THE HIGH COURT

[2024] IEHC 666

[Record No. 2023/324SP]

IN THE MATTER OF AN APPLICATION FOR A DETERMINATION PURSUANT TO ORDER 3(7) OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

MARK ROACHE AND AMANDA ROACHE

PLAINTIFFS

AND

START MORTGAGES DESIGNATED ACTIVITY COMPANY

DEFENDANT

JUDGMENT of Mr Justice Liam Kennedy delivered on the 20th day of November 2024.

1. Personal insolvency arrangements (**"**PIAs**"**) were one of the novel arrangements for insolvent natural persons introduced by the Personal Insolvency Act 2012 ("the 2012 Act"). As appears from decisions such as *Re JD* [2017] IEHC 119, the 2012 Act advances the social and common good by offering debtors an opportunity to restructure their debts and, inter alia, to maintain their continued occupation of their principal private residence, providing an alternative to bankruptcy and possession proceedings. This Court is asked to resolve a question of law concerning such two such PIAs (which I will refer to as "the PIA" as they

are interconnected and in the same terms). which effectively wrote down the Plaintiffs' secured debt to the Defendant (their main creditor) virtually to the mortgaged property's then market value, which I will call the PIA Value. Since the PIA Value was significantly less than the figure outstanding on the loan, the effect was to virtually write off €100,084 of the debt to the Defendant by downgrading that sum to unsecured debt in the PIA (which, as amended, provided for a 99% write off of such debt). The effect of the relevant provisions is that such PIAs may effectively *"wipe the slate"* on *"negative mortgage equity"* as at the date of the PIA.

2. However, values rise as well as fall, and the 2012 Act (and PIA) provided protections for secured creditors (such as the Defendant) whose debts are written down. In particular, they may claim what the parties called a *"claw back"* if the property is sold or otherwise disposed of within a specified period at a value in excess of the PIA Value. In that scenario, the effect of s.103 is that the secured creditor who suffered the write down in the PIA because of the fall in the asset's value may claim a payment to reflect its subsequent uplift in value prior to its disposal. Otherwise, the borrower would benefit at the lender's expense, from both the asset's fall in value, and its subsequent recovery.

3. I need to determine whether such a clawback entitlement would be triggered by the Plaintiffs' proposed refinancing. They wish to re-finance their mortgage (as restructured in the PIA) with another lender. Whether this triggers a clawback (and, if so, the basis for its calculation) depends on s.103. The 2012 Act will be considered further below, but, in short, s.103(3) provides for an additional payment (the *"*clawback*"*) if, within a prescribed period, the mortgaged property is sold or disposed of "*for an amount or at a value greater than the value attributed to"* it in the PIA. s.103 (4) provides in effect that, subject to subsections (5) to (13), the clawback shall be the lesser of: (a) the difference between *"the value of the property on disposition"* and the PIA Value, and (b) the amount by which the principal sum due on the mortgage loan was written down in the PIA.

4. The Defendant says that a clawback entitlement of €85,000 would arise, being the difference between the PIA Value and the property's market value at the time of refinancing. The Plaintiffs disagree, arguing that a clawback would only arise if the sum borrowed on the re-financing exceeded the PIA Value. Therefore, the issue is whether an increase in the Property's value affects the clawback figure on a refinancing even if the amount borrowed is less than the PIA Value.

5. The facts are common ground. The Plaintiffs' mortgage from Permanent TSB was assigned to the Defendant. The Plaintiffs' financial difficulties led them to retain a personal insolvency practitioner (**"**PIP**"**). The High Court ultimately approved a PIA which was subsequently. The relevant terms of the varied PIA were as follows:

a. the Plaintiffs owed the Defendant €350,084. A market value of €240,000 was attributed to the Plaintiffs' principal private residence. It was in *"negative equity"*.

b. The PIA provided for; (i) the reduction of the secured debt owed to the Defendant by €100,084 to €250,000, (the PIA Value); (ii) a 12-month interest-only period (during the PIA term, following which the mortgage would be repaid over an extended 372 month term (i.e. a circa 7 year extension); (iii) interest was set at 3% above the prevailing European Central Bank rate.

c. The Plaintiffs' unsecured debts were duly discharged upon the completion of the 12-month PIA term in November 2021 (at 1 cent in the euro) ending, subject to any clawback, any liability for the €100,084 "written down" mortgage debt. The mortgage loan to the Defendant otherwise continues on the PIA terms.

d. The PIAs contained - as mandated by s.103 - a clause, clause 37, effectively providing for clawback if the Property was sold or disposed of for an amount or at a value greater than the PIA Value. Clause 37 expressly incorporated the provisions of s.103(4) and s.103(13) and is in the following terms:

"If the Arrangement includes terms involving:

(a) retention by a Secured Creditor of the security held by that Secured Creditor, and

(b) a reduction of the principal sum due in respect of the Secured Debt due to that Secured Creditor to a specified amount,

then, unless the relevant Secured Creditor agrees otherwise in Part IV, any such reduction of the principal sum is subject to the condition that, subject to sections 103 (4) to 103 (13), where the property the subject of security is sold or otherwise disposed of for an amount or at a value greater than the value attributed to the security in accordance with section 105, the Debtor shall pay to the Secured Creditor an amount additional to the reduced principal sum calculated in accordance with section 103 (4) or such greater amount as is provided for under Part IV of the Arrangement."

e. In 2023, interest rates rose, substantially increasing the greater than the value attributed to the security Plaintiffs' monthly repayments (from €1,054.00 to €1,468.88).

f. In April 2023, Bank of Ireland offered the Plaintiffs more advantageous mortgage terms (a 20-year mortgage loan of €250,000 with a rate fixed at 3.5% for five years, reverting to a variable rate).

g. The Plaintiffs applied to the Defendant for a redemption statement. The Defendant asserted a redemption balance which included a €85,000 clawback, the difference between its estimate of the value (€335,000) and the PIA Value. (The Defendant's estimate of the property value was less than that advanced in the Plaintiffs' loan application and thus more favourable to the borrower for clawback purposes). The relevant figures for these proceedings are as follows:

Balance due to Defendant Pre PIA	€350,084
Secured Principal Balance provided for in PIA	€250,000
Principal Balance Now Due	€236,362

Refinance Figure	€250,000
Value attributed to Property by Defendant	€335,000
Value attributed to Property by Plaintiffs	€380,000
Clawback Figure claimed by Defendant	€85,000
Clawback Figure calculated by the Plaintiffs	€10,000

6. Appendix 7 of the PIA:

a. set out the details of the restructuring of the mortgage recording that

> *"the Arrangement and this Appendix changes the term of the Existing Loan Offer Letters in the following respects;"*

b. noted that the mortgage loan would be split into two parts, the write-down of €100,084 and the *"active"* component of €250,000 to be repaid by twelve payments of interest only followed by regular instalments of principal and interest and any other amount the debtor owed the secured creditor.

c. confirmed that

> *"following successful completion of the [PIA] the Debtor's live mortgage balance is estimated to be €250,000. The Debtor jointly with the interlocking party proposes to pay full capital & interest payments against the new mortgage balance at the estimated interest rate of 3% (i.e., variable). This would be for the remainder of the mortgage term of 360 months resulting in estimated repayments of €1,054 per month. It is proposed that the interest rate be 3% variable during the term of the PIA and thereafter.* ***Please note that the interest rates and estimated contractual payments will vary depending on ECB policy which can vary from time to time****."*

7. The Plaintiffs contend that, since the property is not being sold, any clawback must be calculated by reference to the sum borrowed (€250,000). The Defendant argues that it should be determined by reference to the property's market value (assumed to be €335,000 rather than the Plaintiffs' higher figure). The Defendant says that the refinance amount is an arbitrary figure chosen by the Plaintiffs. They could have borrowed more in view of the property's value (€380,000 according to their own loan application).

