THE HIGH COURT

[2014 No. 196 CA.]

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACT 2012

IN THE MATTER OF JOSEPH O'CONNOR OF BENEDINE, NENAGH, COUNTY TIPPERARY, A DEBTOR

JUDGMENT of Ms. Justice Baker delivered on the 21st day of May, 2015

1. This is an appeal from a decision of the Circuit Court of the 3rd October, 2014 made by Judge Enright, a specialist judge appointed for the purposes of applications under the Personal Insolvency Act 2012 ("the Act of 2012"), by which she upheld the objection of Bank of Ireland ("the Bank") to the personal insolvency arrangement ("the PIA") proposed by Joseph O'Connor, a debtor. The matter came on for hearing before me grounded on the documentation which was before the Circuit Court, and on lengthy legal submissions from counsel.

2. Before turning to the grounds of objection I briefly outline the facts.

Facts

3. The Bank claims that the debtor is indebted to it in the round sum of €280,000 in respect of which demand has been made. The debtor appointed Mitchell O'Brien, a Personal Insolvency Practitioner (hereinafter "the PIP"), for the purposes of making a proposal for a PIA pursuant to the provisions of the Act of 2012. No argument is made that the procedural requirements of the Act to appoint the PIP were not properly met.

4. The Bank's debt comprises 22.2% of the total debt, and 70.1% of the secured debt of the debtor. Because the Bank is owed more than 50% of the secured debt of the debtor it had a blocking vote, and the PIA could not be approved without its support.

5. A notice of a meeting for the purpose of considering the PIA in the statutory form was sent to the Bank on the 8th July, 2014 for a meeting scheduled to be held at 11am on the 23rd July, 2014 at premises in Dungarvan, Co Waterford. The PIA was subsequently amended and the amended PIA was furnished to the Bank one day before the scheduled creditors' meeting.

6. As is required by the legislation the PIP requested that creditors submit proof of debt within 14 days of the letter. Ulster Bank, one of the creditors, did not prove its debt, although its claim was included by the PIP for a dividend in the proposal put to the meeting. That inclusion is one of the grounds of objection raised by the Bank.

7. The Bank determined to vote against the proposal and emailed a proxy form to the PIP appointing him as its proxy to vote against the proposal at the meeting. The email was sent just before 4pm, the deadline, on the 22nd July 2014.

8. The chairman of the creditors' meeting refused to accept the proxy instrument.

9. An officer of the Bank, Ms Ormiston, attended at the creditors' meeting to vote in person on behalf of the Bank. For that purpose she presented evidence of her authorisation to act on behalf of the Bank to the PIP who acted as chairman of the meeting. The PIP rejected her evidence and did not permit her to vote.

10. Thus the Bank's blocking vote was not cast against the PIA which was deemed to have been approved pursuant to the provisions of s.108 (8) of the Act.

11. By notice of objection dated the 1st August, 2014 the Bank notified the Circuit Court, the Insolvency Service of Ireland and the PIP of its objection to the PIA coming into force on the five grounds set out therein.

12. The application to approve the PIA was heard by Judge Enright on the 1st September, 2014. The objection of the Bank was grounded on the affidavit of Ms Anthea Ormiston sworn on behalf of the Bank on the 28th August, 2014. Written submissions were furnished to the court, which having reserved its judgment to the 3rd October, 2014, upheld the Bank's objections.

13. The effect of the Circuit Court decision is that the PIA procedure has come to an end and the debtor no longer has the benefit of a protective certificate. Section 114 (3) of the Act of 2012 provides that:-

> *"Where the appropriate court upholds the objection to the Personal Insolvency Arrangement, the Personal Insolvency Arrangement procedure shall be deemed to have come to an end, and the protective certificate issued under section 95 shall cease to have effect."*

14. It is from this determination of the Circuit Court that the debtor has appealed. It is agreed that four issues arise for determination by me on the appeal as follows:-

1) Whether the proxy vote of the Bank was properly excluded by the chairman.

2) Whether the Bank was unlawfully prevented from casting a vote personally at the creditors' meeting.

3) Whether the creditors' meeting ought to have been adjourned having regard to the variations in the proposal.

