THE HIGH COURT

[H:IS:HC:2018:000063]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS 2012-2015

AND IN THE MATTER OF PATRICK HALPIN (A DEBTOR)

JUDGMENT of Mr. Justice Denis McDonald delivered on 18th February, 2019

1. This judgment relates to an application brought on behalf of Kenmare Property Finance DAC ("Kenmare") for the following relief:-

> (a) An order to set aside the order previously made by the court on 24th January, 2019, whereby the period of the Protective Certificate was extended for a period of 40 days;
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> (b) directions as to whether the debt of the debtor, Mr. Patrick Halpin, to Kenmare is a secured debt for the purposes of the Personal Insolvency Acts 2012 to 2015 ("the 2012 Act" and "the 2015 Act" respectively). For completeness, it should be noted that there is also a similar application before the court brought by the practitioner (identified below).This question arises in the context of a property known as Aberdeen Lodge (dealt with in detail below): and
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> (c) an order declaring that the debt of Mr. Halpin to Kenmare is not a relevant debt for the purpose of s. 115A of the 2012 Act (as amended by the 2015 Act).

2. At this point, it should be noted that the order of 24th January, 2019 was made *ex parte* on the application of Mr. James Green, the Personal Insolvency Practitioner ("the Practitioner") acting in this case. The order was sought by the Practitioner on the basis of an affidavit sworn by him on 24th January, 2019. In that affidavit he sought, pursuant to s. 95(7) of the 2012 Act, an extension of the Protective Certificate for a period of 40 days in order to facilitate seeking creditor approval under the 2012 Act (as amended), to allow him to engage with the creditors, and, if necessary, re-draft proposals which he had prepared for a Personal Insolvency Arrangement ("PIA"). In his affidavit, the Practitioner also sought directions in relation to what he described as:- "*the section 105 process*" (*i.e*. the process under which security can be valued either by agreement between the Practitioner and the relevant secured creditor or by an independent expert appointed by the parties or, in default of agreement between them, by the Insolvency Service of Ireland ("ISI")).

3. This was the second application by the Practitioner for a 40-day extension. A previous application had been made in December 2018 under s.95(6) of the 2012 Act on foot of an affidavit in which the Practitioner suggested (in para. 31) that a s. 105 valuation of Aberdeen Lodge would be required in order to finalise the proposed PIA. At a later point in this judgment, it will be necessary to consider this affidavit in more detail.

4. The extension of the period of the Protective Certificate has implications for Kenmare as a creditor of Mr. Halpin. Under s. 96(1) of the 2012 Act, Kenmare is prevented, for as long as the Certificate remains in force, from taking a wide range of action against Mr. Halpin. Kenmare is therefore a person adversely affected by the order made on 24th January, 2019. In those circumstances, there is no doubt that, if there are grounds to do so, Kenmare has the necessary *locus standi* to apply to the court to vacate the order made, without notice to it, on 24th January, 2019. The relevant principles governing such an application are addressed in the judgment of Baker J. in *James Nugent* [2016] IEHC 127 where she applied the principles outlined in the judgment of Hogan J in *Re Belohn Limited* [2013] IEHC 157.For reasons which will be explained in more detail below, Kenmare also claims that its ability to enforce a debt and related security as against a company called Elektron Holdings Limited is also affected by the approach which the practitioner proposes to adopt in this case.

5. As noted above, the order of 24th January, 2019 extended the period of the Protective Certificate by a period of 40 days from 26th January, 2019. In the course of the hearing which took place before me on Monday 4th February, 2019 the parties were agreed that the relevant 40-day period will expire on 7th March, 2019. In those circumstances, there is only a very limited time available to me to consider the issues that were debated in the course of that hearing and to give my decision on those issues. This is for the very simple reason that, if it is appropriate for the Practitioner to proceed with proposals for a PIA, he will have to give at least 14 days' notice to creditors of the necessary meeting at which the creditors will vote on those proposals. In those circumstances, this judgment is required to be given not later than Monday, 18th February, 2019.

6. In light of the relatively tight timeframe for the delivery of the judgment, I will confine my description of the background to this dispute to what I consider to be the most relevant facts. I will not attempt to set out every element of the extensive background as canvassed in the affidavit evidence before the court.

Relevant Facts

7. On 4 October, 2012 Irish Bank Resolution Corporation Limited ("IBRC") obtained a judgment for €20 million against Mr. Halpin in the High Court. That was followed by subsequent judgment of 7 November, 2013 in the same proceedings under which IBRC obtained judgment against Mr. Halpin for a further sum of €6,338,369.09. The right to enforce those judgments now vests in Kenmare. By order of the High Court of 3rd November, 2015 Kenmare was given leave to issue execution in respect of those judgments against Mr. Halpin. The judgments in question were obtained on foot of a guarantee given by Mr. Halpin to Irish Nationwide Building Society ("INBS") in respect of the liabilities of a company called Crossplan Investments Limited ("Crossplan"). IBRC is the successor in title to INBS.

8. The amount now due on foot of the judgments is €23,933,503.09. This follows a realisation made by a receiver (appointed by IBRC in 2012) over the assets of Crossplan. The receiver realised a sum of €2,404,866 on the sale of a property known as "Merrion Hall".

9. Mr. Halpin was not the only guarantor of the debts of Crossplan. Those debts were also guaranteed by a company called Elektron Holdings Limited ("Elektron") which also owed money to IBRC on foot of a loan to it from IBRC. Kenmare now stands in the shoes of IBRC in relation to the indebtedness of Elektron. As part of the security for its indebtedness, Elektron gave security over a property known as Aberdeen Lodge on Park Avenue, Sandymount, Dublin 4. This is a hotel or guest house and it is also, reputedly, the family home of Mr. Halpin and his partner Ms. Ann Keane but this is not accepted by Kenmare. Ms. Keane is a director of and a shareholder in Elektron. In 2012, IBRC appointed a receiver over the assets of Elektron including Aberdeen Lodge.

10. Since the appointment of the receiver, there has been protracted litigation in relation to Aberdeen Lodge. Two sets of proceedings were commenced by the receiver in 2012. The first set of proceedings was issued pursuant to s. 316 of the Companies

Act 1963 ("the 1963 Act") in which the receiver sought a declaration as to the validity of his appointment. Both Mr. Halpin and Ms. Keane were respondents to that application. Separately, High Court Proceedings were initiated by special summons by the receiver in which the receiver sought an order against Mr. Halpin and Ms. Keane for possession of Aberdeen Lodge. On 8th November, 2013, a determination was made by the High Court that the receiver had been validly appointed and that he was entitled to possession of Aberdeen Lodge as against Mr. Halpin and Ms. Keane and also against Elektron. That order was appealed to the Supreme Court but, on 11th March, 2016, the Supreme Court dismissed the appeal. By a further order of 8th April, 2016 the Supreme Court granted the receiver possession of Aberdeen Lodge with effect from 8th May, 2016.

