Neutral Citation [2012] IEHC 386

THE HIGH COURT

[2010 No. 709 COS]

IN THE MATTER OF KERR ALUMINIUM LIMITED (IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 286 OF THE COMPANIES ACT 1963

BETWEEN

DONAL BOYLAN

APPLICANT

AND

GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENT

Judgment of Ms. Justice Laffoy delivered on 1st day of October, 2012.

The application

1. On this application the applicant, who is the liquidator of Kerr Aluminium Limited (the Company), which is being wound up in a creditors' voluntary winding up, seeks an order declaring that the payments made by the Company in the period 8th April, 2010 to 26th May, 2010 in favour of the respondent be deemed a fraudulent preference within the meaning of s. 286 of the Companies Act 1963 (the Act of 1963) and invalid. The aggregate amount of those payments was not specified in the originating notice of motion.

Section 286

2. Section 286 of the Act of 1963, as substituted by s. 135 of the Companies Act 1990 (the Act of 1990), insofar as is relevant for present purposes, provides in subs. (1) as follows:

> "Subject to the provisions of this section, any . . . payment . . . made or done by or against a company which is unable to pay its debts as they become due in favour of any creditor . . ., with a view to giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if a winding-up of the company commences within 6 months of the making or doing the same and the company is at the time of the commencement of the winding-up unable to pay its debts (taking into account contingent and prospective liabilities) be deemed a fraudulent preference of its creditors and be invalid accordingly."

3. Sub-section (3) of s. 286, which was introduced by the Act of 1990, provides as follows:

> "A transaction to which subsection (1) applies in favour of a connected person which was made within two years before the commencement of the winding up of the company shall, unless the contrary is shown, be deemed in the event of the company being wound up –
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> (a) to have been made with a view to giving such person a preference over the other creditors, and
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> (b) to be a fraudulent preference,
>
> and be invalid accordingly."

In subs. (5) the expression "a connected person" is defined as meaning a person who at the time the transaction was made was, inter alia, a director of the company.

The evidence

4. The application was heard on affidavit evidence comprising:

> (a) the grounding affidavit sworn by the applicant on 21st December, 2010;
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> (b) a replying affidavit sworn on behalf of the respondent by Gavin Leech, the manager of the respondent's branch at Main Street, Lucan, County Dublin;
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> (c) a further affidavit of the applicant sworn on 18th March, 2011; and
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> (d) a further affidavit of Mr. Leech sworn on 1st April, 2011.

Those affidavits are the only source of the factual basis on which the applicant claims the reliefs sought.

5. On 26th May, 2010 at an extraordinary general meeting of the Company it was resolved that the Company be voluntarily wound up and that the applicant be appointed liquidator for the purposes of the winding up. At the meeting of the creditors of the Company which took place on the same day, 26th May, 2010, the appointment of the applicant as liquidator was confirmed.

6. Prior to its liquidation, the Company carried on the business of provider and fitter of alumium windows. As regards is banking arrangements, it maintained its only current account at the Lucan branch of the respondent. I think it is true to say that the only

factual matters which the respondent divulged in the course of the application were the following:

> (a) the Company had an overdraft facility of €111,600 on the current account (account No. 53740213);
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> (b) the respondent had personal letters of guarantee "totalling €111,737" from Anthony Kerr (Mr. Kerr) in relation to that account; and
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> (c) the personal guarantees were "counter covered" by a first legal charge over a commercial unit and two apartments registered in the name of Mr. Kerr, and by the assignment of a Norwich Union life policy.

At all material times, Mr. Kerr was one of the two directors of the Company.

7. The evidence of the applicant, a Chartered Accountant, was that, prior to the resolution to wind up the Company, he had met Mr. Kerr on a number of occasions in April 2010 regarding the financial difficulties faced by the Company. He met Mr. Kerr on 27th April, 2010, and at that time Mr. Kerr was aware that there was little prospect of fresh investment and that the Company was insolvent. Mr. Kerr was considering the options available to the Company, including liquidation of the Company or examinership. The applicant has averred that, at all material times in April 2010, Mr. Kerr was aware of his personal exposure on foot of the guarantee and the security he had given to the respondent in respect of the Company's overdraft facility.

8. The applicant has averred that he advised Mr. Kerr in writing on 27th April, 2010 that there was no alternative but to proceed and place the Company in liquidation. He exhibited a print of an e-mail he had sent to Mr. Kerr on that day, in which he gave that advice. He laid particular emphasis on the fact that in that e-mail he had indicated that all lodgments received from that day should be lodged to the credit of a separate account for the benefit of all creditors of the Company.

