



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2022:000098

[2024] IESC 19

**O'Donnell C.J.
Dunne J.
O'Malley J.
Hogan J.
Donnelly J.**

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

**AND IN THE MATTER OF JOHN O'DRISCOLL
OF KILCEA, OVENS, COUNTY CORK ("THE DEBTOR")**

**AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 96 AND
112 OF THE PERSONAL INSOLVENCY ACT 2012 TO 2021**

Between/

MICHAEL O'FLYNN

Appellant

and

JOHN O'DRISCOLL AND ALAN MCGEE

Respondents

and

THE INSOLVENCY SERVICE OF IRELAND (No. 2)

Notice Party

Judgment of Ms Justice Elizabeth Dunne delivered on the 15th day of May 2024

1. The appeal in this case concerned the question as to whether a creditor who had failed to prove their debt pursuant to the provisions of the Personal Insolvency Act 2012 (“the 2012 Act”) has *locus standi* to object to the coming into effect of a Personal Insolvency Arrangement (“PIA”). In *O’Flynn v. O’Driscoll and Others (No. 1)* [2023] IESC 32, this Court concluded that there was nothing in the provisions of the 2012 Act which precluded a creditor who has not proved his debt, as requested to do so by the Personal Insolvency Practitioner (“PIP”), from doing so at a later stage. Further, the Court was satisfied that there was nothing in the express terms of the 2012 Act which precludes a creditor, who has not filed proof of debt, from lodging a notice of objection. Therefore, the Court concluded that Mr. O’Flynn (“the appellant”) had *locus standi* to lodge a notice of objection.
2. At the conclusion of the judgment of this Court, having indicated that the appeal would be allowed, the following was stated:

“It would seem, therefore, that it would be appropriate for this matter to be remitted for a further consideration of the issues as to the entitlement of the appellant herein to prove his debt, and, secondly, to lodge a notice of objection to the PIA.”
3. It appears that a hearing took place before the High Court on the 15th January, 2024, in the course of which an order was made for the proof of debt of the appellant in the sum of €1. Therefore, it remains for this Court to consider two outstanding issues, namely, the question of remittal for the purpose of lodging a notice of objection to the PIA, and secondly, the question of costs.

The Issue of Remittal

4. Following the delivery of judgment herein, the parties were invited to consider the question of remittal and the question of costs, and to furnish written submissions in relation to same. The parties were not in agreement as to the approach to be taken to the question of remittal, and accordingly it was necessary to have a further hearing in relation to that issue, and equally, there was disagreement as to the issue of costs. It is the contention on behalf of the PIP that the matter to be remitted, i.e. the determination on the notice of objection of the appellant, should be dealt with by the High Court, as that is the court which last had seisin of the matter. The appellant contends that the matter should be remitted to the Circuit Court, primarily on the basis that that court has never determined the question of the objections furnished by the appellant. Therefore, it is claimed that if the matter is dealt with by the High Court, he will have lost the opportunity to appeal from that decision, given that the High Court was originally dealing with the matter as an appeal from the decision of the Circuit Court in relation to the issue of *locus standi*.
5. As a general proposition, it can be said that, following an appeal, if issues remain in the proceedings, those issues will, as a matter of course, be determined in the court from which the appeal arose. Put simply, if a plaintiff brought proceedings in the High Court, and that court struck out the proceedings on the basis that the proceedings were statute barred – an issue tried as a preliminary issue – the matter would be returned to the High Court following a successful appeal for a full hearing on the merits. Likewise, if a party seeks interlocutory relief, is refused, and thereafter successfully appeals, a number of options will be open to the appeal court – it may make the interlocutory order itself, if appropriate, or it may decide that it is more appropriate to remit the matter to the court below to rehear the issue on the basis outlined by the appeal court. Those are the general options available following a hearing at first instance where there has been a successful

appeal. That reflects the normal course in relation to hearings before the courts, namely, that there is a hearing at first instance and, where sought, an appeal may follow. Any outstanding issues will then be remitted to the court from which the appeal arose.