4) Whether Ulster Bank was improperly included for a dividend despite not having submitted proof of debt.

Procedure on appeal

15. It fell first to me to determine the appropriate means by which this appeal would be prosecuted. The Act of 2012 is silent on the mode of an appeal, and indeed on the entitlement to an appeal. There is nothing however to displace the provisions of the s. 37 (1) of the Courts of Justice Act 1936 which provides in all cases an appeal from the decision of the Circuit Court:

> *"An appeal shall lie to the High Court sitting in Dublin from every judgment given or order made (other than judgments and orders in respect of which it is declared by this Part of this Act that no appeal shall lie therefrom) by the Circuit Court in any civil action or matter at the hearing or for the determination of which no oral evidence was given."*

16. The appeal, being an appeal from a decision of the Circuit Court heard other than on oral evidence, is an appeal to the High Court on Circuit sitting in Dublin. Section 37 (2) of the Courts of Justice Act 1936 provides that an appeal shall be heard and determined by one Judge of the High Court sitting in Dublin:-

> *"Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal."*

17. Henchy J. in *Northern Bank Corporation Ltd. v. Charlton & Ors.* [1979] IR 149 held that the expression *"re-hearing"* for the purposes of s. 37(2) meant that that the matter would be determined on the evidence already heard in the Circuit Court *"by examining documentary material, particularly a written version or report of the evidence"*, and that only in *"exceptional cases"* would *"fresh or re-presented evidence"* be received.

18. Furthermore, the appeal is confined to the grounds already argued in the Circuit Court, and that this is clear by analogy with appeals to the Supreme Court from the decision of Denham J. in *Blehein v. Murphy & Ors.* [2000] 2 I.R. 231 at p.240:-

> *"There being no exceptional reasons, the additional grounds of appeal, being matters not argued in the High Court, should not be permitted."*

19. Kearns J explained the policy behind this reasoning in *Quinn v. Mid Western Health Board & Anor.* [2004] I.R. 1 at p.19:-

> *"parties to litigation must bring forward their whole case and each and every point which properly belongs to the subject of litigation in the course of trial and not seek to do so at a later time."*

20. No application was made by either party to adduce further evidence than that available before the Circuit Court.

21. The second question that fell for determination was how the appeal should proceed. Following argument, counsel for both parties agreed that, while formally the debtor ought to present the case, the only matters of substance before me on the appeal, and the only matter of substance before the Circuit Court, were the four points of objection raised by the Bank, and no argument was made that the formal proofs for the approval of the PIA were in order. Accordingly the Bank presented its grounds for objection and the debtor responded.

22. Counsel facilitated the hearing considerably by narrowing the issues to facilitate the management of the appeal process.

23. Before considering the questions raised in the appeal I briefly outline the provisions of the legislation with regard to the holding of a creditors' meeting and procedures at such a meeting.

The Creditors' Meeting
24. The scheme of the legislation provides for the preparation by the PIP of a proposal for a PIA which is to be considered at a meeting of creditors.

25. Section 106(2) of the Act of 2012 provides for the giving by the PIP of at least 14 days' written notice of the meeting, and s.107 sets out the documents that must be given to creditors when a creditors' meeting is summoned.

26. Section 108(1) provides for voting rights and mandates as follows:

> *"A vote held at a creditors' meeting to consider a proposal for a Personal Insolvency Arrangement shall be held in accordance with this section, section 110 and regulations made under section 111."*

27. Section 111 enables the Minister for Justice and Equality to make regulations relating to the holding of such meetings, and the Minister did so make the Personal Insolvency Act 2012 (Procedures for the Conduct of Creditor's Meetings) Regulations 2013, S.I. 335/2013. The Regulations provided for the voting process and the appointment of proxies to vote at a meeting.

28. The objections relate primarily to the interpretation and application by the PIP of the requirements of these Regulations in the conduct of the meeting and the counting of votes.

