THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 397

Record Number: 2018/252

Peart J.
Edwards J.
McCarthy J.

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

IN THE MATTER OF MICHAEL HICKEY OF KILMACOMMA HILL, CLONMEL, TIPPERARY ("THE DEBTOR")

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 115 A (9) OF THE PERSONAL INSOLVENCY ACT, 2012 TO 2015

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 5th DAY OF DECEMBER 2018

1. This is an appeal by the debtor against the judgment and order of the High Court (Baker J.) dated the 31st May 2018 ([2018] IEHC 313) wherein an objection raised by the creditor, KBC Bank Ireland Plc (KBC), to the debtor's application under s. 115A(9) of the Personal Insolvency Act, 2012 (inserted by s. 21 of the Personal Insolvency (Amendment) Act, 2015) was upheld, resulting in that application being dismissed since he did not meet one of the mandatory criteria specified in s. 91(1) of the Act for the bringing of such an application, namely "that the debtor has not … been the subject of a protective certificate issued under section 95 less than 12 months prior to the date of the application for a protective certificate".

2. The question of whether the debtor met that eligibility criterion required, *inter alia*, a determination by the trial judge as to the proper construction to be given to s. 115A(2) of the Act. Following from that construction, it required a determination as to whether a previous protective certificate issued on the 4th July 2016 had ceased to have any protective effect on, at latest, the 22nd September 2016 in the light of s. 95(5) of the Act, or whether in the particular circumstances it had continuing effect until the trial judge had delivered her judgment on the 18th January 2017 ([2017] IEHC 20) on an objection by KBC to a previous s. 115A application (I will refer to that decision as "Hickey No. 1").

3. If the protective certificate dated the 4th July 2016 was found to be effective up to the 18th January 2017, the debtor did not fulfil the eligibility criteria referred to in para. 1. Conversely, if its effect ceased by at latest the 22nd September 2016, the debtor had not been the subject of a protective certificate issued under s. 95 less than 12 months prior to the date of the application of his next protective certificate which issued on the 20th November 2017, and would be eligible to make an application under s. 115A of the Act.

4. For the reasons appearing in her written judgment delivered on the 31st May 2018 ([2018] IEHC 313), the trial judge concluded that the debtor had been subject to a previous protection certificate during the 12 month period immediately preceding the protective certificate which issued on the 20th November 2017, and therefore was ineligible to make a further proposal for a Personal Insolvency Arrangement (PIA) under s. 91, leading to the issue of the protective certificate dated the 20th November 2017, and for that reason she dismissed the debtor's application under s. 115A(9) of the Act for an order to confirm that the PIA of the 20th November 2017 notwithstanding its rejection at a creditors' meeting held on the 25th January 2018.

5. Having examined and considered the terms of s. 115A(2) of the Act, the trial judge was satisfied that a literal interpretation of the words used by the Oireachtas yielded an absurd result, and one that failed to reflect the plain intention of the Oireachtas gleaned from the Act as a whole. She therefore resorted to s. 5 of the Interpretation Act, 2005 which provides that in such circumstances "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."

6. The sole ground of appeal stated in the debtor's notice of appeal states:

> "The learned trial judge erred in fact and law in determining that the debtor did not meet the eligibility criteria under section 91 of the Personal Insolvency Acts."

7. The determination of this appeal is not so simple a task as that rather brief and generally stated ground of appeal would suggest. While the question of the debtor's eligibility is undoubtedly the core issue on this appeal, its determination depends on other questions, such as whether or not the trial judge correctly construed the statutory provision, and indeed whether she was correct to resort to the kind of purposive construction provided for by s. 5 of the 2005 Act. The determination of that question in turn leads to another, namely the effect of that construction on the life of the previous protective certificate that issued on the 4th July 2016. A third issue that arises, potentially at least, is the effect of the trial judge's earlier judgment in Hickey No. 1 on the question of eligibility in the light of the trial judge's conclusions as to the proper construction of s. 115A of the Act, and in particular what she stated at paras. 62-63 of her judgment of the 31st May 2018. I will come to this in more detail in due course.

