THE HIGH COURT

CIRCUIT APPEAL

[2018 No. 411CA & 412 CA]

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

AND IN THE MATTER OF LEONARD O'HARA (A DEBTOR)

AND IN THE MATTER OF NOELEEN O'HARA (A DEBTOR)

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

JUDGMENT delivered by Mr. Justice Denis McDonald on 25th February, 2019

1. This judgment deals with a preliminary issue which has arisen in the context of two appeals from the Circuit Court. In both of the above cases, an application was made to the Circuit Court under s.115A(9) of the Personal Insolvency Act 2012 ("*the 2012 Act*") (as amended) seeking an order confirming the coming into effect of proposals for a Personal Insolvency Arrangement *("PIA")*. The applications (which are interlocking) are made by a husband and wife in respect of their debts and they came on for hearing in the Circuit Court on 25th October, 2012 before Her Honour Judge Mary Enright sitting at Tullamore Circuit Court. In both cases, the learned Circuit Court judge refused the application and upheld the objection of the objecting creditor, Pepper Finance Corporation (Ireland) DAC ("*Pepper"*).

2. The preliminary issue which arises (and which was the basis for the decision of the learned Circuit Court judge) relates to whether the personal insolvency practitioner in this case, Mr. Niall Moran, ("*the practitioner*") was entitled to rely on the provisions of s. 111A of the 2012 Act for the purposes of the application under section 115A. In this context, it should be noted that s.115A permits the court to confirm the coming into effect of a proposed PIA notwithstanding that the proposal has been rejected by a majority of the creditors of a debtor. There are a number of conditions that must be satisfied for this purpose. Among the conditions which must be satisfied is the requirement laid down in s. 115A(9)(g) that the proposal has been accepted by at least one class of creditors. There is an exception to this requirement where the proposal is one to which s. 111A applies. As the opening words of s. 111A(1) make clear, s. 111A applies where there is only one creditor entitled to vote at a creditors' meeting.

3. In the present case, on the evidence before the Circuit Court, it is clear that there were at least two creditors who were entitled to vote at the meetings of creditors. However, one of them did not return a proxy form to the practitioner and therefore did not exercise a vote at the meetings. The issue which now arises (and which was debated before me at a hearing on 10th December, 2018) is whether the 2012 Act can be interpreted as permitting s. 111A to be invoked in the circumstances which I have just described.

4. In the course of the hearing before me, counsel for both parties were agreed that, on a literal construction of the 2012 Act, the practitioner would not be entitled to rely on s.111A. However, counsel for the practitioner has sought to make the case that a literal interpretation of the relevant provisions of the 2012 Act leads to an absurdity such that the court is entitled to apply the approach authorised by s. 5 of the Interpretation Act 2005 in accordance with the test set out by Clarke J. (as he then was) in *Irish Life and Permanent Plc v. Dunne* [2016] 1 I.R. 92.

The relevant provisions of the 2012 Act (as amended)

5. Before turning to the facts of this case, it may be helpful, in the first instance, to identify and examine the relevant provisions of the 2012 Act (as amended).

6. The first provision which is relevant is section 98(2). It provides that a practitioner may request a creditor to file a proof of debt (in which case the proof of debt provisions of the Bankruptcy Act 1988 apply.)

7. Section 98(2)(b) sets out the consequences for a creditor who does not comply with a request by a practitioner to prove the relevant debt. Section 98(2)(b) provides as follows:

> *"Subject to paragraph (c), a creditor who does not comply with a request under paragraph (a) is not entitled to—*
>
> *(i) vote at a creditors' meeting, or*
>
> *(ii) share in any distribution that may be made under the Personal Insolvency Arrangement concerned."*

8. It will therefore be seen that, where a practitioner has required creditors to prove debts, the only creditors who will be entitled to vote at a meeting of creditors are those who have in fact proved their debts. In the present case, the practitioner required creditors to submit proof of debt.

9. Sections 106 to 108 of the 2012 Act deal with the calling of creditors' meetings by a practitioner. Section 106(1) requires the practitioner to notify the creditors of the holding of a meeting to consider the proposals for a PIA. Section 106(2) requires the practitioner to give fourteen days written notice of the meeting.

10. Sections 108 to 111 deal with the holding of the meeting. Section 108(8) (as inserted by s. 15(b) of the 2015 Act) provides that, where no creditor votes at a creditors' meeting, the proposed PIA is deemed to have been approved.

11. Section 110(1) deals with the outcome of the vote at a meeting of creditors. It provides that a proposed PIA will be considered to have been approved at a creditors' meeting where:-

> *"(a) creditors representing not less than 65 per cent of the total amount of the debts due to the creditors participating in the meeting and voting have voted in favour of the proposal,*
>
> *(b) creditors representing more than 50 per cent of the value of the secured debts who are-*

(i) entitled to vote, and

(ii) have voted,

as secured creditors have voted in favour of the proposal, and

(c) creditors representing more than 50 per cent of the amount of the unsecured debts who—

(i) are entitled to vote, and

(ii) have voted,

at the meeting as unsecured creditors have voted in favour of the proposal."

12. Section 111 provides that the Minister may make regulations relating to the holding of creditors' meetings including regulations in relation to the appointment of proxies. On 30th August, 2013, the Minister made the necessary regulations namely the Personal Insolvency Act, 2012 (Procedures for the Conduct of Creditors' Meetings) Regulations 2013 (S.I. No. 335 of 2013) ("*the 2013 Regulations*"). Regulation 7(1) of the 2013 Regulations provides that votes at a meeting of creditors may be given either personally or by proxy. Regulation 7(2) provides that every notice summoning a meeting of creditors must be accompanied by a form of proxy which is to be completed in writing by the creditor.

