# THE HIGH COURT

**[2023] IEHC 410**

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

**IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012-2015**

**AND**

**IN THE MATTER OF DAVID LANGAN OF 187 BACHELOR'S WALK, DUBLIN 1**

**AND**

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012-2015**

**RULING of Mr Justice Mark Sanfey delivered on the 13th day of July 2023.**

**1.** This ruling relates to the orders to be made on foot of a substantive judgment ('**the judgment**') which I gave in the above matter on 13 June 2023: see [2023] IEHC 320. I invited the parties involved in the application – Mr Gary Digney, the personal insolvency practitioner ('**the PIP**'), the objecting creditor Promontoria (Aran) Limited ('**PAL**') and a secured creditor, Tom Casey, whose interests were directly affected by the objections of PAL – to make written submissions in relation to the appropriate orders, given the terms of my judgment. Each of the three parties took up this invitation and made helpful written submissions ('**the costs submissions**') which I have now considered.

**2.** The original application by the PIP was for an order pursuant to s.115A(9) of the Personal Insolvency Acts 2012-2015 ('**the Act**') confirming the coming into effect of the personal insolvency arrangement ('**the PIA**'). This Court had original jurisdiction in the matter, *i.e.,* it was not an appeal from the Circuit Court. PAL objected to the application on two grounds. Firstly, it contended that a charge on the property in favour of Mr Casey was a preference as set out in s.120(h) of the Act, and that the PIP accordingly had not complied with s.115A(8)(b) in that the PIA proposed by the PIP involved the discharge of monies due to Mr Casey on foot of the charge: see in particular paras. 44-45 of the judgment. Secondly, PAL contended that the PIA was "unfairly prejudicial" to its interests contrary to s.115A(9)(f) of the Act.

**3.** I do not propose, in this ruling, to reiterate the terms of the judgment, which speak for themselves. The court found that none of the objections of PAL was valid. In relation to the issue of whether or not there was a preference, Mr Casey was permitted to attend the hearing and contest the issue, given that the first objection of PAL affected his interests directly. While PAL at the hearing accepted that Mr Casey had a first charge, it was contended, not just that it was an impermissible preference, but that an equitable mortgage which PAL submitted should be found by the court as established in its favour must be regarded as having priority over Mr Casey's charge.

**4.** It was suggested on behalf of PAL in its costs submissions that the PIP should have gathered evidence from Mr Casey so that the matter could have been dealt with when the PIP's application first came before the court in July 2021. There is no reality to this submission. By the time the matter came on for hearing before this Court, Mr Casey had sworn a substantial affidavit, proffered written submissions in relation to the issue concerning him, and engaged senior and junior counsel to defend his position in relation to PAL's "preference" objection. In my view, the participation of

Mr Casey in the hearing was necessary, and it would not have been fair to him to refuse him the opportunity to participate, or to expect the PIP to fight his corner.

**5.** It is also in my view not correct to assert, as PAL does at para. 6 of its costs submissions, that Mr Casey's interests "could not be affected by the refusal of the arrangement". Indeed, the very next sentence accepts that Mr Casey's situation "could be markedly improved by the approval of the arrangement…". While it is true that the refusal of the arrangement would not have affected Mr Casey's status as a first legal charge holder, PAL itself points out in that paragraph that Mr Casey's position "…is arguably greatly improved by the approval of the arrangement as they no longer have to await the outcome of well-charging proceedings which might affect their relative priority over the proceeds of sale for the property".

**6.** The issue of the correct interpretation of s.120(h) was a novel issue which had not been the subject of a previous reported decision of the High Court. What constitutes a preference under the sub-section is by no means clear, and this issue took up a considerable amount of the court's time in hearing from the parties. However, the objection that the charge in favour of Mr Casey was a preference under s.120(h) was, in the words of McDonald J in *Re Finnegan* [2019] IEHC 137 at para. 14 "…designed to deal a knockout blow to the application under s.115A…". While, as McDonald J recognised in that case, it is sometimes the case that the submissions of an objecting creditor are of assistance to the court in resolving difficult issues so that it may on occasion be appropriate to make no order as to costs even where the PIP's application is successful, it does not seem to me that the present case falls into this category. PAL relied squarely on its objections to defeat the PIP's application, and was unsuccessful in this regard. The fact that the issue of what constituted a "preference" was a novel

one does not mean that the objecting creditor gets a "consequence-free" shot at defeating the PIP's application.

