

## MIDLAND CIRCUIT COUNTY OF WESTMEATH

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

## AND IN THE MATTER OF SIDDHARTHA VARMA OF 4 THE DRIVE, LAKEPOINT, MULLINGAR, WESTMEATH ("THE DEBTOR")

## AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115A(9) OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015

**JUDGMENT of Ms. Justice Baker delivered on the 6th day of April, 2017.**

1. This judgment is given in an appeal by Siddhartha Varma ("the debtor") from an order of the specialist judge of the Circuit Court, Judge Lambe, made on 2nd February, 2017, by which she extended time for Ulster Bank Ireland DAC ("the objecting creditor") to lodge a notice of objection to the coming into effect of a proposed Personal Insolvency Arrangement ("PIA").

2. The debtor made a proposal for a PIA which was rejected at a meeting of creditors on 4th January, 2017. On that date, Mr. Colm Arthur, the Personal Insolvency Practitioner ("the PIP") issued a notice of motion pursuant to s. 115A(9) of the Personal Insolvency Acts 2012 – 2015 ("the Act"), that the court would approve the coming into effect of a PIA notwithstanding the rejection of the arrangement at the statutory meeting of creditors.

3. The legal questions arising for determination are as follows:

(a) Whether the time limit provided in the statute for the lodging of a notice of objection is one that is capable of being extended.

(b) Whether the special judge of the Circuit Court has jurisdiction to extend the time.

4. Whether the specialist judge was correct in the present case in making the decision to extend time also falls for consideration, as do the matters required to be considered in the exercise of such discretion, should a discretion exist.

**Time limits under the Act**

5. Section 115A provides for the first time a mechanism by which a PIP may seek approval of the court of a PIA notwithstanding its rejection at a statutory meeting of creditors. The power is far reaching, and involves the court making an order by which the contractual arrangements between a debtor and creditor may be varied, and as a result of which the variation is binding on all creditors.

6. The procedural rules governing an application under s. 115A are set out in the section and in O. 73 of the Circuit Court Rules (S.I. No. 317 of 2013)

7. Order 73, r. 29A(1) provides that application under s. 115A is to be brought not later than fourteen days after the meeting of creditors by notice of motion on notice to each creditor concerned. The time limit is mandatory and no provision exists for the extension of time: *Re Hickey & Personal Insolvency Acts* [2017] IEHC 20.

8. The process of application to the court under s. 115A having been commenced by the debtor's notice of motion, s. 115A(3) provides for service of the notice of motion on "all creditors concerned" and for the service of a notice making provision for opposition by creditors to the application:

"(3) A notice to a creditor under subsection (2) shall be accompanied by a notice indicating that he or she may, within 14 days of the date of the sending of the notice, lodge a notice with the appropriate court, setting out whether or not the creditor objects to the application, and the creditor's reasons for this."

9. The form of a notice of objection is provided in Form 52D of the Schedule of Forms in the Circuit Court Rules, entitled "notice of objection", and is required to specify the reason for the objection by the creditor to the application.

10. A debtor who lodges a notice of objection is required under s. 115A(4) to serve a copy of the notice on the Insolvency Service of Ireland, the PIP and each other creditor concerned.

11. The debtor argues that a strict time limit exists for the lodging by a creditor of a statutory notice of objection and that the statutory provisions must be construed as precluding a power of the court to extend that time limit.

12. For the purposes of making a determination under s. 115A, the appropriate court is required to hold a hearing by virtue of the provisions of s. 115A(6):

"The appropriate court, for the purpose of an application under this section, shall hold a hearing, which hearing shall be on notice to the Insolvency Service, the personal insolvency practitioner and each creditor concerned."

13. Certain matters are to be noted with regard to how the procedure for the making of application under s. 115A envisages service on, and the engagement by, all creditors at the court hearing. Service and participation in the hearing is not confined to those creditors who serve a notice of objection.