29. I turn now to consider the first objection, that with regard to the proxy vote.

The Exclusion of the Proxy Vote of the Bank
30. Regulation 7(1) of the Regulations of 2013 provide for the giving of a vote by proxy. The regulation is admirably short:

> *"Votes at a creditors' meeting may be given either personally or by proxy."*

31. The notice summoning a creditors' meeting is required by 7(2) to be accompanied by an instrument under which a creditor may appoint a proxy to attend and vote on behalf of that creditor, called in the Regulation *"an instrument appointing a proxy".*

32. The Bank, having received notice of the creditors' meeting, sought to vote by proxy. No issue arises as regards the delivery by the Bank of a completed proxy form prior to 4pm on the day before the scheduled creditors' meeting. Some email correspondence occurred between the Bank's representative and the PIP as to the time for admitting a proxy form, but the question of time limits is not now in contention. On 22nd July, 2014 an instrument creating a proxy vote was emailed by the Bank's representative, Jane McDevitt, directing a no vote on the proposal.

33. The chairman of the meeting declined to accept the instrument creating the proxy and deemed it to be invalid, and not completed pursuant to the statutory requirements. By email of 22nd July, 2014 the PIP wrote to the Bank notifying it of this view, and furnishing the legal advice received on which the view was based. In that context the Bank appointed a person to attend and vote personally at the meeting the following day.

34. Before considering the detailed reasons for rejection, it is convenient that I set out the provisions of the Regulations providing the formal requirements for a proxy.

The Regulation providing for a proxy

35. Regulation 7(2) provides that the instrument appointing the proxy:-

> *"shall be in the form set out in the Schedule to these Regulations or in such form, substantially to like effect, which the chairperson in his or her sole discretion shall allow."*

36. Regulation 7(3) provides:-

> *"An instrument appointing a proxy shall be completed in writing under the hand of the creditor or, if such creditor is a company or other body corporate, under the hand of the secretary or other person duly authorised by the company or other body corporate."*

37. Regulation 7(5) provides:-

> *"The chairperson may, unless evidence to the contrary is shown and the chairperson has notice of this evidence, accept a completed instrument appointing a proxy which has been delivered in accordance with these Regulations as evidence that the appointee named therein has been validly appointed by the creditor concerned.*

The proxy
38. The proxy form actually completed by the Bank is as follows, and I use the upper case format employed:

INSTRUMENT APPOINTING A PROXY IN THE MATTER OF A CREDITORS' MEETING PURSUANT TO THE PERSONAL INSOLVENCY ACT, 2012 AND THE PERSONAL INSOLVENCY ACT, 2012 (PROCEDURES FOR THE CONDUCT OF CREDITORS' MEETINGS) REGULATIONS 2013

> AND IN THE MATTER OF JOSEPH O'CONNOR
>
> OF Benedine, Nenagh, Co. Tipperary, A DEBTOR
>
> Mitchell O'Brien OF the Insolvency Resolution Service, Garraun Fadda, Dungarvan, Co. Waterford is hereby appointed agent and proxy for the undersigned in the above matter, to represent and vote for the undersigned against (No) the approval of a proposal at the creditor's meeting to be held in respect thereof on 23rd July, 2014.
>
> For and on behalf of the Governor and Company of the Bank of Ireland ANTHEA ORMISTON (Signed) SIG8150
>
> SIGNATURE OF WITNESS (Signed)
>
> 22nd July, 2014

39. It is accepted that Ms. Ormiston was duly authorised by the Bank to sign the proxy form by and on behalf of the Bank, and the reference "SIG8150" is her authorised signatory number.

Grounds of Exclusion
40. However the debtor argues that the instrument creating the proxy is invalid and incomplete for three reasons: first it does not show on its face the fact of authorization; second the chairman was required to seek evidence that Ms Ormiston was an authorised signatory to execute the instrument appointing the proxy for and on behalf of the Bank; and third he has a discretion to exclude the proxy.

