THE HIGH COURT

[Record No. H:IS:HC:2016:000041]
IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012 TO 2015

AND IN THE MATTER OF NIAMH MEELEY OF CORNASEER, KILTOOM, ATHLONE, COUNTY ROSCOMMON ("THE DEBTOR")

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

[Record No. H:IS:HC:2016:000042]
IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012 TO 2015

AND IN THE MATTER OF RONAN MEELEY OF CORNASEER, KILTOOM, ATHLONE, COUNTY ROSCOMMON ("THE DEBTOR")

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

[Record No. H:IS:HC:2016:000053]
IN THE MATTER OF PART 3, CHAPTER 4, OF THE PERSONAL INSOLVENCY ACTS 2012 TO 2015

AND IN THE MATTER OF DONAL TAAFFE, APARTMENT 47, BLOCK E, SMITHFIELD MARKET, DUBLIN 7 ("THE DEBTOR")

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

[Record No. H:IS:HC:2017:000015]
IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012 TO 2015

AND IN THE MATTER OF JOHN FOYE OF ILLUANA, MILTOWN, GALWAY ("THE DEBTOR")

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

[Record No. H:IS:HC:2017:000016]
IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012 TO 2015

AND IN THE MATTER OF CHRISTINE FOYE OF ILLUANA, MILTOWN, GALWAY, ("THE DEBTOR")

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

JUDGMENT of Ms. Justice Baker delivered on the 5th day of February, 2018.

1. This judgment concerns the interpretation and application of the statutory procedural requirements for the determination by a court of an application for review under s. 115A of the Personal Insolvency Acts 2012 to 2015 ("the Act").

2. Five applications under s. 115A were heard together and similar, albeit precisely not the same, questions arise for consideration.

3. The applications heard over three days concluding on 22nd December, 2017 were dealt with by way of the determination of the preliminary issue whether the applications were properly constituted in the light of the procedural requirements of the legislation. Counsel, including senior counsel, appeared for each of the debtors, and the relevant creditors. The Insolvency Service of Ireland ("the ISI") by reason of its statutory functions under the Act made submissions though counsel James Doherty SC as *amicus curiae* following directions given by me on 10th November, 2017.

4. The matter is of some importance and I am advised that some 400 applications under s. 115A are for practical purposes suspended pending clarification of the questions raised herein.

5. The question for determination is whether in the light of the statutory provisions and the central and substantive statutory role of a Personal Insolvency Practitioner ("PIP") in the review by the court of a proposed PIA under s. 115A, there exists a residual right in the debtor to directly engage in the process.

Relevant legislative provisions

6. Section 115A(1) provides jurisdiction to the relevant court following a review under s. 115A(9) to confirm the coming into operation of a proposed personal insolvency arrangement ("PIA") notwithstanding that it was rejected at a statutory meeting of creditors. The power is far reaching and the effect of an order is to alter the contractual arrangements in a manner that binds all relevant creditors. The primary purpose of the section is to approve a PIA where the arrangement will permit a debtor to continue to own or occupy his or her principal private residence.

7. The section was not contained in the original Act of 2012 and was added by the amending legislation of 2015 which came into force on 20th November, 2015, by the commencement of s. 21 of the Personal Insolvency (Amendment) Act 2015.

8. Section 115A(1) set out the circumstances in which application may be made:-

> "115A. (1) Where—
>
> (a) a proposal for a Personal Insolvency Arrangement is not approved in accordance with this Chapter, and
>
> (b) the debts that would be covered by the proposed Personal Insolvency Arrangement include a relevant debt,

> **the personal insolvency practitioner** may, where he or she considers that there are reasonable grounds for the making of such an application and if the debtor so instructs him or her in writing, **make an application on behalf of the debtor** to the appropriate court for an order under subsection (9)." (Emphasis added)

9. I have emphasised phrases in 115A(1)(c) as these were the focus of my judgment delivered on 5th October, 2017 in *Re Darren Reilly & the Personal Insolvency Acts 2012 to 2015* [2017] IEHC 558, and the application and import of that judgment were the starting point of argument in the present applications.

The judgment in *Re Darren Reilly*
10. The material facts briefly were as follows: The specialist judge in the Circuit Court refused to make an order under s. 115A(9) and his judgment was appealed to the High Court on Circuit by a notice of appeal which expressly identified the debtor as the appellant and which was signed by his solicitor. The PIP was not a moving party or a notice party. The objecting bank argued that the appeal to the High Court on Circuit was wrongly constituted in that it was made by the debtor and not the PIP. The preliminary objection raised by the bank at the hearing of the appeal to the High Court was found to be correct, the appeal of the debtor was not properly constituted and was dismissed. In the course of the judgment it was noted that the legislation was silent on the mode of appeal, but having regard to the scheme of the Act and the nature of the jurisdiction of the High Court sitting as an appellate court in a statutory appeal under the Courts of Justice Act 1936, an appeal from the Circuit Court is required to be made by the PIP.

11. The judgment in *Re Darren Reilly* is 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.

12. The present applications commenced in the High Court, the court with jurisdiction under the Act when the secured liabilities of a debtor exceed the statutory monetary threshold of 2.5 million euro. None of the parties to the present applications argue that the decision in *Re Darren Reilly* is wrong in law. It must follow accordingly that a debtor has no free standing right to bring application under s. 115A without the engagement of the PIP.

13. The judgment in *Re Darren Reilly* is not authority regarding the more complex question at play in the present applications, whether the voice of the PIP is the sole voice to be heard on behalf of a debtor in the statutory review.

14. Before I consider the arguments and statutory provisions I will set out the material facts giving rise to the objections by the creditors that the present applications are not properly constituted.

The applications under consideration: interlocking applications of Meeley
15. Niamh Meeley made a proposal for a PIA which was rejected at a meeting of creditors on 9th March, 2017. A notice of motion under s.115A issued which in its operative part states the following:-

> "TAKE NOTICE that on the 24th day of April 2017 at 11:30 in the forenoon or the first available opportunity thereafter, **solicitor/counsel on behalf of the Debtor**, will apply to this Honourable Court sitting at The Four Courts, Inns Quay, Dublin 7 for the following Order or Orders
>
> 1. An Order pursuant to the provisions of section 115A(9) of the Personal Insolvency Acts 2012 to 2015." (Emphasis added)

16. The motion is signed by McCambridge Duffy, insolvency practitioners, and the necessary statutory proofs including the affidavit of the PIP Mr. James Green are appended to the motion. Messrs. Anthony Joyce & Co. Solicitors are identified on the motion paper as acting on behalf of the debtor. The motion shows service on the relevant creditors and on the ISI.

17. Ronan Meeley, her husband and an interlocking debtor, filed a motion in identical terms.

18. A notice of objection was lodged by each of KBC Bank Ireland plc (Mr. Ó hUiginn BL) and Ulster Bank Ireland DAC (Mr. Kieran BL) objecting to the coming into effect of the PIA on several grounds, including the procedural ground that the applications were not properly constituted.

