[2019] IEHC 752

THE HIGH COURT

[H:IS:HC: 2018: 00020]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS 2012-2015
AND IN THE MATTER OF JAMES FLYNN (A DEBTOR)

JUDGMENT of Mr. Justice Denis McDonald delivered on 11 November, 2019

The issue before the court

1. This judgment addresses a preliminary issue which has arisen in the context of an application by Eugene McDarby, personal insolvency practitioner ("*the practitioner")* pursuant to s. 115 (A) of the Personal Insolvency Act, 2012 ("*the 2012 Act*") as amended by the Personal Insolvency (Amendment) Act, 2015 ("*the 2015 Act*"). The practitioner has proposed a personal insolvency arrangement on behalf of the above named debtor, Mr. James Flynn. The proposal for the arrangement was, however, not supported by a majority of the creditors of Mr. Flynn. In those circumstances, the practitioner has brought an application under s. 115A which permits the court (subject to satisfaction of a significant number of conditions) to confirm the coming into effect of such a proposed arrangement notwithstanding that it has not been supported by the requisite majority of a debtor's creditors. One of the conditions which must be satisfied for this purpose is set out in s. 115A (9) (g) namely that at least one class of creditors has accepted the proposed arrangement by a majority of over 50% of the value of the debts owed to that class. In this case, the practitioner contends that this condition is satisfied in circumstances where one creditor, Carley & Connellan Solicitors, voted in favour of the proposed arrangement. The practitioner contends that Carley & Connellan constitute a separate class for the purposes of s. 115A (9) (g). This is disputed by the objecting creditor namely Everyday Finance DAC ("*Everyday*"). Everyday advances the simple proposition that the firm of Carley & Connellan is one of a number of unsecured creditors of Mr. Flynn and that the firm cannot be treated as a separate class. According to Everyday, the firm should be treated as falling within the general pool of the unsecured creditors of Mr. Flynn. This is the issue that requires to be determined on a preliminary basis. If the practitioner fails on this issue, the requirements of s. 115A (9) (g) will not be satisfied and the entire application under s. 115A will fail without having to consider any of the other issues which would otherwise require to be addressed.

2. For completeness, it should be noted that a single creditor is capable of constituting a class of creditor for the purposes of s. 115A (9) (g). This is made clear in s. 115A (17) under which the court may consider (subject to certain conditions) that one creditor constitutes a separate class. It is unnecessary for present purposes to analyse the provisions of s. 115A (17). The issue which arises is focussed solely on the question whether Carley & Connellan can be differentiated from the other unsecured creditors of Mr. Flynn so as to validly constitute a separate class of creditors for the purposes of s. 115A (9) (g).

Relevant facts

3. Mr. Flynn has debts of €5,404,102.21. Of this, €265,906.71 is owed to EBS DAC, a secured creditor. The balance of Mr. Flynn's indebtedness (in the sum of €5,184,102.21) is comprised of unsecured debt owed to the following:-

(a) €2,603,054.84 is owed to Everyday as successor in title to Allied Irish Banks Plc ("*AIB*");

(b) €1,656,143.59 is owed to Promontoria Aran Ltd;

(c) €564,157.78 is owed to Havbell DAC;

(d) €360,745.00 is owed to Carley & Connellan Solicitors.

4. With the exception of Carley & Connellan, each of the unsecured creditors identified in para 3 above voted to reject the proposed arrangements. Carley & Connellan voted in favour. The debt owed by Mr. Flynn to Carley & Connellan represents 6.96% of his unsecured indebtedness or 6.62% of his overall indebtedness.

5. In the notice of motion issued pursuant to s. 115A (9) of the 2012 Act, the practitioner described Carley & Connellan as the *"Professional Services Class of Creditors*". He set out his grounds for doing so in the following terms:-

> *"The grounds for defining the 'Professional Services Class of Creditors' as same is due to their position as a professional service provider previously retained by the Debtor with a fixed sum invoice due and owing. In that regard, I consider the professional services creditor to be in a separate class as their interests are so dissimilar that it would be impossible for them to consult together with any other creditor with a view to their common interest. …".*

