THE HIGH COURT
CIRCUIT APPEAL

[2021] IEHC 144
[Record No. 2020 56 CA]

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012-2015
AND IN THE MATTER OF PAUDIE BARRY OF MOUNT DESERT LODGE, LEE ROAD, CORK, (A DEBTOR)
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012-2015

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 4th day of March 2021.

Introduction

1. This judgment concerns an appeal of a decision of the Circuit Court (His Honour Judge Patrick Meghen) of 11th February, 2020 to refuse an application by Mr. Alan McGee ('the practitioner' or 'the PIP'), the Personal Insolvency Practitioner acting on behalf of Paudie Barry, the debtor in the title of these proceedings and hereafter referred to as 'the debtor', pursuant to s.115A(9) of the Personal Insolvency Acts 2012-2015 (referred to collectively as 'the Act').

2. The matter came before the court on November 2nd 2020, and concluded on November 9th 2020. The debtor was represented by Mr. Keith Farry BL, and Mr. Bernard Dunleavy SC and Ms. Elizabeth Donovan BL represented the objecting creditor, the Governor and Company of Bank of Ireland ('the objecting creditor', 'Bank of Ireland' or 'the Bank'). Both parties prepared extensive written submissions in advance of the hearing, having already canvassed the issues extensively in an exchange of affidavits.

3. As we shall see, the debtor has experienced difficulties with insolvency for quite some time, and has been attempting to navigate his way through the waters of the personal insolvency regime by means of multiple applications for protective certificates and applications to the Circuit Court pursuant to s.115A(9), on occasions on which Bank of Ireland, the debtor's sole creditor, would not agree to his proposals. This history has given rise to sharp criticism on behalf of the objecting creditor, which suggests that the past conduct of the debtor bears heavily upon his present application, to a degree that it is submitted that the debtor's present application should be regarded as an abuse of process and dismissed on that ground alone. It should be said at the outset that this contention is vehemently rejected by the PIP and the debtor.

4. While the objecting creditor has several other grounds of objection to the debtor's application, the submission that it is tainted by the debtor's past acts and omissions in relation to the insolvency process requires that the past applications by the debtor under the Act must be scrutinised by this Court. Accordingly, it is necessary to set out the background to the matter in some detail.

Background

5. The debtor is self-employed as a surveyor and at present is 52 years of age. He resides in his principal private residence ('PPR') in Lee Road, Cork, and has a dependent daughter in respect of whom he pays maintenance. He works from home, using rooms in his house

to store equipment for his surveying business. In addition, he runs an online business in which he sells medical supplies and devices which address the problem of bedwetting.

6. At the time of the issue of the protective certificate (or "PC") on 5th April, 2019, the total indebtedness of the debtor to Bank of Ireland was €1,215,831.76. This indebtedness arose from four loans to the debtor between 2003 and 2006, all of which are secured on the PPR. The sum also includes monies due on foot of a loan from the bank to the debtor to finance the purchase of a site at Inchydoney, Co. Cork, and the construction of a house thereon. The residual unsecured balance of this loan, after sale of the property by a receiver, is €435,475.51.

7. The bank contends that the debtor ceased to make payments in respect of the loans in or about November 2014, when the debtor first made application for a protective certificate. It is alleged that the debtor made no payments for a year and seven months until June 2016, despite being in receipt of substantial income from his surveying business and the online 'Stop Bedwetting' business. The bank demanded possession of the PPR in June 2015, and issued a civil bill seeking an order for possession of the property, which was served on the debtor on 31st March, 2016. The court was informed that these proceedings "*stand adjourned pending the outcome of the within application*…" [para. 16, affidavit of Patrick Baxter sworn on 14th August, 2019 on behalf of the bank].

8. In his affidavit of 11th October, 2019, the debtor makes the following averments in response: -

> *"6 …I have previously averred that the period of non-payment arose due to when the first Protective Certificate issued the objecting Objector [sic] applied set-off as against the monies available in my business account against the debts outstanding. This left me in a position where I was unable to trade, unable to pay suppliers and unable to operate my business. In the circumstances where I was seeking to grow a business in order to be able to afford my mortgage on my family home it followed that the upkeep of my business was necessary to comply with my long-term objective and indeed the long-term objective of the Objector. I was left in an unfortunate position where I had to use the monies to continue the operation of the business. I say that as soon as the business was operating properly and consistently, I returned to making payments to the objecting creditor in the sum of €2,000 in June 2016 per month as per the PIA proposal for each and every month thereafter. I say I am currently paying the sum of €2,406.37. I have also previously explained and averred that I had almost given up hope of resolving the herein situation and I had been suffering from severe stress, anxiety and difficulties arising from my debt scenario…"*

9. The debtor has applied for four protective certificates in total, and has made two previous applications to the court under s.115A(9) of the Act, both of which were ultimately struck out in the Circuit Court with the PIP's consent. The sequence of events may be summarised as follows: -

(1) A protective certificate was issued to the debtor by the Circuit Court on 27th November, 2014. A PIA was proposed by the PIP to the bank, which declined the proposal on 31st March, 2015. The s.115A review procedure was not available at the time.

(2) A second protective certificate was issued by the Circuit Court on 6th September, 2016. A PIA was proposed, but was declined by the bank on 20th October, 2016. The PIP issued a notice of motion seeking relief under s.115A(9) of the Act on 1st November, 2016, to which motion the bank lodged a notice of objection on 17th November, 2016. The affidavits in the present application set out disputes between the parties as to how or for what reason this s.115A(9) application came to be withdrawn, but it is accepted that the PIP came to the view that he should not proceed with the application, and sought the consent of the bank to have the application struck out with no order as to costs. While the PIP suggests that delays caused by the bank were responsible for the PIA becoming "*incapable of being implemented successfully",* so that the PIP decided to "*restart the process with updated figures*", any suggestion that the bank was responsible for delay, or that it raised "*technical objections*", was strongly refuted by the bank. The s.115A(9) application was struck out on consent on 19th December, 2017.