13. Regulation 7(4) provides that each proxy is to be delivered to the office of the practitioner no later than 4 pm on the last working day before the day scheduled for the holding of the meeting.

14. Regulation 8 provides that, where a creditor abstains from voting at a creditors' meeting, this is not to be counted as a vote by such creditor.

15. Prior to the enactment of s.17 of the 2015 Act (which inserted s. 111A) there was no provision in the 2012 Act which dealt with a situation where there was only one creditor who was entitled to vote at a creditors' meeting. However, s. 111A has now been inserted into the 2012 Act. As noted above, under s. 111A(1)(b) where only one creditor is entitled to vote at a creditors' meeting, then s. 111A will apply. It is important to have regard to the relevant language of s. 111A(1) which is in the following terms:-

"(1) Where —

…

(b) only one creditor would be entitled to vote at a creditors' meeting held under this Chapter …,

the procedures specified in this section, and not those specified in sections 106 and 108 to 111, shall apply in relation to the approval by that creditor of the proposal for a Personal Insolvency Arrangement."

16. In cases to which s. 111A applies, s. 111A(2) sets out that the practitioner is to give written notice to the creditor (i.e. the only creditor entitled to vote) that the proposal for a PIA has been prepared and the creditor then has (in accordance with s.111A(6)(a) of the 2012 Act) a period of fourteen days in which to notify the practitioner in writing of his or her approval or otherwise of the proposal.

17. Under s. 111A(7) a proposal for a PIA (to which s. 111A applies) will be considered to have been approved by the creditor where the creditor notifies the practitioner of the approval. In cases where the creditor fails to notify the practitioner in writing of his or her approval or otherwise of the proposal, s.111A(7)(b) provides that the proposal will be deemed to have been approved by the creditor concerned.

18. I observe that the entire structure of s. 111A is predicated on the existence of only one creditor with an entitlement to vote at a creditors' meeting. In such cases, the practitioner does not proceed to call a meeting of creditors under s. 106. Instead, s. 111 directs the practitioner to give notice of the proposal for the PIA to the sole creditor and that creditor then has a period of 14 days to decide whether or not to approve the proposal.

19. As noted above, a different regime exists where there is more than one creditor with an entitlement to vote – namely the regime described in paras. 9-11 above. In such cases, the practitioner (once the debtor has consented) is required by s. 106(1) to convene a meeting of creditors. There is no statutory provision which allows the practitioner to dispense with the holding of such a meeting if only one of the creditors, so entitled, decides to exercise its entitlement to vote. Nor is there any provision to enable the practitioner to deem that the s 111A regime should apply in such cases.

20. Section 111A must also be read in conjunction with s. 115A (which was inserted into the 2012 Act by s. 21 of the 2015 Act). Under s. 115A(2), an application under s.115A cannot be made later than fourteen days after the creditors' meeting or (in cases to which s.111A applies) within fourteen days from the receipt by the practitioner of the notice of the creditor concerned. As noted above, under s. 115A(9)(g), it is necessary that at least one class of creditors has approved the proposed PIA by a majority of over 50% of the value of the debts owed to that class "*other than where the proposal is one to which s.111A applies".*

21. There are a number of other references within s.115A to s.111A. These include:

(a) subs. (2)(a)(ii) which sets out a requirement as to what should be included in the certificate to be furnished by the practitioner under subs. (2)(d). This is stated to apply in cases "*other than where the proposed Personal Insolvency Arrangement is one to which s.111A applies";*

(b) subs. (2)(d) also deals with the contents of the certificate to be given by the practitioner. It is expressly stated in subs. (2)(d)(ii) that:

> *"where applicable, stating that s.111A applies to the proposal and that the creditor concerned has notified the … practitioner under s.111A(6) that the creditor does not approve of the proposal…";*
>
> (c) subs. (15)(b) provides that the court may accept the certificate of the practitioner under subs. (2)(d): *"as evidence that the proposed Arrangement has not been approved in accordance with s.111A…"*;
>
> (d) subs. (16) sets out what is meant by a proposal for a PIA that has not been approved in accordance with Chapter 4. Subsection (16)(b) provides in particular:
>
> *"In the case of a proposal for a Personal Insolvency Arrangement to which s.111A applies, the creditor concerned has notified the Personal Insolvency Practitioner in accordance with s.111A(6) that the creditor does not approve of the proposal….".*

22. It will thus be seen that the Oireachtas, in enacting the 2015 Act, inserted elaborate provisions into the 2012 Act dealing with circumstances where only one creditor was entitled to vote at a meeting of creditors. The insertion of s. 111A into the 2012 Act required a significant number of consequential provisions to cross-refer to the new regime brought about by s. 111A in order to address those cases where there is only one creditor with an entitlement to vote.

23. In the course of the hearing before me, counsel for Pepper submitted that the effect of the statutory provisions discussed above was clear. In short, where a practitioner requires creditors to prove their debts, s. 98(2)(b) has the effect that any creditor who fails to submit a proof of debt will have no entitlement to vote at a meeting of creditors. However, where more than one creditor submits a valid proof of debt, the relevant provisions which are engaged are ss. 106-111. In such cases, the practitioner will be obliged to call a meeting of creditors under s. 106 and there is no scope to apply the provisions of s 111A even where, of those entitled to vote, only one creditor submits a form of proxy for the purposes of that meeting.

24. Counsel for Pepper submitted that it is clear from the language of s. 111A that it will only apply where the practitioner has prepared a proposal for a PIA and only one creditor would be entitled to vote at a creditors' meeting. He drew attention to the way in which the notice to be sent to the creditor in that case is different to the notice to be sent under section 106. Under s. 111A(2)(a), the practitioner is required to give written notice to the creditor that the proposal for a PIA has been prepared and that the creditor may within the period specified in s. 111A(6) (namely the period of fourteen days from the date of the notice) notify the practitioner in writing of his or her approval or otherwise of the proposal.