9. The applicant has also averred that, when the directors of the Company, including Mr. Kerr, signed off on an Audit Report dated 10th September, 2009 in relation to the accounts of the Company for the year ending 31st December, 2008, which were filed in the Companies Registration Office on 27th October, 2009, they were in a position to know, and did know, that the Company was in severe financial difficulties and unable to pay its debts as they fell due. The Company carried on its business from premises rented from Mr. Kerr and throughout 2009 the Company had been defaulting on payment of the full quarterly rent due to Mr. Kerr. In addition, Circuit Court proceedings had been initiated by a creditor in December 2009 claiming the sum of €8,797 and summary proceedings in this Court had been instituted by another creditor in April 2010 claiming the sum of €59,810.25. Nine employees of the Company had been made redundant in September 2009 and a further six were made redundant in January 2010. The Company had not been in a position to meet its redundancy payments to the staff and payments in respect of the redundancies were made by the Social Insurance Fund. The foregoing are the principal matters which the applicant averred to as pointing to the serious financial difficulties which the Company experienced from September 2009 onwards.

10. The applicant has exhibited the bank statements on the Company's current account with the respondent from May 2008 until the commencement of the winding up of the Company, when the account was frozen. On the basis of the evidence before the Court it is only possible to conduct a superficial analysis of the movements on the current account, because there is no evidence as to the source of lodgments. Moreover, in most cases, there is no evidence of the destination of the payments made by cheque or by direct debit.

11. It is the position of the applicant that at the commencement of the winding up the Company was unable to pay its debts within the meaning of s. 214 and s. 286 of the Act of 1963. That fact cannot be disputed. He has also averred that he is satisfied that the Company was not in a position to pay its debts as they fell due in the six month period leading to 26th May, 2010. That is not disputed by the respondent and, for present purposes, insofar as it is relevant, I think the proper course is to assume that such was the case.

12. The applicant has also averred that during the six month period prior to 26th May, 2010, the Company made significant lodgments to the current account "unbeknownst to its creditors". However, it is not clear from the grounding affidavit why the applicant, in framing the relief he is seeking against the respondent, focused on payments commencing on 8th April, 2010, although it is reasonable to infer that it was because on that day the current account was overdrawn in the greatest amount over approximately the previous two months, and was at its highest amount prior to the commencement of the winding up, at €106,155.88. The factual basis of the applicant's claim for relief, as set out in the grounding affidavit, is that following 8th April 2010 the Company made lodgments to the current account aggregating €115,576 in April 2010 and aggregating €130,279 in May 2010 prior to the commencement of the winding up. At the commencement of the winding up the amount overdrawn on the current account was €32,663. The consequence, it was averred, was that the payments conferred a significant personal benefit on Mr. Kerr by reducing his personal liability under the guarantee and the security supporting the same. As I understand the applicant's claim it is that the aggregate amount of those payments should be declared invalid, without netting off payments actually made from the account by the respondent to third parties in the same period.

13. Finally, the applicant has also averred that payments were made by the Company to "a select number of trade creditors" in the period between 8th April, 2010 and the commencement of the winding up. However, apart from the fact that the sum of €5,000 in respect of rent was paid by the Company to Mr. Kerr on 17th May, 2010, there are no details of the payments in question before the Court. The applicant has sought no relief in respect of any of those payments, although it was contended that they are of relevance in relation to the inferences which the Court has to draw on this application.

14. Mr. Kerr is not a party to this application. However, a letter dated 7th October, 2010 from him to the applicant, in response to a letter from the applicant dated 17th August, 2010, has been exhibited. In that letter, Mr. Kerr stated:

> "The company only has one operating account that being with Bank of Ireland. Company policy is to lodge all receipts into this account without delay.
>
> For security and health & safety reasons cheques and cash are not to be held at the company premises.
>
> As a result of the on-going deterioration in general economic conditions there were concerns that cheques may bounce. Adherence to this policy was therefore crucial and considered a key control in managing the company's working capita (sic).
>
> The level of activity in the company account is similar to that in the months leading up to management's decision to cease trading.

There was no intention by management to reduce the overdraft balance."

