THE HIGH COURT ON CIRCUIT

NORTHERN CIRCUIT COUNTY OF MONAGHAN

[2017 No. 176 CA]

[C:IS:NRND:2016:001384]

IN THE MATTER OF PART 3 CHAPTER 4 OF THE PERSONAL INSOLVENCY

ACTS 2012-2015

AND IN THE MATTER OF DARREN REILLY OF DRUMBEO, CASTLESHANE, COUNTY MONAGHAN ("THE DEBTOR")

AND IN THE MATTER OF AN APPLICATION PURSUANT TO

SECTION 115A (9) OF THE PERSONAL INSOLVENCY ACTS 2012-2015

JUDGMENT of Ms. Justice Baker delivered on the 5th day of October, 2017.

1. John Donnan the personal insolvency practitioner ("PIP") made a proposal for a Personal Insolvency Arrangement ("PIA") on behalf of Darren Reilly ("the Debtor") under the Personal Insolvency Acts 2012-2015 ("the Act") pursuant to his function in that regard. The proposal did not receive the requisite support of creditors at a meeting of creditors held to consider the proposal on 23rd November, 2016.

2. An application was lodged pursuant to s. 115A that the court would approve the PIA notwithstanding the result of the vote at the meeting of creditors.

3. By order of 1st June, 2017 His Honour Judge William G. Lyster, specialist judge of the Circuit Court sitting at Monaghan Circuit Court determined to refuse the application under s. 115A(9) of the Act.

4. The decision of the specialist judge has been appealed and this judgment is given in a preliminary issue raised by Bank of Ireland ("the Bank"), *viz* whether the notice of appeal dated 7th June, 2017 from the order of the specialist judge is properly constituted. The preliminary issue to be determined is one of some importance as the Bank argues that the appeal is not validly brought as it was not made by the PIP, but rather by the Debtor himself. The Bank argues that the appeal must fail as the involvement of a PIP in all stages of the process, including an appeal from a determination by the Circuit Court, is mandatory in all applications under the Act.

5. Counsel for the Debtor has argued that as he is the person whose interests are affected by the appeal he has sufficient *locus standi* to prosecute the appeal.

6. This judgment does not concern itself with the merits of the appeal, or whether the specialist judge of the Circuit Court was correct to refuse to confirm the coming into operation of the PIA notwithstanding the objection of the Bank, and is concerned with the role of the PIP in the insolvency process, and where the engagement of the PIP ends. It also concerns itself with the broad question of the interplay between a debtor and the PIP.

Background facts and procedural steps

7. A meeting of creditors was held on 23rd November, 2016 at which the proposed PIA was considered. KBC Bank Ireland plc, holding a debt of approximately €600,000, voted in favour of the PIA, but the Bank, which holds a debt of almost €720,000, and holds security over the principal private residence of the Debtor, voted against the proposal.

8. By notice of motion in statutory form dated 24th November, 2016 application was made to the Circuit Court for a review pursuant to the provisions of s. 115A(9) of the Act, that the court would approve the coming into effect of the PIA notwithstanding its rejection by the relevant class of creditors. That notice of motion was signed by the PIP and addressed to all relevant parties, and identified that solicitor or counsel on behalf of the Debtor would move the application. The application was grounded on an affidavit of the PIP.

9. The Bank through its solicitors lodged a notice of objection on 14th December, 2016, again in the statutory form.

10. A long affidavit of Jane Boland, an agent of the Bank, was sworn on 15th February, 2017 to ground the Bank's objection, and that was followed by a replying affidavit from the Debtor, sworn on 8th March, 2017, a replying affidavit on behalf of the Bank sworn on 20th March, 2017 and from the PIP sworn on 27th April, 2017.

11. The matter came on for hearing before Judge Lyster, specialist judge of the Circuit Court on 4th May, 2017, who having reserved his judgment, delivered a ruling on 1st June, 2017 in which he declined to make the order.

