[2020] IEHC 123

THE HIGH COURT

[H:IS: HC: 2019:000026]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012-2015 AND IN THE MATTER OF GARY HYDE (A DEBTOR)

JUDGMENT of Mr. Justice Denis McDonald delivered on 9 March, 2020

Introduction

1. This judgment addresses the objection of Promontoria (Scariff) DAC ("Promontoria Scariff") to a personal insolvency arrangement proposed on behalf of the above named debtor, Mr. Gary Hyde, by his personal insolvency practitioner Mr. Alan McGee ("the practitioner"). Under s. 112 (3) of the Personal Insolvency Act, 2012 ("the 2012 Act"), a creditor may lodge a notice of objection with the court in respect of a proposed personal insolvency arrangement which has been approved by a majority of creditors in accordance with the requirements of s. 110 of the same Act. The notice of objection must be lodged within fourteen days of service of a notice by a practitioner of the approval by creditors of the personal insolvency arrangement in issue. Section 114 (1) provides that the objection can be made on the basis of any of the grounds specified in s. 120.

The objection

2. Section 120 lists nine grounds of objection that can potentially be pursued. These include the grounds set out at s. 120 (b) namely that: *"the procedural requirements specified in this Act were not complied with"*. This is the ground which is now pursued by Promontoria Scariff in this case. At the hearing of the objection on 17th January, 2020 counsel for Promontoria Scariff argued that the procedural requirements specified in the 2012 Act were not complied with in this case because (so he submitted) the practitioner had incorrectly classified a judgment mortgage creditor of Mr. Hyde as an unsecured creditor. The debt in question is owed by Mr. Hyde to GE Capital Woodchester Ltd ("*GE Capital*") in the sum of €36,021.11. In circumstances where GE Capital was treated as an unsecured creditor, its vote was outweighed by the value of the debt owed to the remaining unsecured creditors who voted in favour of the arrangement. The value of the debt owed to unsecured creditors voting in favour of the arrangement amounted to €1,359,169.80.

3. However, if the debt of €36,021.11 due to GE Capital had been treated as a secured debt of Mr. Hyde, this would have altered the outcome of the vote of the secured creditors. According to the practitioner's certificate under s. 112 (1) (a) recording the outcome of the votes taken at the creditor's meeting, the total value of secured debt owed to secured creditors, present and voting, amounted to €845,000. The total value of secured debt owed to secured creditors voting in favour of the arrangement amounted to €425,000.00 (or 50.3% in percentage terms). The total value of secured debt owed to secured creditors voting against the proposed arrangement amounted to €420,000.00 (or 49.7% in percentage terms). If the debt due to GE Capital of €36,021.11 had been included in the value of the secured debt, this would have increased the total value of secured debt to €881,021.11. Of that sum, €425,000.00 (or 48.24% in percentage terms) would be counted as voting in favour of the arrangement, while the value of secured debt voting against the arrangement would amount to €456,021.11 (or 51.76% in percentage terms). If that is the true result of the vote at the creditors meeting, this would mean that the

requirements of s. 110 (1) could not be satisfied. Under s. 110 (1) (b), creditors representing more than 50% of the value of secured debts voted at the creditors meeting must vote in favour of the proposal. If the requirements of s. 110 are not satisfied, the proposed arrangement cannot be considered to have been approved by the creditors.

4. For completeness, it should be noted that the issue summarised above was not the ground on which the notice of objection under s. 112 (3) was filed in this case. The only grounds of objection signalled in the notice were: -

   (a) It was alleged that Mr. Hyde had failed to satisfy the eligibility criteria specified in s. 91.

   (b) Promontoria Scariff also contended in the notice that the proposed arrangement required Mr. Hyde to make payments of an amount which he could not afford; and

   (c) The remaining ground relied upon was that the arrangement wrongly excluded debts of €343,480.82 that Mr. Hyde allegedly owed to the Revenue Commissioners and Cork City Council.

5. However, in the affidavit of Mr. Tom Hall grounding the objection (served more than one month after the notice of objection), an issue was raised for the first time, about the status of the judgment mortgage debt owed to GE Capital. This was the only issue that was subsequently argued at the hearing in January 2020.