6. At the hearing which took place in July, 2019, a number of additional arguments were made seeking to justify the treatment of Carley & Connellan as a separate class of creditor. It was contended that Carley & Connellan should be differentiated from the other unsecured creditors in circumstances where, as a firm of solicitors, they would be entitled to exercise a lien over deeds and documents held by them on behalf of Mr. Flynn. It was also suggested that, in contra-distinction to the other unsecured creditors, Carley & Connellan provided services to Mr. Flynn whereas all of the other unsecured creditors had advanced moneys to him or to a company in respect of which he stood as guarantor. It was further submitted that there was a distinction to be made between Carley & Connellan, on the one hand, and Everyday, on the other, in circumstances where Everyday held security over property of a company controlled by Mr. Flynn (as described in more detail below). Finally, it was argued that the unsecured creditors other than Carley & Connellan shared an animus against Mr. Flynn (which was absent in the case of Carley & Connellan).

7. In support of these contentions, reliance was placed by counsel for the practitioner on the affidavit of Mr. Flynn sworn on 3rd July, 2019. In that affidavit, Mr. Flynn set out some of the background to his long running dispute with AIB (the predecessor in title to Everyday). At para. 6 of his affidavit he explained that the debt due to Carley & Connellan arose in respect of legal fees accrued during litigation that took place with AIB. Mr. Flynn explained:-

> *"I say that this was not and is not a commercial loan and there were no agreed repayment terms, but rather a fixed invoice. I say that the firm is not a*

commercial lender and they provided work and services for the debt. I say that they retain security in that they have a lien over my file".

8. In the same affidavit, Mr. Flynn explained that his financial difficulties arose on foot of a guarantee given by him in respect of a company called Fortberry Ltd ("*Fortberry*") and, as a consequence, so he says, of the wrongful conduct of AIB. For the purposes of this judgment, it is unnecessary to set out the nature of the allegations that are made by Mr. Flynn in relation to AIB's conduct. In para. 27 of his affidavit, Mr. Flynn refers to proceedings that were commenced by AIB against Fortberry and him. In para. 28 he explains that, in April 2016, both he and Fortberry consented to judgment being entered in favour of AIB. The judgment against Fortberry was in the sum of €5,182,308.06. The judgment against Mr. Flynn was in the sum of €2.5 million on foot of the guarantee that he had given in relation to the indebtedness of Fortberry. A stay was granted on the judgment until October 2016 subject to a number of conditions including a requirement that Fortberry should procure the execution of legal mortgages in favour of AIB over a number of properties in Dublin. Mr. Flynn says, in para. 30 of his affidavit, that the explicit purpose of the stay was to allow him to procure a reduction in the debt owed by Fortberry to AIB through the intended refinancing or sale of properties. This is supported by the observations of Gilligan J. recorded in the transcript of the proceedings before the court on 20th April, 2017.

9. Mr. Flynn says that, thereafter, Carley & Connellan made significant efforts to obtain the title deeds to effect sales of the properties but without any success. An application was made on his behalf on 11th October, 2016 to extend the stay but that application was refused. Mr. Flynn and Fortberry appealed that refusal to the Court of Appeal on the grounds that (so they alleged) the bank had deliberately obstructed the attempts by him to comply with the order made on April 2016. That appeal was not successful. A receiver was appointed by the bank over the properties in question in October 2016. The properties in question have yet to be realised by the receiver.

The constitution of classes of creditor for the purposes of the 2012-2015 Acts

10. Much of the debate in this case centred around the legal principles which are applicable to the constitution of classes of creditors for the purposes of the 2012-2015 Acts. The principal authority in this context is the decision of Baker J. in *Sabrina Douglas* [2017] IEHC 785. In that judgment, Baker J. applied, by analogy, the principles which apply in a corporate setting to the constitution of classes of members or creditors of a company for the purposes of schemes of arrangements under the Companies Acts. In particular, she had regard to the decision of Laffoy J. in *Re. Millstream Recycling Ltd* [2010] 4 I.R. 253 which, in turn, applied the well-established principles dating back to the decision of the Court of Appeal in *Sovereign Life Assurance v. Dodd* [1892] 2 QB 573 and the more recent decision of the same court in *Re. Hawk Insurance Co. Ltd*. [2001] 2 BCLC 480.