12. It is with regard to the notice of appeal to the High Court that the issue now sought to be determined arises. By notice of appeal dated 7th June, 2017 the Debtor appealed to the High Court against the order of the specialist judge of the Circuit Court. That notice of appeal expressly identifies the appellant as the Debtor, and is signed by his solicitor. The PIP is not a moving party to the appeal and is not a notice party, although the Bank as objecting creditor did serve its memorandum of appearance on the PIP.

The issue to be determined

13. It is the Bank's case that the appeal to the High Court is wrongly constituted in that it is not made by the PIP but rather by the Debtor himself. The Bank argues that the absence of the PIP, and the fact that the appeal was lodged by the Debtor, and not by the PIP, is fatal to the prosecution of the appeal. The Bank argues that having regard to the scheme of the Act a debtor has no standing to maintain an appeal as the legislation envisages that all applications, including appeals, are to be prosecuted by the PIP.

14. By letter of 20th June, 2017 the solicitors acting on behalf of the Bank consented to the making of an order that the PIP be substituted for the Debtor as appellant in the appeal. That offer was rejected as unnecessary by the solicitor for the Debtor, who noted in her replying correspondence of 22nd June, 2017 that she did not act for the PIP.

15. The question raised is one that engages the construction of the legislation, but also the broader question raised by the Debtor of the right of access to the courts.

Relevant legislative provisions
16. Section 115A(1) states as follows:

> "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,
>
> (c) 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)."

17. The language of 115A (1) is clear and vests in a PIP the power to make an application to the court for a review under subsection (9), where the PIP considers that there are reasonable grounds for the making of such application. Accordingly, the power vested in the PIP is not unconstrained, but is to be exercised in appropriate cases and where the PIP can justify the making of the application on reasonable grounds.

18. It is also clear that the power vested by s. 115A(1) is to make application on behalf of the debtor, the person whose interests are impacted by the application, and I accept the argument of the Debtor in the present case that it is the interests of the Debtor and not those of the PIP that are in play in any application for review by the court. The PIP is not a party to the application in the sense that his or her interests may be affected by the result.

19. Before considering the procedural question raised in this appeal, I turn briefly to examine the question of how the interests of a debtor are dealt with in the legislative scheme, and the interplay between a debtor and a PIP.

Interests of the debtor are affected.
20. Section 2 of the Act defines a debtor as "a natural person who owes a debt to a creditor or otherwise has a liability to a creditor". A PIA is entered into by a debtor, not by or through a PIP on behalf of the debtor. The jurisdiction of the court is determined by the residence or domicile of the debtor and not of the PIP. The debtor must perform a number of statutory steps before the application is processed, including the step of appointing a PIP. Section 49(3) envisages the debtor engaging with the Insolvency Service of Ireland ("ISI") before a PIP is appointed. Section 49 provides for a meeting with a PIP or an employee of the PIP in order to advise the debtor as to the feasibility of making a proposal for a PIA or DSA. It is the debtor who appoints the PIP to act on his or her behalf:

> "to act as his or her personal insolvency practitioner for the purposes of Chapter 3 or 4, as the case may be": s. 49 (3),

21. A PIP then acts on behalf of the debtor and with his or her interests in mind. A debtor may terminate the appointment of a PIP, and if he or she wishes to continue with the process by virtue of s. 49A(3) a replacement PIP shall be appointed within two months.

22. A PIP may give notice to the debtor to terminate the appointment under s. 49B(1), and may do so without cause, although notice must be given to the debtor and to the ISI. There is also a power under s. 49C(1)(c) for the appointment of a PIP to be terminated when he or she is no longer authorised to perform the functions of a PIP.