19. Mr. Hayden SC and Mr. Farry BL appeared at the hearing on behalf of the debtors.

Interlocking applications of Foye
20. Christine Foye made a proposal for a PIA which was not approved at a meeting of creditors held on 8th September, 2017. A notice of motion was issued which in its operative part states the following:-

> "TAKE NOTICE that on Monday the 16th day of October 2017, at 11:30 in the forenoon or at the first available opportunity thereafter, **Eugene McDarby of UHY Personal & Corporate Insolvency Solutions Limited Personal Insolvency Practitioner on behalf of the Debtor, and/or the Debtor,** will apply to this Honourable Court sitting at The Four Courts, Inns Quay, Dublin 7, for the following Order or Orders on behalf of the Debtor;
>
> 1. An Order pursuant to the provisions of section 115A(9) of the Personal Insolvency Acts 2012 to 2015;
>
> 2. Such further or other Orders..." (Emphasis added)

21. The motion is signed by the PIP and shows service on the relevant creditors and on the ISI, and identifies the statutory proofs.

22. John Foye, her husband, and an interlocking debtor, filed a motion in identical terms.

23. Bank of Ireland Mortgage Bank and the Governor and Company of the Bank of Ireland (Mr. Dunleavy SC and Ms. Donovan BL) filed notices of objection objecting to the coming into effect of the PIA on several grounds, including the procedural ground made in Meeley. KBC Bank Ireland plc objected in similar terms (Mr. Ó hUiginn BL).

24. Mr. O'Donnell SC and Mr. Farry BL appeared for the debtors.

Application of Donal Taaffe

25. Donal Taaffe made a proposal for a PIA which was not approved at a meeting of creditors held on 17th May, 2017. A notice of motion was issued which in its operative part states the following:-

> "TAKE NOTICE that on the 26th June 2017 at 11.30 in the forenoon or at the first available opportunity thereafter, **solicitor/counsel on behalf of the Debtor, will apply** to this Honourable Court for the following Order or Orders:
>
> 1. An Order pursuant to the provisions of section 115A(9) of the Personal Insolvency Acts 2012 to 2015." (Emphasis added)

26. The motion is signed by Ronan Duffy of Messrs. McCambridge Duffy, insolvency practitioners, and shows service on the relevant creditors and on the ISI, and identifies the statutory proofs.

27. The Governor and Company of the Bank of Ireland (Mr. Dunleavy SC and Ms. Donovan BL) filed a notice of objection objecting to the coming into effect of the PIA on several grounds, including the procedural ground made in Meeley. Objection was also lodged by Pentire Property DAC (Mr. Ó hUiginn BL).

28. Mr. Farry BL appeared at the hearing on behalf of the debtors.

29. It is the preliminary procedural objections that are the subject of this judgment.

Concerns regarding the risk of a costs order against a PIP: Backdrop to the issue
30. The role of the PIP in the statutory scheme was considered at some length in *Re Nugent & Personal Insolvency Acts* [2016] IEHC 127 and the costs ruling at [2016] IEHC 309, and in *Re Darren Reilly*. The immediate issue which seems to have given rise, at least to some extent, to the present applications, was described by the ISI in its written legal submissions in the following terms: The ISI is aware that many PIPs remain reluctant to commence applications under s. 115A because they are fearful of an adverse costs order being made against them personally if the application is unsuccessful. This factor was noted in the judgment in *Re Darren Reilly* and while some general propositions were there stated regarding the issue of costs and in *Re Nugent*, the ISI has argued that I ought to take the opportunity in the present cases to give further guidance.

31. I will return to the question of costs below, but for the present note that the ISI has expressed concern that in some applications under s. 115A solicitors acting for an objecting creditor or creditors have in correspondence to a PIP indicated that an application may or will be made for an order for costs against the PIP personally if an application under s. 115A is unsuccessful, or proceeds in a particular manner. The ISI argues that such approach to the question of costs will discourage an individual PIP from bringing an application under s. 115A and that such an approach would have a "chilling effect" on such applications, language used by Cregan J. in *Coyle v. O'Nolan & Ors*. [2015] IEHC 113, where he was dealing with an application for costs against a liquidator following an unsuccessful application for an order restricting a director.

32. The ISI argues that such a "chilling effect" could have a serious impact on the operation of the Act and in particular on s. 115A.

The Abhaile Legal Aid Scheme
33. In 2016 the Oireachtas introduced a scheme by which an insolvent person who proposed to make an application under s. 115A of the Act was given the benefit of legal aid including a legal aid certificate to instruct solicitor and counsel to appear at the hearing of the application for review.

34. The Civil Legal Aid Regulations were amended by Statutory Instrument No. 272 of 2016 to provide legal aid to an applicant debtor for an application under s. 115A(9) of the Act. The Regulations came into operation on 23rd May, 2016, and the scheme for the provision of legal aid was commenced by the Legal Aid Board on 22nd July, 2016.

35. The Abhaile Scheme did not envisage that the PIP, himself or herself a professional person, could be an applicant for a legal aid certificate, and the Scheme identifies the insolvent person as the person entitled to apply for a legal aid certificate. However, the Scheme does require that the application for a certificate is to be completed by the debtor and by the PIP and the PIP is to certify for the purposes of the application that the debtor has "grounds" to make the application.

36. All the parties accept that the Scheme providing for legal aid may not be relied on for the purposes of the construction of the Act, but the Scheme must be viewed as a legislative response to the fact that a court review may require legal assistance and representation, and I return later to this point.

The statutory role of the PIP
37. The purpose of the Act is to facilitate the orderly resolution of debt without recourse to bankruptcy. There is expressly identified in the long title to the Act of 2012 the public interest and the common good in the "the rational resolution" by a debtor of his or her debts with a view to that debtor continuing to engage in the economic activity of the State: see for example *JD & Personal Insolvency Acts* [2017] IEHC 119.

38. The legislation facilitates an independent process by which debt may be resolved and the role of the PIP is to act as an independent intermediary. This was described in *Re Nugent* at para. 31 as follows:-

> "A Personal Insolvency Practitioner is in a unique role, not equivalent to the role of an examiner or a liquidator appointed by the court under the Companies Acts, although some similarities can be noted. The PIP is required to be interposed between the Insolvency Service of Ireland and the debtor. A debtor may not engage with the process envisaged by the Act, whether to seek a personal insolvency arrangement, or a debt settlement arrangement without employing a PIP. The PIP takes a role between the administrative functions of the Insolvency Service of Ireland and the creditors. The PIP is required for example to consider whether a debtor may avail of the options available under the personal insolvency legislation as an alternative to bankruptcy. The PIP is required to undergo an examination and to apply for registration as a PIP before he or she can operate within the State. Further, by S. 14 of the Bankruptcy Act 1988, a court shall, before making an order of adjudication, consider whether the debtor's inability to meet his engagement could be more appropriately dealt with by a personal insolvency arrangement or a debt settlement arrangement, and the court hearing a petition in bankruptcy must be satisfied that this option has been explored by a PIP who has considered the alternatives and whose professional view is a factor taken into account by the bankruptcy court. All interactions that the debtor has with the Insolvency Service of Ireland, on the one hand, and the court, on the other hand are through the PIP, and this puts the PIP in a unique position of responsibility to the Insolvency Service of Ireland, the court, the creditors and of course to the debtor."

39. The PIP is not to be seen as the agent of the debtor, as s. 98 of the Act requires the PIP to engage in his professional capacity with both creditor and debtor and seek if possible to achieve a solution which is satisfactory to both. By reason of s. 102 there is to be furnished to the PIP an indication by the creditor or creditors of their:-

> "…preference, as to how, having regard to subsection (3) and sections 103 to 105, that creditor wishes to have the security and secured debt treated under the Personal Insolvency Arrangement."

