THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 182

Appeal Number: 2019/247

Kennedy J.
Faherty J.
Ní Raifeartaigh J.

BETWEEN/

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES AND MICHAEL O'CONNELL

PETITIONERS/RESPONDENTS

- AND –
MICHAEL WYMES

RESPONDENT/APPELLANT

JUDGMENT of Ms. Justice Faherty delivered on the 7th day of July 2020

1. This is an appeal by Mr. Michael Wymes (hereinafter "the appellant") against the order of the High Court (Pilkington J.) dated 20 May 2019 pursuant to a judgment delivered on 5 April 2019. By her judgment and order, the trial judge refused the appellant's application pursuant to s. 16 of the Bankruptcy Act 1988 as amended ("the 1988 Act") to show cause against the validity of his adjudication in bankruptcy by the High Court (Meenan J.) by judgment delivered on 20 March 2018 and order made on 23 March 2018.

Background

2. The genesis of the within bankruptcy proceedings are to be found in the judgment of Lynch J. delivered on 6 February 1997 in proceedings entitled *Bula Ltd. (in Receivership) v. Tara Mines Ltd*. Lynch J. dismissed what I will refer to as the Bula plaintiffs' (including the appellant) claims for damages and other reliefs against Tara Mines Ltd. and fifteen other named defendants (including the Minister for Energy, whose successor is now the Minister for Communications, Energy and Natural Resources and Michael O'Connell -the respondents herein). On 24 February 1997, Lynch J. made an order for costs against the appellant and one Richard Wood (*Ex tempore*, High Court, Lynch J., 24 February 1997.) On 31 July 2003, following a protracted taxation process, the final certificate in respect of the High Court costs issued in the amount of €3,297,493.33 which together with interest of €1, 583,519.53 gave a total as to principal sum and interest of €4,881,012.86.

3. Bankruptcy Summonses issued on 9 February 2009 against the appellant and Mr. Wood. In a judgement delivered on 12 May 2009, the High Court (McGovern J.) dismissed these summonses (*Minister for Communications, Energy and Natural Resources v. M.W. & R.W.* [2009] IEHC 413, [2010] 3 I.R. 1).

4. The Bankruptcy Summonses which underlie the present proceedings issued on 15 February 2010 and were served on 1 March 2010. In the case of the appellant, the act of bankruptcy was deemed to have occurred fourteen days after the service of the Bankruptcy Summons. It is common case that the debt has not been discharged.

5. The appellant and Mr. Wood again sought to challenge the validity of their respective Bankruptcy Summonses. These challenges were dismissed by the High Court (McGovern J.) in an *ex tempore* judgment delivered on 29 April 2010. The relevant order is dated 6 May 2010. The appellant and Mr. Wood duly appealed to the Supreme Court.

6. Following McGovern J.'s dismissal of the challenges to the Bankruptcy Summonses on 29 April 2009, the Bankruptcy Petitions issued on 11 June 2010. The relevant provision of the 1988 Act relied on by the Petitioners in each case was s.7(1)(g), *i.e*. that an act of bankruptcy had taken place fourteen days after service of the Bankruptcy Summons on 1 March 2010 and that the debtors had failed to pay the sum referred to in the Summons. The hearing of both Petitions was adjourned to await the outcome of the appellant's and Mr. Wood's appeals.

7. In a judgment delivered by Dunne J. on 9 March 2017 (*Minister for Communications, Energy and Natural Resources v. Wood* [2017] IESC 16), the Supreme Court dismissed the appeals brought by the appellant and Mr. Wood in respect of the application to dismiss the Bankruptcy Summonses. On 26 July 2017, the Supreme Court (Dunne J.) (*Minister for Communications Energy and Natural Resources v. Wood* [2017] IESC 58) issued a further judgment dealing with one matter (interest) that remained from her judgment of 9 March 2017 and wherein the arguments canvassed by the appellant were rejected.