23. Once a PIP is appointed however, he or she takes on a role which is statutory in origin and function, and it is quite clear from the provisions of s. 48 that any person who wishes to become a party as a debtor to a DSA or a PIA must comply with Chapter 2 and must appoint a PIP. The process may not be engaged without that step, and the DSA or PIA may not be concluded without the involvement of a PIP. The PIP under s. 52 must provide advice to the debtor, both in relation to informal debt resolution or resolution by one of the formal means identified in the Act. The PIP is in all of these functions to be independent and to act as a professional and under s. 52(3) the PIP must have regard to various statutory factors in considering the appropriateness of entering into a PIA or DSA. Section 52(5) provides that when a PIP advises a debtor not to make a proposal for or enter into an arrangement then the appointment of the PIP shall come to an end.

24. Thus, the PIP has the role of initiating the process, advising on whether it should be initiated in the first place, and continuing the processing of the application with a view to achieving an arrangement, and having that approved by the court, or where appropriate bringing it to an end without resolution.

25. 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.

26. The question for consideration in this appeal is whether a debtor, whose interests are clearly impacted by a decision of the relevant court under s. 115A(9), has on such account an independent and free-standing right to bring an appeal of a refusal by a court to approve the coming into operation of a PIA.

27. Before considering the procedural requirements of an appeal from an order under s.115A, I will examine the procedural rules governing the making of an application at first instance.

The procedural rules
28. The provisions of s. 115A(1) are reflected in r. 29A of the Circuit Court Rules (Personal Insolvency) 2015, S.I. No. 506 of 2015, the relevant part of which reads as follows:

> "29A. (1) An application by a personal insolvency practitioner on behalf of a debtor under section 115A of the Act for an order under section 115A(9) of the Act shall be brought by notice of motion, (which shall include the notice required by

section 115A(3) of the Act), in Form 52I in the Schedule of Forms, signed by the personal insolvency practitioner concerned…"

29. Form 52I in the schedule of forms prescribes the form of the notice of motion, the relevant parts of which are as follows:

> "TAKE NOTICE that on the.....day of ..... 20.... at ..... in the forenoon or the first available opportunity thereafter, ... of ....., personal insolvency practitioner, will apply to this Honourable Court sitting at ..... for an order under section 115A(9) of the Personal Insolvency Act 2012 on behalf of the above-named debtor, …"

30. The notice of motion must include a certificate of the PIP that he or she considers that "there are reasonable grounds for the making of such an application", and the grounds must be identified. There is also a requirement that the PIP certify that he or she is of the opinion that the debtor satisfies the eligibility criteria, and that the PIA is compliant with the mandatory statutory requirements. The notice of motion must also have appended to it a copy of the written instructions of the debtor to the PIP.

A question of standing?

31. The Bank argues that, on a plain reading of the clear words of the Act and of the Rules, only a PIP has standing to make application to the Circuit Court for an order under s. 115A of the Act, and for any appeal from an order of that court.

32. Because the PIP lodges an application under s.115A on behalf of a debtor, and because of the nature of the interlay between PIP and debtor explained above, the matter is one of procedural but not substantive standing. I consider that the scheme of the Act, and the statutory provisions and rules made thereunder, mandates a particular means by which the application is to be prosecuted. The debtor is the person directly impacted by the decision, and is the person with an interest to be protected, but the engagement by the PIP at the procedural stages is an essential and mandatory requirement for the proper prosecution of an application under the Act.

33. It should be recalled in that context that the PIA, and the power of the court to review the result of a meeting of creditors, is wholly a creature of statute, and the Oireachtas has determined that application under s. 115A is to be made by a PIP, who must in so doing make a judgement that there are reasonable grounds for making the application. The extent to which the pleadings lodged require a concrete and positive engagement by the PIP cannot be ignored.

34. Such procedural rules are not unknown in corporate insolvency law, and I turn now to examine the relevant authorities.

Argument by analogy: Corporate insolvency law

35. In *Southern Mineral Oil Ltd (In Liquidation) & Anor. v. Cooney & Ors*. [1997] 3 I.R. 549 the Supreme Court was considering an appeal from an application by the respondents, shareholders in two companies then in liquidation, that the application by the liquidator for an order pursuant to s. 297 of the Companies Act 1963 ("the Act of 1963") ought to be struck out on the grounds of delay. Lynch J. considered, albeit *obiter*, the question of the procedural correctness of the application under the section.