15. Both of Mr. Leech's affidavits are argumentative rather than factual. However, Mr. Leech, in his first affidavit, helpfully engages in some simple arithmetic and states that the total of the lodgments in April and May in respect of which the applicant seeks relief is €245,855. To illustrate the argumentative nature of Mr. Leech's affidavits, two examples are apt. First, Mr. Leech relied on the passage from Mr. Kerr's letter of 7th October, 2010, which I have quoted above, in support of his contention that the liquidator does not appear to establish the existence of a dominant intention on the part of the Company or its directors to prefer the respondent. Secondly, Mr. Leech asserted that the applicant's claim that the entirety of the lodgments by the Company to the current account in the period after 8th April, 2010 constituted a fraudulent preference and the applicant's averment that an unspecified amount of those lodgments were used by the Company to pay "certain select creditors" are inherently contradictory.

16. In his final affidavit Mr. Leech has averred that, in the event that the applicant's application succeeds in full or in part, the respondent will request the Court to invoke its jurisdiction under s. 287(3) of the Act of 1963 to make orders in these proceedings in respect of the liability of Mr. Kerr under the personal guarantee given by him to the respondent. Sub-section (3) of s. 287 provides:

> "On any application made to the court in relation to any payment on the ground that the payment was a fraudulent preference of a surety or guarantor, the court shall have jurisdiction to determine any questions relating to the payment arising between the person to whom the payment was made and the surety or guarantor, and to grant relief in respect thereof notwithstanding that it is not necessary so to do for the purposes of the winding up, and for that purpose may give leave to bring in the surety or guarantor as a third party as in the case of an action for the recovery of the sum paid."

The respondent has not sought leave to bring Mr. Kerr into these proceedings as a third party. In the circumstances, the Court can express no view whatsoever on the application of that provision.

The law

17. The Court has had the benefit of written submissions from both sides, which were not only thorough and comprehensive, but also raised interesting points. Although I do not propose outlining the submissions in detail, I have had regard to them.

18. In relation to subs. (1) of s. 286, while it is more user-friendly than its predecessor, which necessitated applying s. 53 of the Bankruptcy (Ireland) Amendment Act 1872, which, as amended by the Act of 1963, was set out in the Eleventh Schedule to the Act of 1963, I am satisfied that there is no difference of substance between it and its predecessor. In relation to its application to the facts underlying this application, the principal ingredients of subs. (1) in its current form and their application are as follows:

> (a) That a payment was made by the Company in favour of a creditor. That ingredient is present here because the relationship of debtor and creditor arose between the Company and the respondent because the current account was overdrawn at all material times.
>
> (b) That the Company was unable to pay its debts as they became due, when the payment was made. As I have already indicated, I am assuming that from 8th April, 2010 onwards the Company was not able to pay its debts as they became due.
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> (c) That the payment was made with a view to giving the creditor, that is to say, the respondent, or any surety or guarantor of the debt due to the creditor, that is to say, Mr. Kerr, a preference over other creditors. That is the crucial ingredient in this case. It is well settled that the onus of proof of a dominant intention to prefer under subs. (1) lies on the liquidator, that is to say, in this case, on the applicant. The jurisprudence on establishing an intention to prefer is succinctly summarised in the following passage from the annotation on s. 286 in MacCann and Courtney *Companies Act 1963 – 2009*) (2010 E Book, Bloomsbury):
>
> "In order to prove that a transaction is a preference, it is not sufficient to show that the effect of the transaction was to give a preference; rather the phrase 'with a view to giving . . .' has been interpreted as meaning that the transaction must have been entered into with a dominant intention to prefer. It is not enough to prove that there was actual preferment from which an intention to prefer can, with hindsight, be inferred. The liquidator must prove an intention to prefer at the time the payment is made. Where there is no direct evidence of intention, the court can draw an inference of an intention to prefer in a case where some other possible explanation is open. The method of ascertaining the state of mind of the payer is the ordinary method of evidence and inference, to be dealt with on the same principles which are commonly employed in drawing inferences of fact."
>
> (d) That the winding up of the Company must have commenced within six months of the making of the payment. That requirement is complied with in relation to all the payments made after 8th April, 2010.
>
> (e) That at the commencement of the winding up the Company is unable to pay its debts. I am satisfied that that requirement is complied with.

19. In my view, as a matter of construction, subs. (3) of s. 286 has no application to the facts here. The expression "[a] transaction to which subs. (1) applies" in subs. (3) captures, *inter alia*, any payment made by the Company in favour of a creditor. If the creditor is a connected person within the meaning of subs. (5) then there is a presumption of preference within the two year period provided for in subs. (3). However, in this case, the transaction was in favour of the respondent, who is not a connected person, so there is no presumption of preference. Indeed, in the applicant's solicitors' preliminary letter dated 14th October, 2010 only subs. (1) of s. 286 was invoked.