6. In circumstances where GE Capital has not, itself, sought to challenge the outcome of the vote, it may seem incongruous that Promontoria Scariff should be permitted to argue this issue. However, while I have (as explained below) some significant concerns about the way in which the matter has come before the court, I do not believe that there is anything to prevent Promontoria Scariff from making this case. It is within the ambit of s. 120 of the 2012 Act. If there has been a failure to comply with the procedural requirements of the Act, that is a ground of objection which is available under s. 120 to any creditor of a debtor who wishes to object to the confirmation of a proposed arrangement. The objecting creditor does not have to demonstrate that it has been directly affected by the alleged breach of the procedural requirements in issue.

The case made by Promontoria Scariff

7. Counsel for Promontoria Scariff commenced his submissions by drawing attention to the definition of "*secured creditor*" in s. 2 (1) of the 2012 Act where it is defined in the following terms: -

   "'*secured creditor', in relation to a debt, means a creditor of the debtor who holds, in respect of his or her debt, security … in or over property of the debtor".*

8. Counsel also drew attention to the definition of "secured debt" in the same subsection where it is defined as "…*a debt the payment for which is secured by security in or over any asset or property of any kind*".

9. It will be noted that both of the above definitions require that there should be "*security*" in place over an asset of the debtor. Counsel for Promontoria Scariff highlighted that a judgment mortgage is expressly included in the definition of "*security*" in s. 2 (1). In this context, "*security*" is defined in s. 2 (1) to include a wide range of different forms of security including a judgment mortgage. Counsel submitted that this is reinforced by a consideration of s. 102 (7) of the 2012 Act which makes clear that a creditor who has registered a judgment mortgage against a debtor more than three months before the issue of a protective certificate: *"is a secured creditor for the purposes of a Personal Insolvency Arrangement."*

10. Counsel therefore submitted that there can be no doubt but that GE Capital was a secured creditor for the purposes of the arrangement proposed by the practitioner in this case on behalf of Mr. Hyde.

11. Counsel for Promontoria Scariff then turned his attention to the provisions of the 2012 Act which permit a practitioner, in certain circumstances, to treat a secured creditor as unsecured. There are a number of provisions of the 2012 Act which are relevant in this context. In the first place, under s. 102 (8), a practitioner may treat the debt due to a secured creditor as unsecured debt for the purposes of a personal insolvency arrangement where the secured creditor fails to prove the security notwithstanding a request to do so by the practitioner. Section 102 (8) provides as follows: -

> *"(8) Where requested by the personal insolvency practitioner to do so, a secured creditor shall provide proof of the existence and nature of the security with respect to the relevant secured debt, in default of which, the personal insolvency practitioner may treat the debt as unsecured debt for the purposes of this Chapter."*

12. Counsel for Promontoria Scariff argued that s. 102 (8) will only apply where two conditions are met namely (a) where there has been a request by a practitioner to the secured creditor concerned to prove the security and (b) there has been a subsequent default by the secured creditor to do so. Counsel submitted that there was no evidence in this case that the practitioner had requested GE Capital to prove the judgment mortgage and he therefore argued that s. 102 (8) could not be relied upon by the practitioner in this case.

13. A second route potentially available is to be found in s. 102 (9) and s. 102 (10) of the 2012 Act. Those subsections also permit a practitioner to treat a debt due to a secured creditor as unsecured where the market value of the security held by that creditor is less than 10% of the secured debt and the secured creditor concerned elects to be treated as an unsecured creditor. Those subsections are in the following form: -

> *"(9) Notwithstanding subsection (1) where the market value of the security held by a secured creditor in respect of a secured debt is less than 10 per cent of the amount of that secured debt, the secured creditor may, upon giving notice in writing to the personal insolvency practitioner, elect to be treated as an unsecured creditor for the purposes of this Chapter, other than this subsection and subsection (10).*

(10) Where the personal insolvency practitioner receives notice of an election referred to in subsection (9), the personal insolvency practitioner shall formulate the proposal for the Personal Insolvency Arrangement on terms providing for the surrender of the security to the debtor and shall treat the creditor as an unsecured creditor for the purposes of this Chapter, other than this subsection and subsection (9)."