36. Section 297 of the Act of 1963 provided for an application to be made by a "receiver, examiner, liquidator or any creditor or contributory" of a company. The applicants were two companies which had been wound up by order of the High Court on the petition of the Revenue Commissioners. Lynch J. noted that the legislative provisions envisaged application to be made *inter alia* by a liquidator and not by a company and said as follows at pp. 568 & 569:

> "None of these statutes provide that the application may be brought by the company in receivership or examinership or liquidation. They provide that the application shall be brought by the receiver or examiner or liquidator, as the case may be, and in all cases the application may also be brought by any creditor or contributory of the company in question. Nor do the provisions of O. 74, r. 49 of the Rules of the Superior Courts lend any support to bringing the application in the name of the company in receivership, examinership or liquidation.

37. While the observations of Lynch J. were *obiter*, they were expressly approved by Keane J.

38. A similar matter came for determination recently in a decision of Hunt J. in *Re: Tucon Process Installations Ltd. (In Voluntary Liquidation) v. The Governor & Company of the Bank of Ireland* [2015] IEHC 312. There, Hunt J. relied on the observations of Lynch J. in *Southern Mineral Oil Ltd (In Liquidation) & Anor. v. Cooney & Ors*. which he considered as:

> " …a correct and precise statement of the law on the legal issue arising in this case, …"

39. Hunt J. was hearing an application commenced by the liquidator in the name of a company in liquidation for an order pursuant to s. 139 of the Companies Act 1990. Hunt J. held that the company did not have *locus standi*, and that the statutory provision could not be invoked by the company as it was:

> "…not within the category of applicant specified by either of the statutory provisions in question."

40. Hunt J. expressly noted the "plain and ordinary meaning of the words" of s. 139 which had provided for application by "liquidator, creditor or contributory of a company" which is being wound up and went on to say as follows at p. 3:

> "In the case of an application brought pursuant to a statutory provision, regard must be had to the plain and ordinary meaning of the words of the statute in determining questions such as standing. The nomination of specific parties as potential applicants expressly precludes such statutory applications being brought by a party other than those specified by the legislature, otherwise the precise words used to legislate for classes of applicant would be deprived of ordinary meaning. As the company is not specified by either statutory provision as being an appropriate applicant, it has no standing to seek relief under either of the statutory provisions invoked in this application."

41. The judgment of Hunt J. and his reasoning was expressly approved by the Court of Appeal [2016] IECA 2011 where Costello J. at para. 18 took the view that the relevant section:

> "…does not vest in the company a cause of action which, by some other provisions of the company code is vested in a liquidator, creditor or contributory of the company. It follows that where the legislature has taken the trouble to specify the parties who may bring application under s.139 it is not open to this Court to extend *locus standi* to a party upon whom it has not been conferred by the express words of the statute."

42. The decision of the Court of Appeal, and that of Hunt J. concern precisely the same type of statutory provision as is contained in s. 115A(1). I consider that in light of those authorities, and also noting the clear and unequivocal language in s. 115A(1) itself, that an application for review by the court under s. 115A must be commenced by a PIP on behalf of a debtor, and may not be brought or instituted by a debtor himself or herself. A debtor is not an appropriate applicant.

The role on the PIP on an appeal
43. The question before me however, is not whether the application to the Circuit Court *ab initio*, was correctly constituted, and no argument is made that it was not, but how the appeal to the High Court from the determination of the Circuit Court is to be prosecuted.