8. An aspect of the third issue just referred to is not flagged in the notice of appeal, and neither is it directly addressed in the debtor's written submissions. But I should say now that the respondent has argued strongly that it is a new issue now being raised for the first time on appeal, and that in accordance with the established case law the Court should not permit it. Counsel for the debtor on the other hand argues that the new argument relates directly to the core question of eligibility which was the issue before the trial judge in the High Court, and that it arises directly from what the trial judge stated in her written judgment at paras. 62-63 thereof. In this regard counsel seeks to argue that what the trial judge concluded in these paragraphs is inconsistent with her conclusion in Hickey No. 1 that the debtor's earlier s. 115A application had been lodged one day outside the 14 day period provided for in s. 115A(2) of the Act.

9. Before elaborating on these issues, it is helpful to describe the legislative framework, and to give some further factual background.

The statutory scheme
10. For convenience, I will take the opportunity to provide a description of the legislative scheme introduced by the Act of 2012 (as amended by the Act of 2015) by reference to the excellent and uncontroversial summary contained within the written submissions of the respondent. I am grateful to counsel in this regard.

11. The early years of the financial crisis exposed a marked contrast between the robust insolvency system that existed for the protection of struggling companies (i.e. examination) and the absence of any meaningful consumer insolvency system to address the problems of personal over-indebtedness. That perceived imbalance was sought to be addressed through the enactment of the 2012 Act which, for the first time, established a legal debt settlement system for individual borrowers outside the framework of bankruptcy.

12. The Act creates three distinct differential settlement mechanisms: the Debt Relief Notice, the Debt Settlement Arrangement, and the Personal Insolvency Arrangement. By far the most significant of these three insolvency procedures is the Personal Insolvency Arrangement (PIA) which applies in respect of both secured and unsecured debts. A PIA operates on the principle of "earned debt discharge" with the debtor making payments towards his or her debts over a specified period of time, after which the debtor will stand discharged from unsecured liabilities. A PIA also enables a debtor to restructure unsustainable secured debt, although the obligation to repay such restructured debt will, in most cases, continue beyond the term of the PIA.

13. The Act envisages the appointment by the debtor of a personal insolvency practitioner (PIP) who performs a function not dissimilar to that of an examiner. The PIP assesses the suitability of a debtor for a PIA and formulates proposals for such an arrangement. In order to allow a PIP and the debtor the breathing space within which to prepare a PIA, the Act provides for the issue of a "protective certificate". The protective certificate, as provided by s. 96(1)(a) and (b), precludes creditors from taking enforcement steps, whether by initiating any legal proceedings or taking any step to prosecute legal proceedings already initiated. In addition, s. 96(1)(g) prevents creditors from contacting the debtor regarding the payment of a specified date, otherwise than at the request of the debtor.

14. A protective certificate remains in force for 70 days from the date of its issue, as provided by s. 95(5), but may be extended by the court for a period of 40 days, as provided for by s. 95(6), if the debtor and the PIP can satisfy the court that they have acted in good faith and with reasonable expedition, and where the court is satisfied that a proposal for a PIA which is likely to be accepted by creditors and to be successfully completed by the debtor will be made if the extension is granted. The Court may extend the protective certificate for a further period of 40 days, as provided by s. 95(7), where it is satisfied that the extension is necessary to enable the PIP to perform his or her functions under the Act.

15. Once a PIA has been formulated, it is then put to the creditors at a creditors' meeting convened in accordance with ss. 106–108, and 111 of the Act. Each creditor is assigned voting rights proportionate to the debt due to it on the date the protective certificate issued. As provided by s. 110 of the Act, approval of the PIA requires the support of creditors representing: (i) not less than 65% of the total debt due to creditors voting at the meeting; (ii) more than 50% of the value of the secured debt due to creditors voting at the meeting; and (iii) more than 50% of the value of the unsecured debt due to creditors voting at the meeting. Where no creditor votes at the meeting, the PIA is deemed to have been approved.