40. The PIP calls a meeting of creditors to consider a proposed PIA, and may if he or she believes that to do so is in the interest of achieving the approval of the creditors at the meeting, adjourn the meeting and prepare an amended proposal: s. 109(4).

41. The PIP is a statutory officer with a practical function of facilitating the process, and will seek to achieve a result that is acceptable to both creditor and debtor, and brings into account the interests of both insofar as this may be achieved.

42. As was said in *Re Darren Reilly* at para. 56, a PIP:-

> "… 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."

43. The role of the PIP in the making of an application under s. 115A is one of "substance and responsibility" (para. 57) and not merely procedural or administrative in nature. The reason for this was explained in *Re Darren Reilly*, and previously in *Re Nugent*, that the Oireachtas intended to put an independent person with financial knowledge and expertise at the centre of the process, and to thereby ensure that the financial difficulties of an insolvent debtor and the interest of relevant creditors are fully brought to bear in the process. The PIP also acts as a filter to ensure that a PIA is sustainable, brings the means of a debtor fully into account, and deals with all relevant debts in a coherent and fair manner, and acts as a professional exercising independent judgment in regard to the financial aspects of the PIA, and in the case where a proposed PIA is rejected at the statutory meeting of creditors, ensures that the statutory requirements under s. 115A are met.

The course of the s. 115A application

44. The application under s. 115A is for a review by the relevant court following the rejection of a proposed PIA at a statutory meeting of creditors, and is commenced under the procedure envisaged in s. 115A(2). This requires service of notice by the PIP, no later than 14 days after the creditors' meeting on the ISI, on each creditor concerned and on the debtor. Certain statutory proofs are to accompany the notice: the PIP is to prepare a statement of grounds, annex a certificate of the result of the vote at the meeting, furnish the report referred to in s. 107(1)(d), annex a copy of the proposed PIA, and contain a statement by the PIP to the effect that he or she is of the opinion that the eligibility criteria are met.

45. The PIP must for the purpose of s. 115A(2)(a)(ii) identify the classes who, having voted in favour of the proposal, are in his or her opinion to be treated as distinct classes for the purpose of the application, and these are not always required to be the same classes as the voting classes. The PIP must give reasons for the proposed classes, and the determination of the relevant classes is a matter reserved to the court: *Re Douglas (a debtor)* [2017] IEHC 785.

46. The PIP must expressly confirm that there are "reasonable grounds for the making of" an application: s. 115A(1), and must assemble and serve the statement of grounds and the accompanying documents.

47. The initiating notice is to be accompanied by a notice to the creditors for the purpose of s. 115A(3) inviting them to submit a notice indicating whether or not the application is to be opposed and the reasons therefor.

48. A creditor who chooses to object lodges a formal notice of objection pursuant to s. 115A(4) and this is to be served on the ISI, the PIP and each creditor concerned. Service on the debtor is not required.

49. The Act then provides for a mandatory hearing of the review and for service of notice of the hearing:-

> "(6) The appropriate court, for the purpose of an application under this section, shall hold a hearing, which hearing shall be on notice to the Insolvency Service, the personal insolvency practitioner and each creditor concerned."

50. There is no requirement that the hearing be "on notice" to the debtor.

51. Some emphasis was placed by the objecting creditors on the fact that service on the debtor is not required under subsections (4) or (6), and it was argued that the omission of the requirement of service on the debtor indicates an intention on the part of the legislature that the voice of the debtor is to be heard only through the PIP. I do not consider the service requirements in s. 115A(4) and (6) in themselves indicate such an intention or exclusion, as the obligation to meet the procedures and certify the statutory proofs is vested in the PIP expressly "on behalf of" the debtor. It is at the point of the hearing of the application that the question arises whether it is permissible that a different or other voice be heard.

Role of the court: a hearing is mandatory

52. When it comes to consider the application for review, the relevant court must "for the purpose of an application" under the section hold a hearing and the hearing is to be conducted "with all due expedition": s. 115A(7). The court's power to make relevant orders under the section arises under subsection (9) after such a hearing.

53. The matters of which the court must be satisfied are set out in s. 115A(8) and (9). Section 115A(8) requires the court to be satisfied with regard to the procedural requirements of the Act:-

> "(8) The court shall consider whether to make an order under subsection (9) only where—
>
> (a) it is satisfied that—
>
> (i) the eligibility criteria specified in section 91 have been satisfied,
>
> (ii) the mandatory requirements referred to in section 99 have been complied with, and
>
> (iii) the proposed Arrangement does not contain any terms that would release the debtor from an

excluded debt or an excludable debt (other than a permitted debt) or otherwise affect such a debt,

and

(b) it considers that, having regard to the information before it, including information contained in a notice under subsection (3), no ground specified in section 120 applies in relation to the debtor or the proposed Arrangement."

54. Section 115A(9) requires the court to consider the merits of the application and to have regard to all relevant matters. The court must take a view on those facts, whether the proposed PIA is reasonably likely to enable a return to solvency, and enable the retention of the principal private residence of the debtor, is fair and equitable in relation to each class of creditor who voted against the proposal, and is not unfairly prejudicial to the interests of any interested party:-

"(9) The court, following a hearing under this section, may make an order confirming the coming into effect of the proposed Personal Insolvency Arrangement only where it is satisfied that—

(a) the terms of the proposed Arrangement have been formulated in compliance with section 104,

(b) having regard to all relevant matters, including the terms on which the proposed Arrangement is formulated, there is a reasonable prospect that confirmation of the proposed Arrangement will—

(i) enable the debtor to resolve his or her indebtedness without recourse to bankruptcy,

(ii) enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit, and

(iii) enable the debtor—

(I) not to dispose of an interest in, or

(II) not to cease to occupy,

all or a part of his or her principal private residence,

(c) having regard to all relevant matters, including the financial circumstances of the debtor and the matters referred to in subsection (10)(a), the debtor is reasonably likely to be able to comply with the terms of the proposed Arrangement,

(d) where applicable, having regard to the matters referred to in section 104(2), the costs of enabling the debtor to continue to reside in the debtor's principal private residence are not disproportionately large,

(e) the proposed Arrangement is fair and equitable in relation to each class of creditors that has not approved the proposal and whose interests or claims would be impaired by its coming into effect,

(f) the proposed Arrangement is not unfairly prejudicial to the interests of any interested party, and

(g) other than where the proposal is one to which section 111A applies, at least one class of creditors has accepted the proposed Arrangement, by a majority of over 50 per cent of the value of the debts owed to the class."

55. The power of the court is discretionary and the test is flexible and broad. In that regard the nature of the broadly similar exercise of the court in a confirmation hearing in an examinership was described by O'Donnell J. in *McInerney Homes Limited & Ors. & Companies (Amendment) Act 1990* [2011] IESC 31 at para. 29:-

"The essential flexibility of the test appears deliberate. It is very unlikely that a comprehensive definition of the circumstances of when a proposal would be unfair could be attempted, or indeed would be wise. The fact that any proposed scheme must receive the approval of the Court means that there will be a hearing. The Act of 1990 appears to invite a court to exercise its general sense of whether, in the round, any particular proposal is unfair or unfairly prejudicial to any interested party, subject to the significant qualification that the test is posed in the negative: the Court cannot confirm the scheme unless it is satisfied the proposals are not unfairly prejudicial to any interested party."

