

THE HIGH COURT

[2023] IEHC 320

[Record No. H:IS:HC:2020:000801]

**IN THE MATTER OF PART III CHAPTER IV
OF THE PERSONAL INSOLVENCY ACTS 2012-2015**

AND

**IN THE MATTER OF DAVID LANGAN OF
187 BACHELORS WALK, DUBLIN 1**

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 13th day of June 2023

Introduction

1. This judgment concerns an application by Mr Gary Digney, a personal insolvency practitioner (**'PIP'**), on behalf of David Langan (**'Mr Langan'** or **'the debtor'**) pursuant to s.115A(9) of the Personal Insolvency Acts 2012-2015 (collectively referred to herein as **'the Act'**) for an order confirming the coming into effect of a personal insolvency arrangement (**'PIA'**) proposed by the PIP. The application is made under this Court's jurisdiction, *i.e.*, unlike most such applications, it is not an appeal of a decision of the Circuit Court.

2. The application is opposed by a creditor, Promontoria Aran Limited (**'Promontoria'** or **'PAL'**), which filed a notice of objection on 12 April 2021, albeit that the notice incorrectly set out the amount owing to Promontoria. One of the grounds of objection was that, in breach of s.120(h) of the Act, the debtor gave a preference as defined by s.2(5) of the Act to a solicitor, Mr Tom Casey, within three years preceding the issue of the debtor's protective certificate on 23 November 2020.

3. Mr Casey claimed to be entitled to a first legal charge on premises contained in folio 35826F of the Register of Freeholders, County Wexford. Mr Casey had carried out a very considerable amount of work on behalf of the debtor in connection with certain litigation in which the debtor was involved. The debtor accordingly executed a charge in favour of Mr Casey on 3 January 2019. In view of the contention of Promontoria that the charge was a preference, Mr Casey was represented at the hearing before this Court of the debtor's application by senior and junior counsel. Promontoria and the PIP were also represented by counsel, and very detailed written and oral submissions were made in relation to a multiplicity of issues.

Background

4. In his affidavit of 16 April 2021, Mr Langan avers that he is a single man with no dependants. His principal private residence (**'PPR'**) is a one-bedroom apartment at 187 Bachelors Walk, Dublin 1. The debtor established a furniture business in 1986, comprising a number of retail outlets selling household furniture. There were a number of companies operated by the debtor, and he entered into personal guarantees to obtain loans for these companies. Unfortunately, the recession impacted severely on the business and the companies were wound up in 2009.

5. The debtor engaged with his lenders throughout his financial difficulties. Ultimately his loans were sold by Ulster Bank to PAL, and there was a petition by

PAL to bankrupt the debtor in 2019, after which a protective certificate was issued to the debtor on 23 November 2020. Bank of Ireland is the PPR lender, and the debtor, who is now employed as a salesman, has been making regular payments in respect of the PPR mortgage.

The PIA and the creditors' meeting

6. The PIA proposed by Mr Digney on behalf of the debtor was presented to the meeting of creditors on 12 March 2021. The total of the specified debt creditors in the PIA is €5,745,478.71. The proposed arrangement is for twelve months. It is stated that the secured creditors will receive 67 cent in the euro as opposed to 62 cent in the euro in bankruptcy, and that the unsecured creditors will receive 0.48 cent in the PIA as opposed to 0.27 cent in the bankruptcy.

7. In para. 1.1.1 of part IV of the PIA, Mr Casey is described as a “secured” creditor who has a “first legal charge” in the sum of €236,800 on the Wexford property. Various Promontoria accounts, in excess of €4m, are also set out, and are described as “unsecured”. Part IV sets out the treatment of Mr Langan’s assets. The mortgage term for his PPR is to be restructured to a ten-year term, with arrears capitalised and a variable interest rate. A buy-to-let property in Malahide County Dublin, which is secured in favour of Permanent TSB, is to be sold, and it is not envisaged that any equity will accrue to the debtor from the sale.

8. Paragraph 2.5 of the PIA related to Mr Casey’s “secured debt”. The secured property is 7 Sandy Lane, Ballymoney, County Wexford (**‘the property’** or **‘the Wexford property’**), and is also a buy-to-let property. It is proposed that the property be placed on the market at the s.105 agreed value of €250,000 on approval of the PIA, which states that “the secured creditor is to be repaid from the net sales proceeds with

the surplus of the proceeds of sale to be remitted into the PIA for the benefit of the creditors...” [para. 2.5.6]. Importantly, para. 2.5.7 states as follows:

“It should be noted that Promontoria (Aran) Limited have registered a *Lis Pendens* against the property. Promontoria (Aran) Limited issued High Court proceedings, by way of a special summons, on 7 June 2020 seeking declaratory relief with regard to the property. The said proceedings have not yet been determined.”

This paragraph is repeated at para. 6.2.6 of the PIA.

9. Paragraph 15 of the PIA states as follows:

“15.1. Section 98(1) submissions from creditors to make submissions to the personal insolvency practitioner regarding the debts concerned and the manner in which the debts might be dealt with as part of a Personal Insolvency Arrangement:

15.1.1. No such submissions were received from creditors by the personal insolvency practitioner.

15.2 Section 102(1) indications from the secured creditor(s) detailing 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:

15.2.1. No such indications were received from creditors by the personal insolvency practitioner.”

10. The PIP certifies that 100% of the secured creditors - Bank of Ireland, Permanent TSB, AIB and Mr Casey – voted in favour of the PIA, and that 86% of the unsecured creditors – consisting entirely of the €4,111,850.80 owed to PAL – voted

against the PIA. Accordingly, it became necessary for the PIP to make the current application, which first came before the court on 19 April 2021.