11. According to Ms. Sharon Delaney (the solicitor acting for Kenmare in these proceedings) Mr. Halpin and Ms. Keane failed to comply with the order for possession. As a result, an application for attachment and committal issued. However, because of further proceedings (described briefly below) the motion for attachment and committal was adjourned generally with liberty to re-enter.

12. While the possession proceedings were pending, Mr. Halpin made a complaint alleging offences of dishonesty against an employee and a former employee of IBRC. On 5th March, 2012 a summons was issued by the District Court against each of the employees concerned for offences under s. 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the 2001 Act"). A judicial review of this decision to issue the summonses was sought by the employees. Ultimately, the Supreme Court, by an order of 30th July, 2015 quashed the summonses in question.

13. In 2015 Elektron and Ms. Keane brought proceedings against Kenmare and the receiver in which they challenged the appointment of the receiver and sought an order directing Kenmare to release or vacate any security it holds over Aberdeen Lodge. They contended that the guarantee which had been given by Elektron to INBS in respect of the borrowings of Crossplan was in breach of s. 31 of the Companies Act 1990 ("the 1990 Act") and they also contended that the appointment of the receiver over the assets of Elektron and in particular over Aberdeen Lodge ceased to have effect as of the date of the sale of the loans and related security by IBRC to Kenmare.

14. In a judgment delivered on 25th July, 2016, Twomey J. in the High Court dismissed the 2015 proceedings on the basis that the claims made therein could and should have been raised in the course of the earlier proceedings described above. Twomey J. took the view that the claim amounted to a collateral attack on the decision of the Supreme Court in the earlier proceedings. Elektron and Ms Keane appealed the decision of Twomey J. That appeal was unsuccessful. On 9th May, 2018 Finlay Geoghegan J. in the Court of Appeal delivered judgment upholding the decision of Twomey J. At that point, it was intimated that Elektron and Ms. Keane intended to apply to the Supreme Court for leave to appeal. They also sought a stay on the order for possession previously granted in the 2012 proceedings pending the determination of their application for leave to appeal (and in the event of leave to appeal being granted pending the determination of such appeal). That stay was granted by the Court of Appeal by order dated 6th June, 2018 on the basis (inter alia) that Elektron and Ms. Keane undertook to pay to Kenmare and the receiver the sum of €5,000 per month (representing €1,725 in respect of interest and €3,275 per month in respect of capital on the outstanding loan amounts). A determination of that application by the Supreme Court is expected imminently.

15. In the meantime, on 21st February, 2018 Kenmare commenced bankruptcy proceedings against Mr. Halpin in respect of the unpaid judgment debt of €23,933,503.09. That petition was adjourned in the usual way to allow Mr. Halpin to obtain the advice of a Personal Insolvency Practitioner. In an affidavit sworn on 9th July, 2018, in the bankruptcy proceedings, Mr. Halpin indicated that he had obtained advice from the Practitioner that he was eligible to apply for a PIA and he sought an adjournment of the bankruptcy proceedings in order to pursue such an arrangement.

16. In his affidavit, Mr. Halpin exhibited a statement of affairs in which Kenmare is listed as an unsecured creditor in the sum of €23,933,508.09. Mr. Halpin also exhibited a letter dated 27th July, 2018, from the Practitioner in which he referred to discussions with Mr. Halpin about the prospect of a third-party making a "*lump sum*" available in order to fund a proposed PIA. According to Ms. Delaney, when the matter came on before Costello J. in the Bankruptcy Court on 30th July, 2018 counsel for Kenmare raised an issue as to whether the "*third party funds"* in question referred in reality to the proceeds of realisation or refinancing of Aberdeen Lodges. In paragraphs 48-49 of her affidavit Ms. Delaney says:-

> *"48… Ms. Justice Costello, on the application for an adjournment over the long vacation of the bankruptcy petition, once the issue was flagged to her, was rightfully concerned that the reference to 'third-party funds' was merely a reference to the proceeds of realisation or refinancing of Aberdeen Lodge, in circumstances where (a) a Receiver had been appointed to that asset by Kenmare and (b) Elektron owed over €25 million to Kenmare, and would be obliged to discharge that debt from any such realisation, and therefore any Personal Insolvency procedure predicated on the availability of such funds was doomed to fail. She therefore put the matter back to 2PM and asked counsel for the Debtor to confirm whether the third-party funds to which… reference was made…were not just the theoretical proceeds of realisation of Aberdeen Lodge.*
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> *49. At 2PM, counsel for the Debtor informed the Court that he had taken instructions from the… Practitioner, and that these were separate and distinct third-party funds that may be available…"*

17. The bankruptcy petition was duly adjourned to allow an application to be made by Mr. Halpin for a Protective Certificate under s.93 of the 2012 Act. That application came before me on 8th October, 2018. Ordinarily, such applications do not involve any attendance by solicitor or counsel. The papers are considered in advance online by the court and a decision is subsequently given in open court. However, on this occasion, counsel appeared on behalf of the Practitioner and drew my attention to certain features of the Prescribed Financial Statement ("PFS") which had been prepared by Mr. Halpin in this case (which is an essential proof in any application for the grant of Protective Certificate). In particular, my attention was drawn to the following features of the PFS:-

> (a) On p. 5 the address of the principal private residence of Mr. Halpin was given as 55 Park Avenue, Sandymount, Dublin 4. This is the address of Aberdeen Lodge. The current market value was given at €2 million. Mr. Halpin was stated to have a 50% interest in the "*residence*". However, p. 5 contained the following comment:-
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> > *"Whereas the debtor and his partner are shown as holding 50% each of the PPR it is in fact held by Elektron Holdings Limited. Ann Keane is the sole shareholder and director of Elektron Holdings Limited".*
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> (b) Pages 11 and 14 of the PFS dealt with the liability to Kenmare. Page 11 showed that there was a payment of €5,000 per month being made to Kenmare which was described on that page as the "*Principal Private Residence Lender – secured*" it was also suggested that there was a balance outstanding of €1,116,547.00. My attention was drawn to the comment on p. 11 that Mr. Halpin had personally guaranteed accounts in the name of Elektron and secured on "*the PPR*". The comment also stated that the personal guarantee had not been called in but the loan was in arrears.

(c) Page 14 dealt with what was described as an unsecured debt to Kenmare and the amount shown to be due was €23,933,503.09.

18. There is nothing in the terms of the PFS to show that a receiver had already been appointed over the assets of Elektron including Aberdeen Lodge. Nor was any indication given in the PFS that Aberdeen Lodge was in fact a hotel or guest house.

19. For completeness, it should be noted that p. 13 of the PFS shows that Mr. Halpin has a debt to Tanager DAC which is secured over a different property namely 40 Park Avenue, Sandymount, Dublin 4.

20. Counsel also indicated that although it was accepted by the debtor and the practitioner that Kenmare was not a secured creditor of the debtor, their case was that there was nonetheless a secured debt over Aberdeen Lodge within the meaning of s. 2 of the 2012 Act. There were no detailed submissions made to the court on the issue. I did not require such submissions. I merely noted that such an argument was made and assumed that, if subsequently, Kenmare took issue with this argument, the matter would fall to be debated in due course at an appropriate point in the proceedings.