11. In *Sabrina Douglas*, Baker J. commenced her analysis of the issue by quoting from the well-known judgment of Bowen L.J. in the *Sovereign Life Assurance* case at p. 583 where he said:-

"The word 'class' is vague and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest".

12. Counsel for Everyday stressed that, in accordance with this test, the question for the court is whether the rights of the persons said to constitute a class of creditors are similar. He also argued that the consultation which is required is in relation to how the creditors should respond, or vote upon, the proposed arrangement. Counsel for Everyday argued that, in this case, all of the unsecured creditors (including Everyday itself and Carley & Connellan) are treated in the same way. They each have the same rights against Mr Flynn and also under the terms of the proposed arrangement and, accordingly, must be treated as falling within the same class.

13. Counsel for Everyday submitted that this was supported by what is said by Baker J. in para. 34 of her judgment in *Sabrina Douglas*. At para. 34 of her judgment in that case, Baker J. referred to the judgment in *Millstream Recycling* where Laffoy J. had said that a class is to be ascertained by reference to the following question:-

"are the rights of those who are affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought to be regarded, on a true analysis, as a number of linked arrangements?".

14. At this point, it is necessary to deal with an argument made by counsel on behalf of the practitioner in this case. Counsel submitted that the test applied by Laffoy J. in *Millstream Recycling* was based on a scheme of arrangement in a corporate setting. He submitted that such a setting must be distinguished from the typical personal insolvency arrangement (of which the arrangement proposed in this case is one) where there is never (so he submitted) a number of linked arrangements involving different groupings of unsecured creditors. He said that, in contrast to the corporate scheme of arrangement, the unsecured creditors, under a personal insolvency arrangement, are invariably addressed in the same way. Against that backdrop, counsel for the practitioner questioned the feasibility of applying the *Millstream Recycling* principle to what he contends is the rather different regime put in place under the 2012-2015 Acts. I have serious reservations as to whether it is open to counsel for the practitioner to make this argument. In particular, having regard to the judgment of Clarke J. (as he then was) in *Re. Worldport Ireland Ltd* [2005] IEHC 189, it is difficult to see how this argument is open to counsel. By reference to the principles established in *Worldport*, it seems to me that the court is bound to follow the decision of Baker J. in *Sabrina Douglas*. Nonetheless, lest I am wrong in that conclusion, I will address the argument made by counsel for the practitioner which, for all of the reasons set out below, I believe, in any event, to be mistaken.

15. There are a number of reasons why I must reject this argument on the part of counsel for the practitioner. Not only is it contrary to the principal authority on the issue in the specific context of personal insolvency arrangements (namely the decision of Baker J. in *Sabrina Douglas*) but it is also wrong as a matter of fact. There have been cases where unsecured creditors have been dealt with in different ways under a personal insolvency arrangement. While I acknowledge that such arrangements are relatively rare, there have been some cases where arrangements have provided for different treatment. An example is to be found in a case which was also argued in July 2019 namely *Frank & Teresa McNamara* [2019] IEHC 622 where the Revenue Commissioners were dealt with on a different basis to the other unsecured creditors of the debtors. However, although it is rare to find an arrangement which treats some of the unsecured creditors differently to others, it is not uncommon to find that a particular category of unsecured creditor is treated as a separate class from the remaining unsecured creditors. A relatively common example is where a creditor holding both secured and unsecured debt is treated as constituting a different class (in respect of the unsecured element of the debt owed to it) to those unsecured creditors whose claims are wholly unsecured. In such cases, the creditor who holds both secured and unsecured debts can be said to have different rights to those creditors whose claims are purely unsecured. The creditor with the benefit of such security will have different rights under an arrangement than the creditor without any. In assessing a proposed arrangement and in deciding how to vote on that arrangement, the creditor holding security will, naturally, be influenced by the rights given to it in respect of its security which are likely to be more valuable than the rights given to it as an unsecured creditor. Such a creditor may also have very particular concerns, peculiar to it, in relation to the manner in which its security is to be treated under the arrangement. The additional rights available to it, in its capacity as a secured creditor, will thus make it more difficult, in the context of the unsecured element of its claim, to satisfy the second limb of the *Sovereign Life Assurance* test (i.e. to be in a position to consult together with the remaining unsecured creditors with a view to a common interest). In contrast, the wholly unsecured creditors will view the scheme from a different perspective and in particular will not be influenced by the rights available to a creditor who also has the benefit of security or by the manner in which those rights will be affected by the arrangement.