25. In the case of a notification under s. 106, the notice to be given is fourteen days written notice of the meeting and the date on which, and time, and place at which, the meeting will be held.

26. Counsel for Pepper submitted that, in circumstances where (as discussed in more detail below) there were two creditors who proved their debts under s. 98, the only notice that could lawfully be given by the practitioner under the 2012 Act was notice of the holding of a creditors' meeting. There was no scope under the Act for the practitioner to trigger the s. 111A procedure in such cases.

27. Furthermore, counsel drew attention to what actually happened in this case. A notice was, in fact, sent by the practitioner convening a meeting of creditors under section 106. It was only subsequently (i.e. after only one creditor voted) that the practitioner sought to re-characterise the process as having taken place under section 111A. Counsel for Pepper submitted that this was plainly not in accordance with the Act. He suggested that, under the Act, there was an entirely binary process – either one could invoke the s. 106 procedure (where more than one creditor was entitled to vote at the meeting) or one could invoke s. 111A (which only applies where there is a single creditor entitled to vote on a proposal for a PIA).

28. In order to properly understand the submission which is made by counsel for Pepper, it is necessary to consider the underlying facts.

The Relevant Facts

29. For this purpose, I now describe the facts which arise in the case of Mr. Leonard O'Hara. Since these are interlocking applications, it is sufficient to consider his case alone. In his case, the proposed PIA would suggest that Mr. O'Hara has four creditors. The PIA has been prepared on the basis that each of Pepper, Avantcard, Finance Ireland Asset Management ("FIAM") and A. Browne Limited are creditors of Mr. O'Hara with an entitlement to share in the distribution to be made under the proposed PIA. However, neither Avantcard nor FIAM proved their respective debts pursuant to s. 98 of the 2012 Act. As a consequence, they were clearly not entitled to vote at any creditors' meeting and, absent an order extending the time for them to prove their debts, they will not be entitled to participate in any distribution, in the event that the PIA comes into effect. No such application for an extension was ever made by either of them.

30. The only creditors who, in fact, submitted appropriate proofs of debt were Pepper and A. Browne Limited. They were, accordingly, the only creditors entitled to vote. Because there were two such creditors, the practitioner could not avail of s. 111A but was required to convene a meeting of creditors under s. 106.

31. Following receipt of the proof of debt, the practitioner sent a notice to both Pepper and A. Browne Limited of a creditors' meeting to take place at 10:45am on 11th December, 2017, at 1 Garden Vale, Ballymahon Road, Athlone, Co. Westmeath. The notice expressly invoked section 106(1). Insofar as relevant, the notice was in the following terms:-

> *"I hereby confirm for the purposes of Section 106(1) of the Personal Insolvency Act 2012…, it is proposed to hold a meeting of the creditors of Leonard O'Hara…for the purpose of considering the proposal for a [PIA], on 11th Dec 17at 10:45hrs…in 1 Garden Vale, Ballymahon Rd, Athlone…"*

32. The notice was issued on 27th November, 2017. In the emails circulating the notice, the practitioner indicated that all proxies should be returned to him by 4pm on Friday, 8th December, 2017.

33. Pepper duly completed a proxy form and this was submitted to the practitioner by email on 8th December, 2017. On the same day, the practitioner acknowledged receipt of the proxy. Pepper indicated in the proxy that it was voting against the proposed PIA. Of the overall indebtedness of Mr. O'Hara, Pepper is by far the largest creditor. Of the total debt owed by him of €245,385, Pepper is owed €184,313 in respect of account number M20012762 and €28,328 in respect of account number M20024132. Although neither Avantcard nor FIAM submitted proofs of debt, the PIA records that the amount owed to Avantcard on foot of a credit card account is €15,000, and the amount owed to FIAM in respect of car finance is the sum of €11,994. The amount owed to A. Browne Limited is €5,751.

34. As noted above, A. Browne Limited did not submit a form of proxy and, therefore, did not vote. The effect of the proxy delivered on behalf of Pepper meant that the PIA was not approved. Even if A. Browne Limited had delivered a form of proxy and voted in favour of the proposal, this would not have made any difference in terms of the outcome of the vote. Indeed, even if Avantcard and FIAM had submitted proofs of debt and voted in favour of the proposals, the outcome would have been the same. However, if the practitioner was in a position to persuade the court that either A. Browne Limited or some combination of A. Browne Limited or one or more of the other creditors (had they submitted a proof of debt) represented a different class of creditors to Pepper, it would have been open to the practitioner to contend that the requirements of s. 115A(9)(g) had been complied with. As noted above, it is a condition of the grant of relief under s. 115A(9) that, at least one class of creditors has accepted the proposed arrangement by a majority of over 50% of the value of the debts owed to that class.

35. In circumstances where the only creditor to prove its debt and exercise its voting entitlement was Pepper, the inevitable result was that the proposed PIA was rejected. Section 108(8)(b) set out the consequence that follows from a rejection of a proposed PIA. It provides as follows:-

> *"Where at the taking of a vote at a creditors' meeting in accordance with subsection (1) the proposal is not approved… or deemed…to have been approved, subject to s. 115A, the Personal Insolvency Arrangement Procedure shall terminate and the protective certificate issued under section 95 shall cease to have effect."*

36. Having regard to the fact that a meeting of creditors was convened under s. 106 (as the notice convened the meeting made very clear), Pepper confidently expected that, as a consequence of s. 108(8)(b), the protective certificate would cease to have effect. This was for the reason that Pepper foresaw no potential for the application of s. 115A in circumstances where it was the only creditor to vote and where s. 111A had not been invoked by the practitioner (for the very simple reason that there was more than one creditor entitled to vote). Pepper believed that s. 111A could not apply. Pepper was reinforced in this view by the simple fact that the notice had expressly been served for the purpose of convening a meeting under section 106. The notice had not sought to comply in any way with the provisions of s. 111A which, as noted above, requires the practitioner to give written notice to the creditor requiring the creditor to respond within fourteen days from the date of that notice signifying whether or not the creditor approves or rejects the proposals.

