



THE COURT OF APPEAL

CIVIL

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Court of Appeal Record Number: 2021/53

Collins J.

Costello J.

Haughton J.

IN THE MATTER OF LATZUR LIMITED (IN RECEIVERSHIP)

AND IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr Justice Maurice Collins delivered on 16 March 2023

INTRODUCTION

1. This appeal raises a number of short but significant issues regarding the *crystallisation*, *de-crystallisation* and – so it is argued – *re-crystallisation* of floating charges in the context of an unsuccessful examinership under the Companies (Amendment) Act 1990 (as amended) (“*the 1990 Act*”). Some ancillary issues also arise. These issues have been generated by a dispute between Chelsey Investissements SCA, a Luxembourg company (“*Chelsey*”) on the one hand and the Revenue Commissioners (“*Revenue*”) on the other

as to the priority of their respective claims in the distribution of funds currently held by Ken Fennell in his capacity as receiver of the assets of Latur Limited (in Receivership) (“Latur” or “the Company”).

2. Mr Fennell was appointed receiver of the assets of Latur by Chelsey on 28 November 2013. He had previously acted as interim examiner and then examiner to Latur. Latur and related companies had operated the well-known *A-Wear* retail chain. However, Mr Fennell was unable to formulate any proposal for a compromise or scheme of arrangement which might have secured the survival of the Company and, as a result, on 28 November 2013 the High Court (Charleton J) made an order pursuant to section 16 of the 1990 Act directing that court protection of the Company should cease, and the appointment of the examiner terminate, with effect from 12 noon that day. Chelsey moved immediately to appoint Mr Fennell as receiver (he was appointed at 12.10). I will refer to Mr Fennell as “*the Receiver*”.
3. Revenue says that it is a substantial creditor of Latur. That does not appear to be disputed. It says that a large proportion of the debts due to it rank as preferential debts pursuant to section 98 of the Companies Act 1963 (“*the 1963 Act*”). As I understand it, Chelsey does not dispute Revenue’s claim that some of the debts due to it rank as preferential debt *vis a vis* the general creditors of the Company. However, Chelsey disputes that Revenue has any entitlement to priority over *its* claims.
4. That dispute arises in the following circumstances. Part VI of the 1963 Act (now repealed), specifically section 285, identified a number of categories of debt, including

various categories of rates and taxes, which were to be “*paid in priority to all other debts*” in a winding-up (section 285(2)). Insofar as the assets of the company available for payment of general creditors were insufficient to discharge such preferential debts, section 285(7)(b) provided that they would “*have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge*”. Section 98 of the 1963 Act applied the provisions of Part VI to a situation where a receiver was appointed to a company under a floating charge or possession was taken by or on behalf of the debenture holders of any property covered by such charge.

5. These provisions of the 1963 Act were repealed and re-enacted by the Companies Act 2014 (“*the 2014 Act*”). Section 440 of the 2014 Act re-enacted section 98. Part 11 re-enacted Part VI. Section 621 (as enacted) re-enacted section 285, section 621(7)(b) being identical in its terms to section 285(7)(b) of the 1963 Act.
6. Chelsey says that, prior to the Receiver’s appointment, its floating charge had crystallised into a fixed charge. Accordingly (so Chelsey says) the Receiver was not appointed under a floating charge and its claims are not claims “*under any floating charge created by the company*” and are not statutorily subordinated to the preferential claims of Revenue.
7. In *JD Brian Limited (in liquidation)* [2015] IESC 62, [2016] 1 IR 131, the Supreme Court, reversing the decision of the High Court (Finlay-Geoghegan J) ([2011] IEHC 113, [2011] 3 IR 244) held that the reference in section 285(7)(b) to “*the claims of*

holders of debentures under any floating charge created by the company” meant claims advanced on a charge that was a floating charge *as at the commencement of the winding up* and thus the provision did not capture claims secured by a previously floating charge that had been converted into a fixed charge *prior to such commencement*. It followed that Revenue had no entitlement to priority over the charge-holder in that case. The Oireachtas subsequently legislated to reverse the decision in *JD Brian* by enacting section 92 of the Companies (Accounting) Act 2017, which amended section 621(7)(b) of the 2014 Act.¹ However, it is common case that this amendment has no bearing on these proceedings.

8. The effect of the Supreme Court’s decision in *JD Brian* is that Revenue’s claim to priority *vis a vis* Chelsey is liable to be defeated if Chelsey’s floating charge had *crystallised* prior to the appointment of the Receiver shortly after noon on 28 November 2013.² I do not understand that to be a matter of dispute. The battle line between the parties is as to the status and effect of Chelsey’s charge as at the Receiver’s appointment and whether, at/immediately prior to that appointment, it was a floating charge (as Revenue argues) or a fixed charge (as Chelsey says).

¹ Section 92 substitutes “*any charge created as a floating charge by the company*” for “*any floating charge created by the company*” in section 621(7)(b)). An amendment in those terms had been recommended by the Company Review Group (CLRG) in its *Review of the Implications of the Supreme Court Judgment: In the matter of JD Brian t/a East Coast Print and Publicity and Re East Coast Car Parts Ltd [2015] IESC 62* (November 2015). (the “*CLRG Review*”) The CLRG also recommended an equivalent amendment to section 440(1)(a) of the 2014 Act so that it would apply to a receiver appointed by the holders of a debenture secured by “*a charge created as a floating charge*”. For whatever reason, no such amendment was made.

² An issue of terminology arises here. What I refer to as “*crystallisation*” is sometimes referred to as “*conversion*” (and, in fact, the Debenture here uses the terminology of “*conversion*”). However, both the authorities and commentary predominantly use the language of “*crystallisation*” and so shall I.

9. To better understand the parameters of this dispute, I need to say something more about the terms of the charge here and the circumstances in which it is said by Chelsey to have crystallised prior to the appointment of the Receiver. That will also allow for the identification of the issues potentially requiring determination in the appeal.

10. The judgment of Sanfey J in the High Court ([2020] IEHC 592) gives a characteristically clear and comprehensive account of the factual background and also provides a detailed discussion of the respective arguments of the parties. I will not repeat that exercise here. The reader looking for a more detailed narrative may refer to the High Court judgment, to which of course I shall also refer below.

THE DEBENTURE

11. At issue here is an instrument dated 24 May 2012 which is described as *Debenture - Fixed and Floating Charge*. I shall refer to it, as the Judge did, as “*the Debenture.*” The Debenture is governed by Irish law (Clause 21). Clause 3.1 (“*Fixed Charges*”) creates (or purports to create) a series of fixed charges over a wide range of assets of Latur, including its accounts (3.1.7), goodwill (3.1.9), material contracts (3.1.11) and receivables (3.1.12). As the Judge explains (Judgment, para 5), Chelsey maintains that certain of the available assets of Latur are captured by one or other of these Clause 3.1 fixed charges. Revenue, for its part, contends that the charges created by Clause 3.1 are, as a matter of law, floating rather than fixed charges, on the basis that Clause 3.1 did not impose any restrictions on Latur dealing with the assets covered by those charges. The issue as to the nature and effect of the charges created by Clause 3.1 is not an issue in this appeal. By agreement of the parties, and with the approval of the Judge, that issue was postponed pending the determination of the issues around the floating charge created by Clause 3.3. Accordingly, no further reference is made to it in this judgment.
12. Clause 3.2 (“*Security assignments*”) then effects what are described as absolute assignments of many of the same categories of asset as were the subject of the fixed charges created by Clause 3.1. Clause 3.3 (“*Floating charge*”) next provides that:

“The Chargors hereby charge unto the Chargee by way of first floating charge, all of their assets and undertaking whatsoever and wheresoever, both present and future and the property and assets referred to in clauses 3.1 (Fixed charges)

and 3.2 (Security Assignment) above (if and in so far as such mortgages, charges and/or assignments in this Deed shall be ineffective as fixed charges/security assignments).”

13. Clause 3.4 (“*Conversion of a floating charge*”) is at the heart of the dispute and so I shall set it out in full:

“3.4.1 Conversion by notice

The Chargee may, by notice in writing to the Chargors, convert the floating charge created under this Deed into a fixed charge as regards all or any of the assets of the Chargors if:

(1) an Enforcement Event has occurred;

(2) the Chargee considers, in good faith, that the Secured Assets (or any of them) are in danger of being seized or sold under or pursuant to any form of distress, attachment, execution or other legal process or otherwise to be in jeopardy; or

(3) the Chargee considers such conversion to be necessary or desirable to protect the priority of the Security; and such fixed charge shall apply to all assets the subject of the floating charge as specified in the notice.

3.4.2 Automatic conversion

The floating charge created under this Deed shall, (in addition to the circumstances in which the same will occur under general law) automatically be converted into a fixed charge (without notice) as regards all assets which are subject to the floating charge if:

(1) The Chargor creates (or attempts or purports to create) any Security Interest on or over any of the Secured Assets without the prior written consent in writing of the Chargee;

(2) any person levies or attempts to levy any distress, execution, sequestration, attachment or other legal process against the Secured Assets (or any of them);

(3) if a receiver and/or manager is appointed over the Chargor or any of its assets;

(4) if a petition is presented for the appointment of a liquidator, Examiner or other analogous insolvency official to, or the protection of the court is sought by, the Chargor;

(5) if any meeting of the directors or members of the Chargor is convened for the purposes of considering any resolution for its winding-up or liquidation or for appointing an examiner to the Chargor or other analogous insolvency

procedure or with a view to a composition, assignment or arrangement with its creditors generally (or any class of its creditors) or any meeting is convened for the purposes of considering any event similar or analogous to the foregoing and such resolution is passed; or

(6) if the Chargor ceases to carry on business as a going concern.