16. It is true that, in a corporate setting, the relevant scheme of arrangement will usually explicitly classify creditors into specific categories. That is not done to the same extent in the case of a proposed personal insolvency arrangement under the 2012/2015 Acts. In the latter case, the relevant arrangement will identify secured creditors. It will also identify unsecured creditors. Depending on the circumstances, it may also identify excluded creditors or excludable creditors. However, it will not usually break down the classes any further. Furthermore, there will not be separate class meetings as such. Sections 106 and 109 of the 2012 Act envisage that a single creditors' meeting will be called. Usually no physical meeting of creditors will take place. The votes of creditors will be submitted through the mechanism of proxies in writing. On the day fixed for submission of proxies, the practitioner will count the votes (and the value of those votes) by reference to the proxies which he or she has received. The practitioner will then

assess whether the requirements of s. 110 have been met. Under s. 110 (1) of the 2012 Act, if a proposal is to be considered as having been approved by the creditors of a debtor, not less than 65% of the total amount of the debts due by that debtor to the creditors participating in the meeting must have voted in favour of the proposal. Of those creditors who vote at the meeting, the proposals must be supported by more than 50% in value of the secured creditors and a similar proportion in value of the unsecured creditors. If those thresholds are not met, the proposed arrangement will fail unless the practitioner is in a position to successfully invoke the provisions of s. 115A and to satisfy all of the requirements of that section including s. 115A (9) (g) which is in issue here. While s. 110 envisages that the practitioner will, at the very least, have to divide creditors into two classes (namely the secured creditor class and the unsecured creditor class) the 2012 Act provides no guidance as to how the practitioner should further sub-divide these two categories of creditor into separate classes for the purposes of s. 115A (9) (g) or s. 115A (17). That is a process that only takes place after the practitioner has addressed the question whether the proposed arrangement has been approved by the creditors under s. 110. If the arrangement is not approved by the requisite majority of secured and unsecured creditors, the practitioner will then turn to consider whether there is a basis to make an application under s. 115A (9). In considering that issue, the practitioner will have to assess whether the provisions of s. 115A (9) (g) and s. 115A (17) are capable of being satisfied. At that point, it becomes necessary to identify whether there is a class of creditors which has approved the arrangement. Such a class will usually be found by a sub-division of the secured or unsecured creditors. The provisions of s. 115A (9) (g) and s. 115A (17) demonstrate that the legislature envisaged that such a sub-division may, depending on the circumstances, be required.

17. Notwithstanding the particular statutory regime put in place by the 2012-2015 Acts (as summarised in para. 16 above), I can see no basis to suggest that it was intended by the legislature that a new or different test should be adopted (i.e. a test other than the *Millstream Recycling* test) when it comes to the constitution of classes for the purposes of s. 115A (9) (g) or s. 115A (17) of the 2012 Act. The very fact that the legislation is silent as to how classes should be constituted for those purposes strongly supports this conclusion. The 2012 Act was enacted against the backdrop that there was already a well-established test in place in an analogous setting under the Companies Acts. The test laid down in the *Sovereign Life Assurance* case had been universally accepted and approved not only in Ireland (as illustrated by the decision of Laffoy J. in *Millstream Recycling*) but also in many common law jurisdictions around the world as the judgment of Chadwick L.J. in Hawk Insurance (at p. 518) demonstrates. If the legislature intended that a different approach should be taken in the context of the 2012-2015 Acts, one would expect that it would have set that out in specific terms in the provisions of those Acts. The legislature did not take that course. As noted previously, the Acts are entirely silent on the issue. In these circumstances, it is inconceivable that any other test should be adopted when there is already a well-established test to apply and which is well capable of being applied. Thus, even if it were open to me to depart from the principles established in *Sabrina Douglas,* there is, in my view, no basis to take a different approach to that taken by Baker J. in *Sabrina Douglas.*

18. At para. 35 of her judgment in *Sabrina Douglas*, Baker J. drew attention to what had been said by Laffoy J. in *Millstream Recycling* that it is necessary to ensure:-

> *"not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements and have their own separate meetings."*

but also to ensure that those:-

> *"whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so."*

19. It is clear from these observations by Laffoy J. that a minor dissimilarity in rights as between one creditor and another will not be sufficient to require that they should be treated as separate classes. There must be a dissimilarity of substance before the court will be prepared to accept that different classes should be constituted. The corollary is that, where the rights of the relevant parties are similar (even if not identical), they should be required to consult together.