Legislative Context

8. In brief, PIAs were one of 3 types of insolvency arrangement for individuals introduced by the 2012 Act. Part 3, Chapter 4 allows debtors to engage a personal insolvency practitioner ("PIP") to apply to the court on their behalf to secure temporary protection from creditors. Thereafter, the PIP puts a PIA proposal to creditors for their approval. If necessary, the PIP may apply to court pursuant to s.115A to approve the PIA. Section 99 specifies mandatory requirements for a PIA. In particular:

a. Section 99 (2)(h) and (k) require that, in general, a PIA shall not require that the debtor dispose of his or her interest in or cease to occupy their principal private residence and that, subject to ss.102-105, a PIA shall provide for the treatment of any charged assets.

b. Section 104 provides in effect that the PIP shall, insofar as practicable, and having regard to specified safeguards and considerations, formulate the PIA proposal on terms that will not require the debtor to dispose of their interest in, or cease to occupy, their principal private residence.

c. Sections 100 and 102 stipulate that a PIA may incorporate various options with regard to creditors, including for the treatment or restructuring of secured debts.

d. Section 102 lists options which a PIP can draw upon when advancing proposals for secured debts. The PIA may provide for, inter alia, the security's sale or surrender or the creditor's retention of the security. It lists terms which may be included, which, in brief, include that;

   (a) for a period which may not exceed the duration of the PIA, the debtor's payments to the creditor will be either (i) interest and only part of the capital; or (ii) interest-only; or (iii) deferred;

   (b) the term of the mortgage may be extended;

   (c) the basis for the secured debt's interest rate may be changed;

(d) the principal due in respect of the secured debt may be reduced.

9. Section 102(6)(g) provides that a term may be included (as was the case on this occasion) providing for the reduction of the principal due on secured debt 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 that property for the purposes of the Personal Insolvency Arrangement, 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 as is specified in the terms of the Personal Insolvency Arrangement."*

10. The effect of s.102(11) is that where the secured debt is written down in a PIA, the written down amount– in this case €100,084 – is treated as unsecured debt (with the result, in this case, that it was effectively written off).

11. For present purposes, the relevant parts of the crucial provision are as follows:

> ***"Protections for secured creditors in Personal Insolvency Arrangement.***
> *103.— (1) A Personal Insolvency Arrangement which includes terms providing for the sale or other disposal of the property the subject of the security shall, unless the relevant secured creditor agrees otherwise, include a term providing that the amount to be paid to the secured creditor shall amount at least to— (a) the value of the security determined in accordance with section 105;or (b) the amount of the debt (including principal, interest and arrears) secured by the security as of the date of the issue of the protective certificate, whichever is the lesser.*
> *(2) A Personal Insolvency Arrangement which includes terms providing for—*
> *(a) retention by a secured creditor of the security held by that secured creditor, and*
> *(b) a reduction of the principal sum due in respect of the secured debt due to that secured creditor to a specified amount,*
> *shall not, unless the relevant secured creditor agrees otherwise, specify the amount of the reduced principal sum referred to in paragraph (b) at an amount less than the value of the security determined in accordance with section 105.*
> *(3) A Personal Insolvency Arrangement which includes terms involving—*
> *(a) retention by a secured creditor of the security held by that secured creditor, and*

(b) a reduction of the principal sum due in respect of the secured debt due to that secured creditor to a specified amount,

shall, unless the relevant secured creditor agrees otherwise, also include terms providing that any such reduction of the principal sum is subject to the condition that, subject to subsections (4) to (13), where the property the subject of the security is sold or otherwise disposed of for an amount or at a value greater than the value attributed to the security in accordance with section 105, the debtor shall pay to the secured creditor an amount additional to the reduced principal sum calculated in accordance with subsection (4) or such greater amount as is provided for under the terms of the Personal Insolvency Arrangement.

(4) Subject to subsections (5) to (13), the additional amount referred to in subsection (3) shall be the lesser of—

(a) the entire of the difference between the value of the property on disposition and the value attributed to the security in accordance with section 105, and

(b) the amount of the reduction in the principal sum due in respect of the secured debt under the Personal Insolvency Arrangement as referred to in subsection (3)(b).

(5) For the purposes of subsection (4), any portion of the increase in the value of the property attributable to significant improvements made to (or other measures taken which have made a material contribution to the increase in the value of) the property over which the debt is secured which were made subsequent to the valuation of the security for the purposes of the Personal Insolvency Arrangement shall be disregarded in calculating the additional amount payable by the debtor.

(6) ...

(7) …

(8) For the purposes of subsection (4), the expenses and costs borne by the debtor in connection with the sale or other disposal of the property shall… be deducted from the value attributable to the property on such sale or disposal.

(9) The obligation to pay an additional amount arising by virtue of this section shall not apply where the value of the property on its sale or other disposal is less than the amount of the debt secured by the security (other than any additional amount secured by virtue of subsection (10)) immediately prior to such sale or other disposition of the property.

(10) Any additional amount payable by virtue of this section shall stand secured in the same manner and with the same priority as the principal sum referred to in subsection (3)(b).

(11) The obligation to pay an additional amount arising by virtue of this section shall cease—

(a) on the expiry of the period of 20 years commencing on the date on which the Personal Insolvency Arrangement comes into effect, or

(b) on the day on which the debtor is scheduled or permitted to fully discharge the amount secured by the security (or such later date as may be specified for so doing in the Personal Insolvency Arrangement) and does so discharge his or her indebtedness, whichever first occurs.

(12) ...

(13) For the purposes of subsection (3)—

(a) without prejudice to the generality of that subsection, a disposal by a debtor of property the subject of security held by a secured creditor shall include the voluntary grant by the debtor of security over that property to any person other than that secured creditor, including any such grant of security in connection with what is commonly known as a refinancing of the existing secured debt, and

(b) ....”

12. Section 105 deals with the treatment of the Principal Private Residence in PIAs and the valuation of security, providing for expert determination to establish its value in the absence of agreement between the parties. Section 105(1) specifies that the *“value of security in respect of secured debt for the purposes of this Chapter shall be the market value of the security”*. Section 105(1) sets out matters to be considered in determining the asset’s value:

> *“(a) the type of property the subject of the security;*
>
> *(b) the priority of the security;*
>
> *(c) the costs of disposing of the property the subject of the security;*
>
> *(d) the price at which similar property to that which is the subject of the security has been sold within the 12 months prior to the issue of the protective certificate;*
>
> *(e) the date of the most recent valuation or transaction with respect to the property the subject of the security and the value attributed to the property in respect of that valuation or transaction;*

(f) the value attributed to the property the subject of the security in the debtor's accounting records (if any);

(g) the value attributed to the security in the secured creditor's accounting records (if any);

(h) whether the market for the type of property the subject of the security is or has been subject to significant changes in conditions;

(i) data made available to the public by the Property Services Regulatory Authority pursuant to Part 12 of the Property Services (Regulation) Act 2011 and which relate to property similar to the property the subject of the security; and

(j) any relevant statistical index relating to the valuation of the same or similar types of property as the property the subject of the security".

13. Section 105 (6) stipulates that:

"(6) In this section "market value"—

(a) as respects property the subject of security for a secured debt, means the price which that property might reasonably be expected to fetch on a sale in the open market;

(b) as respects security for a secured debt, means the amount that might reasonably be expected to be available to discharge that secured debt, in whole or in part, following realisation of the security by the secured creditor concerned and, where permitted by the terms of the security or otherwise, after deducting all relevant costs and expenses in connection with the realisation of the security".

14. Section 125 provides for the successful completion of a PIA, stipulating that:

"the debtor shall not stand discharged from the secured debts covered by the (PIA) except to the extent specified in the (PIA)".

