THE HIGH COURT

[C:IS:HC:2016:000039]

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

AND IN THE MATTER OF

FRANK MCNAMARA

AND

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

JUDGMENT of Mr. Justice Denis McDonald delivered on 17 December, 2018.

The application before the court

1. This judgment deals solely with the relief sought in the notice of motion dated 1st June, 2018 brought by James Green, Personal Insolvency Practitioner ("the Practitioner") on behalf of the above named debtor in which the Practitioner seeks to amend the wording of the notice of motion previously filed in these proceedings on 2 February, 2017, which had sought an order pursuant to s. 115A(9) of the Personal Insolvency Act 2012 ("the 2012 Act") as amended by the Personal Insolvency (Amendment) Act 2015 ("the 2015 Act"). Under s. 115A(9) of the 2012 Act (as amended) an order can be sought from the court (subject to compliance with a significant number of conditions) confirming the coming into force of a proposed Personal Insolvency Arrangement ("PIA") notwithstanding that the proposals have been rejected by the creditors of the debtor.

2. The notice of motion seeking relief under s. 115A(9) ("the originating notice of motion") indicated, in its opening words that the application would be moved by: "*solicitors/counsel on behalf* of the Debtor" (emphasis added). Although the notice of motion was signed by the Practitioner, the opening words clearly suggested that the application was made on behalf of the debtor himself.

3. As a consequence of two decisions of Baker J. (addressed in more detail below) both of which were delivered after the originating notice of motion had been issued, it was clarified that, under the 2012 Acts (as amended), the only party who can make an application under s. 115A is a Personal Insolvency Practitioner. In those circumstances, the Practitioner here has brought the present application seeking to amend the originating notice of motion so as to make clear, in its opening words, that the application is brought by the Practitioner on behalf of the debtor. That application is strenuously opposed by the Objecting Creditor, Tanager DAC ("Tanager") albeit that no such objection was identified at any point in its notice of objection dated 10th February, 2017 or in the affidavit of Angela O'Brien sworn on its behalf on 11th May, 2017.

4. Before dealing with the issues which arise on the present motion, it is necessary, in the first instance, to consider the two judgments of Baker J. which were delivered subsequent to the filing and service of the originating notice of motion.

The judgments of Baker J.

5. On 5th October, 2017, Baker J. gave judgment in *Darren Reilly* [2017] IEHC 558 in which she carefully considered the provisions of s. 115A in the context of an appeal from the Circuit Court. The appeal in that case had been brought in the name of the debtor rather than in the name of the practitioner. In para. 26 of her judgment Baker J. identified the question which arose for consideration in that case namely – whether a debtor (as opposed to a practitioner) has an independent and free-standing right to appeal a refusal by the Circuit Court under s. 115A to approve the coming into effect of a PIA. Baker J. answered that question in para. 67 of her judgment in the following terms:-

> *"An application under s. 115A may be instituted only by a PIP, and a debtor has no statutory standing to initiate the application without the active and substantive engagement of the PIP with the process."*

6. Earlier, in para. 56 of her judgment, Baker J. had summarised the role of the practitioner on an application under s. 115A in the following way:-

> *"The fact that a PIP performs a role of responsibility and substance, and is required for the purposes of bringing an application under s. 115A to exercise professional judgement, provides to a large extent the backdrop to the procedural requirements... In bringing a professionally qualified person into the heart of the process, the Oireachtas sought to achieve the orderly processing and formulation of a PIA and of an application by way of review to a relevant court. The process is envisaged as being for the benefit of the debtor, but is not one driven by the debtor, nor can he or she engage the process without an intermediary who cannot be said to act merely on instructions, but is required at all times to seek to achieve the resolution of debt, to do so in the exercise of professional judgement, and to engage his or her knowledge or experience in financial matters to fashion a remedy which is satisfactory to all parties concerned. The PIP is an intermediary therefore in a true sense, and neither the creditor nor the debtor can be said to be his or her client."*

7. Subsequently, in *Niamh Meeley* [2018] IEHC 38 Baker J. had to consider a similar question in the context of an originating application in the High Court for relief under s. 115A (i.e. similar to the originating notice of motion in this case). In para. 11 of her judgment in *Niamh Meeley*, Baker J. summarised her previous decision in *Darren Reilly* as:-

> *"…authority for a narrow proposition, that the involvement of the PIP in the process is mandatory, and that a debtor does not have an independent or free standing right to appeal a decision of the Circuit Court under s. 115A."*

8. In para. 135 of her judgment in *Niamh Meeley*, Baker J. expressed the view (consistent with her decision *Darren Reilly*), that an originating motion must sufficiently identify:-

> *"…that the application is that of the PIP, and as it is self evident that the PIP does so on behalf of the debtor, that phrase is unnecessary, albeit to use it could not be said to be incorrect. A motion is not to be dismissed on account of superfluous or unnecessary words."*

9. In *Niamh Meeley*, the notice of motion did not identify that the practitioner was the applicant. In para. 142 of her judgment Baker J. categorised this as "*an error in that it fails to identify that the PIP makes the application.*"

10. In the concluding paragraph of her judgment (para. 154), Baker J. noted that it had previously been agreed that any question of substitution or amendment of the notice of motion would await her ruling. She added:-

> *"I am not satisfied that the procedural incorrectness is such as justifies the striking out of the proceedings without further argument or application."*

11. The parties before me were agreed that subsequent to the decisions in *Darren Reilly* and *Niamh Meeley* the applications in both of those cases were subsequently amended without opposition from the objecting creditors. Thereafter, the court, in each case, proceeded to deal with the s. 115A applications on their respective merits. It was therefore unnecessary for the court in those cases, to deal with whether it was legally possible to amend the originating notice of motion in order to comply with the judgments in *Darren Reilly* and *Niamh Meeley*.