(3) An application for a third protective certificate was made on 8th February, 2018. A PIA was proposed by the PIP to the bank, and this proposal was declined on 11th April, 2018. The PIP issued a notice of motion pursuant to s.115A(9) of the Act on 25th April, 2018, and the bank lodged a notice of objection on 8th May, 2018. The PIP implies in his affidavit of 16th September, 2019 in the present application [paras. 16 to 17] that the bank, having not initially objected to the protective certificate, only did so as a result of the decision of Baker J in *Re Hickey, a debtor (No. 3)* [2018] IEHC 313. This cannot be correct, as the decision of Baker J was handed down on 31st May, 2018, several weeks after the objection had been lodged by the bank. This objection contended *inter alia*, that the PIP had not been entitled to apply for a protective certificate where less than twelve months had elapsed since the previous protective certificate expired, as required by s.91(1)(i)(i) of the Act. In the event, the motion was struck out by consent when it came before the Circuit Court on 11th January, 2019.

(4) Application was made for the protective certificate in the present matter on 27th March 2019, and the PC was issued by the Circuit Court on 5th April, 2019. The PIA was proposed to the bank, which rejected it on 29th May, 2019. The PIP avers at para. 18 of his affidavit of 16th September, 2019 that the decision in *Re Hickey "had the effect of confirming that the 3rd PC never in fact existed and so over 12 months had passed since the second PC expired thus enabling Mr. Barry to apply for the 4th and current PC".* This interpretation of the Hickey decision is roundly rejected by the bank.

10. In his affidavit of 14th August, 2019 on behalf of the bank, Mr. Patrick Baxter, a case manager in the Personal Insolvency Unit of the bank, avers as follows: -

"39 …the Bank has been greatly prejudiced by the lengthy periods of the protection of this Honourable Court which the Debtor has enjoyed:

(a) 27 November 2014 – 31 March 2015 (4 months),

(b) 6 September 2016 - 19 December 2017 (15 months),

(c) 8 February 2018 – 11 January 2019 (11 months),

(d) 5 April 2019 – to date (4 months to date).

40. As set out in detail above, the Debtor made no payment whatsoever to his mortgage loan accounts in the period from November 2014 until June 2016, which period included the entirety of his first period of protection, which lasted 4 months, and the 15 month period thereafter. The Debtor commenced thereafter to make payments to the said accounts of approximately half of the sum due each month without the consent of the Bank.

41. I say, accordingly, that combined with all the other issues raised by the Bank in its objection, the Bank would be greatly prejudiced in the circumstances by being precluded from having recourse to its security in the event that this Honourable Court sanctions the proposed Arrangement."

11. As against that, the debtor avers in his affidavit of 11th October, 2019 as follows in relation to his payment history over the previous two years: -

"43. I say that in the two years before the issuance of the Protective Certificate and continuing since the instigation of the insolvency process I have been making contributions towards my debts and trying to engage with my creditors.

44. I have been making payments in the sum of €2,000 per month since July 2016. I am currently making payments in the sum of €2,406. I say and I am advised that this sum will not in fact go towards my revised loan balance under the PIA (which is fixed and specified as per the Proof of Debt and the date of the drafting of PIA) but rather will be paid towards the overall loan amount. Whilst not taking particular issue with same, it is worth noting that these monies are paid above and beyond the return specified in the PIA.

45. I say that it goes without saying that my payment history and the level of payments must be viewed in light of my means over the past number of years. I say in the two year period prior to the issuance of my Protective Certificate my payments were consistently in the sum of €2,000.00 per month."

The PIA

12. As Bank of Ireland is the debtor's sole creditor, the s.111A procedure in the Act applies to the debtor's PIA which, as we have seen, was rejected by the bank on 29th May, 2019.

13. The only material retained assets disclosed in the PIA are the PPR, the agreed evaluation of which is €490,000, and the debtor's shareholding in his surveying business, which he values at €58,000. He has a monthly net income of €3,996.26 which, after deduction of set costs, a monthly mortgage payment of €2,406.37, life assurance payments and maintenance for his daughter, leaves him with an available monthly contribution to his debts of €74.38. A lump sum of €10,000, representing the trade-in value of the debtor's Audi Q7 motorcar of €7,500 and a contribution of €2,500, would be available. It is estimated that the total contribution over the PIA term from the debtor would be €20,771.34. The PIP's fees amount to €11,070 inclusive of VAT. The comparison of the outcome of the PIA with bankruptcy suggests that a successful PIA would yield a greater return for Bank of Ireland than if the debtor was adjudicated bankrupt.

14. The structure of the PIA is as follows: -

- The PIA will last for six years;

- In relation to the four loans secured on the PPR, the outstanding balance of €780,356 will be reduced to €500,000 - €10,000 more than the agreed value of the PPR – with the balance of €280,356 to be discharged on the payment of a small dividend. The term of the loans will be extended to 19 years. A tracker interest rate of the ECB rate plus 1% is to apply. The monthly repayment will be approximately €2,406 per month, subject to interest rate fluctuations. The arrears on the account are to be capitalised.

- The unsecured debt to the bank on foot of the loan account in respect of the Inchydoney property in the sum of €435,475.51 is to be discharged on the payment of a dividend.