21. Once a Protective Certificate issues, there is an obligation on the Practitioner under s. 95(12) to notify creditors of the issue of the Certificate. Such a notice was issued by the Practitioner on 9th October, 2018. Among the creditors who were served with that notice was Kenmare. On 22nd October, 2018 Beauchamps Solicitors wrote to the Practitioner on behalf of Kenmare enclosing the proof of debt in respect of the judgment debts amounting to €23,933,503.09. The letter also dealt with Aberdeen Lodge. In particular, the letter noted that there was in fact no debt of €1,116,547 due by Mr. Halpin and that the debt to Kenmare was due from Elektron. The letter stated that:-

> *"This is not a liability of the debtor and the debt of a third-party cannot be included in the Protective Certificate, a Prescribed Financial Statement or any Personal Insolvency Arrangement.*
>
> *Please note that if you fail to take all reasonable steps necessary to remedy this error, out client will rely on this letter to fix you personally with the costs of any application that it is obliged to bring to correct the error".*

22. The letter also stressed that Mr. Halpin has no interest in Aberdeen Lodge; that it was owned by Elektron, and is the subject of an order for possession in favour of the receiver (albeit subject to an ongoing stay).

23. The Practitioner responded on 2nd November, 2018. In reply to the complaint about the inclusion of a debt of €1,116,547 in the PFS, the Practitioner stated that Mr. Halpin had personally guaranteed the liability of Elektron and, on that basis, he suggested that the debt is "*therefore a debt of the debtor. As the debt has been listed on the PFS, it is a specified debt".*

24. The Practitioner was incorrect in making that suggestion. No demand has ever been made by Kenmare or any of its predecessors in title under the guarantee given by Mr. Halpin in respect of the debts of Elektron. As explained in more detail below, the PFS was subsequently corrected in December 2018 to show a balance of €1 on foot of the guarantee. This is consistent with ISI guidance in respect of liabilities under guarantees that have not been called in.

25. In his letter of 2nd November, 2018 the Practitioner also took issue with the threat as to costs contained in the letter of 22nd October, 2018. He referred to the observation made by Baker J. in her judgment in *Re Hickey (a debtor) No. 3* [2018] IEHC 313 where she said, at para. 68:-

> *"This is precisely the form of letter intended to have a chilling effect to which I drew attention in my judgment in In Re Meeley [2018] IEHC 38, where the concern I expressed was that correspondence from creditors which threatened an application for costs against a PIP in a 'routine or ordinary case which is lost' was not a practice which I considered could be condoned by a court."*

26. The Practitioner asked that the threat of costs should be withdrawn. In his letter, the Practitioner stressed his own independence and he sought confirmation by return that the threat of costs had been withdrawn.

27. In turn, Beauchamps responded to the Practitioner in a very lengthy and detailed letter of 16th November, 2018. In that letter, Beauchamps drew attention to a number of inaccuracies in the PFS. In particular, the letter stressed that, contrary to the terms of the PFS, Mr. Halpin had no interest in Aberdeen Lodge which, at all material times, has been wholly owned by Elektron subject to the security originally given to INBS. The letter also described, in some detail, the litigation which had previously taken place involving Mr. Halpin (which I have summarised above). The letter also emphasised that the guarantee given by Mr. Halpin in respect of the Elektron debt had never been called in.

28. On p. 5 of the letter Beauchamps set out the basis on which Kenmare contended that it was not a secured creditor of Mr. Halpin. The letter stressed that Kenmare is an unsecured creditor within the meaning of the 2012 Act in respect of the judgment debts described. It is clear, from the letter, that the underlying concern of Kenmare related to the suggestion by the practitioner that there was secured debt over Aberdeen Lodge which had the effect of bringing that property in some way within the ambit of Mr Halpin's proceedings under the 2012-2015 Acts.

29. The letter also contained a detailed analysis of s. 96 of the 2012 Act, drawing particular attention to the provisions of s. 96(3) which makes clear that no execution or other legal process in respect of a specified debt may be commenced or continued by a creditor "against the debtor *or his or her property*… (emphasis added) except with the leave of the court. In circumstances where Aberdeen Lodge is not the property of Mr. Halpin, the letter suggested that there was nothing in s. 96 to prevent the receiver taking steps against Aberdeen Lodge.

30. In addition, insofar as s. 115A of the 2012 Act is concerned, the letter suggested that there was no "*relevant debt"* as defined by s. 115A(18) in circumstances where there is no debt of Mr. Halpin secured on or over Aberdeen Lodge.

31. Insofar as the issue of costs was concerned, Beauchamps maintained the position previously outlined in the letter of 22nd October, 2018. The letter also suggested that it was clear that Mr. Halpin had failed to make full and honest disclosure of his affairs in the PFS and was therefore in breach of s. 50(3) of the 2012 Act. It was suggested that this, in turn, had "*very serious implications*" for the Practitioner. It was also suggested that this meant that the case was far removed from the "*routine or ordinary case*" mentioned by Baker J. in *Hickey No.3.*

32. The Practitioner passed Beauchamps' letter of 16th November, 2018, to Carley & Associates, the solicitors acting for Mr. Halpin.

They responded on 22nd November, 2018. In their letter of 22nd November, 2018 Carley & Associates accepted that Kenmare is not a secured creditor of Mr. Halpin. However, they made the case that Mr. Halpin has a liability arising out of debts which are secured on Aberdeen Lodge which they maintained is Mr. Halpin's principal private residence. They did so on the basis that Mr. Halpin has a liability to Kenmare on foot of the personal guarantee given in relation to the Elektron loans. With regard to the complaint that the PFS was inaccurate, Carley & Associates explained that, in completing the PFS, Mr. Halpin was constrained by the form which debtors are required to use for this purpose. They also stressed that the PFS is not intended to be a general narrative of a debtor's past experiences with a creditor.

33. Beauchamps were unhappy that their letter to the Practitioner had been answered by a firm of solicitors acting on behalf of Mr. Halpin. In those circumstances, by letter dated 23rd November, 2018 they called on the Practitioner to respond directly to their letter of 16th November, 2018.

34. A reply was received from the Practitioner on 13th December, 2018 in which he provided a response to each of the individual points made in the letter of 16th November, 2018. The letter also suggested that he had engaged with the ISI and that he had "*sought to obtain advices in respect of the matter".*

35. In his letter of 13th December, 2018 the Practitioner acknowledged that Kenmare is not a secured creditor of Mr. Halpin. He confirmed that Kenmare was an unsecured creditor of Mr. Halpin. He nonetheless contended that the debt due to Kenmare:-

> *"…is secured over Aberdeen Lodge, being an asset owned by Elektron… and I believe that this debt is a secured debt pursuant to s. 2 of the Personal Insolvency Acts 2012-2015"*

36. This is the argument that had been briefly outlined to me when counsel addressed me on 8 October, 2018 when I authorised the issue of the Protective Certificate.