Ground one: the form of the instrument
41. The debtor relies on case law concerning the use of proxies in corporate insolvency matters. Reliance in particular is placed on the judgment of Laffoy J. in *In Re CED Construction Ltd. (in voluntary liquidation)* [2011] IEHC 420 which identifies the mandatory nature of the statutory provisions with regard to proxy voting by a corporate creditor at a meeting of creditors. Order 74, rule 75 of the Rules of the Superior Courts deals with proxy votes at a creditors' meeting convened under s.266 of the Companies Act, 1963, for the purpose of passing a resolution to wind up a company. The rule provides as follows:

> *"A creditor or a contributory may vote either in person or by proxy. Where a person is authorised in manner provided by section 139 to represent a corporation at any meeting of creditors or contributories, such person shall produce to the Liquidator or the chairman of the meeting a copy of the resolution so authorising him. Such copy shall either be under the seal of the corporation or be certified to be a true copy by the secretary or a director of the corporation."*

42. Laffoy J. in considering that rule said the following:-

> *"As is clear from the statutory provisions and rules outlined above, there are a number of means available to a corporate creditor to have its wishes in relation to the appointment of the liquidator taken into account at a s.266 convened meeting. It may act through a person duly authorised in the manner prescribed in s.139(1) b in which case the corporate creditor is deemed to be at the meeting in person, but, in compliance with rule 74, the authorised person must produce a copy of the relevant resolution either under seal or certified by the secretary or director of the corporation. Alternatively, the corporate creditor may vote by proxy, but, in that event, it must comply with the mandatory requirements under rule 82(1) in relation to lodging the instrument of proxy not later than 4pm on the previous day. Further, the instrument must be in one of the two forms prescribed in rule 75, which means that in the case of a corporation the form of proxy must be under its common seal or under the hand of some officer duly authorised in that behalf and the fact that he is so authorised must be stated.*

43. Laffoy J. quoted the earlier decision of In *Re Stainless Pipe Line Supplies (Ireland) Limited (in voluntary liquidation)* [2010] IEHC 318 as authority for the latter proposition.

44. As is clear from that extract Laffoy J. considered a number of mandatory requirements arose by virtue of the proxy rules relating

to creditors' meetings in the context of corporate insolvency and the appointment of a liquidator. The proxy form must be in one of the two prescribed forms, and where the creditor is a corporation a form of proxy must be either under its common seal or under the hand of some officer duly authorised and, and this is the factor which is identified as missing in the proxy advanced by the Bank in this case, the fact of authorisation must be stated on the instrument creating the proxy itself.

45. Counsel for the debtor argues that the proxy form advanced by the Bank did not contain a declaration that Ms. Ormiston was an authorised person. That she was duly authorised is not now in doubt, what is argued is that the proxy form ought to have, but did not, contain a statement that she had been duly authorised.

46. Counsel for the debtor argues that in an interpretation of the Regulations for the purpose of the personal insolvency legislation the court must have regard to the authorities on the form of a proxy in the context of company legislation

47. Counsel for the Bank argues that the personal insolvency Regulations are clear, and do not fall to be interpreted in the context of the complex and mandatory nature of the corporate insolvency rules. He argues that the personal insolvency legislation is a complete statutory code, and that it would be incorrect to interpret the provisions of that code, and the Regulations made hereunder, and in particular the Regulation which provide the form of proxy, in the light of the case law in corporate insolvency, and that the new statutory personal insolvency code ought not to be trammelled by the jurisprudence in incorporate insolvency.

48. In the light of the argument I turn now to examine the Act of 2012

The Act of 2012

49. The preamble to the Act describes it as an Act *"to amend the law relating to insolvency"*, to amend the Bankruptcy Act 1988, and to provide for the establishment and functions of the Insolvency Service of Ireland. The recited objectives were to *"ameliorate the difficulties experienced by debtors in discharging their indebtedness due to insolvency"*, and *"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 without recourse to bankruptcy"*.

50. The legislation states as its purpose the regulation of personal, and not corporate, insolvency and the Act expressly provides that the option of personal insolvency be considered as an alternative to bankruptcy. The legislation proposes an *"orderly and rational"* means by which both creditors and insolvent debtors may regulate their affairs.

51. There is nothing in the legislation that links any of its provisions to the Companies Acts, although there are a number of express references in the body of the legislation to the Bankruptcy Act 1988. I consider that the legislation provides a complete and new code by which an insolvent debtor may make binding arrangements with his or her creditors, and the Circuit Court, and in limited circumstances the High Court, has a jurisdiction to give directions with regard to certain matters, to issue a protective certificate, and ultimately to approve the coming into affect of a PIA following its approval of a proposal for such an arrangement by a creditors' meeting.