- This dividend – which will discharge the unsecured debts of €280,356.25 and €435,475.51, a total of €715,831.76 – will be in the sum of €8,701.34, which will be paid over the six years of the PIA, in addition to the fees of €11,070 to be paid to the PIP in respect of his services.

The objections of the bank

15. A notice of objection was lodged by the solicitors for the objecting creditor on 18th June, 2019. This document ran to five pages, and contained a wide range of criticisms of the PIA. The notice contained objections in four categories as follows: -

(1) A preliminary objection that "*…the within proceedings are an abuse of process and/or oppressive in circumstances where the Personal Insolvency Practitioner herein…has obtained on behalf of the Debtor four Protective Certificates from this Honourable Court since 2014 and has made two previous applications to this Honourable Court for Orders pursuant to section 115A(9) of the Acts, both of which were struck out by this Honourable Court with the consent of the PIP.*"

(2) An objection that, in breach of s.115A(8) of the Act, the eligibility criteria set out in s.91 of the Act had not been met, on the grounds that the prescribed financial statement of the debtor "*may not have included all assets of the debtor",* and that *"the proposed PIA incorrectly assesses and calculates at Appendix 2 the comparison of the return on bankruptcy with the return under the proposed Arrangement for creditors…";*

(3) Various objections to the terms of the proposal on the grounds that:

(i) *"…there is a reasonable prospect that confirmation of the proposed Personal Insolvency Arrangement will not enable the Bank to recover the debts due to it to the extent that the means of the Debtor reasonably permit, contrary to the provisions of section 115A(9)(b)(ii) of the Acts…";*

(ii) *"…the costs of enabling the Debtor to continue to reside in the Debtor's principal private residence are disproportionately large, contrary to the requirements to section 115A(9)(d) of the Acts…;*

(iii) *"…the proposed Personal Insolvency Arrangement is unfair and inequitable in relation to the Bank and the Bank's interests and claims would be impaired by its coming into effect, contrary to the requirements of section 115A(9)(e) of the Acts…";*

(iv) *"…the interests of the Bank are unfairly prejudiced by the proposed Personal Insolvency Arrangement, pursuant to sections [sic] 120(e) and section 115A(9)(f) of the Acts…".*

(4) An objection that the conduct of the debtor in the two years prior to the issue of the PC did not support the granting of the reliefs sought.

16. At the conclusion of the notice, the bank reserved its right to "*amend and/or supplement the grounds set out above"*. At the hearing, an objection which had not been included in the notice of objection, and did not make an appearance until the bank delivered its written submissions in reply to the debtor's submissions, took centre stage in the submissions of counsel to the court. The objection concerned an eligibility issue under s.91, which it is necessary to consider in some detail below. Counsel for the debtor did not take issue with the fact that, as the matter had not been raised until the bank's replying written submissions, the debtor had not addressed the issue in his written submissions. While counsel contested the objection fully, he very fairly conceded that, if the court were satisfied that the objection were valid, the debtor's application could not succeed. It is necessary therefore to consider what I have called 'the twelve-month issue' first, and in some detail.

The 'twelve-month issue'

17. In order to understand this objection, it is necessary to examine the statutory provisions on which it is based. I refer to the provisions set out below only to the extent that they are relevant to the objection.

18. Section 115A(8)(a)(i) states as follows: -

"8. The court shall consider whether to make an order under subsection (9) only where –

(a) it is satisfied that –

(i) the eligibility criteria specified in section 91 have been satisfied…".

19. The objection concerns the eligibility criterion set out at s.91(1)(i)(i): -

"91(1) Subject to the provisions of this section and this chapter, a debtor shall not be eligible to make a proposal for a Personal Insolvency Arrangement unless he or she satisfies the following criteria –

…(i) that the debtor has not –

(i) been the subject of a protective certificate issued under section 95 less than 12 months prior to the date of the application for a protective certificate…".

20. Section 91(3) provides a circumstance in which the rigors of s.91(1)(i)(i) may be avoided: -

"(3) The criterion specified in subsection (1)(i) shall not apply where the debtor has, on notice to the Insolvency Service, made an application to the appropriate court and the court has made an order stating that it is satisfied that the current insolvency of the debtor arises by reason of exceptional circumstances or other factors which are substantially outside the control of the debtor and that it would be just to permit the debtor to make a proposal for a Personal Insolvency Arrangement."

21. Section 93 concerns the PIP's duties when applying on behalf of the debtor for a PC, and the form which the application must take. Section 93(2)(b) provides as follows: -

"(2) The application referred to in subsection (1) [i.e. for a protective certificate] shall be in such form as may be prescribed by the Insolvency Service and shall be accompanied by such fee (if any) as may be prescribed and the following documents:

…(b) a document signed by the debtor confirming that he or she satisfies the eligibility criteria specified in section 91…

It is not in dispute that the PIP signed the document required by this subsection in the present instance.

22. Section 94 of the Act requires the Insolvency Service of Ireland ('ISI') to consider the application for the PC, and addresses the ISI's duties in this regard:

"(3) Subject to subsection (4), in considering the application for a protective certificate, the Insolvency Service shall make such enquiries as it considers necessary to satisfy itself:

(a) that the personal insolvency practitioner is a person entitled to act as a personal insolvency practitioner;

(b) having regard to the documents which are required to accompany the application for a protective certificate –

(i) that the debtor satisfies the eligibility criteria for a Personal Insolvency Arrangement specified in section 91; and
(ii) the application does not appear to be frivolous or an attempt to frustrate the efforts of creditors to recover debts due to them.