14. Counsel for Promontoria Scariff submitted that, if these subsections are to apply, there must be an election in writing by the secured creditor followed by notice of such election to the practitioner concerned. Counsel said that there is no evidence in this case that GE Capital made such an election or that it gave notice of such an election to the practitioner. He also argued that, since s. 102 (9) - (10) expressly provide for an election to be made thereunder, there is no scope for a secured creditor to surrender or give up its security in a more informal or different way. He submitted that the sole means by which a secured creditor can give up security is by means of a formal election under s. 102 (9) followed by notice of such election to the practitioner under s. 102 (10).

15. A further mechanism by which secured debt can be treated as unsecured is to be found in s. 108 (3) of the 2012 Act. Section 108 deals with voting rights at creditors meetings. Section 108 (3) permits a secured debt to be treated as unsecured in certain defined circumstances namely where: -

(a) the value of the security has been determined, pursuant to section 105, to be less than the amount of the secured debt due as of the date of the protective certificate; and

(b) the arrangement provides for all or part of the secured debt to be treated as unsecured.

16. For completeness, it should be noted that s. 108 (3) provides as follows: -

"(3) In the case of a secured debt, where:

(a) the value of security held by a creditor who is a secured creditor is determined, pursuant to section 105, to be less than the amount of the secured debt due to the creditor on the day the protective certificate is issued; and

(b) the proposed Personal Insolvency Arrangement provides for all or part ('relevant portion') of that secured debt to:

(i) rank equally with, and abate in equal proportion to, the unsecured debts covered by the Arrangement; and

(ii) be discharged with those unsecured debts on completion of the obligations specified in the Arrangement,

then, the relevant portion of that secured debt shall, for the purposes of this section (other than this subsection), section 110 and regulations made under section 111, be treated as unsecured and the creditor concerned may vote in respect of the relevant portion of that debt as an unsecured creditor."

17. In this case, counsel for Promontoria Scariff accepts that the requirements of s. 108 (3) (b) have been satisfied. However, he submitted that the requirements of s. 108 (3) (a) have not been satisfied in circumstances where no determination was ever made under s. 105 as to the value of the security (i.e. the judgment mortgage) held by GE Capital.

18. The judgment mortgage held by GE Capital relates to the family home of Mr. Hyde. There is no dispute between the parties that an agreement was reached under s. 105 (1) as to the value of the family home but, crucially for the purposes of the argument made by Promontoria Scariff, GE Capital was not a party to that agreement. The agreement in question was reached between the practitioner, Mr. Hyde and Promontoria Scariff under which the property was valued at €425,000. That value of €425,000 is substantially less than the value of the debt owed by Mr. Hyde to Promontoria Scariff which, at the date of the arrangement, stood at €589,915.09. Thus, on the basis of the valuation of €425,000, there would be no equity available in the family home to satisfy the debts of any other secured creditor including the judgment mortgage debt owed to GE Capital. Unsurprisingly, the proposed arrangement therefore stated that the judgment mortgage in favour of GE Capital will "*be treated as an unsecured debt in the arrangement*". The same approach was taken in relation to a further judgment mortgage debt in favour of Tierney and Ahern Building Supplies Ltd.

19. However, counsel for Promontoria Scariff argued that, notwithstanding the agreement reached in relation to the value of the security held by Promontoria Scariff, the practitioner was obliged, if he wished to rely on s. 108 (3) to operate the machinery of s. 105 in order to determine the value of the judgment mortgage held by GE Capital over Mr. Hyde's home.

20. On behalf of Promontoria Scariff, counsel argued that, if the practitioner was to successfully rely upon s. 108 (3), he would have to demonstrate that the judgment mortgage held by GE Capital over Mr. Hyde's home had been valued in one of the ways expressly permitted under s. 105. He argued that it was not sufficient that the security held by Promontoria Scariff itself had been valued. Thus, he argued that, under s. 105 (1) the value of the GE Capital judgment mortgage would have to be agreed between the practitioner, Mr. Hyde and GE Capital. Alternatively, the judgment mortgage would have to be valued by an appropriate independent expert agreed between those parties (as provided for in s. 105 (3) of the 2012 Act). If those parties were unable to agree upon the appointment of an independent expert, then the expert would have to be appointed by the Insolvency Service of Ireland ("*ISI*") pursuant to s. 105 (4). In each case, the valuation would have to take account of the matters set out in s. 105 (5). This would include consideration of the value attributed to the judgment mortgage in GE Capital's

accounting records as provided for in s. 105 (5) (g). Counsel submitted that there was no evidence at all that any such valuation was ever carried out or agreed.