16. For many borrowers, their most significant (if not their only) secured indebtedness is a mortgage over their family home. In such cases, the requirement that a PIA received the support of over 50% in value of the secured debt gave those secured creditors the final say in relation to the PIA. However, the Act of 2015 amended the Principal Act by introducing s. 115A which at s. 115A(9) gives the Court power to confirm the coming into effect of the proposed PIA, notwithstanding that it was rejected at the creditors' meeting, but subject to certain conditions provided for in subs. (9) which are designed to ensure that the process is not abused and that the rights of creditors are respected.

17. Because of their centrality to the issues arising on this appeal, I will set out the relevant provisions of section 115 A (1), (2), and (5) of the Act:

> "115A.:
>
> (1) Where:
>
> (a) a proposal for a Personal Insolvency Arrangement is not approved in accordance with this Chapter, and
>
> (b) the debts that would be covered by the proposed Personal Insolvency Arrangement include a relevant debt,
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> the personal insolvency practitioner may, where he or she considers that there are reasonable grounds for the making of such an application and if the debtor so instructs him or her in writing, make an application on behalf of the debtor to the appropriate court for an order under subsection (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, and shall be accompanied by … [various documents specified at sub-paragraphs (a) - (e)] [Emphasis provided]
>
> (5) *Where an application is made under this section before the expiry of the period of the protective certificate*, such protective certificate shall continue in force until:-
>
> (a) the [PIA] comes into effect under subsection (13), or
>
> (b) one of the following occurs –
>
> (i) the time for bringing an appeal against refusal of the appropriate court to make an order under subsection (9) has expired without any such appeal having been brought.

(ii) such appeal has been withdraw or

(iii) the appeal has been determined. [Emphasis provided]

18. There are a number of eligibility criteria which a debtor must meet in order to make a proposal for a PIA. These are set out at s. 91 of the Act, the most relevant being that at s. 91(1)(i)(i) (already referred to at para. 1 above) which provides, as relevant:

> "(1) … a debtor shall not be eligible to make a proposal for a Personal Insolvency Arrangement unless he or she satisfies the following criteria –
>
> (i) that the debtor has not –
> (a) – (h) …
> (i) been the subject of a protective certificate issued under section 95 less than 12 months prior to the date of the application for a protective certificate."

19. Section 91(3) provides that:

> "The criterion specified in subsection (1)(i) shall not apply where the debtor has, on notice to the Insolvency Service made an application to the appropriate court and the court has made an order stating that it is satisfied that the current insolvency of the debtor arises by reason of exceptional circumstances or other factors which are substantially outside the control of the debtor and that it would be just to permit the debtor to make a proposal for a Personal Insolvency Arrangement."

20. It is worth reiterating at this stage that the core issue on this appeal is whether the trial judge was correct to conclude in the light of these statutory provisions, and on the facts of the case, that the debtor had been "the subject of a protective certificate less than 12 months prior to the date of [the present] application for a protective certificate" on foot of which the present PIA is sought to be confirmed by an order under s. 115A(9) of the Act. As noted earlier, this involves a consideration of the proper construction of the words which provide for the time limit of 14 days referred to in s. 115A(2), and its effect on the duration of the previous protective certificate dated 4th July 2016, and potentially the effect of the trial judge's decision in Hickey No. 1.

