THE HIGH COURT

CIRCUIT APPEAL

[2018 No. 410 C.A.]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015

AND IN THE MATTER OF THOMAS FINNEGAN (A DEBTOR)

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

JUDGMENT of Mr. Justice Denis McDonald delivered on 11th February, 2019

The Issue before the Court

1. The issue before the court relates to the interpretation of s. 115A(2) of the Personal Insolvency Act 2012 ("*the 2012 Act*") as inserted by s. 21 of the Personal Insolvency (Amendment) Act 2015 ("*the 2015 Act*"). The issue relates to the meaning of the words:-

> "*An application under this section* shall be made *not later than fourteen days after the creditors' meeting…"* (Emphasis added)

2. Essentially, the question which requires to be addressed relates to the steps that have to be taken before it can be concluded that an application under s. 115A has been "*made*" within the prescribed fourteen day period. Is it sufficient, for this purpose, to simply file the application in the relevant court office? Alternatively, is it necessary that the application should both be filed and served on the mandatory notice parties within the prescribed fourteen day period?

Background

3. In 2016, Thomas Finnegan ("*the debtor*") initiated proceedings in the Circuit Court under the 2012-2015 Acts with a view to putting in place a Personal Insolvency Arrangement ("*PIA*") with his creditors. Proposals for a PIA were prepared by Cormac Mohan, the Personal Insolvency Practitioner ("*the practitioner*") retained for this purpose. Those proposals were considered at a meeting of creditors which was held on 6th December, 2016. The total amount of debt owed to creditors present and voting at that meeting amounted to €754,789.96. On an overall basis, creditors holding 60.7% of that debt voted in favour of the proposal while a single creditor, Mars Capital Ireland No. 2 DAC ("*Mars*") holding 39.3% of the debt voted against the proposal. When broken down as between secured debt and unsecured debt, there was a majority of secured creditors who voted in favour of the proposal. However, when it came to the unsecured creditors, the total amount of debt held by those in favour of the proposals amounted to 49.9% of the unsecured debt owed by the debtor while a single creditor (Mars) voted against the proposal, holding 50.1%. The result of the vote of the unsecured creditors meant that the requirements of s. 110(1)(c) of the 2012 Act could not be satisfied. In those circumstances, the only route by which the debtor could seek to proceed with the proposals was through the mechanism of an application by his practitioner under section 115A(9). Under s. 115A, the court is given power to approve the coming into effect of proposals for a PIA notwithstanding that the requirements of s. 110 have not been satisfied. The power of the court is carefully circumscribed by the detailed provisions of section 115A. However, the only requirement of s. 115A which is relevant for present purposes is the requirement that the application should be "*made*" not later than fourteen days after the creditors' meeting.

4. In the present case, the s. 115A application was issued in the Circuit Court Office in Trim Co. Meath on 19th December, 2016. It was, therefore, issued within the prescribed fourteen day period after the creditors' meeting. Section 115A(2) requires that the application should be on notice to the Insolvency Service of Ireland ("*ISI*"), each creditor concerned and the debtor. Service on the creditors was effected by posting the notice of motion on 21st December, 2016. In the course of the Circuit Court hearing, it was agreed by the parties that such service fell outside the fourteen day period prescribed by section 115A(2).

5. Following service of the notice of motion seeking relief under s. 115A, a detailed notice of objection was filed on behalf of Mars. At that point Mars was aware of the date of service of the notice upon it. It did not specifically contend, in its notice of objection, that the application was thereby out of time. Instead, in para. 1 of that notice, Mars required proof that the application had been served on all of the parties who were required to be served under the Act. Paragraph 2 was then in the following terms:-

> *"Subject to the foregoing, the Objector reserves the right to object on the basis that the within application has not been brought and/or has not been properly brought within the time permitted by s. 115A(2) of the Personal Insolvency Act 2012, as amended."*

6. When paras. 1 and 2 of the notice of objection are read together, one might think that the focus of these grounds of objection was centred on requiring proof that the s. 115A application had been served on all relevant parties as required by section 115A(2). However, the ground of objection that was ultimately argued in the Circuit Court on behalf of Mars was that the application was out of time because it had not been made within the fourteen day period prescribed by section 115A(2). That is also the argument that was made in this Court at the hearing on 21 January, 2019. No objection was taken by the practitioner that this was outside the scope of the notice of objection.

7. The s. 115A application was duly listed for hearing before Her Honour Judge O'Malley Costello in the Circuit Court on 25th October, 2018. Having considered the papers, the learned Circuit Court Judge came to the conclusion that the application had not been made within the fourteen day period prescribed by section 115A(2). She came to that conclusion on the basis that the application could not be said to be "made" unless and until all of the parties had been served. In circumstances where service on the creditors here had not taken place within the fourteen day period, the learned Circuit Court Judge held that the requirements of s. 115A(2) had not been satisfied and she, therefore, dismissed the application.

8. The practitioner, acting on behalf of the debtor has appealed the decision of the Circuit Court and it has been agreed by the practitioner and Mars that this Court should, in first instance, consider the issue which arises in relation to the interpretation of section 115A(2). This issue is one which has arisen in a substantial number of cases in the Circuit Court and accordingly the decision in this appeal has implications for a large number of other appeals which are currently awaiting hearing.

Relevant Provisions of Section 115A

9. Section 115A(1) provides that where a proposal for a PIA has not been approved, a practitioner may apply for an order under s. 115A(9) where (a) the practitioner considers that there are reasonable grounds for the making of such an application; (b) the debtor so instructs the practitioner in writing; and (c) the debts of the debtor include a "*relevant debt*" (which in broad terms means a debt which was in arrears on 1st January, 2015, or in respect of which the debtor had, before that date, entered into an alternative repayment arrangement with the secured creditor concerned). Where these requirements are met, s. 115A(1) provides that the practitioner "*may…* make an application *on behalf of the debtor to the appropriate court for an order under subs. (9)"* (emphasis added).

10. In turn, s.115A(2) provides as follows:-

> *"An application under this section shall be* made *not later than 14 days after the creditors' meeting …, shall be on notice to the Insolvency Service, each creditor concerned and the debtor, and shall be accompanied by—*
>
> *(a) a statement of the grounds of the application….*
>
> *(b) a copy of the proposal for a Personal Insolvency Arrangement,*
>
> *(c) a copy of the report of the … practitioner referred to in section 107(1)(d),*
>
> *(d) a certificate—*
>
> *(i) with the result of the vote taken at the creditors' meeting…;*
>
> *and*
>
> *(e) a statement by the … practitioner to the effect that he or she is of the opinion that—*
>
> …[certain requirements of the Act have been satisfied]…" (Emphasis added)

11. It is not necessary to consider the entire of section 115A. However, there are a number of other provisions within s. 115A which are of some relevance when considering 115A(2) in context. Thus, for example, s. 115A(3) provides that the notice to a creditor under s. 115A(2) must be accompanied by a notice indicating that the creditor may: "*within 14 days of the date of the sending of the notice, lodge a notice with the appropriate court, setting out whether or not the creditor objects to the application and the… reasons for this".*

12. It will be seen that, in contradistinction to the use of the word "*made*" in s. 115A(2), s. 115A(3) speaks of the lodging of a notice by a creditor who wishes to object to the application. This difference in language is discussed further below.

