THE HIGH COURT
CIRCUIT APPEAL
MIDLAND CIRCUIT
COUNTY OF LAOIS

[2019 No. 1 C.A.]

IN THE MATTER OF THE PERSONAL INSOLVENCY ACTS, 2012-2015
AND IN THE MATTER OF REBECCA FORDE EGAN (A DEBTOR)

JUDGMENT (ON COSTS) of Mr. Justice Denis McDonald delivered on 2 March, 2020

1. This judgment deals solely with the costs of this appeal. The appeal in question was brought by Bank of Ireland Mortgage Bank ("*the bank*") in respect of an order made by the Circuit Court on 20th December, 2018 under s. 115A (9) of the Personal Insolvency Act, 2012 ("*the 2012 Act*") by which the learned Circuit Court judge confirmed the coming into effect of a personal insolvency arrangement proposed on behalf of the above-named debtor by Mr. Daragh Duffy, her personal insolvency practitioner ("*the practitioner*"). In a judgment delivered by me on 20th December, 2019 I dismissed the appeal brought by the bank and affirmed the order made by the learned Circuit Court judge.

2. Subsequent to delivery of judgment by me, I heard argument on behalf of both the bank and the practitioner on 16th January, 2020 in relation to the costs of the appeal. On that occasion, counsel for the practitioner sought an order for costs against the bank on the basis that the bank, in bringing this appeal, was "*on the hazard in relation to costs".* Counsel drew my attention to s. 97 (4) of the 2012 Act which provides, in the specific context of the right of appeal in respect of a protective certificate, that the court is to have regard to the objective "*that all the parties to such an application should bear their own costs unless to do so would cause a serious injustice to the parties to the application*". Counsel for the practitioner made the point that there was no similar provision elsewhere in the Act in relation to applications under s. 115A or in relation to appeals from decisions of the Circuit Court under s. 115A.

3. Instead, s. 115A (14) provides in simple and straightforward terms that:-

> *"The court, in an application under this section, shall make such other order as it deems appropriate, including an order as to the costs of the application."*

That subsection, in contrast to s. 97 (4) clearly envisages that costs will be at the discretion of the court. In *Varvari (a debtor*) [2020] IEHC 23, counsel for the parties were agreed that s. 115A (14) can be seen as displacing, at least to some extent, what counsel for the objecting creditor in that case correctly described as the presumptive rule under O.99 r.1 that costs should "*follow the event".*

4. For completeness, it should be noted that the substantive hearing of the s. 115A application in *Varvari* took place prior to 7th October, 2019 when Part 10 of the Legal Services Regulation Act, 2015 ("*the 2015 Act*") came into operation pursuant to the Legal Services Regulation Act, 2015 (Commencement of Certain Provisions) No. 2 Order 2019 (S.I. No. 502 of 2019). In contrast, the substantive hearing of the present appeal took place on 18th October, 2019 after the 2015 Act came into force. In these circumstances,

it would appear to me that s. 169 of the 2015 Act would now be the operative provision which replaces O.99 r.1 and gives effect, by way of primary legislation, to the principle that costs should ordinarily follow the event. No submissions were made to me at the hearing on 16th January, 2020 as to the possible application of s. 169 of the 2015 Act. It may well be important, in a future case, to determine whether s. 169 can be said to have any application to the specific statutory jurisdiction of the court under s. 115A (14) of the 2012 Act in relation to costs. In circumstances where I have not heard any argument on the issue, it would be inappropriate for me to attempt to express any definite view in relation to the potential interaction between s. 115A (14) of the 2012 Act, on the one hand, and s. 169 of the 2015 Act, on the other. I merely observe that, given the wide terms of s. 115A (14) in the specific context of applications under s. 115A, it would seem to me to be unlikely that s. 169 could be said to override the exercise of the court's jurisdiction under s. 115A (14). That said, courts dealing with costs issues under s. 115A (14) may well be influenced by the approach taken in s. 169 and in particular may think it appropriate to take into account, in any individual case, some or all of the factors in the non-exhaustive list of factors enumerated in s. 169 (1). In this context, it seems to me that the factors identified in s. 169 (1) are matters which a court would be fully entitled to take into account, in a costs application, even in the absence of any statutory provision. As the decision of the Supreme Court in *Dunne v. Minister for the Environment* [2008] 2 I.R. 775 demonstrates, the court is always entitled, even in cases where the "*costs follow the event*" principle applies, to depart from that principle, if in the special circumstances of an individual case, the interests of justice require that it should do so.