37. Thereafter, Pepper was taken by surprise when, on 21st December, 2017, a notice of motion was filed by the practitioner in the Circuit Court office in Tullamore seeking an order pursuant to section 115A(9). In the affidavit subsequently sworn on 22nd December, 2017, in support of the motion, the practitioner made the case that he had complied with the fourteen day time limit prescribed by s. 115A(2) in that his application had been made within the 14 day period after the date of receipt of *"the notice of the creditor concerned under section 111A(6)…".* It should be noted, at this point, that no notice had ever been given by Pepper under s. 111A(6). As described above, Pepper had simply submitted a proxy form to vote at the meeting of creditors convened under s. 106. It did not therefore purport to submit any notice under s. 111A(6).

38. In para. 10 of the notice of motion, the practitioner purported to certify that s. 111A applies to the proposal. When Pepper challenged this position in its notice of objection and in the affidavit of Grainne Naughton sworn on 16th May, 2018, the practitioner responded in paras. 12-14 of his affidavit sworn on 16th July, 2018 as follows:-

> *"12. I say…Avantgarde (sic) were not entitled to vote due to no receipt of a proof of debt. I say and believe that Finance Ireland Asset Management were not entitled to vote in circumstances where they failed to provide a proof of debt.*
>
> *13. I say that A. Browne Limited was not entitled to vote in circumstances where they provided no proxy so therefore no vote could be registered.*
>
> *14. I say in particular…that, therefore, it was correct and appropriate to use Section 111A for the purposes of the within application."*

39. The problem with that averment is that s. 111A had never been invoked by the practitioner at the relevant time. The practitioner never purported to serve a notice under s 111A(2) and Pepper had never given any notice under s 111A(6). Furthermore, contrary to the suggestion made in para. 13 of his affidavit, A. Browne Limited was, in fact, entitled to vote, having submitted a proof of debt.

The case made on behalf of the practitioner

40. At the hearing on 10th December, 2018, counsel for the practitioner acknowledged that, on a literal construction of the 2012 Act, the position taken by Pepper is correct. However, counsel argued that this would lead to an absurdity which cannot have been intended by the Oireachtas. Counsel argued, in particular, that the 2015 Act, which introduced both s. 111A and s. 115A, was enacted to enable an independent review to be undertaken of proposals for a PIA in circumstances where either a sole creditor or a majority creditor vetoes the PIA proposals. It was submitted that, in the present case, there was a single creditor rejection of the proposal and that it would be absurd in those circumstances if the debtor and the practitioner were not entitled to rely upon s. 111A which, counsel argued, was clearly designed to ensure that there could not be a veto of a proposal for a PIA by a single creditor.

41. Counsel for the practitioner relied on s. 5(1) of the Interpretation Act 2005 which provides as follows:-

> *"(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—*
>
> *(i) in the case of an Act to which paragraph (a) of the definition of 'Act' in section 2(1) relates, the Oireachtas, or*
>
> *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

42. The provisions of s. 5 of the 2005 Act were considered by the Supreme Court in *Irish Life and Permanent plc v. Dunne* [2016] 1 I.R. 92. In that case, Hogan J. had stated a case for the opinion of the Supreme Court in relation to a question of law that arose in the course of the hearing of a Circuit Court appeal which was heard entirely on affidavit. In doing so, Hogan J. was conscious of the provisions of s. 38(3) of the Courts of Justice Act 1936 ("*the 1936 Act*") which, on their face, permit a case to be stated by the High Court (when hearing a Circuit appeal) only in cases where oral evidence had been given. There was no equivalent provision permitting a case to be stated in respect of appeals from decisions of the Circuit Court where no oral evidence was given. There are two separate provisions within the 1936 Act dealing with appeals from the Circuit Court to the High Court. Section 37 deals with an appeal where no oral evidence is given. It says nothing about the power of the High Court to state a case for the determination of the Supreme Court. In contrast, s. 38(1) deals with appeals from the Circuit Court to the High Court in cases where oral evidence was given. In s. 38(3), there is express provision that:-

> "*The judge hearing an appeal* under this section *may*, *if he so thinks proper on the application of any party to such appeal, refer any question of law arising in such appeal to the Supreme Court by way of case stated…"* (Emphasis added)

43. Thus, the ability to state a case under s. 38(3) was limited to appeals "*under this section"*. The difficulty in that case was that all of the evidence had been given on affidavit and, therefore, an issue arose as to whether it could be said that the High Court had any jurisdiction to state a case to the Supreme Court.

44. In his judgment in the Supreme Court in *Irish Life and Permanent v. Dunne*, Clarke J. (as he then was) drew attention to the provisions of s. 5(1) of the 2005 Act. He also cited what he had previously said in *Kadri v. Governor of Wheatfield Prison* [2012] 2 ILRM 392 at p. 402 – 403:-

> "*…It is important to note that the construction which [s. 5(1) of the 2005 Act]… requires is one that 'reflects the plain intention of (the legislature) where that intention can be ascertained from the Act as a whole'. It is clear, therefore, that it not only is necessary that it be obvious that there was a mistake in the sense that a literal reading of the legislation would give rise to an absurdity or would be contrary to the obvious intention of the legislation in question, but also that the true legislative intention can be ascertained. There may well be cases where it may be obvious enough that the legislature has made a mistake but it may not be at all so easy to ascertain what the legislature might have done in the event that the mistake had not occurred."*