20. As regards the crucial ingredient, the requirement that the applicant prove, on the balance of probabilities that the dominant intention, when the payments were made by the Company to the respondent was to prefer the respondent, and, indirectly, to prefer Mr. Kerr, the authorities which have been cited by the parties which, in my view, are of most relevance in determining whether the applicant has discharged that onus are the following: the decision of the Court of Appeal of England and Wales in *Re M. Kushler Limited* [1943] Ch. 248; and the decision of the High Court (Carroll J.) in *Station Motors Ltd. v. AIB Ltd*. [1985] I.R. 756. I propose considering each of those authorities, to which counsel for the applicant attached most weight, in detail.

21. A key feature of the legal submissions made on behalf of the applicant was reliance on the so called Rule in *Clayton's Case*. The position adopted on behalf of the respondent is that the Rule is of no relevance to the issue before the Court. I will consider whether it is or is not of relevance later.

Re M. Kushler Limited
22. In the *Kushler* case, the company's bankers, Lloyds Bank, granted the company a permitted overdraft of £800, secured by the guarantee of the majority shareholder and director, Morris Kushler, for the total amount of £900. The overdraft stood at varying amounts down to 10th May, 1941, when it stood at just over £609. On 12th May, 1941, the directors were advised that the company was insolvent and must be wound up. Between 12th May and 21st May, 1941, sums amounting to in excess of £730 were received by the company and paid into the company's account at the bank, with the result that the overdraft was extinguished and Mr. Kushler was relieved of liability under his guarantee. The liquidator claimed that the payments to the bank constituted a fraudulent preference and relied on the following matters in support of that claim:

> (a) that between 10th May and 31st May substantially no payments were made by the company to existing creditors;
>
> (b) that a trade creditor had been pressing for payment of its February account of in excess of £88 since the beginning of April but at the request of Mr. Kushler had consented to wait if half the amount was paid by the end of April, but no part of it had been paid;
>
> (c) that the bank never pressed for reduction of the overdraft and up to 23rd May would have allowed the company to operate up to the limit of their permitted overdraft;
>
> (d) that, although on 14th May there was still an overdraft, no notice of the creditors' meeting was sent to the bank; and
>
> (e) that at the meeting of creditors, in answer to a creditors' question, Mr. Kushler falsely stated that the guarantors were third parties.

The Court of Appeal held that, on the facts, fraudulent preference had been established.

23. In his judgment, Lord Greene M.R., having stated that the period to which attention must be drawn was between 10th May and 23rd May and that the question was what inference ought to be drawn from the evidence, stated (at p. 251):

> "The weight of evidence of conduct in these cases may vary very much according to the type of case with which the court is concerned. In some cases the circumstances may be insufficient to justify an inference of an intent to prefer, but at the other end of the scale comes the type of case, which is extremely familiar nowadays, where the person (such as a director) who makes the payment on behalf of the debtor is himself going to obtain by means of it a direct and immediate benefit. These cases of guarantees of overdraft and securities deposited to cover overdrafts are very common, and where directors have given guarantees the circumstance of a strong element of private advantage resulting from payment of the debt may justify the court in attaching to the other facts much greater weight than would have been attached to similar facts in a case where that element did not exist."

Lord Greene concluded that, taking the whole situation in that case, the proper inference to be drawn was that the payments made after 10th May were made with a view to giving to the bank a preference over the other creditors and so discharging the guarantee. Later, Lord Greene stated (at p. 252):

> "The statute is directing the court to ascertain the state of mind of the payer in relation to a particular transaction. A state of mind is as much a fact as a state of digestion and the method of ascertaining it is by evidence and inference, and I can see nothing in the language of the section which justifies the view that the problem which the legislature sets the court is to be dealt with on any principles different from those commonly employed in drawing inferences of fact. It must, however, be remembered that the inference to be drawn is of something which has about it, at the least, a taint of dishonesty, and, in extreme cases, much more than a mere taint of dishonesty. The court is not in the habit of drawing inferences which involve dishonesty or something approaching dishonesty unless there are solid grounds for drawing them."

That passage is the authority for the last sentence of the passage from MacCann and Courtney which has been quoted earlier.