The arguments of the parties in this case

12. There was a fundamental disagreement between the parties as to the governing rule or other jurisdiction for an application of this kind. It was argued by counsel for the Practitioner, Mr. Declan McGrath SC, that an application of this kind falls within (a) O. 28, r. 12 (RSC); (b) s. 115A(14) of the 2012 Act (as amended); (c) O.28, r.1; or alternatively under the inherent jurisdiction of the court.

13. It should be noted, at this point, that in the notice of motion seeking liberty to make the proposed amendment, a number of bases had been relied upon including O. 63, r. 1(15) and O. 124. In the course of the hearing, no argument was ultimately made in reliance on O. 63, r. 1(15). Some reliance was sought to be placed on O. 124 but, in my view, O. 124 is clearly not capable of being relied upon here. As counsel for Tanager, Mr. Bernard Dunleavy SC, made clear, O. 124 is concerned with noncompliance with the Rules. It is not relevant to a failure to comply with a statutory requirement. It is relevant to the submission made on behalf of Tanager that the provisions of O. 75A were not complied with. However, the issue here is the non-compliance with the provision of s. 115A. The complaint by Tanager that there has been a failure to comply with O. 75A is, in my view, a side-issue which does not require consideration here. Any failure to comply with the Rules can be readily overcome.

14. In contrast to the position taken by the Practitioner, the case made on behalf of Tanager was that the present application is, in substance, an application to substitute a new party – namely an application to substitute the Practitioner for the debtor. In the written submissions delivered on behalf of Tanager, it was argued that the only application which might be capable of curing the error would be an order substituting the Practitioner as applicant in lieu of the debtor.

15. In the submissions made on behalf of Tanager, there was a focus on two rules in particular, namely:

> (a) O. 15, r. 2. Under that rule, where an action has been commenced in the name of the wrong person as "*plaintiff*" the court may "*if satisfied that it has been so commenced through a bona fide mistake, and that is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted…as plaintiff upon such terms as may be just*";
>
> (b) O. 15, r. 13. Under that rule, the court is given a power at any stage of the proceedings to order the names of any parties improperly joined to be struck out and to order that the names of any parties who ought to have been joined should be added.

16. In reliance on the decision of Kearns P. in Sa*ndy Lane Hotel Ltd. v. Times Newspapers Ltd*. [2014] 3 I.R. 369, Tanager submitted that, in circumstances where there was no evidence that a *bona fide* mistake had been made in naming the debtor as applicant in the originating notice of motion, the only potential order which the court could consider making is one pursuant to O. 15, r. 13. The significance of this argument is that, if Tanager is correct, there would be serious implications for the debtor in terms of compliance with the time limit laid down in s. 115A(2) of the 2012 Act. Under that subsection, an application under s. 115A must be made within 14 days after the creditors' meeting. There is no power to extend that time limit.

17. The effect of O. 15, r. 13 was explained by Kearns P. in the *Sandy Lane* case at p. 381. He explained that where the court makes an order pursuant to O. 15, r. 13 the proceedings are then deemed to have commenced only on the date of the making of the order adding the new party. Thus, if O. 15, r. 13 applies in the present case, it would appear to follow that the originating notice of motion (when amended) would only be deemed to have been brought at the time of any order made under that rule. It would be inevitable, in such circumstances, that the application under s.115A could not comply with the fourteen day time limit prescribed by statute.

18. In the submissions on behalf of Tanager, reliance was also placed upon the decision of Hunt J. in the High Court and the decision of Costello J. in the Court of Appeal in *Tucon Process Installations Ltd. (In Voluntary Liquidation) v. Bank of Ireland* [2015] IEHC 312 [2016] IECA 211. In that case, proceedings under s. 139 of the Companies Act 1990 and s. 280 of the Companies Act 1963 were brought in the name of a company in voluntary liquidation. The proceedings were dismissed in circumstances where they ought have been commenced in the name of the liquidator who, under those statutory provisions, was the proper party to take such proceedings. Tanager argued that a similar approach should be taken here. However, I am aware that, in *Tucon*, the liquidator expressly refrained from making any application to amend the application. In fact, Hunt J. in the course of the High Court hearing in that case adjourned the hearing expressly for the purpose of giving the liquidator an opportunity to consider his position and in particular to consider whether he would make an application to amend the originating notice of motion in that case so as to name himself as applicant rather than the company in voluntary liquidation. The liquidator did not avail of that opportunity. Thus, *Tucon* provides no guidance as to what criteria would have been applied by the High Court (or the Court of Appeal) in the event that such an application had been made by the liquidator.