15. Section 129 deals with offences, including the fraudulent disposal of property. It is, inter alia, an offence to commit certain acts for the purpose of avoiding an obligation under a PIA or under the Act. Such acts include a gift or transfer of property on terms that provide for the transferor receiving no consideration or where the value of the property transferred is significantly greater than the value of the consideration provided by the transferee.

THE LAW

Principles of Statutory Interpretation

16. Section 5 of the Interpretation Act 2005, provides as follows:

"5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole".

17. The parties were largely agreed as to the following principles of statutory interpretation, although each considered that such principles supported their own position. In applying s.5 the court must look at the language of the statute in its context.

18. In *Murphy v. GM* [2001] 4 IR 113 (SC), Keane C.J. stated at p. 127 that:

"*A construction leading to* [a] *patently absurd and unintended* […] *result should not be adopted unless the language used leaves no alternative.*"

19. In *Bridgeman v. Limerick Corporation* [2001] 2 IR 517 (SC), Keane C.J. noted at p. 523 that the Court was entitled to have regard to an Act's preamble as a guide to the legislative intention, although it could not *"be called in aid to override the plain language of the enactment.*"

20. In *Dunnes Stores v. Revenue Commissioners* [2020] 3 IR 480 (SC), McKechnie J. said at para. 64 that:

"*... the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail... Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that*."

21. In *Bookfinders Ltd. v. The Revenue Commissioners* [2020] IESC 60, O'Donnell J. stated at para. 56 that:

"*legislation is presumed to have some object in view which it is sought to achieve. A literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision*."

22. In *The People (DPP) v AC* [2022] 2 IR 49, O'Donnell C.J observed at para. 7:

"'*… if, when viewed in context, having regard to the subject matter and the objective of the legislation, a single, plain meaning is apparent, then effect must be given to it unless it would be so plainly absurd that it could not have been intended*".

23. At para. 106 of his judgment in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] 2 ILRM 313 (SC), *("Heather Hill"),* Murray J. summarised principles set out by McKechnie J. in *People (DPP) v. Brown* [2019] 2 IR 1 (SC) on p. 355:

"*(i) The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning...*

(ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include 'the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including ... LRC or other reports; and perhaps ... the mischief which the Act sought to remedy' ...

(iii) In construing those words in that context, the court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language…

(iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the intended object of the Act and the reasons the statute was enacted…” .

24. Having noted at paras. 215 - 216 that the Respondents' case depended on the proposition that the applicant had failed to establish why the Oireachtas would have wished to go beyond the minimum in implementing a particular directive by affording costs protection to all planning challenges Murray J. emphasised that that was the wrong question. The correct questions were (a) why it would not have wished to do so? and (b) where the asserted purpose could be discerned in the statute's text or context? There were credible reasons why the Oireachtas might or might not have wished to allow cost protection for all such challenges. However, it was not the Court's function:

"in the teeth of a statutory provision - the language of which is clear in its terms and effect - to interpret that legislation so as to give effect to one of a number of competing policy objectives without some objective basis for deciding as between them".

25. At paras. 24 and 25 of *Pepper Finance Corporation (Ireland) DAC v. Doyle* [2023] IEHC 662 Simons J summarised the principles, noting that in *Heather Hill,* Murray J.*:*

"*emphasised that the literal and purposive approaches to statutory interpretation are not hermetically sealed. In no case can the process of ascertaining the legislative intent be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted. Rather, it is necessary to consider the context of the legislative provision, including the pre-existing relevant legal framework, and the object of the legislation insofar as discernible.*

[25] The words of the section are the first port of call in its interpretation, and while the court must construe those words having regard to (i) the context of the section and of the Act in which the section appears, (ii) the pre-existing relevant legal framework and (iii) the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain

meaning of the words chosen by the legislature to establish this. The "context" that is deployed to that end, and "object" so identified, must be clear and specific, and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language."

26. Accordingly, the parties agreed that the Court should start with the words of the section and that it is not permissible to read words into an enactment, to fill gaps or "*to indulge in conjecture as to what the legislature would have done if a particular case had been presented to their notice*". The court should give effect to what has been expressed by the words of the enactment and that which follows by implication. It is only where the plain meaning of the words of a section, when viewed in context, would give rise to an absurdity that the Court can invoke other maxims of statutory interpretation.

Statutory Context

27. Unusually, the long title contains lengthy recitals specifying its objectives. Recitals (a) to (c) list these as, inter alia:

"(a) the need to ameliorate the difficulties experienced by debtors in discharging their indebtedness due to insolvency and thereby lessen the adverse consequences for economic activity in the State,

(b) the need to enable creditors to recover debts due to them by insolvent debtors to the extent that the means of those debtors reasonably permits, in an orderly and rational manner, and

(c) the need to enable insolvent debtors to resolve their indebtedness (including by determining that debts stand discharged in certain circumstances) in an orderly and rational manner without recourse to bankruptcy, and to thereby facilitate the active participation of such persons in economic activity in the State."

28. The 2012 Act was introduced to enable individual debtors to restructure their debts in appropriate cases, avoiding bankruptcy or possession proceedings. The parties agreed that the 2012 Act balanced the public interest in orderly and rational debt resolution with

creditors' contractual and property rights. This was discussed by McDonald J. in *Re Fay (A Debtor)* [2020] IEHC 163 at para. 67, when considering a different provision:

> "*…s. 115A contains a large number of conditions that must be satisfied before the court is empowered to consider the grant of relief in favour of a debtor. Those conditions were clearly imposed by the Oireachtas with the object of balancing the rights of parties such as Pepper as against the public interest in securing, where appropriate, the continued occupation by a debtor of his or her home*".

29. Baker J expressed similar sentiments at para. 168 of the Supreme Court decision in *Re O'Connor (A Debtor)* [2023] IESC 31:

> "*… the statutory requirements envisage a balancing of rights and obligations and the affording of due recognition to the contractual, common law, and constitutional rights of the parties, more particularly those of the creditor, whose rights are in general negatively impacted*".

30. In *Re Callaghan (a debtor)* [2017] IEHC 332, in the course of an examination of different issues under the 2012 Act, Baker J. noted in passing the safeguards provided by the s.103 clawback provisions and, at para. 50, she summarised the effect of s.103(3) as being that:

> "*… the secured creditor is entitled to a claw back on a sale within 20 years, or at the end of the mortgage terms, whichever first occurs, should a sale or disposal achieve a higher figure than that in an agreed s.105 valuation…*"

SUBMISSIONS

31. The Plaintiffs submitted that:

a. The Court must identify the plain meaning of the provisions, having regard to the 2012 Act as a whole and its purpose. PIAs are designed to enable debtors to restructure without recourse to bankruptcy and without losing their homes. Section 103's ordinary and natural meaning is that the value for which a

property is disposed of by re-financing is the consideration– the amount borrowed.

b. Alternatively, if s.103 is capable of multiple interpretations, the Plaintiffs' interpretation is more logical. The contention that the Plaintiffs should pay a clawback when they have not realised any enhanced value would be inconsistent with the statutory purpose and would give rise to an absurdity.

c. Sections 103(3) and 103(4) must be read together but their formulation is different, with the former referring to the amount for which the secured property is sold or disposed of and the latter referring to its value on disposition. The ordinary and natural interpretation of the phrase "*disposed for an amount or at a value…*" is the consideration for the disposal. If a property is sold, this is the sale price. Where a property is given as security for a loan, the value attributed to the security interest thus conveyed is the value required to discharge the debt. This is consistent with the s.102(6)(b) definition of the market value of security. The natural reading of the phrase "*the value of the property on disposition"* in s.103(4) is the value of, or consideration given for, the conveyancing transaction.

d. While Baker J.'s remarks in *JD* were *obiter* as she was not concerned with s.103(3), her reading of the provision was that a disposal should *"achieve"* a higher figure than the s.105 value. The value "achieved" on a refinancing is the sum borrowed – a property's market value is not "achieved" by refinancing.

