



THE COURT OF APPEAL
CIVIL

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Haughton J.
Pilkington J.
Meenan J.

**IN THE MATTER OF PART III CHAPTER 4 OF THE PERSONAL
INSOLVENCY ACTS 2012 - 2021**

**AND IN THE MATTER OF DAVID LANGAN OF 187 BACHELORS WALK,
DUBLIN 1 (“THE DEBTOR”)**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF
THE PERSONAL INSOLVENCY ACTS 2012 - 2021**

**JUDGMENT of Mr. Justice Charles Meenan delivered on the 13th day of February
2024**

Introduction: -

1. This is an appeal from the judgment and order of the High Court (Sanfey J.) made pursuant to s. 115A (9) of the Personal Insolvency Acts 2012 - 2021 (the Acts) confirming the coming into effect of a proposed Personal Insolvency Arrangement (PIA). The PIA was proposed by Mr. Gary Digney (the Practitioner) on behalf of Mr. David Langan (“the Debtor”). The application by the Practitioner was opposed by a creditor, Promontoria Aran Limited (Promontoria).

2. Promontoria's opposition to the PIA was based on a number of grounds. The principal ground was that the High Court ought to have refused the order sought by the practitioner as the Debtor, by giving a first legal charge over certain property to his solicitor as security for payment of legal fees owed, had given a "*preference*" for the purposes of the Acts. The second ground was that the confirmation by the High Court of the PIA constituted "*unfair prejudice*" against Promontoria. The third ground was that the aggregate of the debts of the Debtor which were secured was not less than €3M.

Background: -

3. The Debtor is a single man in his sixties whose principal private residence is a small apartment in the centre of Dublin. In 1986 the Debtor established his business, Classic Furniture Limited, which comprised of a number of retail outlets selling household furniture. The Debtor personally guaranteed a number of loans to secure finance for his company.

4. The Debtor first encountered financial difficulty as a result of the economic recession which commenced in or about 2008 with a decline in household furniture sales and consequent loss of income. The Debtor's personal guarantees were called in by Ulster Bank and in 2009 a receiver was appointed over Classic Furniture Limited and related companies, Classic Furniture (Kilkenny) Limited and Navan Design Limited. These companies were subsequently wound up in 2009.

5. The guaranteed loans which the Debtor had with Ulster Bank were sold to Promontoria. In 2019 Promontoria petitioned to have the Debtor adjudicated a bankrupt after which a Protective Certificate was issued to him, on 23 November 2020.

6. In or about December 2016, the Debtor engaged Mr. Tom Casey of Tom Casey Solicitors (the Solicitor) to act on his behalf in a dispute with Promontoria and a Mr. Tom O'Brien. In October 2016 Promontoria had appointed Mr. O'Brien as a receiver over certain property which the Debtor owned in London. The Debtor disputed the validity of Mr.

O'Brien's appointment. Ultimately, after protracted legal proceedings the matter came on for hearing and was heard over six days in the High Court in July 2019. The Debtor was unsuccessful and Promontoria was granted judgment on its counterclaim.

7. The Solicitor was not agreeable to take the Debtor's case on a "*no foal no fee*" basis so legal fees of some €236,800 (VAT incl.) were incurred, which the Debtor was required to pay. The only unencumbered asset which the Debtor had available was his property at 7 Sandy Lane, Wexford (the "Wexford property"). The Debtor agreed to sell the Wexford property to discharge the fees owed, but little progress was made on this.

8. On 29 November 2018, the Debtor agreed to provide the Solicitor with a first legal charge over the Wexford property as security and on 3 January 2019 the security was formally given.

9. In agreeing to take first charge over the Wexford property as security, the Debtor had represented to the Solicitor that the Wexford property was unencumbered and that he was in a position to validly give the first legal charge. Subsequent to the giving of the security the Solicitor received a letter from Promontoria, dated 20 February 2019, asserting *inter alia* that Promontoria held an equitable charge over the Wexford property. On 7 June 2019, Promontoria issued proceedings by way of a Special Summons seeking *inter alia* declaratory relief that an equitable mortgage arose in its favour by virtue of an agreement between the Debtor and Ulster Bank dated 23 December 2008. The Solicitor was instructed by the Debtor in defence of these proceedings and an appearance was filed on 17 July 2019. These proceedings have not been determined and have been adjourned generally.