(4) Subject to subsections (5) to (7), for the purposes of subsection (3) the Insolvency Service shall be entitled to presume that the debtor satisfies the eligibility criteria for a Personal Insolvency Arrangement specified in section 91 if the documents required to be lodged with the Insolvency Service have been so lodged and the Insolvency Service has no reason to believe that the information supplied in or in support of the application for a protective certificate is incomplete or inaccurate."

23. While subsections 94(5) and (6) set out the powers of the ISI to make an inquiry in an appropriate case, s.94(7) provides that

"7. Nothing in this section shall be construed as requiring the Insolvency Service to make an enquiry in any case".

24. On satisfying itself that the application for the PC is in order, the ISI furnishes its certificate to that effect together with a copy of the application and supporting documentation to the appropriate court [s.95(1)(a)(ii)]. The court's responsibilities are set out at s.95(2) as follows: -

"(2) Where the appropriate court receives the application for a protective certificate and accompanying documentation pursuant to subsection (1)(a), it shall consider the application and documentation and, subject to subsection (3) –

(a) if satisfied that the eligibility criteria specified in section 91 have been satisfied and the other relevant requirements relating to an application for the issue of a protective certificate have been met, shall issue a protective certificate, and

(b) if not so satisfied, shall refuse to issue a protective certificate."

25. Section 95(5) provides that "…*subject to subsections (6) and (7) and…[section]115A(5), a protective certificate shall be in force for a period of 70 days from the date of its issue*". The court has power to extend the period of the PC for 40 days in the circumstances set

out in s.95(6), and for a further 40 days in the circumstances set out in s.95(7). Section 95(9) provides that the latter extension may be made once only.

26. Section 115A(5) addresses the issue of how the period of the PC is affected by the making of an application under that section:

> *"(5) Where an application is made under this section before the expiry of the period of the protective certificate, such protective certificate shall continue in force until –*
>
> *(a) the Personal Insolvency Arrangement comes into effect under subsection (13), or*
>
> *(b) one of the following occurs –*
>
> *(i) the time for bringing an appeal against a refusal against the appropriate court to make an order under subsection (9) has expired without any such appeal having been brought,*
> *(ii) such appeal has been withdrawn, or*
> *(iii) the appeal has been determined."*

27. As we have seen, the bank objected in May 2018 to the second application by the debtor under s.115A(9) on the basis that the PIP had not been entitled to apply for a PC in circumstances where less than twelve months had elapsed since the previous PC had expired. The PIP addresses this, and the basis upon which he considered that he was entitled to apply for a further PC, issued by the Circuit Court on 5th April, 2019, notwithstanding the strike-out of the s.115A application based on the previous PC less than three months earlier, at paras. 16 to 18 of his affidavit of 16th September, 2019 as follows: -

> *"16. No objection was made by the secured creditor to the granting of the third protective certificate. Subsequently the High Court decided in Re Hickey that a Protective Certificate endures even where the appeal was lodged outside of the period of the PC.*
>
> *17. In the circumstances Bank of Ireland sought to have their [sic] PC set aside and this was consented to, at the sitting of the court with an explanation given to the court on the day.*
>
> *18. Given the decision in Re Hickey it had the effect of confirming that the third PC never in fact existed and so over 12 months had passed since the second PC expired thus enabling Mr. Barry to apply for the 4th and current PC".*

28. The reference to "*the decision in re Hickey*" appears to be a reference to the decision of Baker J of 31st May, 2018 in *re Hickey, (a debtor)* [2018] IEHC 313, rather than to the decision of the Court of Appeal, reported at [2018] IECA 397, which concerned the appeal from the aforesaid judgment of Baker J.

29. In the *Hickey* case, Mr. Hickey had also made a number of applications under the Act. His creditors rejected the PIA proffered by him on 9th September, 2016, and on 23rd September, 2016, Mr. Hickey made an application pursuant to s.115A(9). By a judgment on 18th January, 2017, the High Court, in a decision reported at [2017] IEHC 20, ruled that the s.115A application was made out of time – one day late – and must fail on that ground. On 6th February, 2017, Mr. Hickey obtained an order under s.91(3) allowing him to make a proposal for a PIA notwithstanding that he had made a proposal under a PC within the previous twelve months. On 22nd May, 2017, the objecting creditor obtained judgment – reported at [2017] IEHC 333, setting aside the s.91(3) order, with an order to this effect being made on 29th May, 2017. An application on behalf of Mr. Hickey pursuant to s.93 for the issue of a third PC was made on 3rd November, 2017. This certificate issued on 20th November, 2017.

30. The question for determination by the High Court was whether, on an interpretation of the Act, a debtor continues to be entitled to protection from creditors pending the determination of an application under s.115A. As Baker J remarked, 'perhaps somewhat ironically', it was the objecting creditor in that case which argued that the protection must continue while an application under s.115A remained undecided, notwithstanding that the application under that section might not be made during the currency of the PC. On this basis, the PC would have been operative until the dismissal of the s.115A application in January 2017, with the result that the PC of 20th November, 2017 would have been issued within twelve months of the expiry of the previous certificate, which under s.91(1)(i)(i) would not be permitted. The debtor argued that the Statute was clear and that protection could only be afforded if the application under s.115A was made while the PC was still 'live', as it were.