6. The position in relation to what might be described as the traditional process – a first instance hearing followed by an appeal – has changed following the 33rd Amendment of the Constitution. Article 34.5.3^o of the Constitution provides for appeals to this Court from decisions of the Court of Appeal, provided that this Court is satisfied that:

“i *the decision involves a matter of general public importance, or*
ii *in the interests of justice it is necessary that there be an appeal to the Supreme Court.*”

7. Article 34.5.4^o provides that the Supreme Court shall have appellate jurisdiction from a decision of the High Court, if satisfied that there are exceptional circumstances warranting a direct appeal, and is further satisfied of the presence of either or both of the following factors:

“i *the decision involves a matter of general public importance;*
ii *the interests of justice.*”

8. Prior to the 33rd Amendment, there is no doubt that an appeal to this Court could not be taken from a decision of the High Court on appeal from the Circuit Court, by virtue of the provisions of s. 39 of the Courts of Justice Act 1936 (“the 1936 Act”), which provides that the decision of the High Court (or the High Court on Circuit), on an appeal under Part IV of the 1936 Act, shall be “*final and conclusive and not appealable*”; see, for example, *Eamonn Andrews Productions Ltd v. Gaiety Theatre Enterprises Ltd*. [1973] I.R. 295. This Court, in the case of *Pepper Finance Corporation (Ireland) DAC v. Cannon & Anor*. [2020] IESC 2, [2022] 1 I.R. 128 considered the question as to

whether or not an appeal under the new constitutional jurisdiction of this Court could be brought from a decision of the High Court on a Circuit appeal. It was concluded by O'Malley J. that this Court has jurisdiction to grant leave to appeal from a decision of the High Court made on appeal from the Circuit Court, notwithstanding s. 39 of the 1936 Act, provided that the constitutional criteria were satisfied (para. 33).

9. Thus, in circumstances such as those which have arisen in this case where there has been a hearing before the Circuit Court, followed by an appeal to the High Court, and where there is a subsequent appeal to this Court, in the circumstances permitted under the terms of Article 34.5.4°, there will be a second appeal. O'Malley J. noted in the course of her judgment, at para. 29, as follows:

“It is relevant to note here that, while appeals from the Circuit Court generally concern well settled areas of law, it is always possible that a decision given in that context may give rise to some new legal development of widespread significance. In accordance with the principles discussed in David Hughes v. Worldport Communications [2005] IEHC 467, as approved in Kadri v. The Governor of Wheatfield Prison [2012] IESC 27, one High Court judge will normally follow a previous decision given by another judge of that Court unless satisfied that it was in error. However, the exclusion of Circuit appeals from the category of decisions of the High Court that could be further appealed has, in the past, brought about a situation where there were conflicting High Court judgments on important questions of law (see, for example, the decisions of Hogan J. and Kearns P. in, respectively, Wicklow County Council v. Fortune [2012] IEHC 406 and Wicklow County Council v. Kinsella [2015] IEHC 229).”

10. She went on to observe, at para. 36, as follows:

“Exceptional circumstances are required in the case of an appeal from the High Court precisely because of the fact that in most cases the most appropriate route of appeal will be to the Court of Appeal. If that Court does not have jurisdiction, there will be the possibility that a point of law that is of general public importance will remain unaddressed by either the Court of Appeal or the Supreme Court. That is not the intention underlying the constitutional structure, and in my view is capable of being seen as an exceptional circumstance that can justify a grant of leave.”

11. She went on to conclude that, on the facts of that case, the exceptional jurisdiction described therein had arisen, and thus an appeal was permissible. As has been seen, this case also met the constitutional criteria for an appeal from the High Court to this Court, notwithstanding that what was at issue was an appeal from the Circuit Court.
12. In normal circumstances, following an appeal from the Circuit Court to the High Court, if there was an outstanding issue that required to be considered further in the Circuit Court, the High Court could, if it saw fit, remit the matter to the Circuit Court for a decision on the outstanding issue or issues. In this case, it is clear that there are outstanding issues, and the question that has to be determined is whether it is appropriate to remit these to the High Court, from which the appeal came, or to the Circuit Court, which originally had jurisdiction in the matter.