10. Under the Acts, every creditor who has proven their debt is entitled to see the "*Proof of Debt*" form as submitted by other creditors. The Solicitor sought the "*Proof of Debt*" form submitted by Promontoria. Under the heading "*Particulars of Security*" Promontoria claimed security over the Wexford property in the form of: -

“Lis Pendens in favour of Promontoria Aran Limited over security at 7 Sandy Lane...”

11. The Solicitor maintained that he had a first charge over the Wexford property and on 15 February 2021 issued a notice of motion seeking, *inter alia*,:-

- (1) an order allowing a late proof of debt submission by the Solicitor;
- (2) an order under s. 2(b) of the First Schedule of the Bankruptcy Acts proving the debt of the specified creditor;
- (3) an order granting liberty to the Practitioner to accept a proof of debt submission from the Solicitor, a creditor specified in the debtor’s PIA, notwithstanding that the time originally allowed by the practitioner for the submission as such has expired and/or extending the said time period.

12. On 15 February 2021 the trial judge directed that Promontoria be served with the said notice of motion and the matter was adjourned from 1 March 2021 to 8 March 2021, given the imminence of the creditor’s meeting. On 8 March 2021, despite being served, no appearance was made by or on behalf of Promontoria. The trial judge was satisfied, having considered the evidence proffered by the Solicitor that he had proven his debt and stated that he would accede to the relief sought at (2) above. There was some dispute as to the form of the order that was drawn up, but it was not in dispute that the Solicitor had formally proven his debt as the first secured charge.

13. Whilst the Solicitor’s application was pending before the High Court the Practitioner, by letter dated 24 February 2021, wrote to Promontoria and other creditors enclosing documentation in advance of the creditor’s meeting which was then scheduled for 11 March 2021. The letter enclosed a copy of the proposed PIA which clearly identified the Promontoria debt as *“unsecured”*, though it noted the *lis pendens* against the Wexford property.

14. By a further letter of 25 February 2021, the Practitioner wrote to Promontoria stating that he wished to “*ensure that your debt is correctly treated*”. This letter dealt with Promontoria’s claim to an equitable mortgage and sought information from Promontoria as to whether they were claiming the *lis pendens* to be a security and what charge they claimed to hold over the Wexford property. The letter further stated: -

“Pursuant to section 98 of the Personal Insolvency Acts on the first Schedule of the Bankruptcy Acts -

- (i) I hereby request that you further prove your debt by way of affidavit of debt with corresponding exhibits;*
- (ii) further, it appears that your debt (or more correctly the security) is disputed and thus I again require the above proofs to be put on affidavit;*
- (iii) any of the legal/factual questions can be responded to me via email at your earliest convenience.”*

Although this letter was received by Promontoria, there was no response.

High Court Application: -

15. It is necessary, at this stage, to set out a number of provisions of the Acts that are relevant to these proceedings. Given the complexity of the Acts, I will only set out those provisions that are strictly relevant: -

Section 2 “secured debt” means a debt the payment for which is secured by security in or over any asset or property of any kind;

“Security” means, in relation to a debt, any means of securing payment of the debt and includes -

- (a) a mortgage, judgment mortgage, charge, lien, pledge, hypothecation or other security, interest or encumbrance or collateral, or over any property (whether real or personal and including choses in action).*

Section 2(5) for the purposes of section --- ... (h), a debtor gives a preference to another person if -

(a) ---

(b) the debtor does anything (including the granting of security), or suffers anything to be done, which has the effect of putting that other person into a position which, in the event that the insolvency arrangement concerned is issued or comes into effect, as the case may be, would be better than the position in which that other person would have been if that thing had not been done or suffered to be done.

115 A (8) The court shall consider whether to make an order under subsection (9) only where -

(a) --

(b) it considers that, having regard to the information before it, including information contained in a notice under subsection (3), no ground specified in s. 120 applies in relation to the debtor or the proposed arrangement.

(9) The court, following a hearing under this section, may make an order confirming the coming into effect of the proposed Personal Insolvency arrangement only where it is satisfied that -

(f) The proposed arrangement is not unfairly prejudicial to the interests of any interested party.