13. Section 115A(4) requires a creditor who lodges a notice under s. 115A(3) to send a copy to the ISI, the practitioner and the other creditors of the debtor.

14. Section 115A(5) provides that where an application is "*made under this section before the expiry of the period of the protective certificate, such…certificate shall continue in force…"*. The continuation of the certificate has significant implications for creditors. As explained in more detail below, for so long as a certificate remains in force, creditors are prevented from taking a whole range of actions against the debtor.

15. Section 115A(6) and (7) are also of potential relevance. Section 115A(6) provides that the court:-

> *"For the purpose of an application under this section, shall hold a hearing, which hearing shall be on notice to the Insolvency Service, … practitioner and each creditor concerned."*

16. Section 115(7) provides that the hearing "*shall be held with all due expedition"*. At this point, it may be helpful to observe that s. 115A clearly makes a distinction between the making of an application and the hearing of an application. There is accordingly no scope to suggest that an application cannot be said to be "*made*" unless the application has been heard by the court. When one considers the provisions of s. 115A(1)-(7) in turn, they appear to envisage three stages, namely (a) the making of an application; (b) the lodging of an objection by a creditor; and (c) the holding of a hearing. Thus, in order for an application to be made, it appears to be clear that this does not require that the matter should actually come before the court within the fourteen day period prescribed by s. 115A(2).

The Arguments of the Parties

17. Very helpful written and oral submissions were made by counsel on behalf of the practitioner and by counsel on behalf of Mars. It is unnecessary to record here every argument that was made. I set out below a short summary of the arguments.

18. In the course of the hearing of this issue on 21st January, 2019, counsel for Mars drew attention to a line of authority (discussed in more detail below) in which the courts, in a number of different statutory contexts, have concluded that an application cannot be said to be "*made*" unless and until it has been served on the relevant respondent. Counsel for Mars also submitted that the 2012-2015 Acts significantly curtail the contractual rights of creditors without their consent and that, in those circumstances, the Acts must be construed in a manner that affords due protection to creditors.

19. Counsel for Mars argued that it was particularly important, in the context of s. 115A, that service should be effected on creditors within the relevant fourteen day period. For as long as the period of protection remains in place, creditors are prevented from taking any of the actions against a debtor they would normally be fully entitled to take. This is the effect of s. 96 of the 2012 Act under which, during the protection period, a creditor is prevented from taking a wide range of steps against a debtor including the initiation of legal proceedings, the taking of any step in pre-existing legal proceedings, the taking of any step to secure or recover payment or the taking of any steps to enforce a judgment or order of the court or Tribunal against the debtor. During this period creditors are also prevented from even making contact with the debtor regarding payment of the debt. It was submitted that this provided an important statutory context which must be borne in mind when considering the meaning of the word "*made*" in section 115A(2).

20. It was also argued that certainty was of critical importance to creditors. Accordingly, it was submitted that, unless there is a requirement to effect service on creditors within the prescribed fourteen day period, creditors, in the aftermath of the meeting, would be left in a considerable state of uncertainty as to whether they could enforce their rights against the debtor.

21. Counsel for Mars also drew attention to the distinction that arises between the use of the word "*made*" in subsections (1) and (2) and the use of the word "*lodge*" in subsections (3) and (4) and he suggested that this was a deliberate choice on the part of the Oireachtas which he contended added force to the submission that, for an application to be made within the meaning of s. 115A(2), it was not enough to simply file or lodge the application in the relevant court office.

22. Counsel for Mars also argued that, in circumstances where s. 115A constituted an interference with the rights of creditors, it should be interpreted in a manner that interferes with those rights to the least possible extent.

23. Counsel for the practitioner, on the other hand, emphasised that each statutory provision dealing with the making of an application to a court must be construed in its own statutory context. Counsel argued that it would not be appropriate to transplant the views of a court (expressed in a different statutory context) to the 2012-2015 Acts. Counsel placed significant emphasis upon the long title to the 2012 Act which expressly records the goals of the Act including the objective to ameliorate the difficulties experienced by debtors, the need to enable insolvent debtors to resolve their indebtedness in an orderly and rational manner without recourse to bankruptcy and, thereby, to facilitate the active participation of such persons in economic activity in the State. Counsel also drew attention to the way in which the Oireachtas had expressly invoked the interests of the common good in enacting the 2012 Act. While, the 2015 Act does not contain a similar long title, the Oireachtas, in enacting the 2015 Act (which introduced s. 115A), was simply amending the 2012 Act and, therefore, the objectives (set out in the long title of the 2012 Act) continue to apply in relation to the amendments made by the 2015 Act.

24. Counsel for the practitioner also focused on a number of decisions of Baker J. in which she had explained the underlying purpose of section 115A. In particular, in *J.D.* [2017] IEHC 119, at para. 32, Baker J. explained the purpose of s. 115A:-

> *"…the amending legislation by which was added s. 115A, affords the far-reaching power of the court to approve a PIA notwithstanding its rejection by creditors. The public interest is in the maintenance of a debtor's occupation and ownership of a principal private residence. That social and common good is concretely referable to the continued occupation by a debtor of a principal private residence, and the power contained in the section is limited by the fact that only those persons who had a relevant debt secured over his or her principal private residence which was in arrears … on 1st January, 2015 could avail of this exceptional remedy. The statutory provision then must be seen as a limited protection of persons whose mortgage payments on their principal private residence fell into arrears at the height of the financial crash. Absent a 'relevant debt', a debtor may not seek to engage the jurisdiction of the court to overrule the result of a creditors' meeting…"*

25. Counsel for the practitioner also referred to the judgment of the Court of Appeal in *Michael Hickey* [2018] IECA 397 where Peart J., on a number of occasions in his judgment, referred to the lodging of an application under section 115A(2). Counsel accepted that the Court of Appeal in that case was not addressing the issue which arises here but he nonetheless suggested that it was of some assistance that Peart J., in that case, had paraphrased the effect of s. 115A(2) in that way.

26. Counsel for the practitioner also referred to the provisions of the relevant Circuit Court Rules and to the provisions of s. 140 of the 2012 Act and suggested that these provided additional support for the submission as to how s. 115A(2) should be interpreted. Counsel also argued that, contrary to the submission made on behalf of Mars, certainty would be enhanced by an interpretation which regarded the filing of an application as sufficient for the purposes of section 115A(2). It was submitted that it would be much easier for a creditor to establish that the relevant fourteen day period had or had not been met if all the creditor had to do was to make contact with the relevant court office to inquire whether any application had been filed within that period. Counsel contrasted that with the position where service was required to be made on the ISI, each individual creditor, and the debtor within the relevant fourteen day period. Any individual creditor would not know whether that requirement had been satisfied without checking with each individual notice party and, very possibly, having to wait until the matter is listed before the court when the relevant affidavit of service would become available. Counsel thus submitted that the proposition advanced by Mars would increase uncertainty for creditors rather than promote certainty.