31. After a thorough and perceptive analysis of the issue, in which the purpose of the Act and the appropriate principles of statutory interpretation were considered, Baker J. concluded as follows: -

> *"62. I consider that the Oireachtas did intend the benefit of a statutory protection from creditors to enure to the benefit of a debtor pending the determination of an application under s.115A. Further, the time limit for the lodging of such application (being 14 days from the creditor's meeting) does not leave the continued protection at large, but in my view, and provided an application is lodged within the statutory 14 days period, the Oireachtas did intend, in the light of its intention in the Act stated in broad and positive terms in the recitals and preamble, that a debtor would continue to have the benefit of a protective certificate until the conclusion of the s.115A process."*

32. The Court of Appeal approved the reasoning of Baker J, although it allowed the appeal on the basis that the s.115A application was in fact made outside the 14-day period within which such an application may be made; the PC obtained by the debtor on 4th July, 2016 ceased to be in effect by 22nd September, 2016 at the latest, with the result that the subsequent PC obtained in November 2017 issued more than twelve months after the

expiry of Mr. Hickey's previous certificate. As Peart J stated at para. 40 of his judgment: -

> *"40. In circumstances where it is not expressly provided in the Act that a debtor who lodges a s.115A application outside the 70 day life of the protective certificate, yet within 14 days of the creditors' meeting, continues to enjoy the protection of the protective certificate, the trial judge was correct to avail of s.5 of the Interpretation Act, 2005 in order to give a construction which, having regard to the Act as a whole, gives effect to the clear intention of the Oireachtas. In my view, she was entitled to conclude that the intention of the Oireachtas was that all debtors who lodged a s.115A application within 14 days of the creditor's meeting would continue to be protected between the expiry of the 70 day life of the certificate and the lodging of that s.115A application provided same was lodged within the 14 days period provided for in s.115A(2) of the Act. The section must be so construed if it is not to give rise to a consequence that could never have been intended by the Oireachtas. To construe the section thus is not to indulge in an impermissible exercise of re-writing the provision, but is rather to construe it in a way that is consistent with the legislative purpose of the Act when it is read as a whole…"*

33. It is against this background that Mr. Farry sought to argue that, if the PC which issued in the present case on 8th February, 2018 – the third PC – had been issued in breach of s.91(1)(i)(i), and the subsequent s.115A application struck out on 11th January, 2019 on this basis, that PC must be deemed never to have existed for the purpose of considering whether the application had been validly made for the fourth PC, issued by the Circuit Court on 5th April, 2019. Counsel submitted that, essentially, there was no difference between the present case and the situation in Hickey; in the latter case, the court found that the PC on which the s.115A application was based was not in force after its expiry on 22nd September at the latest, and therefore not taken into account for the purpose of assessing the 12-month period. Likewise, it was asserted that, as the third PC in the present case was clearly invalid, and the s.115A(9) application was struck out in January 2019 based on this invalidity, that PC should not be taken into account in reckoning the twelve months for the purpose of s.91(1)(i)(i).

34. The bank submitted that it cannot seriously be suggested that the third PC *"never existed"* and that *Hickey* is certainly not authority for this proposition. Counsel pointed out that, when the bank became aware that a third PC had been sought within two months of the strike-out of the previous s.115A application in December 2017, it formed the impression that it must have been procured on foot of an application under s.91(3), and sought copies of the application papers, only to be told by the PIP that no such application had been made. It was submitted that there should not have been an application for the third PC, as the application clearly infringed s.91(1)(i)(i), but that once the PC issued, it could not be said that it did not exist, notwithstanding the legal infirmity.

35. In *Hickey*, the key legal issue was whether an application for relief under s.115A required to be made during the currency of the PC, as the wording under s.115A(5) suggested, or

whether the debtor would be entitled to protection from enforcement action by creditors pending the resolution of the s.115A application even where that application issued outside the currency of the PC. As we have seen, the conclusion of the High Court and the Court of Appeal was that the PC remains in force, provided that the debtor has made the s.115A application within the 14-day time limit set out in s.115A(2), until one of the events set out in s.115A(5) occurs. The continued validity or otherwise of the PC was determined by whether or not the application under s.115A was made in time.

36. There was no decision in *Hickey* therefore that the PC which expired on September 22nd, 2016 at latest was invalid; rather, the decision was that the protection which it afforded did not continue beyond its expiry in circumstances where the s.115A application was not made within time. This is somewhat different to the situation in the present case, in which the debtor contends that he was entitled to apply for a new PC on 27th March, 2019 on the grounds that the previous PC, for which application was made on 8th February, 2018, was invalid and therefore must be deemed never to have existed, so that it does not have to be taken into account for the purpose of computing the 12-month period required by s.91(1)(i)(i).

37. It is clear that the third PC, issued on 8th February, 2018, should not have been issued, as the debtor had been the subject of a PC until the previous s.115A application was struck out on 19th December, 2017. As we have seen, s.95(2)(a) requires that a court must be satisfied that "*…the eligibility criteria specified in section 91 have been satisfied…*", otherwise it must refuse to issue the PC. If the court had been made aware, when considering the issue of the third PC, that the debtor had been the subject of a "*live*" PC less than three months previously, it most certainly would have refused to issue it.

38. The bank lodged its objection on 8th May, 2018. Notwithstanding that the infraction of the 12-month rule had been brought to his attention at this point, the PIP did not withdraw the s.115A(9) application, which came before the court on 11th January, 2019. Section 115A(8)(a) makes it clear that the court can only consider an application under s.115A(9) if the eligibility criteria in s.91 have been satisfied. As it was clear to all on 11th January, 2019 that the criterion in s.91(1)(i)(i) had not been satisfied, the matter did not proceed and was struck out on consent.