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

(a) Conduct, within the two years prior to the issue of the Protective Certificate under s. 95 of -

- (i) *the debtor in seeking to pay the debts concerned, and*
- (ii) *a creditor in seeking to recover the debts due to the creditor.*

120. *The grounds on which a Personal Insolvency Arrangement may be challenged by a creditor under section 114, are without prejudice to section 112 limited to the following matters -*

(h) *the debtor had given a preference to a person within the preceding three years that had the effect of substantially reducing the amount available to the debtor for the payment of his or her debts (other than a debt due to the person who received the preference).*

S. 91(1) provides: -

“S. 91(1) --- a debtor shall not be eligible to make a proposal for a Personal Insolvency Arrangement unless he or she satisfies the following criteria –

(a) ---- that the aggregate of the debts of the debtor which are secured debts are less than €3,000,000---”

16. In brief, the aforesaid provisions of the Acts can be summarised as follows. The court may make an order confirming the coming into effect of a PIA where it is satisfied that neither the proposed arrangement is unfairly prejudicial to the interests of any interested party nor where the debtor has given a preference, as defined in the Acts, to a person within the preceding three years that had the effect of substantially reducing the amount available to the debtor for the payment of his or her debts. In considering whether to make an order affirming the coming into effect of the proposed PIA, regard shall be given to the conduct of the debtor within two years prior to the issue of the Protective Certificate in seeking to pay the debts concerned. There is a “cap” on secured debt of €3,000,000.

17. The Practitioner duly made an application under s. 115 A (9) to confirm the coming into effect of the proposed PIA. Promontoria by “*Notice of Objection*” objected to the coming into effect of the PIA for the following stated reasons: -

“1. The proposed Personal Insolvency Arrangement (‘PIA’) does not comply with the requirement of section 115A(8)(b) of the Personal Insolvency Acts 2012 - 2015 -- in that a ground specified in section 120 of the Act applies in relation to the debtor for the proposed PIA, in breach of section 120(h) of the Act as the debtor gave a preference (as defined in section 2(5) of the Act) to the solicitor --. The debtor purported to charge the premises - the Wexford property - in favour of the solicitor on 3 January 2019.

2. The proposed PIA does not comply with the requirements of section 115A(9)(f) of the Act that it not be unfairly prejudicial to the interests of any interested party. The proposed PIA requires that (the Wexford property) be sold and the proceeds paid to (the solicitor) on foot of an unregistered burden (the purported charge of 3 January 2019). Promontoria is the holder of a registered burden over (Wexford lands) -- (the said) registered burden ranks in priority to (the solicitors) unregistered burden. By ignoring Promontoria’s priority -- and by giving priority to (the solicitor) unregistered burden the proposed PIA unfairly prejudices Promontoria.”

It will be noted that the “*Notice of Objection*” made no reference to the €3m “*cap*” as specified in s. 91(1)(a) of the Act.

18. In a detailed judgment, the trial judge set out the background to the Solicitor being granted a first legal charge over the Wexford property and what evidence there was of Promontoria’s claim to hold an equitable mortgage. In doing so, the trial judge referred to an affidavit of Ms. Adrienne Fitzgibbon, a senior manager of the entity which acts as “*servicer*” on behalf of Promontoria, which referred to an alleged commitment to grant a

first legal charge over the Wexford property, and to an undertaking from the Debtor's solicitor of 23 December 2008 to hold the title deeds in "*in trust for or to the order of Ulster Bank*". The trial judge referred to the correspondence referred to at para. 14 above noting that Promontoria made no response.

19. The trial judge considered the issues raised in Promontoria's "*notice of objection*". Promontoria submitted that the giving of the first legal charge over the Wexford property to the Solicitor was a "*preference*" as defined by the Acts, which was a ground specified in s. 120(h). It followed that the High Court could not make an order confirming the coming into effect of the PIA.