52. The legislation fully regulates the procedures at a creditors' meeting. It would be fair to say that the Act and the structures that it creates are, in relative terms, less complex and burdensome than those found in either the old, and to some extent the current, bankruptcy regime or those regulating corporate insolvency. In its form the legislation is intended to be a self-contained and new insolvency regime, and it is expressly sought that the regime be rational and orderly. While there is nothing in the legislation that expressly mandates that the procedure be either cost effective or speedy, the Regulations made under the Act prescribe the fees of the PIP, the form of prescribed financial statements, the power of the Personal Insolvency Service of Ireland to fix levels of reasonable expenditure etc., and taken together they establish a regime the clear purpose of which is to facilitate insolvent personal debtors whose means are clearly limited. In that regard I am fortified by s. 147 of the Act 2012 by which Court has a discretion to defer a bankruptcy petition, presumably with the aim of engaging the less burdensome procedures established by the Act.

53. Even without consideration of the purpose of the legislation it seems to me that the correct approach must be to consider whether the Regulation providing for a proxy is clear on its face.

54. The Regulations made under the 2012 Act, and in particular Reg. 7 of S.I. 335/2013 which I quoted above, while it does mandate that the instrument creating the proxy be in the form set out in the schedule, in its express terms quite clearly permits of a departure from that form provided the document is "substantially to like effect". Thus it could not be said that the Regulation required in all cases that the statutory form and no variation thereof was always mandated. A variation, provided it is of the same substance and effect as the statutory form, is admissible.

55. I consider that Reg. 7(2) does not create a mandatory form of proxy, and permits of a proxy form which in its substance and effect sufficient to constitute authority to a person to attend and vote at a creditors' meeting for the purpose of considering a proposal for a PIA.

56. Further Reg. 7(3) is quite clear and imposes a number of statutory and mandatory requirements as to the means of execution of the proxy form. These can be set out as follows:-

a) The instrument must be in writing.

b) The instrument must be under the hand of the creditor, if the creditor is a natural person.

c) If the creditor is a company or other body corporate it must be under the hand of the secretary or another person

d) Such other person, i.e. a person other than the company secretary, must be duly authorised by the company or body corporate but there is no express mandatory requirement that the instrument state the fact of authorisation.

57. Order 74 Rules 74 and 75 of the Rules of the Superior Courts, which provide for a voting by proxy at a meeting of corporate creditors is mandatory and with regard to each of its requirement the word "shall" is used. The form of the proxy is mandatory by virtue of it being so designated in O.74 r.75 itself, and not by virtue of any general principle arising in the common law, whether in insolvency generally or otherwise, which mandates a particular form of instrument. This statutory source of the mandatory nature is identified by Laffoy J. in *In Re Michael Madden Quality Meats Ltd (in voluntary liquidation)* [2012] IEHC 122 at paragraph 5 where she held that the company had not completed the form in the manner stipulated in appendix M to the relevant rules *"which by virtue of Rule 75 is mandatory"*.

58. In the interpretation of the Regulation and in the absence of ambiguity the words must be given their plain meaning.

59. Furthermore, regard must be had to the well established requirement that a legislative scheme inform interpretation. At paragraph 12.11 of Dodd *Statutory Interpretation in Ireland* (Tottel Publishing, 2008) the author makes the following general statement, which I adopt:-

> *"The interpreter must consider the statutory scheme as a whole, the part played in that scheme by the provision to be interpreted and the meaning, intention and objective of the legislation concerned."*

60. In *Keane v. An Bord Pleanala* [1997] 1 IR 184 Hamilton CJ stated at p.215:-

> *"In the interpretation of a statute or a section thereof, the text of the statute or section thereof is to be regarded as the pre-eminent indication of the legislator's intention and its meaning is taken to be that which corresponds to the literal meaning."*

61. Henchy J. in *State (Elm Developments) v. An Bord Plenala* [1981] IRLM 108 at p.110 made the following observations:

> *"Whether a provision in a statute or a statutory instrument, which on the face of it is obligatory (for example, by the use of the word 'shall'), should be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused."*

62. Counsel for the debtor points to the dicta of Henchy J. as suggesting that the scheme of Regulation 7(2) ought to be seen as mandatory. He is incorrect in this, and the *dicta* to my mind requires the scheme as whole to be looked at, and points indeed to a requirement to look to the face of a statue or statutory instrument to ascertain whether a particular form is mandatory or merely directed.