3.4.3 Partial Conversion

The giving of notice by the Chargee pursuant to clause 3.4.2 (Conversion by notice) in relation to any assets of the Chargor shall not be construed as a waiver or abandonment of the rights of the Chargee to serve similar notices in respect of any other assets or of any of the other rights of the Chargee.

3.4.4 Treatment of floating charge assets post conversion

The Chargor undertakes to the Chargee that, following the occurrence of any of the events set out in this clause 3.4 (Conversion of a Floating Charge), it:

(1) shall not sell, transfer, convey, lease, licence, assign (or enter into any agreement in connection thereto) or otherwise deal with or dispose of the Converted Assets;

(2) shall deliver as soon as possible to the Chargee or otherwise as agreed with the Chargee in writing, such information as the Chargee shall require to identify the Converted Assets including, for the avoidance of doubt, a full description (including serial/identification numbers in respect of plant and equipment and other tangible assets, account numbers, contract details etc) of all of the assets comprised in the Converted Assets; and

(3) shall deliver as soon as possible to the Chargee or otherwise as agreed with the Chargee in writing, all documents of title relating to such Converted Assets.”

14. Once triggered, the “*Automatic Conversion*” provisions in Clause 3.4.2 operate to convert the floating charge into a fixed charge “*as regards all assets which are subject to the floating charge*”. In contrast, the “*Conversion by notice*” provisions in Clause 3.4.1 operate to convert the floating charge into a fixed charge over “*all assets the subject of the floating charge as specified in the notice*” (my emphasis). The treatment of assets post-conversion is provided for in Clause 3.4.4. Clause 3.4.4 does not provide (and the Debenture does not otherwise provide) for any mechanism whereby the effect of the crystallisation of the floating charge into a fixed charge might be suspended or reversed (decrystallised) by Chelsey, whether generally or by reference to specific assets or asset categories, or by which particular assets might be released from such fixed charge.

15. Another – and somewhat more significant – issue of terminology arises here. In *Re JD Brian* [2011] IEHC 113 and 283, [2011] 3 IR 244, Finlay-Geoghegan J in the High Court considered that it was preferable to refer to crystallisation by service of a notice by the chargee as “*express crystallisation*” rather than as a form of “*automatic crystallisation*” given that it involved the intervention of the chargee (para 44, at page 264 of the report). “*Automatic crystallisation*” is sometimes used to refer to an event specifically agreed in the debenture as causing crystallisation and in other instances is used to refer to “*implicit crystallisation events of the traditional kind developed in the older case law*” (see the passage from Gough, *Company Charges* (2nd ed 1996), at page 232, which is set out at para 43 of the judgment of Finlay-Geoghegan J). Gough uses “*express crystallisation*” to cover both express clauses of the “*automatic*” kind (where the chargee does not need to do anything to cause crystallisation) and clauses where the contract terms require chargee action or intervention (such as by the service of a “*conversion notice*”). I prefer to maintain a distinction between “*express crystallisation*” in the sense in which that expression was used by Finlay-Geoghegan J in *JD Brian* (crystallisation by notice) and “*automatic crystallisation*” (crystallisation caused by the happening of a contractually specified event that does not, or may not, involve any intervention by the chargee). That is consistent with the approach taken in Courtney, *The Law of Companies* (4th ed; 2014) (“*Courtney*”) at para 19.090 and following. It also reflects the structure of the Debenture. That distinction is not entirely tidy (for example, the appointment of a receiver is often contractually stipulated to be a crystallisation event and the chargee may be (but will not necessarily be) the person making that appointment, thus triggering crystallisation) but it is nonetheless serviceable. So far as relevant, I shall refer to events which, on the authorities, may

trigger crystallisation even in the absence of any contractual trigger – such as the commencement of winding-up proceedings – as “*implicit crystallisation events*”.

THE CRYSTALLISATION EVENTS RELIED ON BY CHELSEY

16. Chelsey relies on a number of alternative crystallisation events, as follows:

(1) First, Chelsey argues that the floating charge crystallised on **3 October 2013** when Vangas Management SA, the sole member of Latur, decided in writing that Latur “*forthwith petition the High Court for the appointment of an Examiner, including on an interim basis.*” That, Chelsey says, was (or ought to be regarded as) a meeting of the members of Latur convened for the purpose of considering a resolution for the appointing of an examiner such as to trigger automatic crystallisation pursuant to Clause 3.4.2(5) of the Debenture (which, it will be recalled, refers in material part to “*any meeting of the ... members of the Chargor ... convened for the purposes of considering any resolution ... for appointing an examiner*”).

Notwithstanding the arguments of Revenue to the contrary (set out further below), the Judge held that Clause 3.4.2(5) was, as a matter of principle, capable of triggering automatic crystallisation of the floating charge. However, he found that the charge had not, in fact, crystallised on 3 October 2013 because, in his view, a decision taken in writing by the sole member of a single member company pursuant to Regulation 9(3) of the European Communities (Single Member Private Limited Companies) Regulations 1994³ (“*the 1994 Regulations*”) did not come within the scope of Clause 3.4.2(5), properly construed (Judgment, paras 119-130). Chelsey says that the Judge

³ SI 275/1994

erred in this regard and invites this Court to read Clause 3.4.2(5) as encompassing a decision taken by the sole member of a single-member company. Revenue, on the other hand, seek to stand over the Judge's finding (in addition to contending that Clause 3.4.2(5) should not be given effect in any event on grounds of public policy).

(2) Second (and in the alternative) Chelsey relies on Clause 3.4.2(4) of the Debenture to say that the floating charge crystallised on the presentation of Latur's petition for the appointment of an examiner on **8 October 2013**.

The Judge accepted that the presentation of the petition for the appointment of an examiner effected the automatic crystallisation of the floating charge. While the charge had de-crystallised on the appointment of the examiner (that, in the Judge's view, following from the Supreme Court's decision in *In re Holidair* [1994] 1 IR 416 ("*Holidair*")), it had re-crystallised as soon as the period of court protection had finished and had the status of a fixed charge immediately prior to the appointment of the Receivership (Judgment, paras 113 – 116). Revenue disputes virtually every aspect of the analysis that led the Judge to this conclusion. Fundamentally, it says that allowing Chelsey to rely on Clause 3.4.2(4) of the Debenture would be contrary to the policy underpinning the examinership regime established by the 1990 Act and would be a breach of section 5(2)(d) of that Act. The Judge rejected that argument but it is renewed by Revenue on appeal.

(3) Third (and again in the alternative) Chelsey says that the floating charge (if not already crystallised) crystallised on **23 November 2013** by virtue of the delivery by

Chelsey to the Company of a *Notice of Crystallisation* of that date (the “*Notice*”) in the following terms:

“Re: Debenture – Fixed and Floating Charges, dated May 24, 2012 (‘the Debenture’)

Notice of conversion to a Fixed Charge under Section 3.4.1 of the Debenture.

Dear Sirs,

We refer to the debenture described above.

This is a notice to you sent pursuant to Section 3.4.1 of the above noted Debenture, specifically subsection 3.4.1(3) thereof.

For greater certainty and clarity, the purpose of this notice is to convert the Floating Charge created under the Debenture to a Fixed Charge under said Debenture as regards to all or any of the assets listed below, all due to our consideration that this conversion is desirable to protect our Security, as that term is defined in the Debenture.

The assets subject to this notice are those listed in Section 3.2 of the above noted Debenture and defined in Section 1.1 of said Debenture as any Security, Security Interest, Secured Obligation and Secured Asset(s). In particular, the assets include: -

the Material Contracts

the Insurances and Insurance Proceeds

the Intellectual Property

each Account together with all monies at any time standing to the credit of the Accounts and all interests and all other rights accruing or arising in connection with such accounts or monies

the leases

the Receivables

the benefit of all Ancillary Rights, and

any bill of exchange or other negotiable instrument held by it.

Please note that you are, from your receipt of this notice on this date, restricted from using, disposing or otherwise dealing with the assets listed herein, and subject to the fixed charge. Gentlemen, please govern yourselves accordingly.”.

A significant issue arose in the High Court as to whether this Notice was properly and effectively served on the Company. The Judge concluded that the Notice had been effectively served (in Canada) even if service had not been effected in the manner contemplated by the Debenture (which provided for service at Latur's registered offices in Dublin). In any event, he considered that Revenue could not take any point about service in circumstances where Latur had not done so. (Judgment, paras 138-144). Revenue says that the Judge erred in holding that the service of the Notice was effective. As to its substantive effect, the Judge held that the Notice had crystallised the

floating charge which then simultaneously de-crystallised (the examiner was in place on 23 November 2013 and Latur was under court protection and the Judge considered that the charge had to de-crystallise “*in order for the examinership to be able to function*”, in accordance with the principles set out in *Holidair*) (Judgment, para 136). The charge had then re-crystallised when court protection ended. Again, this analysis has been the subject of a root and branch challenge on appeal, with Revenue’s principal contention being that section 5(2)(d) of the 1990 Act precluded the service of a notice of crystallisation (and/or prevented the effective crystallisation of the floating charge) while Latur was under the protection of the court.