Appeals from the Circuit Court to the High Court

13. In order to set the context for the discussion on remittal, it would be useful to make some brief comments on appeals from the Circuit Court to the High Court. Section 37 of the 1936 Act sets out the provisions in relation to appeals from the Circuit Court in civil cases heard without oral evidence. Section 38 provides for appeals from the Circuit Court in cases not otherwise provided for. Section 37(1) of the 1936 Act states that an

appeal shall lie to the High Court sitting in Dublin from every judgment given or order made (other than judgments and orders in respect of which it is declared by Part IV of that Act that no appeal shall lie therefrom) by the Circuit Court in any civil action or matter at the hearing or for the determination of which no oral evidence was given. Section 38(1) provides that an appeal shall lie from every judgment or order of the Circuit Court in a civil action or matter, and goes on to provide for circumstances in which the case will be appealed to the High Court sitting in Dublin, or, as the case may be, to the High Court on Circuit sitting in the appeal town for the county in which the judgment or order was heard and determined. Sub-section 38(1) has been amended by the provisions of s. 98 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, but in practical terms the amendment is not of relevance to the issue in these proceedings.

14. Section 38(2) provides as follows:

“Every appeal under the section shall be heard and determined by one judge of the High Court and shall be so heard by way of a rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made.”

15. Finally, I should refer briefly to s. 39 of the 1936 Act, which is the provision that provided that a decision of the High Court, or of the High Court on Circuit, on an appeal under this part of the Act shall be final, conclusive and not appealable. I have already referred to the decision of this Court in the case of *Pepper Finance* and, as can be seen, following the 33rd Amendment of the Constitution, it has been determined that an appeal does lie to this Court in exceptional circumstances, notwithstanding the provisions of s. 39 of the 1936 Act.

16. It is important to note that the appeal is a rehearing – in other words, if oral evidence was heard in the Circuit Court, then the matter will proceed by way of a rehearing of the oral evidence that was given in the Circuit Court. In cases where no oral evidence was given in the Circuit Court, Order 61(8) of the Rules of the Superior Courts 1986 (S.I. No. 15) provides as follows:

“Where any party desires to submit fresh evidence upon the hearing of an appeal in any action or matter at the hearing or for the determination of which no oral evidence was given, he shall serve and lodge an affidavit setting out the nature of the evidence and the reasons why it was not submitted to the Circuit Court. Any party on whom such affidavit has been served shall be entitled to serve and lodge an answering affidavit or to apply to the Court on the hearing of the appeal for leave to submit such evidence, oral or otherwise, as may be necessary for the purpose of answering such fresh evidence, provided, however, that the Court may at any time admit fresh evidence, oral or otherwise on such terms as the Court shall think fit, and may order the attendance for cross-examination of the deponent in any affidavit used in the Circuit Court or the High Court.”

17. The point to note, therefore, is that an appeal from the Circuit Court to the High Court is, for all practical purposes, a full rehearing of the matter in the Circuit Court, and if the need arises to provide fresh evidence in a case in which no oral evidence was given in the Circuit Court, an application can be made to facilitate that, in accordance with the provisions of the Rules.
18. The position in relation to a Circuit Court appeal is different from an appeal from the High Court to the Court of Appeal, or an appeal to the Supreme Court. The learned

authors of *Delany and McGrath on Civil Procedure* (4th Edition, Round Hall Press, 2018) at para. 23-211 observe:

“As O’Donnell J. noted in Lough Swilly Shellfish Growers Co-op Society Limited v. Bradley, an appeal is something less than a re-hearing and, unless additional evidence is admitted in accordance with the principles outlined above, the appeal will be heard and determined on the basis of the evidence and documentary material that was before the trial court. A transcript of the evidence and submissions will often be available but, if not, and either the Court of Appeal or Supreme Court considers that the record available to it of the proceedings in the court below is deficient, it may have regard to such evidence, or to such verified notes or other materials as it deems expedient. In addition, if the Court of Appeal or Supreme Court considers it necessary, it may direct the Registrar to apply to the trial Judge for a report on the trial or any part thereof.”