8. The hearing of the Petitions to have the appellant and Mr. Wood adjudicated bankrupt ultimately came before the High Court (Meenan J.) on 23 January 2018. The appellant appeared in person and filed several affidavits in opposition to the Petition. Mr. Wood was legally represented. His counsel adopted the position that Mr. Wood was not consenting to the orders being sought. Mr. Wood did not file any affidavits in relation to the proceedings.

9. As already outlined, Meenan J. delivered judgment on 20 March 2018 (*Minister for Communications, Energy and Natural Resources v. Wymes* [2018] IEHC 213). He found that the Petitioners were entitled to the reliefs sought and that the appellant and Mr. Wood must each be adjudicated bankrupt. There was no appeal from Meenan J.'s Order of 23 March 2018 by either Mr. Woods or the appellant.

10. However, following the adjudication of bankruptcy, on 31 May 2018, the appellant filed a Notice to Show Cause against the validity of the adjudication. The Notice reads as follows:

> "NOTICE IS HEREBY GIVEN that the said Michael Wymes intends to show cause to the High Court against the validity of the adjudication of bankruptcy made on the 20th day of March 2018 against him, on the grounds, *inter alia*, that the following requirements of s.11(1) of the Bankruptcy Act, 1988, have not been complied with:
>
> (1) There was no act of bankruptcy committed by him within the three months previous to the presentation of the petition, to found the petition which issued on 11 June 2010, and the adjudication on foot thereof dated 20 March 2018.
> (2) The petition was not a valid petition in that:
>
> (a) It did not recite the specific order of bankruptcy on which the petition was founded, as required by O.76, r.19(1)(b);
> (b) The act of bankruptcy alleged in it was not, by reference to s.7(1) of the Act, an act of bankruptcy identified in statute or recognised at law;
> (c) There was no affidavit filed on the presentation of the petition which factually proved an act of bankruptcy, such a filing being a requirement of O.76, r.21.
>
> An affidavit setting out in detail the grounds of the application to show cause has been filed and is served herewith."

11. The appellant's grounding affidavit was sworn on 1 June 2018. As noted by the trial judge, it runs to some 396 paragraphs. At para. 9, the appellant reprises, as Ground A, his challenges to the validity of the Petition as set out in his Notice to Show Cause. Thereafter, he lists a number of other matters which he avers are reasons why the Adjudication Order ought not to have been made. These grounds are:

> "B. The claimed indebtedness was statute barred …
>
> C. The Petition was tainted by ulterior, collateral and improper purpose/ economic duress and wrongdoing towards a collusive grossest of undervalues for the lands of Mr. Wood…
>
> D. The Existence of an Accommodation between Mr. Wood and the Petitioners… E. Oppression consequent to the bankruptcy process being prolonged to March 2018, although readily available as a remedy since 31 July 2013 i.e. and extant period of some 15 years…
>
> F. A Form of Execution had issued which remained to be proceeded upon…
>
> G. The Proceedings were of Public Interest and Importance…"

12. On behalf of the Petitioners (hereinafter "the respondents"), Ms. Grainne Uí Thuama swore an affidavit on 20 July 2018. The appellant swore a supplemental affidavit on 23 August 2018. His second supplemental affidavit was sworn on 1 November 2018.

13. As stated, the application to show cause was refused by Pilkington J.

The relevant legislative framework

14. Before proceeding to consider the decision of the trial judge, it is apposite at this juncture to set out the legislative framework pertinent to the within proceedings.

15. Section 7(1) of the 1988 Act provides, in relevant part:

> "7.—(1) An individual (in this Act called a "debtor") commits an act of bankruptcy in each of the following cases—
>
> …
>
> (g) if the creditor presenting a petition has served upon the debtor in the prescribed manner a bankruptcy summons, and he does not within fourteen days after service of the summons pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor.
>
> (2) A debtor also commits an act of bankruptcy if he fails to comply with a debtor's summons served pursuant to section 21 (6) of the Bankruptcy (Ireland) Amendment Act, 1872, within the appropriate time thereunder, and section 8 (6) of this Act shall apply to such debtor's summons.
>
> (3) This section applies, so far as it is capable of application, in relation to acts and things and omissions and failures to do acts and things whether occurring before, or partly before and partly after or wholly after, the commencement of this Act.