24. The judgment of Goddard L.J. in the Kushler case is also cited frequently. He stated (at p. 255):

> "The authorities establish that the mere fact that a preference is shown is not sufficient to enable the court to draw the inference that that preference was fraudulent. Before that inference can be drawn the court must be satisfied that the dominant motive of the debtor was to prefer the particular creditor. It would be dangerous to attempt to lay down any particular circumstance or set of circumstances from which the court was or was not justified in drawing that inference, except to say that the mere fact that a preference is shown is not sufficient. For the rest, the matter stands as it does in any matter relating to a state of mind. Where in any criminal or civil court the person on whom the onus lies proves no more than a state of facts equally consistent with guilt or innocence, it is impossible to draw the inference of guilt. To give a person the benefit of the doubt only means that the case against him is not proved beyond reasonable doubt, and, therefore, fails. . . . In my view, for the reasons given by the Master of the Rolls, the inference of an intention to prefer here is overwhelming . . .."

Station Motors Limited v. AIB Ltd.
25. There were a number of issues in the *Station Motors* case. However, the facts relevant to the issue which bears on the application of s. 286(1) were that Station Motors Ltd. was effectively controlled by two directors, William Murphy and his wife. On 16th June, 1980, by joint and several guarantee, Mr. Murphy and his wife guaranteed the obligations of the company to the defendant bank on foot of its current account up to £75,000 with interest. The company went into liquidation on 3rd October, 1980, the company being insolvent, on foot of notice to convene an extraordinary general meeting which issued on 15th September, 1980. Between 15th September, 1980 a sum in excess of £23,278 was lodged to the company's current account. During the same period six cheques totalling in excess of £8,057 were honoured by the bank, of which one was payable to Mr. Murphy in the sum of £2,730 and was drawn on 16th September, and the other five were drawn prior to 15th September. The bank's evidence was that those cheques were paid following representations from Mr. Murphy. During the same period four cheques totalling £2,321 were presented but were not honoured.

26. Against those facts, the first issue the Court had to decide was whether the lodgments made after 15th September, 1980 constituted a fraudulent preference within the meaning of s. 286(1). In addressing that issue, Carroll J., having stated that there was no direct evidence by Mr. Murphy as to what his intention was, continued (at p. 761):

"Nevertheless the court is not precluded from drawing an inference of an intent to prefer. *Re M. Kushler* Limited . . . deals with the following points: –

1. The phrase "with a view to giving such creditor a preference" means that the intention to prefer must be the dominant intention which actuates the payment (*per* Lord Greene M.R. . . .).

2. It is not enough to prove that there was actual preferment from which an intention to prefer can, with hindsight, be inferred. The liquidator must prove an intention to prefer at the time the payment is made (*per* Goddard L.J. . . .).

3. Where there is no direct evidence of intention, there is no rule of law which precludes a court from drawing an inference of an intention to prefer, in a case where some other possible explanation is open (*per* Lord Greene M.R. . .). . . .

4. The method of ascertaining the state of mind of the payer is the ordinary method of evidence and inference, to be dealt with on the same principles which are commonly employed in drawing inferences of fact (*per* Lord Greene M.R. . .)."

27. Carroll J. stated that, having considered the established facts in the case before her, she was satisfied that the overwhelming inference to be drawn from those facts was that the lodgments made after 15th September, 1980 were made with the composite intention to prefer (a) the bank as a direct creditor and (b) the Murphys themselves as guarantors of the company's overdraft. She then outlined the facts which supported that view as follows:

(a) The case was a guarantee case, and the guarantee which had been £30,000 in January 1980 had been increased to £70,000 in June 1980.

(b) Given that at a directors' meeting of 15th September, 1980 it was resolved to convene the extraordinary general meeting and the creditors' meeting for the purposes of a creditors' voluntary winding up, the inference had to be drawn that, on and from 15th September, the directors knew that the company was insolvent.

(c) Only six cheques were paid out of the company's account on and after 15th September and then only as a result of special representations made by Mr. Murphy. It had been argued by the bank that the account was being operated normally in the ordinary course of business because of the payment of those six cheques. However, Carroll J. found exactly the opposite; the necessity to make a special case for those cheques inferred that the account was not being operated normally. The fact that one of the cheques was drawn after 16th September by Mr. Murphy did not weaken the inference of an intention to prefer the bank, which was coupled with an intention to prefer the guarantors. The payment of the cheque for £2,730 to Mr. Murphy was a direct preferment of him rather than an indirect preferment by reducing the amount payable on foot of the guarantee.