56. The personal insolvency legislation gives the court a power with a similar degree of flexibility and discretion.

57. The legislation is silent as to how the application before the court under s. 115A is to be heard. Statutory Instrument No. 507 of 2015 inserted O. 76A, r. 21A into the Rules of the Superior Courts to regulate applications to the High Court. An application by a PIP on behalf of the debtor is required to "be commenced by notice of motion" in the statutory form and signed by the PIP. Rule 21A(3) provides for the entry of the notice of motion and objections thereto for "initial consideration by the Court" no later than 21 days after the date of issue of the notice of motion. Rule 21A(5) provides that the court shall give directions and make orders for the determination for any objections, but is silent as to the mode by which the application be heard.

58. Order 76A, rule 21A(5) of the Rules of the Superior Courts provides that:-

"On the date first fixed for a hearing for the purposes of s 115A(9) of the Act (or on any adjournment from such date), the Court shall (if it does not hear and determine any objections on that date) give directions and make orders for the determination of any objections in accordance with rule 5."

59. How the review is to be heard will depend on whether there is objection, and the extent and nature of the objections. In practice all applications under s. 115A are determined on affidavit, and usually, if not invariably, the affidavit of the debtor is tendered in evidence. I am advised that in some applications in the Circuit Court, cross examination of the deponent of an affidavit has been permitted.

60. In some of the more contentious cases in the High Court there has been a robust exchange of affidavits and legal submissions before the case is heard. Counsel, often senior counsel, appear for the objecting creditor or creditors and for the debtor, and the hearings have been long and fully argued.

61. On the other end of the spectrum there have been applications for a determination under s. 115A(9) where, no objection having been made, the matter proceeds on a consideration of the statutory proofs and the analysis by the trial judge of the PIA, and depending on the nature of the PIA, the relevant comparison with the outcome in bankruptcy, the means by which the PIA deals with reasonable living expenses and identifies that an arrangement is sustainable, and the means by which creditors of different classes are to be treated. In those cases the applications are relatively straightforward, although they have invariably been made by counsel.

62. In the first application under the Act for an order under s. 115A, the written ex tempore ruling of the court was published on the Courts Service website, not because the matter was contentious but because it was the first application under the section: *Re O'Connor & Personal Insolvency Act 2012* [2016] IEHC 317. A reading of that ruling shows that the review was not engaged merely by reference to the statutory proofs, or the stated opinion of the PIP, and regard was had as to whether the proposed PIA was fair to all creditors, to questions of proportionality and whether there was a reasonable prospect that the PIA would enable the debtor to resolve his indebtedness without recourse to bankruptcy.

63. The court engaging the review must be satisfied of the matters set out in s.115A(9), and the opinion of the PIP regarding the classification of the classes of creditors, and the reasonableness of the application are not determinative.

64. Thus, whilst the role of the PIP requires consideration of the reasonableness of the application before it is lodged, I consider that the Act does not envisage that the PIP bears the sole responsibility of answering the objections or argument of a creditor. The court engaged in a review under s. 115A is to balance the interests of creditor and debtor and the court is not confined to the evidence that the PIP so considers.

65. While the rules of court may not be used as in interpretative tool to construe a legislative provision (*Spillane v. Dorgan* [2016] IECA 84), the Rules make it clear that the mode of trial is a matter for the trial judge as to how the case is to be heard.

66. This is in accordance with the general principle that the court may regulate its own process*: PJ Carroll & Co. Limited v. Minister for Health and Children* [2005] 3 I.R. 457.

67. I do not accept the argument of counsel for Pentire Property DAC that in regulating the hearing of the review the court is impermissibly engaging the process of statutory interpretation by the exercise of its inherent jurisdiction. The determination of the mode of the hearing of the review is quintessentially a matter for the court except where a statute clearly mandates a mode of trial or hearing. The Act of 2015 does not contain an express exclusion, and the court may therefore determine the mode of hearing. This is a matter of particular importance when the exercise engages discretionary factors.

68. Before dealing more fully with this argument I turn to consider the argument that once the formal proofs required in s. 115A and O. 76A, r. 21A have been met by a PIP the "jurisdictional threshold" for a hearing under subsection (7) of s. 115A is established in that the application has been "made". This involves a consideration of what it means to "make" an application.

The "making" of the application

69. The ISI and counsel on behalf of the debtors, albeit with different emphasis, argue that in each case the PIP has "made" the application in conformity with the legislative requirement in s. 115A(1), and that thereafter the hearing is to be convened at which the voice of the debtor may be heard other than through the PIP.

70. Much argument in the course of the three days hearing related to the meaning of the expression "make an application". Counsel for the ISI argues that the phrase must be seen as identifying two stages in an application under s. 115A, *viz*. the making of an application and a hearing, as a hearing is expressly contemplated in s. 115A(7) and (9). As a starting point, I consider that the section does in its plain words envisage two stages, the making of the application, and thereafter the mandatory hearing "for the purpose of an application". The plain words suggest that the application is made and thereafter determined.

71. But who "makes" the application? It is argued that an application is "made" when the procedural proofs of the section are met, and reliance is placed by way analogy on three recent authoritative judgments which I will briefly consider.

72. In *K.S.K. Enterprises Limited. v. An Bord Pleanála* [1994] 2 I.R. 128, the Supreme Court considered whether an application by way of judicial review of a decision of An Bord Pleanála was made within time. The relevant provisions of s. 82 of the Local Government (Planning and Development) Act 1963 (as amended) and s. 19(3) of the Local Government (Planning and Development) Act 1992 required that application "be made within a period of two months". The Supreme Court determined that the application was made when the notice of motion was filed in the Central Office of the High Court and served on all necessary parties. The court however, expressly made that determination in the context of the legislative provisions and objectives, and rejected the argument that the making an application could be "constituted by the mere filing of a notice of motion in the court offices" (p. 135).

73. In *DPP v. England* [2011] IESC 16, on a case stated from the High Court relating to the time limits for the service of an application for an order permitting the continued detention of cash seized under s. 38 of the Criminal Justice Act 1994. Application for forfeiture was required to be "made" while the cash was detained under that section. The question for the Supreme Court on the case stated was whether the issuance of the notice of motion was the "making" of an application. The counter argument was that as the notice of motion stated that counsel would apply for an order and that the application would not be "made" until the application was actually moved in the court. Hardiman J. considered that the nature of the document made it difficult to regard the issuance of the document or even the service as the "making" of an application, and noted that the document "in its own terms" did not purport to be anything other than a notice of an intention to make an application. Hardiman J. considered the provisions of O. 163 of the Rules of the Superior Courts, rule 2 thereof provided for application to the made by originating motion *ex parte* for an order under s. 2(1) of the Proceeds of Crime Act 1996. Hardiman J. having referred to *K.S.K. Enterprises* considered it not to be wholly analogous and not dispositive, and came to the conclusion that the application was not made by the service of notice indicating an intention that application was to be made.

