THE CIRCUIT COURT
AN CHUIRT CHUARDA

Eastern Circuit **County of Louth**

[Record No.C:IS:ESLH:2016:001340]

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCT ACT, 2012,
AS AMENDED BY THE PERSONAL INSOLVENCY (AMENDMENT) ACT, 2015

AND IN THE MATTER OF [redacted] FINNEGAN OF [redacted], A DEBTOR

JUDGMENT of Her Honour Judge Mary O'Malley Costello delivered on the 25th day of October, 2018

1. In this matter the objecting creditor submits that the application to review must be dismissed on a preliminary basis as having been made outside of the Statutory time limit prescribed by Section 115A of the Personal Insolvency Acts, 2012 — 2015 ("The Act").

2. The relevant provisions of Section 115A of the Act are 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,

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).

(2) An application under this section shall be made not later than 14 days after the creditors' meeting referred to in subsection (16)(a) or, as the case may be, receipt by the personal insolvency practitioner of the notice of the creditor concerned under section 111A(6) (inserted by section 17 of the Personal Insolvency (Amendment) Act 2015), shall be on notice to the

Insolvency Service, each creditor concerned and the debtor, and shall be accompanied by—

(a) a statement of the grounds of the application, which shall include—

(i) a statement that the proposal for a Personal Insolvency Arrangement has not been approved in accordance with this Chapter,

(ii) other than where the proposed Personal Insolvency Arrangement is one to which section 111A applies, a statement identifying, by reference to the information referred to in paragraph (d)(i)(II) contained in the certificate furnished under paragraph (d), the creditor or creditors who, having voted in favour of the proposal, should, in the opinion of the personal insolvency practitioner, be considered by the court to be a class of creditors for the purpose of this section, and giving the reasons for this opinion,

(b) a copy of the proposal for a Personal Insolvency Arrangement,

(c) a copy of the report of the personal insolvency practitioner referred to out section 107(1)(d)

(d) a certificate—

(i) with the result of the vote taken at the creditors' meeting and identifying—

(I) the proportions of the respective categories of votes cast by those voting at the creditors' meeting, and

(II) the creditors who voted in favour for and against the proposal, and the nature and value of the debt owed to each such creditor,

or

(iii) where applicable, stating that section 111A applies to the proposal and that the creditor concerned has notified the personal insolvency practitioner under section 11IA(6) that the creditor does not approve of the proposal,

and

(e) a statement by the personal insolvency practitioner to the effect that he or she is of the opinion that—

(i) the debtor satisfies the eligibility criteria for the proposal of a Personal Insolvency Arrangement specified in section 91,

(ii) the proposed Personal Insolvency Arrangement complies with the mandatory requirements referred to in section 99(2), and

(iii) the proposed Personal Insolvency 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.

3. It is accepted that the relevant dates in these proceedings are as follows:

a. The Creditor's Meeting was held on **6 December 2016**;

b. The Section 115A motion was filed on **19 December 2016** (**day 14**),

c. The relevant parties were served on **21 December 2016** (**day 16**). Date of posting of the motion and supporting documentation which is service within the meaning of the act.

4. Counsel on behalf of the objecting creditor submits that the application pursuant to Section 115A was required to have been made on or before 19 December 2016 but this time limit was not complied with the relevant parties having not been served until 21 December 2016.

5. It is accepted that in *re Hickey a debtor* [2017] IEHC the court was only required to determine the date upon which time starts to run, being the day of the Creditor's Meeting or the day after the Creditor's Meeting. The Court determined that time, for the purposes of the Act, commences to run from the day of the Creditor's Meeting including that day. The court confirmed that the statutory time limit is strict and cannot be enlarged.

6. In the circumstances of that case; wherein the Notice of Motion was not filed with the Court Office within the 14 day Statutory Time Limit, the Court dismissed the Section 115A application as having being made out of time.

7. It was not necessary for the Court to determine if a Section 115A Motion is required not only to be filed within the 14 day Statutory Time Limit, but also served on all prescribed Respondents within the said period such that the Application can be deemed made within the meaning of the Act and the Law.

8. This court is asked to determine that issue.

Section 115A (1) of the Act prescribes that

"An application under this section shall be made not later than 14 days after the creditors' meeting".