The submissions on behalf of the practitioner

5. Counsel for the practitioner submitted that, in the particular circumstances of this case, it would be appropriate to apply the "*costs follow the event"* principle. Counsel for the practitioner drew attention to the fact that, in the Circuit Court, the learned judge made no order as to costs. In the case of first instance proceedings, counsel submitted that the approach taken by the learned Circuit Court judge was correct and in accordance with the practice which has developed subsequent to the judgment of Baker J. in *Re. Meeley (a debtor*) [2019] 1 I.R. 235. Counsel acknowledged that, subsequent to the decision in *Meeley*, a practice had developed to the effect that, in respect of a first instance hearing, the courts generally make no order as to costs on a s. 115A application irrespective of the outcome of that application. However, he submitted that the position must be different where an objecting creditor appeals that decision to a higher court. He argued that, having had the benefit of no costs penalty at the first instance hearing, it would not be appropriate to take the same approach on appeal where the court confirms the decision made at first instance. Counsel also sought to rely on a letter sent by the solicitors for the practitioner to the bank on 17th October, 2019 in which an offer was made that, if the bank agreed not to pursue the appeal, the practitioner would not seek his costs of the appeal. Counsel for the practitioner argued that the failure of the bank to take up this offer added force to his application for the costs of the appeal.

6. Counsel for the practitioner also drew attention to the decision of Simons J. in *Tanager v. Ryan* [2019] IEHC 694 in which Simons J. held that the unsuccessful respondent, Tanager

DAC ("*Tanager*") should be made liable for the costs of an appeal taken by a debtor against an order of the Circuit Court giving leave to Tanager to execute an order for possession in respect of the debtor's family home notwithstanding the existence of a protective certificate issued under the 2012 Act. Simons J. held that there were no special circumstances which would justify a departure from the ordinary approach taken under O.99 r.1 (which has now been replaced by s. 169 of the 2015 Act). At para. 41 of his judgment in that case, Simons J. held that the respondent to that appeal should be entitled to his costs on the basis that, having lost the appeal on its merits, Tanager should be made liable for the costs of the appeal.

7. Finally, counsel for the practitioner also relied on my judgment in *Re. Finnegan (a debtor) (No.2)* [2019] IEHC 137 in which I rejected an argument made by the unsuccessful applicant in that case that there was no basis, on public interest grounds, to depart from the usual principle that costs should follow the event. I deal further, below, with the judgment in *Finnegan*.

The submissions on behalf of the bank

8. In response, counsel for the bank made a number of submissions. He began by making clear that he fully accepted that, in regular *inter partes* litigation, the normal rule is that costs will follow the event. With regard to the decisions of Simons J. in *Tanager v. Ryan* and my own decision in *Finnegan* (*a debtor),* counsel for the bank submitted that both costs judgments were focused on the question of whether it could be said that the underlying substantive judgments in both cases revolved around issues of general public interest. Counsel submitted that it was easy to see why arguments to that effect were rejected in each case.

9. Counsel for the bank drew attention to the approach taken by Baker J. in *Meeley (a debtor)* where she concluded that, save in exceptional circumstances, a practitioner should not be made liable for costs of an unsuccessful application under s. 115A. At para. 112 of her judgment in that case, Baker J. suggested that the same principle might potentially: -

> *"inform the approach to an application by a PIP for an order for the costs of a successful review against a creditor."*

However, Baker J. did not make any definitive ruling to that effect in her judgment. Counsel for the bank very properly said that he was not advancing a "*sauce for the goose*" argument based on this observation by Baker J. in para. 112 of her judgment in *Meeley*. He accepted that, having regard to the nature and scheme of the 2012 Act, a practitioner is generally insulated from any liability for costs of *bona fide* proceedings under the Act. Counsel accepted that objecting creditors are not quite in the same position as a practitioner insofar as costs are concerned.