(4) Finally, in the High Court Chelsey also relied on the appointment of the Receiver on **28 November 2013** as an automatic crystallisation event pursuant to Clause 3.4.2(3) of the Debenture. It is well-established that the appointment of a receiver crystallises a floating charge. But it does not follow that that would give Chelsey any basis for asserting priority *vis a vis* Latur’s preferential creditors here, having regard to the provisions of section 98 and Part VI (and particularly section 285) of the 1963 Act. That may explain why this point was not pressed in the High Court and was not pursued on appeal.

17. There are some further factual matters to be noted. They are set out in detail in the Judgment of Sanfey J. A curious feature of the proceedings is that Chelsey did not initially rely on automatic crystallisation pursuant to Clause 3.4.2 of the Debenture at all. The issue between Chelsey and Revenue as to their respective priority arose exclusively by reference to Clause 3.4.1 and the effect of the Notice that was (according

to Chelsey) served on the Company on 23 November 2013. That was the position as of June 2019 when the Receiver applied for directions under section 438 of the 2014 Act and is reflected in the fact that the Receiver's notice of motion sought directions "*determining the effect of the notice of crystallisation dated 23 November 2013 .. in the context of the examinership*". That was the sole relief sought directed to Clause 3.4 of the Debenture (the other relief was directed to Clause 3.1). The application for directions was grounded on a lengthy affidavit of the Receiver which sets out in detail Chelsey's contentions regarding the effect of the Notice pursuant to Clause 3.4.1 but which was entirely silent about any possible automatic crystallisation under Clause 3.4.2.

18. In September 2019, a Mr Jack Stein swore an affidavit on behalf of Chelsey, as its authorised representative. Mr Stein had also been involved in the affairs of Latur and averred that he had been "*intimately involved in the examinership*". While Mr Stein did make brief reference in that affidavit to automatic crystallisation, that reference was limited to Clause 3.4.2(3) of the Debenture, which provides for the automatic crystallisation on the appointment of a receiver and/or manager over the assets of Latur. As I have already indicated, the contention that Chelsey is entitled to priority on the basis that its floating charge crystallised on the appointment of the Receiver is no longer pursued.
19. The contention that the floating charge had crystallised on 3 October 2013 (pursuant to Clause 3.4.2(5) of the Debenture) or on 8 October 2013 (pursuant to Clause 3.4.2(4)) – which is now Chelsey's principal contention, with the argument based on crystallisation

by notice relegated to secondary, alternative, status – is something of a retrospective construct. It appears to have been advanced for the first time in Chelsey’s written submissions to the High Court on the Receiver’s directions application, which were delivered in March 2020, almost **6½ years** after the appointment of Mr Fennell as interim examiner. If the floating charge crystallised either on 3 October or 8 October 2013 (as now contended by Chelsey) it seems to follow that Chelsey must have been ignorant of the correct legal position when it served the Notice on 23 November 2013. It would also seem to follow that the examiner (and the High Court that appointed him) had been unaware of the correct legal position on his appointment – namely that all the assets of Latur were at that time the subject of a fixed charge in favour of Chelsey. Certainly, the verifying affidavit sworn by Mr Stein on 8 October 2013 for the purpose of grounding the examinership petition does not suggest that the floating charge had already crystallised or would do so on the presentation of Latur’s petition under the 1990 Act.

20. This raises a related point, namely whether the examiner was aware of the service of the Notice on 23 November 2013. While the evidence on this point is perhaps not as clear as one might expect, there is certainly no evidence in the material before the Court that the Notice was served on (or copied to) the examiner. The only *evidence* of service is of service by Judah Bendayan, a director of Chelsey, on Mr Stein at a location in Canada on 23 November 2013. Furthermore, such evidence as is available suggests that Mr Fennell did not find a copy of the Notice in the Company’s records (see paras 17 and 18 of the Receiver’s affidavit of 15 October 2019). But, as Mr Kennedy SC (for Chelsey) observed in argument, all of that does not necessarily exclude the possibility

that the Notice, or a copy of it, found its way to the Company's records but may have been subsequently misplaced.

21. The facts just referred to prompted arguments in the High Court about waiver and estoppel to which it will be necessary to make further reference. First, however, it is appropriate to examine the authorities on the crystallisation of floating charges, with particular attention to *Holidair* and *JD Brian*.

**CRYSTALLISATION (AND DE-CRYSTALLISATION)
OF FLOATING CHARGES**

The Characteristics of a Floating Charge

22. In *Re Keenan Bros Ltd* [1985] IR 401, Henchy J described a floating charge as follows:

“.. in the case of a floating charge, while such charge is effective in law from the date of its creation, because it is of its nature, dormant and hovering, it does not attach to the assets expressed to be subject to it so as to prevent the company from continuing to deal with those assets in the ordinary course of business until the happening of some event, such as the appointment of a liquidator, which shows that the company is no longer in business, or until the chargee intervenes. ... A floating charge, so long as it remains floating, avoids the restricting (and in some cases, paralysing) effect on the use of the assets of the company resulting from a fixed charge. While a charge remains a floating one, the company may, unless there is agreement to the contrary, deal with its assets in the ordinary course of business just as if there were no floating charge.” (at 418)

23. That freedom of the chargor to continue dealing with its assets in the ordinary course of business (the third of the characteristics identified by Romer LJ in the Court of Appeal in *In Re Yorkshire Woolcombers Association Limited* [1903] 2 Ch 284, at 295) has been said to be the “*hallmark of the floating charge*”: *In re Spectrum Plus Ltd* (in

liquidation) [2005] UKHL 41, [2005] 2 AC 680, per Lord Scott at paras 106-107, citing (*inter alia*) the opinion of Lord Millett for the Privy Council in *Agnew v Comr of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710 as well as the Supreme Court's decision in *In re Keenan Bros Ltd*.

24. There is some debate as to the nature of the interest created by a floating charge. It is generally accepted that it creates a *present* security, immediately affecting the relevant assets of the chargor company. In her judgment in *JD Brian* (at para 17) Finlay-Geoghegan J cited with approval a statement from *Goode on Legal Problems of Credit and Security* (4th ed, 2008) (“*Goode*”) (in turn citing a passage from the well-known judgment of Buckley LJ in *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, at 999)⁴ to the effect that it was established that “*a floating charge creates an immediate, albeit, unattached security interest*” (emphasis in the original). *Gough* is to the same effect, describing the floating charge as “*a present and immediate charge from its inception which at crystallisation becomes converted into a special charge*” (at para 15.2). However, there appears to be less consensus as to the precise nature of the security interest thus created in the period between creation and crystallisation and, in particular, whether or not the chargee obtains an immediate equitable/proprietary interest in the charged assets. *Gough* suggests that a floating charge gives rise to a “*deferred proprietary interest*” for the chargee.⁵ *Courtney* suggests that it is an overstatement to describe the pre-crystallisation rights of the chargee as “*proprietary*”,

⁴ This passage was cited with approval by the High Court (Blayney J) in *In re Tullow Engineering (Holdings) Ltd* [1990] 1 IR 452, at 457-458.

⁵ See the passage set out in *Courtney*, para 19.066.

such rights bring (according to *Courtney*) better described as “*an equity*” rather than “*an equitable interest*” (para 19-066). Other commentators take a different view. Goode and McKendrick argue that, in the period prior to crystallisation, the holder of the charge has no rights *in specie* but has an interest in the chargor’s “*fund of assets*”, analogous to the interest of a beneficiary in a trust fund.⁶ Worthington has suggested that the floating charge is similar to the fixed charge, coupled with a licence to deal in the charged assets.⁷ In his speech in *In re Spectrum Plus Ltd*, Lord Walker expressed the view that “*the chargee has a proprietary interest*” but it is not entirely clear whether, in doing so, he was endorsing the Goode or the Worthington theories. Fortunately, however, it is not necessary to enter further into this debate here.⁸

25. Here, it is clear, *Latzur* was free with deal with its assets in the ordinary course of business “*just as if there were no floating charge*”, unless and until that floating charge crystallised.

The Effect of Crystallisation

26. According to *Donnelly*, crystallisation of a floating charge is the process by which the

⁶ *Goode and McKendrick on Commercial Law* (6th ed; 2021) at para 25-06, reiterating views expressed in *Goode* at para 4-03 (though it appears that more editions of Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* tend toward characterising the floating charges as a defeasible fixed charge).

⁷ Worthington’s *Proprietary Interests in Commercial Transactions* (1996) at pages 74-77

⁸ For further discussion, reference may be made to *Donnelly*, *The Law of Credit and Security* (3rd ed; 2021) (“*Donnelly*”) at para 14-13. McGrath, “The Floating Charge in Ireland after *JD Brian Ltd*” (2012) 35 *Dublin University Law Journal* 306-316, Lynch Fannon “The Floating Charge Debate in Irish Law: The Path to Clarity” (2015) 22 *Commercial Law Practitioner* 187–195 and Quinn, “The Crystallisation of Floating Charges: Rethinking the Conceptual Framework” (2020) 20 *Journal of Corporate Law Studies* 178-198.

charge ceases to float and becomes a fixed charge. As to the effects of crystallisation, she states:

“The effects of crystallisation are, first, the company loses that right which is characteristic of the floating charge, namely to deal with the assets in the ordinary course of business; secondly, the charge attaches to the assets which are in the company’s possession at the time of crystallisation;⁹ and thirdly, there is an equitable assignment of the charged assets to the debenture holder¹⁰ and the debenture holder takes its place in the order of priorities as a fixed charge holder from this point” (para 14-14)

27. According to Goode and McKendrick, as against the chargor company *“the chargee has all the rights of the holder of a specific equitable charge and the company’s actual authority to deal with the fixed assets free from the charge comes to an end”* (*op cit*, para 25.23). The authors draw a distinction between the effect of crystallisation as between chargor and chargee and as between chargee and third parties, which they characterise as a question of priorities (*ibid*, para 25.24). While the company’s *authority* to deal with the assets comes to an end, it does not follow that its *power* to do so is fully terminated and third party rights may depend on whether or not they had notice of the crystallisation of the floating charge (para 25.30).