20. In para. 36 of her judgment in *Sabrina Douglas*, Baker J. quoted from the final conclusion of Laffoy J. in *Millstream Recycling* where she said:-

> *"While there are inevitably distinctions in the detail of the claims of the contamination creditors (such as their precise value, procedural progress and so forth), in their basic form, these claims are characterised by an overriding similarity: the claims themselves are of a similar nature; they fall to be determined on similar bases; they arise from the same incident; and, in all cases, the creditors have suffered considerable hardship".*

21. Counsel for the practitioner argued that this observation by Laffoy J. highlights a significant difference of substance between the circumstances considered by Laffoy J. in *Millstream Recycling* and the present case. Here, in contrast to *Millstream Recycling*, the claims of the unsecured creditors do not arise from the same incident. On the contrary, they arise from different contractual relationships. In addition, counsel again highlighted the fact that, alone of all of the unsecured creditors, Carley & Connellan were a provider of services. All of the other unsecured creditors had a creditor-debtor relationship with Mr. Flynn under which monies had been advanced either to Mr. Flynn personally or to a company controlled by him.

22. Again, I must reject this argument of counsel for the practitioner. In my view, no significant emphasis can be placed on the reference by Laffoy J. to the fact that, in *Millstream Recycling*, the claims of the "*contamination creditors*" all arose from the same incident. There is nothing in the case law dealing with the constitution of creditor classes to suggest that classes should be constituted by reference to whether or not the claims of the relevant creditors all arose from a similar incident. That observation by Laffoy J. was made in the very particular circumstances of the *Millstream Recycling* case where the

claims of the creditors in issue had all arisen out of the same incident of contamination. However, I can see nothing in the judgment of Laffoy J. in that case which suggests that she considered that this was a necessary requirement in order to treat the "*contamination creditors*" as a single class for the purposes of a scheme of arrangement under consideration there. On the contrary, it is quite clear from a consideration of her judgment as a whole that she was applying the classic sovereign *Life Assurance* test.

23. The approach taken by Laffoy J. is also consistent with the approach taken by the English Court of Appeal in *Re. Hawk Insurance*. In that case, Chadwick L.J. very helpfully identified the analysis that should be undertaken by a court confronted with a question of this kind. At p. 518 he said:-

> "In each case, the answer to [the] question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied".

24. In this case, it is therefore necessary to consider the rights which each of the unsecured creditors have against Mr. Flynn. It is also necessary to consider the manner in which those rights are released or varied under the proposed arrangement. Thirdly, it is necessary to consider the new rights which the scheme gives the unsecured creditors. At present, each of the unsecured creditors (listed in para. 3 above) have a right to claim against Mr. Flynn for the full amount of the debt due to them. None of the unsecured creditors has any right to realise any property of Mr. Flynn. In the case of Carley & Connellan, it is argued on behalf of the practitioner that they are in a different position because they are entitled to exercise a lien over the documents of Mr. Flynn which are held by them. However, in contrast to the EBS, Carley & Connellan have no right to realise any property of Mr. Flynn in exercise of such a lien should they choose to exercise it. The nature of their right is possessory only over the relevant documents of Mr. Flynn (if any) held by them. In Wylie "Irish Land Law", 5th ed. at para. 12.15 the nature of such a lien is described as follows:-

> *"A lien is a concept which has been recognised at common law and in equity. A common law lien confers on the holder a mere right of retention of another person's property until such time as a debt is paid, e.g., the right of a garage proprietor to retain a car repaired by him until its owner pays the repair bill. Such a common law lien gives the holder no right (in the absence of a contractual or statutory provision) to sell the property retained or to deal with it in any other way. In this respect, as we shall see, there is a marked difference between a common law lien and a mortgage. Furthermore, if the holder of the lien parts with possession of the property to the debtor or his agent, or to anyone other than his own agent, it is lost. In short, the 'security' for the debt is dependant entirely upon the creditor's possession of the property and this too is a point of difference from a modern mortgage".*

