Neutral Citation [2017] IEHC 20

THE HIGH COURT

[H:IS:HC: 2016: 000019]

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

AND IN THE MATTER OF MICHAEL HICKEY OF KILMACOMMA HILL, CLONMEL, WATERFORD (THE DEBTOR)

AMD IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A (9) OF THE PERSONAL INSOLVENCY ACT 2012 AS AMENDED

JUDGMENT of Ms. Justice Baker delivered on the 18th day of January, 2017.

1. One matter falls for determination in this judgment, the question of the time limit for the bringing of an application pursuant to s. 115A(9) of the Personal Insolvency Acts 2012 – 2015 ("the Acts").

2. Section 115A, inserted by the amending legislation of 2015, provides for a court review and approval of the coming into effect of a proposed Personal Insolvency Arrangement ("PIA") rejected by creditors in certain circumstances, with a view to enabling the debtor not to dispose of an interest in, or cease to occupy, all or part of his or her principal private residence.

3. Michael Hickey ("the debtor") made a proposal for a PIA under the Acts and a meeting of creditors was held in accordance with the provisions of the Act on 9th September, 2016. He did not obtain the requisite support for the approval of the PIA, albeit Permanent TSB, the mortgagee which held security over his principal private residence, voted for the arrangement. The debtor then sought to invoke the provisions of s. 115A(9) and the sole question for determination in this case is whether the debtor was in time in lodging the application. An objection by KBC was lodged in respect of the application pursuant to s. 115A (3) of the Act on 5th October, 2016 and the question of time was raised as a procedural objection.

4. Certain other matters were raised by way of objection, but it has been agreed that I would determine the procedural objection by way of a preliminary issue.

5. Section 115A(2) of the Act makes provision for the time limit for the bringing of an application to the Court under s. 115A(9):

> "(2) An application under this section shall be made not later than 14 days after the creditors' meeting referred to in subsection (16) (a) or, as the case may be, receipt by the personal insolvency practitioner of the notice of the creditor concerned under section 111A (6) (inserted by section 17 of the Personal Insolvency (Amendment) Act 2015), shall be on notice to the Insolvency Service, each creditor concerned and the debtor. …"

Section 111A does not apply as that section relates only to the approval of a proposed PIA when there is only one creditor.

6. Order 76(A) of the Rules of the Superior Courts provides that an application under s. 115A (9) shall be brought by notice of motion. The motion dated 1st September, 2016 was lodged by e-mail on Friday, 23rd September, 2016, and stamped and lodged in the Central Office of the High Court on 28th September, 2016. For the purposes of the issue to be determined in this application no argument is made that the lodging of the notice of motion by e-mail is sufficient lodgement by "electronic means" in accordance with O. 76(a), r. 4, and it is accepted that neither the personal insolvency practitioner ("PIP") or the solicitor instructed to act in the prosecution of the application is an authorised "electronic user" within the meaning of r. 4(1) of that Order. I do not therefore intend addressing that issue further.

7. The meeting of creditors was held on 9th September, 2016 and if that day is to be included in the 14 day period prescribed by s. 115A(2) the time limit expired on 22nd September, 2016, a Thursday. If the day of the creditors' meeting is not to be reckoned time expired on 23rd September, 2016, a Friday.

Section 18(h) of the Interpretation Act 2005 ("The Act of 2005")

8. Section 18(h) of the Act of 2005 provides as follows:—

> "(h) Periods of time. Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in the period;"

9. That section is not materially different from s. 11 of the Interpretation Act, 1937, and the statutory provisions have been considered in a number of cases to which I now turn.

10. In *McGuinness v. Armstrong Patents Limited* [1980] I.R. 289 McMahon J. was considering the meaning of the provisions of s. 11(2)(b) of the Statute of Limitations 1957 which provided the then relevant period for the bringing of an proceedings for damages for personal injuries. The statutory provision was expressed in the negative and provided that an action shall:—

> "…not be brought after the expiration of three years from the date on which the cause of action accrued."

11. The plenary summons would have been issued within time if the day on which the cause of action accrued was excluded from the computation of the three year period, but McMahon J. held that the date of accrual did come to be included within the statutory time limit in the light of the Act of 1937.

12. That judgment is not dispositive of the question before me as the word "after" appeared in the Statute of Limitations Act and is not a word used in s. 11(2) (b) of the Act of 1957 as indicating or defining a time period which rather is to be seen as identified by the word "from".

13. The next case in sequence is the judgment of Ellis J. in *The State (Hamad) v. North Eastern Health Board* [1982] 1 JIC 2001 which called for the interpretation of a provision of the Health (Removal of Officers and Servants) Regulations, 1971 by which was provided for the consideration by the Chief Executive of representations made "before the expiration of seven days after the giving of such notice".