⁹ And will also cover subsequently acquitted assets within the scope of the charge.

¹⁰ That crystallisation of a floating charge effects an equitable assignment of the charged assets to the debenture holder has long been understood the law in this jurisdiction: see e.g. *In Re Interview Ltd* [1975] IR 382

28. Here, of course, the Debenture made express provision for the “[t]reatment of floating charge assets post conversion”, providing that Latur should not “sell, transfer, convey, lease, licence, assign (or enter into any agreement in connection thereto) or otherwise deal with or dispose of the Converted Assets”. Even in the absence of such a provision, it follows from the Supreme Court’s decision in *JD Brian* that, as a matter of law, if and when the floating charge crystallised here (and it seems clear that it crystallised at some point, even if only on the appointment of the Receiver) Latur “would thereafter be restricted in the use of the property and assets and rights which had been the subject of the floating charge and .. [Latur] would cease to be entitled to use such property in carrying on its business without the consent of [Chelsey]” (at para 71, per Laffoy J). While Laffoy J (with whose judgment Clarke and Charleton JJ agreed) was there addressing the effects of crystallisation by notice – or express crystallisation as I have referred to it – the logic of her analysis applies equally to automatic crystallisation or (so far as recognised in Irish law) crystallisation arising from the occurrence of an implicit crystallisation event.

Express and Automatic Crystallisation – the decision in JD Brian

29. *JD Brian* appears to have been the first case in this jurisdiction to consider the efficacy of an express crystallisation (crystallisation by notice) clause in a debenture. There were, as Finlay-Geoghegan J noted in the High Court, “two schools of thought” in Irish academic commentary but she had little difficulty in concluding that such clauses were, in principle, permissible and effective. In coming to that conclusion, she found the analysis of Hoffman J in *In re Brightlife* [1987] 1 Ch 200 persuasive. For the reasons

set out in *In re Brightlife*, she rejected the argument that such clauses should not be recognised as a matter of public policy, given their potential adverse effect on third party creditors. It was, in her view, a matter for the Oireachtas to intervene to restrict the use of such clauses if it saw fit to do so and she concluded that “*there is no rule of law which precludes parties to a debenture creating a floating charge agreeing, as a matter of contract, that the floating charge will crystallise upon the happening of an event or a particular step taken by the chargee*” (para 56, page 268 of the report).

30. That conclusion did not avail the debenture holder in the High Court, for two distinct reasons. First, declining to follow *In Re Griffin Hotel* [1941] 1 Ch 129, Finlay-Geoghegan J held that section 285(7) of the 1963 Act gave priority to the preferential debts over the claims of the debenture-holder, regardless of when the floating charge had crystallised and irrespective of whether it had done so before the commencement of the winding up. The detailed discussion in her judgment on this point is illuminating and, if I may say so, persuasive. However, on appeal the Supreme Court (per Laffoy J) took a different view. Secondly, and in any event, Finlay-Geoghegan J held (in a subsequent judgment) that service of the notice had not had the effect of converting the floating charge into a fixed charge because of the absence from the debenture of any provisions restricting the entitlement of the company to continue to deal with the charged assets in the course of its business. Again, the Supreme Court took a different view on this point.
31. For present purposes, however, it is the point upon which the High Court and Supreme Court agreed that is significant. At para 29 of her judgment (with which Clarke and Charleton JJ agreed), Laffoy J noted Finlay-Geoghegan J’s conclusion that there was

no rule of law precluding the parties to a debenture agreeing that a floating charge would crystallise upon the happening of an event or the taking of a step by the chargee and expressed her agreement with that conclusion, which she noted was not disputed by any of the parties.

32. While *JD Brian* was concerned with an *express crystallisation* (crystallisation by notice) clause, the logic of the High Court’s analysis (endorsed on appeal by the Supreme Court) appears to apply with equal force to *automatic crystallisation* clauses. Indeed, in the passage cited above, Finlay-Geoghegan J expressly refers to the freedom of parties to agree that a floating charge would “*crystallise upon the happening of an event*”, which is of course the very essence of automatic crystallisation. *Courtney* makes that very point (at para 19.104), although noting that the effectiveness of an automatic crystallisation clause in terms of securing priority over preferential creditors may sometimes be uncertain (*ibid*). Johnston, *Banking and Security Law in Ireland* (2nd ed; 2020) also regards *JD Brian* as settling the issue of the validity of automatic crystallisation clauses in this jurisdiction (at para 12.33). The validity in principle of clauses providing for automatic crystallisation – provided that they are drafted with sufficient clarity¹¹ - appears to be well-established in England and Wales: see, for

¹¹ In *In re Brightlife Ltd* [1987] 1 Ch 200, Hoffman J referred to the decision of the House of Lords in *Government Stock and Other Securities Investment Co Ltd v Manila Railway Co Ltd* [1897] AC 81 which, in his view, gave rise to a “*plain inference*” that a sufficiently explicit provision for automatic crystallisation ought to be given effect. However, he added that “*It is true that the commercial inconvenience of automatic crystallisation gives rise to a strong presumption that it was not intended by the parties. Very clear language will be required. But that does not mean that it is excluded by a rule of law.*” (page 213C). This passage was cited with approval by Finlay-Geoghegan J in *JD Brian*. In *Re Permanent Houses (Holdings) Ltd*, Hoffman J reiterated the view that “*provided that the language of the debenture was sufficiently clear, there was no conceptual reason why the parties should not agree that any specified event should cause the charge to crystallise*” (page 567e)

example, *Re Permanent Houses (Holdings) Ltd* [1988] BCLC 563 as well as the discussion in *Gough* at para 11.06 and following and Parsons (ed), *Linguard's Bank Security Documents* (7th ed, 2019) ("*Linguard*") at para 9.26 and following.

33. Even in the absence of any express provision in the debenture, the authorities suggest that a floating charge may crystallise on the occurrence of certain events (implicit crystallisation events). Such events include the commencement of the winding-up of a company or the appointment of a receiver: *Courtney* at paras 19.092-19.093. *Courtney* also suggests that ceasing to carry on business is likely to be an implicit crystallisation event (para 19.105 and following). *Linguard* is to the same effect (paras 9.18-9.20). Notably, *Linguard* suggests that the appointment of an administrator will not crystallise a floating charge (at least in the absence of an express provision to that effect), because such an appointment is not of itself inconsistent with the continuation of the company's business (at para 9.18, citing *In re MF Global UK Limited (in special administration)* [2012] EWHC 3068 (Ch), [2013] 1 WLR 903)
34. In any event, Chelsey did not contend for any form of implicit crystallisation event here. Rather, it relied squarely on the automatic crystallisation clause in the Debenture (and, in the alternative, on the express crystallisation clause). For its part, Revenue did not dispute that automatic crystallisation clauses could, in principle, be effective as a matter of Irish law. That was the view reached by the Judge here and his analysis has not been challenged by Revenue. Its challenge is narrower. Revenue argues that, while Latzur was under the protection of the High Court, the floating charge could not effectively crystallise as such crystallisation would conflict with the objectives of the examinership process and be contrary to the provisions of section 5(2) of the 1990 Act. According to

Revenue, its position is supported by the Supreme Court's decision in *Holidair* and it is to that decision that I next turn.

35. Before doing so, it may be observed that there is at least one material distinction between express crystallisation and automatic crystallisation clauses. The former involves active intervention by the debenture holder, in the form of the service of a crystallisation notice on the chargor company. The company at least will be on notice that a previously floating charge has crystallised (though third parties will not, given the absence of any registration requirement in respect of the crystallisation of floating charges).¹² Where automatic crystallisation is concerned, however, a crystallisation event may occur without the charge holder or the chargor even realising it or advertent to it. Many common crystallising events are public - the commencement of winding-up proceedings, the appointment of a receiver - but others are not. The creation of a security interest by the chargor may, for instance, trigger the crystallisation of a floating charge without the knowledge of the charge-holder. So too, crystallisation on the happening of an event of default. Charge-holder and chargor may simply not advert to the terms of the Debenture at all – as appears to have been the case here. That has obvious potential to prejudice third parties dealing with the company, giving rise to potential disputes about priority, estoppel, waiver and the like: see *Gough*, para 15.16

¹² Because the crystallisation of a floating charge is not considered to constitute the creation of a new charge such as to trigger the statutory obligation to register that is now to be found in section 409 and following sections of the 2014 Act (previously section 99 of the 1963 Act). See for example the discussion in Lynch Fannon “Crystallisation of Floating Charges: Reform and Clarity” (2016) 23 *Commercial Law Practitioner* 209-212, at page 210.

and following. The position can hardly be said to be satisfactory but it is evident from *JD Brian* that reform is a matter for the legislature.¹³

De-crystallisation – the Decision in *Holidair*

36. *Holidair* was another case in which there was a dispute as to the nature of a charge created over the book debts of the chargor companies. The debenture required the companies to pay the proceeds of its book debts into an account designated for that purpose by the trustee (acting on behalf of the creditor banks). In fact, however, no account had been designated and the companies had been permitted to use the book debts in the ordinary course of their business. The companies got into financial difficulty and the banks appointed joint receivers. However, the companies then applied successfully for the appointment of an examiner. Following the appointment of the examiner, the trustee wrote designating an account in which the proceeds of the book debts were to be paid. The validity of that direction was challenged by the companies by reference to section 5(2) of the 1990 Act and on the basis of alleged estoppel.¹⁴
37. Section 5 of the 1990 Act (now section 520 of the 2014 Act) provided in subsection (1) that, during the period beginning with the presentation of a petition for the appointment of an examiner to a company and (subject to some immaterial exceptions) ending on the expiry of three months from that date or on the withdrawal or refusal of the petition

¹³ See also the discussion in the CLRG Review. As is there explained, under the 2014 Act the register of charges maintained by the Registrar of Companies no longer includes details of crystallisation events in relation to floating charges (at page 15).