19. Counsel for Tanager submitted that the issue here is one of standing. The court is not faced with a mere typographical error. Absent an application to amend, counsel argued that the court would be compelled to find that the notice of motion does not comply with the 2012 Act such that the application would have to be struck out. Counsel submitted that the lack of standing is apparent on the face of the originating notice of motion. In these circumstances, counsel argued that the court is entitled to ask itself what is the reason for the failure of the Practitioner to properly formulate the applications. It was submitted that there is no evidence at all before the court that there was a mistake. In fact, counsel argued that the evidence was to the contrary.

20. Counsel for Tanager argued that, at the very least, what the court requires is an explanation. He contrasted the evidence before the court in this case with the affidavit evidence before the court in *Cavan Crystal Glass Ltd*. [1998] 3 I.R. 570 (a case on which the Practitioner relies and which is addressed in more detail below).

21. The submissions on behalf of Tanager also sought to distinguish the case law (again addressed in more detail below) on which the Practitioner relied where the court had been prepared to make orders under O. 28, r. 12 or O. 28, r. 1.

22. With regard to the attempt by the Practitioner to rely on the inherent jurisdiction of the court, the case made by Tanager was that the inherent jurisdiction is not available in circumstances where the rules already govern a situation of this kind. In addition, it was argued that it could not have been within the contemplation of the legislature that the inherent jurisdiction of the court be invoked by parties in proceedings under the 2012-2015 Acts. Attention was drawn to the fact that, under the Acts, the vast majority of proceedings are taken in the Circuit Court which (so it was argued) could not be said to have any inherent jurisdiction. It was argued that the legislature could not have contemplated that a different regime would apply in the High Court than in the Circuit Court.

Discussion and analysis
23. I believe that I should commence my consideration of the issues by first addressing the four bases on which the Practitioner has sought to move this application. If I come to the conclusion that the Practitioner is entitled to rely on one or more of these bases, it will be unnecessary to consider the remaining issues that were debated in the course of the hearing before me. I will therefore address, in turn, each of the four bases identified in para. 12 above.

Order 28, rule 12
24. Order 28, rule 12 is, as counsel for the Practitioner observed, in very broad terms. It provides as follows:-

> *"The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."*

25. On the face of it, O. 28, r. 12:-

> (a) applies to any defect or error in any proceedings;
>
> (b) permits the court to make any necessary amendments in respect of such an error or defect for the purpose of determining the real question or issue raised by or depending on the proceedings.

26. The provisions of O. 28, r. 12 were applied Kelly J. (as he then was) in *Cavan Crystal Glass Ltd.* [1998] 3 I.R. 570. In that case, a petition to appoint an examiner was presented to the court on 27th February, 1998. At that time, the applicable statutory regime was contained in the Companies (Amendment) Act 1990 ("the 1990 Act"). Under s. 3(6) of the 1990 Act, a company had a time period of no more than fourteen days in which to present a petition of that kind after the date of appointment of a receiver. On the day immediately prior to the presentation of the petition, a receiver had been appointed to the company by Ulster Bank Limited. The petition was presented by two directors of the company namely Mr. Neil MacKay and John Maher. Paragraph 4 of the petition stated that these were the only directors of the company. In this context, it is important to note that, under s. 3(1) of the 1990 Act, a petition could be presented by all of the directors of the company or by a shareholder who holds at least 10% of the shares in the company.

27. In the course of the hearing before Kelly J. it emerged that the petitioners were not the only directors of the company. On that basis, it was claimed by the receiver and by the bank that the petition had not been brought at the suit of all of the directors of the company. This objection was upheld by the court. However, an application was made to amend the petition to name Mr. MacKay as the sole petitioner on the basis of his status as a shareholder holding not less than one tenth of the paid up capital. Objection was taken to any amendment of the petition. It was submitted by the banks and the receiver that, even if the court were to amend the petition in the manner sought, it could be of no assistance to the company because any such amendment could not override the statutory provisions contained in s. 3(6) of the 1990 Act. It was also contended that there was no power under the rules which permitted an amendment of the type sought. In response, Mr. MacKay sought to rely on O. 15, r. 2, O. 28, r. 1 and O. 28, r. 12. He also placed reliance upon the provisions of s. 3(7) of the 1990 Act. I deal with the provisions of s. 3(7) below. Section 3(7) is relevant to one of the alternative bases on which the present application is moved namely s 115A(14)..

28. Kelly J. decided the application under O. 28, r. 12 and s. 3(7) of the 1990 Act. At pp. 581-582 he said:-

> *"Whatever may be the merits of the arguments of… the bank as to the inapplicability of O. 15, r. 2 and O. 28, r. 1…, I am quite satisfied that the petitioners are entitled to rely both upon the provisions of O. 28, r. 12 and s. 3(7) ... There is no evidence to controvert the assertion made by Mr. MacKay to the effect that the failure to present this petition as a shareholder holding in excess of 10% of the capital of the Company was a bona fide one. It is clear that this petition had to be prepared and presented as a matter of considerable urgency. I accept that the error made was a genuine one. In such circumstances it would be strange indeed if the court did not have the power to put right such an error. I am of the view that it does have such power under the provisions of O. 28, r. 12 and under s. 3(7)…*
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> *Needless to say, the court must always be astute to ensure that its process is not abused. This is particularly so in petitions presented under the Act. The mere presentation of a petition… provides statutory protection to the company… Given that such protection brings about a drastic abridgement to the rights of creditors, the court must make certain that this procedure is not abused… Great care should therefore be given to the presentation of petitions under the Act. In the present case, however, I am satisfied that a genuine mistake was made and I therefore propose to allow the amendment sought.*
>
> *This amendment does not involve the substitution of new petitioners for the existing one. It involves the striking out of Mr. Maher as petitioner and an alteration of the status in which Mr. MacKay petitions the court. It must be borne in mind that Mr. MacKay would have been entitled to petition as a shareholder of in excess of 10% of the share capital of the company at all times. By allowing the amendment I am merely changing the description which is applicable to him as petitioner."*