39. While the third PC should not have been issued, is the PIP correct in asserting at para. 18 of his affidavit of 16th September, 2019 that it "*never in fact existed*", so that over twelve months had passed between the second PC and the fourth PC? In my view, this cannot be so. There is no suggestion that the court's order issuing the third PC was not regular on its face, or that it did not bind Bank of Ireland as the debtor's sole creditor. The existence of the PC remained a barrier to its ability to prosecute its action for possession of the PPR. The PIP continued to rely on the PC as an essential element of his s.115A(9) application, notwithstanding that it must have been clear to him, at least from May 2018 onwards when he acknowledged to the bank that there had been no s.91(3) application, that the PC should not have been issued.

40. In these circumstances, not only can it not be said that the third PC "*never in fact existed*", but the PIP continued to rely upon it until he was compelled to concede that, due to a clear failure to comply with the eligibility criteria, the s.115A(9) application could not proceed. I am in any event satisfied that the third PC did exist and had legal force – although an application by the bank to have it set aside would certainly have succeeded – and that it must be taken into account for the purpose of computing the 12-month period in s.91(1)(i)(i).

41. As the third PC was "*live*" until 11th January, 2019, and as the application for the fourth PC on which the present application is based was made on 27th March, 2019, the debtor fails to fulfil the eligibility criterion set out in s.91(1)(i)(i). I am therefore precluded, in accordance with s.115A(8)(a)(i), from considering the present application, which must be dismissed.

Abuse of process

42. While the conclusions I have reached above are sufficient to decide the present application, I consider that it is necessary to address the "*preliminary objection*" quoted at para. 15(1) above.

43. In his submission on behalf of the bank, Mr. Dunleavy was heavily critical of the actions of the debtor – and by extension, the PIP – in procuring "*…four Protective Certificates from this Honourable Court since 2014…*", and in *making "two previous applications to this Honourable Court for orders pursuant to section 115A(9) of the Acts, both of which were struck out by the [courts] with the consent of the PIP". As counsel put it "…the debtor has effectively looked to game the system and to utilise the provisions of the Act to keep a creditor at bay without the accompanying honesty, candour and best efforts which underpin that entitlement."*

44. Counsel made it clear that the bank was "*not asking for a prohibition on repeated certificates"*, but submitted that the way in which PCs were sought and used as the basis for applications pursuant to s.115A(9) which were "*pulled at the last minute*", suggested that the court's processes were being abused.

45. I should say that the bank's allegations in this regard were rejected by Mr. Farry, who, as I will outline, had criticisms of his own to level at the approach of the bank to the matter. However, it is appropriate at this point to make some general remarks about the propriety or otherwise of successive applications for PCs.

46. There is no impediment in the Act to a debtor applying for multiple PCs, subject to the constraints that he "*has not been the subject of a protective certificate issued under section 95 less than twelve months prior to the date of the application for a protective certificate…*" [s.91(1)(i)(i)], and that a debtor "*may enter into a Personal Insolvency Arrangement once only*" [s.90].

47. The reason for the 12-month provision is clear. As has been acknowledged many times by this Court, the ability of a debtor to obtain protection from his creditors for a period of

not less than 70 days and perhaps as much as 150 days – or longer if an application under s.115A(9) is brought within time – represents a very significant intrusion on the rights of creditors to pursue legitimate means of recovering their debts. The protection is afforded so that a debtor obtains respite from his creditors in order to marshal his assets with a view to putting his best foot forward in formulating a proposal to his creditors. If his proposal is rejected by the creditors, or his s.115A application is unsuccessful, he must wait a year, other than in the exceptional circumstances envisaged in s.91(3), before he can seek the protection of the court for another attempt to persuade his creditors to accept a PIA. Within that year, the creditors are free to pursue other methods of enforcement to recover the due debt. On the other hand, a year may pass and the debtor's circumstances may change such that he can formulate a proposal which is sufficiently different from its predecessor that the creditors may be persuaded to endorse it.

48. The 12-month provision represents a balance between allowing the debtor a period free from the pressure of having to placate debtors threatening legal action or enforcement so that he may bring a proposal before his creditors, and the need to restore to the creditors their entitlement to pursue their legal rights against the debtor if the proposal is rejected. It enables the debtor to examine critically the reasons why his PIA was unacceptable to the creditors, and to investigate ways in which a PIA might be formulated so as to accommodate the concerns of the creditors. There does not seem to me to be any reason why a debtor cannot apply for successive PCs, as long as the applications are made in accordance with the requirements of the Act, and always in good faith and in a manner respectful of the personal insolvency regime.

49. As I have decided that the debtor's application should be dismissed in any event, I do not propose to examine in granular detail the grievances the bank has about the conduct of the PIP. There were trenchant complaints about the content of the successive PIAs, and how the proposals changed from one PIA to the next. Counsel for the PIP on the other hand maintained that, if there were errors or omissions in previous PIAs, the current PIA had taken account of such matters and should be judged on its own merits.

50. As to the central complaint of the bank, that the debtor had tried to "*game the system*", I am uncomfortable with this phrase – which was used more than once, and with emphasis by counsel – as it carries with it the implication of the deliberate use of underhand and improper tactics. However, there is no doubt that some of the actions taken by the PIP on the debtor's behalf were inappropriate. The PIP must surely have been aware, particularly when it was brought to his attention by the bank in May 2018 that the application for a PC in February 2018 could only be justified by the PIP having made a s.91(3) application, that the third PC was not compliant with the eligibility criteria in the Act. However, he did not withdraw his s.115A(9) application, which was clearly fatally flawed, but allowed it to remain in place, thereby providing protection against action by the bank and the possession proceedings in particular, until he consented to the withdrawal of the application when it came on for hearing in January 2019. The PIP then made application on behalf of the debtor on 27th March, 2019 for a PC, in circumstances

where there had been a "live" PC less than three months previously, although this may be explained by the PIP's mistaken view that the third PC "never existed" as a matter of law.