A chronology of relevant events

21. Events relevant to the present appeal commence on the 4th July 2016 when the first *relevant* protective certificate (the first certificate) issued on foot of a proposed PIA. There had been a previous certificate issued on the 17th December 2015 but that was in respect of an earlier Debt Settlement Arrangement (DSA) as opposed to a PIA, and is not relevant for the purposes of this appeal. I will set forth the relevant events *seriatim* as follows:

- 4th July 2016 (Day 1) – first protective certificate issues (70 day duration).
- 9th September 2016 (Day 68) – Creditors' meeting rejects the proposed PIA.
- 23rd September 2016 – notice of motion under s. 115A issued (Day 15 after the creditors' meeting, i.e. one day out of time per Hickey No. 1).
- 18th January 2017 – Judgment delivered in Hickey No.1 (s. 115A application dated the 23rd September 2016 out of time – application dismissed - see above).
- 20th November 2017 (Day 1) – second protective certificate issues (70 day duration).
- 25th January 2018 (Day 67) – Creditors' meeting convened and rejects proposed PIA.
- 28th January 2018 – Day 70 of second protective certificate.
- 5th February 2018 – second s. 115A application issued (Day 12 of 14 day period following creditors' meeting within which an application must be issued as provided by s. 115A).
- 19th February 2018 – objection to application filed – raising, inter alia, the non-eligibility issue under s. 91(1)(i)(i) of the Act.
- 30th April 2018 – eligibility issue heard by Baker J.
- 31st May 2018 – judgment delivered by Baker J.

The judgment of the trial judge

22. Having referred at para. 2 of her judgment to the eligibility issue raised against the second s. 115A application lodged by the debtor, the trial judge stated at para. 3:

> "The ground of objection calls for consideration of whether the issuing of a motion for relief pursuant to s. 115A(9) of the Act has the effect of continuing in force the protection afforded by a protective certificate, even in circumstances where *the application* under s. 115A(9) was made outside the currency of a certificate. The point has not been the subject of any judicial determination." [Emphasis provided]

23. The reference to "the application" in the above passage is a reference to the first s. 115A application which was the subject of the Hickey No. 1 decision, and which was found to have been issued out of time by one day. The question could also be described as being whether the first protective certificate (4th July 2016) had remained in effect beyond the 70 day period specified in s. 95(5), notwithstanding that the s. 115A application was lodged outside the 14 day time limit provided, and until the court had determined on the 18th January 2017 that the application had not been validly issued.

24. The trial judge went on to note the argument made by KBC that it was not until her decision on the 18th January 2017 (Hickey No. 1) that the debtor ceased to have the benefit of the first protective certificate and therefore, since that date was within the 12

months prior to the date of his second protective certificate (20th November 2017), he was not eligible to make a second proposal for a PIA, as provided by s. 91(1)(i)(i) of the Act, and therefore that his s. 115A application should be dismissed.

25. The trial judge then phrased the issue for determination slightly differently than she described it at para. 3 of her judgment. At para. 14 she stated:

> "The question for determination on the facts, therefore, is whether the debtor has 'been the subject of a protective certificate' less than 12 months prior to the date of the application for the [second] protective certificate. The matter will fall to be determined in the light of a consideration of whether the protection afforded by a protective certificate continues *when a debtor [in]vokes the provisions of s. 115A.*"

26. The distinction to which I wish to draw attention is that at para. 3 she included the phrase "where the application under s. 115A(9) was made outside the currency of a certificate", whereas at para. 14 she has stated "when a debtor [in]vokes the provisions of s. 115A". This distinction assumes some significance as will be seen in due course.

27. The trial judge proceeded to refer to the requirement in s. 115A(2) that an application under the section "shall be made not later than 14 days after the creditors' meeting" where the PIA was rejected, and she referred to the provisions of s. 115A(5) which provides that where the application is brought *before the expiry of the 70 day period of the protective certificate* the protection afforded by the certificate will continue until the determination of the s. 115A application. She was of the view that this provision "appears to be logical", and that "the plain words of the subsection are in no way lacking in clarity".

28. However, the trial judge then went on to consider what was the position if the application under s. 115A was brought *on a date that was beyond the 70 day protection period provided for in s. 95(5), yet within 14 days after the creditors' meeting*. In that context she stated that "it is not necessary that an application under s. 115A be made in the currency of the protective certificate, and the time limits set out in s. 115A(2) can be satisfied outside the currency of the protective certificate". She went on to state that "whether a debtor, in those circumstances, is entitled to protection from enforcement action by his or her creditors in the same way as he or she would be, had the application under s. 115A been made in the currency of the protection, is the central question for determination in this judgment."