20. Counsel for Promontoria submitted that the provision of s. 604 of the Companies Act 2014, which referred to an "*unfair preference*", could not usefully be compared to s. 120(h) of the Acts. It was submitted that s. 120(h) was expressed in terms which did not require an examination of intention and that the court was limited to an examination as to whether a "*preference*" had been given "*within the preceding three years*" which had the effect of "*substantially reducing*" the amount available to the Debtor for the payment of his debts. This submission was rejected by the trial judge.

21. The trial judge stated: -

"51. However, it does not seem to me that the interpretation of this subsection is as straightforward as the objecting creditor contends. The word 'preference' in itself suggests a conscious decision on the part of a debtor to favour one person over other persons to whom debts might be owed; it would have been an easy matter for the draughtsman to insert the term 'preference' and express the impugned Act in a completely neutral manner in the subsection, if the intention had been to prohibit any transaction, no matter how innocent or absent any attention to prefer the recipient, which would have the effect of substantially reducing the available to discharge debts."

22. The trial judge considered the term “*preference*” in the context of the scheme of the Acts, stating: -

“Counsel for the PIP also makes the point that debtors will routinely make payments in the three years prior to the grant of the protective certificate which reduced the amount available to them for the payment of debts. They pay the cost of maintaining and supporting themselves and their families; they may make substantial payment from their personal resources with the view to supporting or ultimately attempting to rescue a business which provides their livelihood, often unfortunately to no avail. Typically, they will do their best to keep up mortgage payments on the PPR with a view to preserving the family home. Section 115A(10)(a) of the Act requires the court to have regard to the conduct, within the two years prior to the issue of the protective certificate, of the debtor in seeking to pay his debts, and a court may well consider refusing to order the coming into effect of the PIA if a debtor has been significantly delinquent in making repayments of his PPR mortgage during this period.

53. Payment by a debtor of the PPR mortgage repayments in the three years prior to grant of the protective certificate may well, taken cumulatively, have ‘the effect of substantially reducing the amount available to the debtor for the payment of his or her debts ..’. However, it is very clear from the scheme of the Act that such payments are not the sort of acts to which s. 120(h) is directed. How then is s. 120(h) to be interpreted, and what exactly is meant by the term ‘preference’?”

23. In answer to the question which the trial judge posed he stated: -

“57. The wording of s. 120(h) provides little assistance as to how it is to be interpreted and implemented. There is no reference, as there is in s. 604 and 608 of the 2014 Act, to concepts of unfairness or fraud. However, the use of the term

'preference' suggests that the subsection was not intended to refer to any act or payment, regardless of intention or circumstances, which had the effect of substantially reducing amounts available for the payment of debts; implicit in the word 'preference' is the notion that the act or payment was done or made for the purpose of procuring some illicit personal advantage, to the disadvantage of other creditors to whom payment would normally been made at the time using the assets the subject of the alleged preference."

24. The trial judge applied his views as to what was meant by "preference" to the circumstances under which the Solicitor was given a first legal charge over the Wexford property. He noted that the Solicitor had done a considerable amount of work for the Debtor and had made clear that a "no foal no fee" arrangement for fees was not acceptable. The charge which was executed in favour of the Solicitor was at a point when the Debtor owed the Solicitor a substantial sum in respect of the fees incurred. The trial judge concluded: -

"61. -- Mr. Langan (the Debtor) was embroiled in heavy litigation and was entitled to pay for the legal services without which he could not continue to prosecute the proceedings. I do not accept the proposition that the grant of security in these circumstances over property which the debtor had almost two years previously committed to sell to discharge a debt constitutes a 'preference' of the person in whose favour the charge was executed."

25. The trial judge then considered the issue of "unfair prejudice" raised by Promontoria. This involved consideration of the equitable mortgage that was being claimed. The trial judge considered this in the context in which the Practitioner has to discharge his duties under the Acts. The Practitioner conducts a statutory process to determine the extent of the indebtedness of the Debtor and to ensure that all debts were correctly classified and treated in his PIA. The trial judge referred to the "Proof of Debt Form" (see para. 10 above)

furnished by Promontoria which did state the existence of a *lis pendens* and, though there was a reference to a “charge”, no details were given. To elicit such details the Practitioner sent the letters referred to at para. 14 above. There was no response from Promontoria.