16. Section 11 sets out the criteria for a petition for adjudication against a debtor, as follows, in relevant part:

> "11.(1) A creditor shall be entitled to present a petition for adjudication against a debtor if—
>
> (a) the debt owing by the debtor to the petitioning creditor (or, if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to more than €20,000,
>
> (b) the debt is a liquidated sum,
>
> (c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition, and
>
> (d) the debtor (whether a citizen or not) is domiciled in the State or, within 3 years before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in the State or has

carried on business in the State personally or by means of an agent or manager, or is or within the said period has been a member of a partnership which has carried on business in the State by means of a partner, agent or manager."

17. Section 16 provides:

"16—(1) The bankrupt may, within three days or such extended time not exceeding fourteen days as the Court thinks fit from the service of the copy of the order of adjudication on him, show cause to the Court against the validity of the adjudication.

(2) On an application to show cause under subsection (1) the Court shall, if within such time the bankrupt shows to its satisfaction that any of the requirements of section 11(1) have not been complied with, annul the adjudication and may, in any other case, dismiss the application or adjourn it on such conditions as the Court thinks fit, having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him.

(3) Nothing in this section shall be construed to prevent the immediate seizure of the goods of the bankrupt on his adjudication."

18. Outside of the grounds provided for in s. 16, an adjudication in bankruptcy may be annulled pursuant to s. 85(C)(1)(b) of the 1988 Act. It provides:

"(1) A person shall be entitled to an annulment of his adjudication (a) where he has shown cause pursuant to section 16, or

(b) in any other case where, in the opinion of the Court, he ought not to have been adjudicated bankrupt"

19. As noted by Sanfey and Holohan, Bankruptcy Law and Practice in Ireland, 2nd Ed. Round Hall 2010, the import Section 85C(1)(b) of the 1988 Act is that it gives the court an unfettered discretion in relation to the grounds for annulment.

20. By s. 135 of the 1988 Act, the Court has the specific power to "review, rescind or vary any Order made by it in the course of bankruptcy, other than an Order of discharge or annulment".

21. It is also the case that where the notice to show cause merely cites s.11(1) of the 1988 Act but the grounds relied on go beyond allegations of non-compliance with that provision, the "just and equitable" jurisdiction inherent in s. 88C (1)(b) is engaged even if the latter provision is not expressly referred to in the application to show cause. This is clear from the dictum of Laffoy J. in *In the matter of Sean Dunne* [2015] 2 I.L.R.M. 103, [2015] IESC 42:

"The trial judge stated (at para. 8) that, although the notice to show cause was ostensibly based on the appellant's assertion that the requirements of s. 11(1) of

the Act of 1988 had not been complied with, the notice went beyond allegations of non-compliance with s. 11(1) and encompassed arguments based, for example, on inadequacy of service and infringement of the principle of universality. In those circumstances, the trial judge stated that it was appropriate to deal with the application on the basis of an application pursuant to s. 16 and also s. 85(5) of the Act of 1988. The trial judge then quoted s. 85(5) (which, since the commencement of amendments introduced by s. 157 of the Personal Insolvency Act 2012 on 3 December 2013 is s. 85C(1)). That provision, which in the interest of clarity will henceforth be referred to as s. 85C(1), stated and states:

> *'A person shall be entitled to an annulment of his adjudication –(a) where he has shown cause pursuant to section 16 or*
>
> *(b) in any other case where, in the opinion of the Court, he ought not to have been adjudicated bankrupt.*

Subject to the reservation which will be outlined at the end of this judgment in relation to procedural matters, I consider that the approach adopted by the trial judge in considering the issues before the High Court pursuant to s. 16 in combination with s. 85C(1) was the correct approach. As he stated (at para. 9) the burden of proof rested on the appellant to show that the requirements of s. 11(1) had not been complied with or that there were other grounds under s. 85C(1) entitling him to an annulment of the adjudication." (at para. 17)