29. The trial judge noted the argument by KBC that any interpretation of s. 115A that a protective certificate does not continue in force pending the determination of a s. 115A application would lead to an absurd result, and that it had been urged further that on a true interpretation of the subsection, the commencement of an application under the section "must mean that a debtor is deemed, as a matter of law, to continue to have the benefit of the protective certificate pending a final determination of that application". The basis for that contention of absurdity by KBC is not identified at that point in her judgment, but it becomes clear later in the judgment that the argument made was that if an application under s. 115A is lodged outside the 14 day period, it would be an absurd result if, until that application was determined (even though it was lodged out of time), the creditor was entitled to take enforcement steps against the debtor in the meantime. KBC argued further that "on a true interpretation of this subsection, *the commencement of an application* under s. 115A must mean that a debtor is deemed, as a matter of law, to continue to have the benefit of the protective certificate pending a final determination of that application" [Emphasis provided]. I am assuming that this reference to "the commencement of an application" includes a commencement outside the 14 day limit.

30. The trial judge stated at para. 24 that the objection by KBC arises from the fact that the application under s. 115A lodged on the 23rd September 2016 (*i.e.* the first application) continued to afford protection to the debtor until judgment was delivered on the 18th January 2017 in Hickey No. 1.

31. I would just pause to say at this point that, while it may have been presumed *by the parties* at the relevant time that the first protective certificate continued to have effect after the first s. 115A application was lodged by the debtor on the 23rd September 2016, that question did not arise for determination in Hickey No. 1, which was confined to the question whether that first application had been brought "not later than the 14 days after the date of the [first] creditors' meeting". It is only on the present application that the question whether the protective certificate, as a matter of law as opposed to on the working assumption of the parties, continued to give protection to the debtor even though the application was brought *outside* the 14 day period, and therefore not covered by s. 115A(5) of the Act.

32. The trial judge noted the debtor's contrary argument that the words of the section are clear and unambiguous – they mean exactly what they say, namely that where an application is lodged within the currency of the protective certificate the certificate will continue to be effective pending the determination of the application, and that the provision should be given a literal construction, and that no absurdity arises, such as contended for by KBC.

33. The trial judge also noted the argument made by KBC that "a plain or literal reading of [the section] will mean in practice that in many, if not most, cases where an application for relief under the section is made, a debtor will not have the benefit of the continuation of protection pending the determination of the application, and that this is an absurd result which does not accord with the intention of the scheme of the Act generally". I presume this to imply that in the experience of KBC at least, many, if not most, s. 115A applications are brought outside the 14 day period prescribed.

34. The trial judge considered the terms of s. 5 of the Interpretation Act, 2005, and concluded that s. 5(1)(b) thereof provided "a jurisdiction to consider whether an unambiguous and perfectly plain and not obscure statutory provision may still lead to an absurdity", and she noted also that this was a conclusion reached by the Supreme Court, per Clarke J. (as he then was) in *Irish Life and Permanent Plc v. Dunne* [2016] 1 I.R. 92. She identified from that judgment the test which the Supreme Court identified for when the court can intervene with a purposive interpretation in the face of a literal meaning of the words, as follows:

> "(a) Whether an interpretation in accordance with the literal or plain meaning of the words did lead to a conclusion that there was 'no possible or conceivable basis on which the Oireachtas might have chosen to legislate in the manner which a literal construction of the relevant provisions [would] require, at para. 39;
>
> (b) If such an absurd result flows from a literal interpretation, the court may engage the approach envisaged by s. 5 (1) (b) only if it is possible to tell from the Act as a whole 'what the true legislative intention actually is', at para. 41."