51. It goes without saying that, where the PIP on behalf of the debtor seeks to invoke the protection of the court in a manner which restricts the rights of his creditors in such a fundamental way, he must act with honesty and candour and in a manner which respects the rights of his creditors. Against this backdrop, I have to say that the PIP's conduct, particularly in relation to the third PC/second s.115A(9) application, gives rise to legitimate concern.

52. On the other hand, counsel for the PIP had much to say about the approach of the bank to the debtor's attempts to deal with his insolvency. Mr. Farry, a counsel of unparalleled experience in representing debtors in personal insolvency matters, asserted that Bank of Ireland, as a matter of policy, will not countenance any PIA which involves a write-down of secured debt. He referred to the letter sent by the bank to the PIP of 18th April, 2019 on receipt of the fourth PC, which stated *inter alia*, as follows: -

> ***"Treatment of Debt:***
> *As part of the proposal for an Arrangement you should consider the current options available from us regarding the treatment of our debts (both secured and unsecured).*
>
> **Secured Debt**
> *We currently have a range of restructuring options available for secured debt which may be suitable for the customer. Your proposal regarding any restructuring of our secured debt should consider whether any of these options are suitable.*
>
> *Our current available options include:*
>
> *(a) Interest only repayments;*
>
> *(b) Interest only plus part capital repayments;*
>
> *(c) Term Extension;*
>
> *(d) Fixed repayments during the term of the PIA/DSA*
>
> *(e) Capitalisation of Arrears;*
>
> *(f) Split mortgage*
>
> *(g) Trading Down*
>
> *(h) Any other measures that may be appropriate to the debtor's individual circumstances…*
>
> ***Unsecured Debt***

Currently, we have a number of options available for the treatment of unsecured debt. We await receipt of your proposals regarding the Debtor's ability to make repayments in respect of his unsecured debts."

53. Counsel asserted that it was significant that the options set out in this letter for dealing with secured debt did not include any mention of a write-down. I would have thought that this is understandable; the bank is hardly going to invite and encourage a solution which involves writing-off its debt. However, counsel also drew attention to an email from Mr. Baxter on behalf of the bank to the PIP of 29th May, 2019, communicating the bank's decision not to support the PIA:

"Good morning Alan,

Please find attached file containing our decision in respect of Mr. Barry's PIA application together with relevant supporting documentation. Kindly acknowledge safe receipt. ***We are not positioned to support a position where the bank would incur significant write-down*** *and where debtor [sic] is able to reside in a property that is in excess of his requirements. There is also no proven affordability in respect of proposed level of mortgage repayments.*

The debtor could consider trading down to a more modest property and reduce his future commitments however the number of submissions which continue to seek retention of the existing property clearly indicates his position in this regard…" [emphasis added].

54. Counsel for the PIP submitted that the bank at this stage has rejected four proposals and failed to make any counter-proposal, other than a vague suggestion that the debtor might consider trading down. He asserts that the current PIA is one which, although it involves a significant write-down of the bank's secured debt, offers a better outcome for the bank than bankruptcy – a contention which is contested by the bank – and that the repeated applications for PCs and s.115A(9) relief have been "*necessitated by a complete disregard [by the bank] for how the personal insolvency regime is supposed to work where there is an acknowledgement of an insolvent situation".*

55. In his replying submissions, Mr. Dunleavy did not address directly the question of whether or not the bank has a blanket policy of refusing to engage with PIAs which involve a secured debt write-down. He said that the bank was "*a responsible lender*", and that "*of course it is in the bank's interest that there is a work-out…*". He accepted that bank had at the outset encouraged the debtor to seek appropriate advice in relation to his insolvency, and that if a "reasonable" PIA had been submitted, he had "*no doubt the bank would have voted for it…*". He did not however say whether the bank would ever contemplate as being "reasonable" a PIA which would include a secured debt write-down.

56. I wish to make it clear that I do not intend any criticism of counsel in this regard. The bank's objections to the present PIA, summarised at para. 15 above, were quite properly based on substantive and detailed criticisms of the present PIA, and the submissions of

counsel in support of these objections did not require counsel to address the question of whether or not the bank has a policy or "attitude" to PIAs which involve secured debt write-down. Success on any of these objections would have been sufficient to defeat the PIPs application, and as we have seen, the submission – not in fact included in the notice of objection – that the eligibility requirements had not been observed was in fact successful.

57. Mr. Farry was making the point about this alleged policy to justify what he contends was the necessity, in order to resolve the debtor's insolvency, to bring repeated applications under s.115A(9) in view of what the PIP considers to be an unjustified intransigence on the part of the bank, which as the only creditor of the debtor, has complete control over whether or not the PIA is accepted. The PIP takes the view that the only way in which the debtor's difficulties can be resolved is by way of a PIA. Bankruptcy is not seen as a viable option for the debtor. His position is that, if the bank will not engage with a PIA involving secured debt write-down, his only option is to invoke s.115A(9) in an attempt to persuade the court that it should confirm the coming into effect of the PIA notwithstanding the bank's opposition.

58. I do not have to decide whether Bank of Ireland has such a policy, much less to consider whether any such policy, if it exists, is justified. However, it is appropriate to offer some general observations on the approach of debtors and creditors to their engagement with the process.