29. In the course of his submission, Mr. Dunleavy on behalf of Tanager, argued that the decision in Cavan Crystal is of no assistance to the Practitioner here for two reasons:-

(a) In the first place, there was evidence of a *bona fide* mistake in that case which was fully explained in the evidence before Kelly J. Counsel submitted that there was no evidence of any such mistake here and, furthermore no sufficient explanation for the error has been provided;

(b) secondly, counsel placed significant emphasis upon the observation by Kelly J. in *Cavan Crystal* at p. 582 that the amendment sought there did not involve the substitution of a new petitioner for the existing one. The same party continued as petitioner, the

only amendment was to delete the name of one petitioner, delete the reference to directors, and insert a new description of Mr. MacKay as a shareholder. Counsel submitted that, in contrast, in the present case, the application, of necessity, involves the substitution of one party for another namely the substitution of the Practitioner for the debtor. It was argued that the only way in which such an application could be moved is under O. 15.

30. For his part, Mr. McGrath, on behalf of the Practitioner, argued that, in contrast to O. 15, r. 2 (which is predicated upon a *bona fide* mistake having been made) O. 28, r. 12 contains no equivalent requirement. All that has to be established is a defect or error. He argued that there was clearly an error here insofar as the notice of motion records the debtor as the applicant. Mr. McGrath stressed that this is how it had been characterised by Baker J. in *Niamh Meeley* at para. 142 where she said:-

> *"In the case of …Mr. and Mrs. Meeley, the motion was signed by the PIP although the operative part of the motion did not identify the PIP as being the applicant. The PIP did have a substantial input into the motion, and did give the necessary certifications*. The motion contains an error in that it fails to identify that the PIP makes the application." (emphasis added).

31. Mr. McGrath also argued that this "*error*" arose against a backdrop where, prior to the decisions of Baker J. in *Darren Reilly* and *Niamh Meeley*, there was significant uncertainty among practitioners and lawyers as to who should be named as applicant in originating motions brought pursuant to s. 115A and O. 75A.

32. Counsel stressed that, as a matter of fact, the application here, although naming the debtor as applicant, was made by the Practitioner. The debtor had no hand, act or part in the preparation of the application. There was therefore a clear parallel between the present case and the situation which confronted the court in the *Cavan Crystal* case.

33. While Kelly J. in *Cavan Crystal* placed some emphasis on the explanation that was provided in that case, counsel argued that there was nothing in O. 28, r. 12 which required an explanation to be given and that, in any event, the uncertainty described above provided an explanation. At this point, it should be noted that counsel for Tanager rejected the suggestion that there was any uncertainty and he drew attention to the way in which Baker J. had referred, in para. 134 of her judgment in *Niamh Meeley*, to a variety of formulae which had been current prior to her decision in *Darren Reilly*.

34. I have given careful consideration to the arguments on both sides in this case. I have also carefully considered the evidence and the terms of the originating notice of motion.

35. In my view, the terms of the originating notice of motion are important. Although the motion recites that the application is to be made by solicitors/counsel on behalf of the debtor, there are a number of other features of the motion which make it very clear that the Practitioner was the party who was actually involved not only in the manner of its preparation and presentation but also in a substantive way. These include:-

> (a) The motion is signed not by the debtor but by Mr. Green, the Practitioner.
>
> (b) The motion is accompanied by the written instruction of the debtor dated September 2017 which concludes as follows in language which clearly indicates that the debtor was instructing the practitioner to make the application :-
>
> *"Having considered the information and advice you have given me, please accept this letter as my formal instruction to you to commence the process of appealing my vetoed PIA to the relevant Court on my behalf."*
>
> (c) The notice of motion is itself addressed not only to the Insolvency Service and the creditors but also to the debtor himself. This would make no sense if, in substance, the debtor was the moving party.
>
> (d) Paragraph 7 of the notice of motion sets out that the Practitioner considers that there are reasonable grounds for the making of the application and he sets out each of these grounds. References to the debtor throughout this paragraph are all in the third person.
>
> (e) Consistent with sub-para (b) above, paragraph 9 of the notice of motion expressly states that:-
>
> > *"the debtor has instructed me in writing to make this application on their (sic)behalf, a copy of which instruction is appended to this notice of motion";*

(f) paragraph 10 of the notice of motion states that, submitted with the application is "*my report*" (i.e. the report of the Practitioner) under s. 107(1)(d).

