate issued.

21. The creation of the two charges and the filing of the priority entry with a view to giving a degree of priority to those charges is the primary focus of the application by the Credit Union, which argues that the effect of the issue of the protective certificate was such as to cause irreparable harm to it within the meaning of s. 97 of the Act. In addition, it asserts that the failure by Mr. McManus to disclose the existence of the priority entry and/or the charges subsequently registered as burdens on his principal private residence in his prescribed financial statement ("PFS"), completed on the 26th January, 2006, and supported by a statutory declaration of verification sworn on the 28th January, 2016, amounts to material non-disclosure, on foot of which the court should, in the exercise of its discretion, remove the benefit of the protective certificate.

22. The debtor deals with the creation of the charges and the alleged non-disclosure at some length in his replying affidavit. He explains that as early as June, 2015 he began the efforts to raise funds to enable him to put a meaningful proposal to his creditors for a Personal Insolvency Arrangement. He identified equity of approximately €120,000 in his principal private residence which he owns

jointly with his wife. Attempts to organise an equity release through AIB were unsuccessful. In those circumstances, he sought the assistance of his wife's mother and his parents, and in or around July, 2015 they collectively agreed to lend to the couple the total sum of €120,000, but conditional on obtaining security for that sum. As the only equity available to the couple was their joint equity in their principal private residence, an agreement was reached and reduced to writing in a memorandum dated the 2nd November, 2015, for the advance of a loan of €60,000 in the case of Mr. and Mrs. McManus, and a further €60,000 in the case of Mrs. Doyle, in consideration of natural love and affection, in further consideration of an agreement to repay the loan by 240 monthly instalments of €250, together with interest at an initial agreed rate of 2%, and in consideration of the granting of a charge over the lands comprised in Folio CN 13881F County Cavan. The initial agreement provided for drawdown within 44 days from the 2nd November, 2015, but a written and signed endorsement extended the date of drawdown to the 30th July, 2016. Mr. McManus says this was done in contemplation of an insolvency arrangement, but that fact does not appear in the written memorandum of agreement.

23. Mr. McManus in his replying affidavit says that he did not move, sell or "affect", or in any way put his assets beyond the reach of creditors "other than in accordance with law". At a later point in his affidavit, he says that he was "perfectly legally entitled to take steps to fairly deal with all of my creditors under the proposed Personal Insolvency Arrangement". He maintains that his creditors are more likely to accept the proposed financial arrangement if there is available for distribution to them the sum of €60,000, half of the total funds from the loan agreement, and that what he was in essence doing, and this is the language of his counsel, was unlocking the equity in his principal private residence and accelerating or "manufacturing" the release of monies from that source.

The effect of registration of the charges: irreparable harm to the Credit Union?
24. The primary argument made by Mr. McManus with regard to the application by the Credit Union for an order pursuant to s. 97 of the Act is that the judgment mortgage of the Credit Union came to be registered too late and would have been defeated by the legislation irrespective of the registration of the charges.

25. Section 102(7) of the Act as amended provides as follows:

> "(7) Subject to *subsections (3)(b), (9) and (10)* a creditor who has registered a judgment mortgage against a debtor more than three months before the Insolvency Service's issue of the protective certificate is a secured creditor for the purposes of a Personal Insolvency Arrangement."

26. This provision reflects s. 51 of the Bankruptcy Act 1988, as amended.

27. The Credit Union judgment was lodged for registration as a judgment mortgage on the 19th November, 2015. The application for the protective certificate issued on the 12th February 2016. In those circumstances the judgment mortgage is impacted by the provisions of s. 102(7), and Mr. McManus is correct that that loss of priority over simple contract creditors, essentially the loss of the security afforded by a judgment mortgage, would have happened irrespective of the registration of the charges, because it was registered within the three month period provided by s. 102 (7).

28. Priority for a judgment mortgage has been limited since 1988 under the bankruptcy regime, and since 2012 by the provisions of s. 102(7), and in those circumstances the loss of priority over simple contract creditors, of which the Credit Union complains, does not arise from the registration of the charges or the priority entries, but would have occurred as a matter of law. It is the timing of the registration of the judgment mortgage that defeats it, and it is argued in those circumstances that the registration of the charges is not a matter that has any practical consequence for the creditor, and is not therefore a harm or loss as defined by s. 97 (3) which would not otherwise occur.

29. Counsel for the Credit Union counters that argument by suggesting that absent a protective certificate, the Credit Union had a number of options available to it, including the pursuit of an order of garnishee against the monies agreed to be advanced by the family members. Further, it is suggested that having regard in particular to the decision of Laffoy J. in *MIBI v. Stanbridge* [2008] IEHC 389; [2011] 2 I.R. 78, that an application pursuant to s. 74 of the Land and Conveyancing Law Reform Act 2009, that the charge be deemed a fraudulent preference, would be successful, as it is clear from the affidavit evidence of Mr. McManus that the device he put in place to borrow monies from his parents and his mother in law, was one that was in discussion for some time, and did in fact prefer the new creditors over existing creditors.

Decision on the effect of the certificate
30. The loss the Credit Union suffers by reason of the issue of the protective certificate is a loss of status as a secured creditor having regard to the provisions of s. 102(7). The issue of the protective certificate also has the practical and legal effect that the Credit Union may not bring any proceedings to impugn the charges during the currency of protection, whether pursuant to s. 74 of the Land and Conveyancing Law Reform Act 2009 or otherwise.