25. It is noteworthy that, under the terms of the proposed arrangement, Carley & Connellan are not treated in any way differently to the other unsecured creditors. There is nothing

in the proposed arrangement which refers to or addresses any lien which they may be entitled to invoke against Mr. Flynn. Nor is there any evidence before the court which suggests that Carley & Connellan have ever sought to invoke such a lien. Likewise, there is no sufficient evidence as to the nature of the documents held by Carley & Connellan or as to whether any of them are important or whether any of them have a particular value. In this context, it is important to bear in mind that the onus lies on the practitioner to demonstrate to the court that all of the requirements of s.115A have been satisfied including the requirements of s. 115A (9) (g). In my view, the evidence falls far short of establishing that any claimed lien would put Carley & Connellan in a different class to the unsecured creditors identified in para. 3 above.

26. Moreover, even if one were to overlook the paucity of evidence in respect of the lien, it is notable that it is nowhere suggested that, as a consequence of any lien, Carley & Connellan are entitled to demand more by way of repayment from Mr. Flynn than any of his other unsecured creditors or to be treated, in any meaningful way, differently to the unsecured creditors. In terms of the dividend to be paid to them under the proposed arrangement, they will be paid at precisely the same rate of return as any of the other unsecured creditors. They get no additional benefit under the arrangement as a consequence of their right to exercise a lien. Accordingly, it is the right to be repaid which seems to me to be the relevant right for present purposes.

27. For the reasons outlined above, it is clear that each of the unsecured creditors (including Carley & Connellan) have similar rights – namely the right to be repaid the debt owed to them. In each case, the manner in which that right is to be released or varied under the terms of proposed arrangement is precisely the same. In each case, the unsecured creditors will each receive a dividend calculated in the same way. Thus, under the terms of the scheme, in lieu of their pre-existing right to pursue Mr. Flynn for the whole of the relevant debt due to each of them, they will (in the event that the scheme comes into effect) have the right to payment of a dividend calculated at the same rate in each case. Thus, applying the approach suggested by Chadwick L.J. (quoted in para. 23 above) the rights which are to be released or varied under the arrangement (i.e. the right to be repaid their debts) are all precisely the same. Similarly, the new rights given to them under the proposed arrangement (namely the right to payment of a dividend distributed on a *pari passu* basis) are also precisely the same. No distinction whatever is made between Carley & Connellan and the remaining unsecured creditors. Subject to a consideration of the remaining issues raised by counsel for the practitioner, it therefore seems to me to follow that, to paraphrase Laffoy J. in *Millstream Recycling*, the rights of each of the unsecured creditors are sufficiently similar to the rights of the others that not only can they properly consult together but they should be required to do so. Applying the test laid down in the *Sovereign Life Assurance* case, all of the unsecured creditors should therefore be treated as a single class.

The security held by Everyday

28. As noted in para. 6 above, it was further submitted that there was a distinction to be made between Carley & Connellan, on the one hand, and Everyday on the other, in

circumstances where Everyday hold security over property of Fortberry. In my view, this is an entirely academic point. Even if Everyday were to be treated as falling into a different class, it is clear that a significant majority in value of the remaining unsecured creditors voted against the proposed arrangement. The relevant debts due to each of the unsecured creditors are listed in para. 3 above. It is quite clear that, together, the debts owed by Mr. Flynn to Promontoria Aran Ltd and Havbell DAC far exceed the debt owed to Carley & Connellan.

29. For completeness, I should make clear that, even if the considerations identified in para. 28 above did not exist in this case, I cannot see a proper basis to treat Everyday as being in a different class merely because it holds security over property of Fortberry. While, of course, Everyday would be entitled to exercise rights over the property secured in its favour by Fortberry, Everyday retains the right to pursue Mr. Flynn in respect of his personal liability on foot of the guarantee given by him in respect of the debts of Fortberry. In fact, the only right which Everyday has against Mr. Flynn is a purely personal right to pursue him on foot of the judgment for payment of a debt. In circumstances where none of the debts is disputed, this is precisely the same right as any of the other unsecured creditors have. The fact that Everyday holds security over the property of Fortberry does not affect this conclusion. Crucially, Everyday holds no security over the property of Mr Flynn. As an unsecured creditor of Mr Flynn, Everyday retains the right to seek repayment from him notwithstanding its concurrent right to rely on its security against Fortberry. The relevant principle was identified in the following terms in the opinion of the Privy Council in *China & South Sea Bank v. Tan* [1990] 1 AC 536 at p. 545 where Lord Templeman explained the position as follows:-