44. Section 96 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 inserted s. 37(1A) into the Courts of Justice Act 1936 a provision for appeals from a decision of the Circuit Court under the Personal Insolvency Act 2012:

> "96. Section 37 of the Courts of Justice Act 1936 is amended by the insertion of the following after subsection (1):
>
> (1A) Notwithstanding subsection (1), an appeal shall lie to the High Court sitting in Dublin from every judgment given or order or decision made (other than a decision to which section 169 (4) of the Personal Insolvency Act 2012 applies) by the Circuit Court in the performance of any function or exercise of any power or jurisdiction conferred on that court by that Act, whether or not oral evidence was given at the hearing or for the determination of the proceedings or matter concerned."

45. The legislation is silent on the mode of appeal and the power of the appellate court, and the matter must therefore be considered by reference to the power and function of an appellate court, specifically the High Court in a statutory appeal in the exercise of its jurisdiction under S. 37 of the Courts of Justice Act 1936 ("the Act of 1936").

The jurisdiction of the appellate court
46. The appellate jurisdiction of the High Court hearing an appeal from a decision of the Circuit Court under 37(1) and (1A) is set out in s. 37(2), of the Act of 1936 which provides as follows:

> "37. (2) Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal."

47. Section 39 of the Act of 1936 states:

> "The decision of the High Court on Circuit on an appeal under the Act is final and conclusive and not open to appeal."

48. The High Court when determining an appeal under s. 37(1A) is hearing an appeal from the Circuit Court, a court of limited and local jurisdiction, established by s. 4(1) of the Courts (Establishment) and Constitution Act 1961. The court is not exercising its full originating jurisdiction pursuant to Article 34.3.1 as explained by Finlay-Geoghegan J. in *Kelly v. National University of Ireland Dublin aka University College Dublin (UCD)* [2017] IECA 161:

> "The statutory appellate jurisdiction of the High Court is a jurisdiction conferred by statute which is in addition to and is distinct from its originating jurisdiction as a court of first instance pursuant to Art. 34.3.1." (para. 24)

49. In *Re: O'Connor (a debtor)* [2015] IEHC 320, [2015] 3 I.R. 434, I considered the role and jurisdiction of the High Court sitting as an appellate court in an appeal under the Acts, and *inter alia* determined that "the appeal is confined to the grounds already argued in the Circuit Court" (para. 18) save, where exceptional reasons exist as explained by Denham J. in *Blehein v. Murphy* [2000] 2 I.R. 231.

50. The High Court in the present case is acting as an appellate court in the determination of a circuit appeal, and its jurisdiction is thereby constrained. It is not exercising its original jurisdiction vested in it by the Constitution. As stated by Finlay-Geoghegan J. in *Kelly v. National University of Ireland Dublin aka University College Dublin (UCD)* at para 36:

> "The appellate jurisdiction is to hear and determine the appeal by a rehearing and is limited to the subject matter of the application to the Circuit Court and the jurisdiction of the Circuit Court in relation to the application."

51. That, in my view, has the consequence that the High Court exercising its appellate jurisdiction does so within the procedural and substantive confines of the Circuit Court jurisdiction conferred on it by statute. In those circumstances, it seems to be an unavoidable conclusion that the High Court cannot hear and determine an appeal other than one which complies with the statutory procedural rules for the bringing of the decision under appeal. The analysis above outlines these procedural rules.

52. Accordingly, I am of the view that in order to be properly constituted an appeal from a decision of a review by the court must, in accordance with the statutory provisions in s. 115A(1), be an application by a PIP. The jurisdiction exercised on appeal is not a new jurisdiction but rather the court engages of a matter within the jurisdiction of the court of first instance, the procedural and substantive elements whereof are defined by statute, and the parties to which are, and can only be, the same parties as those who litigated and were entitled to litigate before the Circuit Court.

Is the role of the PIP purely procedural?
53. The Debtor argues that once a PIP has performed his or her functions and brought the matter as far as the application for a review under s. 115A, the process may be continued by a debtor, if necessary by appealing a refusal of the Circuit Court for review under s. 115A.

54. It is argued therefore that once the procedural steps have been taken, the procedure is complete and the s. 115A application is properly before the Circuit Court. In those circumstances, it is argued that an appeal is governed solely by s. 37 of the Act of 1936 as amended by the Act of 2013.