37. In his letter, the practitioner also confirmed that Mr. Halpin does not own or have any interest in Aberdeen Lodge and that the manner in which the PFS had been completed was dictated by the form of the PFS which a debtor is required to use. Nonetheless, the practitioner accepted that there was an error in the PFS and he proposed that the PFS would be amended, the period of the Protective Certificate should be extended, and a draft PIA proposal should be prepared for consideration by creditors.

38. At this point, it should be noted that, in the period between receipt of the Beauchamps letter of 16th November, 2018 and the practitioner's response of 13th December, 2018 the Practitioner had received a letter dated 30th November, 2018 from the ISI in which the ISI indicated that it was not in a position to appoint an independent expert to determine the market value of Aberdeen Lodge. The letter drew attention to the provisions of s. 105(4) of the 2012 Act which makes the clear that the role of the ISI under s. 105 to appoint such an expert only arises where the debtor and the secured creditor have previously been unable to agree the valuation of secured property and have likewise been unable to agree on the appointment of an independent expert to carry out a valuation. The letter also made clear that the ISI was not in a position to give any legal advice:-

> *"as regards the substantive question as to whether or not the property known as Kenmare holds (sic) 'Aberdeen Lodge' as security for debts owed to them by Mr. Halpin."*

In the course of the hearing before me, counsel for Kenmare drew attention to the closing words of that sentence which, he suggested, very clearly indicated a view by the ISI that Aberdeen Lodge would only be relevant to any PIA process if it was held as security for debts owed to Kenmare by Mr. Halpin.

39. Beauchamps did not immediately respond to the Practitioner's letter of 13th December, 2018. A week later, the Practitioner wrote again to Beauchamps on 20th December, 2018, in which he drew attention to the difference in value placed on Aberdeen Lodge by Kenmare and Mr. Halpin respectively. He noted that in Beauchamps letter of 22nd October, 2018 a value of €3 million had been indicated for Aberdeen Lodge whereas, in his PFS, the debtor had specified a value of €2 million. In those circumstances, the Practitioner suggested that it was appropriate to invoke the provisions of s. 105(3) and appoint an independent expert to determine the value. He put forward the names of three experts for this purpose. This provoked a response from Beauchamps on 21st December, 2018 in which they reiterated that Kenmare does not accept that the Practitioner is entitled to deal with Aberdeen Lodge in circumstances where it is not the property of the debtor and Kenmare is not a secured creditor of the debtor in respect of the property for the purposes of the 2012 Act. In their letter, Beauchamps stated that s. 105 only applies where the Practitioner seeks to engage with a "*secured creditor*" and that s. 105 was inapplicable in circumstances where Kenmare was not a secured creditor of Mr. Halpin in respect of Aberdeen Lodge. Beauchamps asked the Practitioner to confirm that he agreed with the position as set out by Beauchamps.

The application under s. 95(6) of the 2012 Act

40. In the meantime, on 14th December, 2018 the Practitioner had applied under s 95(6) of the 2012 Act, on an *ex parte* basis, to the court for a 40 day extension of the period of the Protective Certificate. In that affidavit, the Practitioner explained that the Certificate was due to expire on 17th December, 2018. In paras. 12-29 he drew attention to the correspondence with Beauchamps (which was exhibited). He also explained that in light of the issues raised by Beauchamps, he had required the debtor to complete an updated PFS. In para. 19 he described Aberdeen Lodge as "*one of the underlying assets in this case*" and he then explained that, under the 2012 Act, agreement was required in relation to the value of secured assets and that in light of the "*hostility*" between the parties he considered that it would be safer to appoint an independent valuer to set a s. 105 valuation.

41. In para. 35 of his affidavit, the Practitioner stated that proof of funds is critical to any proposed PIA and he said that he had been informed that the debtor had secured third-party funding to purchase Aberdeen Lodge and also to make a lump sum contribution of €50,000 for the benefit of unsecured creditors.

42. I confirm that, in the course of making that application to the court on 14th December, 2018, counsel for the Practitioner drew my attention to the correspondence between Beauchamps and the Practitioner (which I have summarised above).

43. On the basis of the material contained in the affidavit, and in circumstances where there was an ongoing debate between the parties, I was satisfied to make an order under s. 95(6) of the 2012 Act extending the protection period for 40 days from 17th December, 2018.

44. Following the making of that order, the Practitioner did not immediately respond to the letter from Beauchamps of 21st December, 2018. In the meantime, he appears to have reverted to the ISI for guidance as to how he should proceed. On 19th January, 2019 he received a letter from the ISI in which, perfectly understandably, the ISI declined to provide advice and instead suggested to the

Practitioner that the issues raised by Kenmare should be brought to the attention of the court at the earliest opportunity by the Practitioner and, if necessary, appropriate directions sought. In expressing this view, the ISI made clear that the issues raised by Beauchamps would need to be resolved before any valuer could be appointed under s. 105(4). Accordingly, the ISI stated that it was not in a position to deal with any potential request for the appointment of an independent expert until such time as the issues had been determined by the court.

The application under s.95(7) of the 2012 Act

45. On 22nd January, 2019 Beauchamps wrote to the Practitioner noting that no response had been received to their letter of 21st December, 2018 and noting further that the bankruptcy petition was listed for mention on 28th January, 2019 in circumstances where the Protective Certificate was due to expire on 26th January, 2019. The letter also noted that Kenmare had not received any notice of a creditors' meeting and, in the circumstances, Beauchamps suggested that they would seek a hearing date for the petition on 28th January.

46. The Practitioner responded to that letter on 24th January, 2019. In the letter he conceded that an issue arose regarding the interpretation of s. 105 "*on a plain reading of the Acts*" but he suggested (without explaining why this was so) that the interpretation which had been suggested by Beauchamps in their letter of 21st December, 2018, leads to an absurd result. In his letter, the Practitioner stressed his independence and continued as follows:-

> *" In acting to ensure your interests are protected and respected, we assume that your client requires the sale or realisation of the underlying security and our instruction from the Debtor is that he is in a position to re-finance the value of the PPR in full.*
>
> *This re-finance, based on our experience, will be a maximal return for your client, and would be better than the recovery in bankruptcy….*
>
> *In light of the time constraints, I propose extending the period of the Protective Certificate and seeking directions from the court regarding s. 105… I will ask the court that your client be put on notice of the said application…"*

47. On the same day (24th January, 2019) the Practitioner made an application under s. 96(7), on an *ex parte* basis, seeking a further extension of the protection period for 40 days from 26th January, 2019. He also indicated that he sought directions in relation to the s. 105 process and, in the course of the application, counsel indicated that it was intended that Kenmare should be put on notice of that application for directions.

48. In his affidavit grounding the application, the Practitioner exhibited the updated PFS (which now showed a nominal balance outstanding in respect of the Elektron guarantee in the sum of €1 and also purported to show that Mr. Halpin had an ownership interest in Aberdeen Lodge of 0.01%). The Practitioner also exhibited the correspondence between himself and Beauchamps and the letter of 19th January, 2019, from the ISI. For completeness, it should be noted that, at the hearing before me on 4 February, 2019, no case was made that Mr Halpin had any ownership interest in Aberdeen Lodge.