19. Thus, as can be seen, the form of appeal is significantly different. In practical terms, the nature of the rehearing on a Circuit Court appeal is little different to the first instance hearing before the Circuit Court (see also, *Kelly v. National University of Ireland (UCD)* [2017] 3 IR 237 at 244-249).

Remittal

20. There is no dispute between the parties that the matter of considering the appellant’s objection to the PIA must be remitted. The only issue between the parties that remains to be resolved concerns the court to which the matter should be remitted.
21. The approach of the respondent to the question of remittal is straightforward. It is argued that the question of the appellant’s objection to the PIA should be remitted to the High Court for determination. Reliance is placed on the judgment of this Court in

the case of *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381, a matter concerned with Circuit Court proceedings for possession pursuant to s. 62(7) of the Registration of Title Act 1964. I will return to a consideration of that decision shortly.

22. By contrast, the appellant argues that, as the substantive issues raised by him have never been considered by the Circuit Court, this is the court to which the matter should be remitted. It is pointed out that the liabilities of the debtor come within the jurisdiction of the Circuit Court, and this is relied on to argue that the Circuit Court is the “*appropriate court*” in which to deal with the matter (see s. 5 of the 2012 Act).
23. Secondly, the appellant seeks to distinguish this case from *Bank of Ireland Mortgage Bank v. Cody* on the basis that the passage relied on by the respondent therein is *obiter*, and that the question of remittal did not appear to be in issue.
24. It is further argued that the matter should be remitted to the Circuit Court to deal with this issue as a matter of fair procedures so that the appellant has a first instance hearing on his objections followed by an appeal.
25. I propose to deal with the point as to the “*appropriate court*” first. This point is based on s. 5 of the 2012 Act, which defines “*appropriate court*” as meaning:
 - “(a) where the application is made under Chapter 3 or 4 of Part 3, and the total liabilities of a debtor determined on the basis of the Prescribed Financial Statement completed by the debtor concerned in respect of the application concerned are in excess of €2,500,000, the High Court, and
 - (b) in any other case, the Circuit Court.”
26. To my mind, the argument based on the allocation of jurisdiction is simply misplaced. This is a standard provision, similar to many such provisions which can be found in many statutes, which sets out the basis of the jurisdiction as to which court shall deal

with particular matters. The allocation of jurisdiction as to which court has jurisdiction to deal with proceedings at the outset cannot be of assistance in deciding to which court a matter should be remitted following an appeal to this Court. I reject any argument based on that proposition.

27. Reference has been made to the decision in *Bank of Ireland Mortgage Bank v. Cody* by both parties. This was a judgment of this Court in which Baker J. made the following observation at para. 107 of her judgment:

“Where an action has concluded in the Circuit Court, a High Court judge hearing a statutory appeal is the sole court then vested with the right to determine the appeal. There is no statutory jurisdiction to remit to the Circuit Court, and no such jurisdiction is required to be implied. Indeed, it would in my view potentially lead to an injustice, and a failure to recognise the finality for which s. 39 of the Courts of Justice Act, 1936 provides, were the High Court judge hearing the appeal to remit an action to the Circuit Court for rehearing, when in turn the decision from that remitted hearing would be open to a further appeal. The aim of finality would suggest an alternative interpretation. It must be different with regard to an interlocutory order made in the Circuit Court and dealt with by appeal to the High Court but that proposition derives from the nature of an interlocutory order which does not conclude the action.”

28. She continued at para. 108:

“I would conclude that the power to adjourn summary possession proceedings to plenary hearing cannot be a power to remit the matter to the Circuit Court for further hearing. Rather the power is one to adjourn to plenary hearing in the High Court exercising its statutory appellate jurisdiction, as that court continues to have seisin of the evidential and legal matters raised in the appeal,

and has sole jurisdiction by virtue of the fact that the Circuit Court action has concluded.”