55. The Act does not envisage that the PIP will step out of the s. 115A process immediately upon the lodging of the application, and the application is brought, *inter alia*, grounded on affidavit evidence from the PIP, and sometimes from the debtor. The affidavit of the PIP is a necessary part of the evidence before the court, whether the Circuit Court or the High Court, on appeal or as court of first

instance

56. 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 and the limitation and directions regarding the manner by which application may be brought. 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.

57. The role of the PIP in the statutory process has already been considered extensively by me in *Nugent & Personal Insolvency Acts* [2016] IEHC 127. The role is one of substance and responsibility and the PIP does not perform a mere administrative role in formulating a proposal for a PIA or in making application under s. 115A to the court for a review following a meeting of creditors.

58. The PIP does not merely process that application under s. 115A on the instructions of a debtor, but the mandatory statutory forms provide that the PIP must certify that the application is one which he or she considers to be reasonable, and that he or she is satisfied that the statutory tests are met. The legislation envisages the PIP taking a professional and considered view as to the reasonableness of engaging a court application, and envisages a different role for a debtor, the role of instructing the PIP to make such application.

59. The professional indices of the role explain to a large extent why the Oireachtas has chosen to vest in the PIP alone the power to initiate an application under s. 115A of the Act. The limitation on the form of the application thus created is one not unfamiliar in other areas of insolvency law, and one which properly reflects the role of the PIP in the statutory scheme.

60. The role envisaged by the Act in the bringing of an application under s. 115A, and therefore in the appeal of a decision of the Circuit Court under that section, is not incidental nor purely procedural, and while the debtor is the ultimate beneficiary of an order permitting the coming into operation of a PIA, the debtor is not identified in the statute as an appropriate or qualified person either to bring an application under s. 115A or lodge an appeal from a decision under that section.

Legal representation
61. Counsel points to the fact that the Legal Aid Board has granted civil legal aid to the Debtor to make the application under s. 115A and to appeal from the Circuit Court to the High Court. That recognises that many of these applications which raise new and untested questions of law require legal aid and assistance, particularly as creditors are usually represented by solicitor and counsel, and often by senior counsel. The Legal Aid Board is no doubt recognising the unique protection offered to a debtor by s. 115A which *inter alia* seeks to secure ownership or occupation of a principal private residence of a debtor. That it would grant legal aid in the circumstances is desirable and appropriate.

62. However, the fact that a party or parties is represented, whether before the Circuit Court or the High Court on appeal, by counsel and solicitor does not mean that the application is one in respect to which those parties do not have to meet the gateway requirements.

Argument from the Constitution
63. The Debtor argues in reliance inter alia, on the seminal decision of the Supreme Court in *East Donegal Co-operative Livestock Mart Limited & Ors. v. The Attorney General* [1970] 1 I.R. 317, that as a creditor has a right to appeal from a decision under s. 115A, a debtor must have such a right and that right of the debtor cannot be constrained by any requirement that the appeal may only be brought with the concurrence of the PIP.

64. That a debtor is an aggrieved person whose interests are impacted or likely to be impacted by the decision of a court whether at first instance or on appeal under s. 115A. does not mean in itself that a debtor may initiate an appeal without observing the statutory and clearly mandatory provisions of the legislation setting out the procedural requirements to commence application under the Act, bearing in mind that the scheme invoked by the debtor is wholly statutory in origin, and in regard to which the Oireachtas has determined that a particular mode of bringing an application is to be followed.

65. The decision of the Supreme Court in *Chambers v. An Bord Pleanála & Anor.* [1992] 1 I.R. 134. recognises that the access to court is one which is constitutionally guaranteed, but is not authority for the proposition that it may not be lawfully regulated by statute. McCarthy J., with whom the rest of the court agreed, said as follows:

> "Section 82 of the Act of 1963 prescribes a time limit for proceedings such as these; obviously, the statutory scheme contemplates challenge in the courts. Access to the courts to contest a justiciable issue is constitutionally guaranteed. It may be regulated as examined in *Murphy v. Greene* [1990] 2 I.R. 566 where not the *locus standi* but the right to sue was controlled by the statute."