31. An order setting aside the protective certificate or an order pursuant to s. 97 would not at this juncture have the effect that the charges would be ordered to be removed from the Folio. The charges have not been exhibited, but appear as burdens on the Folio. I note that the agreement to create the charges is stated in bald terms, and although it might have been the intention of the parties that the charges would be contingent and would operate only if the creditors of Mr. McManus approved the Personal Insolvency Arrangement, the loan agreement and the agreement for the creation of the charges does not reflect such a condition, and is not expressly linked to the personal insolvency process. There is for example, no agreement that the monies would be held on trust for the benefit of the creditors or a proposed personal insolvency arrangement. On the face of the agreement it was an unconditional and executed agreement for a secured loan and not a contingent loan.

32. I consider that the Credit Union has, by reason of the issue of the protective certificate, suffered an irreparable loss that it would not have otherwise suffered, because the existence of the protective certificate means that the Credit Union may not during its currency seek to bring any declaratory or other proceedings in regard to the validity of the charges, or the question of the priority. If the creditors of Mr. McManus approve a Personal Insolvency Arrangement it will be too late for the Credit Union to challenge the charges or seek otherwise to make a claim against the monies agreed to be advanced by the family agreement Accordingly, I do not accept the argument made by counsel for Mr. McManus that the Credit Union has not established one of the proofs required for an application under s. 97 and that the loss of status and priority is one that would have happened irrespective of whether the charges were put in place. The Credit Union has lost the possibility of any challenge to the charges as a direct result of the issue of the protective certificate.

The effect of non disclosure
33. The legislation offers no guidance as to what matters ought to inform the court in the exercise of its jurisdiction under s. 97. It could be argued that every creditor suffers some harm as a result of the issue of a protective certificate, because of the comprehensive protection afforded to a debtor during the currency of protection. The harm which the legislation envisages and which

forms the basis for an application under s. 97 must be irreparable and of a type which would otherwise not occur but for the issue of the protective certificate. The legislation does not, as in the context of an examinership, contain a requirement as found in *s. 541 of Part 3* of the Companies Act 2014 that an objecting creditor show "unfair prejudice" by a scheme of arrangement. The authorities under that provision do not offer much assistance.

34. 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. The legislation grants an umbrella of protection for the purposes of giving a debtor the opportunity of resolving his indebtedness in a rational way, and a creditor who wishes to breach that umbrella or seek an order that the debtor is not protected from action by him must show some specific and distinct prejudice. This is in my view implicit in the long title to the Act of 2012, that the legislation intended to permit the rational resolution of debt for the purpose of enabling a debtor to participate in the financial life of the State and in the common good, as explained in my judgment in *Re P. (a Bankrupt)* [2016] IEHC 117.

35. I consider that the Credit Union has shown 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. The particular prejudice is that the Credit Union may not bring proceedings to set aside those securities and should Mr. McManus be 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 the value of its debt will suffer a significant diminution.

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.

38. Further, I consider that as the legislation does not mandate the court to accede to the application of a creditor who meets the threshold requirements of s. 97 (3), the court retains an element of discretion to make an order. In that regard, and in the light of the considerations explained by me in *Re Nugent* and the imperative of full and frank disclosure required by the Acts, I consider that I ought not ignore that the Mr. McManus did not disclose the existence of the charges and of the family loan agreement in his application for a protective certificate, and the PFS before the court when the certificate was granted gave a wholly wrong impression that there was a degree of valuable equity in the principal private residence of Mr. McManus.

39. For the reasons explained above, I reject the argument of counsel for Mr. McManus, that I ought to entirely ignore the existence of the charges and the fact that they and the family loan agreement were not disclosed to the court on the application for the protective certificate because the charges themselves did not defeat the judgment mortgage of the Credit Union.

40. I am satisfied that I ought to be influenced by the fact that the charges and the loan agreement were not disclosed to the court on the hearing of the application for a protective certificate, and that they came to light as a result of happenstance, and because the Credit Union had lodged its judgment for registration as a judgment mortgage against the same property as is burdened by the charges. In those circumstances, I am satisfied that the application invokes the discretion of the court as explained by me in *Re Nugent*.

41. I am satisfied that the Credit Union has met the statutory test, and that my discretion ought to be exercised in favour of making an order pursuant to s. 97 declaring that the protective certificate shall not apply to the Credit Union. No argument was made that any other creditor would be unfairly prejudiced by the order as the creditors are all either secured or are owned very small sums.

42. The order sought by the Credit Union does not inure for the benefit of all the creditors and it does not of itself mean that the personal insolvency process cannot continue. In the decision in *Re Nugent* I have already determined that the High Court has a jurisdiction in its discretion to set aside the extension of a protective certificate and that one consideration that will bear on the court's decision is whether there has been a material non-disclosure by a debtor. Counsel for Mr. McManus argues that the jurisdiction of the court in regard to the grant of a protective certificate is circumscribed by the fact that the court is mandated to issue the protective certificate provided the statutory tests are met, but that in the case of an application for an extension of the period of protection the court has a discretion under the legislation.

43. Because I am satisfied that the Credit Union is entitled to an order under s. 97, I do not propose to deal in this judgment with the broad question of whether different principles are in play in an application to the court to set aside a protective certificate from those applicable to an application to set aside an extension of a certificate after the expiration of the initial period of protection of 70 days, as explained by me in my judgment in *Re Nugent*.

44. Further, because of the specific prejudice I have found, I also do not propose dealing with the other matters argued not to have been disclosed by the debtor in his application for a protective certificate, and whether these are material or arose as a result of differences in figures that emerged in the course of the proceedings, or as a result of genuine error.

45. I propose therefore making an order that the protective certificate shall not apply to the Credit Union.