49. In para. 20 of his affidavit, the Practitioner again referred to Aberdeen Lodge as "*one of the underlying assets in this case…".* In para. 26, he said that he had received correspondence from Beauchamps, "*the thrust of which outlined that the PPR was not an asset that could be included or valued in the PIA process as Kenmare is not a 'secured creditor'".*

50. Nonetheless, the Practitioner made the case that the PIA (which he considers could be put in place) will entail the refinancing of Aberdeen Lodge and that Mr. Halpin has produced proof of funds to him for that purpose. In para. 31 of his affidavit, he stated that the PIA would therefore need to be based on a s. 105 valuation. He explained that he had sought guidance from the ISI and he referred to the ISI letter of 19th January, 2019 (described above). In para. 43 of his affidavit he explained that a binding valuation had not been provided and he did not have time to complete the s. 105 process, finalise the PIA and give creditors the requisite fourteen days' notice required under the 2012 Act. In those circumstances he sought an additional 40 day extension of the protection period.

51. Having considered the matter, I made an order extending the protection period for 40 days. I also directed that the application for directions should be served on Kenmare. That application was listed before the court on Monday 29th January, 2019. Counsel for the Practitioner and counsel for Kenmare attended on that day. Counsel for Kenmare indicated that Kenmare intended to bring its own application before the court. In those circumstances, the Practitioner's application for directions was adjourned to 4th February, 2019. Subsequently, Kenmare issued its own motion seeking the relief outlined in para. 1 above and its motion was heard by me on 4th February, 2019 in conjunction with the application by the Practitioner for directions.

52. It should be noted at this point that there is no specific provision in the 2012-2015 Acts which enables a practitioner or any creditor to apply to the court for directions. Nonetheless, I am of the view that the court has an inherent jurisdiction to adjudicate on disputes that arise between a creditor and a practitioner or a debtor during the course of proceedings under the 2012-2015 Acts. In this context, I note that, in *James Nugent* [2016] IEHC 127 at p.p. 9-10, Baker J. came to the conclusion that the High Court continues to exercise its full original jurisdiction in relation to applications under the 2012 Act. For that reason, Baker J. took the view that she was not confined to the provisions of s. 97 of the 2012 Act in considering whether the protective certificate in that case could be set aside on the application of a creditor. She held that the creditor was entitled to rely on *Re Belohn Ltd* principles under which an order made on an *ex parte* basis can be set aside where there has been a failure on the part of the applicant to make full and frank disclosure to the court.

53. In *James Nugent*, Baker J. did not have to address whether the court also has a jurisdiction to give directions in relation to matters in dispute between a practitioner and a creditor in relation to an issue of interpretation of the 2012- 2015 Acts which it is necessary to resolve in order to allow proceedings under the 2012-2015 Acts to either proceed or to conclude. The court cannot, of course, supplement the statutory provisions by reference to its inherent jurisdiction. The statutory scheme created by the 2012-2015 Acts is a scheme created by the Oireachtas and the court would not be entitled, in my view, to supplement that scheme. Any attempt by the court to do so would not be consistent with Article 15 of the Constitution. However, where the court is simply interpreting a provision of the 2012 Act in circumstances where that interpretation is necessary in order to allow proceedings under the 2012-2015 Acts to take their course, the court is not, in my view, trespassing on the legislative function of the Oireachtas. In such circumstances, the court is doing no more than exercising its full original jurisdiction under Article 34.3.1 of the Constitution to determine a question of law that arises under the Acts. In light of the tight timeframes under the Acts, it is crucial that such issues should be resolved within the existing insolvency proceedings rather than requiring the parties to resort to separate declaratory proceedings. I therefore believe that the court is in a position to give directions in relation to the issue raised by the Practitioner as to the potential application of s. 105 of the 2012 Act. Equally, I believe the court is entitled to address the question as to whether

the debt of Mr. Halpin to Kenmare is or is not a secured debt for the purposes of the 2012-2015 Acts. I will therefore address the questions which have been raised.

Analysis and discussion
54. While a number of questions have been raised in the motions brought by the practitioner and by Kenmare, it seems to me that there are two central questions which fall for determination namely:-

(1) Whether there is a relevant secured debt in respect of Aberdeen Lodge such as to attract the application of the 2012-2015 Acts to Aberdeen Lodge in the context of the proposed PIA;

(2) whether there are grounds to set aside the order of 24th January, 2019.

55. If the first of those questions is answered in the negative, then the questions raised by the practitioner as to the application of s. 105 fall away.

Is there a relevant "secured debt" over Aberdeen Lodge?
56. There is no doubt that Kenmare has a mortgage over Aberdeen Lodge. However, that mortgage secures the debt owed by Elektron to Kenmare on foot of the guarantee given by Elektron in relation to the liabilities of Crossplan. As noted above, it is accepted by both the Practitioner and Mr. Halpin that Kenmare is an unsecured creditor of Mr. Halpin Nonetheless, in circumstances where Kenmare holds security over Aberdeen Lodge (which Mr. Halpin claims is his principal private residence) the Practitioner contends that there is a secured debt over that asset for the purposes of s. 2 of the 2012 Act. That contention is based on the definition of "*secured debt*" in s. 2 of the 2012 Act. In particular, it is based on the fact that the definition contains no reference to ownership and no reference to the identity of the debtor. The definition simply provides that "*secured debt*" means:-

> *"A debt the payment for which is secured by security in or over any asset or property of any kind".*

57. The argument made on behalf of the Practitioner is that this language is sufficiently wide to cover secured debts owed by someone other than the debtor and therefore extends to a secured debt owed by Elektron. This is in contrast to the definition of "*secured creditor*" in s. 2 which explicitly refers to a debt of the debtor. The definition of "*secured creditor*" is in the following terms:-

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

58. As noted above, the practitioner and the debtor accept that Kenmare is not a secured creditor of Mr. Halpin within the meaning of that definition in respect of Aberdeen Lodge. They accept that the definition of "*secured creditor*" very clearly relates to a debt of the debtor over property of the debtor. Aberdeen Lodge is not the property of the debtor and he has provided no security over it in respect of his personal indebtedness to Kenmare. Nonetheless, they maintain that there is still a secured debt within the meaning of s. 2 in respect of Aberdeen Lodge even though there is no debt currently due by Mr. Halpin to Kenmare which could be said to be secured over Aberdeen Lodge.