63. I adopt the dicta of Lafoy J. in *Re Michael Madden Quality Meats Ltd. (in voluntary liquidation)* that to ignore the mandatory nature of O.74 r.75 would be to surrender the rule *"nugatory or superfluous"*, and by analogy to create a mandatory requirement, when one is not required by the clear words of the Regulation, as is the case in Reg. 7(2), would be to ignore the language of the Regulation and make its broad approach to substance and not form nugatory or superfluous.

64. In my view the provisions of Reg. 7(3) are clear and do not admit of an interpretation which would have the effect that the particular form in the appendix to the Rule is mandatory, and the Rule read in its entirety has the opposite effect and points to the substance and not the form of the instrument as being the true matter in consideration. There is nothing in the Regulation which requires the fact of authorisation to be stated in the instrument, and one ought not to be implied, whether from the wholly different operative statutory regime or otherwise.

The second point: evidence of authority

65. The second point counsel makes is that the chairman was entitled to threat the proxy as invalid as he had no evidence of the means by which Ms. Ormiston was authorised by the Bank to act on its behalf in executing the instrument creating the proxy. Again the starting point is the Regulation, specifically 7(3) and counsel for the debtor argues again by analogy from the law of corporate insolvency. He points to this law as illustrative of a particular problem which it is argued would arise where evidence of authorisation was not furnished to a chairperson prior to the creditors' meeting. Counsel for the debtor argues that the legislature could not have intended that an instrument creating a proxy, which was sufficient in form, can obviate the requirement that a chairperson seek evidence that it was executed by a person duly authorised to do so.

66. Counsel for the Bank points to the Regulation itself as evidence of the statutory intent that no requirement of evidence of the source of authorisation is required.

67. Regulation 7(5) governs the power of a chairperson to accept a completed instrument appointing a proxy this provides as follows:-

> *"The chairperson may unless evidence to the contrary is shown and the chairperson has notice of this evidence, accept a completed instrument appointing a proxy which has been delivered in accordance with these Regulations as evidence that the appointee named therein has been validly appointed by the creditor concerned."*

68. Counsel for the Bank suggests that Reg. 7(5) creates a presumption that a completed instrument, provided it has been delivered in accordance with the Regulation, is presumed to be valid and that the chairperson may accept the validity of the document without further question, and is not put on enquiry.

69. It is argued in essence that the provisions of Reg. 7(5) are protective of the role of the chairman and entitle him or her to accept a document as substantially valid without further enquiry, and that to so permit is consistent with the purpose and intent of the legislation to create a rational and orderly means of dealing with personal insolvency.

70. In other areas of law the legislature has recognised and established such a presumption, and for example s. 61 of the Succession Act, 1965 provides a presumption in favour of a purchaser from a personal representative that he or she is acting correctly and within powers concerned within their powers. Equally s. 53 of that Act provides that a conveyance of land by a personal representative shall be conclusive evidence of title, and has been interpreted of being protective of purchasers and limiting the number of enquiries that need to be made. These are statutory examples of such a presumption or statutory protection, and I consider that Reg. 7(5) creates a similar class of presumption, with similar protective consequence and effect. Counsel for the debtor however, argues that there is no evidential presumption, and submits that the chairman of a creditors' meeting cannot be expected to rely on his or her own personal knowledge of the authority of the person executing the instrument. He relies on the decision of Laffoy J. in *In Re Mountview Foods Ltd. (in voluntary liquidation)* [2013] IEHC 125 where Laffoy J. held that the chairman of a creditors' meeting in the context of a resolution to wind up a company had no discretion to accept the instruments notwithstanding that he was in a position to say that he personally knew each of the persons who had signed the proxy forms and that each of them "owned" the relevant companies. Laffoy J. held that such discretion could not arise, and she did so because of what she regarded as the mandatory requirements of O.74 r.75 which I have considered above.