29. Counsel on behalf of the appellant seeks to distinguish that decision on a number of bases. In the first instance, it was pointed out that the issue in that case had been heard in full in the Circuit Court by way of contrast to this case, where the application of the appellant in relation to his objections has never been heard and was dismissed on the basis of *locus standi*. Further, it is argued that the comments made in that case were *obiter* and concerned a different factual background. It is true to say that the comments made in that decision relate to a different factual background and, further, that the position is one where the matter under appeal to the High Court had been fully heard in the Circuit Court. Nevertheless, it seems to me that the comments made by Baker J. in *Cody* are of some assistance.
30. I have already described the nature of an appeal from the Circuit Court to the High Court. What is involved is a full rehearing of the matter before the Circuit Court. The matters before the Circuit Court were not interlocutory in nature, as might be the case in some situations. Had the High Court found in favour of the appellant on the issue of *locus standi*, it would have been open to that court to deal with the issue of the objections of the appellant. In this context, it is relevant to bear in mind the nature of the orders that were made in the Circuit Court, and which were the subject of appeal to the High Court. In the first instance, the order of the Circuit Court was:
1. To approve the application to approve the Personal Insolvency Arrangement;
 2. To refuse the objection of a creditor to a proposal for the Personal Insolvency Arrangement;
 3. To refuse an originating notice of motion dated 20th December, 2021;
 4. To award costs to the debtor against Michael O’Flynn.

31. The appeal to the High Court was an appeal from the whole of the judgment of the Circuit Court. In other words, it was open to the High Court, as I have said, to deal with the question of the objections of the appellant to the making of the PIA. Therefore, it follows that the High Court, to paraphrase the words of Baker J. in *Cody*, continues to have seisin of the evidential and legal matters raised in the appeal, and has sole jurisdiction by virtue of the fact that the Circuit Court action has concluded. The basis of the High Court's jurisdiction was the order of the Circuit Court which had been appealed against. The High Court dismissed that appeal on a basis this Court has now determined to be incorrect. It follows that the order of the High Court must be set aside. This is not a case where the decision on appeal means substituting a decision and order for that of the High Court. The order of the High Court being set aside, the matter should now return to the point where the jurisdiction of the High Court was invoked. Accordingly, in my view, it is appropriate that this matter should now be remitted to the High Court to enable that court to deal with and determine the outstanding issues on the appeal. It might be observed that had the High Court reached a different conclusion on the issue of *locus standi*, it could have proceeded to consider the appellant's objections and ruled on them. Neither party could have taken issue with that approach had the outcome of the appeal before the High Court accepted that the appellant had *locus standi*. Therefore, I am satisfied that this matter should be remitted to the High Court.

Costs

32. It is now necessary to turn to the issue of costs in these proceedings. There is a measure of agreement in relation to the question of costs. In the first place, no question arises as to the costs of the Insolvency Service of Ireland, as no order as to costs is sought by or against them.

33. In the second place, it is accepted that the costs orders made against the appellant in the Circuit Court and the High Court should be set aside. The appellant now seeks an order as to his costs in this Court. The respondent contends that there should be no order as to costs made in the proceedings.
34. A number of points are not in dispute. It is not disputed that, as a general rule, it is not appropriate to make a costs order against a PIP. In this context, the law in this area was reviewed in the case of *Re Varvari (A Debtor)* [2020] IEHC 23 (McDonald J.). In that case, having carried out a review of the relevant case law in relation to costs in insolvency matters, McDonald J. made a number of observations. In this context, I think it would be useful to consider his judgment in some detail. Starting at para. 41, he stated:

“41. There was a significant measure of agreement between counsel for the practitioner and counsel for Tanager in relation to the relevant legal principles. Both were agreed that s.115A (14) can be seen as displacing, at least to some extent, what counsel for Tanager correctly described as the presumptive rule under O.99 r.1 that costs should “follow the event.”