Mr Casey's application

11. On 15 February 2021, an application was made to this Court on behalf of Mr Casey for an order permitting late submission by him of his proof of debt. Counsel for the PIP indicated that the PIP was not objecting to the application. An order was made by this Court on that date that a late proof of debt submission by Mr Casey be allowed.

12. Subsequently, Mr Casey made an application to this Court seeking to prove his debt in court, as he would be entitled to do under para. 2(b) of the First Schedule to the Bankruptcy Act 1988 as amended, paras. 1-22 of which are applicable to the personal insolvency regime by virtue of s.98(2)(a) of the Act. It is notable that, in a letter to PAL of 25 February 2021, to which I refer in detail at paras. 38 to 42 below, the PIP notified PAL of Mr Casey's intention to make this application.

13. I insisted that PAL be served with the application, and the matter was adjourned from 1 March 2021 to 8 March 2021, given the imminence of the creditors' meeting. Mr Casey's affidavit of 26 February 2021 grounding the application set out at exhibit DC1 his proof of debt, and outlined his alleged security and the nature of it.

14. No appearance was made by or on behalf of PAL on 8 March 2021. Mr Casey swore an affidavit of service on 4 March 2021 of his notice of motion and affidavit of 26 February 2021 on PAL and the solicitors acting for them. I was satisfied that appropriate service had been effected on PAL, and having considered the evidence proffered by Mr Casey, was satisfied that he had proved his debt, and indicated that I would accede to the relief sought at para. 2 of the notice of motion *i.e.*, "...an order

under s.2(b) of the First Schedule of the Bankruptcy acts proving the debt of the specified creditor... [Mr Casey]”.

15. At the hearing before me of the present application, the terms of the perfected order of 8 March 2021 gave rise to some dispute. The order states as follows:

“Upon application of counsel for Tom Casey the specified creditor being mentioned before the Court on this day for an Order allowing a late proof of debt by the said specified creditor Tom Casey practising under the style and title of Tom Casey Solicitors in the presence of Counsel for the Personal Insolvency Practitioner on behalf of the debtor

Whereupon and on reading the Notice of Motion filed on 15th day of February 2021 and the Affidavit of Tom Casey filed on 15th day of February 2021 and the documents and exhibits therein referred to

And on hearing Counsel for the specified creditor and Counsel for the Personal Insolvency Practitioner

And the Court being satisfied that the specified creditor Tom Casey has proven the debt of Tom Casey Solicitors of €236,800.00 secured by way of first legal charge dated 3rd day of January 2019 over folio WX35826F being 7 Sandy Lane, Wexford

And the Court doth make no order as to costs”.

16. The order is problematic from a number of points of view. A formal order had in fact been made on 15 February 2021 permitting a late proof of debt submission by Mr Casey, not on 8 March 2021 as the above order might suggest. The order does not refer to the affidavit of 26 February 2021 sworn by Mr Casey, on which the application to prove the debt and the charge was grounded. Also, the format of the order does not accurately reflect the orders made by the court.

17. Counsel for Promontoria contended at the hearing of the present application that the only curial part of the order was the final part of it relating to costs, and that the statement as to the court "...being satisfied that the specified creditor Tom Casey has proven the debt of Tom Casey Solicitors of €236,800.00 secured by way of a first legal charge dated 3rd day of January 2019 over [the Wexford property] ..." was a recital and was not an order of the court as such.

18. While the order is unfortunately worded, nobody could be under any illusion, having read Mr Casey's affidavit of 26 February 2021, that what he was seeking was an order from the court "...to deem proven my debt as the first secured charge" [para. 34, the conclusion to the affidavit]. I indicated at the hearing on 8 March 2021 that, having already permitted Mr Casey to submit a late proof of debt, I was satisfied to accede to his application to prove his debt before the court, in accordance with the terms set out at exhibit TC1 – the proof of debt ultimately submitted by him – to his affidavit. It is notable that PAL took no issue with the order, which was perfected on 10 March 2021. PAL's position, as expressed in its written submissions of 13 June 2021, was that it had not – even at that stage – had sight of the order. However, PAL had certainly seen the affidavit of Mr. Casey of 26 February 2021, as reference is made to it in the affidavit of its solicitor, Kim Scanlon, sworn on 16 April 2021, which affidavit grounded the Notice of Objection of PAL to the PIA. It is not clear what, if any, steps were taken by PAL to determine whether the intended application was indeed made by Mr Casey if the service of the application had been somehow overlooked by PAL. Certainly, PAL could have been in no doubt, on receipt of Mr Casey's affidavit of 16 September 2021, to which I refer at paras. 22 to 27 below, as to Mr Casey's view of the application and the order made.