The submissions on behalf of the practitioner

21. Counsel for the practitioner drew attention to the following: -

(a) In the first place, he highlighted that GE Capital has not itself chosen to raise any issue about its treatment as an unsecured creditor;

(b) Secondly, he noted that the ground of objection now pursued by Promontoria Scariff was not raised in its notice of objection filed under s. 112 (3) of the 2012 Act;

(c) Thirdly, he placed significant reliance on the proof of debt submitted by GE Capital in this case from which it is clear that GE Capital did not purport to prove its debt in its capacity as a secured creditor. The proof of debt form requires, at item 7, that the creditor should provide particulars of "*any security held, the value of the security, and the date it was given"*. That item was not addressed by GE Capital when completing the form. Instead, a line was simply drawn through the answer box corresponding with item 7. Thereafter, the proposed arrangement was drafted by the practitioner and circulated to all of the creditors in which it was clearly stated that the judgment mortgage in favour of GE Capital would be treated as an unsecured debt. The issue was dealt with in the following terms on p. 14 of the proposed arrangement: -

> *"A valuation of the secured asset of €425,000.00 is an agreed valuation pursuant to s.105 of the Act. The Judgment Mortgage in favour of GE Capital… will be treated as an unsecured debt in the arrangement."*

(d) In circumstances where GE Capital chose to prove the debt owed to it in the capacity of unsecured creditor, counsel argued that GE Capital had waived any claim to be treated as a secured creditor for the purposes of the proposed arrangement or for the purposes of voting on that arrangement. Counsel argued that, where a secured creditor waives its status in that way, there is no requirement that there should be a express statutory mechanism permitting such a waiver. Furthermore, he argued that, where a statute does expressly provide for one or more such mechanism, there is no requirement that the secured creditor must utilise such a mechanism in order to validly waive its status as a secured creditor;

(e) With regard to the argument made on behalf of Promontoria Scariff in relation to the application of s. 105 of the 2012 Act, Counsel submitted that the "*relevant*" secured creditor for the purposes of s. 105 (1) is the first charge holder and that, in circumstances where, having regard to the extent of the indebtedness to the first charge holder, the debtor does not have any equity in the secured property, there

is no requirement that any subsequent charge should have to be valued under s. 105.

The response of Promontoria Scariff

22. In response, counsel for Promontoria Scariff argued that the proof of debt form submitted by GE Capital could not be said to constitute an election within the meaning of s. 102 (9). He also argued that the request by the practitioner to GE Capital to prove its debt did not satisfy the requirements of s. 102 (8) under which, as noted above, the practitioner may request a secured creditor to prove the existence and nature of the security with respect to the relevant secured debt. In this context, it should be noted that the only letter exhibited by the practitioner was his letter of 16 July 2019 sent to all creditors notifying them of the issue of the protective certificate on the preceding day and requesting them to file a proof of debt. The letter did not request the creditors to prove any security held by them.

23. With regard to the arguments made by the practitioner in respect of s. 105, counsel argued that it is clear from the terms of s. 105 that each security must be valued. Thus, counsel argued that, if there were ten judgment mortgages, each one of them would have to be valued even if there was a valuation agreed between a first charge holder, the practitioner and the debtor, which valued the property at less than the amount due to the first charge holder. Counsel also reiterated the argument previously made by him that, unless the statutory procedures set out in the 2012 Act are followed, there is no other mechanism by which a secured debt can be treated as an unsecured debt for the purposes of the vote by creditors on a proposed arrangement.

Discussion

24. I have considerable reservations as to whether it is open to Promontoria Scariff to pursue the argument advanced by it at the hearing in January 2020. As noted in para. 4 above, the ground of objection canvassed in Mr. Hall's affidavit and argued at the hearing in January 2020 was not identified in the notice of objection which was filed. In this context, it is important to bear in mind that s. 112 (3) expressly requires a creditor to lodge a notice of objection with the court within fourteen days of the date of transmission by the practitioner of notice of the outcome of the creditors' meeting. In turn, s. 114 (2) envisages that a hearing will be given to the objection lodged under s. 112 (3). The objection lodged in this case under s 112 (3) (which was subsequently heard in January 2020) did not raise the issue argued at the hearing. It is accordingly difficult to see how the issue could be raised at the hearing under s 114 (2).