10. While not suggesting that the same approach must be taken in respect of creditors, counsel for the bank nonetheless argued that the principles which emerge from the decision of Baker J. in *Meeley* should inform the approach of the court to the present

application and he suggested that the court should look at the conduct of the creditor in the context of the appeal. In making that submission, counsel for the bank drew attention to a number of observations I made in my judgment in *Finnegan* at paras. 12-13 where I said:-

> *"12. The standard approach or default position is that costs follow the event. The winner, ordinarily, is entitled to costs. I fully acknowledge the general applicability of that principle but I believe it must be approached with some caution in the context of proceedings under the 2012-2015 Acts. As the decision in … Meeley illustrates, the standard approach does not always apply in connection with personal insolvency proceedings.*
>
> *13. Equally, it seems to me that it is not always appropriate to apply the standard approach in cases where issues arise on the evidence presented by a practitioner and the court derives assistance from the submissions of an objector in resolving those issues. In such cases, it may be appropriate, depending on the individual circumstances, to make no order as to costs even where the practitioner is, ultimately, successful in the application."*

11. In contrast to the position in *Finnegan*, counsel argued that the approach taken by the bank in this case was not designed to "*deal a knockout blow*" to the application under s. 115A. On the contrary, the bank had presented a very focused appeal. Counsel accepted that, in paras. 34-57 of my substantive judgment delivered on 20th December, 2019, I had been critical of some aspects of the case made by the bank. But counsel argued that these were not the subject of any oral argument or submission in the course of the hearing in October, 2019. This was not a situation, counsel argued, where the bank, for the purposes of the appeal, had run every possible argument. The bank's oral submissions were centred on the principal issue identified in para 18 of my judgment in relation to the effect of s. 116 of the 2012 Act. Counsel submitted that this was an important issue which required to be resolved and which was ultimately "*teased out*" between the bank and the court. Counsel argued that, as the length of the substantive judgment demonstrates, the issue in relation to s. 116 was a "*point of substance*".

12. In considering the issue of costs, counsel for the bank argued that the court should ask itself the following questions: Was the issue one that required resolution? Did the bank put up helpful arguments? Did the court derive assistance from the arguments made by the bank? Did the bank act in a focused way or did the bank seek to raise all possible arguments? If the court answers those questions in favour of the bank, counsel suggested that, having regard to the observations made by Baker J. in para. 112 of her judgment in *Meeley*, the court should treat the bank (as an unsuccessful creditor) in the same way as the court would treat an unsuccessful practitioner. Counsel submitted that, accordingly, no order for costs should be made against the bank.

13. With regard to the letter of 17th October, 2019, counsel for the bank highlighted that the letter was sent only the day before the hearing in October 2019. At that point, all of the costs of the appeal had already been incurred. Counsel suggested that the reliance

placed by the practitioner on the letter was entirely inconsistent with the observations of Baker J. in *Michael Hickey (a debtor)* [2018] IEHC 313 where she said at para. 67-69:-

> *"67. This matter was listed for hearing of the preliminary objection by the Objecting Creditor on 30 April 2018. In their letter of 27 April 2018, Messrs. Holohan Law Solicitors described the position adopted by the Objecting Creditor as 'unstateable, incorrect in law' and said that it was clear that the law was in their favour, and called upon KBC to withdraw the application and to pay measured costs in respect of the application.*
>
> *68. This is precisely the form of letter intended to have a chilling effect to which I drew attention in my judgment in In Re Meeley …, where the concern I expressed was that correspondence from creditors which threatened an application for costs against a PIP in a 'routine or ordinary case which is lost' was not a practice which I considered could be condoned by a court.*
>
> *69. I make a similar comment with regard to the overly enthusiastic letter from Messrs. Holohan Law. The approach adopted is not one consistent with the scheme of the legislation, which envisages a rational approach to the question of insolvency, and which in itself seems to me imports an obligation to adopt a rational approach on both the creditor and debtor in regard to any matter before the court."*

14. In conclusion, counsel for the bank summarised his submission by saying that, while he did not contend that the position of a creditor in relation to the costs of an appeal is precisely the same as the well-established position in respect of practitioners, it may nonetheless be appropriate in a suitable case (and he suggested that the present one fell within this category) to take an analogous approach. In particular, he suggested that this is the approach that should be taken in an appeal that raises a new issue and where the creditor runs the appeal on what he described as a constructive basis. In such cases, he submitted that it was appropriate that the creditor should be placed in a somewhat equivalent position to a practitioner. In making that submission, he also very properly recognised that, in contrast to the practitioner, the creditor in pursuing an appeal is not engaged in any statutory function. He also recognised that, in the case of a creditor, there were, in contrast to the position of a practitioner, commercial interests at stake.