45. In the *Irish Life* case, Clarke J. noted that, in Kadri, he had expressed the view that a literal construction of the provision under consideration there was not absurd and furthermore, he had come to the view that the potential problem with the relevant legislation in that case was that the Oireachtas (had it applied its mind to the question), might have considered including some additional provisions in the legislation concerned. However, Clarke J. concluded that there was a range of potential provisions which could have been included by the Oireachtas in the legislation in question. In contrast, in the *Irish Life* case itself, Clarke J. was able to come to the conclusion that there was no conceivable basis on which the Oireachtas might have chosen to allow for a case stated in one type of Circuit appeal but not in another. He, therefore, concluded that a literal interpretation of the 1936 Act would lead to an absurdity. However, he pointed out that this was not sufficient for the purposes of section 5. At p. 108, he added:-

> *"As pointed out in Kadri, it must also be possible to tell, from the Act as a whole, what the true legislative intention actually is. In my view, such is possible in this case. The 1936 Act was designed to make a change from the previously existing position which allowed for a form of appeal to this Court under s.61 of the 1924 Act in circumstances where either, in accordance with the legislation in place at the time, the two judges of the High Court hearing the appeal from the Circuit Court disagreed or where, even though they agreed, they were satisfied that the case involved a question of such importance as to be fit to be the subject of an appeal to this Court. That regime clearly contemplated that there would be cases where it would be appropriate that final clarification be obtained on important questions from this Court. There is nothing in the 1936 Act which suggests that there was a radical change in policy. Rather, there was a change in the location of the hearing of certain types of appeals … due to a mistake in drafting, led, on a literal construction, to an exclusion, for no good reason, of the right to have important issues finally clarified by this Court, but only in cases where no oral evidence was heard in the Circuit Court. In my view, the intention of the Oireachtas is clear. It was that a High Court judge hearing a circuit appeal should have the entitlement, if satisfied that it was an appropriate case in which to exercise the power, to state a case to this Court. The statute was not intended to exclude, for no obvious or conceivable reason, the case stated procedure from being available in respect of cases originally heard in the Circuit Court without oral evidence."*

46. In the course of his judgment, Clarke J. sounded a note of warning that the courts cannot too readily conclude that a literal construction leads to absurdity. He stressed that the question must be asked in each case as to whether there is a possible basis on which the Oireachtas might have chosen to legislate in the manner which a literal construction of the relevant statutory provision would suggest. At p. 108, he said:-

> *" As pointed out in Kadri, it is not for this Court to assess the policy behind any legislation. Where there are possible reasons for adopting a particular measure, even if there might be grounds for believing that the legislation may be ill-suited to achieving its ends, the courts are given no mandate by s.5 of the 2005 Act to intervene. The question which must be asked is as to whether there could be any 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."*

47. Section 5 of the 2005 Act has been applied in relation to a different aspect of section 115A of the 2012 Act. In *Michael Hickey* [2018] IEHC 313, Baker J. had to consider the provisions of section 115A(5). Under that provision, where an application is made for an order under s. 115A before the expiry of the period of the protective certificate, the certificate will continue in force until either the PIA comes into effect or the application is refused and any appeal has either been withdrawn or determined. There is no express provision in the 2012 Act (as amended) dealing with circumstances where an application is made under s. 115A within fourteen days after the date of a meeting of creditors and where, in the meantime, the protection period has expired. In this context, it should be noted that under s. 115A(2) there is a period of fourteen days after the date of the meeting of creditors in which to make an application for an order under section 115A(9). However, in some cases, it may not have been possible for the application to have been made within the period of the protective certificate.

48. In such cases, an issue arose as to whether the debtor would continue to have protection under the 2012 Act where the relevant practitioner acting on behalf of the debtor had brought an application under s. 115A within the applicable fourteen day period prescribed by section 115A(2). There was no express provision in the 2012 Act which conferred any such protection on the debtor. In her judgment, Baker J. referred to the twofold test applied by the Supreme Court in the *Irish Life* case, namely:-

"(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 was required';

(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'."

49. Baker J. concluded that a plain reading of s. 115A(5) led to an absurd result in circumstances where there was no possible or rational basis for the distinction between one cohort of applicants under s. 115A who, because of the timing of the meetings of creditors, were in a position to lodge an application under s. 115A within the original protection period of 70 days or (if applicable) an extended period of 110 days, and the other cohort 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".*

50. Baker J. then had to consider whether the second limb of the *Irish Life* test had been met – i.e. whether the legislative intention could be discerned from the Act as a whole. In considering this issue, Baker J. addressed the purpose of the Act. Baker J. reiterated what she had previously said in *Re Nugent* [2016] IEHC 127 at para. 59 where she described the purpose as follows:-

"The purpose…is to avoid a debtor being made bankrupt… [T]he personal insolvency regime offers a more benevolent means by which he or she can deal with indebtedness. This is envisaged by the Oireachtas as being in the common good."

51. Baker J. also reiterated what she said in JD [2017] IEHC 119 at para. 72:-

"The purpose of the … legislation is to enable the resolution of personal debt, and the common good sought to be achieved in s. 115A is the protection of the right to continue to enjoy residence in a person's home."

52. At para. 61 of her judgment in *Michael Hickey*, Baker J. indicated that the intention of the Oireachtas was that the benefit of statutory protection from creditors should continue to apply pending the determination of an application under section 115A. In reaching that view, she had regard to the long title to the Act and its recitals.

53. The approach taken by Baker J. in relation to the application of s. 5 of the 2005 Act, was subsequently upheld by the Court of Appeal in *Re Michael Hickey* [2018] IECA 397 (albeit that the Court took a different view as to the result)..