35. The trial judge then approached the question whether a literal interpretation gave rise to an absurd result, which would allow her to resort to the jurisdiction provided by s. 5 of the Act of 2005. By reference to s. 96 of the Act she identified the enforcement measures against which a debtor was protected by a protective certificate. These steps are set out in her judgment by reference to the section, and do not need to be recited here. At para. 47 she stated:

> "If a creditor could take enforcement action against a person before a *validly made* application under s. 115A was determined by the relevant court or on appeal, the protection afforded by s. 96 would be set at naught. A debtor will lose the protective umbrella and a plainly absurd set of circumstances could evolve, namely that before the court gave a determination under s. 115A, the debtor might [have] been declared bankrupt, enforcement action might have been commenced or concluded, judgment obtained, or a possession order in respect of the principal private residence made. Any of these scenarios would have the effect that any order of the court under s. 115A could be pointless or, at the very least, the court considering the application under s. 115A could make an order by then incapable of performance. Thus, not only would the general scheme of the Act, which seeks to achieve an orderly resolution of debt and offer an umbrella of protection during which such may be achieved, be defeated, but more especially the jurisdiction that the court has to provide a degree of protection to the principal private residence of a debtor under s. 115A could be lost." [Emphasis provided]

36. This statement by the trial judge explains the obvious rationale behind the protection provided by s. 96 to a debtor who lodges his or her s. 115A application *within* the time provided by s. 115A(2) of the Act. The trial judge then addressed the distinction between an applicant who lodges the application within the 70 day life of the protection certificate and an applicant who lodges the application outside that 70 day period, yet within the period of 14 days after the creditors' meeting. She noted the argument by KBC in the following terms:

> "Counsel for [KBC] argues that there is no possible basis why the Oireachtas might have discriminated between one cohort of applicants under s. 115A, those who, because of the timing of the meeting of creditors, were in a position to lodge an application under s. 115A within 70 days, the currency of a protective certificate, or 110 days, if an extension had been granted, and those who, for reasons which might arise because of the complexity of the case, or indeed, the approach that the creditor or creditors might have taken in the earlier stages of the process, would find that it was not possible for the application to be made within the currency of the protective certificate."

37. At para. 49 of her judgment the trial judge expressed her agreement with that submission, stating at paras. 49-50:

> "49. I agree that no possible or rational basis can be said to exist for such discrimination, which must be seen to be both invidious and to serve no useful purpose. Furthermore, it would leave a debtor in a situation where the failure of a creditor to act with expedition or to respond to correspondence from a PIP, or who is otherwise slow to engage, could, whether inadvertently or otherwise, place the debtor in a position where a creditors' meeting happened so close to the end of the currency of the protective certificate that it was not possible for the PIP to formulate an application under s. 115A within the currency of such protection.
>
> 50. In that regard, a number of matters must be noted. First, it is not the case that an application under s. 115A is formulaic or routine, and the application engages the court in a number of statutory discretionary factors. It would be fair to say that many applications under s. 115A are contested. Furthermore, an application under s. 115A requires that the PIP would assemble a large number of documents and, in addition, prepare a certificate that he or she considers that there are reasonable grounds to believe that the granting of the order would have the effect of protecting the continued ownership or occupation by the debtor of his or her principle [sic] private residence."

38. In reaching her ultimate conclusion that a literal meaning of the section would give rise to an absurd result, she went on to state at paras. 51 – 53:

> "51. Thus the Oireachtas on the one hand allows 14 days after the creditors' meeting for the lodging of an application under s. 115A, but on the other hand, it leaves open the possibility that a PIP would not have time after the rejection of a proposed PIA at a meeting of creditors to lodge the papers within the 70 day protective period (or extended period, where appropriate.
>
> 52. Second, the Oireachtas envisaged circumstances where application could be made for an extension of a protective certificate under s. 95(6), but that such application for extension is required to be made before a meeting of creditors. Once the creditors have rejected a proposed PIA, no application for an extension of time may be made for the purposes of an application under s. 115A. The provisions of s. 95(7) permit in limited and extraordinary circumstances, such as the PIP's death, a further addition or additional extension of the protective certificate.
>
> 53. Third, it is difficult to envisage circumstances that might give rise to a successful application in the relevant court for an injunction to restrain enforcement, the appointment of a receiver, or a stay on the remedies restrained by s. 96(1) of the Act. An application for such injunctive relief would be reliant on the indulgence of the court hearing the application as the circumstances would not readily be amenable to any argument that protection could be derived from any statutory or other principles, and it would be difficult to ground the application in a cause of action known to the common law or general equitable principles."

39. Having for these reasons determined that the result of a literal interpretation of the words of the section produced an absurd result, the trial judge proceeded to examine whether the legislative intent might be discerned from the Act as a whole, in accordance with the second limb of the test as explained by the Supreme Court in *Irish Life and Permanent Plc v. Dunne* [above]. Having done so, she concluded that the legislative purpose of the Act as a whole, and of the provisions of s. 115A(2), could be ascertained, and that to achieve that purpose required that enforcement action by a creditor "must be stayed pending the determination of the application under s. 115A, irrespective of whether that application was made within the currency of a protective certificate or after it had expired". She went on to state that any other interpretation "would fail to support the legislative intent".

40. In circumstances where it is not expressly provided in the Act that a debtor who lodges a s. 115A application outside the 70 day life of the protective certificate, yet within 14 days of the creditors' meeting, continues to enjoy the protection of the protection certificate, the trial judge was correct to avail of s. 5 of the Interpretation Act, 2005 in order to give a construction which, having regard to the Act as a whole, gives effect to the clear intention of the Oireachtas. In my view, she was entitled to conclude that the intention of the Oireachtas was that all debtors who lodged a s.115A application within 14 days of the creditors' meeting would continue to be protected between the expiry of the 70 day life of the certificate and the lodging of that s. 115A application provided same was lodged within the 14 days period provided for in s. 115A(2) of the Act. The section must be so construed if it is not to give rise to a consequence that could never have been intended by the Oireachtas. To construe the section thus is not to indulge in an impermissible exercise of re-writing the provision, but is rather to construe it in a way that is consistent with the legislative purpose of the Act when it is read as a whole. I would uphold the conclusions of the trial judge at para. 62, where she stated:

> "62. I consider that the Oireachtas did intend the benefit of a statutory protection from creditors to enure to the benefit of a debtor pending the determination of an application under s. 115A. Further, the time limit for the lodging of such application (being 14 days from the creditors' meeting) does not leave the continued protection at large, but in my view, *and provided an application is lodged within the statutory 14 days period*, the Oireachtas did intend, in the light of its intention in the Act stated in broad and positive terms in the recitals and preamble, that a debtor would continue to have the benefit of a protective certificate until the conclusion of the s. 115A process." [Emphasis provided]

41. It is now necessary to turn to what should flow from this conclusion for the present debtor, Mr Hickey, since his first s. 115A application was not only lodged outside the 70 day protective period, but also, as found in Hickey No. 1, one day outside the 14 day period prescribed by s. 115A. His first application failed because of his failure to bring his application within the time prescribed by s. 115A(2). However, the trial judge found that he had continued to be protected by the first protective certificate after the expiry of the protective certificate, notwithstanding that his s. 115A application was not brought within the 14 day period provided for, and was therefore ineligible to bring his second application for a PIA because the certificate continued in effect until the 18th January 2017. In my view, she erred in so concluding, given that the protective certificate had ceased to have effect by the end of day 70, and there is nothing in the Act, either expressly or by necessary implication, to suggest that it was intended that upon the lodgement of a s. 115A application outside the 70 day life of the certificate and beyond the 14 day period in s. 115A(2) the protection provided by the certificate will revive and endure until the s. 115A application is determined.