The practitioner's response

15. In response, counsel for the practitioner submitted that the bank had not confined itself, in the pursuit of its appeal, to the legal issue in relation to the effect of s. 116. He highlighted that the written legal submissions delivered on behalf of the bank raised significantly more issues than had been the subject of oral argument at the hearing in October 2019. Counsel noted that, at the hearing in October, 2019, the arguments made in the written submissions had not been withdrawn and that, accordingly, it had been necessary for the court to address them in the judgment of December 2019. Counsel for the practitioner also submitted that the costs regime as applied in practice by the courts proceeds on the understanding that, in the case of a first instance hearing, the court will

not generally make an order for costs against an objecting creditor. However, if the objecting creditor fails to succeed in its objection at first instance, it cannot be the case (so counsel argued) that the creditor should be in a position to run the case all over again on appeal with an effective immunity in respect of costs. He also submitted that the clear intention of the bank's appeal was not to clarify the law for the future but to deliver a knockout blow to the arrangement proposed by the practitioner in this case. The appeal was to further the bank's commercial interests and counsel submitted that it would be entirely inappropriate in such a case that a creditor should be insulated from the costs consequences of pursuing such an appeal.

16. Counsel for the practitioner also suggested that the s. 116 issue was not a new issue and that it had, in substance, been addressed by Baker J. in *J. D*. [2017] IEHC 119 and by me in my judgment in *Ahmed Ali* [2019] IEHC 138.

17. Finally, counsel for the practitioner sought to draw a contrast between the present appeal and cases where the appellant creditor pursues an appeal in circumstances where a legitimate issue arises in relation to the quality of the evidence before the Circuit Court or where the evidence relevant to the grant of relief under s. 115A is relatively finely balanced. Counsel accepted that, in practice, the court, in such cases, does not ordinarily make an award of costs against an objecting creditor, even on appeal.

Discussion

18. As noted by me in para. 12 of my judgment in *Finnegan (a debtor)* I believe the standard position under O.99 r.1 (now found in s. 169 of the 2015 Act) that costs follow the event must be approached with some caution in the context of proceedings under the 2012 Act. As the decision of Baker J. in *Meeley (a debtor*) illustrates, the standard "*costs follow the event*" approach will not be taken as against a practitioner save in exceptional circumstances of the kind discussed in that judgment or in the circumstances described by me in my judgment in Varvari (a debtor) [2020] IEHC 23. Baker J. explained the rationale for this approach, at para. 151 of her judgment in *Meeley* in the following terms:-

> *"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 an 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', …".*

Baker J. came to the conclusion that, accordingly, a costs order would not be made against a practitioner save in exceptional circumstances. As noted above, counsel for the bank accepts that an objecting creditor will not be in quite the same position as a practitioner in light of the fact that the objecting creditor will have a commercial interest in pursuing an objection. However, counsel for the bank nonetheless submitted that, in the particular circumstances of this appeal, the bank should be treated in a somewhat analogous position.

The costs of proceedings at first instance

19. I agree that, in many cases, it may be inappropriate to take the conventional "*costs follow the event*" approach against an unsuccessful objecting creditor in proceedings at first instance. As outlined by me in para. 13 of my judgment in Finnegan, this is especially so in cases where issues arise on the evidence presented by a practitioner and the court derives assistance from the submission of an objector in resolving those issues. The submissions made by an objector will also often be of considerable assistance to the court in determining whether the conditions for the grant of relief under s. 115A have been satisfied in any individual case. In carrying out its task under s. 115A, it can be of considerable help to the court to hear argument from two sides. Where an objecting creditor attends the hearing of the application and makes constructive arguments (particularly in relation to the adequacy of the evidence before the court) the court can proceed, with a greater level of assurance, to reach a sound determination as to whether the conditions for relief have or have not been satisfied in any individual case.