54. In his judgment in the Court of Appeal, Peart J. said at para. 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.'"*

55. Counsel for the practitioner argued that the same approach should be taken here. He argued that a literal interpretation gives rise to absurdity or involves a failure to reflect the intention of the Oireachtas gleaned from a consideration of the Act as a whole. In making that argument, counsel drew attention to the following features of the Act which, he suggested, indicate a clear intention on the part of the Oireachtas to ensure that, in cases where a proposed PIA is shot down by a single creditor, there should be an ability to apply to the court under s 115A:

(a) In the first place, when, in 2015, the Oireachtas came to enact what is now s 115A of the 2012 Act (and to make it a condition of relief under that section that at least one class of creditor should have accepted the proposed PIA) the Oireachtas was careful to dis-apply that condition in a case to which s. 111A applies – i.e. where the proposed PIA has been rejected by the only creditor entitled to vote. It was submitted that this showed a clear legislative intention to ensure that the ability to apply to the court under s 115A should not be defeated where there is only one creditor with an entitlement to vote and that creditor refuses to approve the proposal;

(b) Secondly, it was submitted that it made no sense that a debtor with a single creditor entitled to vote should have the ability to avail of s. 115A while a debtor in the position of Mr or Mrs O'Hara should not have that ability. It was argued that no logical distinction can be made between rejection by a single creditor entitled to vote (where there is the ability to avail of s. 115A) and rejection by a single voting creditor (where, on a literal interpretation of the Act, there is no ability to avail of s. 115A).

(c) It was also contended that s. 111A itself also showed a clear legislative intention to ensure that the system set up by the 2012 Act would continue to be capable of functioning even in cases where there is only one creditor who participates in the process. The argument was that the failure to legislate for a similar outcome in a case such as the present one is an obvious *lacuna* in the 2012 Act as amended in 2015. It was suggested that the legislature could never have intended that such a *lacuna* should occur;

(d) Counsel also drew attention to the provisions of s. 108(8) which was inserted in the 2012 Act at the same time as s. 111A and s 115A. Under s. 108(8)(a), where no creditor votes at a creditors' meeting, the proposed PIA will be deemed to have been approved. Counsel submitted that this again illustrated a concern on the part of the Oireachtas that the process established under the 2012 Act should not be defeated by the failure of creditors to vote. In the context of a single creditor entitled to vote, s. 111A(7)(b) was to similar effect. It was submitted that, similarly, the Oireachtas could not have intended that a s. 115A application here should be defeated as a consequence of the failure of A. Browne Limited to vote. It was argued that the amendments made in 2015, introducing s. 111A and s. 108(8), were informed by experience in the intervening years since the enactment of the 2012 Act, that dividends to unsecured creditors were often so small that it was not worthwhile for smaller creditors to submit proofs of debt. These amendments made in 2015 were therefore clearly designed to overcome this problem. The case made was that the Oireachtas could not have intended that the failure of A. Browne Limited to vote would put s 115A beyond the reach of Mr and Mrs O'Hara.

The response of Pepper to the s. 5 argument

56. In his response, counsel for Pepper drew attention to the opening words of s. 111A(1) where, he suggested, the Oireachtas, very clearly, drew a line between the circumstances where ss. 106-111 will apply and the quite separate situation in which s. 111A will apply. In particular, he drew attention to the following language in s. 111A(1):-

> "*(1) Where-*
>
> *(a) a…. practitioner has prepared a proposal for a [PIA]…*
>
> *(b) only one creditor would be entitled to vote at a creditors' meeting…*
>
> the procedures specified in this section, and not those specified in sections 106 and 108 to 111, shall apply …" (emphasis added)

57. Counsel submitted that this language demonstrates that the Oireachtas, quite deliberately, provided for a binary regime, with one set of statutory provisions governing those situations where there is more than one creditor entitled to vote and an entirely separate provision dealing with cases where there is only one such creditor. Counsel submitted that the practitioner was, in substance, asking the court to re-write the 2012-2015 Acts which he said was impermissible.

58. Counsel also stressed that, in requiring that at least one class of creditor should vote in favour of a proposal for a PIA, the Oireachtas clearly intended to put a checking mechanism in place, so that the court, when dealing with an application under s. 115A, would have the assurance that there was at least one cohort of creditors who regarded the proposals as commercially acceptable. This is a well tried mechanism which is used, for example, in the legislation governing examinerships originally introduced under the Companies (Amendment) Act 1990 ("*the 1990 Act*").

59. I agree that such a requirement, in a multi-creditor case, is an important checking mechanism. As counsel for Pepper suggested, this is reflected in the approach taken in the context of examinerships (which have an obvious parallel with proceedings under the 2012-2015 Acts). If the proposed arrangement has been approved by at least one class of creditor, it provides a measure of re-assurance to the court that the proposals make business sense and are capable of being considered to be reasonable in all the circumstances.

60. Counsel for Pepper also submitted that the practitioner was proceeding on the basis that, in some way, a debtor has a right to pursue a PIA. Counsel suggested that this was fundamentally misconceived. He argued that the ability to pursue a PIA is a statutory privilege and a debtor must therefore meet the strict statutory conditions for the exercise of that privilege. It was also argued that it was wrong to suggest (as the practitioner did) that the operation of s. 111A, in accordance with its terms, leads to any unfairness. Section 111A is simply an aspect of the statutory scheme prescribed by the Oireachtas, another feature of which is the requirement under s. 115A(18) that the relevant mortgage loan be in arrears as of 1 January, 2015 (or to have been in arrears before that date and to have been the subject of an alternative repayment arrangement). Counsel cited, in this context, the unfortunate position of the debtor in *Sarah Hill* [2017] IEHC 18 who, because she had managed to keep up payments on a mortgage loan as of January 2015, was unable to avail of s. 115A (a result which Baker J characterised as harsh).

61. Counsel for Pepper also distinguished the present case from *Michael Hickey* on the basis that, in the latter, there was an obvious mistake and, furthermore, it was possible to discern the true intention of the Oireachtas. In such circumstances, both limbs of the s. 5 test were readily satisfied.