The Oireachtas has regulated or controlled the means by which proceedings may be brought by a liquidator or examiner of a company. The Oireachtas has chosen a similar approach in the statutory review provisions in s. 115A from which there is an appeal under statute. Regulation of access to the courts is open to the Oireachtais, and in so regulating the mode of access the Oireachtais has not denied access to the court or prevented a debtor from seeking relief. The procedural requirements of s. 115A do not limit the access of a debtor to the court, but regulate that access. The regulation of the process is one done in the interests not merely as the process, but also it seems to me to limit unnecessary and unmeritorious applications to the court in cases where the application could not possibly succeed.

Decision
66. What the Debtor argues in effect is that the High Court hearing the appeal from the Circuit Court engages a jurisdiction different from that of the Circuit Court, and I reject that contention. The High Court engages precisely the jurisdiction engaged by the Circuit Court, and its power and jurisdiction is an appellate jurisdiction, to determine the correctness or otherwise a decision taken by the Circuit Court. It is as constrained by procedural requirements as was the Circuit Court, and it may hear an application only if it is correctly before it, in the same way and to the same extent as the Circuit Court.

67. An application under s. 115A(1) 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. The appeal court is constrained by the jurisdictional

limitations and cannot engage with the application unless it is brought by the persons who were before the Circuit Court.

68. I am conscious of the practical problem that this conclusion might cause in certain cases. Express provision is made in the legislation for the fees of the PIP in preparing a PIA and calling a meeting of creditors. The legislative scheme is silent as to any costs that a PIP might incur in lodging an application under s. 115A, or an appeal form an order refusing the relief. Many, if not all, of the applications for review to the Circuit Court are conducted by solicitor or solicitor and counsel, and all of the appeals to the High Court, or applications to the High Court in the exercise of its original jurisdiction under the Act, have been to date conducted by solicitor and counsel, and often senior counsel. There is no express provision that the fees and expenses of the PIP, whether in attending court or engaging with solicitor or counsel be met. The PIA makes provision for the fees of a PIP but these fees are already identified in the PIA by the time it comes for consideration by a court.

69. These practical considerations cannot however lead me to construe the statue other than I have done in the course of this judgment.

70. I can envisage circumstances where PIP might be concerned, not so much that he or she would have the fees and expenses for the prosecution of the appeal met, but that he or she might be required to bear the cost of an unsuccessful review or appeal under s. 115A.

71. An award of costs against a PIP has not been made in any application of which I am aware, but the Debtor points to the fact that in *Nugent and Personal Insolvency Acts (No. 2)* 2016 IEHC 309 I considered that there was "no reason in principle why costs could not be awarded against a PIP in a suitable case", although I did go on to say that "such jurisdiction would be exercised sparingly and in exceptional circumstances". If a PIP lodges an application *bona fide* and in exercise of his or her professional and reasonable judgement, and prosecutes an appeal in a similar fashion, it seems unlikely that a PIP would be subject to an award of costs, and the usual order which has been sought by successful creditors is that an order be made against the debtor, not against the PIP.

72. The awarding of costs against a party is a matter that is within the discretion of the court which will make an order in the light of all the circumstances. The fact that the court may, in exceptional circumstances, award costs against a PIP does not lead me to the conclusion that a PIP ought not to play the statutory role which I consider is envisaged by the Act in the bringing of an appeal from a decision of the Circuit Court under s. 115A of the Act.

73. Accordingly, I am of the view that the preliminary objection raised by the Bank is correct, and that the appeal of the Debtor from the decision of the Circuit Court is not properly constituted and must be dismissed.

74. I will however hear the parties on how the matter may proceed, and whether an order for substitution can or ought to be made at this juncture.