74. That matter came again for consideration before the Supreme Court in *Reilly v. DPP & Ors.* [2016] IESC 59, where Dunne J. made a distinction between a notice *ex parte* which she accepted could not be made until it was moved in court, and a notice of motion, where the application would be "made" by the service of a motion on the parties concerned. At para. 17 she said that following:-

> "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 learned trial judge succinctly stated: 'Such an assessment of a time limit would be imprecise and subject to the vicissitudes and vagaries of Court calendars and work loads and cannot have been intended by s. 39(1).' (at para. 22) The crucial point is that the notice of motion must be issued and served on those entitled to notice within the relevant two year period."

75. Dunne J. did not depart from the analysis of Hardiman J. in *DPP v. England* but noted that O'Malley J. had come to the same conclusion in *DPP v. Gerard Alphonsus Humphreys & Ors*. [2014] IEHC 539, having considered *DPP v. England.*

76. These judgments all concerned a particular statutory context and the question before the court was whether the application was made in time. The general proposition that can be distilled is that an application is made when it is commenced by motion on notice and served on the relevant persons concerned. These, albeit authoritative and recent, decisions could not in my view be dispositive of the question at issue in the present case having regard to the statutory contexts in which they were given. However, they are useful starting points and reference, and do suggest that the "making" of an application may constitute the lodging or service of the initiating pleading, and that the hearing may be differently characterised.

77. In my view the plain words of s. 115A(1) allied to the express words of s. 115A(7), mean that the hearing "for the purpose of an application" may be seen as a different stage of the process of review. However, that does not answer the argument of the creditors that the statutorily identified stages in the process do not envisage one person lodging or meeting the formal proofs of an application, and thereafter a different person conducting the hearing.

78. Counsel for Bank of Ireland argues that the scheme of the Act and in particular certain legislative provisions support the argument that only the PIP may be heard by the court in the application under s. 115A(9), and that no residual role is left for the debtor in the application. It is argued that a "single voice" articulates the claim and that the statutory procedures, and in particular the provisions of subsections (4) and (6), leave no role for the voice of the debtor and that this is supported by the observation in para. 42 of *Re Darren Reilly* that "a debtor is not an appropriate applicant".

79. Certain sections of the Act do appear at first glance to bear this out: s. 115A(2) requires that notice of the application is given to the debtor which would not be necessary or appropriate if the debtor was himself or herself a competent applicant. Section 115A(6) uses the same language and mandates notice on a number of parties but not on the debtor. Section 115A(4) requires a debtor to serve a notice of objection on the PIP and other relevant parties but again not on the debtor.

80. But to more fully understand the nature of the court review, the interest of the debtor in the subject matter of the review must be considered.

The question of "standing"

81. The application in *Re Darren Reilly* involved a consideration of what was described at paras. 31 to 34 as "a question of standing". It is clear that if a PIA is approved at a meeting of creditors and subsequently affirmed by the court, or if on review by the court, the PIA comes into force notwithstanding the rejection at a meeting of creditors, the parties bound by its terms are the debtor and, in respect of any specified debt, the creditor concerned. The PIP does not drop out of the picture as he or she continues to have a supervisory and notification requirement, but the benefit of the PIA is enjoyed by the debtor and the creditor and not by the PIP.

82. At para. 32 the necessary statutory engagement by the PIP in the making of an application under s. 115A was described as a matter "of procedural but not substantive standing". That particular expression was the focus of argument in the course of the hearing in the present applications. Before dealing more fully with those arguments I should take the opportunity to clarify what the distinction means.

83. Standing is normally linked to or derived from the fact that a person bringing an application or seeking to oppose an application has a direct interest in the outcome, and must therefore be understood to have a right to engage in that litigation. Standing in that sense is a matter of substance, linked to the substance of the suit and whether a person can be said to have a real and substantial interest in the outcome.

84. Procedural standing is sometimes found as a result of statutory intervention, or because a litigant may otherwise lack capacity. In the case of corporate or personal insolvency under the Act the relevant statutory schemes vest standing in a liquidator, examiner or PIP.

85. The decision in *Re Darren Reilly* does not conclude that a different person may have substantive standing and procedural standing, or as was argued by the debtors, that the Act envisages application being made by the debtor because the debtor has a substantive or real interest in the outcome.

86. However, it cannot be denied that notwithstanding the necessity that the PIP be engaged at all stages of the process, once the application under s. 115A is lodged the dispute is between the debtor and the objecting creditor. From the point of view of the substance of the litigation it is the debtor and the creditor who have the substantial interest in the outcome, and while the legislation does not envisage that any part of the process could be engaged without the involvement of the PIP, the process envisages the court approving the coming into effect of a PIA which thereafter binds both parties and in which the PIP has no personal interest.

87. The Supreme Court in *Chambers v. An Bord Pleanála* [1992] 1 I.R. 134 said that as the plaintiffs are "aggrieved persons" they have *locus standi*:-

> "The plaintiffs are aggrieved persons; by definition, they have locus standi; no question arises of being granted *locus standi*. It may be denied in pleading and the issue raised but, initially, it is entirely a matter of objective assessment." (At p. 142)

88. A debtor has standing in that sense and a vital interest in the outcome of the court review under s. 115A. Whether this may be regarded as giving a debtor the right to be heard in the application is central to the question of whether and how the debtor may be heard.

89. The debtors argue that once the procedural requirements have been met the debtor may engage with the process and make submission to the court. The debtor argues that the PIP has had the necessary "active and substantive engagement" described as an essential gateway requirement in para. 67 of *Re Darren Reilly*.

90. None of the creditors made the argument that the PIP may not be legally represented. But it is argued that as the legislation expressly indentifies that the PIP makes the application "on behalf of the debtor", that the legislation intended to remove the right of the debtor to be otherwise represented.

91. I turn now in that context to examine that expression in the section.

What do the words "on behalf of" in the statute mean?
92. As a matter of general statutory interpretation, a court must assume that when words are used in a statute that the Oireachtas intended that effect be given to all of the words used, or as put by the Supreme Court in *Goulding Chemicals Limited v. Bolger* [1977] I.R. 211:-

> "It is to be presumed that words are not used in a statute without a meaning and, accordingly, effect must be given, if possible, to all the words used, for, as has been said, 'the legislature is deemed not to waste its words or to say anything in vain' – per Lord Sumner in *Quebec Railway, Light, Heat & Power Co. v. Vandry* [1920] A.C. 662, 676." (At pp. 226 to 227)

93. The Act provides that a PIP may make application "on behalf of" a debtor. The PIP acts in a representative capacity in making an application under s. 115A. The Oireachtas must be taken to envisage precisely the fact on which the debtors rely, namely that the outcome of the application is one in which the debtor has an interest or substantive interest in the litigation. At para. 25 of my judgment in *Re Darren Reilly*, I said the following:-

> "I agree with the Debtor that the benefit of the application enures to a debtor. I disagree however with the characterisation for which counsel for the Debtor contends, that the role of the PIP is merely procedural. While it is the case that the PIP may not construct a PIA without instructions, and more specifically that the PIA which is proposed must be pursuant to s. 99(1) and 'agreed to by the debtor', the process may not be concluded without a meeting of creditors which must be arranged by the PIP, and s. 115A expressly provides that the PIP lodges application for review. It should also be noted that under s. 115A(2) the PIP must serve notice on the debtor of the lodging of an application under the section, and the procedural requirements of s. 115A(4)(iii), and s. 115A(6)(iv) are that the objecting creditor is to give notice to the PIP, and make no provision for the giving of notice to a debtor of an objection."