(g) Paragraph 12 of the notice of motion sets out the opinion of the Practitioner (it opens it with the words "*I am of the opinion that…*") that the debtor satisfies the eligibility criteria for the proposal of a PIA specified in s. 91 of the 2012 Act, the proposed PIA complies with the mandatory requirements set out in s. 99(2) and the proposed PIA does not contain any terms that would release the debtor from an excluded debt or an excludable debt (other than a permitted debt).

36. Thus, although the opening words of the notice of motion refer to the debtor as applicant, the substance of the motion very clearly proceeds on the basis that the Practitioner is fully participating in the motion and is, in effect, dominus litis. In substance and in fact, each of the matters that are required to be dealt with under s. 115A and under O. 76A, r. 21A were appropriately addressed in the originating notice of motion. Thus, for example:-

> (a) The notice of motion appended the instruction given by the debtor to the Practitioner to make the application as required by s. 115A(1) and r. 21A(1)(d).
>
> (b) It also contained a statement of the grounds of the application as required by s. 115A (2)(a) and r. 21A(1)(b).
>
> (c) Paragraph 6 of the notice of motion identified three classes of creditors "*defined*" by the Practitioner for the purposes of demonstrating that a number of classes of creditors voted in favour of the proposal. While the word "*defined*" was used rather than the precise language of s. 115A(2)(a)(ii), it seems to me that, in substance, para. 6 complied with the requirements of that provision and with r. 21A(1).

(d) Furthermore, as noted above, para. 7 expressly set out what the Practitioner considered were the reasonable grounds for making the application. This complied with the obligation contained in s. 115A(2)(a) and with the specific requirements of Form No. 58 prescribed by r. 21A(1).

(e) Paragraph 10 of the notice of motion appended the Practitioner's report which is described in the notice of motion as "*my report*". This complied with the requirements of s. 107(1)(d) of the 2012 Act which requires that such a report should be prepared by the Practitioner;

(f) paragraph 11 of the notice of motion noted that the certificate of the Practitioner as to the result of the vote taken at the creditors meeting accompanied the application. This complied with the requirements of s. 115A(2)(d) and r. 21A(1)(e);

(g) as noted above, para. 12 of the notice of motion stated the opinion of the Practitioner that certain provisions of the 2012 Act had been complied with. This complied with the requirements set out in s. 115A(1)(e) of the 2012 Act and r. 21A(c).

37. In my view, the material identified in paras. 35-36 above is very relevant in the context of the language of O. 28, r. 12 which empowers the court to make all necessary amendments "*for the purpose of determining the real question or issue raised by or depending on the proceedings*". When one considers that the motion here addresses all of the proofs that a practitioner must place before the court for the purposes of an application under s. 115A, it can readily be seen that the real question or issue raised by the originating notice of motion is whether, on the basis of the material placed before the court by the practitioner, the s. 115A application should either be granted or refused on the merits. All the necessary proofs for that purpose are before the court (albeit that those proofs have yet to be assessed by the court). There is, however, a defect in the application in that the wrong party has been named as applicant in the opening words of the notice of motion even though the notice is signed not by that person (namely the debtor) but by the practitioner. In this context, I must bear in mind that O. 28, r. 12 expressly envisages that defects in proceedings can be cured under that rule. By its own terms, the rule is not confined to mistakes per se.

38. It has been suggested by Tanager in this case that, there was an obligation on the Practitioner to explain why the debtor was originally named as applicant. It was also suggested that, it is clear from the affidavit sworn by the Practitioner in support of the originating notice of motion that the decision to name the debtor was deliberate and that it did not arise out of any slip or error. In this context, reliance was placed on the averment made by the Practitioner in para. 5 of his affidavit grounding the s. 115A application sworn on 17th February, 2017, where he said:-

> *"For the record, I say that I am an independent Personal Insolvency Practitioner… and as such, whilst I stand over the… PIA…, I do same whilst balancing the interests of each specified creditor and the Debtor. Indeed, in that regard, I owe my duties to this Honourable Court, the creditors and the Debtor*. I say and believe that it is prescribed under the Acts that I instigate the herein appeal on behalf of the Debtor however it should be noted that I am not a party to these proceedings and as such, for the most part, this Affidavit is sworn to be of assistance to this Honourable Court." (emphasis added).

39. In my view, this averment on the Practitioner is very plainly based on a misconception as to the true legal position. However, at the time this averment was made, the Practitioner did not have the benefit of the judgments of Baker J. in *Darren Reilly* and *Niamh Meeley* and he was setting out the position as he considered it to be. Nonetheless, in substance, what he said in para. 5 of his affidavit is not entirely mistaken in that the Practitioner acknowledges in that paragraph that it was he rather than the debtor who instigated the s. 115A application. Furthermore, as noted above, when one considers the application as set out in the originating notice of motion, it is clear that it contains all of the elements that an application under s. 115A should address.

40. In his subsequent affidavit sworn on 2nd July, 2018 in support of the application to amend the originating notice of motion, the practitioner further explained the position. In that affidavit he drew attention to the work which had been undertaken by him while acting as practitioner in this case. It is quite clear that all of the steps which the practitioner is required to take under the 2012-2015 Acts were undertaken by him and not by the debtor. He also confirms, in para. 21 of his affidavit, that he had been instructed by the debtor in writing to make the application under s. 115A. In para. 22 of this affidavit, he says that it was he who formulated the notice of motion, drafted the statement of grounds, defined the class of creditor, issued the voting certificate and (as noted above) signed the notice of motion. He also confirms in the same paragraph that it was he who arranged for the originating notice of motion to be issued.