25. There is no express provision in the 2012 Act which suggests that the objection can subsequently be expanded to include grounds that were not specified in the notice filed within the fourteen-day period prescribed by s. 112 (3). I appreciate that in *Varma (a debtor*) [2017] 3 I.R. 659, Baker J., following a very careful analysis of the statutory provisions and the relevant legal principles, came to the conclusion that the time limit prescribed under s. 115A (3) of the 2012 Act (in the context of a notice of objection to an application under s. 115A) was directory rather than mandatory and was capable of being extended.

26. However, insofar as I am aware, the question of whether a similar view should be taken of s. 112 (3) has not yet been determined. I do not know whether a similar view would necessarily be taken in the particular context of s. 112 (3). I do not believe that it would be appropriate for me to express any definite view on the issue in circumstances where no point was taken on behalf of the practitioner that Promontoria Scariff is out of time to make the case set out in Mr. Hall's affidavit. Accordingly, the issue was not argued before me at the hearing of the objection in January 2020.

27. Moreover, I bear in mind that, in any event, even if the present objection had not been made, the court would, inevitably, have to consider the question under s. 115 (2) (a) (i) of the 2012 Act (as amended). Under that provision, the court is expressly required, in considering an application to approve the coming into effect of a proposed arrangement, to determine whether the requisite proportion of creditors (as required by s. 110) have approved the arrangement. In those circumstances, the issue now ventilated by Promontoria Scariff would have to be considered in due course.

28. Nonetheless, for good order, Promontoria Scariff should, at minimum, have made an application to extend the time for the making of the objection ventilated in Mr. Hall's affidavit and argued before me at the hearing in January 2020.

29. I also have a further reservation that the affidavit of Mr. Hall did not signal the full ambit of the challenge to the practitioner's treatment of GE Capital as an unsecured creditor. The affidavit did not raise any issue with regard to s. 102 (8), s. 102 (9) - (10), s. 105, or s. 108 (3). While I fully appreciate that it is usually not appropriate to raise issues of law in an affidavit, I must bear in mind that the affidavit is the only document in which the issue as to the status of GE Capital's debt is raised. Notably, the case made by Mr. Hall in that affidavit is encapsulated in the following terms in para. 7: -

> *"7. I say and believe that the PIP has inadvertently included €36,021.11 of secured debt (the Judgment Mortgage of GE Capital…) with the unsecured debt, for the purposes of the vote of the Creditors' Meeting. I say that, according to the Certificate, GE Capital… voted against the proposed PIA. I say that if this vote (in terms of debt) against the proposed PIA had been included within the category of secured debt voters (entitled to vote and who voted), this category would have voted against the proposed PIA by over a majority of 50% of the amount of secured debts owed to it (€456,021.11 (€420,000 plus €36,021.11) against the PIA as opposed to €425,000 in favour of the PIA, or in percentage terms, 52% against 48% in favour of the proposed PIA".*

30. None of the specific arguments made by counsel on behalf of Promontoria Scariff at the hearing in January 2020 was signalled in the affidavit. My concern is that, in those circumstances, the practitioner has not had a proper opportunity to address, by appropriate evidence, each of the grounds now relied upon. In my view, this is very unsatisfactory. Although no application was made by counsel for the practitioner to adjourn the hearing to adduce additional evidence, there would obviously have been good grounds to do so. I am concerned that the practitioner may have been taken by surprise

by the arguments that were ultimately made on behalf of Promontoria Scariff at the hearing in January 2020. Thus, for example, when the practitioner came to swear a replying affidavit to the affidavit of Mr. Hall, he exhibited the proof of debt submitted by GE Capital. No response was ever made to that affidavit by Mr. Hall. In light of the arguments ventilated at the hearing in January 2020, one might have expected Mr. Hall to respond to say that the proof of debt, by itself, did not indicate that the requirements of s. 102 (9) and (10) were complied with. I do not know what additional evidence the practitioner might have put before the court, had such an averment been made by Mr. Hall.