e. The Defendant's interpretation (that the clawback liability is independent of the amount borrowed) would preclude the Plaintiffs from any refinancing, regardless of the amount borrowed. If the property's value on disposition is deemed to be its market value in the event of refinancing, then the clawback

would still be calculated as if the entire property was being sold even if a small amount was borrowed.

f. No clawback would arise on a property's sale unless the sale was for more than the PIA value. If debtors can redeem their mortgage without clawback during the clawback period by selling at less than the PIA value, there is no reason why they should be punished for re-financing at any value, even a value below the PIA value. The Oireachtas should not be presumed to have intended to impose such a radical restriction on debtors in the absence of clear wording to that effect.

g. The Defendant's interpretation of s.103 would require a mechanism to determine the property's value but there is no such provision. Furthermore, neither subsection (3) nor (4) use the term "market value" in relation to property the subject of the disposition. The Oireachtas cannot have intended that a clawback be calculated for the purpose of s.103, by reference to the property's market value at the time of re-financing, without using the term "market value" or providing a mechanism for ascertaining its market value (as was provided for the purposes of s.105). No such difficulties arise in respect of the Plaintiffs' interpretation. The figure borrowed by way of refinancing is objectively ascertainable. It is logical to assume that it is the figure intended by the Oireachtas as the benchmark for a clawback calculation.

h. Where a borrower refinances by granting security to a new lender, the value of the new lender's property interest is the new loan's principal balance. Correspondingly, the interest disposed of by the borrower equates to the sum borrowed. No other equity has been realised. Unless reflected in the sum borrowed, the equity in the property is not available to borrower as cash. It

follows that, for s.103(3) and (4), the value at which a property is disposed of by way of refinancing, or the value on disposition, is the sum borrowed.

i. The Defendant's interpretation would expose previously insolvent borrowers to a liability even though the transaction triggering the clawback may not generate the means to pay the clawback. This would be contrary to the statutory objectives of returning debtors to solvency and enabling them to participate in the State's economic life. It would expose debtors to a liability beyond their means, again contrary to the objectives of the 2012 Act.

The Defendant's Submissions

32. The Defendant submitted that:

a. the issue turned on the phrase *"the value of the property on disposition"* in s.103(4). The natural and ordinary meaning is that a property's value is its objective value rather than the consideration received on its disposition. s.103 protects secured creditors who suffer a debt write-down. The clawback prevents a debtor from benefitting both from the property's fall in value and a recovery in the stipulated period. For the statutory protections afforded to secured creditors to operate effectively, s.104(4) must mean that the clawback is based on the value on disposition. The alternative interpretation would introduce subjectivity which would undermine the protections. This cannot have been the Oireachtas' intention when mandating protection for secured creditors. Likewise, the refinance amount is an arbitrary figure chosen by the Plaintiffs. They could have sought to refinance at a higher amount since the Property value was stated to be €380,000.00 in their loan Bank of Ireland application.

b. The Plaintiffs' interpretation would require the Court to insert words in s.103 to provide that the value referred to would mean the value of the consideration received. Further, the Plaintiffs place too great an emphasis on the 2012 Act's stated purpose in suggesting that the Oireachtas could not have intended - despite the clear language - for the property's value to be the relevant figure. The 2012 Act balances the public interest in debt resolution mechanisms with the creditors' contractual and property rights which will be impacted. To balance these competing rights, the 2012 Act requires the inclusion of protections for secured creditors in every PIA. One such protection is the s.103(2) prohibition on writing down the secured debt in the PIA below the value of the security. Another is the clawback provided for in s.103(3) if a secured property, which has been the subject of a write down is subsequently disposed of for an amount or at a value greater than the value attributed to it in the PIA. The clawback calculation methodology is set out in s.103(4). The Plaintiffs' interpretation would do violence to the wording. The phrase *"the value for which a property is disposed of*" in the Plaintiffs' submissions identifies the error. The wording of s.103(3) and s.103(4) references the value *of the property on disposition* rather than *the value for which the property is disposed of*. The former, rather than the latter, is relevant for the clawback. Section 103(2) refers to the clawback arising where a property is disposed of *at a value* greater than the written down value. Accordingly, it is the *property's value* that is relevant for the purpose of s.103(2), not the *value of the consideration* as suggested by the Plaintiffs. Furthermore, in identifying how the clawback amount shall be calculated, s.103(3) refers solely to "*the value of the property on disposition"*. Therefore, clawback depends on the property's

value as compared with the value ascribed to it in the PIA. This is the natural meaning of *"the value of the property on disposition"*.

c. The Oireachtas could have required that the calculation be based on the value of the consideration on disposal, but it did not do so. There are good reasons why such a measure may not have been deemed appropriate. The requirement that the clawback be calculated on the property value protects creditors whereas consideration would be open to manipulation. A debtor could dispose of the property on terms designed to avoid clawback and thereafter the property could be be re-sold for full value depriving the creditor of the clawback.

d. The remainder of s.103 supports the conclusion that it is the property value that determines clawback. Section 103(5) provides that increases in the value of the property attributable to improvements by the debtor should be disregarded in the calculation. Section 103(5) references the "*value of the property"* when addressing the impact of improvements. The Plaintiffs' interpretation would not allow for the proper operation of s.103(5) as the amount borrowed on refinancing may not correspond to the value of the property. Section 103(10) states that the sum due under s.103(3) - the clawback figure - shall stand secured in the same manner and with the same priority as the principal sum due to the creditor. Therefore, the creditor is entitled to require the payment of the clawback before discharging the mortgage. A debtor cannot dispose of the property for a price or value less than the property's actual value as the clawback amount will remain secured against it.

e. In response to the Plaintiffs' submission that s.103 does not provide for a statutory method of determining the property's value, the Defendant noted that in an open market transaction the property value will ordinarily be the purchase

price (less costs associate as per s.103(8)). Equally when a party is refinancing with a reputable/regulated mortgage lender, the debtor would be obliged to obtain a valuation to satisfy the new lender of the loan to value ratio. In this case, the Bank of Ireland Loan Offer noted the Plaintiffs' valuation for the refinancing - €380,000.

f. No ambiguity arises in respect of how the clawback is to be calculated as set out in s.103(4). It involves comparing the value of the property on disposition with its PIA Value. However, if any ambiguity does arise, the Plaintiffs' interpretation is illogical. Section 103 provides for protections to secured creditors who's contractual and property rights are significantly infringed by the PIA. The Plaintiffs' interpretation would allow debtors to circumvent those protections. The logical interpretation is that the objective value of the property is the more suitable basis for calculating the clawback. The property's objective value is less susceptible to manipulation.

g. The Plaintiffs' focus on the legislative intention to allow debtors to resolve the indebtedness is erroneous in principle since the provision protects secured creditors. The Plaintiffs' argument also - contrary to *Heather Hill* - rejects the statutory words purely based on an argument that the Oireachtas could not have intended them to apply rather than by reference to the statutory language. The clawback obligation based on the property value is specified in the 2012 Act. It is easy to surmise why the Oireachtas sought to rely on its objective value rather than the consideration for the disposition, which could be manipulated.

h. The PIA accorded the Plaintiffs significant benefits. The reduction in the principal amount due by the Plaintiffs was based on the fall in the secured property's value. The protection afforded to the Defendant under s.103(3) and s.103(4) is that the Plaintiffs cannot benefit from any uplift in the Property's

value in the event of a disposition during the specified period. It is understandable that the Oireachtas provided such protection for secured creditors, preventing the Plaintiffs from simultaneously benefitting from the write down due to the drop in the Property's value and from any subsequent recovery during the specified period.