42. Both counsel also drew attention to the case law, in particular the decisions of Baker J. in Re: James Nugent [2016] IEHC 309, Re: Darren Reilly [2017] IEHC 558 and Re: Niamh Meeley [2018] IEHC 38. Those authorities make clear that, although the court has jurisdiction to award costs against a practitioner, this jurisdiction will be exercised sparingly and costs will only be awarded against a practitioner in exceptional circumstances. As Baker J. observed in Darren Reilly at para. 71:

“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.”

43. *The underlying reason why an order for costs will not generally be made against a practitioner who acts in a bona fide way was described as follows by Baker J. in Re: Nugent at para. 17:*

“The PIP does not act in a quasi- judicial manner, but does have a unique and burdensome obligation to the court in the manner in which an application is presented for protection, and a high degree of frankness and trust is required for the process to function in the manner envisaged. In those circumstances there is, it seems to me, no reason in principle why costs could not be awarded against a PIP in a suitable case, although I consider, as did Costello J. in Wogan, that such jurisdiction would be exercised sparingly and in exceptional circumstances.”

44. *In deciding not to make an award of costs against the practitioner in Darren Reilly, Baker J. took the following into account:*

(a) *The application was one of the earliest applications under the personal insolvency regime;*

(b) *There was a public interest in clarifying the law in the area;*

(c) *The practitioner did not stand to gain financially from the application and the scale of fees charged by the practitioner was modest;*

(d) *There was no evidence of mala fides on the part of the practitioner.*

45. *Subsequently, in Niamh Meeley, Baker J. reiterated these considerations at paras. 151-152 in the following terms:*

“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' in the language of the Supreme Court in McIllwraith v. His Honour Judge Fawsitt [1990] 11.R. 343 where the question concerned the award of costs against Circuit Court judge in judicial review.

... The circumstances in which a costs order against a PIP would be made would be exceptional, probably more correctly, truly exceptional.”

46. *It is accordingly clear that, although a practitioner does not have immunity from liability for costs, it will only be in exceptional circumstances that an order for costs will be made against a practitioner. I do not, however, believe that Baker J. in Niamh Meeley intended to exhaustively define or describe the circumstances in which a practitioner might be made liable for costs. In particular, I do not believe that Baker J. intended to suggest that a practitioner would only be made liable for costs in equivalent circumstances to*

those in which a judge would be made liable for costs under the principles established by the Supreme Court in McIllwraith v. His Honour Judge Fawsitt [1990] 1 I.R. 343. Having regard to the fact that a practitioner is actively involved as a participant in proceedings under the 2012-2015 Acts, a practitioner has a significantly different role to that of a judge of the District or Circuit Court who will only ever act in an adjudicative capacity. As Baker J. had previously observed in Re: Nugent (in the passage quoted in para. 43 above) a practitioner does not act in a quasi-judicial manner. In my view, the reference by Baker J. to McIllwraith was clearly intended to underline that it would only be in exceptional circumstances that a practitioner would be made liable for costs.”

35. Given the comprehensive review by McDonald J., it is not necessary for me to elaborate on the issue of costs in relation to PIPs in insolvency matters in detail. Suffice it to say that the general rule to the effect that costs follow the event will not generally be applied to a PIP in the course of insolvency proceedings, for the reasons outlined above. There is, of course, a jurisdiction to award costs against a PIP, but as has been said, it is truly an exception to the rule that this will occur. McDonald J., in *Re Varvari*, went on to conclude at para. 61:

“It is only in what should be very exceptional circumstances of the kind outlined in paras.42-54 above that a practitioner will have any reason to fear that he or she may find themselves exposed to a liability for costs. If a practitioner behaves honestly, responsibly and professionally, the practitioner will have nothing to fear. Practitioners should be aware that it is their duty to make full disclosure and to satisfy themselves, insofar as practicable, that the debtor has made appropriate disclosure. ... it is important that practitioners understand that they

are independent professionals and they have a duty to place all facts before the court which are relevant to any of the statutory conditions in s. 115A and any facts which may be relevant to the exercise of the discretion of the court.”

McDonald J. has put the matter very clearly.