42. Paragraph 62 of the trial judge's judgment has given rise to some controversy between the parties on this appeal, as I stated earlier. An argument made by the debtor by reference to its contents is said by KBC to amount to a new argument that was not made at first instance, and it is urged upon this Court that it should not be permitted. It is the highlighted sentence above that has led to what KBC considers to be a new argument being advanced by the debtor. I do not see it as a new argument as such, I have to say. The debtor in my view is simply pointing out that in Hickey No. 1 the trial judge decided that his first s. 115A application was in fact lodged out of time, and therefore that her proviso in para. 62 *"and provided an application is lodged within the statutory 14 days period"* should have led to the very opposite ultimate conclusion as far as Mr Hickey is concerned, namely (a) that the first protective certificate, had ceased to have any effect once the 14 day period in s. 115A had passed without an application being lodged, and (2) that he therefore did meet the eligibility criterion in s. 91(1)(i)(i) of the Act that he "has not … been the subject of a protective certificate issued … less than 12 months prior to the date prior to the date of the application for a protective certificate".

43. In my view that submission is correct. I am fortified in my view when I consider the consequences that would flow from a finding that the life of a protective certificate that has lapsed is revived once a late application is lodged for the purpose of seeking an order under s. 115A, which, it must be remembered, is an order confirming a PIA notwithstanding that it was rejected by the creditors at a creditors' meeting.

44. Let us suppose for a moment that a PIA is rejected at the creditors' meeting, and that no application is lodged within either the 70 day life of the protective certificate, or within 14 days of the meeting. In such a situation there can be no doubt that the creditor may take such enforcement steps against the debtor as may be open to it, since the debtor has ceased to be protected. Let us suppose that some months then pass during which enforcement steps are taken. Can it be sensibly suggested that the debtor could suddenly decide at that point to lodge a late s. 115A application, and that this would have the effect that the pursuing creditor would once again be restrained from continuing those enforcement measures? I think not. If in principle, such a situation was permissible under the scheme of the Act it would matter not whether the late s. 115A application was lodged one day late, or one hundred and one days late. Either way the certificate has ceased to protect the debtor and cannot be revived once it has expired. In Mr Hickey's case his first certificate has been found in Hickey No. 1 to have expired before his first s. 115A was lodged. The lodgement of his application on the 23rd September 2016, albeit just one day late, cannot have revived the protection provided by the lapsed certificate.

45. Very respectfully, I cannot agree with the trial judge's conclusion as stated in para. 63 of her judgment that "the protective certificate which issued to Mr Hickey on the 4th July 2016 continued in force until the motion under s. 115A issued on the 23rd September 2016 was determined by the dismissal of that application following my judgment delivered on the 18th January 2017 [and that] the debtor therefore did have a protective certificate which continued in force until the 18th January 2017".

46. KBC have argued that, if this is the correct position, it puts a creditor in an impossible position if it receives a late s. 115A application, since it would require the creditor to make a decision as to whether the application was late, and whether it could nonetheless proceed to take or continue enforcement steps in the face of an application, the validity of which was yet to be determined by the Court. It is true that it may not be until the hearing of the application that it may be found to be invalid. However, it has to be said that it is a simple task to decide whether or not a s. 115A application is or is not brought within the periods provided for in the legislation. If it is late, the creditor may choose not to take any steps until the matter is heard by the court, but in my view would be free to do so. It seems that a couple of possibilities exist in that instance. Firstly, the debtor might bring some sort of injunction application to restrain the creditor. That would enable the issue to be addressed at an early stage. Alternatively, the creditor might bring its own application to have the application struck out in limine. Whatever method is adopted, the perceived difficulty facing the creditor in that situation cannot in my view lead to a conclusion that it is to be implied within the scheme of the Act that a lapsed protective certificate revives once a late application is lodged seeking an order under s. 115A.

47. For the reasons stated, I would uphold the trial judge's interpretation of the section, but would allow the appeal in respect of eligibility under s. 91(1)(i)(i) of the Act, and remit the s. 115A application to the High Court for determination.