41. In para. 23 of his affidavit he says:-

> *" I say that the Debtor had no hand, act or part in the making, lodgement or issuance of the…application, (once they provided me with a written instruction to do so on their behalf). I say that it is therefore clear, as it is clear since the date in 2016 when I was appointed on behalf of the Debtor that I have taken all steps in the Personal Insolvency process, (from issuance of the PC and the issuance of the PIA proposal), and that I have made… the application on behalf of the Debtor."*

42. In para. 25 of his affidavit, the practitioner provides the following explanation for the fact that the debtor was named as applicant on the first page of the originating notice of motion:-

> *"I say that in the issuance of the Notice of Motion, and in light of the Legal Aid Scheme, I sought to make it clear on the face of the Notice of Motion that solicitor/counsel would appear in court to argue the case. I say that I am an Insolvency Practitioner and I do not have the skills, training or qualifications to personally run or argue a legal case (against solicitor and counsel (and often senior counsel) for the creditor and hence the wording of the motion."*

43. The practitioner exhibits the terms of the relevant Legal Aid Scheme (known as "*the Abhaile Scheme*") issued by the Legal Aid Board on 10 May, 2016. It is clear from the terms of that scheme that it is the debtor to whom the legal aid is advanced to bring an application under s. 115A. Page 3 of the Scheme document says:-

> *"the following are the criteria for the…PIA Review Legal Aid Service… element of the Scheme:*
>
> - *The person is insolvent…, and*
> - *The person has made a proposal for a… PIA which has not been approved by their creditor (s)*

> • *The debts that would be covered by the proposed [PIA] include a debt secured on the person's principal private residence…and*
>
> • *The person's Personal Insolvency Practitioner considers that there are reasonable grounds for the making of an application to the Circuit Court or High Court (as appropriate) for an application under s. 115A…"*

44. It is quite clear from the terms of the Abhaile Scheme that it is the debtor who is legally aided rather than the practitioner. While this is not expressly stated in the affidavits sworn by the Practitioner on 2nd July, 2018, it would be understandable, in light of the terms of the Abhaile Scheme that it might have been thought necessary to name the debtor as applicant in circumstances where it is the debtor who is legally aided.

45. Whether or not the Abhaile Scheme was the reason why the debtor was named as applicant on p. 1 of the originating notice of motion here, I am of the view that there was a "*defect or error*" within the meaning of O. 28, r. 12 in the originating notice of motion in this case insofar as the debtor was named as applicant on p. 1 of the notice. I am also of the view that it is understandable that this error occurred in circumstances where the practitioner was not legally qualified. It was he who signed the notice of motion rather than any solicitor. While Form 58 (prescribed by O. 76A, r. 21A) envisaged that the practitioner would be named as applicant, a non-legally qualified person (such as the practitioner here) would not necessarily understand the significance of the need to comply with the requirements of the rule. Likewise, a non-legally qualified person would not have the expertise to comprehensively understand all of the facets of the 2012 Act (as amended). Furthermore, the very fact that, prior to the decisions in *Darren Reilly* and *Niamh Meeley* there were a variety of approaches in use (in relation to the naming of applicants), shows that there was significant uncertainty among practitioners as to how the motions should be formulated. It appears from para. 134 of the judgment in *Niamh Meeley* that the terms of the Abhaile Scheme formed at least part of the explanation for the approach which had been taken in some of these motions.

46. I also understand that the hearings in both *Darren Reilly* and *Niamh Meeley* before Baker J. were extensive in nature and involved not only submissions from a number of participants in the insolvency process but also submissions from counsel retained on behalf of the Insolvency Service of Ireland (ISI). This illustrates the extent to which there were clearly arguments which could be made both for and against the proposition that the debtor could properly be named as applicant.

47. Against that background, I accept the explanation that is given by the practitioner in this case in para. 25 of his affidavit sworn on 2nd July, 2018. I can well understand why, in the circumstances described above, an insolvency practitioner would not have appreciated that it was essential that the practitioner should be named as applicant rather than the debtor.

48. In this context, I am conscious that counsel for the practitioner has urged that, in an application under O. 28, r. 12, there is no requirement that an explanation should be provided to the court in respect of the defect or error in issue. However, while there is no such express requirement contained in O. 28, r. 12 it seems to me that, in any application of this kind, the court is exercising a discretion. In order to persuade a court to exercise its discretion in favour of the applicant, it seems to me that affidavit evidence explaining how the error or defect arose is something that the court would almost invariably require.

49. There are two aspects to O. 28, r. 12. The first is that there is a defect or error in the proceedings. The second is that the defect or error has in some way prevented the real question or issue raised by the proceedings being determined. In my view, both of those aspects are present here. In the first place, there is an obvious defect or error in the originating notice of motion. Secondly, the real question raised by the originating notice of motion is apparent on the face of the motion. As discussed above, the notice of motion deals with everything that one would expect a practitioner to address in an application properly brought under s. 115A. The only "*fly in the ointment*" is that the name of the debtor is given as the applicant in the opening paragraph of the notice of motion. This seems to me to be an obvious error or defect and one which it is entirely appropriate to cure in order to permit the real question at issue to be determined on the merits.