(d) The payment of the five other cheques did not negative an intention to prefer the bank directly and the guarantors indirectly. In proportion to the lodgments, the amounts involved in the four cheques were very small.

(e) Once the directors had decided on 15th September to hold the meetings for a creditors' voluntary winding up, there could not be normal trading, as the company at that stage must have been unable to pay its debts.

On the basis of the foregoing facts, Carroll J. found the inference overwhelming that the lodgments after 15th September were made to prefer the bank directly and the guarantors indirectly and that was the dominant purpose of the lodgments.

Application of the law to the facts of this case

28. On the basis of the facts of this case and, in particular, the conclusions which can be drawn from an analysis of the statements of account, it was submitted on behalf of the respondent that none of the impugned lodgments constituted a preference of the respondent and that the liquidator had failed to prove that the dominant intention of the Company or its directors was to prefer the respondent.

29. In embarking on an analysis of the bank statements in relation to the current account put in evidence, for the purpose of illustrating the factual distinctions between the *Kushler* and *Station Motors* cases and this case, it is appropriate to reiterate what has been observed earlier as to the necessarily superficial nature of the analysis, because in most cases it is not possible to identify the payee or purpose of a cheque or direct debit paid in the period in issue. Nonetheless, I consider that because of the overview of the operation of the current account which can be thereby ascertained, it is proper to draw inferences from the analysis.

30. It is not clear when the directors resolved to hold the members' meeting and the creditors' meeting on 26th May, 2010. However, having regard to the provisions of s. 266 of the Act of 1963, it must have been on 16th May, 2010 at the very latest. It appears from a letter dated 22nd October, 2010 from the respondent to the applicant, which is quoted in the grounding affidavit although not exhibited, that the respondent received information from the director of the Company, whom I assume to be Mr. Kerr, on 24th May, 2010 of the intention to wind up the Company.

31. Prior to 7th April, 2010 the overdraft on the current account had been at its highest on 4th February, 2010, when it reached €106,652.22. However, a large lodgment was made on the following day, which brought the overdraft down to €21,801.51. In the succeeding two months, the overdraft fluctuated. For instance, it was at its lowest on 8th February, 2010 at €11,112.37, whereas it increased thereafter and by 22nd March it had reached €94,957.67. It fluctuated again after that, the lowest point it reached before 7th April, 2010 being €68,963.17 on 31st March, 2010. An analysis of the statements on the current account from late November 2009 to 4th February, 2010 reveals a similar pattern of fluctuation.

32. The increase in the overdraft between 31st March, 2010 and 7th April, 2010 was a consequence of seven cheques and two direct debits having been paid on 1st April, 2010, which was obviously the Thursday before the Easter holidays, four cheques and two direct debits having been paid on 6th April, 2010 and three cheques and two direct debits having been paid on 7th April, 2010, during which period no lodgments were made. A small lodgment was made on 8th April, 2010 in the amount of €3,800. Between that date and the date on which the next lodgment was made, 15th April, 2010, five cheques and seven direct debits had been paid. While the credit for the lodgment on 15th April, 2010 was in the sum of €53,870.04 a portion of that credit amounting to €28,300 was reversed on the following day, although a lodgment in the sum of €28,800 was actually credited later on 20th April, 2010. Between the 20th April and the 30th April, seven cheques, seven direct debits and one standing order were paid. In the same period there were three amounts credited, two lodgments and one other credit. The overdraft fluctuated upwards from €55,603.83 on 20th April, 2010 to €62,131.92

on 30th April, 2010.

33. In the first week of May 2010, which was a four working day week, the overdraft increased to €83,528.12, during which period no lodgments were made. During the next week, which commenced on Monday, 10th May, 2010, there were five lodgments and one other credit. During the same period eight cheques and three direct debits were paid, in consequence of which the overdraft was reduced to €39,167.78. In the following week, which commenced on Monday, 17th May, there were two lodgments which totalled €18,500 and two other credits which totalled €6,134.40, whereas eleven cheques, four drafts and three direct debits were paid, which resulted in the overdraft going up to €43,458.03. Thereafter, the only movements on the current account were as follows: the payment of one cheque, one direct debit and cheque book stamp duty; one lodgment on 25th May, 2010 in the sum of €6,194; and one other credit in the sum of €5,000. Effectively the line was then drawn and the current account was overdrawn in the sum of €32,663.10.

34. After 8th April, 2010 there were five credits to the account (the source of which is not identifiable), which were not made by way of lodgment, which I assume were electronic payments from debtors, which aggregated €19,672. All of those credits post-dated 27th April, 2012.