59. The Practitioner also draws attention to the definition of "security" in s. 2 which, again, is silent in relation to the identity of the debtor. Insofar as relevant, the definition of "security" is stated to mean:-

> *"…in relation to a debt, any means of securing payment of the debt and includes –*
>
> *a mortgage, judgment mortgage, charge, lien, pledge…or other security interest…in or over any property …,*
>
> *an assignment by way of security, and*
>
> *an undertaking or agreement by any person…to give or create a security interest in property".*

60. In my view, the approach taken by the Practitioner is based on a mistaken view of the law. For similar reasons to those explained in my judgment in *Thomas Finnegan* [2019] IEHC 66 at para. 27, I believe that the definitions of "*secured debt*" and "*security*" must be read in context. When one considers the 2012 Act (as amended) as a whole, it is quite clear that the approach taken by the Practitioner is incorrect. When the Act is considered as a whole, it is clear that the definition of "*secured debt*" was always intended to be read in conjunction with the definition of "*secured creditor*" which both sides accept covers only creditors who hold security over property of the debtor in respect of a debt owed by that debtor. Thus, for example, s. 99 (2) (dealing with the mandatory requirements concerning a PIA) refers in para. (k) to the requirement that a PIA: "*shall make provision for the manner in which security held by a secured creditor is to be treated*". There is no equivalent provision in relation to security held by someone who is not a secured creditor. The Act plainly contemplates that the relevant security will be held by a secured creditor (as defined).

61. In his submissions to the court, counsel for the practitioner referred to s. 100 (2) (f) (which is part of the non-exhaustive list of options that may be included in a PIA dealing with payments to creditors). Section 100 (2) (f) provides that, in respect of secured debts, the PIA may include an arrangement for the treatment of the security and the satisfaction or restructuring of the secured debts. Counsel emphasised that this makes no reference to a "*secured creditor*" and he therefore suggested that this provided further support for the proposition advanced by the practitioner. However, it is crucial to observe, in this context, that s. 100(2)(f) is expressly stated to be subject to ss. 102 to 105 of the 2012 Act. When one reads s.100(2)(f) in light of those provisions, I do not believe that there is any basis for counsel's submission.

62. Section 102 of the 2012 Act clearly proceeds on the basis that the practitioner is dealing with a "*secured creditor*" (namely a secured creditor as defined in s. 2 - i.e. a creditor who holds security over property of the debtor in respect of a debt). Section 102(1) envisages that where a secured creditor has been notified by a practitioner that a protective certificate has been issued, the secured creditor must furnish to the Practitioner an estimate (made in good faith) of the market value of the security. In addition, the creditor may also indicate a preference as to how a creditor wishes to have the security and secured debt treated under the proposed PIA. Section 102(1) therefore very obviously proceeds on the basis that the secured debt is owed to a secured creditor (as defined). There is no equivalent provision dealing with secured debt which is not owed to a secured creditor of the debtor in respect of property owned by the debtor.

63. Similarly, s. 102(2)(b) provides that, in formulating a proposal for a PIA, the Practitioner must, to the extent that it is reasonable to do so, have regard to any preference expressed by the secured creditor as to the treatment of the security and the secured debt.

There is an express link made here between the secured creditor on the one hand and the secured debt on the other. There is no provision made to deal with what is to happen if the practitioner is faced with a secured debt which is owed to someone other than a secured creditor of the debtor in respect of property which is not owned by the debtor.

64. This is reinforced by a consideration of s. 102(5) of the 2012 Act which provides as follows:-

> "Where a [PIA] provides for the sale… of the property which is the subject of the security for a secured debt, and the realised value of that property is less than the amount due in respect of the secured debt, the balance *due to the secured creditor* shall abate in equal proportion to the unsecured debts…" (Emphasis added).

65. The language of s. 102(2) clearly presupposes that where there is a secured debt, there will also be a secured creditor of the debtor. The section does not contemplate the disposal of property which is the subject of a secured debt where the relevant holder of security is not a secured creditor of the debtor. It will be seen from the language of s. 102(5) that the section operates very clearly on the basis that, when the Oireachtas speaks of a secured debt, it has in mind that the secured debt in question will be owed to a secured creditor (as defined). It appears to me to be equally clear that, when s.102(2) speaks of "*property*", it refers to property of the debtor that is subject to security in favour of a secured creditor of the debtor.

66. This conclusion is reinforced by a consideration of the provisions of s. 102(6) of the 2012 Act. Section 102(6) provides that a PIA may include a number of different terms in relation to secured debt. Those terms are then set out in paras. (a) – (i). For instance, para. (a) provides that the PIA may include a term that the debtor pay interest and only part of the capital amount of the secured debt to the secured creditor for a specified period of time not exceeding the duration of the PIA. Similarly, para. (d) provides that the PIA may include a term that the secured debt payments "*due to be made by the debtor"* be deferred for a specified period of time (which again is not to exceed the duration of the PIA). While no reference is made to a "*secured creditor*" in para. (d), it is nonetheless clear that what the Act has in mind are secured debt payments which are due to be made by the debtor and not by some third party. In the present case, Mr. Halpin, the debtor, is not due to make any payments to Kenmare under any form of security over Aberdeen Lodge.

67. Similarly, para. (g) provides that the PIA may include a term that the principal sum due on foot of a secured debt may be reduced but subject to a condition that where the property (the subject of the security) is subsequently sold for an amount greater than the value attributed to the property under the PIA, "*the secured creditor's security will continue to cover such part of the difference between the attributed value and the amount for which the property is sold…"* Here again, it will be seen that the Oireachtas clearly envisaged that the secured debt would be owed to a secured creditor (as defined).

68. I appreciate that not every paragraph within s. 102(6) refers to a "*secured creditor*". However, when one reads the subsection as a whole, I believe it is clear that, where the Oireachtas has referred in the subsection to a "*secured debt*", the intention always was to refer to a secured debt due by the debtor to the secured creditor. Thus, for example, para. (i) provides that the PIA may include a term that the principal sum due in respect of the secured debt be reduced to a specified amount. If the argument of the Practitioner is correct, it would mean that under s. 102(6)(i) of the 2012 Act, the secured debt owed by a third-party (*i.e.* not the debtor) to a creditor could be reduced even though that third-party was not itself the subject of proceedings under the 2012-2015 Act and even though the property subject to the relevant security is not owned by the debtor. Had that been the intention of the Oireachtas, I believe it would have been necessary to spell that out in very clear terms. It must be borne in mind, in this context, that the 2012 Act represents a significant curtailment of creditors' rights. If it had been intended that the Act could apply not only to curtail creditors' rights in respect of debts due by the debtor but also debts due by third-parties, I believe this would require very explicit language in the 2012 Act. In my view, that language is demonstrably absent from the 2012 Act.

69. The provisions of s. 102(8)-(11) lend further force to the conclusion that, where the Oireachtas refers to a "*secured debt*", it is intended that this would refer to a secured debt due to a secured creditor by the debtor. Thus, s. 102(8) provides that, where requested by a practitioner to do so, a secured creditor must provide proof of the existence and nature of the security with respect "*to the relevant secured debt*" in default of which the Practitioner may treat the debt as unsecured.

70. Similarly, s. 102(9) opens with the words:-

> "…where the market value of the security *held by a secured creditor* in respect of a secured debt…" (Emphasis added)

Again, the link between the secured debt on the one hand and the secured creditor on the other is immediately obvious. There is a similar express link contained in s. 102(11).