36. It was argued on behalf of the appellant that a number of factors arose in this case which should result in an order for costs against the respondent. It was pointed out that the issue in this case – the question of *locus standi* of a creditor who did not prove their debt in the time provided – was “*a knockout blow*” such that the appellant could not raise his objection to the PIA. Reference was made in this context to the decision in the case of *Re Rebecca Forde Egan (A Debtor)* [2020] IEHC 102, in which McDonald J. stated at para. 22:

“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.”

37. Thus, the point is made that in this case, the respondent raised an issue on a legal point to deal “*a knockout blow*” to the objection, rather than dealing with the underlying arguments and concerns in relation to matters such as disclosure or insolvency, or such like. The point was made on behalf of the respondent that the issues in this case arose out of the approach taken by the appellant in not furnishing a proof of debt when requested, thus giving rise to the question of *locus standi*. The point is made that the respondent, having taken a view on the law which was ultimately found to be incorrect

in this Court, “*fought the point tooth and nail, to the bitter end*”. It has to be said that the issue as to *locus standi* raised in this case was fought very strongly by the respondent. The point raised was an issue of law arising under the 2012 Act, on which the Circuit Court and the High Court came to different conclusions to this Court. Clearly, the point raised was one that had to be clarified by this Court. However, there is no doubt in my mind that all of the litigation that has ensued in these proceedings could have been avoided by a reasonable approach being taken by both parties in the course of the litigation as to the position of the appellant, the question of *locus standi*, his entitlement to submit a late proof of debt, the extension of time in relation to that issue, and so on. It is extremely unfortunate that the parties found themselves dug in to such an extent on an issue of this kind, and from the point of view of a PIP, it is difficult to see how the approach taken by him could be said to have been one which conformed with the spirit of the legislation. It is hard to see on any objective basis why it was necessary for the respondent to take such a vigorous role in opposing the appellant herein in pursuing his objection.

38. Further, it is said by the appellant that by his conduct, the respondent has acted in bad faith. I cannot see any basis whatsoever for such a contention, and in the absence of any basis for making such an assertion, this is something that should not have been said. The fact that a point was fought “*tooth and nail*” is not evidence that supports such a serious allegation.
39. Another argument raised on behalf of the appellant in relation to the issue of costs concerns the issue of whether the respondent has a personal interest in the matter. It is undoubtedly the case that a PIP is entitled to charge fees for his services in relation to insolvency matters. To that extent, no doubt, every PIP has a personal interest in the case at a very broad level. The point was made that, in this case, the issue in relation to

locus standi was not raised by the debtor, nor was any evidence provided by the debtor. The matter was raised and argued by the respondent “*as his own case*”. It was also pointed out that the respondent obtained costs orders against the appellant in the Circuit Court and High Court, and that, in those circumstances, when it sought his financial and personal interests, the respondent sought costs. I accept, of course, that this is a case in which the PIP sought costs, having succeeded in his arguments before the Circuit Court and the High Court. That, to my mind, does not indicate a personal interest on the part of the respondent in running the issue before the court. I see no basis upon which it could be said that the respondent has a personal interest in the proceedings.

40. Finally, an argument was made on behalf of the respondent in relation to the chilling effect on practitioners, and the operation of the personal insolvency system, if a costs order was awarded against him in this case. It is contended on behalf of the appellant that, in this case, the respondent did not act independently, and in the circumstances, an order for costs should be made against the respondent.
41. I have already set out some of the case law in relation to costs in personal insolvency matters, and to the general principles applicable to orders for costs. As has been pointed out, the making of an order for costs against a PIP is the exception rather than the rule. I see nothing on the facts of this case to bring the matter within the parameters of the exceptional cases where such an order might be made.
42. There is no doubt that the respondent in this case raised an issue at the outset and fought that issue through the Circuit Court, the High Court and, ultimately, this Court, where he lost the point. The proceedings were conducted with a degree of rancour which is hard to understand in the context of the personal insolvency regime. In the course of the principal judgment in this case, I referred to some of the correspondence which took place between the parties. There is no doubt that, from an early stage, there was a high

level of conflict between the parties and, in truth, it is somewhat difficult to understand why this should have been the case. I also referred to the long title of the 2012 Act, and bearing that in mind, it is hard to see how the approach of the respondent and the appellant could be said to have reflected the objectives of the Act, namely, on the one hand, to “*ameliorate the difficulties experienced by debtors in discharging their indebtedness due to insolvency*”, and on the other hand, “*the need to enable creditors to recover debts due to them by insolvent debtors, to the extent that the means of those debtors reasonably permits ...*” Both sides have conducted the litigation in a confrontational manner. See, for example, para. 41 of the principal judgment and the comments made therein.