Relevant Principles of Interpretation

27. As the decision in *Howard v Commissioners of Public Works* [1994] 1 IR 101 shows, it is well settled that, when construing the provisions of a statute, the language of the statute is, in the absence of indicia to the contrary, to be given its natural and ordinary meaning. In addition, as McGuinness J observed in *D.B. v Minister for Health* [2003] 3 IR 12 at p.21, it is often necessary, when construing an individual provision, to consider that provision in the context of the Act as a whole. The relevant principle was described by Walsh J. in *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317 at p. 341, as follows:-

> *"The long title and the general scope of the Act of 1967 constitute the background of the context in which it must be examined. The whole or any part of the Act may be referred to and relied upon in seeking to construe any particular part of it, and the construction of any particular phrase requires that it is to be viewed in connection with the whole Act and not that it should be viewed detached from it. The words of the Act, and in particular the general words, cannot be read in isolation and their content is to be derived from their context. Therefore, words or phrases which at first sight might appear to be wide and general may be cut down in their construction when examined against the objects of the Act which are to be derived from a study of the Act as a whole including the long title. Until each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or unambiguous."*

28. The requirement that the language or any provision must be read in context is important in two respects. In the first place, it is clearly important that this principle should be borne in mind when looking at the language of section 115A(2) itself. It would be wrong to consider the words of that subsection in isolation. The words of s. 115A(2) should, in accordance with the principle outlined by Walsh J. in *East Donegal*, be read in light of the provisions of the 2012-2015 Acts as a whole.

29. Secondly, the principle that the language of a statutory provision should be read in context, is equally important when considering the case law to which the court has been referred. While the approach taken to date in the case law is obviously of considerable assistance, it is essential to bear in mind that, as Baker J. observed in *Ronan Meeley* [2018] IEHC 38 at para. 76, such judgments must be considered in their own particular statutory context. It would not be appropriate in one statutory setting to blindly apply the approach taken under a different statutory regime.

Relevant case law

30. Subject always to the caveat identified in para. 29 above, it is nonetheless helpful to commence a consideration of this issue by examining the way in which the courts, in other statutory settings, have addressed what is involved in making an application to the court.

31. In the course of the hearing on 21st January, 2019, both sides referred to the decision of the Supreme Court in *KSK Enterprises Ltd v. An Bord Pleanála* [1994] 2 I.R. 129. That case concerned what was then a new provision of the Local Government (Planning and Development) Act 1963 ("*the 1963 Act*"), introduced by s. 19(3) of the Local Government (Planning and Development) Act 1992 ("*the 1992 Act*"). The new provision required that applications to challenge decisions of An Bord Pleanála in relation to planning matters were now required to be taken by means of an application for judicial review under O. 84 within a period of two months commencing on the date on which the decision of An Bord Pleanála was given. The new provision also made clear that any determination of the High Court in such proceedings would be final with no appeal to the Supreme Court save where the High Court certified that its decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court. These provisions were very clearly introduced to restrict the circumstances in which a planning decision could be challenged and also to minimise the delay to the planning process that could ensue as a consequence of any judicial review challenge.

32. The particular provision that was considered by the Supreme Court in that case was s. 82(3) B of the 1963 Act (as inserted by s. 19(3) of the 1992 Act). Insofar as relevant, subs. 3B was in the following terms:

> *"An application for leave to apply for judicial review … shall:*
>
> *(i) be made within the period of two months, commencing on the date on which the decision is made and*
>
> *(ii) be made by motion on notice to … the Board and each party … to the appeal".*

33. In the High Court, Flood J. came to the conclusion that, for an application to be "*made*" within the meaning of s 82(3B), it had to appear in the court list within the two-month period prescribed by the subsection. His decision was appealed to the Supreme Court. In the course of the Supreme Court hearing, four alternative possible interpretations were contended for (two put forward by the applicant and two by the respondents):

> (a) The applicant submitted that, once a notice of motion was filed in the central office, this should be sufficient to treat the application as having been made;
>
> (b) Secondly, it was contended by the applicant, in the alternative, that the application was "*made*" once it had been filed and served on at least of the one of the respondents;
>
> (c) The respondents argued that the trial judge was correct and that an application for leave to apply for judicial review could not be regarded as having been made within the meaning of the subsection until such time as it was moved in court even if this was only for the purpose of asking that it be heard on a subsequent day;
>
> (d) The respondent also submitted, in the alternative, that an application for leave to apply for judicial review could not be interpreted as having been made until two things had occurred, namely the filing of the notice of motion and its service on each of the respondents.

34. In considering these rival contentions, Finlay C.J. at p. 135 drew attention to the general scheme of the new provisions. He said:

> *"the general scheme of the sub-section now inserted by the act of 1992 is very firmly and strictly to confine the possibility of judicial review in challenging or impugning a planning decision either by a planning authority or by An Bord Pleanála. The time limit which has already been mentioned is indicated as being a very short time limit and it is an absolute prohibition against proceeding outside it with no discretion vested in the court to extend the time. Secondly, there is a provision contained in the sub-section as inserted that leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed. Thirdly, in relation to all matters other than constitutional challenge to a statute, the determination of the High Court is stated to be final … except in the case … where a High Court judge certifies that there is a point of law of exceptional public importance … ."*

35. Having adverted to these striking features of the new provisions, Finlay C.J. continued (also at p. 135):

> *"From these provisions, it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision".*

36. It might be suggested that somewhat analogous considerations apply in the context of s. 115A which would explain why the Oireachtas would prescribe such a tight timeframe requiring that the application should be made within fourteen days. As counsel for Mars submitted at the hearing, s. 115A has the potential to adversely affect creditors' rights in a significant way insofar as it permits the court (subject to being satisfied that each of the requirements of the section for the grant of relief have been met) to effectively overturn the decision made at the creditors meeting and instead to impose on the creditors an arrangement which interferes with their contractual rights. Furthermore, counsel for Mars emphasised that it was of crucial importance to bear in mind that the making of an application within the time limits laid down by s. 115A(2) has the effect of continuing the protection period for an indefinite period pending the determination of the application by the court and possibly pending the determination of an appeal . The continuation of that period deprives creditors, pending the resolution of the s. 115A application, of all of the rights which they would ordinarily have which are, for the duration of the protection period, stayed as a consequence of the operation of section 96.

37. I agree that the imposition of a fourteen-day period for the making of an application under s. 115A is indicative of a concern on the part of the Oireachtas to ensure that any application should be made within a very tight timeframe so as to minimise the extent to which creditors rights will continue to be curtailed in the aftermath of a creditors' meeting. That said, it seems to me that counsel for the practitioner was correct insofar as he suggested that certainty for creditors would equally be achieved by requiring that the relevant notice be filed within the relevant fourteen-day period. As counsel for the practitioner highlighted, if service of the notice of motion is also required to be effected within that period, a creditor on whom the relevant papers were served would be left in a state of some uncertainty as to whether the provisions of the Act had been complied with at least until that creditor had checked with all other mandatory notice parties or had attended court on the return date of the application to ascertain (from the relevant affidavit of service, whether all other notice parties had been served within the fourteen day period). Indeed, this is illustrated by the terms of paras. 1-2 of the notice of objection here from which it appears that Mars was unsure whether all necessary notice parties had been

served and was therefore putting the practitioner on proof of service on all parties.