59. The objectives in the long title to the Act, to which the legislature had regard in framing the provisions of the Act are as follows: -

> *"(a) The need to ameliorate the difficulties experienced by debtors in discharging their indebtedness due to insolvency and thereby lessen the adverse consequences for economic activity in the State,*
>
> *(b) the need to enable creditors to recover debts due to them by insolvent debtors to the extent that the means of those debtors reasonably permits, in an orderly and rational manner, and*
>
> *(c) the need to enable insolvent debtors to resolve their indebtedness (including by determining that debts stand discharged in certain circumstances) in an orderly and rational manner without recourse to bankruptcy, and to thereby facilitate the act of participation of such persons in economic activity in the State…".*

60. As Baker J. remarked in *Re JD, (A Debtor)* [2017] IEHC 119 at para. 70, the Act

> *"…is a considered and nuanced approach to the financial crisis and reflects a legislative choice to offer a less blunt and more flexible approach to the resolution of personal debt than was available heretofore in bankruptcy".*

It is clear, in my view, that the Act envisages a reciprocal process of engagement between debtor and creditors, in which there is "give and take".

61. By way of example, s.98(1) obliges the PIP, as soon as practicable after the issue of the PC, to give written notice to the creditors of his appointment and invite them to make submissions to him regarding the debts concerned and the manner in which they might be dealt with as part of a PIA. The PIP is then obliged to consider any such submissions made. Sections 102 to 105 of the Act set out detailed provisions that must be taken into account as to how secured debts are to be addressed in the PIA, and s.102(1) provides that, on being notified of the issue of the PIA, the secured creditor "*…may also indicate, a preference as to how, having regard to subsection (3) and sections 103 to 105, that creditor wishes to have the security and secured debt treated under the Personal Insolvency Arrangement".*

62. The Act therefore envisages the secured creditor having input into the treatment of its debt in the PIA. The PIP will engage with the creditor to obtain a sense of what might be acceptable as regards treatment in the PIA of the secured debt. If the PIP forms the view that the PIA will not be viable unless some secured debt is to be written-off, he can explore this with the creditor prior to finalising the PIA. In such a case, the secured creditor can take a view as to whether it is prepared in principle to countenance a write-off, and if so, whether the write-off is warranted having regard to the provisions of the Act and the means of the debtor. The secured creditor will also take into account the documentation referred to at s.107 of the Act, which the PIP is obliged to furnish to creditors in advance of the creditors meeting, in the present case where only one creditor is involved, by s.111A(2)(b) of the Act. This documentation, which specifically requires at s.107(1)(d) the inclusion of a comparison of the outcome under the PIA with the estimated financial outcome if the debtor were to be adjudicated bankrupt, should give the creditors an opportunity to satisfy themselves that the "nuclear option" of bankruptcy would be unlikely to yield a better outcome, although in the present case, the PIP's bankruptcy comparison is the subject of criticism and objection by the bank.

63. It seems clear to me that the scope and architecture of the Act ideally envisage a mutual exchange of documentation, information and views between the PIP and the secured creditors in particular with a view to arriving at a workable PIA which will resolve the debtor's insolvency. Inherent in the statutory scheme is the notion, in broad terms, that the PIP will bring all of the resources of the debtor to bear in order to provide the best return achievable for creditors, while allowing the debtor to retain sufficient income to maintain a reasonable standard of living for himself and his dependents, and if possible to remain in the debtor's PPR. Equally, the scheme requires creditors to take a pragmatic, outcome-focussed view of their prospects of recovering debts due to them, which it seems to me requires that each creditor approaches the PIA with an open mind.

64. If a secured creditor were to implement a policy decision that it would not engage with any PIA which involved the write-down of secured debt, without carrying out a review of the merits of each individual arrangement, it seems to me that such an approach offends against the spirit and intendment of the statutory scheme. Such a policy may render a PIA unworkable unless the court can be persuaded to confirm the coming into effect under s.115A(9) of the arrangement, as the debtor contends is the situation in the

present case. Where the secured creditor is not the only creditor, but controls the statutory voting majority, it may be that the PIA has to be structured in such a way as to favour that creditor in order to secure its approval, with other creditors being accorded considerably less favourable treatment. It is therefore possible that implementation of such a policy would adversely affect other creditors as well as the debtor.

65. I wish to emphasise that, in any given case, a creditor is perfectly entitled to vote to reject a PIA for any reason whatsoever, and does not require to account for its vote at the creditor's meeting, although it may of course have to set out its grounds of objection to any subsequent s.115A(9) application by the debtor. It does seem to me however, by way of general observation, that a blanket policy not to engage with any PIA involving write-down of secured debt would offend against the principle that the PIP engages proactively with creditors who approach each proposal pragmatically, with an open mind, and with a view to engaging with a resolution of the debtor's insolvency in a manner consistent with the insolvency regime and as effectively and fairly as possible. It is difficult to see how such a policy could be adopted by a "responsible lender".

Conclusion

66. As will be clear from the foregoing, there will be an order dismissing the PIP's application. This means that the debtor's insolvency remains, and the parties must consider what happens next. While the bank will be free to pursue whatever remedies are available to it to recover its debt, the debtor must also consider the options open to him.

67. One would like to think that the parties could lay down their arms and negotiate a mutually satisfactory resolution in a non-antagonistic manner. I would certainly encourage the parties to do so, and in fact the court has been made aware that efforts were being made by the parties up to the date of the hearing to resolve the matter. Hopefully these efforts will continue, and in the circumstances, I think it is better if I do not express any view on the validity or otherwise of the other matters set out in the bank's notice of objection. In any event, I am conscious that one cannot rule out the possibility that the matter may come back before the courts again in the future, although hopefully that will not be necessary.

68. As this judgment is being communicated electronically, I will list the matter for the first Personal Insolvency List after the expiry of 7 days from the date of the judgment, at which point I will hear the parties as to the terms of the order to be made.