¹⁴ A further issue also arose as to the powers of the examiner to borrow which is not material here.

(whichever first happened) “*the company shall be deemed to be under the protection of the court*”. Section 5(2) (so far as material) then provided:

“(2) For so long as a company is under the protection of the court in a case under this Act, the following provisions shall have effect:

(a) no proceedings for the winding-up of the company may be commenced or resolution for winding-up passed in relation to that company and any resolution so passed shall be of no effect;

(b) no receiver over any part of the property or undertaking of the company shall be appointed, or, if so appointed before the presentation of a petition under section 2 , shall, subject to section 6 , be able to act;

(c) no attachment, sequestration, distress or execution shall be put into force against the property or effects of the company, except with the consent of the examiner;

(d) where any claim against the company is secured by a charge on the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of such security, except with the consent of the examiner;

(e) no steps may be taken to repossess goods in the company's possession under any hire-purchase agreement (within the meaning of section 11 (8)), except with the consent of the examiner; ...”

38. In the High Court, Costello J held that the charge was a fixed charge. As to the section 5(2) argument, Costello J held that the appointment of the receivers had impliedly

revoked the companies' permission to use the book debts in the course of their business. The debenture holders legally owned the debts as they arose (by virtue of the fixed charge) and the appointment of the receivers "*meant that the companies had no longer permission to use them.*" But even if that was not the case, the directions were not, in the judge's view, prohibited by section 5(2). Those directions could not be construed as an action to *realise* the banks' security (the act prohibited by section 5(2)(d)). They were rather a step to *preserve* their property and constituted a "*reasonable protective step*" for them to take, as otherwise it could be argued that once the book debts had been collected by the companies and paid into their account, they ceased to be book debts (at page 429). The estoppel argument also failed (page 430).

39. On appeal, the Supreme Court took a different view of the nature of the charge, for the reasons set out in the judgment of Blayney J (with which the other members of a full five judge court agreed on the issue). It was that judgment that was the focus of attention in argument here but the judgment given by Finlay CJ is also worthy of attention. He cited the following passage from the judgment of McCarthy J in *In re Atlantic Magnetics Ltd* [1993] 2 IR 561 (which was also opened to us on this appeal) as setting out a general principle and a general identification of the purposes of the 1990 Act:

"It is, I believe, of great importance to bear in mind in the application of the Act that its purpose is protection - protection of the company and consequently of its shareholders, workforce and creditors. It is clear that parliament intended that the fate of the company and those who depend upon it should not lie solely in the hands of one or more large creditors who can, by appointing a receiver pursuant to a debenture, effectively terminate its operation and secure, as best

they may, the discharge of the monies due to them, to the inevitable disadvantage of those less protected. The Act is to provide a breathing space, albeit at the expense of some creditor or creditors.”

40. Regarding the issues arising on the appeal, therefore, Finlay CJ considered that:

“it is appropriate that we should approach it on the basis that the intention of the legislature to be derived from the terms of the Act of 1990 was to provide a period of protection available for examination so as to try and ensure that if possible some scheme of arrangement might be made rather than an immediate liquidation or receivership of a company. It was also, I am satisfied, part of the intention of the legislature that if at all possible and if considered appropriate by an examiner, during the relatively short period of protection of the court provided for in the Act of 1990, that a company should be continued as a going concern and that where ambiguity or doubt arises concerning the construction of any sections in the Act, these two objectives should be borne in mind.” (at page 440).

41. Finlay CJ was in no doubt but that the banks’ direction to lodge all book debts collected into a designated account was inconsistent with section 5(2)(d) of the 1990 Act. The subsection did not merely prohibit the realisation of the whole or part of any security but also prohibited any action to realise such security. The direction was, in his view, such an action, given that it was intended to ensure that the book debts would be available as a set off in respect of part of the debts due to the banks at the end of the period of protection (at page 442). That the banks could have taken that step prior to

the appointment of the examiner was irrelevant, given that they had not done so. The appointment of a receiver was also, in his view, irrelevant as it did not constitute or trigger a requirement to place monies into a designated account (*ibid*).

42. In his judgment, Blayney J addressed the nature of the charge and whether, if it was a floating charge, it had de-crystallised by virtue of the appointment of the examiner (it being clear that, if the charge was a floating charge, it had crystallised on the appointment of the receiver). Having concluded that the charge was a floating charge, it was necessary to address the submission made by the companies and the examiner to the effect that the charge would have become de-crystallised – “*that is to say, it would have resumed its character of a floating charge*” (my emphasis) – on the appointment of the examiner. In his view, that submission was well-founded. The analysis leading to that conclusion is relatively brief and so I shall set it out in full:

“Once the examiner was appointed, the receivers could no longer act (s. 5, sub-s. 2 (b) of the Act of 1990). It would accordingly have been pointless to keep the book debts frozen. The receivers would have had no right to collect them. Apart from this, since the purpose of the Act of 1990 as emphasised by the Chief Justice in his judgment, is the protection of the company and consequently of its shareholders, workforce and creditors, it would be wholly inconsistent with that purpose that the companies would be deprived of the use of their book debts particularly as it appears that they are absolutely essential for their survival during the period of protection. Furthermore, it is no injustice to the debenture holders who appointed the receivers since the companies are continuing to trade and so continuing to create new book debts to replace those that may be paid and

the proceeds of which may be used by the companies. Finally, it seems to me that if the receivers were to insist upon the charge on the book debts remaining crystallised, they would be in breach of s. 5, sub-s. 2 (d) of the Act of 1990, which provides that:

"Where any claim against the company is secured by a charge on the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of such security, except with the consent of the examiner."

For these reasons I would hold that on the appointment of the examiner the charge on the book debts ceased to be crystallised and became again a floating charge." (pages 448-449; my emphasis)

43. It is evident from the judgment of Costello J in the High Court that the companies had argued that the floating charge, having crystallised on the appointment of the receivers, had subsequently de-crystallised when the court had directed the receivers to cease to act under section 6 of the 1990 Act. Costello J rejected that argument, on the basis that the section 6 order merely affected the receivers' power to act and did not alter the legal consequences of their appointment. No authority appears to have been cited in either the High Court or the Supreme Court for the *de-crystallisation* of floating charges which had previously *crystallised* – certainly none is identified in any of the judgments in *Holidair*.

44. *Holidair* is not without its critics: see for instance what is said in *Courtney* (para 23.074). According to O’ Donnell, *Examinerships* (2nd ed, 2016) the decision “*has not met with universal enthusiasm from the banking community*” (at para 4.37). That may be as may be but, clearly, *Holidair* is binding on this Court.
45. While Blayney J referred to the charge decrystallising on the *appointment of the examiner*, section 5(2) provides that the period of protection runs from an earlier point, namely the *presentation of the petition*. Strictly, therefore, the substance of Blayney J’s analysis points to the charge decrystallising at that point. That was accepted in argument by Chelsey. As for the reasons for concluding that the charge had decrystallised, Blayney J identified a number of considerations. Some are practical and pragmatic (the receivers could no longer act and it would have been pointless to keep the book debts frozen as the receivers would have had no right to collect them; in any event the companies were continuing to trade and were creating new book debts to replace those paid and used). However, it is also clear that Blayney J saw difficulties in principle in allowing the debenture holders to freeze the book debts of the companies. Those book debts were “*absolutely essential*” for the survival of the companies during the period of protection and it would be “*wholly inconsistent*” with the protective purpose of the 1990 Act to permit the debenture holders to deprive the companies of their use. That aspect of Blayney J’s reasoning does not appear to be dependent on section 5(2)(d), which is identified as a separate consideration. For the debenture holders to “*insist on the charge on the book debts remaining crystallised*” would, in Blayney J’s view, be in breach of section 5(2)(d). Of course, Finlay CJ also considered that the debenture holders’ efforts to freeze the proceeds of the book debts was inconsistent with that provision.

De-crystallisation and its consequences

46. Chelsey disputes that section 5(2)(d) has any application here. Its position is that the crystallisation of its floating charge did not, of itself, constitute “*action .. to realise the whole or any part of [its] security*”. But it does not dispute that, having crystallised (whenever that may have been) the charge created by the Debenture de-crystallised. That was the position it took in the High Court and it was expressly accepted by the Judge. Its acceptance that the crystallised charge had de-crystallised was no doubt a response to *Holidair*.¹⁵ But, whatever the rationale, Chelsey’s position is significant for the resolution of this appeal.