94. No party argues that that conclusion is incorrect. However, counsel for Mr. and Mrs. Meeley argue that a PIP who is usually an accountant or a qualified financial advisor does not have a right of audience before the court under s. 17 of the Courts Act 1971. Section 17 of the Courts Acts 1971 provides:-

> "A solicitor who is acting for a party in an action, suit, matter or criminal proceedings in any court and a solicitor qualified to practise (within the meaning of the Solicitors Act, 1954) who is acting as his assistant shall have a right of audience in that court."

95. That section does no more than give a solicitor a right of audience in the superior courts. It does not exclude the PIP, who seems at least *prima facie* to be vested with the power to address the course in his or her own right on behalf of a debtor.

96. I accept also the argument of counsel for the creditors, that the Act does give the PIP a right of audience before the court in his or her representative capacity. The PIP is regulated by the ISI and not, unless the PIP is incidentally also a solicitor, by the Law Society of Ireland. The Act does not on its face give the PIP the power to independently instruct counsel, although a solicitor may be instructed who may, in turn, instruct counsel. The ability to engage counsel is a matter that goes to the very nature of the court process.

97. A PIP who is also qualified as a solicitor may address the court in his or her capacity as solicitor and may instruct counsel, but having regard to the fact that a PIP is an intermediary and "neither the creditor nor the debtor can be said be his or her client" (*Re Darren Reilly* at para. 56) the role of the solicitor PIP is as yet untested. Solicitors and/or counsel appear on the instructions of a client. Thus the question remains as to whether a PIP may "move" an application in the legal sense and argue it before the court.

98. The Act must be interpreted in such a way as to achieve a rational result and the purpose of the Act must always inform that interpretation. In *Boyne v. Dublin Bus/Bus Átha Cliath (No. 2)* [2008] 1 I.R. 92, Gilligan J. noted that the court should have regard to the purpose of an enactment:-

> "Indeed, in any question of statutory interpretation the court is bound to have in mind the purpose of a statutory rule or the mischief at which it is directed, so far as such purpose or mischief can be ascertained. That is not to say, of course, that the court can simply give effect to that purpose, but where the court has to make a judgment about the proper meaning of a statute it is likely to want to consider whether it can by the process of interpretation give effect to its purpose or the mischief to which the statute is directed."

99. In *Lawlor v. Flood* [1999] IEHC 10, Kearns J. expressly adopted a view that it is to be assumed that the Oireachtas intended an interpretation to have logic and reason, an expression also used in *KSK Enterprises Limited v. An Bord Pleanála*. In *Lawlor v. Flood,* Kearns J. quoted Bennion on Statutory Interpretation, 3rd Ed., (1997) at p. 427 as follows:-

> "It is a rule of law … that when considering in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the Court should presume that the legislature intended common sense to be used in construing the enactment."

100. A debtor does not lose legal capacity merely by engaging with the Act, or immediately upon obtaining a protective certificate under s. 95(2)(a). An infant plaintiff has no legal capacity and a next friend will act on behalf of the infant in proceedings both brought by or against that infant. Therefore, no comparison with the bankruptcy legislation, that regulating corporate insolvency, or with the representative capacity of a next friend acting on behalf of an infant is apposite with regard to the question of whether the insolvent debtor may be heard at a court review, and whether the reference to the PIP acting "on behalf of" the debtor excludes the debtor from direct participation.

101. To that extent the PIP may not be usefully compared either with the liquidator of a company or the official assignee in bankruptcy where there is an express statutory loss of capacity. The Act does not deprive a debtor of his legal capacity, and indeed it could be said that the purpose of the Act was to avoid a debtor becoming bankrupt, and thus to avoid circumstances where the debtor's legal capacity was lost.

102. A further practical matter must be examined. There is no provision in the Act which recognises the right of a PIP to be indemnified for any legal costs incurred by him or her in the making of an application under s. 115A, even where such costs are incurred in the performance of his or her legitimate legal duties arising in connection with the application.

No provision for costs in s. 115A

103. While the Act of 2012 makes specific provision for the costs of a PIP in the insolvency process and these costs are expressly to be brought into account in assessing the outgoings of a debtor by reason of s. 99(2)(f)(i), no provision is made in the amending legislation of 2015 to deal with the costs of a PIP of bringing an application under s. 115A which of its nature requires application to the court: *Re Darren Reilly*, at para. 68.

104. While the legislation does take and adapt concepts from bankruptcy and examinership law, the personal insolvency legislation creates a distinct legal process which provides for separate machinery different from that in bankruptcy and examinership. The position of a PIP is unique. A PIP is different from an examiner appointed under Part 10 of the Companies Act 2014 where the costs and expenses of an examiner carry priority even when an examinership process fails and the company in examinership is placed into liquidation.

105. A trustee, or a personal representative of a deceased person, is entitled to be indemnified out of trust or estate funds in respect of any costs and expenses incurred in the management of the trust or estate, or in litigation commenced against or by the trustee or personal representative in a representative capacity.

106. The principle is explained in Daniell's Chancery Practice, 7th Ed., (1901) at p. 987 that:-

> "As a general rule, wherever an estate or fund is administered by the Court, the costs of all necessary and proper parties to the proceedings are a first charge upon it and must be defrayed thereout before the claims of the persons beneficially entitled thereto are satisfied."

107. The analogy is not useful as the estate of an insolvent debtor could not be said to be available to meet the costs of the PIP.

108. The rule in liquidation that in general a liquidator is entitled to be indemnified out of the assets of the company is of some antiquity. In *Re London Metallurgical Company* [1895] 1 Ch 758 Vaughan-Williams J. said that the costs of litigants who successfully bring proceedings against a liquidator:-

> "…are to be paid out of the assets of the company. That is the general rule, though under exceptional circumstances an order may be made going beyond that and giving them the right to be paid by the liquidator personally." (At p. 763)

109. A PIP engages a statutory role but is not entitled by statute to such indemnity. Any agreement that the costs or expenses would be paid by the insolvent debtor is worthless, and not easily consistent with the scheme of the Act which requires that the means of a debtor be fully brought to bear in the repayment of debts.

110. Thus the position of a PIP is more stark than that of a liquidator or trustee because a PIP does not take possession of the estate of an insolvent debtor and may not seek an indemnity from any assets of the insolvent debtor to meet costs. Further, the application under s. 115A does not permit the court on review to modify the proposed PIA, even for the purpose of providing for the costs of a PIP of bringing the application. There are accordingly no statutory means by which the court may award the PIP costs out of the estate of the insolvent debtor.

111. There is no provision in the legislation for the discharge of the fees of solicitor, counsel or indeed of the PIP under s. 115A. It would be absurd if the PIP were to be personally responsible for those costs or that they be treated as liabilities of the insolvent debtor to be dealt with outside the process. The result would leave the debtor with a debt for which no provision is made and which may be sufficient to render the PIA unsustainable or lead to insolvency and thereby frustrate the entire aim of the insolvency process.

112. It also must be relevant that express provision was made for the costs of the PIP in other stages of the statutory process, including the costs of post-PIA supervision. The absence of such suggests the Oireachtas did not intend the PIP to incur the legal costs of the hearing of the review. The express vesting in the court by s. 115(14) of power to award costs of the application does not clarify the matter. Further, if costs are only in exceptional circumstances to be awarded against a PIP, the same principle might inform the approach to an application by a PIP for an order for the costs of a successful review against a creditor. This point is considered further below.