31. Notwithstanding the reservations voiced by me above, I propose to deal, insofar as necessary, with the arguments debated at the hearing in January 2020. For reasons which I explain in more detail below, I have come to the conclusion that the objection made by Promontoria Scariff is, in any event, misconceived.

32. In my view, it is clear from the proof of debt form submitted by GE Capital that GE Capital has accepted that it has no security over the property of Mr. Hyde. That is acknowledged very clearly by the way in which GE Capital has completed the proof of debt form from which it is plain that GE Capital did not consider itself to be a secured creditor notwithstanding the judgment mortgage held by it. In the course of the hearing in January 2020 counsel for Promontoria Scariff, in a very able argument, submitted that a creditor can only waive or dispense with its status as a secured creditor if one or more of the circumstances expressly provided for in the 2012 Act apply. In other words, unless one of the provisions discussed above (namely s. 102 (8), s. 102 (9) – (10), s. 105 or s. 108 (2)) applies, counsel argued that there can be no loss by GE Capital of its status as a secured creditor.

33. While I fully acknowledge that, in many circumstances, the principle of statutory interpretation neatly encapsulated in the Latin maxim *expressio unius est exclusio alterius* would support the submission of counsel for Promontoria Scariff, I do not believe that this principle applies in the particular context now under consideration. I have formed that view in circumstances where, as a matter of law, virtually any right can be waived either expressly or by implication or by conduct. Waiver can arise in a multitude of circumstances. Thus, for example, a contractual right (inserted for the exclusive benefit of one party to the contract) can be waived. Likewise, a statutory right can ordinarily be waived in the absence of any statutory provision to the contrary. Even a constitutional right is capable of waiver unless it has the status of an inalienable right. As Walsh J. observed in the Supreme Court in *G. v. An Bord Uchtála* [1980] I.R. 32 at p. 71: -

> *"Natural rights may be waived or surrendered by the persons who enjoy them, provided that such waiver is not prohibited either by natural law or by positive law."*

34. It is the case that, in certain statutory regimes, express statutory provision has been made to prohibit a waiver of rights. An example is to be found in s. 85 of the Landlord and Tenant (Amendment) Act, 1980 ("the 1980 Act") which expressly provides that any restriction on the rights conferred by that Act will be void unless it is effected in the

manner specifically envisaged in s. 17 (1) (a) (iiia) or s. 17 (1) (a) (iiib) of the 1980 Act. It is noteworthy that there is no equivalent provision in the 2012 – 2015 Acts prohibiting all forms of waiver of rights by a secured creditor other than those specifically provided for in s. 102 (8), s. 102 (9) – (10) or s. 108 (3).

35. I fully appreciate that, as counsel for Promontoria Scariff argued, there are express provisions in the 2012 Act which describe particular circumstances where a creditor's right to a secured status will be lost. Given the subject matter, and the evident desire of the legislature to make the processes under the 2012 – 2015 Acts as comprehensive as possible, it is unsurprising that there are specific statutory provisions to that effect. However, I do not believe that, by making such express statutory provision in the 2012 – 2015 Acts, the Oireachtas intended to exclude all other circumstances in which waiver of a secured creditor status could arise. In my view, if the Oireachtas intended that the 2012 – 2015 Acts should have that effect, one would expect to find an explicit statutory provision making this clear (similar, by way of analogy, to the provisions of s. 85 of the 1980 Act).

36. It is essential to bear in mind that the expressio unius maxim is no more than a guide and is not applicable in all circumstances. Dodd in "*Statutory Interpretation in Ireland*", 2008, at para. 5.95 makes the following very pertinent observation in relation to the maxim: -

"Substantial or radical amendment in the law usually requires an express provision or must be clearly intended by implication. The degree of clarity required is unlikely to be satisfied by the application of the expressio unius maxim. The issue arises where provisions are enacted for particular cases which were already and more widely provided for by the law. In such cases, it may be argued that an intention to alter the general law can be inferred from the partial or limited enactment, relying on the maxim. Though much will depend on the provision itself and the enactment in which it appears, typically the application of the maxim on those circumstances has been rejected. In The State (Minister for Local Government) v. Judge Sealy, the power of the Circuit Court to award costs was challenged by way of a conditional order of certiorari. On behalf of the State, it was argued that the District Justice had no power to award costs to a successful defendant. Section 9 of the Act expressly provided that: -