14. Ellis J. distinguished the judgement of McMahon J. in *McGuinness v. Armstrong Patents*, and said that the period of time specified in the Interpretation Act is distinguishable in a statute where

> "… the period of time is expressed to begin or be reckoned from particular day but is a period of time expressed to begin on or be reckoned from the happening of an event."

15. Ellis J. considered that the provisions of s. 11(h) of the Act of 1937 offered no assistance to construe or reckon a period of time required to be reckoned from the happening of an event, and that the departure from the language of the Interpretation Act, 1937 was such "as to indicate an intention by the Legislature that the day in which the notice or proposal of intention to remove the Prosecutor was given or served was not deemed to be included in the 7 day period as expressed and defined" in the relevant section of the statutory regime with which he was dealing.

16. Counsel for the debtor relies on the distinction drawn by Ellis J. between the reckoning of time "from a particular day" or "from the happening of an event".

17. Counsel for the objecting creditor argues that the distinction between "day" and "event" made by Ellis J. has not found support in later authorities, and that insofar as it might lead to a conclusion which differs from these later authorities it is not to be followed.

18. I turn now to consider those later authorities but note by way of a preliminary observation that the judgment of Ellis J. was not referred to in any of those later cases. Two judgments of Hedigan J. are of note. In the first of these, *Golden v. Kerry Co. Co.* [2011] IEHC 324 Hedigan J. was considering the provisions of s. 17(1) of the Planning and Development Regulations 2001, as amended, which provide for the publication and direction of notices "within the period of 2 weeks before the making of a planning application". Hedigan J. was asked to consider whether the period of two weeks did include the date the notice was published and the date the application for planning permission was made and held that the date of the planning application was to be included in the calculation of the two week period, and came to that conclusion based on s. 18(h) of the Act of 2005. The statutory provision construed by Hedigan J. did not make any reference to "the date of the making of the application", and contained the more general phrase "before the making of the application", which would suggest that he did not consider that the event, the making of the application, could be seen as different from the date of that event.

19. Hedigan J. also gave judgment in *Brown v. Kerry Co. Co.* [209] IEHC 552, [2011] 3 I.R. 514. That case concerned the time limit provided by s. 261(a) of the Planning and Development Act 2000 by which a planning authority could impose conditions on the operation of quarry "not later than 2 years from the registration of a quarry" under the statutory scheme created by that Act.

20. Hedigan J. considered that the 2 year time limit prescribed by s. 261(6)(a) did include the date of the registration of the quarry and again drew from s. 18(h) of the Act of 2005 as an interpretative aid. Again no distinction was drawn between the registration of a quarry (an event) and the date of the registration of the quarry (a day or date).

21. That the interpretation of a time limit as mandated by s.18 (h) is in accordance with the plain use of language is evident from the decision of the Supreme Court in *Sulaimon v. Minister for Justice Equality & Law Reform* [2012] IESC 63. There the Supreme Court considered what it means to "reckon" a period of time from a particular day. In making the reckoning Hardiman J. calculated time by including in his calculation the date of birth of the infant who had sought an order that he was entitled to a certificate of Irish nationality. At p. 16 of the judgment Hardiman J. expressed the view that the statutory provisions coincide with the "ordinary method of reckoning periods of time to and from a particular date, or a date which is ascertainable". Hardiman J. made no reference to the judgment of Ellis J. in The *State (Hamad) v. North Eastern Health Board*, but the judgment of the Supreme Court does not adopt an analysis which recognises a distinction between a date and an event, the premise on which the judgment of Ellis J. was grounded.

22. Hogan J. in *Re Belohm & Anor. & the Companies (Amendment) Act 1990* [2013] IEHC 157 at para. 43 interpreted the provisions of s. 3(6) of the Act of 1990 by reference to the interpretative tool of s. 18(h) and held that time ran from the day a receiver was appointed to the company, and that that particular day was "included in the computation of the three day period" within which an application to appoint an examiner was to be made.

23. A recent consideration of the question of time is contained in the judgment of Keane J. in *McMahon v. Larkin & Anor.* [2016] IEHC 483 who held that the 12 month period prescribed under s.149 of the Companies Act, 1990 was to be reckoned to include the day on which the company was wound up.

24. Herbert J. in *Boyle v. Higgins* [2013] IEHC 31 where he was considering the time limits under s. 150 of the Companies Act, 1990 which provided the time limit for the bringing of an application for a restriction under that Act not earlier than 3 months nor later than 5 months "after the date" on which a report to the ODCE had been delivered. He regarded the word "after" as different from the words denoting time in s. 18(h) of the Act of 2005, and held that when time was to run "after a particular date" no statutory interpretative tool was to be found in that subsection which provided such only when time was to be reckoned "from" a particular date. Herbert J. considered that the relevant rule was found at common law and he was therefore persuaded that the specified day was excluded from the reckoning of time.