71. I reject that argument and I do not consider that the word "may" in Reg. 7(5) imports a discretion, but rather it seems to me to that the word is enabling i.e. the chairperson is enabled, permitted, or allowed to accept an instrument which has an appearance of being valid as sufficient evidence that the person executing the instrument has been validly appointed by the creditor concerned to effect the instrument. The enabling provision permits the chairperson to treat an appointee as having been validly appointed and does not give discretion to the chairperson to accept or reject a validly constituted instrument. Further, the Regulation creates a presumption of validity such that in the absence of evidence to the contrary a chairperson is not put on enquiry, and may accept an instrument if it is formally or substantially valid on its face.

The third point: discretion
72. A chairperson of a meeting does have discretion to consider the substance of the instrument creating the proxy, but this is contained in 7(2) which allows a chairperson "in his or her sole discretion" to allow a vote by proxy where he or she is satisfied as to either the form or the substance and effect of the instrument proffered.

73. Thus it seems to me that the chairperson of the creditors' meeting does have the discretion to consider whether the instrument creating the proxy is adequate and effective for its purpose, and that discretion is one which enables the chairperson to look to the form or, if necessary or desirable, to the substance. This is not a broad discretion to exclude a proxy other than for want of effect. I do not consider on the other hand that Reg. 7(5) creates a requirement that the chairperson seek evidence of authority, but rather that it empowers the chairperson to accept that a nominee is validly authorised, and may do so, and is empowered to do so, unless evidence to the contrary is shown which calls that authority or the validity of that appointment into question.

74. I do not consider that Reg. 7(5) gives a broad discretion to a chairperson of a meeting to refuse to accept an instrument of proxy, and his discretion is confined to considerations of the form, substance and effect of the instrument under Reg. 7(2).

Application to the Facts
75. The evidence before the Circuit Court was that at the creditors' meeting there was no evidence that could have led the chairman to believe that Ms Ormiston was not the validly appointed nominee of the Bank with authority to execute the instrument creating the proxy. Email correspondence with Ms. Ormiston was exhibited in the Circuit Court so the PIP knew of the role she played in the process, nor has the PIP averred in any of the affidavits that he had reason to believe, or had evidence that led him to be concerned, that Ms. Ormiston was not an authorised signatory of the bank. As a matter of fact there was nothing before the chairperson of the meeting that would have alerted him to any doubt as to the authority of Ms. Ormiston, and no evidence was before the Circuit Court that such was the case.

76. I consider that the Regulations do not require proof of the fact of authority to execute the instrument creating the proxy, and that accordingly the chairperson of the meeting was entitled to accept the proxy vote. Nothing was before the chairperson which could have or did in fact put him on notice of any frailty in authority. It was not necessary for him in the circumstances to look outside the proxy form itself which was valid on its face.

Conclusion
77. Thus it seems to me that the following findings flow from the above.

a) The instrument creating the proxy was valid in form and substance.

b) The instrument therefore was effective.

c) The chairperson had no discretion to exclude the proxy vote in the circumstances.

d) There was no evidence to suggest that want of authority on the part of Ms. Ormond was before the chairperson of the meeting, and therefore as he had no reason to doubt the effectively and validity of the instrument. He was not put on enquiry.

78. Thus in the circumstances the chairperson of the creditors' meeting was not correct to exclude the Bank's vote by proxy.

79. Accordingly, in answer to the first question on this appeal, I consider that the proxy vote was unlawfully excluded from voting at the creditors' meeting. Accordingly, the first objection of the Bank is shown. As this is determinative of the issue before me I do not consider it necessary or desirable to answer or to deal with the other grounds of objection, which arise only if the proxy vote was not operative.

80. Counsel for the debtor specifically requested that I deliver judgment on each of the four points of objection but having regard to the fact that I heard the appeal as a judge of the High Court hearing a Circuit Appeal, and, partly in recognition of the dicta of Kearns P. in *Wicklow County Council v. Kinsella & Anor.* [2015] IEHC 229 I consider that the precedential value of any findings or determinations on the other grounds would be limited.