19. The portion of the order expressed as a recital (“and the court being satisfied...”) at para. 15 above was clearly intended to be part of the curial portion of the order, and it does not seem to me that the parties interpreted it in any other way until counsel raised its apparent status as a recital rather than an order at the hearing of the present application. Indeed, counsel for PAL acknowledged at the hearing before me that Mr Casey had a first legal charge over the Sandy Lane property; as we shall see, it is submitted however that the absence of registration at the time of the grant of the protective certificate or holding of the creditors’ meeting is fatal to the PIP’s treatment of the charge in the PIA.

Notice of objection

20. By a notice of objection of 12 April 2021, Promontoria set out the following “reasons for objection”:

“(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 (‘the Act’) in that a ground specified in section 120 of the Act applies in relation to the debtor or the proposed Personal Insolvency a Arrangement (‘PIA’). In breach of section 120(h) of the Act, the debtor gave a preference (as defined by section 2(5) of the Act) to Tom Casey, within the three years preceding the issue of his protective certificate (‘PC’) (on the 23rd of November 2020). The debtor purported to charge the premises contained in folio 35826F of the Register of Freeholders, County Wexford, in favour of Tom Casey, on the 3rd of January 2019. On foot of the purported charge, the proposed PIA requires that the aforesaid premises be sold and the proceeds of approximately €250,000 be paid to Tom Casey, thereby depriving the Debtor’s unsecured creditors of this sum.

(2) The proposed PIA does not comply with the requirements of s.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 premises contained in folio 35826F of the Register of Freeholders, County Wexford be sold and the proceeds of approximately €250,000 be paid to Tom Casey, on foot of an unregistered burden (the purported charge of the 3rd of January 2019). Promontoria is the holder of a registered burden over the aforesaid Folio, (registered on the 20th of June 2019), and pursuant to s.74 of the Registration of Title Act 1964 (as amended), Promontoria's registered burden ranks in priority to Tom Casey's unregistered burden. By ignoring Promontoria's priority ranked burden and the provisions of s.74 of the Registration of Title Act 1964 (as amended), and by giving priority to Tom Casey's unregistered burden the proposed PIA unfairly prejudices Promontoria".

The notice of objection from PAL was served outside the fourteen-day period provided by s.115A(3) of the Act, a circumstance which required an application by PAL, grounded on an affidavit of 30 April 2021 by Gillian Scully, a solicitor from the firm representing PAL, to extend the time for filing the notice. By an order of 10 May 2021, an extension of time was granted to PAL.

21. In an affidavit sworn on 16 April 2021, Kim Scanlan, a solicitor in the firm representing PAL, referred to a confirmation given by the PIP at clause 4.1.3 of part III of the PIA that the debtor has "...not given a preference to a person within three years preceding the application for the protective certificate that has had the effect of substantially reducing the amount available to the debtor for the payment of his debts...", and exhibited the deed of charge executed by the debtor in favour of Mr Casey on 3 January 2019. It was asserted by the deponent that the PIP's confirmation

was accordingly incorrect, and that the charge comprised a preference within the meaning of the Act. It was further pointed out that the charge was not registered as of 31 March 2021, although there was an application pending in this regard. Ms Scanlan then avers that

“...I say that Promontoria does have a registered burden on the relevant folio, being a *lis pendens* registered on 20th day of June 2019. I say and believe that the proposed PIA simply ignores Promontoria’s registered burden and gives priority to an unregistered burden (Mr Casey’s charge) [italics in original]”

PAL’s equitable mortgage versus Mr Casey’s first legal charge

22. Mr Casey swore an affidavit on 16 September 2021 in support of the PIP’s application to have the PIA confirmed. The purpose of the affidavit was primarily to address the two grounds of objection raised by Promontoria (see para. 20 above). In doing so, Mr Casey set out the background to the proceedings in which he acted for Mr Langan; in those proceedings (**‘the plenary proceedings’**), in which Mr Casey’s firm was engaged in December 2016, Mr Langan sued Promontoria and a receiver in relation to the latter’s appointment over a certain property in London. The defendants in those proceedings defended the matter fully, and made a counterclaim for judgment in excess of €4.5m.

23. At paras. 24 to 28 of his affidavit, Mr Casey set out the circumstances in which Mr Langan gave security to him in respect of the fees incurred by Mr Casey in the litigation. Mr Casey was not agreeable to taking the case on a “no foal no fee” basis. He avers that Mr Langan agreed in February 2017 to dispose of the Wexford property to fund the plenary proceedings. However, Mr Casey became concerned that little progress was being made in this regard while the proceedings were advancing. He avers that Mr Langan agreed, on 29 November 2018, to provide him with a first

legal charge of the Wexford property as security for his costs and outlay in the proceedings. A formal charge was executed in this regard on 3 January 2019.

24. Mr Casey avers that at no time during his firm's representation of Mr Langan was there any assertion by or on behalf of PAL that it had any interest in the Wexford property until receipt of a letter of 20 February 2019 from PAL's solicitors. That letter asserted that PAL held an undertaking of 23 December 2008 from a firm of solicitors to hold the title deeds in respect of the Wexford property "in trust and for and to PAL's order". The letter asserted that PAL accordingly held an equitable charge over the property, and that it was "entirely inappropriate" for Mr Langan to seek to dispose of the property without seeking PAL's consent or notifying it of the intention to sell.