20. However, in my judgment in *Finnegan*, I also suggested that a different approach may well be appropriate where an objecting creditor has mounted a vigorously pursued but unsuccessful argument on the law which was designed not to clarify a point of genuine uncertainty but instead to deal a knockout blow to an application under s. 115A. I addressed this issue in para. 14 of my judgment in *Finnegan* where I said:-

> *"14. Here, Mars has mounted a vigorously pursued argument on the law which was designed to deal a knockout blow to the application under s. 115A. Prima facie, it is difficult to distinguish the approach taken by Mars in this case from normal inter partes litigation where the standard approach discussed above is almost invariably taken. …."*

On the other hand, there may well be cases where a legal issue of substance is raised by an objecting creditor which requires to be resolved in the interests of legal certainty and I would not wish to suggest that an objecting creditor should always be penalised just because it loses a legal argument which it has raised. I appreciate that it may be difficult to draw a bright line between those cases where an objector should be made subject to an order for costs (on the basis of an unsuccessful challenge on a legal issue) and those where it should not. However, in any individual case, the court will be in a position to form a view as to whether the legal issue raised by the objector was one of genuine substance that required to be resolved in the interests of legal certainty. If the issue can be characterised in that way, the court may well form the view that it would not be appropriate to make an order for costs against the objecting creditor. On the other hand, if the issue is one which was, in substance, previously resolved by an earlier decision or where the point raised lacks any real substance, the court may well be justified in making an order for costs against the unsuccessful objector.

21. In cases where the objecting creditor raises issues in relation to the quality of the evidence placed before the court by the practitioner, I believe that the court, dealing with applications under s. 115A at first instance, should be slow to impose a liability in costs on the unsuccessful objector unless the court is satisfied that there was no merit at all to

the position taken by that creditor. In my view, it is necessary to bear in mind that, as noted further below (in the context of costs of appeals to the High Court) that proceedings under s. 115A are not adversarial in any traditional sense. The court is conducting a process of enquiry as to whether the relevant conditions for relief under s. 115A have or have not been satisfied. In those circumstances, it is of assistance to the court, in evaluating the evidence before it, to hear submissions from a party other than the practitioner. The participation of an objecting creditor in the hearing often assists the process of evaluation of the evidence by the court.

The costs of an appeal to the High Court

22. The position in relation to the costs of an unsuccessful objector on appeal potentially gives rise to different issues. It seems to me that a distinction may need to be drawn between appeals where the principal argument raised by the objecting creditor is based on a legal point and cases where the objecting creditor makes submissions which are confined to addressing genuine concerns in relation to the quality of the evidence available such that issues can be said to arise as to whether the relevant conditions for the grant of relief under s. 115A have been satisfied in any individual case.

23. In cases where the appeal revolves around a legal point raised by the objecting creditor, there is significant substance to the argument made on behalf of the practitioner in this case that, having had the benefit of no order as to costs in the Circuit Court, a similar immunity in respect of a liability for costs should not necessarily be available on appeal. There may, of course, be cases where the legal point in issue is one which has arisen in a large number of cases at first instance and where it is important, in order to clarify the law, that it should be resolved on appeal. It may well be appropriate in such cases to apply the same or analogous principles to those discussed in the judgment of Clarke J. (as he then was) in *Cork County Council v. Shackleton* [2011] 1 I.R. 443 albeit that there is no party to proceedings under the 2012 Act who could be said to be a *"public authority"*. In cases where a doubt has arisen as to the correct legal position, the greater good in resolving that issue on appeal may well outweigh and displace any suggestion that costs should follow the event.

24. On the other hand, in cases where the objecting creditor confines its submissions on appeal to issues relating to the quality of the evidence available in order to satisfy the conditions for relief, there is also much to be said for the submission made by counsel for the bank that, in cases under the 2012-2015 Acts, the court should be slow to impose an order for costs against an unsuccessful objecting creditor (even on appeal) where the creditor has acted constructively in its engagement with the court. This is particularly relevant in the context of appeals from the Circuit Court to the High Court which are by way of a full rehearing. The High Court, on appeal, has to engage afresh with each of the conditions for the grant of relief under s. 115A and it can be of enormous assistance to the court, in its deliberations as to whether these conditions have been satisfied in any individual case, to hear submissions from the objecting creditor. Obviously, in all these cases, the objecting creditor will be acting in its own commercial interests. However, while the objecting creditor acts in that way, it also acts as a *legitimus contradictor*. As