47. According to *Gough*, the effect of the de-crystallisation of a crystallised charge is:

“to re-convert the crystallised fixed charge back into a floating charge. A de-crystallised charge subsequently operates in the same manner as the floating charge in its original floating phase. The de-crystallised floating charge will crystallise again in identical manner by means of implicit crystallisation or

¹⁵ In its written submissions, Chelsey submits that, if a floating charge which was crystallised prior to examinership de-crystallised in the manner explained in *Holidair*, then “*by extension, a floating charge which is crystallised at the commencement of or during the examinership must automatically and immediately de-crystallise for the same reasons. The continued crystallisation of the charge would be incompatible with the policy underpinning the legislation, which is aimed at ensuring the survival of the company during the period of protection*” (at para 75; emphasis in the original). Of course, this analysis rather begs the question of why “*the policy underpinning the legislation*” does not simply operate to prevent the crystallisation of a floating charge in such circumstances in the first place.

upon the occurrence of an express crystallisation event. An express crystallisation clause continues to apply to a de-crystallised floating charge. A de-crystallised floating charge will re-crystallise upon the occurrence of any relevant event specified in the express crystallisation clause.” (para 15.21; my emphasis)

48. *Linguard* is to the same effect – de-crystallisation of a charge that has become fixed has the effect of allowing it “*to float once again*” (at para 9.31). It is clear from his judgment in *Holidair* that Blayney J. understood the concept of de-crystallisation in precisely that sense – as he put it, “*on the appointment of the examiner the charge on the book debts ceased to be crystallised and became again a floating charge.*”
49. *Gough* and *Linguard* discuss de-crystallisation in the context of there being an express provision for de-crystallisation and/or waiver of crystallisation in the relevant debenture. *Linguard* notes that the concept of decrystallising a charge which has become fixed is recognised in Scotland by section 62(6) of the Insolvency Act 1986.¹⁶ Noting that there is no English authority directly on the subject, *Linguard* nonetheless states that “*it is now common for English debenture security to include provision for de-crystallisation (or ‘reconversion’) where the debenture holder agrees to do so, for*

¹⁶ Section 62(6) does not actually use the language of de-crystallisation. It provides that if a receiver is removed or ceases to act and no other receiver is appointed within a month “*the floating charge by virtue of which the receiver was appointed—(a) thereupon ceases to attach to the property then subject to the charge, and (b) again subsists as a floating charge*”

example, following the cure of an earlier event of default or other crystallising event.”
(para 9.31).

50. In this jurisdiction, *Holidair* has been given some indirect statutory recognition in the form of section 150(1) of the National Asset Management Agency Act 2009 which, by subsection (1)(c), provides that the appointment of an examiner to a company whose assets are under the control of a statutory receiver “*does not .. cause the de-crystallisation of any charge created as a floating charge over assets that are under the control of the statutory receiver.*” Notably, however, the 2014 Act does not contain any provision either reversing or otherwise limiting its holding as to the de-crystallising effect of the appointment of an examiner.

RE-CRYSTALLISATION?

51. The floating charge having (on Chelsey’s argument) crystallised (and that is, of course, vigorously disputed by Revenue) and then decrystallised, how then did it once again become a fixed charge (as Chelsey says it did)?

52. Chelsey’s essential argument is expressed as follows in its written submissions on appeal:

*“It is clear from the passage extracted above that the basis for Blayney J’s finding [that the charge at issue in *Holidair* had decrystallised] was the overriding legislative aim of protecting the company during the period of examinership. It is in the nature of an examinership, that it is a temporary relief only. This rationale obviously does not apply once the protection is lifted. If the commencement of court protection is sufficient, in and of itself, to reverse the effect of a crystallisation, then it is submitted that the lifting of that protection should, conversely, have the effect of re-crystallising the charge. To hold otherwise would be to, effectively, extend the effect of the examinership beyond the period of court protection. It is submitted that for that to be the case it would have to be provided for expressly in legislation” (para 75; emphasis in the original)*

53. As the submissions note, this argument was accepted by the Judge. I have already referred briefly to his analysis and it is appropriate now to consider it at greater length.

54. At para 114 of his Judgment, the Judge expresses the view that, if the floating charge created by the Debenture had automatically converted to a fixed charge and then de-crystallised in the manner “*deemed permissible*” in *Holidair*, it “*must follow that the charge re-crystallises when the period of protection ceases without the court having approved proposals for the survival of the company.*” Otherwise, in his view, the effect of the examinership would indeed extend beyond the period of court protection. Once the statutory examinership scheme ceased to apply “*logic demands that the de-crystallisation be reversed. If the automatic crystallisation of the floating charge is valid, but the effect of it is suspended for the period of court protection, it follows that, after the protection is lifted, the charge must thenceforth be regarded as a validly constituted fixed charge*” (para 115; my emphasis). There was, in the Judge’s view, an analogy with the appointment of a receiver. A receiver remained appointed during the period of court protection and, when that protection ceased, the receivership could be “*reactivated*” (at para 114, citing O’ Donnell, *op cit* at para 3.61).
55. With respect to the Judge, I do not find this analysis persuasive. As Blayney J made clear in *Holidair*, when a charge de-crystallises, it reverts to being a floating charge. It is not simply suspended for the period of court protection. That, in my view, is a significant misunderstanding of the correct position and it is one that undermines the entirety of the Judge’s analysis. At any given point in time, the charge was *either* a floating or fixed charge. I agree with Revenue that there is no space or intermediate position between these two states. On Chelsey’s account, the charge crystallised into a fixed charge and then - simultaneously or at least shortly afterwards - de-crystallised to become a floating charge once again. It did not become some form of hybrid charge,

semi-fixed and semi-floating or, as Mr Kennedy appeared to suggest at one point, some form of contingent fixed charge. Its charge having de-crystallised and resumed its character as a floating charge, Chelsey did not have the rights of a fixed charge holder. Therefore any suggestion that Chelsey was exercising restraint in the enforcement of its rights is misplaced both as a matter of law (because it did not have the rights of a fixed charge holder) and as a matter of fact (because it appears to have been unaware of any crystallisation event having occurred, at least prior to the service of the Notice on Latzur). After the charge decrystallised (assuming that it ever crystallised), it continued as a floating charge unless and until some further crystallisation event occurred.

56. On the termination of court protection, Chelsey was immediately free to exercise its rights under the Debenture, including the right to serve a fresh crystallisation notice (which it did not do) and/or to appoint a receiver (which it did). That being so, there is in my view no force to the suggestion that it is necessary to posit a re-crystallisation of the charge as otherwise the effect of the examinership would be extended beyond the period of court protection. Neither, in my view, is the analogy with the position of a receiver apt or useful. On the appointment of an examiner, a receiver may lose the power to act but that does not affect his or her appointment as such in a way that is analogous to the de-crystallisation of a previously crystallised floating charge in accordance with the holding in *Holidair*.
57. The crystallisation of a floating charge into a fixed charge has significant consequences for the chargor and for third parties dealing with the chargor. It is essential that a chargeholder who contends that a charge has crystallised into a fixed charge in a particular

circumstance and at a particular time should be able to identify a clear legal basis for that contention. Legal certainty requires that there be clarity as to when and how crystallisation is triggered. In my view, Chelsey has not identified any clear basis for its contention that the floating charge here re-crystallised on the termination of court protection on 28 November 2013. Such a contention finds no support in *Holidair* or in any other authority cited to us. It finds no support in the terms of the Debenture either. The Debenture is silent on the issue of re-crystallisation (a point emphasised in argument by the Revenue who note that the Debenture post-dates the decision in *Holidair*, the argument being that the Debenture could have provided for (re)crystallisation at the end of the period of court protection but had not). Nor, in my view, does “*logic*” provide such support. Even if logic was the touchstone, there is nothing illogical in taking the view that it was a matter for Chelsey to exercise its rights under the Debenture on the termination of court protection.

58. I should say that I did not understand Chelsey to argue that the termination of the examinership was in itself an event which triggered the (re)-crystallisation of the floating charge or that some other event or circumstance occurred at that time (and prior to the appointment of the Receiver) which caused the charge to crystallise. Nor did I understand Chelsey to contend that, on the termination of the examinership, the charge (re)-crystallised by reference to any past event, such as to the presentation some weeks before of the petition to appoint an examiner. Even if that point had been argued, I would not have been persuaded by it. I do not construe Clause 3.4.2 as providing for some form of retrospective crystallisation or for repeated crystallisations by reference

to the same underlying events. In any event, it is certainly not “*very clear*” that Clause 3.4.2 is to that effect and that, in this context, is fatal to any such argument.

59. It follows that, in my view, the Judge erred in concluding that the floating charge created by the Debenture (re)crystallised immediately on the termination of court protection at 12 noon on 28 November 2013.
60. If that be correct, it follows that the floating charge here (re)crystallised only on the appointment of the Receiver. It is not suggested by Chelsey that, on that basis, it can rely on *JD Brian* to claim priority over the preferential creditors of Latur. That is sufficient to dispose of the appeal. However, I believe that I should nonetheless address the other issues that have been argued and, in particular, Revenue’s arguments that the floating charge did not crystallise into a fixed charge at any point prior to the appointment of the Receiver.