14. Section 115A(7) requires that the hearing shall be held "with all due expedition". Order 73, rule 29A(3) provides for the early listing of the proceedings, not less than 21 days after the issue of the notice of motion. Order 73, rule 5 gives the court a wide discretion to make directions for the conduct of the matter, including directions in regard to the exchange of affidavits, delivery of written submissions and if necessary the hearing of oral evidence.

15. The process then is envisaged as being one in which the debtor and all creditors are entitled to participate and is envisaged as an inter partes hearing.

### **Is the time limit under section 115A(3) mandatory?**

16. In *Re Hickey & Personal Insolvency Acts*, the statutory period for the lodging by a debtor of a notice of motion by way of appeal under s. 115A(2) was held to be a mandatory time limit in respect of which no jurisdiction to extend exists. The language of s. 115A(2) is expressly mandatory, or in the language of Finlay Geoghegan J. giving the judgment of the Court of Appeal in *Law Society of Ireland v. Tobin & Anor.* [2016] IECA 26, “clear and unambiguous”.

17. The various factors in the express language of s. 115A(3) and the nature of the right of an objecting creditor to be heard require a different consideration.

18. The Act is silent as to the effect on the engagement a creditor may have at the hearing of the motion under s. 115A when that creditor has not lodged a notice of objection. It seems evident that the purpose of the notice of objection is to provide a form of pleading which sets out the basis of the objection, and that interpretation is consistent with the general requirement that the hearing be held with expedition and in a manner “likely to minimise the costs of the proceedings” (Order 73, rule 5(1)). The purpose of the notice of objection is to foster expedition and to provide a cost effective means by which the hearing is to be conducted, and this is also consistent with the express provisions in the Rules by which the court may make case management directions.

19. However, I do not consider that the language of s. 115A(3) is sufficiently similar to the language in s. 115A(2) to lead to the same conclusion with regard to the mandatory nature of the time limit. This is for a number of reasons: the fourteen day time limit is found in a subsection directed to the debtor and which regulates the form of notice to be given to the creditors of the making of the application under s. 115A. The word “shall” appears in s. 115A(3), but that mandatory direction regulates the form of the notice to creditors, and not the time limit within which the creditor is to lodge the notice of objection in statutory form. Section 115A(3) does not in its own terms prescribe a time limit for the lodging of the notice of objection, but rather it mandates the PIP to notify a creditor of the right to lodge the notice of objection. A creditor has a right to lodge a notice of objection within fourteen days, but the fourteen day time limit is not found in a free standing and mandatory direction which regulates the time limits.

20. In *Law Society of Ireland v. Tobin & Anor.*, the Court of Appeal was considering an application to extend the time for an appeal from the High Court to the Court of Appeal under s. 12 of the Solicitors (Amendment) Act 1960. The section provided that either the Society or a solicitor “may appeal” within the period of 21 days. Finlay Geoghegan J. rejected the submission that s. 12 was to be construed as if the Oireachtas intended that no appeal should lie unless it was lodged within 21 days, and that any appeal lodged outside that time limit was excluded. The Court of Appeal held, by reference to the decision of the Supreme Court in *McDonald v. Bord na gCon* [1965] I.R. 217 that the Act did yield a result that excluded an appeal lodged outside the 21 day period, and that a constitutional interpretation of the statutory provisions could do so only if the exclusion was clear and unambiguous:

“Were it not for the pre-existing constitutional right to appeal such a construction might be correct. However the constitutional right, and consequent necessity for ‘clear and unambiguous’ words to limit or exclude it require a different conclusion.” (para. 21)

21. Eagar J. considered the conclusion of the Court of Appeal in his recent judgment in *Curran v. Solicitors’ Disciplinary Tribunal* [2017] IEHC 2, and held that the time limit for an appeal against a finding of the disciplinary tribunal was mandatory and incapable of extension, and that the facts were to be distinguished from those in *Law Society of Ireland v. Tobin & Anor.*, as the case before him concerned an appeal from a decision of a statutory body. No constitutional right to appeal was engaged and, therefore, Eagar J. held that the construction, for which Finlay Geoghegan J. contended, where a constitutional right was engaged, was inapplicable.