26. Further, the trial judge referred to the application by the Solicitor to prove his debt. Though served with the papers and the matter being adjourned to facilitate them, there was no appearance by Promontoria. The trial judge concluded: -

“67. In these circumstances, the PIP treated the PAL debt in the PIA as unsecured. In my view, he was perfectly entitled to do so. He sought to engage with PAL as to the nature of its security and how it might be treated in the PIA, but received no response. He informed PAL of Mr. Casey’s intended application and supplied it with Mr. Casey’s proof of debt and correspondence relating to the application. He supplied PAL with the proposed PIA which clearly identified the entire debt due to PAL as unsecured.”

27. The trial judge considered Promontoria’s submission that as the Solicitor’s charge had not been registered on the Folio on the date of the creditor’s meeting it was an unregistered charge and could not, as of that date, confer any interest on the Solicitor pursuant to s. 62(2) of the Registration of Title Act 1964. The trial judge stated: -

“72. As I have made clear above, this court made an order on 8 March 2021 that Mr. Casey had proved his first legal charge over the Wexford property, notwithstanding the erroneous terms of the perfected order. He applied for registration of the charge on 26 February 2021. The charge was subsequently registered sometime between 9 May 2021 and 16 September 2021. Mr. Casey had therefore established the validity of his charge prior to the meeting of creditors; all that remained was for it to be registered on the Folio.”

and: -

“74. ... By the time of the meeting, the first legal charge had been pronounced valid by this court, and a registration application was pending. If the PIA had been approved by the creditors, the sale of the Wexford property might have had to await registration on the Folio of the first legal charge so that the sale of the property could proceed; at this stage, Mr. Casey’s title under the charge has long been perfected by registration, and it is clear that this registration took place well within the 12 months within which the PIA was to be completed.”

28. The trial judge duly made an order pursuant to s. 115A(9) confirming the coming into effect of the proposed PIA, being satisfied that it was appropriate to do so in all the circumstances.

Notice of Appeal: -

29. The Appellants, Promontoria, appeal the judgment and order of the High Court on three grounds: -

- (i) That the trial judge erred in finding that a “*preference*” in s. 120(h) of the Acts requires a subjective assessment of the intentions of the Debtor at the time of giving the impugned preference and failed to have any, or any proper regard to the statutory definition of the word “*preference*” as defined in s. 2(5) of the Acts.
- (ii) That the trial judge erred in finding that there was no unfair prejudice to Promontoria in circumstances where the effect of the PIA was to remove the priority which would have accrued to Promontoria’s well charging relief in the event of the Special Summons proceedings being successful. Further, the registration of a legal charge by the Solicitor, after the protective certificate came into effect, barred Promontoria from seeking to set aside that charge or otherwise impugn its creation.

(iii) That the trial judge failed to address the arguments of Promontoria that the secured debts of the Debtor exceeded €3m and therefore the Debtor was ineligible to apply for relief under the Acts.

Consideration of appeal: -

30. In considering the appeal, I will address the three grounds as they are set out above: -

“Preference”

It was not disputed but that the giving of the first legal charge to the Solicitor had the effect of substantially reducing the amount available to the Debtor to pay his debts, so the issue is how is “preference” to be interpreted.

The approach that a court should take in interpreting a statute has been the subject of many detailed judgments both of this court, the Supreme Court and the High Court.

In the *Law Society of Ireland v the Motor Insurers Bureau of Ireland* [2017] IESC 31 Clarke J. (as he then was) stated: -

“10.4 The modern approach has sometimes been described as the ‘text in context’ method of interpretation. It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard to the context or circumstances in which the document in question came into existence. On the other hand, it is important not to lose sight of the fact that the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established. That is so whether the document in question is a statute, a contract, the rules of an organisation, a patent or indeed, any other form of document which is designed, whether by agreement or unilaterally, to impose legal rights and obligations on either specific parties or more generally. To fail to have sufficient regard to the text of such a document is to give insufficient weight to

the fact that it is in the form of the document in question that legal rights and obligations have been determined. However, an overdependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence.

10.5 Perhaps it is fair to say that the main underlying principle is that a document governing legal rights and obligations should be interpreted by the courts in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context.”