**DID THE CHARGE CRYSTALLISE PRIOR TO
THE APPOINTMENT OF THE RECEIVER?**

The Alternatives Contended for by Chelsey

61. As already explained, Chelsey contended for three alternative crystallisation events. I will, for ease of reference, set out these again and I will then consider each in turn.

(1) Automatic crystallisation on **3 October 2013** when Latur's sole member, Vangas Management SA, decided in writing that Latur should petition the High Court for the appointment of an examiner to the Company (clause 3.4.2(5) of the Debenture).

(2) Automatic crystallisation on **8 October 2013** on the presentation of Latur's petition for the appointment of an examiner (clause 3.4.2(4) of the Debenture)

(3) Express crystallisation on **23 November 2013** by virtue of the delivery by Chelsey to the Company of a *Notice of Crystallisation* of that date (clause 3.4.1 of the Debenture)

These Alternatives Considered

(1) *Crystallisation on 3 October 2013*

62. Two issues arise here. The first is whether the Judge was correct to conclude that the written decision of Vangas Management SA (the sole member of Latur) to petition the High Court for the appointment of an examiner to Latur did not constitute and/or could

not be regarded as equivalent to “*any meeting of the directors or members of the [Latzur] ... convened for the purposes of considering any resolution .. for appointing an examiner to [Latzur]*” for the purposes of Clause 3.4.2(5) of the Debenture. The second issue - which arises only if this Court disagrees with the Judge on the first issue – is whether Clause 3.4.2(5) is contrary to public policy having regard to the provisions of the 1990 Act.

63. The argument urged on us by Chelsey was that considerations of “*context*” and “*business commonsense*” clearly weighed in favour of interpreting Clause 3.4.2(5) as providing that a written resolution of the single member to petition for the protection of the court was the trigger event. That is what the Debenture ought to have provided and that, so Chelsey says, is how the clause should be interpreted. Its written submissions state:

*“The function of the relevant clause, and consequently the intention of the parties is, however, clear – the parties intended that if the formal steps were taken to prepare for the examinership and the Company resolved to proceed down that route, crystallisation would occur at that juncture. The reasonable person having a sympathetic understanding of the practical context would, it is submitted, identify and give effect to that intention in interpreting the clause.”*¹⁷

64. Several authorities were cited by Chelsey in support of this contention, including *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98

¹⁷ Written submissions on appeal, at para 71.

and *Analog Devices BV v Zurich Insurance Company* [2005] 1 IR 274. However, Chelsey particularly relied on the judgment of O’ Donnell J (as he then was) in *Law Society of Ireland v Motor Insurers’ Bureau of Ireland* [2017] IESC 31 and the injunction (at para 12 of that judgment) that the court engaging in the task of contractual interpretation “*must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement.*” The court must consider what a reasonable person would consider had been agreed and that reasonable person is expected “*not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate*” (*ibid*).

65. In his oral submissions on this point, Mr Kennedy characterised Chelsey’s position as one which sought the substitution of a “*workable formulation*” for the “*unworkable*” form of words that had been adopted in the Debenture. That, he said, was entirely unobjectionable. He accepted that the construction for which Chelsey was contending would require the Court to read additional text into Clause 3.4.2(5) but that was, he said, permissible in circumstances where the intention of the parties was clear.
66. Revenue supported the Judge’s analysis and conclusions on this issue.
67. In arriving at his conclusion, the Judge had careful regard to the arguments made by Chelsey, which were in substance the same as the arguments advanced by Chelsey before this Court. He was mindful that there were limits on the legitimate scope of the

interpretative exercise and that it was not permissible for the court to rewrite the contractual bargain the parties have made, as reflecting in the language of the contract at issue: see for example the decision of the Supreme Court in *Marlan Homes v Walsh* [2012] IESC 23, to which the Judge referred.

68. The authorities indicate that there are certain circumstances in which a clear mistake in the language used in a contract may be corrected by construction: see the decision of the House of Lords in *Chartbrook Limited v Persimmon Homes Ltd* [2009] 1 AC 1101, which was approved and applied in this jurisdiction in *Moorview Developments Ltd v First Active* [2010] IEHC 275. However, this line of authority was not relied on by Chelsey. That is unsurprising. There is, in my view, no error of language in Clause 3.4.2(5) analogous in any way to the linguistic errors that were considered capable of correction by construction in those cases. The meaning of Clause 3.4.2(5) is clear. It is capable of operating, even as regards a single member company. Such a company has a member (and as the Court observed in argument, the reference to “members” in Clause 3.4.2(5) is to be read as including a reference to “member” in the singular) and it has directors.
69. Having said that, there is little or no doubt that the drafting of Clause 3.4.2(5) does not adequately reflect the fact that Latzur was a single member company, whose sole member could, by virtue of Regulation 9(3) of the 1994 Regulations, validly decide to petition the High Court for the appointment of an examiner by way of written decision, rather than by the adoption of a resolution at a meeting of the member(s). That no doubt was, in one sense, an error on the part of Chelsey, one which undermined the benefit intended to be achieved from Clause 3.4.2(5). But it does not follow that it is the court’s

function to repair a deficiency of drafting of this kind, whether in the name of “*business commonsense*”, “*text in context*” or “*correction by construction*.”

70. It may be that, in a different context, the permissible boundaries of the court’s interpretative function could stretch that far, though I am far from convinced that such is the case. But the context here is particular and, in my view, it weighs decisively against the Court embarking on the exercise asked of it by Chelsey here.

71. Clause 3.4.2 of the Debenture identifies a number of crystallisation events, the occurrence of which will trigger automatic crystallisation of the floating charge created by Clause 3.3. It is clear from the authorities that “*very clear language*” is required from the drafter in this context. As Hoffman J stated in *In re Brightlife Ltd*, in a passage expressly approved by Finlay-Geoghegan J in *JD Brian*, “*the commercial inconvenience of automatic crystallisation gives rise to a strong presumption that it was not intended by the parties.*” That is why (adapting what was said by Hoffman J in *Re Permanent Houses (Holdings) Ltd*) “*the language of the debenture [must be] sufficiently clear.*” In this context, the drafter must live or die by the precision and clarity of the language they employ. There is, in my view, no scope at all for a court to effectively rewrite a provision such as Clause 3.4.2(5) in the manner the Court has been invited to do here. The provisions of Clause 3.4.2 must, in my view, be read strictly and where – as here – the language that has been used by the drafter is not apt to capture some event or circumstance, the court simply has no repairing function or power.

72. I would therefore uphold the conclusion of the Judge on this issue.

73. It follows that the floating charge did not crystallise on 3 October 2013 as belatedly asserted by Chelsey.
74. That being so, it is not strictly necessary to address Revenue's more fundamental objection to the supposed crystallisation of the floating charge on 3 October 2013. That objection, as I understood it, was that an agreement designating a decision to seek the protection of the court under the 1990 Act as a crystallisation event was contrary to public policy and, accordingly, void and unenforceable. The point was not really addressed in submission and no authority was cited in support of it. Any observations I may offer are clearly *obiter* in any event. That said, I see no force in the point. The Oireachtas has legislated in this area, first in the form of the 1990 Act and subsequently in Part 10 of the 2014 Act. That legislation, as interpreted by the Supreme Court in *Holidair*, restricts the entitlements of charge holders in the context of examinerships. However, there is nothing in the 1990 Act or in Part 10 of the 2014 Act (or in any part of that Act) that seeks to prohibit a clause in a debenture such as Clause 3.4.2(5) here. It may be that such a clause will be of little practical benefit to the charge holder in any event, given that *Holidair* indicates that any charge de-crystallises on the appointment of an examiner. But it is another matter entirely to suggest that such a clause is illegal and/or contrary to public policy. If the Oireachtas takes that view, it can legislate accordingly. Absent such legislation, such a clause is, in principle, a valid and enforceable one.

(2) *Crystallisation on 8 October 2013*

75. Chelsey argued – and the Judge accepted – that the floating charge crystallised on presentation of Latur’s petition for the appointment of an examiner and then de-crystallised “*on the granting of protection and the appointment of Mr Fennell as interim examiner*” (Judgment, para 102). The Judge’s conclusions are criticised by Revenue. It says that the presentation of the petition triggered court protection under section 5(1) of the 1990 Act (which Chelsey accepts) and that court protection had the effect of preventing the crystallisation of the charge (which Chelsey disputes).
76. Chelsey’s position here is a difficult one. It denies that the crystallisation of the floating charge was an “*action .. to realise the whole or any part of [its] security*” within the meaning of section 5(2)(d) of the 1990 Act. On that basis, it says, section 5(2)(d) did not prevent the crystallisation of the charge on 8 October 2013. At the same time, it accepts – indeed it positively asserts – that, having crystallised, the charge de-crystallised immediately or almost immediately. In the course of argument, I expressed difficulty in understanding how those two positions could be maintained at the same time. Further reflection has not led me to any clearer understanding. If the charge de-crystallised – as Chelsey says it did - that can only have been because it would have been inconsistent with the examinership, and the provisions of the 1990 Act, to permit it to remain in place as a fixed charge. But if that is so, how can it be said that the crystallisation of the charge was permissible in the first place?
77. In her submissions on this point, Ms O’ Brien emphasised that the crystallisation event relied on by Chelsey was also the trigger for the commencement of court protection.