25. Mr Casey refers in his affidavit to proceedings issued on 7 June 2019 (**'the 2019 proceedings'**) by way of special summons on behalf of PAL seeking declaratory relief, *inter alia* that an equitable mortgage arose in its favour by virtue of an agreement between the debtor and the bank of 23 December 2008. Mr Casey's firm is instructed by Mr Langan to defend the proceedings, which have not yet been determined and are adjourned generally, presumably to await the outcome of the present application.

26. The plenary proceedings were heard over a period of six days, and the matter was determined in favour of the defendants (Twomey J) on 31 July 2019: see [2019] IEHC 602. Judgment was granted to PAL in the sum of €4,309,428.00; Mr Casey records that a bankruptcy petition was issued by PAL against the debtor, in which PAL is proceeding "by reference to the entire of the judgment debt without reference to any claimed security over the Wexford property".

27. The affidavit goes on to refer to the application made to this Court which resulted in the order of 8 March 2021. Mr Casey was present with counsel in court on

that date, and avers at para. 40 of his affidavit that "...the Court was satisfied to make an order that the Creditor [*i.e.*, Mr Casey himself] had proven its Debt of [€236,800] secured by way of charge over the [Wexford property] ...".

28. Adrienne Fitzgibbon, a senior manager of the entity which acts as "servicer" on behalf of PAL, swore an affidavit in reply of 29 October 2021. She refers to a letter from Ulster Bank Ireland Limited to Mr Langan of 23 December 2008 which recorded the alleged agreement between Mr Langan and Ulster Bank Ireland Limited, in which it is recorded that "...[i]f the net proceeds from the re-finance of the Ballymoney property have not been received on or before 28th February 2009, the Guarantor, [*i.e.*, Mr Langan] hereby agrees to the bank receiving a First Legal Charge over the property". It is asserted that the benefit of this agreement was subsequently transferred to Promontoria.

29. Ms Fitzgibbon refers to the alleged commitment to grant a first legal charge over the Wexford property, and to an undertaking from Mr Langan's solicitor of 23 December 2008 to hold the title deeds "in trust for or to the order of Ulster Bank", and avers to her belief that PAL accordingly hold an equitable mortgage over the Wexford property. She refers at paras. 10 and 11 of her affidavit to the 2019 proceedings, noting the absence – as of the date of swearing of her affidavit – of a replying affidavit by the debtor "prior to the matter being adjourned generally at the outset of the Covid-19 Pandemic".

Proof of debt of PAL and Mr Casey

30. It is important to be clear about the sequence of events in relation to the proof of debt submitted by PAL on the one hand, and Mr Casey on the other. The key events seem to me to be as set out in the following paragraphs.

31. The protective certificate was granted on 23 November 2020. An extension of the statutory period for forty days was granted by this Court on 29 January 2021.

32. An application was made to this Court on notice to PAL by Mr Casey pursuant to para. 2(b) of the First Schedule to the Bankruptcy Act 1988 as amended to prove Mr Casey's debt as a first legal charge on the Wexford property. This court acceded to that application on 8 March 2021, notwithstanding the ambiguous terms of the perfected order in that regard: see paras. 11 to 20 above.

33. An application for registration of the charge was made on 26 February 2021. The parties were unable to provide a precise date for the court as to when the charge was actually registered. In his affidavit of 10 May 2021, the PIP exhibited a "pending applications report" of 9 May 2021 which referred to the charge: in his affidavit of 16 September 2021, Mr Casey exhibited a copy of the folio relating to the property which showed the charge registered against the Wexford property as of 26 February 2021, although the entry on the folio did not state the date of actual registration. It is undoubtedly the case therefore that the charge had been registered against the property, at latest by 16 September 2021.

34. By letter of 27 November 2020, the PIP wrote to PAL, enclosing a prescribed financial statement ('PFS') and the protective certificate. The PIP also enclosed a proof of debt form and asked PAL to complete and return it, "...confirming the amount you are owed and whether your debt is secured, preferential, or unsecured". The letter referred to the consequences for the creditor which would ensue pursuant to s.98(2)(b) if a proof of debt was not furnished and submissions were invited from "all creditors...regarding the debts concerned and the manner in which the debts might be dealt with as part of a personal insolvency arrangement".

35. A proof of debt form was submitted on behalf of PAL. The form listed four different facilities totalling €638,859.02 owed by Mr Langan to PAL. Under the heading “particulars of security”, PAL had entered the following:

“Lis pendens in favour of Promontoria Aran Limited over security at 7 Sandy Lane, Ballymoney, Co. Wexford. Charge held over folio: WX35826F.”

36. The form went on to specify three separate term loans under which Classic Furniture Limited (‘CFL’) owed a total of € 3,472,991.78 to PAL. The “particulars of security” section listed seven different letters of guarantee between 2002 and 2008 – the last of which was the letter of 23 December 2008 referred to at para. 28 above – furnished by Mr Langan in respect of the liabilities of CFL. However, the form gave no indication as to how the letters might constitute a “security” for the purpose of the PIA.

37. By letter of 24 February 2021, the PIP wrote to PAL among other creditors enclosing a suite of documentation in advance of the creditors’ meeting, which at that time was planned for 11 March 2021. In addition to notice of the meeting and a proxy form, the letter included, *inter alia*, a copy of the proposed PIA. The proposal clearly identified the Promontoria debt as “unsecured”, although it noted the *lis pendens* against the Wexford property. It noted Mr Casey’s charge, and provided that Mr Casey be “repaid from the net sales proceeds” of the property.