35. Unlike the circumstances which prevailed in the *Kushler* case and in the *Station Motors* case, the foregoing analysis of the statements on the current account, and, in particular, the level of activity thereon, against the background of the totality of the evidence, in my view, does not give rise to the inference that Mr. Kerr made the lodgments to the Company's current account with the dominant intention of preferring the respondent as creditor, with the objective of reducing his own liability on foot of the guarantee he had given the respondent and the security which supported it. The explanation given by Mr. Kerr in his letter of 7th October, 2010 to the applicant, which I have quoted earlier, in my view, is a plausible explanation as to why the Company continued to lodge all receipts into the current account promptly. There is no discernible significant disproportion between the lodgments and other credits between 28th April, 2012 and the ruling of the account, which covered approximately one month, and the lodgments and other credits in the corresponding period up to and including 27th April, 2012. The net effect of the failure on the part of the Company to make lodgments to the credit of a separate account after receipt of the applicant's e-mail of 27th April, 2010, given that the Company continued to make payments to its creditors and was not advised to do otherwise, was that the overdraft on the current account had reduced by slightly less than €25,000. The five credits which were not made by way of lodgment, over which Mr. Kerr may not have had any direct control, contributed to that reduction to the extent of €19,672, although one credit is designated "Kerr 04".

36. Accordingly, I find that the applicant has not discharged the onus of proof which he bears under s. 286(1) that the payments aggregating €245,855 made by the Company into its current account with the respondent were made with the dominant intention of preferring the respondent and, in consequence, indirectly preferring Mr. Kerr as surety and chargor. While that disposes of the matter and it is not strictly speaking necessary to consider the respondent's fallback position, I make the following observations without expressing any definitive view on the argument advanced on behalf of the respondent.

The respondent's fallback position

37. It was submitted on behalf of the respondent that, if the Court were to hold that the dominant intention was to prefer the respondent, the applicant's claim should, in any event, be limited to the net total of the impugned lodgments, which I understand to mean the amount of the lodgments less the cheques, direct debits, standing orders and so forth paid by the bank during the relevant period, which the respondent assessed as amounting to €36,300.67. In the connection, counsel for the respondent referred the Court to the following texts:

> (a) Goode on *Principles of Corporate Insolvency Law* (at para. 11 – 86), where the author observed that the type of outcome which the applicant has sought on this application, a declaration of invalidity of all of the payments made by the Company to the respondent in the period in issue without any deduction of the payments made by the respondent to third parties, would produce a result which would "seem unfair in the extreme, giving a windfall to the general body of creditors"; and
>
> (b) *McPhersons Law of Company Líquidation* (2nd Ed. by Andrew R. Keay, 2009) (at para. 11.030).

Counsel for the respondents also opened certain Australian authorities to the Court.

38. As is pointed out in McPherson (at para. 11.030), in Australia the courts have exempted payments made pursuant to a clear and bona fide running account from being attacked as preferences. At common law in Australia, if a creditor can establish the fact that the transaction sought to be impugned was not an isolated transaction but was part of a series of transactions which involved the creditor dealing with the debtor pursuant to a running account, then any payment will not be regarded as preferential. Further, it is pointed out that the common law has now been codified as far as liquidations are concerned in Australia. The editor of McPherson makes the following observation in relation to the Australian jurisprudence:

> "Professor Goode has commended the law as it has developed in Australia. It is certainly possible to argue that such a principle assists in keeping companies afloat as credit providers are willing to continue lines of credit without undue fear of debtors entering liquidation and then having to discard all payments made to them in the six months prior to the commencement of the liquidation. Professor Adrian Walters has pointed out, adroitly, it is submitted respectfully, that the need for exempting running account payments from the effect of the preference provision is less in England and Wales because payments to a supplier or a bank are not likely to be able to [be] attacked successfully because the court is likely to infer that the making of the payment was not influenced by a desire to provide a preference. In Australia there is no need to prove a desire to provide a preference."