noted above in the context of first instance hearings, in considering the issues which arise under s. 115A, it is of considerable assistance to the court to have arguments made on both sides. If an objecting creditor acts constructively and confines its objections and submissions to points that clearly require debate, it would be inappropriate, in my view, to penalise the objecting creditor in costs even where it is unsuccessful on appeal. While the objecting creditor cannot be said to be in the same position as a practitioner (who carries out a very important statutory function) in relation to its potential liability for costs, the observations made by Baker J. in *Meeley* with regard to the positon of a practitioner are also of some relevance to the position of an objecting creditor who acts constructively. As Baker J. observed in para. 150 of her judgment, an application under s. 115A "*could not properly be regarded as inter partes litigation in the true sense*". In the same paragraph, she reiterated the observations made by O'Donnell J. in the Supreme Court with regard to the role of an examiner under the Companies Act where he said, in *McInerney Homes Ltd* [2011] IESC 31 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. …".*

25. Having regard to the nature of the proceedings before the court (which are similar to those which arise, in a corporate setting, in the context of examinerships), it seems to me that it must be open to the court in any individual case (whether at first instance or appeal) to decide not to penalise an unsuccessful objecting creditor in costs where the court has obtained significant assistance from the position taken by that creditor. This is more likely to be so in the context of unsuccessful submissions on the evidence rather than on the law but I would not wish to suggest that unsuccessful arguments on the law should always result in costs consequences. As noted above, there may be cases where a genuine doubt exists as to the law which might, in an individual case, justify the court in making no order as to costs.

26. I should equally make clear that there may well be circumstances where it is appropriate for the High Court, on appeal, to make an adverse costs order against an objecting creditor who has confined itself to addressing evidential issues. In my view, the court should generally be less receptive to the position adopted by an objecting creditor where the evidence adduced on behalf of the practitioner and the debtor in the Circuit Court has been comprehensive and complete and the Circuit Court has, on that basis, expressed itself to be satisfied that the conditions for the grant of relief under s. 115A have been satisfied. There is some merit in the submission made on behalf of the practitioner in this case that, at least in such cases, it would not be appropriate to allow an objecting creditor to pursue the same unsuccessful arguments in the High Court, on appeal, which it had lost in the Circuit Court without any risk as to costs. That would encourage unmeritorious appeals. It would be impossible, of course, to lay down any hard and fast rule in this regard. Every case must depend on its own individual facts. Section 115A (14) specifically declares that the court is free to make any order as to costs as it thinks appropriate.

27. Nonetheless, it seems to me to be entirely appropriate for a court to take the approach outlined in para. 25 above where the court is satisfied that the unsuccessful objector has been of assistance to the court in the way in which it has approached the matter either at first instance or on appeal.

The approach to be taken in this case

28. The question which now arises is whether it is appropriate in the specific context of this appeal to make no order as to costs as against the bank. Notwithstanding the very able and ingenious submissions made by counsel on behalf of the bank, I have come to the conclusion that it would not be appropriate, in the particular circumstances of this case, to take that course. I have reached that view in circumstances where, to my mind, the legal issue raised by the bank was inconsistent with the pre-existing case law of the court in particular the seminal decision of Baker J. in *J.D*. and, to a lesser extent, my own decision in *Ahmed Ali*.

29. As noted in para. 7 of my December 2019 judgment, the principal argument made on behalf of the bank in its oral submissions in the course of the appeal was that, if the court were to approve the arrangement by granting the order sought by the practitioner under s. 115A (9), this would, in effect, deprive the bank of its rights under s. 116 (6) to enforce its rights against Mr. Egan (the husband of Ms. Forde Egan) who is a former bankrupt. It was argued that such an outcome was self-evidently unfair and prejudicial to the rights and interests of the bank such that the court would be precluded by s. 115A (9) (e) and (f) from approving the arrangement. It was also argued that the right of the bank to pursue Mr. Egan under s. 116 (6) meant that the requirements of s. 115A (9) (b) (iii) could not be satisfied in this case. Insofar as relevant, s. 115A (9) (b) (iii) provides that the court cannot make an order confirming the coming into effect of a proposed arrangement unless it is satisfied that there is a reasonable prospect that the arrangement will *"enable the debtor…not to dispose of an interest in … or … not to cease to occupy … his or her principal private residence*."