50. In my view, the correction of this defect or error in the notice of motion is not, in substance, the substitution of a new party. On the contrary, it is clear from the terms of the originating notice of motion that the practitioner is, in truth, a party to the motion. He has signed the motion. He has provided all of the detail contained in the motion. Moreover, there is a written instruction from the debtor to the practitioner to make the application.

51. In all of these circumstances, I am of opinion that O. 28, r. 12 gives power to the court to make an order amending a motion by adding the words "*acting for James Green, Personal Insolvency Practitioner of McCambridge Duffy*" after the words "*solicitor/counsel*" in line 2 of the notice of motion such that it will now read:-

> "*TAKE NOTICE that on the 13th day of February 2017 at 11.30 in the forenoon or the first available opportunity thereafter, solicitor/counsel acting on behalf of James Green, Personal Insolvency Practitioner of McCambridge Duffy on behalf of the Debtor, will apply to this Honourable Court sitting at the Four Court Inns Quay Dublin 7 for the following Order or Orders…"*

The remaining grounds on which the Practitioner relied

52. In light of the view which I have expressed above, it is strictly unnecessary to deal with the remaining grounds on which the practitioner sought to rely. Nonetheless lest I am wrong in the conclusion which I have reached above and in deference to the arguments which were addressed to me in the course of the hearing on 19th November, 2018, I now briefly consider the remaining grounds on which counsel for the practitioner sought to rely.

Section 115A(14)

53. As noted above, in the course of the hearing, counsel for the practitioner drew attention to the striking parallel between the language of s. 115A(14) of the 2012 Act (as amended) and the language contained in s.3(7) of the Companies (Amendment) Act, 1990 on which Kelly J. relied in the *Cavan Crystal* case. In the case of s. 3(7), it gave the court the power, on the hearing of a petition under s. 3 of the 1990 Act, to: "*dismiss it, or adjourn the hearing, … or make any interim order, or any other order as it thinks fit*". Under s.115A(14) the court is given power to make such order as it deems appropriate on an application under s.115A. While the language is not identical to s.3(7) of the 1990 Act, it is very clearly to the same effect. Given the approach taken by Kelly J. in the *Cavan Crystal* case, it seems to me that s.115A(14) provides an alternative basis on which the order directed in para. 51 above could be made. Taking into account all of the factors discussed in paras. 38 to 50 above, it seems to me that it is entirely appropriate (to use the language of s.115A(14)) to make that order. In those circumstances, I believe that s.115A(14) provides an additional basis on which to make the order sought.

Order 28 Rule 1
54. Order 28 r.1 provides as follows:

> *"The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."*

55. It was argued by Tanager at the hearing that O.28 r.1 has no application in circumstances where the document containing the error is a notice of motion. However, this ignores the non-exhaustive definition given to "pleading" in O.125 r.1 as including an "*originating summons, a statement of claim, defence, counter-claim, reply, petition or answer*". It seems to me that a notice of motion under O.76A r.21A is very clearly a "pleading" within the meaning of O.28.1. Rule 21A clearly requires that very specific particulars should be given including the grounds for the making of the application. It is not simply a notice of motion that seeks relief. It is a notice of motion which seeks relief based on grounds which are stated in the body of the notice. This seems to me to be in the same *genus* as an originating summons or a statement of claim or a counter-claim. It therefore seems to me to fall within the ambit of a "pleading".

56. The relevant principles applicable to applications under O.28 r.1 have been considered in a number of cases all of which show that the court takes a generous approach which is designed to ensure that the real issues in controversy are determined. Generally, an amendment will be allowed unless to do so would cause injustice (as explained further below) to the opposing party. Thus, for example, in Croke v. Waterford Crystal Ltd [2005] 2 I.R. 383 at p.401, Geoghegan J. described the basic purpose of O.28 r.1 as a "liberal rule".

57. Similarly, in *DPP v. Corbett* [1992] ILRM 674 at p. 678 Lynch J. said, with reference to a similar power of amendment in the District Court Rules:

> *"'The day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party. While courts have a discretion as to amendment that discretion must be exercised judicially and where an amendment can be made without prejudice to the other party and thus enable the real issues to be tried the amendment should be made. If there might be prejudice which could be overcome by an adjournment, then the amendment should be made and an adjournment also granted to overcome the possible prejudice and if the amendment might put the other party to extra expense that can be regulated by a suitable order as to costs or by the imposition of a condition that the amending party shall indemnify the other party against such expenses.'*

58. A useful illustration of the approach taken under O.28 r.1 is to be found in the decision of the Supreme Court in *Aer Rianta International v. Walsh Western International* [1997] 2 ILRM 45. In that case, an application was made for leave to amend a defence in proceedings relating to the carriage of goods. The plaintiff had sued the defendant in relation to a loss sustained by it as a consequence of the theft of its goods from a warehouse after they had been entrusted to the defendant. In the original defence delivered in 1995 the defendant had expressly acknowledged the contractual relationship between the parties. However, subsequently, in September 1996 an application was brought under O.28 r.1 seeking liberty to amend the defence to replace the admission of a contractual relationship with an express denial of the existence of such a relationship and with the addition of a new plea that contended that any contractual relationship that may have existed was not with the defendant but with a Dutch company. The amendment, if allowed, had potentially very serious consequences for the claim of the plaintiff in circumstances where the claim against the Dutch company might well have been barred by the time limitation provisions of the CMR. Nonetheless, the Supreme Court permitted the amendments notwithstanding that fact and also notwithstanding that the amendment was likely to lead to a postponement of the trial.