> *"In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise his power of sale over the mortgaged security, he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor."*

30. In my view, it is clear from this passage that a creditor who holds security from a principal debtor is not prevented from exercising his or her rights to pursue and seek payment from a guarantor in respect of the debt guaranteed. The creditor has a choice as to how to proceed. In this case, the right which Everyday has against Mr. Flynn is precisely the same right as that available to all of the other unsecured creditors of Mr.

Flynn – namely the right to pursue Mr. Flynn in respect of his debt. As the *China & South Sea Bank* case shows, the fact that Everyday also has a right to pursue Fortberry and to exercise security rights over the property of Fortberry does not affect this conclusion.

Carley & Connellan as a provider of services

31. As noted in para. 6 above, one of the arguments made by counsel for the practitioner in this case is that Carley & Connellan should be differentiated from the other unsecured creditors on the basis that, alone of those creditors, Carley & Connellan provided services to Mr. Flynn. All of the claims of the other unsecured creditors arise from a debtor-creditor relationship following the advancement of monies to Mr. Flynn or to a company controlled by Mr. Flynn. In my view, the origin of the indebtedness of Mr. Flynn to Carley & Connellan is irrelevant in this context. The case law shows very clearly that what the court must consider is the nature of the rights which the creditors have against the debtor and the extent to which those rights are varied or affected by the proposed arrangement. As already discussed above, the rights which Carley & Connellan have against Mr. Flynn are precisely the same as the rights which any of the other unsecured creditors have. It is true that Carley & Connellan may have the entitlement to exercise a lien over certain papers of Mr. Flynn. However, for all of the reasons discussed in paras. 24 to 27 above, I am of the view that the existence of this lien is not relevant. The relevant right of Carley & Connellan is the right to be paid. It is the same right as that held by all of the other unsecured creditors. Moreover, as discussed above, it is affected in precisely the same way as the claims of all of the other unsecured creditors. Each of them suffers the same proportionate reduction in the debt under the terms of the proposed arrangement as all of the other unsecured creditors. None of them is dealt with any differently under the terms of the arrangement than the other. In all of these circumstances, I can see no basis to form the view that merely because Carley & Connellan provided services to Mr. Flynn, they should be treated as falling into a separate class.

The allegation of *animus*

32. In the course of the hearing, my attention was drawn by counsel for the practitioner to certain correspondence that took place between AIB (the predecessor in title to Everyday) and the solicitors then acting for it. The correspondence in question predated the formulation of the proposals for the arrangement in this case. The correspondence included an email from AIB's solicitor to AIB itself in which reference was made to Mr Flynn's "*past behaviour*" and expressed the opinion that AIB should "*refuse the PIA*". It was submitted by counsel for the practitioner that the correspondence demonstrated that, at that stage, AIB and its solicitors had already firmly made up their mind to oppose any proposals that might be put forward by the practitioner for an arrangement under the 2012-2015 Acts. It was suggested that this showed a definite *animus* on the part of AIB against Mr. Flynn and that, for that reason, Carley & Connellan (who hold no such *animus*) should be treated as falling into a separate class. In this context, it appears to be suggested that, in some way, all of the other unsecured creditors share this alleged animus against Mr. Flynn. It was also submitted that, given this alleged *animus*, those unsecured creditors and Carley & Connellan could not consult together with a view to their common interest.

33. In my view, this submission on the part of the practitioner is mistaken. I fail to see how the motivation of a particular creditor is relevant to the question as to how classes of creditors are be constituted. In any arrangement, it would be unsurprising that one or more creditors might have some level of hostility to a debtor in relation to a long unpaid debt. More importantly, as the case law shows, the question as to how creditors are to be classified depends on the rights held by them and the way in which those rights are varied or released under the terms of a proposed arrangement. Whether a creditor is well disposed or ill disposed towards the debtor is not relevant to those issues.