i. To the extent that any ambiguity arises, the Court is entitled to have regard to the description of s.103 of the 2012 Act as a section providing protections for secured creditors. Any ambiguity ought to be resolved in favour of providing effective protections for creditors rather than ease of refinancing for debtors. It cannot be said that an absurd result arises in providing for robust protections to enable secured creditors to benefit from any uplift in value of the secured property. On the contrary, it would be incongruous if a debtor could obtain benefit from the fall in value of the secured property and thereafter refinance without being obliged pay the clawback sum to the secured creditor on the basis of its uplift in value.

j. Without conceding the correctness of the Plaintiffs' assertion that the Defendant's interpretation would prevent a debtor from refinancing, even if that was so, the fact that the section might limit how debtors deal with their property post PIA cannot by itself displace an interpretation as reflecting the Oireachtas' intention, unless it is possible to identify why the Oireachtas would not have wished to provide for such an outcome? The Plaintiffs' speculation that the Oireachtas might have wished to achieve a different outcome cannot suffice. Competing policy choices were open to the legislature, including to prevent the circumvention of the statutory clawback provisions. The Plaintiffs are seeking to disregard the language of a provision which is clear in its terms so as to give

effect to their preferred policy choice without an objective basis for doing so (in terms of the statutory text or context, contrary to *Heather Hill.* Accordingly, while not accepting that the Defendant's interpretation would in practice effectively preclude the Plaintiffs from refinancing, even if that was so, it is not a basis to ignore the clear and unambiguous language of the section.

Discussion

33. The parties agreed that the words of the 2012 Act, read in context, must be my starting point and that I should only invoke other canons of construction if the language was ambiguous or would give rise to an absurdity. Each side assured me that the words supported their own case whereas their adversary's interpretation would give rise to such an absurdity. I will first consider the words of s.103, read in the context of Part 3. The interpretation issue ultimately hinges on whether *"value"* in subsections (3) and (4) means either: (a) the consideration stipulated by the parties to the transaction triggering the clawback, (the purchase price in a sale or, according to the Plaintiffs, the amount loaned in a refinancing); or (b) the worth of the property at the time of the transaction (which, according to the Defendant is its then market value, irrespective of the arrangements between the transacting parties).

34. The crucial provision for present purposes, s.103, is entitled "*Protections for secured creditors in personal insolvency arrangement*" and the following subsections are relevant:

a. Subsection (1) is the first statutory protection for creditors. If a PIA provides for a secured asset's sale, the secured creditor must receive its then value (or the full amount owed, if less). This ensures that the PIA cannot erode the secured creditor's effective property interest (the security's value at the time of the PIA).

b. Subsection (2) is the second protection for creditors. A PIA cannot reduce any secured principal debt to a figure below the then value of the corresponding security. The effect is that to the extent the secured debt represents "negative equity" – meaning that in economic terms it is unsecured in any event in an insolvency – the deficit is treated as unsecured debt in the PIA. Accordingly, the Oireachtas was ensuring the preservation of the creditor's secured property interest while allowing a reduction to the asset's then economic value. This was the basis for the €100,084 reduction in the Defendant's secured debt which reduced the property's PIA Value to a figure slightly above its then market value.

c. These proceedings concern the third statutory protection for secured creditors. As has been noted, subsections (3) and (4) provide for "clawback" if the secured debt is reduced in a PIA (reflecting the secured asset's reduced value at the time) and the property is later sold or disposed of at a higher value during the specified period (which can be up to 20 years). Subsection (3) effectively requires that then, unless the secured creditor agrees otherwise (and there is no such agreement here), the PIA shall be subject to a condition that:

"subject to subsections (4) to (13), where the property the subject of the security is sold or otherwise disposed of <u>for an amount or at a value greater than</u> the value attributed to the security in accordance with s.105, the debtor shall pay to the secured creditor <u>an amount additional to the reduced principal sum calculated in accordance with subsection (4)</u> or such greater amount as is provided for under the terms of the Personal Insolvency Arrangement."(emphasis added)

d. Subsection (4) provides for the calculation of the "clawback":

"(4) Subject to subsections (5) to (13), the additional amount referred to in subsection (3) shall be the lesser of:

(a) … the difference between the value of the property on disposition and the value attributed to the security in accordance with section 105, and

(b) … the reduction in the principal sum due in respect of the secured debt under the (PIA) as referred to in subsection (3)(b)." (emphasis added)

e. Subsection (5) and (6) protect the debtor, stipulating that, when calculating the clawback, allowance should be made for improvements funded by the debtor which increased the secured asset's value, disregarding the increase in value attributable to the improvements and thus reducing the clawback liability.

f. Subsection (8) also protects the debtor, providing for the deduction of reasonable expenses and costs incurred in connection with the property's sale or other disposal from *"the value attributable to the property on such sale or disposal",* for the purposes of the clawback calculation.

g. Subsection (9) also protects the debtor, confirming that there will be no clawback liability if *"the value of the property on its sale or other disposal"* is less than the amount of the secured debt (including any additional amount secured by virtue of *subsection (10)*)".

h. Subsection (10) protects the secured creditor, effectively providing that the s.103 clawback figure *"shall stand secured in the same manner and with the same priority as the principal sum referred to in subsection (3)(b)".* Accordingly, if a clawback is payable, then the effective secured debt is the

aggregate of the clawback and the amount that the secured debt was written down to in the PIA.

i. Subsection (11) defines the clawback period - in this case, 20 years from the date the PIA took effect, the maximum period provided for.

j. Section 103 (13) (a) is a further creditor protection, unequivocally confirming that a s.103 (3*)* disposition by a debtor includes refinancing. A disposal includes the voluntary refinancing of the secured debt.

35. The Plaintiffs' strongest argument is the s.103(3) reference to the secured property being sold or otherwise disposed of *"for an amount or at a value greater than"* the PIA Value. They say that references to selling or disposing of the property *"for an amount"* or *"at a value"* must mean the transaction price (or terms, in the case of a refinancing or other disposition) and that it is the value ascribed to the Property by the transaction parties (rather than its objective value) which determines the value for the purposes of s.103. They also note that the effect of s.102(6)(g) is that, where the PIA provides for the reduction of the secured debt, any such reduction must be subject to a condition that, where the secured asset is subsequently sold for an amount greater than the PIA Value, the secured creditor's security will continue to cover such part of the difference between the PIA value *"and the amount for which the property is sold*" as is specified in the PIA.

36. I consider that the words of the provision, read in their statutory context are more consistent with the Defendant's interpretation. In considering s.103(3) in isolation, it stipulates that the clawback is payable where the security *"is sold or otherwise disposed of for an amount or at a value greater than"* the PIA value. The word *amount* naturally references the amount ascribed to an asset in a transaction, but the concept of *value* is more objective. In this case, the asset was *disposed of* (rather than being sold). It is straining language to regard a refinanced asset as being disposed of either for the amount or the value

of the monies advanced. I consider that in terms of the plain language of the subsection, it is the concept of value, rather than amount, which is relevant in the context of a refinancing and the reference to the amount for which the asset is disposed of is accordingly inapplicable. Furthermore, it seems to me that as a matter of plain English the concept of value refers to the value of the asset disposed of rather than the amount borrowed. Accordingly, the words of subsection (3) favour the Defendant's interpretation.