38. It is clear from the judgment of Finlay C.J. that the considerations outlined by him at p. 135 of his judgment (quoted in para. 34 above) significantly influenced the ultimate decision arrived at in that case that both filing and service must be effected within the relevant two-month period prescribed by s. 82(3B) of the 1963 Act (as inserted by the 1992 Act). It is also clear from p. 136 of the report in *KSK* that a second significant factor in the ultimate decision of the court was that the statute required that the application would be "*made by motion on notice*". The language used in that phrase is important. It creates a direct link between the word "*made*" and the requirement of a "*motion on notice*". It suggests that, for an application to be "*made*", a notice must be given by means of a motion on notice. In other words, the Act spells out how one goes about making the statutory application – one does so by motion *on notice*. At p. 136 Finlay C.J. drew attention to the statutory requirement that the application be made in that way, saying:

> *"in the case of a motion on notice* which is what is provided for *in this sub-section, I am quite satisfied that it could not be said to have been made under any circumstances until notice of it had been given to the parties concerned. Such a construction of the phrase 'application made by motion on notice' seems to me entirely consistent with the plain objects of this sub-section and with its other provisions.. The vital and important thing is that within the very sharply limited time scale the parties concerned – and it would seem to me very particularly the person who had received the decision permitting him to develop – must be made aware of the challenge which it is sought to bring by way of judicial review to the validity of that decision."* (emphasis added).

39. In those circumstances, Finlay C.J. rejected the suggestion that the filing of a notice of motion would be sufficient of itself to come within the provisions of the subsection. Instead, he held that it was necessary that the relevant motion should be both filed and served on all of the mandatory respondents. The court, however, disagreed with the approach which had been taken by Flood J. in the High Court. At p. 136 Finlay C.J. said:

> *"It seems to me that to conclude that an application could only be made for leave to apply for judicial review under this subsection where an actual application of some description was made in court or where it could be established that an application would have been made in court if the court had been able to reach it in a list on the day concerned is to create too imprecise a cut-off point in time for the making of an important application."*

40. That observation has some resonance in the context of a submission made by counsel for the practitioner in this case discussed in para. 37 above. As noted above, counsel for the practitioner submitted that, if service was a necessary element of the making of an application within the meaning of s. 115A(2), this would create significant uncertainty particularly in cases where (as often happens in the case of an insolvent debtor) there is a large number of creditors. For the reasons outlined in para. 37 above, any individual creditor served with the papers within the relevant fourteen-day period could well have great difficulty in ascertaining whether each one of the other creditors had been served within the same period. In the present case, there was a total of seven creditors but, in my experience, it is not uncommon for a debtor to have significantly more than seven creditors.

41. I was also referred to the decision of the Supreme Court in *Director of Public Prosecutions v. England* [2011] IESC 16. That case was concerned with the proper interpretation of s. 39(1) of the Criminal Justice Act, 1994 ("the 1994 Act") which allows, in certain circumstances, the forfeiture of property seized by members of an Garda Siochana or officers of Customs & Excise. It is important to keep in mind that, in essence, the provisions in issue in that case permit the confiscation of property by the State and it is understandable that the provisions should be narrowly construed. Under s. 38(1) a member of An Garda Síochána or an officer of Customs and Excise may seize and detain cash which is being imported into or exported from the State if the garda or the officer concerned has reasonable grounds for suspecting that the cash directly or indirectly represents the proceeds of drug trafficking or is intended for use in such trafficking. Section 38(2) requires that the detention of the cash cannot continue for more than 48 hours unless its detention beyond that period is authorised by an order made by a judge of the District Court. Under s. 38(3) an order of the District Court cannot be in place for a period longer than three months. More than one such order can be made in succession (as each relevant three month period comes to an end) subject to an overall limitation of two years on the period of detention.

42. The particular provision considered by the Supreme Court in that case related to the ability of the Circuit Court to order the forfeiture of any cash seized under section 38. Under s. 39(1) a judge of the Circuit Court may order the forfeiture if satisfied of certain matters "*on an application made while the cash is detained under that section*".

43. The relevant facts are not set out in detail in the judgment of the Supreme Court. Nonetheless, it is clear that, in that case, the last order of the District Court under s. 38 authorising the detention of the cash in issue expired on 5th May, 1999. On 23rd April, 1999, the DPP filed a notice of motion in the Circuit Court Office seeking relief under section 39. The relevant notice specifically stated that counsel for the DPP "*will apply to this Honourable Court on 29th June, 1999"* for the relevant relief. The question which, therefore, fell for consideration by the court was whether it could be said that the application had been made on 23rd April, when the notice of motion was filed in the Circuit Court Office. It is clear from pp. 14-16 of the judgment of Hardiman J. that, in the course of the hearing before the Supreme Court, the decision in *KSK* was the subject of debate. In particular, it is clear from p. 16 of the judgment that, in the course of argument before the court, counsel for the DPP expressly conceded that, save in cases where it might be impossible to identify or serve a necessary respondent, service of the relevant motion was required in order to comply with the requirements of section 39. Hardiman J. concluded that, in the circumstances, the application was not made while the money to which it related was detained under section 38. It is, however, important to note that, notwithstanding his reference to the decision of the Supreme Court in *KSK*, Hardiman J. was careful to observe at p. 13 that there was no authority immediately or directly relevant to the question of construction raised. This seems to me to be an acknowledgment by Hardiman J., consistent with the subsequent observation made by Baker J. in *Meeley*, that each statutory provision must be read by reference to its own terms and in its own context.

44. A somewhat similar issue subsequent arose in *Reilly v. DPP* [2016] 3 I.R. 229 which also dealt with s. 39(1) of the 1994 Act. In that case, Dunne J. (giving the judgment of the Supreme Court) referred to the decisions in both *KSK* and *DPP v. England*. At p 243, Dunne J., having considered the observations of Finlay C.J. at p. 163 of his judgment in *KSK* (as to the distinction between a motion made *ex parte* and a motion on notice), continued as follows:-

> *"As Finlay C.J. pointed out in the passage … in the case of a motion on notice it could not be said to have been made until notice of it had been given to the parties concerned. In this case there is no doubt but that the notice, having issued within the two-year time period, was also served within the two-year time period. In those circumstances I am satisfied that the application is made pursuant to s. 39(1) once the motion has been issued and served on the parties requiring to be notified within the relevant time period. I do not accept the contention that in order for the application to be made it is necessary that an application be made in open court as suggested. As the trial judge succinctly stated*

at p. 14:-

> *' … Such an assessment of a time limit would be imprecise and subject to the vicissitudes and vagaries of court calendars and workloads and cannot have been intended by s. 39(1).'"*

45. The decisions in *DPP v. England* and *Reilly v. DPP* were therefore both concerned with the same statutory provision, namely s. 39 of the 1994 Act. At the hearing before me, I was also referred to the decision of O'Malley J. in *DPP v. Humphreys* [2014] IEHC 539 which was again concerned with s. 39 of the 1994 Act. In her judgment, in that case, O'Malley J. reviewed the relevant case law including *KSK Enterprises* and *DPP v. England*. At para. 67 of her judgment, she said:-

> *"…I am conscious of the fact that this is a case in which, well before the expiry of the relevant District Court order, the Director had sought unsuccessfully to serve certain parties with notice of the intended forfeiture application and had made application to the Circuit Court for directions as to service…. The process of the court was thereby invoked with the specific purpose of ensuring proper service… However, it seems to me that the statements of principle by the Supreme Court in KSK Enterprises and DPP v England* are broad enough to bind this court to find that, where a statutory time limit requires that an application be brought by way of motion on notice, the notice must be served on all necessary parties within that time limit…" (emphasis added).