Discussion

62. I have considered the submissions made on both sides. I can understand the desire of the practitioner to treat the matter as falling within s. 111A. It is regrettable that A. Browne Limited, having gone to the trouble of submitting a proof of debt, did not, thereafter, exercise its entitlement to vote. I can see that there is an argument to make that a *lacuna* exists in the Act in so far as the Act does not deal with circumstances where there is more than one creditor entitled to vote but where only one creditor exercises that entitlement. However, the existence of a perceived *lacuna* does not necessarily give rise to an absurdity or to the conclusion that the Oireachtas cannot have intended that such a purported *lacuna* should exist.

63. Under the 2012-2015 Acts, the Oireachtas has put in place a detailed statutory scheme to enable debtors, subject to fulfilling a significant number of conditions, to resolve their indebtedness and be restored to some semblance of normality so that they can, again, play an active role in the economic activity of the State. In putting that scheme in place, the Oireachtas has attempted to balance the interests of the common good in resolving such indebtedness against the rights of creditors. The Acts restrict the rights of creditors in quite far-reaching ways. It is unsurprising, therefore, that the Oireachtas would strictly delimit the ambit of the scheme which has been put in place. The Oireachtas has chosen to do so in a number of ways. The provisions of s.115A are a paradigm example of this. Section 115A contains a myriad of conditions which must be satisfied before the court can sanction a proposed arrangement.

64. Thus, for example, s.115A(18) requires that there must be a debt secured on the debtor's principal residence that was in arrears as of 1 January, 2015 (or in arrears before that date and subject to an alternative payment arrangement). As Baker J observed, that requirement had quite a harsh impact on the debtor in *Sarah Hill*. The result of the application of s115A(18) in that case was that a debtor (who had made valiant efforts to keep up to date with mortgage payments in late 2014) was treated less favourably than a debtor who had failed to make any payment at all during the same period. This was as a consequence of the choice made by the

Oireachtas in the way it constructed the statutory scheme under the 2012-2015 Acts. From the perspective of Ms Hill, it must have appeared very unfair – even cruel - that the scheme is designed in this way but the fact is that this is an inherent part of the scheme which the Oireachtas has put in place. In terms of fairness, it is difficult to see how any distinction can be made between s.115A(18) on the one hand and the equally clearly drafted provisions of s.111A(1) on the other. They are both inherent features of the statutory scheme dealing with insolvent debtors. Depending on the circumstances, they both have the capacity to give rise to unwelcome and, sometimes, very unfortunate consequences for debtors. In particular, they may operate to exclude a debtor from the benefits available under statutory scheme created by the 2012-2015 Acts.

65. It is also crucially important to bear in mind that, as noted above, the Acts represent an attempt by the Oireachtas to balance the common good in promoting the resolution of debt on the one hand against the property rights of creditors on the other. Save where a mistake or absurdity is manifest (such as that identified in *Michael Hickey*), the court should proceed with caution. Any attempt by the court to identify gaps in the legislative regime and to repair such perceived gaps carries a very real risk that the court will interfere with the balance struck by the Oireachtas between the interests of the common good and the rights of creditors. In addition, it carries the risk that a court will trespass on the legislative function of the Oireachtas more generally.

66. Section 5 of the 2005 Act is not intended to give the courts an unfettered power to supplement the provisions of legislation. As Clarke J observed in *Kadri*, at p 4, the mandate given to the courts by s. 5 is to engage in interpretation not rewriting. In *Kadri*, Clarke J suggested that the approach to be taken under s. 5 is broadly similar to that taken in the context of contract law known as the "*correction of mistakes by construction*". In such cases, the court will intervene only where (a) there is a clear mistake and (b) it is clear what the correction ought to be. That is a useful shorthand for the approach which the court should take under s. 5 as explained by the Supreme Court both in *Kadri* and in *Irish Life*.

67. As explained by the Supreme Court in *Irish Life*, the test to be applied under s. 5 involves two stages:

> (a) in the first place, in addressing the question whether there is an obvious mistake or absurdity, the court must consider whether there is any possible reason why the legislature may have decided to adopt the relevant statutory provision in the terms in question. If there is, that is the end of the court's enquiry. The court should only move to the second stage where no possible reason can be identified; and
>
> (b) In those cases where it is not possible to identify any possible reason for the course taken by the Oireachtas in the literal language of the provision, the court may only intervene where it is clear from a consideration of the Act as a whole, what the true legislative intention is. In cases where there is more than one way of addressing the mistake or absurdity in issue, the court has no mandate to interfere.

68. Kadri is a very good illustration of the limits of the court's power under s. 5. In that case, the Supreme Court was clearly troubled that there was a *lacuna* in the Illegal Immigrants Act 1999. The court was troubled by the fact that the Act made no provision to extend the maximum 8 week period of detention of an illegal immigrant facing deportation where the immigrant in question effectively frustrated the ability of the authorities to deport him within that period by strenuously resisting all attempts to place him on a flight or other means of transport. While Clarke J suggested that it may well have been likely that the Oireachtas might have wished to make some provision for that situation, the Supreme Court was not satisfied that s. 5 could successfully be invoked to fill the perceived gap in the legislation. The court was not persuaded that there was an obvious mistake and, even if there were a mistake, it was not possible to say what the legislature might have done in the event that it had been alive to the purported mistake. As para. 3.9 of the judgment of Clarke J illustrates, there was more than one way in which the problem might have been addressed if the Oireachtas had turned its mind to it.