Conclusion on the nature of the hearing

113. For all of these reasons, I consider that the Act envisages that an application having been made and a hearing then having been convened, the hearing is to be conducted according to the directions of court. I accept in a broad way the argument of ISI that on a plain reading of s. 115A the Oireachtas envisaged a two stage process.

114. I consider that the answer to the general proposition raised in the present cases is that as the Oireachtas vested in the relevant court a wide power to engage in a review of a proposed PIA it must be intended that the court would have a wide discretion to give directions with regard to the hearing of the application under s. 115A(9), and that it could give directions for the hearing of argument and evidence on behalf of the debtor who has a vital interest in the result.

115. Further, I do not consider that the Oireachtas envisaged that a non-legally qualified intermediary would be the sole person entitled to argue the merits and legal principles arising in an application under s. 115A(9) of the Act. Such a conclusion fails to have regard to the role of the PIP in the process leading up to the formulation of a PIA. The PIP has not been, in that process, the agent of either the debtor or the creditor, and neither is his client. He or she is an intermediary interposed to bring financial knowledge and analysis to the process of orderly debt resolution.

116. The PIP has the statutory function of assembling the proofs for the purposes of s. 115A and of certifying certain essential matters, including the reasonableness of the application. But the court is not confined in the exercise of its statutory discretionary function to the evidence or views of the PIP. The PIP does not on account of lodging the application cease to be an intermediary, or take on the role of acting for one party to the hearing.

117. Even if the PIP does instruct a solicitor who in turn instructs counsel, the role engaged by the PIP up to the point of the hearing of the review is not easily reconciled with the role envisaged by the creditors, a new role of advancing the arguments in support of

the exercise of the discretionary power under s. 115A(9) when a court comes to review the PIA and consider the objections.

118. A court must have sufficient assistance in its assessment of the law and facts to arrive at a correct decision. What falls to be addressed in the hearing of an application under s. 115A is the fairness, sustainability and proportionality of the proposed PIA, and I use these words as shorthand for the various statutory indices by which the Act characterises the discretionary role of the court. In the performance of that role a court must have available to it the arguments concerning the legal principles and the merits of the proposed PIA to a sufficient degree to fully and fairly engage its role.

119. It could not be regarded as in accordance with basic fairness that argument could be heard only from or on behalf of the objecting creditors, when the debtor has a vital interest in the outcome and as the contractual relationships capable of being impeded are those of the creditor and debtor.

120. The principles of equality of arms and basic principles of fairness support a conclusion that a debtor who has a vital interest in the outcome should be entitled to be heard. This is in line with the requirement long recognised by the courts that a statute be interpreted and applied in a manner that is consistent with the constitutional requirement of fairness of process, *East Donegal Co-Operative Society Livestock Mark Limited v. Attorney General* [1970] I.R. 317, and the European Convention on Human Rights Act 2003.

121. A simple literal approach to an interpretation of s. 115A(1) might at first glance suggest that only the PIP may bring, move and conduct the application before the court, but I consider that that would give rise to an absurd result.

122. The decision in *Re Darren Reilly* dealt with the means by which an appeal is to be instituted, and *ipso facto* the decision means that the PIP must be involved in making an application for review. It is not authority for the proposition that the debtor has no right to be heard nor can it lead to the conclusion that if an application is properly "brought" or "instituted" or "commenced" by a PIP (all words used in para. 42 of the judgment) the debtor may not be heard through counsel and solicitor if this is necessary, or regarded as appropriate, having regard to the circumstances of the case and the likely arguments to be advanced. It is in my view a matter for the court to determine in the individual case.

123. The PIP is a statutory construct and is a representative with financial expertise and skills. He has been designated as an essential element in the process, presumably as the Oireachtas envisaged that the formulation of a PIA and the engagement with creditors was required to be done by an independent person with financial knowledge and expertise who would understand and interpret the financial circumstances of a debtor with sufficient skills and understanding to formulate a PIA which may be acceptable to creditors. The Act recognises the essential requirement that a financial expert be interposed in the process, and that a debtor may not without such expertise seek to engage with the process, obtain the benefit of a protective certificate, or seek to formulate a PIA without such representation.

124. I do not accept the argument of counsel for the debtors that the professional and financial knowledge of the PIP is no longer required once the motion has been lodged, as even at a basic level, the certificate of reasonableness lodged by the PIP and his or her grounding affidavit may come to be interrogated by the court, as indeed may be correctness of the proposed classes of creditors. But the role of the PIP as intermediary does not readily permit that he or she would argue the interest of the debtor at the hearing of the review under s. 115A(9) where the legal and factual matters engaged in the discretionary judgment of a court, and the objections of a creditor or creditors are to be considered. The PIP has not become the voice of the debtor at the review.

125. Therefore, I do not accept the argument of the creditors that the voice of the debtor is intended to be silenced and that the PIP is the only voice to be heard in the articulation of the arguments or interests of the debtor in the review.

126. Further, and apart entirely from the argument derived from the role the PIP engages in the process leading up to the formulation of a PIA, I consider that as a debtor has an interest to protect and as the Oireachtas has not expressly identified that the debtor may not be heard on the application, counsel for the ISI is correct and the voice of the debtor is not intended to be silenced. That voice may be heard only if the application is properly before the court.

127. Accordingly, I reject the argument of counsel for the objecting creditors, and in particular those advanced by counsel for Bank of Ireland that the consequence of the interpretation advanced by the ISI would lead to litigation chaos. Chaos is avoided by the fact that the threshold proofs must be met before an application may be heard and these of their nature require the express and focused engagement by a financial expect with the terms of the proposed PIA and whether it is reasonable to seek that the court would engage its jurisdiction to approve the coming into force of a PIA notwithstanding that it was rejected at a meeting of creditors. The PIP performs a role of filtering unmeritorious applications, and assembling the proofs. Chaos is also avoided by the expressed vesting in the court of the power by the Rules to make directions for the hearing of the application, and the general power to manage its own process.

128. For these reasons and taking all of the statutory provisions in s. 115A into account, I consider that the Act does not envisage that the PIP is the sole voice to be heard at the court review.

129. How that voice is to be heard is a matter for the court in the exercise of its jurisdiction to manage the process and the conduct of an application before it.

The 2nd question: The form of the motion

130. The preliminary issue before the court is whether the notice of motion in each case is properly constituted where the applications on their face identify that application will be made by solicitor or counsel on behalf of the debtor, and where the motion paper does not identify that the application will be made by the PIP in what the creditors argue is the only manner proscribed by s. 115A of the Act.

131. To some extent the issue in the present applications concerns the form of the motion and whether the operative part of a motion may use language that states:-

(a) The application is made by the PIP; or

(b) The application is made by the PIP on behalf of the debtor; or

(c) The application is made by solicitor/counsel on behalf of the debtor; or

(d) The application is made by solicitor/counsel on behalf of the PIP on behalf of the debtor.

132. It is argued on behalf of the debtors that the proofs or gateway requirements contained in s. 115A have been met in the following way:-

(a) The PIP has performed his statutory function and certified that the reasonable grounds exist for the making of the application;

(b) He or she has provided his written consent insofar as it is necessary that the application be continued;

(c) The PIP has signed the notice of motion and the statement of grounds;

(d) The PIP has sworn an affidavit grounding the application;

(e) The PIP has confirmed that he or she is of the belief that there are reasonable grounds for the making of the application.