46. The decision in *Humphreys* (and in particular the passage highlighted above) was relied upon by counsel for Mars in this case. However, in my view, this observation by O'Malley J. should be seen in context. The issue before her related to s. 39 of the 1994 Act. The Supreme Court had already ruled on the interpretation of s. 39 in *DPP v. England*. Of course, the High Court was bound by that decision in the context of s. 39 of the 1994 Act. I fully appreciate that the language used by O'Malley J. in the passage highlighted above might suggest that the same principles should apply to any statutory provision which requires that an application be brought by way of motion on notice. However, I strongly doubt that O'Malley J. intended to go that far. Her words must be seen in the context of the specific statutory regime under consideration in that case. Moreover, O'Malley J, in the passage in question, specifically confines her remarks to statutory provisions which require an application to be made by motion on notice.

47. As noted above, it is important to consider each statutory provision in context. This was emphasised by Finnegan J. (as he then was) in *McK v. H.* (Unreported, High Court, 12th April, 2002) which concerned the interpretation of s. 2(5) of the Proceeds of Crime Act 1996 ("*the 1996 Act*"). Under s. 2(5) of the 1996 Act, an interim order restraining the disposal of property by a respondent in proceedings under the 1996 Act, will continue in force for 21 days from the date of the order "*and shall then lapse unless an application for the making of an interlocutory order in respect of any of the property concerned is brought during that period".* This case, therefore, related to the meaning of the word "*brought*" in the context of the 1996 Act. In his judgment, Finnegan J. referred to the Supreme Court decision in *KSK* and, at p. 5, he said:-

> *"There is a significant difference between [section 82(3) of the 1963 Act] where the word used is 'made' and [section 2(5) of the 1996 Act] where the word used is 'brought'. There are three possible meanings to be attributed to 'brought' -*
>
> *(i) that the motion be issued,*
>
> *(ii) that the motion be issued and served,*
>
> *(iii) that the motion be issued and served and moved in court.*
>
> *In deciding that …section 82 required service the Supreme Court had regard to the importance of notification to the recipient of a planning permission and the planning authorities a consideration which does not apply in relation [1996 Act]. The word 'brought' is used throughout the Statute of Limitations 1957. It is well settled that the Statute of Limitations applies not just to proceedings commenced by summons but equally to proceedings commenced by motion, … or petition …. In every case once the initiating process is issued time ceases to run and it is never necessary that service be effected within the limitation period. … I am satisfied accordingly that a motion pursuant to … the 1996 Act is brought when the same is filed in the Central Office pursuant to the Rules of the Superior Courts …."*

48. The decision of Finnegan J. in that case was subsequently appealed to the Supreme Court where Geoghegan J, giving the judgment of the court, upheld the High Court decision. The judgment of Geoghegan J, nonetheless, differed in one significant respect from the reasoning of Finnegan J in the High Court in that Geoghegan J did not consider that there was any relevant distinction between the word "*made*" and the word "*brought*". The judgment of the Supreme Court is reported as *F. McK v. A.F.* [2005] 2 I.R. 163. At p. 172 of the report, Geoghegan J. said:-

> *"I am quite satisfied that the application for the making of the … order was 'brought' during the statutory 21 day period. I do not think that there is any significant difference between this case and K.S.K. Enterprises Ltd. v. An Bord Pleanála …. Counsel for the defendant tries to make a relevant distinction between the word 'made' and the word 'brought', but I believe that no such distinction can be made. Given the uncertainties of the availability of courts and judges at any given time and the systems of listing, a statute which creates a time limit for the bringing or making of an application or uses any such cognate words should be interpreted as meaning the date of issuing if the proceedings require a summons or filing or possibly in some cases filing and serving if what is involved is a motion, but unless there are express words in the statute that require it, it should not be interpreted as meaning the actual moving of the application in open court…"*

49. It should be noted that, in that case, the motion had been both issued and served within the statutory time limit. This is clear from p 6 of the judgment of Finnegan J. The argument made by the defendant was that the application could not be said to be "*brought*" until the application was moved in court. In those circumstances, the observations by both Finnegan J and Geoghegan J - that the issue of a motion may be sufficient in itself – should be regarded as *obiter dicta*. Nevertheless, the observations are helpful in illustrating that the Supreme Court did not regard the decision in KSK as requiring, in all cases, that service be effected on the relevant notice parties before an application could properly be regarded as having been "*made*".

50. In the course of the hearing on 21st January, 2019, counsel for the practitioner emphasised the way in which Geoghegan J, in the passage just quoted, envisaged that filing was sufficient in itself for an application to be "*made*", save "*possibly in some cases filing and serving what is involved is a motion…".* Counsel submitted that one must look at the relevant statute to see which of these alternatives is appropriate in light of the particular language and context of the statute namely whether the issue of the motion is sufficient or whether the statute requires both issue and service. Counsel also emphasised that, in *KSK*, s. 82(3B) of the 1963 Act (as amended) expressly required that the application "*be made by* motion on notice" (emphasis added). Thus, the subsection expressly

required that for the application to be made, notice had to be given. It will be recalled in this context that Finlay C.J. noted, p. 136 of the report, that the subsection specifically provided that the application be made by motion on notice.

51. In the course of the submissions, I was also referred to the decision of Humphreys J. in *McCreesh v. An Bord Pleanála* [2016] 1 I.R. 535. In my view, that decision is of limited relevance since it was dealing with the separate question as to when an *ex parte* application could be said to be made. In that case, the relevant application for leave to apply for judicial review was filed in the Central Office but was not moved within the relevant statutory time periods. Humphreys J. came to the conclusion that this was sufficient. In reaching that conclusion, he drew attention at p. 537 to the fact that the Central Office of the High Court is "*an arm or instrument of the High Court and not some sort of entirely separate or independent agency*". In my view, counsel for Mars was correct in characterising the ratio of this decision as being limited to *ex parte* applications. As will be seen from the provisions of s. 115A(2), an application for relief under s. 115A is not intended to be pursued on an *ex parte* basis. There is a statutory obligation to give notice to all of the creditors, the debtor and the ISI. Importantly, however, s. 115A(2) does not refer to a "*motion on notice*". Instead, as an analysis of the language and structure of the subsection suggests, the obligation to give notice is one of three individual components of the requirements set out in section 115A(2).

Analysis of the Relevant Statutory Provisions

52. Before addressing the language of s. 115A(2) in detail, it is important to bear in mind that, if an application is to be made under s. 115A(9), a number of very important steps have to be taken in advance. Section 115A is not a straightforward provision. There is a myriad of considerations that have to be taken into account before any decision could be made as to whether it is appropriate to make an application to the court under S.115A.