22. A debtor making an application under s. 115A who is required by virtue of s. 115A(2) to lodge the notice of motion within fourteen days of the meeting of the statutory meeting of creditors is engaging a statutory and not a constitutional right, and that the statutory time limit is similar in nature to that identified by Eagar J. in *Curran v. Solicitors’ Disciplinary Tribunal*. This is the conclusion in *Re Hickey & Personal Insolvency Acts*.

23. On the other hand, an application under s. 115A could have an impact on the contractual rights of that creditor, and as a result the property rights of the creditor could be significantly impaired. A creditor is entitled to be heard both under the express words of the statute and as a matter of constitutional fairness. By way of illustration, the proposed PIA in the present case makes provision for the writing down of the secured debt of the objecting creditor by a sum in excess of €100,000. Furthermore, s. 115A provides for a hearing by the relevant court of the application of the debtor and no express provision is contained by which a creditor who has not lodged a notice of objection is not to be heard. Indeed, each creditor concerned with a proposed PIA is expressly required to be on notice of the hearing by s. 115A(6):

“The appropriate court, for the purposes of an application under this section shall hold a hearing, which hearing shall be on notice to the Insolvency Service, the Personal Insolvency Practitioner and each creditor concerned.” (Emphasis added)

24. For these two reasons, therefore, the fact that a property right in a debt is capable of being adversely affected by the hearing, and because the Act does not expressly preclude the hearing by the court of a creditor who has not lodged a formal notice of objection, I do not consider that the time limit under s. 115A(3) is to be regarded as mandatory, and, to use the language of Finlay Geoghegan J. in *Law Society of Ireland v. Tobin & Anor.*, there are no “clear and unambiguous” words which would enable me to conclude that the time limit is mandatory and not capable of being extended.

25. I am satisfied too that because constitutional rights are engaged at the hearing of the application under s.115A an interpretation of the section requires a construction which is consistent with the Constitution and would require that fair process be imported as has been recognised in the leading case of *Dellway Investments Limited & Ors. v. NAMA & Ors.* [2014] 4 I.R. 1.

26. For all of these reasons, therefore, I conclude that the objecting creditor is correct, and that the fourteen day time limit specified in s. 115A(3) is directory rather than mandatory in nature and capable of being extended.

### **Power to extend time**

27. The debtor argues that the specialist judge of the Circuit Court has no inherent power to extend time and that, therefore, even if it can be said that the fourteen day time limit is capable of being extended, no power exists by which the specialist judge of the Circuit Court can exercise that jurisdiction.

28. In *Law Society of Ireland v. Tobin & Anor.*, the Court of Appeal extended time for appeal in the exercise of its inherent jurisdiction derived “from the implied constitutional principles of basic fairness of procedures” and because a party “may not be unfairly precluded from pursuing a constitutional right of appeal”.

29. Part 6 of the Act deals with the power of the specialist judges of the Circuit Court, and s. 189 inserts s. 26A into the Courts (Supplemental Provisions) Act 1961, as follows:

"(6) A specialist judge may, in any place in the State outside a relevant circuit, hear and determine any application which he or she has power to hear and determine within that circuit ... ."

30. The specialist judge therefore may exercise only those powers and jurisdictions conferred by statute. The specialist judges of the Circuit Court by statute have been vested with the power to make any order that may be made by a County Registrar under s. 34(1) of the Second Schedule to the Court and Court Officers Act 1995 ("the Act of 1995"). An express power to extend time is contained in Section 1(iii) of the Second Schedule to the Act of 1995:

"An order for the enlargement of the time for doing any act or taking any step in an action or matter."

31. The provision is clear, and the specialist judge, having the jurisdiction of a County Registrar, may extend the time for the doing of any act, including the lodging of any notice. The power of a specialist judge is constrained by any statutory provision to the contrary, as is found in section 115A(2).