39. I do not consider it necessary to address the Australian authorities cited by counsel for the respondent or the recent decision of the Chancery Division of the English High Court in *Re Oxford Pharmaceuticals Ltd.; Wilson & Anor. v. Masters International Ltd. & Anor*. [2009] 2 BCLC 485 in which it was considered that the approach of the Australian courts is the correct approach, but where the statutory provision being applied was, in my view, materially different to s. 286(1). Suffice it to say that I cannot see how, having regard to the wording of s. 286(1), it would be open to the Court, if satisfied that the applicant had discharged the onus of proving that the payments impugned by him were made "with a view to giving" Mr. Kerr, as surety and as the creator of the security for the overdraft due to the respondent, an indirect preference over other creditors, to do other than declare that the impugned payments were invalid as required by s. 286(1). In other words, as a matter of construction of the express wording of subs. (1) of s. 286, it is difficult to see a basis for netting down the aggregate amount of the payments made by the Company to the respondent by deducting the value of the cheques, direct debits, standing orders and so forth paid by the respondent to third parties during the period in issue, if there was a factual finding by virtue of which those payments were deemed to be fraudulent preferences, so that

they were invalid.

Rule in Clayton's Case relevant?
40. Counsel for the applicant submitted that the rule in *Clayton's Case* is of relevance to the determination of the issue in this case and they did so by reference to the decision of the High Court (Kenny J.) in *In Re Daniel Murphy Ltd*. [1964] I.R. 1. In that case, Kenny J. was concerned with the application of s. 212 of the Companies (Consolidation) Act 1908, which was the predecessor of s. 288 of the Act of 1963, which has been substituted by s. 136 of the Act of 1990. Section 212 dealt with the avoidance of a floating charge and provided as follows:

> "Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of. the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent per annum."

41. The company in that case, Daniel Murphy Ltd., had an overdraft with the National Bank Ltd. on the security of an equitable mortgage of the company's premises. The company wanted to increase the overdraft from £9,759 to £15,000 to finance its operations. The bank was agreeable, provided the company executed a floating charge in its favour. By letter dated 8th June, 1961 the company agreed to give the floating charge to the bank, whereupon it immediately began to draw down the new facilities to their full extent. However, there was delay in executing the floating charge and it was not executed until 2nd August, 1961 and it was not registered in the Companies Office until 6th August, 1961. The company went into voluntary liquidation on 21st August, 1961. Between 8th June and 21st August, 1961 lodgments of £30,887 were made by the company to the credit of the relevant account, while cheques amounting to £36,003 were debited. The account was not ruled on until 21st August, 1961. The liquidator of the company sought directions as to whether the floating charge was wholly or partially invalid in respect of the debt due by the company to the bank.

42. On those facts, Kenny J., on the first question he considered, which is not of relevance for present purposes but gives perspective to the second question, held that monies advanced after an agreement to give a charge, but before the execution of the deed of charge, were advanced at the time of the charge within the meaning of s. 121 of the Act of 1908, provided that any delay in having the charge completed and registered was not intended to deceive creditors and was not unreasonable or culpable. On the facts before him, he held that there had been neither unreasonable delay nor intention to deceive. The second question arose out of the fact that, when the resolution to wind up was passed, the account was overdrawn in the sum of £14,475, whereas it had been overdrawn in the sum of £9,759 on 8th June, 1961, when the company agreed to give the charge. The question was whether the amount secured by the floating charge was the amount of the overdraft and interest when the winding up commenced or, alternatively, that amount less the amount due to the bank on 8th June, 1961. On this point, Kenny J. stated (at p. 13):

> "In this case the Company's no. 1 account with the Bank was not ruled or closed when the promise to give the charge had been made or when the floating charge was executed, and I do not see any reason why the rule in Clayton's Case should not apply. If it does, the monies due to the Bank by the Company on the 8th June must be regarded as having been discharged by the monies subsequently lodged and the total sum due on the 21st August is now due to the Bank on the security of the floating charge."

43. Later (at p. 15), Kenny J. stated that, as the rule in *Clayton's Case* applied to the account, the entire sum of £14,475 was advanced after 8th June, 1961 and he had no doubt it was advanced in reliance on and was secured by the charge. So the bank had valid security for that balance and interest. The necessity to apply the rule in Clayton's Case in that case arose because of the exception in s. 212 that a floating charge made within three months of the commencement of the winding up, which had occurred, would be invalid "except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge". So the question of the appropriation of the payments after 8th June, 1961 on the unbroken account arose.

44. However, in my view, no question of appropriation of the payments into the account arises on the application of s. 286(1) to the facts here. Accordingly, I cannot see how either the rule in *Clayton's* Case or the decision of Kenny J. in *In Re Daniel Murphy Ltd*. is of any relevance in the application of s. 286(1) to the facts of this case. In my view, the reliance by the applicant on those authorities is misconceived.

Order
45. There will be an order dismissing the applicant's application.