53. In the first place, the practitioner will have to consider whether there are good grounds for making the application. There is no question of the practitioner issuing the application mechanically and without thought or careful consideration. One of the statutory requirements in s. 115A(2)(a) is that the practitioner should state the grounds of the application. That requires the practitioner to exercise his or her knowledge and expertise and, most especially, an independent judgment. This was emphasised by Baker J in a number of judgments. For example, in *John Foye* [2018] IEHC 38 at para. 43, Baker J explained the role of the practitioner in the following terms:

> *"The role of the PIP in the making of an application under s. 115A is one of 'substance and responsibility' … and not merely procedural or administrative in nature. The reason for this was explained in Re Darren Reilly and … in Re Nugent, that the Oireachtas intended to put an independent person with financial knowledge and expertise at the centre of the process…."*

54. The practitioner will also have to consider whether there exists a separate class of creditor which voted in favour of the proposals. This involves a consideration of the test in *Sovereign Life Assurance v. Dodd* [1892] 2 Q.B. 573, as applied in Ireland by Laffoy J. in *Re Millstream Recycling* [2010] 4 I.R. 253, and by Baker J. in *Sabrina Douglas* [2017] IEHC 785. Unless such a class can be identified (which involves showing that the *Sovereign Life* test has been satisfied in respect of that class), the application, in a multi-creditor case such as this) cannot be got off the ground. Section 115A(9)(g) makes that clear.

55. In addition, the practitioner will have to consider whether there is a good basis to satisfy the court as to each of the requirements set out in section 115A(8) and (9). The practitioner will, therefore, have to be in a position to justify, for example, that the proposed arrangement is fair and equitable in relation to each class of creditor that has not approved the proposals and that the arrangement is not unfairly prejudicial to the interests of any individual creditor. While these are issues that one assumes the practitioner will have considered when formulating the proposed PIA, a practitioner will nonetheless need to satisfy his or her mind, in advance of mounting any s. 115A application, that there is sufficient material available to justify the practitioner's views to the court.

56. If an application is to be mounted, the practitioner will also have to be satisfied that he or she will be able to demonstrate to the court that the proposals enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit.

57. It will also be necessary for the practitioner to discuss with the debtor whether it is appropriate to make an application under section 115A. In this context, an application under s. 115A cannot be brought by the practitioner unless and until the debtor instructs the practitioner to proceed.

58. Furthermore, the practitioner will have to prepare a certificate (which is a relatively detailed document) setting out the result of the vote taken at the creditors' meeting and identifying the proportions of the respective categories of votes cast by the creditors voting at that meeting and identifying those creditors who voted in favour of and against the proposal and the nature and value of the debts owed to each such creditors. This is a requirement of s. 115A(2)(d). The practitioner will also have to provide the statement required under s. 115A(2)(e) in relation to the requirements of sections 91 and 99(2). And, of course, the application under s. 115A(9) will also have to be drafted incorporating all of the material enumerated in paras. (a) to (e) of s.115A(2).

59. The practitioner will also need to ensure that there is evidence available to prove that a "*relevant debt*" exists within the meaning of s.115A(18) i.e. that, as of 1 January, 2015, the loan account secured on the debtor's principal private residence was in arrears or that, at some time prior to that date, the debtor had been in arrears but had entered into an alternative repayment arrangement with the secured creditor concerned. While that may seem like a requirement which can be readily satisfied by reference to the state of the debtor's account with the relevant secured creditor, it may not always be that simple in practice to get the relevant documentary proof in place particularly where the affairs of the debtor are chaotic.

60. It is unlikely that the steps described above could be taken without some input and advice from a legal advisor. While a practitioner will have considerable professional expertise and will have to exercise an independent judgment, legal advice is likely to be necessary given that any application under s. 115A necessarily involves court proceedings which, in many cases, will be opposed by one or more of the creditors who voted against the proposal.

61. Against the background described above, I believe it is fair to say that the fourteen day period prescribed by s.115A(2) is a remarkably short period. I appreciate that a similar period is prescribed, for example, under the Illegal Immigrants (Trafficking) Act 2000 in respect of challenges to immigration and asylum decisions, but that period is capable of being extended by the court. I also appreciate that an even shorter period exists under the Irish Takeover Panel Act 1997, but again, that is capable of being extended by the court (subject to certain conditions). In the present case, it is agreed by both parties, that the fourteen day period described by s.115A(2) is not capable of extension. This follows from a decision of Baker J. in *Michael Hickey* [2017] IEHC 20.

The language used in the relevant provisions

62. Turning to the relevant statutory provisions, it is useful, in the first instance, to consider the provisions of section 115A(1). It provides (*inter alia*) that an application can be brought where the practitioner "*considers that there are reasonable grounds for the making of such an application".* In the course of the hearing before me, counsel for the practitioner suggested that it cannot have been the intention of the Oireachtas that the words"*making of such an application*" are intended to cover both the issue of notice of motion and service of the notice of motion. Counsel suggested that the Oireachtas could hardly have intended that the practitioner had to direct his or her mind to whether there were reasonable grounds for taking both of those steps. It was submitted that what the Oireachtas had in mind was that the practitioner should give consideration to whether there are reasonable grounds for invoking the jurisdiction of the court which would be done by the issue of the notice of motion. It seems to me that there is some substance to this submission although, of itself, it would not be determinative.

63. In so far as the provisions of s.115A(2) are concerned, counsel for the practitioner submitted that, in contradistinction to s. 82(3)(b) of the 1963 Act considered by the Supreme Court in *KSK*, s. 115A(2) does not provide that the application should be made by motion on notice. Instead, it sets out three separate (albeit interlinked) requirements, namely:-

> (a) that the application should be made not later than fourteen days after the meeting;
>
> (b) that notice should be given to the Insolvency Service, each creditor concerned and the debtor; and
>
> (c) that the notice must be accompanied by each of the materials set out in paras. (a) to (e) of the subsection.

64. In my view, this submission by counsel for the practitioner has considerable force. It is borne out by a consideration of the punctuation within section 115A(2). In this context, notwithstanding the approach which has traditionally been taken in England & Wales, the Irish Courts have regard to punctuation as an aid to statutory interpretation. This is clear, for example, from the judgment of Hardiman J. in *Minister for Justice v. Bailey* [2012] 4 I.R. 1 at page 72. It is also apparent from the judgment of Fennelly J. in *Twil Ltd v. Kearney* [2001] 4 I.R. 476 at page 492.

65. The punctuation within s. 115A(2) breaks up the subsection into three parts. The first part is concerned with the making of the application within fourteen days, the second part deals with the requirement to give notice to the Insolvency Service, each creditor concerned and the debtor, and the third part relates to the materials that are required to accompany the application. Each of these parts of the subsection are separated by a comma. Ignoring the reference to s.111A (which is not relevant for present purposes) those three parts are:-

> (a) the first part comprises the words *"An application under this section shall be made not later than 14 days after the creditors' meeting…,";*
>
> (b) the second part comprises the words "*shall be on notice to the Insolvency Service, each creditor concerned and the debtor,…";* and
>
> (c) the third part comprises the words "*and shall be accompanied by…a statement of the grounds of the application…".*

66. Each one of these three components of s. 115A(2) relates to "*an application under this section*". Thus, the first part requires that the application under the section must be made not later than fourteen days after the creditors' meeting. The second part requires that notice of the application must be given to the Insolvency Service, the creditors and the debtor. The third part requires that the application must be accompanied by each of the documents set out at paragraphs (a) to (e). When one analyses the language of s. 115A(2) in this way, it suggests that there are, in fact, three requirements within the subsection.