22. In *Danske Bank v. O'Shea* [2016] IEHC 732, Costello J. considered what was required in an application to show cause by reference to the *dictum* of Dunne J. in Harrahill v. Kennedy [2013] IEHC 539. She stated:

> *"4. In Harrahill v. Kennedy [2013] IEHC 539 Dunne J., considered the nature of an application to show cause against the validity of the adjudication under s.16. At para 21 it is stated: —*
>
> > *"Showing cause is, in my view, something other than raising an issue which has to be litigated elsewhere. In "Bankruptcy Law and Practice" (2nd Ed.), Sanfey and Holohan expressed the view at para. 2.102 that "the court has to be satisfied that it is just and equitable to annul the adjudication." That seems to me to be a helpful approach to adopt in cases where the application to show cause against the validity of the adjudication arises in circumstances other than a failure to comply with the criteria set out in section 11(1)…*
> >
> > *The test under s. 16(2) is, as I have said, slightly different [to that in s. 8(6)(b)] and I am satisfied that apart from a failure to comply with the criteria set out in s.11(1) the court can annul the adjudication if satisfied that it is just and equitable having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him. Raising*

an issue that could be tried elsewhere does not seem to me to be the correct basis upon which to consider an application under section 16(2).

5. Thus if the bankrupt establishes that there was a failure to satisfy the requirements of s.11(1) of the Act of 1988, then the court shall annul the adjudication. If not, then the court must consider whether it would be just and equitable so to do having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him."

23. Although, undoubtedly, the discretion vested in a court when just and equitable grounds are raised in an application to show cause an unfettered one, it is the also case that, in the words of Costello J. in in *Danske Bank v. O'Shea*, *"[a]n application to show cause is not an appeal against matters previously ruled upon on the occasion of an adjudication."* Thus, the distinction between exercising discretion under the "just and equitable" grounds and an appeal is a distinction which must be carefully observed even though it may sometimes be a nuanced matter as to which side of the line a particular issue falls.

The judgment of the High Court

24. At the outset of her judgment, the trial judge noted that the matter had "a significant and difficult history" but that what was before the court was a discrete application pursuant to s. 16 of the 1988 Act which must be "carefully construed pursuant to its terms". The trial judge was satisfied that the appellant had brought his application to show cause within the requisite timeframe as set out in s. 16(1) of the 1988 Act. She was also satisfied that the criteria set out as s. 11(1)(a) and (b) were satisfied: the debt arose pursuant to an Order of the High Court in favour of the respondents dated 25 February 1997 and exceeded €20,000. She noted that s. 11(1)(d) did not arise in the context of the application, there being no issue as to domicile.

25. Based on the grounds advanced by the appellant, she considered that the only portion of s. 11(1) with which he took issue was s. 11(1)(c), which is the requirement that the act of bankruptcy on which a petition is founded has occurred within three months before the presentation of the petition. She noted that in his affidavit, the appellant advanced a significant number of other additional grounds in support of his application to show cause against the adjudication of bankruptcy.

26. At para. 31, she noted that the validity of the bankruptcy had been conclusively determined by the Supreme Court ([2017] IESC 16). At para. 33, she noted that the burden of proof rests on the bankrupt to show to the satisfaction of the court that the requirements of s.11(1) of the 1988 Act have not been complied with.

27. The trial judge went on to address the appellant's argument pursuant to s.11(1)(c) of the 1998 Act that no act of bankruptcy had occurred within the three months preceding the presentation of the Petition. She stated:

"40. This ground has already been comprehensively dealt with and rejected by Meenan J. in his judgment (paragraph 14 and the consideration within that paragraph of the

decision of Dunne J. in *McConnon v Zurich Bank* [2012] IEHC 557, [2012] 4 IR 737). No new issue of ground has been raised by Mr. Wymes in advancing this criteria. As this is not an appeal from the Order of Meenan J. in my view this ground fails on the basis that no new evidence has been advanced but is simply a reiteration of the matters raised and dealt with by Meenan J.