37. My conclusion is greatly reinforced by the terms of s.103(4). The Plaintiffs' submissions rightly acknowledged the interrelationship between subsections (3) and (4) and the need for them to be reconciled and read together but the Plaintiffs did not, in my view, sufficiently address s.103(4). I consider that the two subsections, read together, are consistent and complementary. However, in the event of any inconsistency, subsection (4) is the governing provision for present purposes because, while providing for the clawback provision, s.103(3) stipulates that s.103(4) governs the determination of any clawback figure. Subsection (3) states that

> *"the debtor shall pay to the secured creditor an amount additional ... calculated in accordance with subsection (4) or such greater amount as is provided for under the terms of the Personal Insolvency Arrangement".*

38. Section 103(4) then determines the formula for determining any such clawback exposure. Significantly, it does so by reference to *"the value of the property on disposition"* which must, in my view, be a reference to the property's objective or market value. As a matter of ordinary usage, I struggle to characterise the amount borrowed on a refinancing as the "*value of the property on disposition",* particularly as the Plaintiffs' loan application confirmed that its then value was €380,000. My conclusion as to subsection (4) impacts my conclusion in respect of subsection (3) (and vice versa) because the Oireachtas is unlikely to have intended the term *"value"* to have different meanings in the two interlocking

subsections. In isolation, I would still have inclined to the Defendant's interpretation of subsection (3). However, the position is even clearer with regard to subsection (4). When the two subsections. are coupled – as they must be – it is hard to see a basis for the Plaintiff's construction in the language of the section. The latter would require me to imply or insert words into s.103 without any basis to do so.

39. My conclusions at paras. 35 - 37 are arguably determinative, but in any event they are reinforced by an analysis of the statutory context, including the other subsections of s.103 which reference the Property's value. In particular:

a. Although relating to other shareholder protections, subsections (1) and (2) both refer to the value of secured assets in terms which clearly references their objective value.
b. Subsections (5) and (6) also support the Defendant's interpretation, reducing the clawback to reflect the extent to which any increase in the property's value was due to certain improvements by the debtor. Furthermore, as the Defendant observed, the Plaintiffs' interpretation could impact on the operability of subsections (5) and (6) - (the amount borrowed would not correlate to the value of the property).
c. Subsection (8)'s reference to deducting expenses from *"the value attributable to the property on such sale or disposal",* for the purposes of the subsection (4) clawback calculation also points to the secured asset's objective value.
d. Likewise, subsection (9)'s reference to *"the value of the property on its sale or other disposal"* points to the objective value of the asset.

Such references to *value* throughout s.103 sit more comfortably with the Defendant's interpretation of subsections (3) and (4). It is unlikely that the Oireachtas would have

envisaged recourse to the asset's objective value for so many subsections of s.103 while adopting a different approach for subsections (3) and (4).

40. I reach a similar conclusion having regard to the provisions of the 2012 Act as a whole, including the Long Title and the entirety of Part 3. In particular, while stipulating how the secured property's value should be determined *"for the purposes of"* Chapter 4 of the 2012 Act - which includes ss.103 –105 seems to repeatedly reference the concept of an objective market value of the secured asset:

a. Subsections (1) and (2) stipulate that its value *"shall be the market value of the security",* an objective standard (albeit the subsection envisages that the parties should agree the figure if possible).

b. Subsections (3) and (4) provide for expert determination in default of agreement of the value of the security, again an objective concept.

c. Subsection (5) specifies considerations to be taken into account in valuing the property.

d. Subsection (6) makes clear that the "market value" of a secured property in that section **"***means the price which that property might reasonably be expected to fetch on a sale in the open market*".

e. The submissions appeared to assume that s.105 applied to the original PIA but not to a refinancing but there was little, if any, discussion of the point. The use of the expression *"for this part of the Act"* in s.105 might suggest that, on its face, the provision includes a disposition or refinancing subsequent to the PIA. However, the reference to the PIP's role in agreeing the Property's value might suggest that s.105 is limited to PIA arrangements (since the PIP's role would typically conclude when the PIA ends). Even if the provision is not directly

applicable to a refinancing after the conclusion of a PIA, its wording supports the Defendant's construction of s.103 to the extent that it shows that, at least in the context of s.105, that the Oireachtas intended *"value"* to mean *"market value"* and it specified in subsection (5) considerations to be taken into account in reckoning the market value. Such a policy approach is logical and in accordance with my understanding of normal commercial usage. It is also significant that the provision is clear as to what value means in the context of a secured asset. The provision was effectively confirming the approach which would likely have been secured at common law in any event, rather than changing the concept of value and I see nothing in the 2012 Act to suggest that the Oireachtas contemplated the term "value" having a different meaning in s.103.

41. I also note that the word "value" is used throughout the 2012 Act, no less than 75 times and it seems to me that when it is employed in relevant contexts it seems to generally refer to the objective or market value rather than prices paid. For the foregoing reasons, I am not convinced, either as a matter of ordinary usage or in the context of the 2012 Act, that the term *"value"* in s.103 equates to the price paid on a sale, let alone the amount borrowed on a refinancing. In addition to the legislative context which I have discussed, difficulties with the Plaintiffs' interpretation include the following:

a. I accept that parties to loans might well describe such transactions by reference to the amount advanced. A loan might well be described as a €1million transaction, that being the figure borrowed. However, such descriptions are clearly referrable to the value *of the loan*, rather than that *of the property*. The latter would, almost always, be a different, and larger, figure for obvious reasons.

b. The Plaintiff's position suggests that their property was disposed of *"for"* €250,000 or that the asset's value for the purposes of s.103 was €250,000 notwithstanding that, according to the Plaintiffs' own loan application, their property was actually worth €380,000. Such an interpretation would ignore the reality that, by definition, the amount borrowed on security is almost invariably less than the security's value, the value being the value of a permanent disposition, a sale rather than as security for a loan. Loans are fundamentally different from sales. In the former, the consideration is the temporary use of the principal, a radically different commercial and legal concept from the permanent disposition which arises on a sale. This makes it difficult to see how the Plaintiffs' construction reconciles with the language of the statute.

c. As a matter of ordinary linguistic usage, and based on normal commercial practice, the concept of *"value"* is distinct from *"price"* or *"consideration"*. They may correspond in practice but will not necessarily do so. For example, in the absence of a mythical economic Elysium offering perfect market equilibrium, every sale (particularly if it is other than an open market, arms length transaction) is potentially a good or bad bargain. In such circumstances, the asset's value may well differ from the price or consideration negotiated by parties to a particular transaction. A motorist claiming under an insurance policy may find that, according to the insurer, a new car's value differs considerably from its purchase price. Accordingly, even for sales, there are difficulties with equating price and value. No less an authority than Lord Darlington (in Oscar Wilde's Lady Windermere's Fan) distinguished between the two as long ago as 1892. They are different concepts which may, and do, diverge in practice (as in the case of sales other than on an arm's length, open market, basis). A

recognition of the potential divergence between an asset's value and the price paid for it appears in s.2(4) of the 2012 Act which defines sales at an undervalue. Essentially, debtors sell at an undervalue if, inter alia, the value they provide is significantly greater than the value of the consideration (generally the price) provided by the counterparty. Section 129(2)(c) makes it an offence for the debtor to sell at an undervalue. More importantly, there is no foundation in the statutory wording to suggest a legislative intent that, if a property is refinanced or otherwise disposed of, it is refinanced *"for an amount or at a value"* which represents the sum borrowed.

d. It is an even greater stretch to describe the property value as the amount borrowed in a refinancing context. The figure advanced by a prudent lender on the strength of security generally represents a proportion of its value, leaving the lender a buffer to deal with market vicissitudes. The Central Bank of Ireland requires regulated lenders to incorporate *"loan to value"* ratios in lending decisions. Even unregulated lenders consider an asset's market value when agreeing to lend.

42. The Plaintiffs emphasised the legislative goal, contending that the Oireachtas *"could not have intended"* the property value to be the basis for the clawback calculation on a refinancing. However, it is difficult to reconcile this argument with *Heather Hill*. Firstly, as I have outlined, the language of s.103, particularly in s.103(4), does not support the contention. Secondly, the Plaintiffs' characterisation of the legislative purpose of the 2012 Act is incomplete. I agree that the legislation was intended to offer distressed borrowers an alternative to bankruptcy and repossession. In particular, PIAs offer individuals a chance to rebuild their lives by restructuring their debts while remaining in the family home. However, that is not the full story. The 2012 Act also has regard to the rights of creditors, particularly

secured creditors. This balance was discussed by McDonald J. in *Re Fay (A Debtor)* [2020] IEHC 163 and by Baker J. in the Supreme Court in *Re O'Connor (A Debtor)* [2023] IESC 31. To balance competing interests, the 2012 Act mandates protections for secured creditors in any PIA. This balance is the core objective. One such protection is the s.103(2) prohibition on writing down the secured debt below the value of the security. McDonald J. described this as *"an extremely important protection for secured creditors",* which was undoubtedly informed by respect for the secured creditors' property rights (*Re Parkin* [2019] IEHC 751). The same can be said of s.103(3) and s.103(4).