69. In the present case, I do not believe that the case made by the practitioner passes the first stage of the twofold s. 5 test. I am far from convinced that there is an obvious error on the part of the Oireachtas in enacting what is now s. 111A of the 2012 Act. It seems to me that it is possible to identify a plausible reason why the Oireachtas enacted s. 111A in the way that it has. In this context, there is a logical distinction to be made between single creditor cases and cases where there is more than one creditor entitled to vote but where only one creditor ultimately decides to vote. It is clear from s. 111A that the Oireachtas did not wish to deny debtors the protection of s. 115A in single creditor cases. In such cases, there will be no meeting of creditors and, therefore, the checking mechanism that such a meeting provides will be absent. The Oireachtas clearly did not wish to see the operation of the Act effectively vetoed by a single creditor in such circumstances.

70. That is quite different to the multi creditor case where only one creditor turns up at the meeting (either in person or by proxy) to vote. In such cases, the Oireachtas may well have had in mind that the meeting still provides a useful checking mechanism in that the failure of the remaining creditor or creditors to vote demonstrates that the terms of the proposed PIA were so unattractive that they could not command the support of any of the creditors entitled to vote.

71. The practitioner seeks to answer that contention by suggesting that other provisions of the Acts indicate that the Oireachtas did not have in mind that non-attendance by a creditor at a meeting should be equated with rejection of the proposals for a PIA. In particular, counsel for the practitioner pointed to the provisions of s. 108(8) of the 2012 Act (as inserted by s. 15(b) of the 2015 Act) under which proposals for a PIA in a multi-creditor case will be deemed to be approved where no creditor votes at the meeting. It was submitted that this showed that the Oireachtas did not intend that a non-voting creditor should be taken to be an objecting creditor.

72. I accept that such an explanation is open on the basis of this provision. However, I do not believe that this is the only possible explanation which is open. As noted in paras. 69-70 above, there seems to me to be a logical basis for the Oireachtas to distinguish between cases where no creditor votes at a meeting and cases where not all creditors refrain from voting. In cases where no creditor votes on proposals, the Oireachtas may simply have been concerned to ensure that the Acts could continue to operate notwithstanding creditor apathy. In such cases, it was therefore necessary to put in place a provision such as s. 108(8).

73. The difficulty is that it is by no means certain that the Oireachtas must have intended that the same approach should be taken in cases where not all creditors refrain from voting. This is readily apparent when one considers those cases where more than one creditor votes. If, in such cases, the non-voting creditor was to be treated as voting in favour of the proposals, this could have the effect of seriously skewing the outcome of the vote and devaluing the votes of those creditors who had taken the trouble to cast a vote. It would reward apathy and undermine the incentive to creditors to cast their vote. It would also undermine the value of the checking mechanism which the holding of a meeting provides.

74. It might be suggested that this consideration has less weight in cases, such as the present, where only one creditor has chosen to exercise its entitlement to vote. However, I do not believe that one could safely conclude that the consideration carries no weight at all. Even in such cases, weight might be attached to the fact that the creditor in question has taken the trouble to turn up at the

meeting (either in person or by proxy) and exercised its entitlement to vote. In that way, the holding of the meeting has still served some purpose as a checking mechanism. In my view, it is simply unsafe to rule this out as a basis for the manner in which the Oireachtas chose to proceed in enacting the relevant provisions of the 2012 Act (as amended).

75. In these circumstances, I have come to the conclusion that the first part of the s. 5 test has not been surmounted by the practitioner in this case. I do not believe that it can be safely said that the Oireachtas has made a mistake in not making express provision to deal with circumstances where it transpires that, at a meeting convened under s. 106, only one creditor exercises its entitlement to vote.

76. Furthermore, even if it could be said that there is an obvious mistake on the part of the Oireachtas, I cannot see any basis on which it could be said that the second limb of the s. 5 test has been satisfied. I do not believe that it is, at all, clear that the Oireachtas would have made provision that a practitioner would be entitled to retrospectively invoke s.111A where it transpires that he has previously convened a meeting under s. 106 and where only one creditor exercises its entitlement to vote. That is essentially what the practitioner contends here.

77. There is more than one way that the Oireachtas could have addressed the purported mistake. The approach advocated by the practitioner is, certainly, one avenue that might have been adopted (by means of appropriate additional provisions in s.111A). But the Oireachtas could also have decided, for example, to expressly provide that the non-voting creditors should, consistent with s. 108(8), be counted as voting in favour of the proposed PIA. The Oireachtas might further have provided, in such cases, that, where the deemed votes in favour are outvoted by voting creditors holding debts of a greater amount, the practitioner would have to establish that the non-voting creditors constitute a separate class within the meaning of s. 115A(17). There would, obviously, be valid policy reasons why the Oireachtas might decide that the practitioner should have to show that the non-voting creditors constitute a separate class within the meaning of s. 115A(17). As discussed above, the requirement in s. 115A(9)(g), that there should be at least one class of creditors voting in favour of the proposals, provides an important checking mechanism.

78. The suggestion made in para. 77 above is no more than an indication of a possible approach that might conceivably be taken. There are other approaches that would also be open. Crucially, one could not rule out that the Oireachtas might not wish to legislate for some additional requirement or safeguard in cases where, as here, there is a creditor entitled to vote who does not exercise that entitlement. It is not a given that the Oireachtas would proceed in the manner suggested by the practitioner.

79. It follows, in my view, that the second stage of the s. 5 test cannot be satisfied in this case.

Conclusion

80. In the circumstances, I have come to the conclusion that there is no scope for the application of s. 5 of the 2005 Act. I must accordingly decide this case by reference to the literal meaning of the provisions of the 2012-2015 Acts. In light of the provisions of s. 111A(1) of the 2012 Act (as amended) there is no basis on which the practitioner can rely on s. 111A in this case. It follows that there is no basis on which the provisions of s. 115A can be invoked.

81. I must therefore dismiss the appeal and affirm the order of the Circuit Court dismissing the application made by the practitioner under s. 115A.