133. The statutory form provides for the operative part of the motion to read as follows:-

"TAKE NOTICE that on … xxx personal insolvency practitioner, will apply to this Honourable Court …"

134. The affidavit of Mark Foster, solicitor, sworn on behalf of the Governor and Company of the Bank of Ireland in response, in particular, to the submissions made by ISI gives by way of example illustrations of the evolution of crafting of the initiating motion under s. 115A to take account of the new Legal Aid Scheme and the judgment in *Re Darren Reilly*. The examples given by way of illustration are Circuit Court cases in which the following variety of drafts is found:-

(a) Application to be made by "solicitor/counsel on behalf of the Personal Insolvency Practitioner of the debtor" (16th March, 2016);

(b) Application to be made by "solicitor/counsel on behalf of the Personal Insolvency Practitioner on behalf of the debtor" (14th June, 2016);

(c) Application to be made by "solicitor/counsel on behalf of the Personal Insolvency Practitioner on behalf of the debtor" (21st July, 2016), after the commencement of the Legal Aid Scheme;

(d) Application to be made by the "Personal Insolvency Practitioner on behalf of the debtor and/or the debtor" (28th July, 2017), after the commencement of the Legal Aid Scheme; and

(e) Application to be made by "Personal Insolvency Practitioner on behalf of the debtor" (after judgment was delivered in *Re Darren Reilly* on 5th October, 2017).

135. I am of the view that an initiating 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 the superfluous or unnecessary words.

136. An application which describes the applicant as being the "PIP and/or the debtor" is more troublesome in that it lacks clarity. I accept the argument of counsel for the creditors, and especially counsel who argued the matter on behalf of Bank of Ireland, that a creditor receiving an application under s. 115A is entitled to know when the gateway or threshold requirements of the Act are met, viz. whether the application is "brought by" the PIP. Thus a notice that says the application is brought in addition or in the alternative by the debtor is unsatisfactory in that it is not possible from the face of the motion paper to assess whether the threshold requirements are met.

137. I do not propose or suggest that there is only one form which may accurately initiate the application. The form in the Rules is suitable, but as with any statutory form, it may be varied. A suitable or desirable variation would be the addition of a further operative part by which notice is given that application would be made for directions from the court that the debtor be heard, whether through counsel or solicitor or both.

138. The letter accompanying the motion may in the alternative give an indication that it is intended to seek directions from the court as to the hearing of counsel or solicitor on behalf of the debtor.

139. There is in my mind no reason why a solicitor who represents the debtor is not competent to serve the motion papers and annexed statutory proofs. The effecting of service is a matter within the competence of a solicitor, and no party argues that service could be deemed to be part of the making of the application.

140. It is both difficult and imprudent at this juncture to give more than general guidance on the form of originating motion by which an application may be commenced, save to say that the form in the Rules is capable of being modified, or even if the motion in the exact form provided in the Rules is used, a creditor can be in no doubt that the PIP appears on behalf of the debtor and that the PIP does so in a professional capacity, and not otherwise.

141. I turn now in the light of these general observations to examine the motion papers in the present applications.

The form of present motions

142. In the case of the applications 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.

143. I am satisfied in the Taaffe application that notwithstanding that the motion is signed by the PIP the motion paper is procedurally incorrect, for the same reason.

144. In the case of the applications by Mr. and Mrs. Foye, the application contains superfluous words insofar as the motion paper states that Mr. MacDarby makes application "on behalf of the debtor". The motion could not on that account be held to be improperly

constituted. It is clear to the creditor receiving such a motion that the debtor proposes or at least reserves the right to make application. The application is not improperly constituted.

The questions of liability for costs of an application under s. 115A
145. I accept that the form of the motions by which the present applications were commenced reflect concern on the part of the PIP in each case or perhaps the lawyers for the debtor that the bringing of the application under s. 115A might expose a PIP to a costs order.

146. I also note that the grounding affidavits of the PIPs identify that they are "not a party" to the proceedings. This I take to be a direct reference the comments in *Re Darren Reilly*, that a PIP is not a party to the litigation in the sense that the PIP has no personal interest in the outcome.

147. Counsel for Bank of Ireland makes the argument that the approach taken by the insolvency practitioners in the present cases amounts to a stepping away by them from their statutory role and that it is this, rather then any objection by the Bank, that might be said to have a "chilling effect" on the prosecution of applications under the section.

148. That question whether costs could be awarded against a PIP was already considered in *Re Nugent* and *Re Darren Reilly*, but I have been invited in the current cases by the ISI in particular to give some further guidance as to the proper approach of the court to costs in such matters. I propose doing so below, albeit in a cautious manner having regard to the fact that it is not possible now to predict the classes of factual circumstances that might give rise to a consideration of costs.

149. A great deal of comfort was given with regard to the risk that a PIP takes regarding a possible costs order in the judgment in *Re Nugent* and *Re Darren Reilly*. In essence the principle must be that costs would be granted against a PIP in exceptional circumstances or where the PIP acted in bad faith.

150. The application under s. 115A could not properly be regarded as *inter partes* litigation in the true sense. That was the approach taken by the Supreme Court to the role of an examiner at a confirmation hearing in *Re McInerney Homes Ltd & Ors and the Companies Amendment Act, 1990* [2011] IESC 31 where the court said the following at para. 32:-

> "The issue is not only an adversarial one: the Court is conducting a process in the public interest and will, for example, have regard to the interests of parties such as employees who may not be represented before it. It should be noted however that the argument advanced by the companies, if correct, would give rise to some anomalies. If a creditor lacked the means to formally object, then on the companies' argument, the examiner would still have to bear the burden of satisfying the Court that the proposal was not unfairly prejudicial to such a creditor. On the other hand if the creditor felt so strongly that he or she did formally object, but lacked the resources to do so effectively, then the logic of the companies' arguments would be that the onus would nevertheless have shifted to him or her and the Court should proceed to approve the scheme on the basis that the objector had failed to discharge the onus of proof of unfairness."

151. Having regard to the particular and express public interest that is performed by a PIP in the insolvency process, and the fact that the PIP has no economic or personal interest in the outcome of an application, save for any fees which might come to accrue under a PIA which might come into effect following a making of a order of court, I consider that a costs order would not be made, unless it can be shown that a PIP acted without *bona fides* or dishonestly, or "acted with any impropriety", the language of the Supreme Court in *McIllwraith v. His Honour Judge Fawsit*t [1990] 1 I.R. 343 where the question concerned the award of costs against Circuit Court judge in judicial review.

152. The correspondence from creditors which threatens that an application for costs against a PIP would be made in a routine or ordinary case which is lost is not appropriate, and is not a practice which a court would condone. The circumstances in which a costs order against a PIP would be made would be exceptional, probably more correctly, truly exceptional.

153. The question may come to be more fully argued in a suitable case in the light of the views expressed in the present judgment regarding the role of the PIP in the s. 115A review.

Decision
154. I will hear counsel as to how the matters are to proceed. It was agreed that judgment would be delivered on the preliminary general objections by the creditors, and that any question of substitution or amendment to the notice of motion would await this ruling. I am not satisfied that the procedural incorrectness is such as justifies the striking out of the proceedings without further argument or application.