There was not, as the Judge appeared to consider, any temporal gap between the two. She contended that the statute had to be given precedence in this context. I did not understand Mr Kennedy to disagree (though he also made it clear that, on his case, the sequence was immaterial). I agree with Ms O' Brien's submission. The statute must first be considered. The presentation of the petition here triggered the protection provided for by section 5 of the 1990 Act. The question then arises as to whether the fact that Latur was under court protection excluded the crystallisation of the floating charge.

78. In my view, *Holidair* permits of only one answer to that question. Crystallisation of the floating charge would have had the effect of depriving Latur of the use of *all* of its assets, as well as effecting an equitable assignment of all such assets to Chelsey. Such are, as we have seen, the legal consequences of crystallisation. That Chelsey may have taken no steps to enforce its rights is, in this context, immaterial. The consequences follow as a matter of law. Adapting what was said by Blayney J in *Holidair* to meet the circumstances here, “*it would be wholly inconsistent with [the purpose of the 1990 Act] that [the Company] would be deprived of the use of [its assets] particularly as it appears that they are absolutely essential for [its] survival during the period of protection.*” If (as Blayney J went on to hold), it would be a breach of section 5(2)(d) for the receivers to “*insist upon the charge on the book debts remaining crystallised*”, then *a fortiori* the crystallisation of a floating charge over all of the assets of Latur would constitute a breach of that provision.
79. The judgment of Finlay CJ in *Holidair* points to the same conclusion. Crystallisation of the floating charge here was an action to realise Chelsey's security in the same way

as the receivers' direction in *Holidair* was – it was intended to ensure that Latur's assets (including its accounts and receivables) would, to the maximum extent possible, be available to Chelsey to set off against the debts due to it.

80. Underpinning the whole of section 5(2) of the 1990 Act is a clear legislative policy that, during the period of protection, no action should be undertaken by the creditors of a company that could undermine the prospects of survival of the company and the whole or any part of its undertaking as a going concern. Crystallisation of the floating charge would clearly have that effect in my view.

81. Accordingly, I agree with Revenue that the floating charge did not crystallise on the 8 October 2013 and therefore differ from the Judge on this point.

82. Insofar as Revenue may have asked the Court to go further, and to hold that Clause 3.4.2(4) was contrary to public policy and therefore void and unenforceable, I would not be prepared to do so. The Oireachtas has legislated in this area, in the form of the 1990 Act and in particular section 5 (now Part 10 of the 2014 Act and section 520). It has not, to date, enacted any general prohibition on clauses such as Clause 3.4.2(4). Whether to do so in the future is a matter for the legislature.

(3) Crystallisation on 23 November 2013

83. The position here is even clearer. In my view, it inevitably follows from the analysis in *Holidair* that section 5(2)(d) precluded Chelsey from taking any action to crystallise the floating charge during the period of protection. Accordingly, leaving aside any issue as to the manner in which the Notice was purportedly served on 23 November 2013, it did not crystallise the floating charge.

84. As to the issue of service, it was fully argued before us and so I shall address it, albeit as briefly as possible.
85. Clause 18.2 of the Debenture (“*Addresses*”) sets out the address “*of each Party for any communication or document to be made under or in connection with this Deed.*” The address given for Latur is the address of its registered offices in the IFSC “*or to such other address .. as may be notified to the Chargee by not less than five Business Days’ notice.*” Clause 18.3 (“*Delivery*”) then provides that “[*a*]ny such notice or other communications made or delivered by one party to another under or in connection with this Deed will only be effective (1) if delivered by hand, on delivery; (2) if sent by fax, upon transmission, subject to the correct code or facsimile number being received on the transmission report; (3) in the case of posting, 48 hours after posting (and proof that the envelope containing the notice or communication was properly addressed, prepaid registered and posted by airmail will be sufficient evidence that the notice or other communication has been duly served or given)”.
86. Here, the Judge found as a fact that the Notice was actually served by Mr Bendayan (then a director of Chelsey) on Mr Stein (a director of Latur) at an address in Canada on 23 November 2013 (Judgment, para 142). I did not understand Revenue to contest that finding and, in any event, there is in my view no basis for disturbing it. The Judge also found that such was not the manner of communicating the Notice provided for in the Debenture (Judgment, para 141). That finding is not challenged. The real issue is whether the admitted failure to communicate the Notice as per the provisions of Clause 18 of the Debenture means that it was not effectively served. That in turn raises the

question of whether the provisions of Clause 18 are to be regarded as exclusive or merely permissive. Given that the issue of service is not determinative of the rights of the parties, I do not propose to engage in a lengthy discussion of this issue. In my view, for the reasons set out by Lord Neuberger MR and Gross LJ in *Ener-G Holdings plc v Hormell* [2012] EWCA Civ 1059, [2013] 1 All ER (Comm) 1162, Clause 18 ought not to be read as prescribing the exclusive methods of service on Latur or invalidating other means of service. In my view, the purpose of Clause 18 was to provide a means of service that shifted the risk from server to intended recipient. Once one of those methods of service was used, the notice was treated as served, and received at a particular time, regardless of whether or when it came to the attention of and/or was actually received by the addressee. Service by any other means is not excluded but any such service is at the risk of the server.

87. Accordingly, I agree with the Judge's conclusion on this point. I do not, however, agree with him that it was not open to Revenue to take this point. Chelsey was contending that it was entitled to priority over Revenue on the basis (*inter alia*) that it had effectively triggered the crystallisation of the Clause 3.1 floating charge by service of the Notice on Latur on 23 November 2013. In my view, Revenue was fully entitled to make the case that Clause 18 prescribed an exclusive means of service and that, the Notice not having served in accordance with its provisions, it was ineffective. I do, however, agree with the Judge to the extent that, on the premise that Clause 18 was not exclusive, any issue there might be as to whether service on Mr Stein was good service (because, for instance, Mr Stein did not authority or ostensible authority to accept service of the Notice) was a matter for the Company to raise.

88. In conclusion, it follows from the above that the floating charge did not crystallise prior to the appointment of the Receiver on 28 November. In any event, even if it did, on Chelsey's own case it de-crystallised on 8 October 2013 (when the petition was presented and Mr Fennell was appointed as interim examiner) or (on the premise that the charge was crystallised by the Notice) on 23 November 2013. As discussed above, it did not, contrary to Chelsey's submissions and the Judge's conclusions, re-crystallise when Latur ceased to be under the protection of the court. The charge crystallised only on the appointment of the Receiver.

OTHER ISSUES

89. Arguments concerning estoppel and waiver were made in the High Court and, to a lesser extent, before this Court. In light of my conclusions on the central issue of whether the floating charge had crystallised prior to the appointment of the Receiver, it is not necessary to consider these arguments further. Significant issues potentially arise and it would be more appropriate for such issues to be addressed in proceedings where they arise as matters of live controversy on the facts.

CONCLUSIONS

90. It may be helpful to summarise my principal conclusions:

- (1) The floating charge created by Clause 3.3 of the Debenture did not crystallise at any point prior to the appointment of the Receiver.
- (2) The charge did not crystallise on 3 October 2013 because the decision taken by Vangas Management SA to petition for the appointment of an examiner to Latzur was not an automatic crystallisation event within the scope of Clause 3.4.2(5) of the Debenture.
- (3) The charge did not crystallise on 8 October 2013 because it follows from *Holidair* that crystallisation of the floating charge at that point was inconsistent with the fact that Latzur was under the protection of the court and was excluded by section 5(2)(d) of the 1990 Act.
- (4) For the same reasons, the charge did not crystallise on 23 November 2013.
- (5) Even if the floating charge had crystallised on one of those dates, it was accepted by Chelsey (and by the Judge) that it had subsequently de-crystallised. Contrary to Chelsey's contentions, and the Judge's findings, the charge did not re-crystallise on the termination of court protection on 28 November 2013. On the premise that the charge crystallised and de-crystallised (a premise which is not well-founded), it continued as a floating charge until the occurrence of a further crystallisation event – here, the appointment of the Receiver.

(6) The Receiver was, accordingly, appointed on foot of a floating charge and not a fixed charge.

91. In light of these conclusions, the declarations granted by the High Court must be discharged. As to what order should be made by this Court, it appears to me that a declaration in the following terms is appropriate and sufficient:

“A Declaration pursuant to section 438 of the Companies Act 2014 (as amended) that the applicant’s appointment on 28 November 2013 as receiver over the assets and undertaking of Latzur Limited was on foot of a floating charge”

However, the parties will have an opportunity to be heard on the form of order should they wish.

92. As regards costs, the Judge directed that Chelsey should recover 20% of its costs from Revenue (the reasons why Chelsey was limited to recovering only 20% of its costs are set out in a further judgment of the Judge given on 11 February 2021 ([2021] IEHC 94)). In light of the outcome of the appeal, that order must be set aside and it appears to follow that Revenue ought to get its costs both in the High Court and in this Court. That is a provisional view only, however.

93. Should either party wish to contend for an order in terms different to and/or by way of addition to the declaration proposed above, and/or for a different costs order, they should first seek agreement from the other side. If agreement is reached on the form of order to be made, the Office should be notified of the terms of the agreed order. In the absence of agreement, either party may, within 21 days of the date of this judgment, make a request to the Office for a hearing. In that event, the Court will convene a short hearing at a date and time to be notified. It should be noted that the party seeking the hearing will be at risk of costs in the event that the order ultimately made is as per the provisional indication above.

Costello and Haughton JJ agree with this judgment and with the orders proposed.