71. This link between the secured debt on the one hand and the secured creditor on the other is further reinforced by a consideration of s. 103 which sets out certain protections for secured creditors in a PIA. It is unnecessary to set out the entire text of s. 103. It is sufficient to observe that the entire of the section proceeds on the basis that what the Act is concerned with are debts owed to secured creditors of the debtor. The Act is not concerned with persons holding security who are not themselves secured creditors of the debtor.

72. In his submissions to the court, counsel for the Practitioner placed significant emphasis upon s. 104 of the Act which imposes an obligation on a practitioner, when formulating a proposal for a PIA, to do so, insofar as reasonably practicable, on terms that will not require the debtor to dispose of an interest in or to cease to occupy the principal private reside. Counsel submitted that the Practitioner here had an obligation to seek to formulate a proposal for a PIA which sought to preserve the ability of Mr. Halpin to occupy Aberdeen Lodge. It making that submission, counsel emphasised that the definition of "*principal private residence*" contains no requirement that the residence should be owned by the debtor. It is, however, necessary to note that this obligation on the Practitioner is not absolute. The obligation is qualified by the words "*insofar as reasonably practicable*". A practitioner cannot work miracles. Nor can a practitioner undo or re-write history. In particular, I cannot see any basis on which the practitioner can draw into proceedings under the 2012 Act an asset in which the debtor has no interest and which is the subject of security granted by the owner of that asset in respect of a debt which greatly exceeds the value of that asset. For the reasons already explained above, the Act does not envisage that it could have effect in relation to property owned by a third-party which is subject to a security in favour of a creditor in respect of a debt owed by that third-party to that creditor.

73. If any further support for that conclusion is required, it is to be found in s. 105 of the 2012 Act which the Practitioner seeks to invoke here. Section 105 sets out detailed provisions dealing with the valuation of secured property for the purposes of the PIA. As the Practitioner himself acknowledged in his correspondence with Beauchamps and in his affidavits to the court, it is crucial that a value can be placed on secured property if proposals for a PIA are to be prepared (dealing with the liabilities of the debtor to the relevant secured creditor) which have some hope of passing the unfair prejudice test. In this case, what the practitioner seeks to do

is to invoke s. 105 in the specific context of Aberdeen Lodge.

74. When one considers the provisions of s. 105, it is clear that they only apply in the context of a secured debt owed to a secured creditor of the debtor. This is plain from the provisions of s. 105(1) of the Act which provides as follows:-

> *"Subject to the provisions of this section the value of security in respect of secured debt for the purposes of this Chapter shall be the market value of the security determined by agreement between the… practitioner, the debtor and the relevant secured creditor."*

75. This provision is very useful in showing what the Oireachtas had in mind when it speaks of secured debt in s. 2 of the 2012 Act. It clearly had in mind secured debt owed by the debtor to a secured creditor as defined (i.e. a creditor who holds security in respect of a debt over the property of the debtor) . There would be no reason to include the debtor as a relevant party to any agreement as to the value of secured property unless this were so. Furthermore, the language of s. 105(1) clearly envisages that there will be a relevant secured creditor in respect of every secured debt.

76. For the practitioner to succeed in his argument, he is driven to suggesting that s. 105(1) requires to be broadly interpreted so as to embrace not only a secured creditor as defined in s. 2 but also the holder of secured debt over property which is not owned by the debtor. To my mind, this exposes the artificiality of the argument which the practitioner seeks to make. It runs directly counter to the express language of s. 105(1) and the remaining subsections of s. 105. Those subsections are clearly designed to provide a mechanism to enable the value of mortgaged property to be assessed in a manner that will bind each of the practitioner, the debtor and the secured creditor concerned. There are repeated references to "*the secured creditor*" and "*the relevant secured creditor*". The section is simply not capable of being operated in the absence of a secured creditor of the debtor. Equally, the section is plainly not capable of being operated in respect of property not owned by the debtor. Had it been the intention to extend it to such property, s. 105 would undoubtedly have made express provision for the relevant third-party owner to be one of the participants in the process contemplated by s. 105(1). In light of the obvious impact on property rights, it would be unthinkable that the Oireachtas would provide for a process to value the property of a third-party without expressly requiring that party's involvement in that process.

77. The fundamental difficulty for the practitioner is that, for his argument to have any prospect of success, the definition of "*secured debt*" in s. 2 must be read on its own without reference to any of the other provisions of the Act. It involves a consideration of the definition of "*secured debt*" in isolation divorced from the way in which that term is subsequently used throughout the Act. Having read the definition in that way, the practitioner then seeks to shoehorn the definition into the sections of the Act dealing with secured creditors notwithstanding that those sections are, demonstrably, the wrong fit for the proposition that the practitioner seeks to advance. A consideration of the provisions discussed in paras. 60 to 76 above illustrates, very clearly, why the practitioner's approach does not work.

78. I have, therefore, come to the conclusion that the approach advocated by the practitioner is wrong. When one considers the definition of "*secured debt*" in the context of the Act as a whole, it is clear that it is intended to apply solely to a debt of the debtor which is secured over property of the debtor in favour of a secured creditor (as defined). For the purposes of the question posed in para. 1(b) above, I accordingly hold that the debt of Mr Halpin to Kenmare is not a secured debt for the purposes of the 2012-2015 Acts in so far as Aberdeen Lodge is concerned. There is no debt owed by Mr Halpin to Kenmare which is secured over Aberdeen Lodge. In those circumstances, it follows that there is no scope for the application of s.105 of the 2012 Act. That section is concerned solely with the valuation of property of a debtor which is the subject of security in favour of a "*secured creditor*" (*i.e.* a creditor of the debtor who holds in respect of his debt, security over the property of the debtor). Section 105 plainly does not extend to the property of Elektron.

The application to set aside the order of 24 January, 2019

79. I accept that Kenmare is adversely affected by the order made on 24 January, 2019 extending the duration of the protective certificate. I therefore accept that Kenmare has *locus standi* to seek to have that order set aside. The order was made *ex parte* and therefore Kenmare did not have an opportunity to address the court before the order adversely affecting it was made. For completeness, it should be noted that an application for an extension of a protective certificate is required to be on notice to the ISI so it is not, technically, an *ex parte* application. That does not seem to me to make any difference. In Kenmare's case, it was not given advance notice of the application, with the result that it was, in substance, an *ex parte* application in so far as Kenmare is concerned. It should also be noted that, in any event, ISI had given consent to the application being moved on an *ex parte* basis.

80. The basis for Kenmare's application to discharge the order is that there was a failure on the part of the practitioner to comprehensively apprise the court of the case made by it in the correspondence described above. There is undoubtedly a jurisdiction to set aside an order made *ex parte* where there has been material non-disclosure on the part of the applicant. However, the jurisdiction is not confined to non-disclosure. As the decision of McCracken J in *Voluntary Purchasing Groups Inc. v Insurco International Limited* [1995] 2 ILRM 145 confirms, it also extends to cases where the affected party wishes to present their side of the case. In that case, McCracken J said at p. 147"*… it is in the interests of justice essential that an ex parte Order may be reviewed and an opportunity given to parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the court. It would be quite unjust that an Order could be made against a party in its absence and without notice to it which could not be reviewed on the application of a party affected".*

81. Although McCracken J, there, spoke of an order made against a party, I believe that the principle identified by him (which is based on the interests of justice) applies equally to a case such as the present where Kenmare is manifestly affected in the exercise of its rights by the order made, *ex parte*, on 24 January, 2019. Kenmare is thus entitled to challenge the making of that order either on the grounds that it was made on an erroneous basis or on the ground that there was material non-disclosure by the practitioner.