32. For those reasons, I do not propose engaging the question of whether, in the absence of an inherent jurisdiction by the specialist judge, the High Court hearing an appeal from a decision of that judge may exercise its inherent jurisdiction. The power to extend time is one conferred by statute upon the specialist judge, and therefore I conclude that the specialist judge had a power to make the order in respect of which this appeal is brought.

#### **Extension of time in the present case**

33. The specialist judge extended the time for the lodgement by the creditor of a notice of objection. The debtor argues that she was incorrect as the application was not grounded on affidavit and she had no factual basis on which she could come to the conclusion she did. The debtor argues that the jurisprudence that has evolved since the leading judgment of the Supreme Court in *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] 1 I.R. 170, must guide the court regarding that the matters which fall for consideration on such an application namely:

(a) that the applicant shows that he has a bona fide intention to appeal formed within the permitted time;

(b) he must show the existence of something like mistake, mistake as to procedure or as to the meaning of the relevant rule not being sufficient for this purpose; and

(c) he must establish an arguable ground for such appeal.

34. No evidence was adduced on affidavit before the Circuit Court in the circumstances explained in the affidavit of Conor Moore filed and sworn on 24th February, 2017 for the purposes of this appeal. It seems that counsel attended at the hearing to explain to the specialist judge that a delay in lodging the notice of objection had occurred due to an administrative error in the classification of an email report. Watch Portfolio Management (Ireland) Limited ("Watch") had been authorised to lodge the proofs of debt and deal generally with the procedural requirements of the insolvency process, and had been served with copies of the notice of motion and the other relevant documents prescribed by statute, but the email from Watch, forwarded to the objecting creditor, was not delivered, due to the number and size of the attachments, although the classification on the email server of Watch showed the documents as having been delivered.

35. Counsel appeared at the hearing before the specialist judge to say that the objecting creditor wished to object to the application and explained the delay in lodging notice of objection by way of submission, and offered affidavit in support. It is correct in those circumstances to say that at the date of the order extending the time, the specialist judge did not have evidence on which she could come to the decision to extend time. If the test in *Eire Continental Trading Company Limited v. Clonmel Foods Limited* is relevant then the necessary factual elements were not established by evidence.

36. A number of observations are to be made. I am not satisfied that the test in *Eire Continental Trading Company Limited v. Clonmel Foods Limited* is relevant or useful as a guide to the factors that might influence the specialist judge in deciding to extend time. The notice of objection cannot be characterised as an appeal, and it forms more the function of a pleading by way of defence, or identification of the issues and factual bases on which the objection will be maintained.

37. It seems to me that the approach of the specialist judge, in considering whether to extend time for the doing of any act or taking of any step in an insolvency matter in respect of which he or she has jurisdiction to extend time, will be one that is exercised in the broad discretionary framework in which an extension of time may be granted, including that the specialist judge is satisfied with the nature of the explanation given, that the extension is not sought merely as a means of delaying the process, a factor of particular importance having regard to the statutory imperative that the hearing is to be conducted with due expedition. Another factor that would come into consideration would be whether the objecting creditor had voted against a PIA at a meeting of creditors, and whether the creditor had lodged a proof of debt and engaged with the process to date.

38. Counsel for the objecting creditor argues for a general rule that the court would extend time for the delivery of a notice of objection, albeit that an extension of time might be granted on terms that costs be awarded to the debtor. Reliance is placed on the judgment of O'Sullivan J. in *Ewing v. Kelly* [2000] IEHC 58, where the High Court was dealing with the extension of time for the delivery of a pleading.

39. I do not propose stating a general rule, save to say that the scheme of the personal insolvency legislation, and the power granted to the specialist judges of the Circuit Court under the Act, does permit the extension of time, and that the factors that might influence the granting of an extension of time are discretionary factors, the elements of which are a matter for the forum in which the matter is argued, and to be dealt with in the light of relevant discretionary factors, some of which have been identified by me above.

40. For all of the reasons stated, I consider that the application to extend time was made within jurisdiction and for good cause, and I propose therefore rejecting the appeal of the debtor against the order of 2nd February, 2017.