9. Counsel for the objecting creditor refers the court to the consideration of the words '*The making of an application'* by Ms Justice Baker (para 70-76) in the case of *Meely* [2018] IEHC 38 as follows, and I quote: —

> *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 agues 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).*
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> *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.*
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> *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 of analogy on three recent authoritative judgments which I will briefly consider.*
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> *72. In K.S.K. Enterprises Limited. v. An Bord Pleanála [1994] 2 IR128, the Supreme Court considered whether an application by way of judicial review of a decision of An Bord Pleanäla 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 the 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).*
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> *73. In DPP v. England [2011] IESC 16, 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 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 the 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]1 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.*

10. Counsel for the objecting creditor submits that since the High Court Judge clearly approved of and followed the decision of the Supreme Court in *Reilly*, which confirmed that for an application to be **made** within the meaning of the Statute, the Notice of Motion was required to be issued and served on the parties who where required to be notified within the relevant time period and since it was not served within that period it is out of time.

11. The decision of O'Malley J in *Humphreys* [2014] IEHC 539 is of particular assistance as it concentrates on procedure in the Circuit Court and concludes that:–

> *"where a statutory time limit requires that an application be brought by way of a motion on notice, the notice must be served on all necessary parties within that time limit. Neither the subsequent High Court decisions, nor the introduction of Order 69 of the Circuit Court Rules have altered that position."*

12. It is accepted that these authorities must be considered having regard to the statutory contexts in which they were given. In that regard, counsel for the objecting creditor further submits that the wording of the Legislation considered in *KSK Enterprises Limited. v. An Bord Pleanála* [S.C. No. 70 of 1914] is not dissimilar to that used in the personal insolvency legislation.

13. In that case Finlay CJ found that the Legislature's intention in fixing a short mandatory time period within which to bring an application seeking to challenge a decision of a planning authority was to ensure certainty and safety to parties potentially affected by the decision, permitting them to act on the unchallenged decision with comfort after the expiry of the mandatory time limit.

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

challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."

14. I am also referred to the decision of Ms Justice Costello in *Lehane v Burke & Anor* [2017] IEHC 426 where the issue of '*when an application is made'* was considered in the context of a Bankruptcy application. That case is concerned with the issue of whether an application is made in time where the hearing is outside the statutory time limit. Judge Costello cited with approval the same finding of Dunne J. in *Reilly v DPP* being that an application is made once the Motion has been issued and served on the parties required to be notified within the relevant time period and held:

"It is therefore clear that if a motion is issued and served before a time limited for making an application, even if it has not yet been moved in court it , nonetheless this constitutes an application made to court or other tribunal (as the case may be)."

15. I agree with the submission that the same reasoning applies in the context of personal insolvency. The Principal Act brought in a mechanism whereby Debtors would be afforded a period of protection from their creditors, within which time they presented a proposal to their creditors providing for a rearrangement of their affairs. The Legislature prescribed a very limited period of protection considering the steps involved in formulating and presenting a proposal. The Act provided for a creditors meeting to be held within the limited time frame and prescribed that a proposal would only be imposed upon a creditor against their will in circumstances where the majority of classes of creditors were in favour of the restructure.

16. The Legislation was then amended by the introduction of Section 115A, which provided for the creation of a new mechanism for the approval of a proposal otherwise rejected by a majority of a class of the Debtor's Creditors by the Court subject to certain criteria being fulfilled. The Legislature mandated that any application under Section 115A is ***to be made within 14 days*** and that the application is to be heard and determined with due expedition.

17. I agree that it is essential that creditors be served an application under Section 115A in the time frame provided for by the Act. This is particularly so, given that the effect of the making of an application under Section 115A is to either extend or reintroduce protection which had otherwise lapsed as per Baker J in *Re Hickey No. 3* [2018] IEHC 313.

18. The objecting creditor makes the case that since in the present proceedings the creditors meeting was held on 6 December, 2016 and the proposal was rejected, the Protective Certificate lapsed on that date.

19. All creditors concerned were therefore free to pursue the debtor for repayment of their debts, progress legal proceedings and/execute judgments against him and might unwittingly breach of Section 96 of the Act by doing so unless they are put on notice of the S115A review application. It is submitted that it could never have been the intention of the Oireachtas to legislate for such a situation.