38. By a further letter of 25 February 2021, the PIP wrote specifically to Promontoria stating that he wished to “ensure that your debt is correctly treated”. The letter pointed out that Mr Casey claimed a first legal charge of the Wexford property, and that he “...has brought a High Court application to prove his debt and thereafter to have his debt proven as a first ranking secured charge”. The letter attached Mr

Casey's proof of debt and correspondence relating to his proposed application to court regarding his proposed application.

39. The letter went on to deal with Promontoria's claim to an equitable mortgage, pointing out that an affidavit sworn in the proposed application for Mr Langan's adjudication in bankruptcy did not refer to any claim for security "save for a reference to an equitable mortgage being claimed in 2019 proceedings...". The letter then stated as follows:

"With the claim being made by Mr Casey;

(1) Can you please confirm if you are claiming that the lis pendens is security, and if so, what form of security that it is.

(2) The proof of debt specifies that there is a charge held over folio WX35826F. Can you please identify such charge.

(3) If you are maintaining that the lis pendens is security, can you please identify the legal basis for this.

(4) If you are maintaining that the lis pendens is a charge, then can you please identify the legal basis for this.

(5) Can you please provide information as to the basis on which the lis pendens relates to each of the loans/facilities specified in the proof of debt? For example, the proof of debt specifies that the overdraft facility (50000096) is a secured debt over folio WX35826F. What is the basis for this.

(6) Can you please provide evidence of each of the loan facilities being secured over folio WX35826F

(7) Please confirm if you are contending that the undertaking given by Mr Marcus Lynch solicitor is being relied upon as security.

(8) Please confirm if you would require a clause in the PIA enabling/confirming the ability of Promontoria to take such further or other steps against Mr Lynch on foot of the undertaking as claimed.

(9) Can you please provide a copy of the debt proceedings bearing record number 2017 No. 966P.

(10) Can you please confirm if any security was identified as being held by Promontoria in those proceedings (I assume in the defence and counterclaim).”

40. Significantly, the letter went on to state as follows:

“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.”

41. The letter drew Promontoria’s attention to Mr Casey’s proposed application, and noted that it was returnable before the High Court on 1 March 2021 (it was on that occasion adjourned for a week to allow Mr Casey to effect service on PAL). The PIP specifically stated in the letter that he understood “that Mr Casey will seek an Order from the Court deeming his debt to be proven as the first charge. I therefore recommend that you attend before the Court if you dispute this position or wish to

make submissions...I will be neutral on the application and I will be bound by the decision of the High Court”.

42. Although counsel for PAL at the hearing before me was unable to confirm that this letter was received by PAL, there is no reason to believe that it was not; certainly, none of the deponents on behalf of PAL in the application before me suggested that PAL had not received this letter. It certainly appears that PAL did not respond to the letter.

43. Mr Digney avers at para. 11 of his replying affidavit of 10 May 2021 that he “endeavoured to engage on this case with [PAL]...[h]owever, at no stage during the PC process did the objector engage with me”. The PIP’s position is that the proof of debt form did not specify that any of the Promontoria debts was secured. It was submitted that a *lis pendens* is not a security; counsel for Mr Casey in particular submitted that a *lis pendens* is simply a notification that there is litigation pending in relation to a property, but does not constitute a security as such. Counsel for the PIP pointed out that a *lis pendens* was not a “means of securing payment of the debt” as set out in s.2 of the Act, nor was it included in the list of matters deemed to be a “security” in that section. It was submitted that, while a *lis pendens* might be a “burden”, it is not a security.

Is Mr Casey’s charge a preference?

44. The first ground of objection by PAL to the PIP’s application is on the basis that the PIP has not complied with s.115A(8)(b) of the Act in that the charge on the Wexford property in favour of Mr Casey is prohibited by s.120(h) of the Act. Section 115A(8)(b) is as follows:

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

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

45. Section 120 of the Act is as follows:

“120. The grounds on which a Personal Insolvency Arrangement may be challenged by a creditor under section 114 are, without prejudice to section 122, limited to the following matters:

(a) that the debtor has by his or her conduct within the 2 years prior to the issue of the protective certificate under section 95 arranged his or her financial affairs primarily with a view to being or becoming eligible to apply for a Debt Settlement Arrangement or a Personal Insolvency Arrangement;

(b) the procedural requirements specified in this Act were not complied with;

(c) a material inaccuracy or omission exists in the debtor’s statement of affairs (based on the Prescribed Financial Statement) which causes a material detriment to the creditor;

(d) the debtor, when the Personal Insolvency Arrangement was proposed, did not satisfy the eligibility criteria specified in section 91;

(e) the Personal Insolvency Arrangement unfairly prejudices the interests of a creditor;

(f) the debtor has committed an offence under this Act, which causes a material detriment to the creditor;

(g) the debtor had entered into a transaction with a person at an undervalue within the preceding 3 years that has materially contributed

to the debtor's inability to pay his or her debts (other than any debts due to the person with whom the debtor entered the transaction at an undervalue);

(h) the debtor had given a preference to a person within the preceding 3 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).”