> *'where a person is convicted of an offence under any section of this Act, the court by whom such person is convicted may order him to pay the costs of the prosecution'.*

It was argued that by expressly empowering the court to award the costs to the prosecution, the court was precluded from awarding costs to a successful accused. The High Court rejected the argument of expressio unius by reference to a passage from Maxwell on Statutes:

> *'Provisions sometimes found in statutes enacting imperfectly or for particular cases only that which was already and more widely the law have occasionally*

furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim, expressio unius est exlusio alterius. But that maxim is inapplicable in such cases, the only inference which a Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts) is that the Legislature was either ignorant or unmindful of the real estate of the law or that it acted under the influence of excessive caution'".

37. That passage from Dodd is precisely in point. Prior to the enactment of the 2012 – 2015 Acts, there can be no doubt but that a secured creditor could, at any stage, have waived its status as a secured creditor and confined itself to the status of unsecured creditor. There was nothing in any provision of the law which prevented a secured creditor from acting in that way. Accordingly, if the legislature wished to alter the law of waiver, so as to confine it, in the context of the 2012 – 2015 Acts, to the particular circumstances set out in the 2012 Act, this would, as the extract from Dodd makes clear, have required very clear words evidencing an intention to that effect.

38. Having regard to the very important considerations identified in the above passage from Dodd, it would not be appropriate to apply the *expressio unius* maxim. Something more would be required. As noted above, it is noteworthy that there is no express provision in the 2012 - 2015 Acts which says that the only way in which the status of secured creditor will be lost is if one of the mechanisms set out in the 2012 Act is followed. Equally, I can see nothing in the general tenor or scheme of the 2012 – 2015 Acts to suggest that the Oireachtas intended to displace or exclude the ordinary operation of the law of waiver.

39. In these circumstances, the fact that (if it be a fact) the procedures set out in the 2012 Act (which would give rise to a statutory loss of secured status) may not have been followed, does not, to my mind, mean that a waiver of GE Capital's secured status could not take place. In my view, it remained open to GE Capital to waive its secured status in any manner recognised by the general law.

40. Moreover, it is entirely understandable that GE Capital would waive its status as a secured creditor. Although it may not have been a party to the agreement reached between Promontoria Scariff, the practitioner and Mr. Hyde as to the value of Mr. Hyde's family home, it would be somewhat fanciful to think that Promontoria Scariff would agree to an unjustifiably low valuation of the family home. It would not be in its commercial interests to do so. It is therefore to be expected that another commercial entity such as GE Capital would accept, following the valuation agreed with Promontoria Scariff, that Mr. Hyde had no remaining equity in his home against which the judgment mortgage could be enforced. It was, accordingly, an entirely logical and commercially sensible approach for GE Capital to accept that it should no longer be considered to be a secured creditor. There would be no point in causing all of the additional delay and cost that would be involved had GE Capital insisted, for example, that its security in the form of the judgment mortgage should be separately valued for the purposes of s. 105. That would have been an entirely

empty and hypothetical exercise which would have achieved nothing other than to increase costs. In this context, I accept that there may well be circumstances where it might be necessary to value more than the security held by a first charge holder over property of a debtor but there was no sense in doing so in this case. The facts spoke for themselves. Like so many of these cases, the value of the family home fell well below the extent of the debt owed by the debtor to the first charge holder. It would be an entirely barren exercise to go through the process of carrying out valuations of any second or subsequent charge in such circumstances.

Conclusion

41. Accordingly, I have come to the conclusion that GE Capital waived its status as an unsecured creditor. This was an entirely realistic and appropriate course for GE Capital to take in the circumstances. It follows that GE Capital was correctly treated by the practitioner as an unsecured creditor for the purposes of the votes taken at the creditors' meeting called to consider the proposed arrangement. It likewise follows that the requirements of s. 110 were fully satisfied in this case. Creditors representing more than 50% of the value of the secured debts at the meeting have voted in favour of the proposal. There is no dispute that creditors representing more than 50% of the amount of the unsecured debts voted in favour. The proposed arrangement in this case has accordingly been approved by Mr. Hyde's creditors. In those circumstances, the objection raised by Promontoria Scariff in the affidavit of Mr. Hall must be dismissed.