**7.** I am also mindful that PAL was to a large extent the author of its own misfortune. As the judgment points out, PAL did not engage with the considerable efforts of the PIP to determine PAL's position regarding its security. The evidence before me established that, at my direction, PAL was served with notice of Mr Casey's application seeking to prove his debt as a first legal charge on property of the bankrupt, which was heard by this Court on 8 March 2021. No appearance was made by PAL on that occasion. At that point, PAL was aware that the PIP acknowledged the first legal charge of Mr Casey and proposed to discharge monies from the sale of property to satisfy the charge. However, it did not appear at the hearing and object to Mr Casey's application, but voted against the PIA at the meeting of creditors on 12 March 2021, and, as we have seen, served a notice of objection to the PIP's s.115A(9) application. Also, PAL delayed very considerably in initiating proceedings in 2019 to validate its alleged equitable mortgage, which was based on an alleged security of 23 December 2008 – see para. 70 of the judgment in this regard.

**8.** I am of the view that both the PIP and Mr Casey were "entirely successful" within the meaning of s.169(1) of the Legal Services Regulation Act 2015 ('**the LSRA**'). The PIP was put to the cost of a fully contested s.115A(9) application; PAL assumed a costs risk in opposing the application. I also consider that Mr Casey was entitled to defend the inclusion of his first legal charge in the PIA, and to assert its primacy over the alleged equitable charge held by PAL. He was not obliged to leave these issues to the PIP. Having considered the matters set out at s.169(a)-(g) of the LSRA, I am satisfied that both the PIP and Mr Casey are entitled to their costs of the application, to be adjudicated in default of agreement.

**The 8 March 2021 order**

**9.** At the conclusion of my judgment, I invited submissions as to whether the order of this Court of 8 March 2021 should be amended. At paras. 15-19 of the judgment, I explained that the perfected order of that date purporting to deem Mr Casey's debt proved contained a number of errors, and did not reflect the order actually made by the court.

**10.** Counsel for Tom Casey in the costs submissions agreed that the order should be amended, and kindly proffered a replacement draft order, which I am happy to adopt, with some minor amendments. I will therefore order that the order of this Court of 8 March 2021 be amended so that the portion of the order quoted at para. 15 of my judgment is deleted and is replaced by the following:

> "Upon application of counsel for Tom Casey the specified creditor being mentioned before the court on this day following an order so made on 15 February 2021 allowing a late proof of debt by the said specified creditor Tom Casey practising under the style and title of Tom Casey Solicitors in the presence of counsel for the personal insolvency practitioner on behalf of the debtor
>
> Whereupon and on reading the notice of motion filed on 15 day of February 2021 and the affidavit of Tom Casey filed on 15 day of February 2021 and the documents and exhibits therein referred to
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> And the affidavit of Tom Casey filed on 26 February 2021 and the documents and exhibits therein referred to
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> And on hearing counsel for the specified creditor and counsel for the personal insolvency practitioner

and the court being satisfied that the specified creditor Tom Casey has proven the debt of Tom Casey Solicitors of €256,800 and that the said debt is secured by way of first legal charge dated 3rd day of February 2019 over folio WX35826F being 7 Sandy Lane, Wexford, the court doth order accordingly And the court doth make no order as to costs."

**Stay on the order**

**11.** PAL in its costs submissions sought an order that this Court would stay the approval of the PIA pending filing of an appeal. It submitted that this would not unduly prejudice the creditor as the protective certificate would continue in force. PAL also sought a stay against any award of costs made against it.

**12.** In an application for a stay, the court must be given to understand, even in broad terms, the basis for the proposed appeal so that it is aware of the issues which would be involved as part of its assessment of the *bona fides* of the appeal. In *Danske Bank v McFadden* [2010] IEHC 119, Clarke J (as he then was) suggested that two broad issues had to be considered in relation to an application for a stay. The first is whether the appeal is *bona fide*: at para. 3.2.2 of his judgment, he refers to McCarthy J in *Redmond v Ireland* [1992] 2 IR 362 having noted "that a heavy responsibility lay on the legal advisers of those seeking a stay to assist the court on the reality of an appeal and also noted that appeals have been known in the past to have been brought for tactical rather than *bona fide* reasons". Secondly, Clarke J suggested that the court is required to conduct a "balance of convenience" assessment akin to determining whether or not to grant an interlocutory injunction. He referred once again to the words of McCarthy J in *Redmond* to the effect that the court is, in those circumstances, required to "maintain a balance so that justice will not be denied to either party".

**13.** Unfortunately, in the present case there is no indication of the grounds upon which PAL might appeal. There is no doubt that some of the issues were novel and difficult. However, this Court must be put in a position where it can assess what would be involved in an appeal. Is there one issue, or many? How complex are the issues which it is proposed to raise on appeal? Does a party consider that it must appeal "on principle", *i.e.,* with a view to reversing what it sees as a decision of the trial court which might be harmful to it in other cases? Could it be said that one or more grounds of appeal are fanciful, clearly having little prospect of success?

**14.** In the absence of any such factors which would enable the court to form an assessment of the *bona fides* of the appeal, the court is not in a position to award a stay pending appeal. The court will therefore proceed to make a final order in the matter, although I will provide for a stay on that order of one week so that the parties may consider their respective positions.