67. There is, accordingly, a notable difference between the language and structure of s. 115A(2) on the one hand and the language and structure of s. 82(3B) of the 1963 Act considered by the Supreme Court in *KSK*. As noted above, the language of s. 82(3B) expressly required that the application be made by motion on notice. The requirement of notice was an inherent and express element of the making of the application. In his judgment (at p. 136 of the report), Finlay C.J. drew attention to the phrase "*application made by motion on notice*" which is what is provided for in s. 82(3B). That is not the way in which the opening words of s.115A(2) have been drafted. The language of s.115A(2) simply requires that the application shall be made not later than fourteen days after the creditor meeting. There is no equivalent to the phrase "*An application for leave to apply for judicial review...shall …* be made by motion on notice" (emphasis added) which appeared in s. 82(3B) of the 1963 Act (as amended) or similar words. There, the requirement of notice was an integral element of what was involved in making the relevant application. In contrast, in s. 115A(2), the word "*notice*" is not linked in the same way with the word "*made*" as it is in s.82(3B). The giving of notice is not expressed to be an inherent or integral element of the making of the application. Instead, the language and structure of the subsection suggests that it is an additional requirement to the obligation to make the application within fourteen days.

68. In addition, the fourteen day requirement is specifically referable to the words "*an application under this section shall be made".* Section 115A(2) does not specifically require the notice to be given within the same period.

69. In my view, an analysis of s.115A(2) taken on its own, supports the case made by the practitioner. However, it would be unsafe to consider s.115A in isolation. For all of the reasons discussed above, it is necessary to consider s. 115A(2) in context. Counsel for Mars submitted that when one looks at the language of s. 115A(3) it is clear that the Oireachtas was not equating the lodging of an application in the relevant court office with the making of an application to the court. It should be recalled at this point that s. 115A(3) envisages that a creditor who wishes to object to the application under s. 115A must *"lodge a notice with the appropriate court*".

70. It was submitted that the Oireachtas very deliberately used the word "*lodge*" in s. 115A(3) in contradistinction to the use of the word "made" in s. 115A(2) . Counsel submitted that this shows, very clearly, that the Oireachtas must have intended, when using the word "*made*" in s. 115A(2) to have meant something different to the physical act of merely lodging the notice of motion in the relevant court office.

71. At first sight, there is significant force in the argument made by counsel for Mars. However, on further analysis, there is a logical reason why the Oireachtas would use the word "*lodge*" in the context of sections 115A(3) and (4). There is a very real difference between the nature of the step taken by a creditor in lodging a notice of objection and the nature of the step taken by a practitioner on behalf of a debtor in issuing a s.115A application. In the case of the notice of objection, it merely has to be filed in the relevant court office in connection with the pre-existing application brought by the practitioner under section 115A. There is no further engagement required of the party lodging that notice other than placing it on the pre-existing court file. In contrast, a party required to make an application to the court (which is what the practitioner on behalf of the debtor must do under section 115A) has

significantly more engagement with the court office. It is not simply a question of filing or lodging the relevant application and putting it on the court file. Instead, when the application is brought to the court office, it must, in the first instance, be given a date on which the matter will first appear before the court; the office must not only assign a return date to the application but must enter the application in the relevant court list for that day. The provisions of s 115A(6) are of some relevance here. Under s.115A(6), the Oireachtas was careful to ensure that there would be a hearing of any s.115A application which has been made. Section 115A(6) expressly imposes an obligation on the court to hold a hearing. Therefore, when the application has been received by the office, a chain of events is set in motion which will inevitably require that the application appear in the court list.

72. The lodging of the notice of objection does not require the same level of engagement. All that is done, is that the notice is filed. The act of filing a document of that kind is quite mechanical in nature.

73. This distinction between the mere filing of a document, on the one hand, and the steps that require to be taken when a s.115A application is brought into the court office, on the other, is also important in the context of s. 140 of the Act. Section 140 of the Act empowers rules of court to be made dealing with the procedural steps that are required to be taken in the context of court proceedings under the Acts. Section 140 was relied upon by both sides in support of their interpretation of the language used in section 115A. Thus, for example, counsel for the practitioner argued that the language of s. 140(1)(a) (considered in more detail below) supported the contention that the making of an application was complete when the application was brought to the court office. Counsel for Mars argued that s. 140(5) supported the interpretation advocated by Mars since it appears to make a distinction between the lodgement or filing of a document on one hand and the making of an application on the other.

74. On my analysis of s. 140, it appears to me to add weight to the case made on behalf of the practitioner here. In the first place, I draw attention to the language used in s. 140(1)(a) which, insofar as relevant provides as follows:-

> *"(1) Notwithstanding any other provision of this Act, or any other enactment or rule of law, rules of court may, in relation to any proceedings under this Act before an appropriate court, make provision for—*
>
> > *(a) the lodgement or filing of a document with, and making of an application to, the court by transmitting the document or application by electronic means to the court office"*

75. In my view, this language strongly supports the view that the Oireachtas did not intend that the making of an application would, of itself, extend to the service of the application on any relevant notice party. The language used in s. 140(1)(a) clearly supports the proposition that the Oireachtas regarded the making of an application as complete once the application is with the relevant court office. This follows from the fact that s. 140(1)(a) clearly regards it as appropriate for a court rules committee to make a rule that the making of an application to the court can be effected by transmitting the application by electronic means to the court office.

76. By the express terms of s. 140(1)(a), the Oireachtas has empowered rules to be made that make provision for the "*making of an application to … the court by transmitting the … application by electronic means to the court office".* Those words plainly contemplate that the making of the application will be complete when the relevant application is transmitted by electronic means to the court office.

77. I do not believe there is anything in s. 140(5) which undermines this view. That subsection provides as follows:-

> *"(5) References in this Act to the—*
>
> > *(a) furnishing of a document to,*
> >
> > *(b) lodgement or filing of a document with,*
> >
> > *(c) making of an application to,*
> >
> > *(d) transmission of a document to or by, or*
> >
> > *(e) issue of a document by,*
>
> *the appropriate court shall be construed as including a reference to the performance of such action by electronic means, where this is provided for in rules of court referred to in subsection (1)."*

78. It was submitted on behalf of Mars that this provision showed that the lodgement or filing of a document was regarded by the Oireachtas as something different to the making of an application. He drew attention to the way in which they are separately enumerated at paras. (b) and (c) respectively of s. 140(5). It was suggested, in those circumstances, that one could not regard the filing of the application in the Circuit Court office as the making of an application under section 115A. I do not accept this submission. For the reasons outlined above, it seems to me that there is a significant difference between the issuing of a motion by a court office and the lodgement or filing of a document with a court office. In my view, the issuing of a s. 115A application cannot be characterised merely as filing or lodging. As explained above, the motion is not simply placed on the court file. It is given a date by the court office and entered in the list of motions to be listed before the court on that day. There is, therefore, a rational explanation for the distinction made by the Oireachtas between the lodgement or filing of a document, on the one hand, and the making of an application, on the other.

79. Thus, when s. 115A(2) is read in conjunction with s. 140, I believe there are strong grounds for concluding that the Oireachtas did not intend that a s. 115A application would require to be served on the relevant notice parties before it could be considered to have been "*made*". It must follow that there are equally strong grounds to conclude that, once the s. 115A application has been issued in the relevant court office within a period of fourteen days after the creditors' meeting, the application has been duly made.