46. It is submitted on behalf of PAL that s.115A(8)(b) makes it clear that the court must satisfy itself, prior to embarking on a consideration of the PIA pursuant to s.115A(9), that no ground under s.120 applies to the PIA, and that the court must therefore be satisfied at the outset that the charge on the Wexford property is not a preference for the purpose of s.120(h). It is contended that the existence of a preference, if so found, would vitiate the court's jurisdiction to embark upon the s.115A(9) process.

47. Counsel for PAL submitted that the provision in company law deeming certain acts to be an “unfair preference” in a winding up could not usefully be compared to s.120(h) of the Act. Section 604 of the Companies Act 2014 (‘the 2014 Act’) is directed primarily to an act which “is done with a view to giving the creditor...or any surety or guarantor for the debt due to such creditor, a preference over the other creditors of the company” if certain conditions set out in the section are met. In employing the terminology “with a view to giving the creditor...a preference...”, the section clearly requires an examination of the motivation of the person carrying out the Act to see if the requisite intention of preferment is present.

48. Section 604 of the 2014 Act marked a shift away from the concept of “fraudulent preference” embodied in its statutory predecessor, s.286 of the Companies

Act 1963 ('the 1963 Act'). The case law in respect of that section suggested that where the alleged act of preference was carried out due to the will of the company being overborne, for instance by pressure exerted by a creditor which threatens the existence of the company, such an act would not be deemed to be a preference: see *re Daly & Co.* [1887-8] 19 LR Ir 83. Also, Carroll J in *Station Motors Limited v Allied Irish Banks Limited* [1985] IR 756 held that there must be an intention to prefer one creditor over others, and that this must be the dominant intention. The wording of s.604 suggests that these well-established principles may continue to be applied in the interpretation of that section.

49. Counsel however submits that s.120(h) is deliberately expressed in terms which do not require an examination of the intention of the perpetrator of the act: the court must examine only whether a "preference" had been given "within the preceding three years", and that this act had the effect of "substantially reducing" the amount available to the debtor for the payment of his debts. In essence, PAL argues that the section connotes an objective test not dependent on the intention of the debtor in assessing whether or not a preference within the meaning of the section has taken place. It is further submitted that the creation of a first legal charge by the debtor in Mr Casey's favour within three years prior to the grant of the protective certificate, on any objective reading, substantially reduced the amount available for payment of the creditors. It has essentially meant that the Wexford property is available for the discharge of Mr Casey's debt only, to the detriment of the other creditors.

50. Counsel for the PIP argued that the sale value of €250,000 or thereabouts represents in fact a very small percentage of the total indebtedness of the debtor of €5.7m; however, I think that, given that Mr Langan, under the PIA, retains his PPR and will not receive any equity from the Malahide buy-to-let property, the charge

effectively removes the only available asset of the debtor from the pot available for unsecured creditors. In those circumstances, it seems clear that the charge had the effect of substantially reducing the amount available to the debtor for the payment of his creditors.

51. However, it does not seem to me that the interpretation of the 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 have been owed; it would have been an easy matter for the draftsman to avoid 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 intention to prefer the recipient, which would have the effect of substantially reducing the amount available to discharge debts.

52. 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 reduce the amount available to them for the payment of debts. They pay the costs of maintaining and supporting themselves and their families; they may make substantial payment from their personal resources with a 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 a PIA if a debtor has been

significantly delinquent in making repayments of his PPR mortgage during this period.

53. The payment by a debtor of 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”?

54. A typical example of a “preference” in corporate insolvency, whether under the 1963 or 2014 Acts, would be the discharge in anticipation of the liquidation of the company by the directors of debts due to creditors with whom the directors proposed to promote a business relationship after the liquidation had taken place. Another example would be where a director, once again in anticipation of impending liquidation of the company, causes the discharge by the company of a debt to its bank which the director has personally guaranteed. In both cases, the preference of a creditor to the detriment of the general body of creditors is obvious and clearly intentional.

55. In the present case, PAL argues that it does not have to establish an intention to act consciously to the detriment of the creditors, as in the two examples above, as the wording of s.604 – see para. 47 above – would suggest. Counsel emphasises the wording of s.120(h): the preference must merely have “the effect” of substantially reducing the amount available for creditors. It is submitted that this wording suggests that it is the effect of the preference, rather than the intention behind it, which determines whether s.120(h) applies, and that in the present case, the undoubted

“effect” of the execution of the charge in favour of Mr Casey was the substantial reduction of the amount available to Mr Langan to pay his creditors.

56. However, this does not explain why the legislature chose to frame s.120(h) in terms of a “preference”: “...the debtor had given a preference within the preceding three years...”. Every decision to pay one creditor rather than another could be said to be a preference of that creditor. Was it the intention of the legislature that every payment “...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...” could potentially come within the terms of s.120(h)? I do not think that this can be so. As we have seen, a PIP advancing a s.115A(9) application must show a good payment record by the debtor in the two years prior to the grant of a protective certificate in respect of his PPR mortgage, notwithstanding that such payments may substantially reduce the amount available for payment of his debts.

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 s.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 have been made at the time using the assets the subject of the alleged preference.