30. Although the bank argued that the issue raised by it in relation to the effect of s. 116 (6) was novel, I do not believe that this is, in fact, correct. Section 116 (6) was expressly addressed in both *J. D*. and in *Ahmed Ali*. While the argument made by EBS (the relevant objecting creditor) in *J.D*. was simply that s. 116 (6) was insufficiently broad to protect its position, Baker J. analysed the subsection and came to the conclusion that the subsection operated to permit EBS to proceed against the spouse of the debtor in that case notwithstanding confirmation of the arrangement involving the debtor alone. As noted by me in para. 14 of my December 2019 judgment in this case, Baker J., in the course of her judgment in *J.D.,* drew attention to the standard terms of the arrangement proposed in that case which expressly provided that any person who borrowed money as a joint borrower with a debtor would continue to be liable to the relevant creditor notwithstanding confirmation of the arrangement. In my December 2019 judgment I essentially followed and applied the decision in *J.D.* It is true that the bank, in the present case, specifically submitted that the court could not approve the arrangement having regard to the provisions of s. 115A (9) (b) (iii) of the 2012 Act. As noted in para.

25 above, under that provision, the court may not make an order confirming the coming into effect of a proposed arrangement unless it is satisfied that there is a reasonable prospect that confirmation of the arrangement will secure the continued occupation by the debtor of his or her principal private residence. The bank submitted in the present case that this condition could not be satisfied in circumstances where, under s. 116 (6), it must be entitled to pursue a remedy against Mr. Egan under s. 31 (2) (a) of the Land and Conveyancing Law Reform Act, 2009 ("*the 2009 Act*"). In my view, that argument was addressed, in substance, in the judgment of Baker J. in *J.D.*

31. I do not know whether a specific argument was made by EBS to that effect in *J. D.* However, s. 115A (9) (b) (iii) is one of the conditions which the court must consider when confronted with an application under s. 115A. It is clear from s. 115A (9) that each of the conditions set out in that subsection (including the condition described at para. (b) (iii)) must be satisfied before the court can make an order confirming the coming into effect of a proposed arrangement. It is therefore inconceivable that the provisions of s. 115A (9) (b) (iii) were not considered by Baker J. Moreover, it is clear from her judgment that, although she did not specifically identify the subsection by name, Baker J. addressed the issue in substance. This is clear from the terms of para. 57, 58 and 89 (c) of her judgment. In para. 57 she explains why, notwithstanding that the objecting creditor, EBS, was entitled to proceed against the debtor's spouse, any such action was likely, in practical terms, to achieve nothing (in circumstances where, as in the present case, the value of the debt due to the objecting creditor exceeded the value of the family home). In paras. 57-58, Baker J. said:-

> *"57. on the figures currently available, the principal private residence of the debtor has a value well below the amount owed on the mortgage, and insofar as EBS might seek to recover possession against Mr. R it will undoubtedly be met by an argument that an order for possession has no practical import as Ms. D and her children will continue to reside in the house and may, as a matter of law, continue to do so provided the terms of the restructured mortgage are met.*
>
> *58. Therefore, it seems to me that the argument of EBS that it is unfairly prejudiced with regard to the enforcement of its security interest in the premises insofar as Mr. R is concerned is not borne out by the law or the facts. The prejudice to EBS will be caused, not by the fact that Mr. R has not been brought into the restructured arrangement, but by the extent of the negative equity …"*

32. It will be seen that, in these paras., Baker J. held (as I did in the present case) that it was likely that the action which the objecting creditor proposed to take against the non-participating spouse would not be successful in circumstances where the value of the debt exceeded the value of the home. For that reason, the right of EBS in that case to pursue the debtor's spouse under s. 116 (6) did not trigger the application of s. 115A (9) (b) (iii). It is therefore unsurprising that, in para. 89 (c) of her judgment, Baker J. was able to conclude that the proposed arrangement: *"preserves the entitlement of the debtor to*

continue to reside with her young children in her principal private residence and does not deprive the secured creditor of any claims against a co-debtor or co-mortgagor."