31. More recently in *Heather Hill Management CLG v An Bord Pleanála* [2022] IESC 43 Murray J. stated: -

“106. ... The judgment of McKechnie J. in Brown provides a good summary that is reflected in the other decisions: indeed, it was cited at some length and relied upon in the course of the judgment of the Court of Appeal in this case. The essential points he made were as follows:

(i) The first and most important part of call is the words of the statute itself, those words being given their ordinary and natural meaning (at paras. 92 and 93).

(ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include ‘the immediate context of the sentence within which the words are used; the other

subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including ... LRC or other reports; and perhaps ... the mischief which the Act sought to remedy' (at para. 94)

(iii) In construing those words in that context, the court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language (see para. 92).

(iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the intended object of the Act and the reasons the statute was enacted (at para. 95)."

32. Of relevance to the interpretation of "*preference*" s. 5 of the Interpretation Act 2005 provides: -

"5(1) In construing the provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of -

(i) in the case of an Act to which paragraph (a) of the definition of 'Act' in section 2(1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the Parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or Parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole. ..."

33. The interpretation which the appellant seeks to put on “*preference*” essentially requires a literal interpretation of s. 2(5). This is underlined with the further submission of the appellant that, unlike other statutes which deal with the giving of a preference to creditors, there is no provision in the Acts for a qualitative assessment of the “*preference*” in question. It would follow, on this interpretation, that the payment by a debtor (including the granting of security) to a creditor within the preceding three years that had the effect of substantially reducing the amount available for the payment of other creditors would be a “*preference*” for the purposes of the Acts.

34. The appellant did submit that payment by a debtor of a mortgage would not be a “*preference*”. However, it is difficult to see how this submission is consistent with the submission, also made by the appellant, that the wording of the Acts precludes a qualitative assessment of such payment. This would be illustrated in a situation where a debtor has two mortgages e.g., one over the family home and the other over his/her business and chooses to pay one but not the other. The respondents placed particular emphasis on the provisions of s.115A(10) which provides that a court, in considering to make an order confirming a PIA must look at the conduct of the debtor, within the two years prior to the issue of the protective certificate, in seeking to pay his/her debts. Clearly the Debtor is not in a financial position to pay all his/her creditors so payment of one debt but not others, on the appellants interpretation, would be a “*preference*”, thus depriving the Debtor of the benefit of the Acts. In other words, where a debtor conducts himself/herself in the manner required by the Acts this would result in him/her losing the benefit of the Acts. Thus, the interpretation contended for by the appellants would amount to a fundamental contradiction between the relevant sections of the Acts.

35. The passages from the cases cited above emphasise the importance of considering statutory provisions in their context. So, what is the “*context*” for the purposes of the Acts?

The objective of the Acts is set out in the Long Title as follows:

“An Act to amend the law relating to insolvency, to amend the Bankruptcy Act 1988 ... and having regard to the following objectives –

(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 reasonable 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 rational manner without recourse to bankruptcy, and to thereby facilitate the active participation of such persons in economic activity in the State ...”

36. The Acts were passed by the Oireachtas at a time when financial crises were wreaking havoc with the lives and livelihoods of many citizens. Many, of whom the Debtor is a good example, borrowed very significant sums of money from financial institutions, who were all too ready to lend it, in the hope of achieving significant returns. When the inevitable crash happened, given the numbers of people involved, it was imperative that there be an alternative to bankruptcy so as to enable such people to return to economic activity and, at the same time, be fair to their creditors. It is in this context that the Acts have to be interpreted.

37. There is a specific requirement, s.115A(10), that debtors, notwithstanding their insolvency, seek to pay their creditors. Given this, it must follow that the interpretation of

“*preference*” requires a qualitative assessment of the conduct of the debtor in doing so. I am in agreement with Sanfey J. where he refers to this requirement and points out that a failure by the Debtor to pay the mortgage on his/her residence may result in the court refusing to order the coming into effect of a PIA (para. 52).

38. The trial judge examined the circumstances in which the Debtor gave security to the Solicitor for legal fees. He correctly concluded such could not be impugned. It was submitted in the course of the appeal that were the Acts to be interpreted as this being a “*preference*” it would amount to an interference with the Debtor’s right of access to the courts. This submission was not elaborated on. However, even though the Debtor still had a right of access to the courts without instructing a solicitor there would be an issue in that, although he could pay a solicitor to represent him, he would be denied the benefits of the Acts if he did so.