58. When one considers the grounds in s.120 on which a challenge to a PIA may be made, it is notable that, while s.120(b) and (d) relate to procedural failures in the

PIA, some fault or morally reprehensible aspect of the PIA or the debtor's conduct is implicit in grounds (a), (c), (e), (f) and (g). For instance, ground (e) refers to a PIA which "unfairly prejudices the interests of a creditor" (a ground on which PAL relies in the present application); ground (f) refers to where the debtor "has committed an offence under this Act, which causes a material detriment to the creditor"; and ground (g), the terminology of which is in similar terms to s.120(h), relates to where "the debtor had entered into a transaction with a person at an undervalue within the preceding 3 years that has materially contributed to the debtor's inability to pay his or her debts...".

59. It seems to me that the use in the subsection of the concept of "preference" and the context in which the subsection is placed requires some qualitative examination of the nature of the payment impugned by an objecting creditor. Mr Casey's evidence is that the agreement with Mr Langan that the Wexford property would be sold to pay his fees took place in February 2017. The charge was executed in January 2019 as a result of his concern that the agreement had not been implemented, as the property had not yet been sold. There is no issue between the parties that Mr Casey – a sole practitioner – did a considerable amount of work on Mr Langan's behalf in the plenary proceedings, and that he is owed a sum of €236,800 in respect of that work. In fact, PAL accepts that Mr Casey has a first legal charge over the property; it contends however that the charge infringes s.120(h).

60. In those circumstances, could it be said that there was a preference given to Mr Casey at all? He had made it clear to Mr Langan that a "no foal no fee" arrangement would be unacceptable – he would not do the work without being sure of payment. By January 2019, he had already done a considerable amount of work, as is clear from his affidavit of 16 September 2021. At that time, he was in the throes of preparing for the

hearing of the plenary proceedings, which ultimately took place in June/July 2019. He avers in his affidavit that, at the time the charge was executed, no assertion had been made by PAL that it had any interest in the Wexford property [para. 27].

61. In my view, the execution of the charge is not a preference within the meaning of s.120(h). The commitment to sell the Wexford property to discharge Mr Casey's legal fees, which – given the nature of the plenary proceedings in the commercial list, with its application for injunctive relief and the very substantial counterclaim of the defendants – were always likely to be very substantial, was given at the outset of those proceedings, and more than three years prior to the grant to Mr Langan of his protective certificate in November 2020. The charge was executed in favour of Mr Casey in circumstances where Mr Langan was by that stage very substantially indebted to Mr Casey, and where Mr Casey had said he would not work without payment. If Mr Langan had indeed sold the Wexford property and paid Mr Casey the sum of €236,800 in January 2019, it is difficult to see how such a payment could be impugned. Mr Langan 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.

62. Section 120 of the Act permits a creditor to object to the PIA on the grounds that the debtor has contravened s.120(h). I accept the submission of PAL that, once a creditor objects to an alleged preference, the court must satisfy itself that the impugned act or payment does not contravene s.120(h) before entering upon a consideration of the PIA for the purpose of a s.115A(9) application; this is clear from

the terms of s.115A(8)(b) of the Act. An established contravention of s.120(h) would result in the PIA procedure being deemed to have come to an end, and the protective certificate would cease to have effect: see s.114(3) in this regard. The burden of proof of a contravention of s.120(h) is on the objecting creditor; however, to the extent that the intention of the debtor may be a factor in determining whether or not a preference has taken place, the court is entitled to draw inferences as to the debtor's intention from the established facts. These latter principles have long applied to the determination of whether a preference exists in corporate insolvency, and in my view apply equally to an objection under s.120(h).

63. However, for the reasons set out above, I am not satisfied that the execution by the debtor of a first legal charge in favour of Mr Casey on 3 January 2019 was a “preference” within the terms of s.120(h).

Unfair prejudice?

64. The points made by counsel in support of the second ground of objection may be summarised as follows:

(1) The equitable mortgage for which PAL contends was created by the pledge of the debtor in the terms set out at paras. 12 to 15 of Ms Fitzgibbon's affidavit of 29 October 2021, to which I refer at paras. 28 to 29 above. There is no reply to this affidavit from the PIP, and the court should therefore regard the equitable mortgage as established in evidence for the purpose of the present application.

(2) While PAL accepts that Mr Casey has a first legal charge, that charge was not registered by him as of the date of either the grant of the protective certificate or the creditors' meeting on 12 March 2021. PAL relies on s.62(2) of the Registration of Title Act 1964, which is as follows:

“There shall be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form but, until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land”.

(3) The *lis pendens* registered on 20 June 2019 constituted a registrable burden on the land pursuant to s.69(1)(i) of the Registration of Title 1964. As of the date of the meeting of creditors, it was the only registered burden on the land; notwithstanding this, the unregistered first legal charge has been given preference over the registered *lis pendens* and/or the equitable mortgage;

(4) The registration of the first legal charge contravenes s.96(3) of the Act, which is as follows:

“(3) Without prejudice to subsections (1) and (2), whilst a protective certificate remains in force, no other proceedings and no execution or other legal process in respect of a specified debt may be commenced or continued by a creditor to whom subsection (1) applies against the debtor or his or her property, except with the leave of the court and subject to any order the court may make to stay such proceedings, enforcement or execution for such period as the court deems appropriate pending the outcome of attempts to reach a Personal Insolvency Arrangement, but this subsection shall not operate to prohibit the commencement or continuation of any criminal proceedings against the debtor.”