59. In the course of his judgment in that case, Murphy J. adopted the following statement of principle applicable to O.28 r.1 contained in the judgment of Bowen LJ. in Crooper v. Smith (1884) 26 Ch D 700 at pp 710-711 where the latter said:

> *"…it is a well-established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. …I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding maters in controversy, and I do not regard such amendment as a matter of favour or of grace…it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision on the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."*

60. In my view, those words "*as soon as it appears that the way in which a party has framed his case will not lead to a decision on the real matter in controversy*" are particularly apposite here. It is clear from the terms of the originating notice of motion (taken as a whole) and from the affidavit evidence before the court that the party who framed the notice of motion in this case and settled every facet of it was the practitioner and not the debtor.

61. Furthermore, it appears to me to be clear that the amendment sought will not cause injustice in the sense understood in the case law. In this context, Murphy J. in the Aer Rianta case explained the type of injustice that would have to arise to persuade a court not to grant an amendment of this kind. At p. 51 he expressly adopted what was said by Lord Keith of Kinkel in Kettelman v. Hansel Properties Ltd [1987] AC 189 at p. 203:

> *"The sort of injury which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case than he would have been in if his opponent had pleaded the subject-matter of the proposed amendment at the proper time. If he would suffer no prejudice from that point of view, then an award of costs is sufficient to prevent him from suffering injury and the amendment should be allowed.*
>
> It is not a relevant type of prejudice that allowance of the amendment will or may deprive him of a success which he would achieve if the amendment were not to be allowed" (emphasis added by Murphy J).

62. No prejudice in relation to case presentation has been alleged by Tanager here. In this context, I agree with counsel for the Practitioner that "*presentation*" in this context embraces issues such as the non-availability of documents or the non-availability of a witness. If a witness relevant to a proposed amendment had died in the intervening period between the date of delivery of the original pleading and the date of the proposed amendment, that would be a classic example of presentation prejudice. Likewise, if a party had, in reliance on the nature of the existing claim, destroyed documents which, although relevant to the proposed amended claim

(but not to the claim as originally formulated), are no longer available at the time an application is made to amend, that might constitute presentation prejudice of the kind which Murphy J. had in mind. No such prejudice has been asserted here.

63. In all of the circumstances outlined in paras 54 to 62 above, it seems to me that the order proposed in para. 51 above can also quite properly be made under O.28 r.1.

The inherent jurisdiction of the court
64. It was also suggested that the amendment might be allowed under the inherent jurisdiction of the court. This was not pressed very strongly at the hearing before me. In my view, it is questionable whether it could be said that there is any basis on which to exercise any inherent jurisdiction of the court in circumstances where there is already ample provision made in the Rules prescribing the circumstances in which amendments may be allowed by the court. In *Lopes v. Minister for Justice and Equality* [2014] 2 I.R. 301 the Supreme Court made it clear that the inherent jurisdiction of the court cannot be used as a means of getting around legitimate provisions of procedural law. In *Lopes*, Clarke J. (as he then was) said at pp. 307-308:

> *"It is important to emphasise that the inherent jurisdiction of the court should not be used as a substitute for, or means of getting round, legitimate provisions of procedural law. That constitutionally established courts have an inherent jurisdiction cannot be disputed. That the way in which the ordinary jurisdiction of those courts is to be exercised is by means of established procedural law including the rules of the relevant court is also clear. The purpose of any asserted inherent jurisdiction must, therefore, necessarily, involve a situation where the court enjoys that inherent jurisdiction to supplement procedural law in cases not covered, or adequately covered, by procedural law itself. An inherent jurisdiction should not be invoked where there is a satisfactory and existing regime available for dealing with the issue under procedural law, for to do so would set procedural law at nought."*

65. In light of the observations of Clarke J. in *Lopes*, and in light of the fact that I have come to the view that O.28 r.12 and O.28 r.1 and also s. 115A(14) permit the proposed amendment, I do not believe that it would be appropriate to consider whether there might also exist an inherent jurisdiction to do so. In my view, the ability of the court to permit the amendment is already adequately covered under the rules and the statutory provisions and therefore it is unnecessary (and most probably inappropriate) for the court to consider whether the parallel jurisdiction exists under the inherent jurisdiction of the court.

Conclusion
66. In light of the views which I have reached in relation to O.28 and in relation to s.115A(14) I do not believe that it is necessary to consider O.15.

67. For all the reasons discussed above, it seems to me that the amendment proposed in this case should be allowed. I propose to make an order in the terms of para. 51 above. I make that order under O.28 r.1, O.28 r.12 and s. 115A(14) of the 2012 Act (as amended).

68. I will hear the parties as to whether any consequential orders are required.

69. I have not dealt here with the identical application which is made in the interlocking proceedings involving the debtor's spouse. However, given that the circumstances are identical in both cases, it must follow that a similar order should be made in her case also.