25. Herbert J. relied on a judgment of the Court of Appeal for England and Wales in *Zoan v. Rouamba* 1 W.L.R. 1509 where the Court was dealing with an approach identified as long in existence in the common law, that while legislative provisions dealt with periods of time "beginning with" or "from" a specified day, that day was to be included, the common law held that where an act is to be done days months or years "from or after a specified date" that the period commenced on the day after such specified day. Chadwicke L.J. relied on the judgment of Lord Goddard in *Stewart v. Chapman* [1951] 2 K.B. 792 that "whatever the expression used" the date from which the period of time was to be reckoned was to be excluded and the criminal statute which required the service of a summons "within 14 days of the commission of the offence".

26. The Court of Appeal for England and Wales considered that there was "a real difference between a direction that a period of time is to begin with a specified date and a direction that a period is to be reckoned from that date".

27. The opposite proposition must be the case in Irish law as s. 18(h) is clear that a reckoning either beginning with or reckoned from a particular date was to include that day. The judgment of the court in *Zoan v. Rouamba* is not an authority by which I am persuaded. Accordingly, the judgment of Herbert J. does not offer any interpretative assistance in the present case, and I express no further view on it. However it is to be noted that Herbert J. did not base his reasoning on any distinction between an event and a date as was found to be relevant by Ellis J. in *The State (Hamad) v. North Eastern Health Board*.

Discussion

28. The purpose of the interpretative tool contained in s. 18 of the Interpretation Act, 2005 is to create uniformity and clarity in the interpretation of statutes. The long title suggests that its purpose was to guide in the "interpretation and application" of legislation and statutory instruments. Section 13 requires that the Act be "judicially noticed". I consider that the Oireachtas intended that the interpretative tools relating to the construction of periods of time were intended to govern the interpretation of any and all statutory expressions that related to or provided for the calculation of time. It is not therefore the case that in order for s. 18(h) to govern the interpretation of a time phrase in an Act that the expression "begin on", "be reckoned from" or "to end on", "be reckoned to" be the only time clauses governed by the legislation. It would be unsatisfactory if a materially different consequence arose from the use of phrases other than those expressly identified in s. 18(h), and the Act would have failed to perform its objective of providing a sufficient degree of certainty and clarity in the interpretation of statutory provisions. It is of course central to the operation of a statutory time limit that the calculation of that time limit is clear and certain and I do not consider that the Oireachtas intended to limit the scope of time related prepositions to those expressly identified in s. 18(h). This means that prepositions such as "from", "since", "beginning on", "before" etc. would all be read in a manner consistent with the interpretation created by the Act.

29. Fennelly J. recognised the importance of consistency in the interpretation of different time phrases within a particular statute in *Walsh v. An Garda Síochána Complaints Board* [2010] 1 I.R. 514 where at para. 16 he said "it makes no sense to interpret the two provisions so as to contradict each other." He made this observation in the context of the question before him whether the Oireachtas intended to produce a different result in regard to two different time limits. Fennelly J. also describes s. 18(h) as a "considered legislative choice", and also noted the approach in common parlance to the question of time limits and gave the example of an anniversary date as being one which is commonly considered to happen within the year or relevant time frame.

30. The debtor argues that the personal insolvency legislation identifies 17 different time limits in various subsections and that the only subsections that use the word "after" are s. 119A and 115A, all of the other time limits using an expression which counsel says is more readily consistent with the language of s. 18(h), the word "within".

31. It is argued in those circumstances that this different use within the same statute was intentional and rational primarily because in practice a meeting of creditors will often be lengthy and finish well outside normal business hours. I do not consider that this approach is consisted with the decision of Fennelly J. in *Walsh v. An Garda Síochána Complaints Board*, which is authoritative on the matter.

32. It is argued also that to reckon the day of the meeting of creditors within the time limit in the Act would fail to recognise the practical factual context in which a meeting of creditors is conducted. I consider that this argument fails to have regard to the requirement of legal certainty in statutory time limits, the precise mischief which was intended to be dealt with by the Interpretation Act, 2005, and earlier enactments. It could not be said that the reckoning of a time period would depend on the time of day when an event happened or concluded.

Conclusion

33. I conclude that the debtor was out of time for the lodging of an application by way of appeal under s. 115A (9) of the Act of 2012. There was no argument advanced that I have a power to enlarge the time for the making of appeal and counsel for the debtor accepts that the law has been authoritatively decided by the Court of Appeal in *Law Society of Ireland v. Tobin & Anor.* [2016] IECA 26 and that as Finlay Geoghegan J. said giving the judgment of the Court in reference to statutory time limits:—

> "Such statutory provisions are true limitation sections in that they expressly or clearly and unambiguously preclude the bringing of an action after the specified period."

34. The statutory time limit is strict. I consider therefore that the application must fail.