21. Furthermore, in the case of *Meeley* [2018] IEHC 38 the court under the heading '**The course of the section 115A application,'** dealt with the procedure to be followed and made the position absolutely clear.

> *"the application under section 115 a is for a review by the relevant court following a rejection of the proposed PIA at the statutory meeting of creditors and is commenced under the procedure envisaged in section 115(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"*

22. Counsel for the PIP on behalf of the Debtor makes the point that in all cases if a limitation period bars a remedy it must be specifically pleaded in order to raise the issue at trial. In fact, from an examination of the pleadings they did raise the issue of the statute in this case.

23. Counsel for the PIP on behalf of the Debtor further makes the case that the section 115A proceedings are not new legal proceedings(while accepting that the process of review is instigated by an originating notice of motion).He submits that proceedings are commenced by the application for a Protective Certificate and culminate in a section 115A review .On that basis he seeks to distinguish the case of *KSK Enterprises Ltd* v *An Bord Pleanála* and cites as authority for the fact that it is sufficient to issue the motion but not necessary to serve it within the 14 day period the 2002 case of *McK v. F* 12 April 2002, Finnegan J High Court (unreported) and the 2007 case of *Earl v Cremin* [2007] IEHC 69. In fact in the latter case the court confirmed that the defects in the plaintiffs proceedings were purely procedural and did not go to jurisdiction. Moreover, more recent case law, particularly those decided in the context of the Insolvency legislation must take precedence.

24. Counsel for the Personal Insolvency Practitioner refers the Court to Order 76A Rule 2IA of the Circuit Court Rules which provides**:**

> (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 commenced by notice of motion (which shall include

the notice required by section 115A(3) of the Act), in Form No. 58, signed by the personal insolvency practitioner concerned, which shall —

(3) On receipt of a notice of motion and appended documents in accordance with sub-rule (1), the proper officer shall issue the notice of motion and enter the notice of motion and any objections thereto for initial consideration by the Court on the earliest practicable date which is not less than 21 days after the date of issue of the notice of motion.

(4) The personal insolvency practitioner shall, not later than four days after the notice of motion referred to in sub-rule (1) has issued, send a copy of same to the Insolvency Service, to the debtor and to each creditor concerned.

25. It is argued by Counsel for the Personal Insolvency Practitioner on behalf of the Debtor, that since the Circuit Court rules provide for four days for service the application was served on time.

26. However, the 14 day time limit is prescribed by an Act of the Oireachtas. This primary legislation takes precedence over Statutory Instrument 507/2015.

27. I accept the submission that the requirement that all required parties be served with the Section 1 15A application not later than four days after its issuance does not purport to amend/extend the 14 day time limit mandated by the Principal Act. The four day rule is to ensure prompt notification in circumstances where the application is issued with due expedition post the creditor's meeting and to clarify that in such circumstances the PIP cannot abstain from service until the end of the 14 day statutory time limit.

28. In the present case the Applicant was entitled to make an application under Section 115A on any date between 6 December and 19 December. Indeed, as can be seen from the papers filed in court Mr Finnegan instructed his PIP to make this application two days after the creditors' meeting. An application could have been issued from the Court Office and properly served within the 14 day time limit.

29. It has been confirmed by the High Court that the Court does not have the power to extend the 14 day time limit prescribed by the Principal Act. Accordingly, it would be wholly inconsistent with the Legislation and its interpretation by the High Court if the four day requirement in the rules were deemed to extend the 14 day statutory limit by a further four days.

30. The only manner in which the Act can be interpreted is if the Section 115A application is required to be both issued and served within the 14 day time limit in order to be "made" within the meaning of Sub Section 2 .

31. Obviously it would be impossible to ensure that the court would hear the review application within the said period so therefore and in accordance with the authorities quoted there is a difference between making the application and the second stage of having it dealt with in court.

32. While the timeframe is tight the act does specifically provide that matters/applications under the act shall be dealt with expeditiously and this strict time limit is in my view in accordance with the general provisions of the legislation. The purpose of strict statutory time limits is to ensure that the rights of all parties are clear and unambiguous .

33. The within application, not having been issued and served on the required parties prescribed by the Act within 14 days, has not been MADE within the mandatory time limit and must accordingly be dismissed on a preliminary basis.