39. It could further be added that the construction contended for by Promontoria would be “absurd or would fail to reflect the plain intention of ... the Oireachtas” as per s. 5 of the Interpretation Act 2005. I am satisfied that the trial judge’s construction of the Acts “reflects the plain intention of ... the Oireachtas”.

“Unfair Prejudice”

40. Promontoria maintained that it had an equitable mortgage over the Wexford property and issued a Special Summons seeking, *inter alia*, a well charging order in respect of same.

41. In considering Promontoria’s claim the trial judge looked at the statutory process which the practitioner followed. The “*Proof of Debt*” form, as was furnished by Promontoria, made no mention of any equitable mortgage. The only security referred to was a *lis pendens* registered on the Wexford property. At the hearing, Promontoria accepted that a *lis pendens* is not a “security” for the purposes of the Acts.

42. The “*Proof of Debt*” form was followed up by detailed correspondence from the Practitioner to Promontoria (referred to at para. 14 above). It was accepted that, though received, this correspondence was not replied to. Further, the Solicitor made an application to prove his debt in court. This application was, by order of the court, served on Promontoria and the matter was adjourned to enable such service. Despite service, there was no appearance by Promontoria. The trial judge correctly concluded:

“68. This Court is being asked to confirm the coming into effect of the PIA. It is not part of this Court’s function to adjudicate, in the context of this application, on the validity or otherwise of PAL’s (Promontoria) alleged equitable mortgage. The 2019 proceedings are concerned with a claim in that regard. However, for the purpose of the PIP’s application, the debtors’ indebtedness to PAL is correctly deemed to be unsecured, in accordance with statutory procedures appropriately conducted by the PIP.”

43. Promontoria submitted that the Solicitor’s charge was not registered at the time of the creditors meeting of 1 March 2021 when the vote on the PIA took place. It is an unregistered charge and thus as of that date did not confer any interest on the Solicitor. Again, the trial judge referred to the fact that the Solicitor had proved his first legal charge over the Wexford property in court. The Solicitor then applied for registration on 26 February 2021 and it was subsequently registered some time between 9 May 2021 and 16 September 2021. The trial judge was satisfied that the Solicitor had established the validity of his charge prior to the creditors meeting and, correctly, rejected this submission.

€3 million “cap”

44. As mentioned earlier, this issue was not referred to in the “notice of objection” and there is only a passing reference to it in Promontoria’s written submissions filed in the High Court. The trial judge dealt with the matter briefly:

“77. It was also suggested that the eligibility requirement in s.91(1)(a) that the aggregate of the debts of the debtor which are secured debts is less than €3m was breached in the present case. In view of my finding that the PIP was correct in treating the entire of the PAL debt as unsecured, this point is without merit.”

An examination of the evidence before the High Court supports this conclusion.

45. In the “*Proof of Debt*” form the only reference Promontoria made to a secured debt was for a sum in the order of €638,000 and the particulars of security were given as follows “*lis pendens* in favour of (Promontoria) over security (Wexford property).” As mentioned, it was accepted that a *lis pendens* is not security and there was a failure on the part of Promontoria to give any other detail on its “security” despite requests from the Practitioner to do so.

46. Promontoria sought to rely on the fact that a Special Summons had been issued seeking to enforce the undertaking already referred to. The wording of the undertaking was considered by the court. On no reading of this undertaking could it amount to the giving of a security for a sum of €3 million or more. The figures referred to in the undertaking were far short of this sum.

Conclusion

47. By reason of the foregoing, I dismiss the appeal. As for costs, my provisional view is that as the respondent has been in “entirely successful” for the purposes of s.169 of the Legal Service Regulation Act 2015, there should be an order for costs against the appellant. The parties will have 14 days from the electronic delivery of this judgment in which to notify the Court of Appeal Office by email if they wish to seek a different costs order, and in that event a short costs hearing will be arranged. In default of any such request the proposed order will be perfected. As this judgment is being delivered electronically, Haughton and Pilkington JJ. have authorised me to state that they agree with it.