33. In these circumstances, notwithstanding the considerable skill shown by counsel for the bank in their submissions both oral and written, I do not believe that the question which was raised in this case could be said to be in any way novel or one that required to be resolved. Notwithstanding the length of my December 2019 judgment, the issue seems to me to have been settled by the decision of Baker J. in *J.D.*

34. Similarly, although I did not address the issue in the context of s. 115A (9) (b) (iii) in *Ahmed Ali*, I nonetheless reached a similar conclusion to that of Baker J. in *J.D.* (albeit in the context of the case made by the bank in that case that it was unfairly prejudiced by the proposed arrangement). In para. 50 of my judgment, I expressed the view that, although the bank would be free to take action against the wife of the debtor in that case, it was difficult to see that the bank would be in a position to pursue partition proceedings. In those circumstances, it was clear that confirmation of the proposals would secure the continued occupation of the principal private residence by the debtor. In this context, it is important to bear in mind that, although I did not specifically refer to s. 115A (9) (b) (iii) in that section of my judgment, I made clear in para. 56 that I was nonetheless satisfied that all of the requirements of the section had been satisfied in that case and that it was appropriate, in all of the circumstances, to confirm the coming into effect of the proposals for an arrangement.

35. Having regard to the pre-existing case law, I do not believe that the bank could be said to have pursued a novel point in these proceedings. While I fully appreciate that, in the oral submissions made to the court, the bank's counsel made detailed and well-structured submissions in support of the bank's case, the submissions were not addressed, in truth, to any new point of interpretation of the 2012 Act which required to be determined by the court in the interests of legal certainty.

36. I appreciate that, in the written legal submissions delivered on behalf of the bank, observations were made in relation to the quality of the evidence before the court. As noted above, the High Court, on a full rehearing on appeal from the Circuit Court, may well benefit from such submissions to the same extent as the Circuit Court, at first instance, did. As noted above, where the court derives assistance from such submissions, there may well be a basis for the court to make no order as to costs even where the objecting creditor fails to persuade the court that the evidence is insufficient to warrant the grant of an order under s. 115A. However, I do not believe that this could be said to be such a case. In contrast to many of the cases which come before the court, the evidence adduced on behalf of the debtor and the practitioner in this case was of a very detailed and comprehensive kind. In this context, it is noteworthy that, in making arguments on behalf of the bank in relation to the costs of the appeal, counsel for the bank accepted that the court had, in the December 2019 judgment, criticised the approach taken by the bank in relation to a range of issues which arose in the course of the evidence and the written submissions delivered on behalf of the bank.

Decision

37. In the circumstances, I am satisfied that this is not a case in which it would be appropriate to make no order as to costs. On the contrary, this seems to me to be an appropriate case which, in the exercise of the discretion of the court, it would be appropriate to make an order for costs against the bank in relation to the appeal, such order to include the costs of the written submissions, the hearing which took place in October 2019, and the further hearing which took place in relation to costs in January 2020. I will therefore make an order to that effect, such costs to be sent for adjudication before the legal costs adjudicator in the event that the parties are unable to agree the costs.

38. I am conscious that, in awarding costs against the bank in relation to the appeal, I am taking a different approach to that adopted by the learned Circuit Court judge in the course of the proceedings before her. I should make clear that I fully agree with the approach taken by the learned Circuit Court judge in making no order as to the costs of the Circuit Court proceedings. Had I been in her position, I would have taken the same approach. While I have ultimately not been persuaded that the bank has raised a point of substance in relation to the law or in relation to the quality of the evidence adduced by the practitioner, I would have been very slow to impose an order for costs against the bank, had this matter been before me at first instance. It seems to me that the role played by the bank at first instance was still a very useful role as *legitimus contradictor*. It is also the case that the detailed evidence of Ms Forde Egan ultimately placed before the Circuit Court by the practitioner was largely in response to issues which the bank had earlier raised on affidavit. It would have been surprising in those circumstances if the Circuit Court had made an adverse costs order. However, the position on appeal is quite different. At the time the appeal was lodged, there was comprehensive evidence available to strongly support the grant of relief under s. 115A. Having regard to the extent of that evidence, I am of the view that the bank cannot plausibly contend that it should be immune from costs in respect of the appeal.