43. Creditors are impacted by PIAs as the 2012 Act – and Part 3 in particular –strikes a new balance. In particular, s.103 was evidently intended to protect secured creditors subjected – as in this case – to a write down of the debt otherwise lawfully due to them. As the Plaintiffs put it, the rationale for s.103 is that it is only fair that a creditor precluded from realising their security and forced to accept a write-down and a change to the mortgage terms should have first recourse to any later uplift in its value. The provision protects such secured creditors and prevents debtors who benefitted from a write down based on a fall in the secured asset's value, then benefitting from a recovery in its value.

44. The Plaintiffs' repeated reference to the 2012 Act's objects ignore the evident statutory intention to be even-handed, by ensuring that the secured creditor (who had suffered the write down), rather than the borrower (who had not), would benefit from any asset value uplift in the event of a sale or disposition within the defined period. Accordingly, I reject the characterisation of the objectives of the 2012 Act solely by reference to borrowers. The Oireachtas engaged in a balancing exercise, and it is misleading to assess the statutory purpose by reference to only one side of the scales.

45. The Defendant's interpretation does not create an absurdity. The Defendant might say that such an outcome would be a fair result in this case for 100,084 reasons. Furthermore,

the borrowers are under no legal compulsion to refinance. If they hold onto the property for the 20 years specified in the PIA which their PIP proposed, they can sell or refinance without clawback. By choosing to refinance, they voluntarily crystallise the situation, changing the PIA arrangements. They must bear the consequences of their choice.

46. I see no rationale for dispensing with the clawback obligation simply by reference to the figure which the borrower might arbitrarily refinance. Such an approach would be at odds with other references to "value" throughout the 2012 Act. For example, the logic of the provisions for deduction of the costs of sale and allowance for the value contributed by the debtor (by way of improvements), align more logically with the intention that the creditor should otherwise retain the benefit of the uplift in the value of the property.

47. I consider that it unlikely that the Oireachtas, or the parties to the particular PIA, or the Courts which approved it would have intended to allow the debtor to circumvent a protection which was specifically intended to encompass refinancing and which, according to the PIA, was intended to endure for the maximum time permitted by the 2012 Act - 20 years. The Plaintiff's interpretation would drastically reduce this period in this case.

48. The Plaintiffs argued that the Defendant's interpretation could not be correct because it would be unfair to require them to pay an €85,000 clawback, although no such uplift in value would actually be achieved or realised by them (they only propose to borrow €250,000 – the figure to which their mortgage was written down – rather than the redemption value (€320,000) proposed by the Defendant). They asserted that the clawback obligation would return them to insolvency, contrary to the statutory objective. However, this submission would effectively allow a debtor to determine the clawback figure on the basis of the refinancing amount. The amount would not be required to be related to the property value, which would seem contrary to s.103(4).

49. Similarly, if the clawback calculation on a refinancing was based solely on the amount advanced by the new lender, this could be manipulated. A debtor could refinance to repay the principal due to the secured creditor and then sell for full market value, retaining the benefit of the uplift which should have been paid to the secured creditor under s.103. This undermines the creditor's statutory protection.

50. The legislature dealt not only with the possibility of a sale but extended the protection to any *"other disposition"* and, to be even more explicit, made clear that this included *"refinancing"*. Such explicit statutory provisions demonstrate a clear legislative intent to apply the clawback for the period specified in the 2012 Act and the PIA in the event of a sale, refinancing or other disposition and to protect the mortgagee's rights. The Plaintiff's proposed interpretation is inconsistent with that manifest statutory objective.

51. I disagree with the Plaintiffs submission that they should not have to pay a large clawback because they had not realised or obtained any enhanced value from the property. In one sense, increases in an asset's value always remain notional until its disposal. Mortgagors who remain in their existing home without changing their mortgage terms and who meet their mortgage payments are in the same position for practical purposes, irrespective of intervening fluctuations in the property markets. However, the Plaintiffs' submission ignores the impact of the refinancing on the Defendant. The Defendant's rights under the mortgage which the Plaintiffs freely entered into were significantly varied by the PIA (due to the €100,084 write down, the interest only period, the extended mortgage term and the new interest rate provisions). The Defendant is bound by those provisions although they differ from those originally negotiated by the mortgage parties. It remains bound even in the event of disadvantageous market developments from its perspective.

52. While the 2012 Act envisaged that the rights of secured creditors could be impacted by a PIA, it struck a balance. The Plaintiffs' interpretation would mean that the borrowers

retained its benefits while terminating their ongoing obligations arising from the terms of s. 103 and the PIA, effectively circumventing their clawback obligation. It would be a one sided bargain rather than the balance referenced by McDonald and Baker JJ. Without the clawback, even though the increased value might only be realised in the event of a sale (or a larger loan), such a sale or refinancing would render the Plaintiffs the beneficiary of the unrealised increased value, even though they also benefitted from its write down. They – rather than the Defendant – would reap the benefit of the additional equity due to price rises and a disposal within the clawback period, contrary to the evident intention of s.103. I see no basis to conclude that the Oireachtas would have regarded this as an equitable outcome – the wording s.103 seems directed to the opposite effect.

53. Although there was no suggestion that this was the motivation on this occasion, it follows from the Plaintiffs' interpretation that, if market values increased, the borrower could avoid the statutorily mandated clawback by borrowing a small amount so as to extinguish the secured creditor's interest without giving them any credit for the increased equity. This would undermine the object of the provision. The fact that s.103 referred to *"or other disposition"* and the specific provision for refinancing in s.103(13) demonstrates a statutory objective to ensure that the clawback entitlement crystallised in the event of any disposition by the borrower - whether by sale, refinancing or otherwise.

54. If any absurdity was to arise it would be as a result of the Plaintiffs' interpretation because the statutory intention of protecting secured creditors could be undermined by the simple expedient of a refinancing. The absence of a statutory valuation procedure (if s.105 is inapplicable) is not determinative. As the Defendant points out, any residential borrower refinancing with a reputable/regulated mortgage lender would be obliged to obtain an independent valuation for the secured property to satisfy the new lender of the loan to value ratio. Indeed, the Plaintiffs had ascribed such a valuation on this occasion, confirming a

valuation for the purpose of the refinancing of €380,000.00. The Plaintiffs' submission would allow a debtor to determine the value of the clawback on the basis of the amount of refinancing sought. This amount would not be required to be related to the value of the property in any way, which would clearly be contrary to s.103(4).

55. I am also struck by the fact that an unusual consequence of the Plaintiff's interpretation would be to render the Defendant's legal position liable to be altered as a result of contractual arrangements to which it was not party and in respect of which it had no say. It is axiomatic that contracts govern the relationship of the parties to such contracts in accordance with their terms. It would be a surprising result – and contrary to the doctrine of privity of contract – if the legal relationships and rights and obligations between the Plaintiff and the Defendant arising under the original mortgage and the subsequent PIA (as amended) and the associated legislation could effectively be unilaterally altered as a result of the Plaintiff entering into a refinancing arrangement with a third party, borrowing a modest amount to eliminate a clawback obligation which, in accordance with the legislation, had been intended to apply for a much longer period.