80. However, before reaching any final conclusion on this issue, I must bear in mind the argument that was made by counsel for Mars that s. 115A represents a significant encroachment on the rights of creditors – particularly insofar as it extends the period of protection. As a consequence of the extension of the period of protection, creditors are unable to take any form of action against the debtor. As noted above, s. 96 of the 2012 Act very seriously curtails the exercise of rights by creditors against the debtor during the protection period. Counsel also drew attention to the way in which an arrangement approved under s.115A can seriously affect creditors' rights.

81. I fully accept that, mindful of the impact on creditors, the Oireachtas intended to create a tight timeframe for the bringing of an application under section 115A. This is very clear from the way in which the Oireachtas prescribed a very short period of fourteen days. It is also underlined by the fact that the Oireachtas has not given any power to the court to extend that time period. The impact on creditors is a significant consideration that must be borne in mind in seeking to understand the intention of the Oireachtas in framing s.115A(2) in the way that it has. On the other hand, it is noteworthy that the Oireachtas chose not to use the "*motion on notice*" language previously used in the 1992 Act (which inserted s 82(3B) into the 1963 Act).

82. Moreover, when s 115A(2) and s 140 are considered together it appears to be clear that in the 2012-2015 Acts, the Oireachtas specifically had in mind that the making of an application could be achieved by bringing it to the court office. A consideration of those provisions strongly suggests that the Oireachtas did not contemplate that the application would also have to be served on the notice parties before it could be considered to have been "*made*". Given the significant steps that have to be taken by a practitioner before mounting a s. 115A application the Oireachtas may have considered that it would be imposing an unachievable burden on a practitioner if service also had to be completed within the very tight fourteen day period prescribed. In this context, it was suggested by counsel for Mars that service of the application should not be a burden for practitioners since it could be undertaken by electronic means. To my mind, that argument fails to recognise that, while the Oireachtas has empowered the court rules committees to make rules allowing for electronic service, the Oireachtas stopped short of requiring that such rules should be made. Therefore, s 115A has to be capable of being operated even without the benefit of electronic service. In the absence of electronic means to serve the application, a requirement to serve what could be a large number of notice parties within the same fourteen day period as is available for the taking of the steps described in paras. 52-60 above could give rise to significant difficulty in some cases. It is therefore understandable that the Oireachtas would not require that service be effected within the fourteen day period.

83. It seems to me that the way in which the Oireachtas chose to address the policy consideration identified by Mars was in the requirement set out in s. 115A(7) under which the court and the parties are placed under a statutory obligation to ensure that a hearing under s. 115A is held "*with all due expedition*". That means that practitioners would not be entitled to delay service of the notice required under section 115A(2). Indeed, I note that when the Circuit Court Rules Committee came to enact rules for the purposes of s. 115A, the committee was obviously mindful of the obligation contained in section 115A(7). Order 73, rule 29A(3) requires that on receipt of a notice of motion under s. 115A and the appended documents (e) the documents required under s. 115A(2)(a) to (e), the office is required to list the matter for initial consideration by the court *"on the earliest practicable date which is not less than 21 days after the date of issue of the notice of motion*". Furthermore, r. 29A(4) imposes an obligation on the practitioner to send a copy of the application to the ISI, the debtor and each creditor concerned *"not later than 4 days after the notice of motion … has issued*".

84. The Superior Court Rules contain very similar provisions in Order 76A, rule 21A. Under r. 21A(3) the office is required to list the notice of motion for initial consideration on the earliest practicable date not less than 21 days after the date of issue. Under r. 21A(4), the practitioner is required to serve the notice of motion within four days from the date of issue. Under r. 21A(5), the court is required (if it does not hear and determine any objections on that date) to make directions and make orders for the determination of any objections.

85. In my view, the provisions of the Circuit Court Rules and Superior Court Rules, therefore, give effect to the obligation imposed on the court (and on the parties) by s. 115A(7) to hear any application under s. 115A with "*due expedition*".

86. The rules are also interesting in that the Rules Committee in each case, appears to have taken a similar interpretation of s. 115A(2) as that taken by the practitioner in this case. In the case of both sets of rules, there is a specific obligation imposed on the practitioner to serve the notice of motion on the ISI, the debtor and the creditor within four days after the date of its issue. There would be no need to address the question of service of the notice of motion if, under the Act, the service of the motion was already an inherent part of the making of the application. Thus, the approach taken in the Rules suggests an understanding on the part of the respective Rules Committees that the making of the application was confined to the issue of the notice of motion.

87. Of course, the provisions of the rules cannot be used as an aid to the interpretation of the Act. Nonetheless, the fact that the Rules Committees (comprised of members with very significant experience and expertise) have taken this interpretation of the Act is striking.

88. In the course of the hearing, counsel for Mars submitted that it would be surprising if it had been the intention of the Oireachtas that an application under s. 115A could be regarded as having been "*made*" merely by issuing the relevant notice of motion in the court office. In making this submission, counsel drew attention to the provisions of s. 96(1) of the 2012 Act which prevents the creditor from taking steps against the debtor while a protective certificate remains in force. He highlighted that the prohibition on the taking of such steps only applies to a creditor "*to whom notice of the issue of a protective certificate has been given".* Counsel submitted that the scheme of the Act envisaged that creditors would not be adversely affected without notice first being given to them. However, there are provisions of the Act which make clear that orders can be made which have the effect of extending the protection period without any requirement that any advance notice be given to a creditor. For example, under ss. 95(6) and (7), an application can be made by a practitioner to extend the period of the protective certificate by an additional period not exceeding 40 days (subject to satisfaction of certain conditions). The Act does not require that such applications should be made on notice to creditors notwithstanding that it could be possible in the particular case to extend the protection period by a period of 80 days (where successive applications are made under s. 95(6) and subsequently under section 95(7)). There is a requirement under s. 95(12) that the practitioner should notify the creditors of any decision to extend the period of a protective certificate. However, that is notification after the event. In the meantime, the protective period has been extended without notice to the creditor. Once the protective certificate has been extended, it remains in force and the creditors are restrained by virtue of s. 96(1) from taking any of the actions against the debtor specified in that subsection.

Conclusion

89. For the reasons outlined in paras. 81-83 above, I believe that the Oireachtas, in enacting s. 115A, carefully put in place a regime that ensured that the rights of creditors would be appropriately protected by placing an express obligation on the courts to deal with applications with due expedition. This ensures that delays to creditors resulting from such applications will be no longer than are necessary. This is reinforced by the provisions of s 115A(6) which obliges the court to hold a hearing of any s.115A application. The application cannot be allowed to sit on a court file.

90. When s. 115A(2) is read in context, I am of the view, for all of the reasons previously explained, that the interpretation advocated by the practitioner is correct. I reject the suggestion that this creates uncertainty for creditors. On the contrary, as explained in paras. 37 and 40 above, it seems to me that this interpretation promotes certainty.

91. Accordingly, I have come to the conclusion that an application under s 115A(9) is made once the application has been lodged in

the relevant court office. In my view, s. 115A(2) does not require that service be effected on the statutory notice parties within the fourteen day period prescribed.