(5) A finding that the first legal charge takes priority over the equitable mortgage for which PAL contends would render moot the 2019 proceedings,

in which PAL seeks to establish its alleged equitable mortgage. It is contended that this unfairly prejudices PAL.

I propose to deal with these points in the following paragraphs.

The equitable mortgage

65. In relation to the question of whether this Court should regard PAL as having, for the purpose of the present application, an equitable mortgage, one must bear in mind the context in which the PIP discharges his duties and makes the present application.

66. In preparing the PIA, the PIP conducts a statutory process to determine the extent of the indebtedness of the debtor and to ensure that all debts are correctly classified and treated in his proposal. As regards PAL's claim, the steps which the PIP took in this regard are set out at paras. 34 to 40 above. The proof of debt form furnished by PAL referred to the *lis pendens*, and while it did refer to a "charge" over the folio, it gave no details of this charge. The PIP subsequently wrote a detailed letter, the terms of which are set out at paras. 39-40 above, which raised queries in relation to whether PAL was claiming security in very specific terms. There does not appear to have been any response to this letter.

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 to PAL as unsecured.

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 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.

69. In relation to the *lis pendens*, I accept the submission on behalf of the PIP and Mr Casey that, while the *lis pendens* may be a registrable burden, it is not a charge or security on the folio of the Wexford property. It alerts the reader of the folio to the existence of litigation which may affect the ownership interests in the folio; however, it does not come within the definition of "security" in s.2 of the Act, which is as follows:

“security’ means, in relation to a debt, any means of securing payment of the debt and includes –

- (a) a mortgage, judgement mortgage, charge, lien, pledge, hypothecation or other security interest or encumbrance or collateral in or over any property (whether real or personal and including choses-in-action),
- (b) an assignment by way of security, and
- (c) an undertaking or agreement by any person (including a solicitor) to give or create a security interest in property”.

70. PAL argues that it is unfairly prejudiced by being effectively deprived of the opportunity to establish its equitable charge in the 2019 proceedings. In my view, this point is without merit. It is often the case, in both corporate and personal insolvency, that proceedings against the company or debtor are compromised in some way by liquidation or examinership (in the case of a company) or bankruptcy or personal

insolvency (in the case of an individual debtor). There may be cases in which the argument can be made that this is indeed unfair, particularly in circumstances where the creditor has acted expeditiously and the hearing of the proceedings is imminent. Those factors do not apply to the present case, in which PAL did not even identify its security to the PIP despite his detailed enquiries, and where the security relied upon arose from a letter of 23 December 2008, with proceedings not being initiated until June 2019. PAL can hardly argue in such circumstances that determination of the present application should await the outcome of the 2019 proceedings.

Is the treatment of the first legal charge in the PIA valid?

71. PAL argues that, as Mr Casey's charge was not registered on the folio at the time of the creditors' meeting of 12 March 2021 when the vote on the PIA took place, it is an unregistered charge and cannot, as of that date, confer any interest on Mr Casey pursuant to s.62(2) of the Registration of Title Act 1964.

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 some time 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.

73. The PIP compiled the draft PIA circulated to creditors in February 2021, after the grant of the protective certificate on 23 November 2020, on the basis that Mr Casey had a valid first legal charge to which the Wexford charge was subject. The PIA disclosed very clearly that PAL had a *lis pendens* registered against the property. Both the draft PIA and the PIA presented to the creditors' meeting acknowledged the

first legal charge and proposed payment to Mr Casey of the amount owed to him from the proceeds of sale.

74. The creditors were apprised of the security and how it was to be treated. That is what they voted on. As I have found, the PIP correctly treated the PAL debt as unsecured. All creditors other than PAL voted in favour of the PIA. 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 twelve months within which the PIA was to be completed.

75. Accordingly, given my finding as to the nature of the order of the court on March 8 2021, and in the somewhat unusual circumstances of the case, I am of the view that the PIP was entitled to treat the first legal charge in the way that he did, and that the fact that registration of the charge had not taken place by the date of the creditors' meeting is not fatal to that treatment.

76. I do not consider that the application to this Court by Mr Casey contravened s.96(3) of the Act in any respect. All Mr Casey sought to do was to apply to court seeking to prove his debt in court, which, as I have mentioned at para. 12 above, he is entitled to do pursuant to para. 2(b) of the First Schedule to the Bankruptcy Act 1988 as amended. It is not the sort of "legal process" to which s.96(3) is directed. No application was made by Mr Casey to this Court for execution on foot of the charge.

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.

Conclusion

78. As I am of the view that none of the objections raised by the objecting creditor is valid, I will make an order pursuant to s.115A(9) confirming the coming into effect of the proposed PIA. I am satisfied that it is appropriate to do so in all the circumstances.

79. In particular, I am satisfied that approval of the PIA does not constitute an unfair prejudice against PAL. I am influenced in this conclusion by the very considerable delay of Promontoria and its predecessor in initiating proceedings to establish the alleged equitable mortgage, and its complete failure to engage with the PIP during the proof of debt process, notwithstanding his repeated entreaties to do so.

80. I will allow the parties to make brief written submissions of not more than 1,000 words within seven days of the delivery of this judgment in relation to the issue of costs, and any ancillary orders to be made. The parties might in particular consider whether an order amending the order of 8 March 2021 would be appropriate.