82. On this application, Kenmare has strongly contended that the nature of the case made by it was not adequately drawn to the attention of the court on 24 January and Kenmare submits that, had adequate disclosure been made, this may have affected the outcome of the application. I can well appreciate Kenmare's concerns in this regard, but, I am not persuaded that there was material non-disclosure. On the contrary, my attention was specifically drawn to the correspondence between Beauchamps and the practitioner and I was informed that the practitioner took a different view of the law. The same approach was taken at the time of the previous application in December 2018.

83. At the time the applications were made in December 2018 and January 2019 respectively, I did not reach any conclusion on the legal issues debated in correspondence. My only concern on each occasion was to consider whether the statutory criteria for the grant of an extension were met. I saw that there was a significant legal issue that would require to be resolved but I did not attempt to assess the strength of either side's case. In retrospect, it now strikes me that it would have been better if, at the hearing of the

first application in December, I had directed the practitioner to bring an application to resolve the issues in dispute. That would have assisted in bringing about a speedier determination of the dispute. Regrettably, I had assumed that one or other of the parties would bring an application before the court.

84. I am very grateful to the ISI for advising the practitioner to seek the directions of the court. This advice resulted in the inclusion of an application for directions in the motion presented to the court on 24 January, 2019. I am mindful that Kenmare has highlighted that an earlier letter from the ISI to the practitioner was not exhibited in the affidavit previously presented to the court on 14 December, 2018 - namely the letter of 30 November, 2018 described in para. 38 above. Kenmare complains that, in para. 22 of the practitioner's affidavit sworn on 13 December, 2018 it was merely stated that the ISI had indicated that " *the 105 process had not been exhausted between the parties and refused to appoint an independent valuer*." Kenmare made the point that the letter makes no mention of the exhaustion of the s. 105 process further suggested that the ISI, in that letter, "*inadvertently, in refusing to provide legal advice, sets out the correct test that the Practitioner should have been applying, namely whether Kenmare holds "Aberdeen Lodge" as security for the debts owed to it by Mr Halpin".* In her affidavit, Ms Delaney suggests that an "*independent person"* reading the letter would immediately be aware that there is no such security, and that "*it is wholly improper to involve security for debts owed by a third party in the personal insolvency procedure",*

85. In my view, the ISI letter of 30 November, 2018 should have been exhibited for completeness. However, I do not believe that the failure to do so was material in the context of the relief that was sought. I am not convinced that the letter had the potential to affect the outcome of the application made to the court on 14 December. In the first place, it is clear from the letter that the ISI was not purporting to offer legal advice, so I do believe that I would have read the second sentence in the letter in the way suggested by Ms Delaney. In particular, I would not have read it as an indication of the ISI's view as to the correct legal position.

86. Secondly, it is important to bear in mind that, on an application for an extension of the operation of a protective certificate, the court is concerned with the specific statutory criteria set out in s. 95. The court is not involved in a more wide-ranging review of the insolvency process and, in particular, the court is not involved, at that point, in assessing the sustainability of any case made by a practitioner in the context of a legal issue in dispute between parties to the insolvency process. It might be otherwise if there was evidence to suggest that a practitioner was raising a legal issue in bad faith (for example where there was evidence that the practitioner was raising a legal issue that he or she knew was unsustainable).

87. Thus, even if the letter had been exhibited, I do not believe that it would have had the potential to cause me to take a different view in relation to the outcome of the extension applications made in either December or January.

88. Nor, do I think that the summary of the effect of the ISI letter given in the practitioner's affidavit of 13 December, 2018 was misleading. It is true that the ISI did not expressly say that the s. 105 procedures had not been exhausted. But, in substance, that is the effect of the letter. I therefore do not accept that the court was misled.

89. In the circumstances described above, I do not believe that a basis has been established to set aside the orders made in December or January on the grounds of material non-disclosure.

90. Likewise, I do not believe that I should set aside the extension orders on the ground that, in light of my finding on the meaning of "*secured debt*", there is now no prospect that proposals for a PIA can be formulated. While the affidavits of the practitioner, grounding the s. 95 applications, proceeded on the basis that Aberdeen Lodge would be a part of any arrangement, I do not believe that I could safely take the view that proposals cannot be formulated for a sustainable PIA even in the absence of that property. In this context, I note that there is at least one secured creditor in this case who holds security over other property of Mr Halpin on Park Avenue. I also note that, on the evidence contained in the practitioner's affidavits, there is the prospect of some money (in the order of €50,000) being made available to fund the payment of a dividend to unsecured creditors. In light of Mr Halpin's insolvency, there is some incentive to those creditors to vote in favour of such an arrangement since they will do better under such an arrangement than in a bankruptcy. At the hearing on 4 February, I was informed that the practitioner would proceed to formulate a revised proposal for a PIA in the event that I reached an adverse finding in relation to Aberdeen Lodge. In these circumstances, I believe that there is evidence before the court to fulfil the requirements of s 95 notwithstanding the finding I have made in relation to Aberdeen Lodge.

Relevant debt

91. The third element of Kenmare's application is for an order that the debt of Mr Halpin to Kenmare is not a "*relevant debt*" for the purposes of s. 115A(18). It is a gateway requirement to the exercise of the court's jurisdiction under s. 115A that such a debt should exist. For such a debt to exist there must be a debt of the debtor which is secured over the principal private residence of the debtor. In light of my conclusion in relation to the meaning of "*secured debt*", I think it is fairly obvious that, even on the assumption that Aberdeen Lodge is the principal private residence of Mr Halpin, there is no debt of Mr Halpin secured over that property and it would appear to follow that s. 115A cannot be availed of. However, I do not believe that it would be appropriate to go so far as to make a determination to that effect at this stage given that a meeting of creditors has yet to be held and, as yet, there has been no requirement to seek to invoke s.115A.

Conclusion

92. I will therefore make a determination that, for the purposes of these proceedings under the 2012-2015 Acts, there is no secured debt of Mr Halpin over Aberdeen Lodge. I will make a consequential direction that there is no scope for the application of s.105 in relation to Aberdeen Lodge and equally no scope to bring Aberdeen Lodge into play as an asset for the purposes of any PIA that may be proposed on behalf of Mr Halpin.

93. For the reasons outlined in paras. 79-90 above, I refuse the application to set aside the order made on 24 January, 2019.

94. I make no determination in relation to the relief described in paras. 1(c) and 91 above but merely observe, on an *obiter* basis, that the answer to the question posed in para. 1(c) seems obvious.

95. I will hear the parties in due course in relation to costs and any other consequential orders that may be required.