43. Unfortunately, the combative nature of the proceedings was emphasised by one further issue that arose in the course of dealing with the issues of remittal and costs. Following the exchange of submissions on these issues between the parties, it was noted in the course of agreeing the authorities for the purpose of the hearing before this Court on this issue that the initial submissions furnished on behalf of the appellant contained the following sentence:

“This is despite the concession of Senior Counsel for the PIP during the hearing before the Supreme Court that the matter ought to be remitted to the Circuit Court”

44. A footnote relating to that submission, quoting from a transcript of a hearing, was then set out. Counsel on behalf of the respondent took issue with the reference made in the submission on the basis that that comment was never made in these proceedings before the Supreme Court. The comment was made in separate proceedings in relation to a different motion heard before the High Court. While the comment made was accurate, it is contended that it is misleading in the context of this issue and was completely

irrelevant to the issue of whether this Court should, or could, remit the application to the Circuit Court. It was acknowledged by the appellant that the quotation was an error, and an apology was made in respect of the error. However, it was nonetheless contended that the point made in those related proceedings was, to a certain extent, reiterated in these proceedings where counsel for the respondent in reply to a question from the Chief Justice as to what would happen if the appeal was successful, responded “*We will all be back in the Circuit Court, I suppose is the upshot of it*”. In order to copper-fasten this issue, the Court was furnished with a copy of the transcript of the hearing before this Court on the 22nd June, 2023, and in addition, the Court was provided with a further transcript in respect of the hearing that took place on the 8th May, 2023 before the High Court. In other words, a great deal of paper has been produced in relation to what was described as a concession by counsel, but in truth, was a throwaway remark made in response to a question posed by the Chief Justice in the course of the hearing.

45. For my part, I have to say that it is most unfortunate that this litigation has been conducted in such an unhelpful fashion. It was wrong to say that counsel on behalf of the respondent had conceded that the matter should be remitted to the Circuit Court, and to quote from a transcript, as though the transcript was from the hearing before this Court, when in fact the transcript related to different proceedings. For counsel for the appellant to then represent what can only be characterised as a throwaway remark in the course of the hearing before this Court as amounting to a concession on the part of counsel for the respondent is, to my mind, unfair. It is a normal part of proceedings before any court that the parties involved may make concessions from time to time on points raised against them. It is a normal part of the conduct of the business of the courts that concessions made by counsel are relied upon as to issues arising in a particular case. However, a comment such as that made by counsel for the respondent in response

to the question posed by the Chief Justice during the course of the hearing does not, in my view, amount to the sort of concession that would be an answer which could be ultimately binding on a party. The answer given by counsel was a response in an ‘off-the-cuff’ moment to the question posed, and was made in a context where the broader jurisdictional questions which have been dealt with in this judgment had not been fully considered. An attempt to elevate it into a concession is, in my view, quite unfair. In the course of the principal judgment herein, I referred to the intransigence of the parties (see para. 41). Counsel on behalf of the appellant has referred in these submissions to the bad faith on the part of the respondent. For reasons already explained, I simply do not see any evidence of that. However, a party making such a serious charge should be expected to be particularly careful themselves in what is said. It is particularly desirable in cases where the parties have become entrenched and combative that their legal representatives maintain professional independence, detachment and fairness in their dealings with their opponents and the Court.

46. As it is, I am satisfied that the appropriate order to make in respect of the hearing before the Supreme Court in these proceedings is an order that each party should bear their own costs. Accordingly, there will be no order for costs in favour of the appellant.