56. The PIA negatively impacts secured creditors' rights by reducing the secured debt. It is therefore understandable that the Oireachtas provided for the protection for such secured creditors, preventing the Plaintiffs from simultaneously benefitting both the debt write down due to the reduction of value of the Property, and from any subsequent increase in value of the Property during the specified period. The PIA gave the Plaintiffs significant benefits as against the Defendant and other creditors. The reduction in the principal amount due was permitted due to the fall in the secured property's value. The protection afforded to the Defendant under s.103(3) and s.103(4) is that the Plaintiffs cannot also benefit from any uplift in the Property's value for the specified period.

57. I am unswayed by the submission that the Defendant's interpretation would make it impractical for any debtor to refinance. It is not clear to me that this would be the case in all circumstances. It may depend on whether the asset's value had risen or fallen and by how much and on other relevant facts such as interest rates and other circumstances. Expert evidence would be required to establish such a proposition. There was no evidence as to how much the Plaintiffs could borrow. Indeed, if the Plaintiffs' valuation of €380,000 was correct, then, assuming a 90% loan to value ratio for purely illustrative purposes, it is not obvious that the Plaintiffs would not have been able to raise the redemption value sought by the Defendant nor is there any evidence that the Plaintiffs have unsuccessfully attempted to do so. Admittedly, refinancing appears more manageable in this case because of the relative modesty of the Defendant's redemption figure as compared to the value proposed by the Plaintiffs. More importantly, even if I agreed that the provision would mean that refinancing would become unfeasible, restricting debtors' options post PIA such an outcome would not of itself alter my conclusion as to the meaning and effect of s.103. Such an outcome could only be a basis to alter the interpretation or application of a provision if (to paraphrase Murray J. in *Heather Hill*) it was possible to identify from the statute why the Oireachtas could not have intended such an outcome. I can see nothing in the words of the 2012 Act to support the Plaintiffs' contention other than the general statutory concern to allow borrowers to restructure their debts and to facilitate their remaining in the family home. However, that objective was consistently balanced by another policy consideration which the Oireachtas may well have considered at least equally legitimate and one with particular constitutional overtones – the need to protect the property rights of secured creditors.

58. Another way of looking at this is to note that there is no basis in the words of the 2012 Act to assume that the Oireachtas would have preferred to prioritise the debtor's ability to refinance following a PIA (notwithstanding that the debtor had benefitted from the PIA,

including from a write down of the secured debt) over and above the protection afforded to a secured creditor on whom a significant write down had been imposed. There is no indication in the 2012 Act that the Oireachtas would have been disposed to prioritise the former goal above the latter.

59. It is not the Court’s function to interpret legislation which is clear in its terms and effect to prefer one of a number of competing possible policy objectives unless there is an objective basis for deciding as between them. In my view, any such objective basis would favour the Defendant rather than the Plaintiffs in the context of s.103 (3) and s.103(4). Accordingly, even leaving aside the doubts as to the factual premise of the Plaintiffs’ submission (that the Defendant’s interpretation would expose previously insolvent borrowers to a liability even though the transaction triggering the clawback may not generate the means to pay the clawback), such a situation would not, in isolation, afford a basis to ignore the statute. Furthermore, the submission ignores the fact that, although the Plaintiffs may wish to refinance, they are not obliged to do so.

60. The Plaintiffs placed great emphasis on the absence of a statutory mechanism (such as s.105) for determining a property’s value for the purposes of s,103. In my view, even if s.105 is not applicable to s.103, that would simply reflect the need to resolve the value of a secured asset without delay, to avoid an obstacle to progressing the PIA. The concept of the *value* of a mortgaged property does not seem to me to be so arcane as to require a statutory mechanism to give effect to s. 103. If the parties were unable to agree the value of the asset, then the issue could be quickly and simply resolved by litigation in the normal way. The absence of a pricing mechanism does not afford a basis to ignore the plain language of s.103 and the ascertainment of the objective value of the secured property is unlikely to be a major obstacle in practice. As the Defendant has noted, the Central Bank of Ireland controls the approach adopted by regulated finance service providers to the valuation of residential property by virtue of the

Regulation 8 of S.I. No.546/2022 *Central Bank (Supervision and Enforcement) Act 2013 (s.48(1)) (Housing Loan Requirements) Regulations 2022*. While it was not suggested that those regulations directly concern the interpretation of s.103 they do demonstrate the feasibility of the parties (or, if necessary, the court) determining the value of the secured asset for the purposes of s.103 even without a specific statutory mechanism and there are numerous other examples of legislation tacitly leaving issues such as determinations of reasonable prices etc for the Courts to determine in the particular circumstances in the absence of agreement. There are many statutory examples where legislation referred to issues such as the value of an asset without imposing a mechanism for determination of same. In particular, s.547 of the Taxes Consolidation Act 1997 provides that the acquisition of an asset shall be deemed for the purposes of the Capital Gains Tax Acts to be for a consideration equal to the market value (as opposed to the price actually paid) in certain circumstances one being where the transaction was made otherwise at arm's length. While not directly applicable, the provision does recognise that the price paid for an asset is not necessarily its value. The Defendant also relied on s.548 of the same Act which, again for the purposes of the Capital Gains Tax Acts, defined "market value" as the price which those assets might reasonably be expected to fetch on a sale in the open market.

61. For completeness, while respectfully agreeing with Baker J.'s judgment in *JD*, I do not consider that her passing reference to s.103(3) is relevant to the current issues. Her comments were obiter, and she was not required or concerned to undertake a forensic analysis of the provision but rather to provide a high-level picture of the statutory context before dealing with the rather different issues arising in that case.

62. For the reasons outlined above, while my conclusion as to the clear meaning of the legislation means that I do not need to resolve any ambiguity, I would have reached the same conclusion if I had considered the legislation ambiguous, rendering it unnecessary to invoke other tools of statutory construction.

63. I have referred to the Plaintiffs' submission that it would be anomalous for clawback to arise on refinancing in circumstances in which debtors could redeem their mortgage without clawback during the clawback period by selling at less than the PIA value. This argument is based on the premise that no clawback would arise on a property's sale unless the sale price was greater than the PIA value. However, I am not convinced of the premise on which this argument is based. While I do not need to conclusively determine that point, to the extent that it is relevant to this case, I would note that while a property's value may be the same as its sale price in the context of an arm's length open market sale, in the event of any divergence it would be the property's value at the time of sale, rather than the price paid on the sale, which would determine the value for clawback purposes. In this regard I would also note the obligations placed on debtors in such contexts pursuant to s.129 which seems to me to counter both parties' submissions as to the possibility of the debtor selling at a material undervalue. Such a transaction would be unlawful.

64. I am not convinced by the submission that the reference in s.102(6)(g) to *"the amount for which the property is sold"* means that the clawback must be determined by the value of a transaction rather than the property's market value". Section 103 is the operative provision for present purposes. However, as far as a sale of the property is concerned, the Oireachtas would not have expected any material divergence between the value of a property and its sale price by virtue of the responsibility placed upon the debtor by s.129 which effectively made it unlawful to sell such assets at an undervalue. In any event, s.103 takes priority over s.102 and s.102 offers no guidance as to the meaning of the "transaction value" in the context of refinancing nor indeed does that expression appear in the legislation.

65. The Plaintiffs argued that if the Defendant's interpretation was correct then the Oireachtas would and should have used the term "market value" in relation to property the subject of the disposition in subsection. (3) or subsection (4). In fact, the term "value" is used repeatedly throughout Part 3 of the 2012 Act. I have examined the repeated occurrence of the

term and in my view, the consistent usage of the term “value” is generally intended to convey the objective or market value. I expect that the Oireachtas considered that the term was clear and that it would have been superfluous and unnecessary to use the term “market value” rather than “value”. I agree with that assessment.

Conclusion

66. The Plaintiffs are not entitled to the reliefs sought in the Special Summons. The matter will be listed on 29th November 2024 to deal with the question of costs and any ancillary matters.