34. If anything, the email from AIB's solicitor evidences a predetermination to vote against the arrangement. In principle, I can see no distinction between cases where a creditor, even in advance of receipt of proposals for an arrangement, has determined to oppose any arrangement which is put forward and cases where, for example, creditors agree in advance to support a particular arrangement. In the latter case, it is well established that a creditor who agrees in advance to support a particular arrangement is not to be treated as falling into a separate class from other creditors holding the same rights. This is clear from the decision of David Richards J. in Re. *Telewest Communications Plc (No. 1)* [2005] 1 BCLC 752 at p. 759. That principle was expressly followed by Kelly J. (as he then was) in Ireland in *Re. Depfa Bank Plc* [2007] IEHC 463. I can therefore see no distinction in principle between the position of a creditor who undertakes to vote in favour of a particular arrangement and the position of a creditor who determines, in advance of the circulation of proposals for an arrangement, to oppose any such arrangement. I have, accordingly, come to the conclusion that the existence of any alleged *animus* on the part of AIB, as predecessor in title to Everyday, would not require that AIB or Everyday be placed into a different class. Even if it were placed into a different class, that would not make any difference to the result. As previously noted, the vote of Carley & Connellan was outweighed by the value of the votes of Promentoria Aran Ltd and Havbell DAC who both voted against the arrangements. There is no evidence before the court to establish that there was any *animus* against Mr. Flynn held by either of those creditors.

Other matters

35. There is one further matter which I should address. While I do not believe that it is relevant to the issue which requires to be decided in this case, a submission was made by counsel for the practitioner here that gives me some cause for concern. In the course of submissions, counsel for the practitioner sought to suggest that there was a tension between one element of the decision of Baker J. in *Sabrina Douglas* and one element of my own decision in *Noel Tinkler* [2018] IEHC 682. In particular, it was suggested that the view expressed by me in para. 32 of my judgment in *Tinkler* is inconsistent with the view expressed by Baker J. in para. 45 of her judgment in *Sabrina Douglas* where she held that a creditor holding security over a principal private residence is capable of being considered as a separate class of secured creditor for the purposes of s. 115A. In my view, there is no inconsistency between the views expressed by Baker J., on the one hand, and by me, on the other. The point made by me in para. 32 of my judgment in *Tinkler* is not concerned with the issue addressed by Baker J. in para. 45 of her judgment in *Sabrina Douglas*. The latter is concerned with whether or not the holder of security

over a principal private residence should be considered to constitute a separate class of secured creditor. In contrast, para. 32 of my judgment in *Tinkler* is concerned with whether or not the holder of such security is entitled to preferential treatment (as compared to secured creditors holding security over other property of a debtor). I wish to make it very clear that I entirely agree with the view expressed by Baker J. in para. 45 of her judgment. In my view, a creditor holding security over a principal private residence is capable of constituting a separate class of secured creditor for the purposes of s. 115A (9) (g) of the 2012 Act. In light of the provisions of s. 99 (2) (h) and s. 104 (1) of the 2012 Act (both of which make clear that, save in quite exceptional circumstances, a personal insolvency arrangement should seek to preserve the ability of a debtor to remain in his or her principal private residence) the rights of the holder of security over such a property are capable of being affected in a uniquely different way to the holders of security of other property of a debtor. In such circumstances, having regard to the well-established tests which are applied in the context of the constitution of classes of creditor (as outlined above) it is almost always the case that such a creditor will be in a different class of secured creditor to any other secured creditors of a debtor in any particular case. There is nothing in my judgment in *Noel Tinkler* which affects or undercuts that fundamental proposition.

Conclusion

36. In light of the views expressed by me above, I have come to the conclusion that, in this case, Carley & Connellan, solicitors, cannot be considered to be in a separate class to the other unsecured creditors of Mr. Flynn. In those circumstances, the condition set out in s. 115A (9) (g) of the 2012 Act cannot be satisfied in this case. As a consequence, the application made by the practitioner under s. 115A (9) must fail. In these circumstances, I proposed to make an order dismissing the present application on that basis. It is therefore unnecessary to consider the remaining issues that would ordinarily require to be addressed on an application under s. 115A.