41. If I am incorrect in my view then Mr. Wymes' argument also fails as being factually incorrect. As recited by Meenan J. and on the basis of the facts outlined and documentation submitted to this Court the bankruptcy summons issued on 15 February 2010 and was served on Mr. Wymes on 1 March 2010. Fourteen days thereafter Mr. Wymes having failed to discharge the sum within that time had committed an act of bankruptcy (s. 7 (1)(g)). Thereafter the petition must be served within three months from that act of bankruptcy. The Petition was issued on 10 June 2010 which is within the three months required by section 11(1)(c) of the 1988 Act."

28. The trial judge next considered the other grounds put forward by the appellant as challenges to the validity of the Petition, to wit:

- it did not recite the specific act of bankruptcy on which the Petition was founded, as required by O.76, r.19(1)(b) of the Rules of the Superior Courts ("RSC");
- the act of bankruptcy alleged in the Petition was not, by reference to s.7(1) of the 1988 Act, an act of bankruptcy identified in statute or recognised by law;
- there was no affidavit filed on the presentation of the Petition which factually proved an act of bankruptcy, such a filing being a requirement of O.76, r.21 RSC.

29. In rejecting these arguments, the trial judge found that the validity of the Petition had been "comprehensively dealt with by Meenan J. in his adjudication of [the appellant] as a bankrupt" and that no new grounds had been advanced. She found that "the petition on its face clearly recites the act of bankruptcy and it is detailed at paras. 1 and 3 of that document." She was also satisfied that the requirements of O.76, r.21 were met, noting that two affidavits accompanied the Petition.

30. The trial judge went on to state at para. 46:

> "…In addition the case law cited above makes it clear that Mr. Wymes is not entitled to simply re-iterate matters argued in his adjudication (*O'Shea*) or seek to adduce new matters that should properly have been dealt with within that adjudication (*Dunne)*. In my view there is no matter within the petition which requires any order pursuant to RSC 124. I also echo the comments of Laffoy J. in *Dunne* to the effect that, even if I am entirely mistaken with regard to the matters set out at paragraph 2 of Mr. Wymes' application to show cause no possible prejudice is suffered by him in light of the judgments arising within this bankruptcy process."

31. The trial judge next addressed grounds B-G as set out in the appellant's grounding affidavit. In summary, she found that these grounds had been considered previously and "no judgement of any court… has found that any of these grounds should operate, to quote from s. 135 of the 1988 Act 'to review, rescind or vary an order made by it in the course of a bankruptcy matter…'"

32. Ultimately, Pilkington J. was satisfied that the appellant had failed to satisfy the criteria within s. 16 of the 1988 Act. At para. 50 of her judgment she stated, *inter alia*:

> "… The sole issue is therefore whether the criteria within s. 16(2) has been satisfied. That, based upon the case law set out above is a two-stage process:
>
> (i) has there been compliance with s. 11 of the 1988 Act – if not the section (and case law) is very clear that non-compliance with this section will result in the adjudication being set aside and,
> (ii) whether any other grounds [advanced] render it on what have been described as just and equitable grounds or perhaps more broadly where a degree of discretion by the court might be exercised."

33. The trial judge opined that an application to show cause was not an appeal from an adjudication of bankruptcy, nor an opportunity merely to reiterate or seek to advance arguments or grounds already considered within the adjudication process itself. Nor could it seek to introduce new grounds that should have been raised within the adjudication process. She noted that the Bankruptcy Summons had been adjudicated upon by the Supreme Court "so there is no issue as to its validity". She noted the strict and mandatory requirements applicable to a bankruptcy summons but opined that "with regard to a petition whilst there must also be strict compliance some discretion may be afforded".

34. On the facts of the case, she was satisfied that there had been strict compliance with s. 11 of the 1988 Act. With respect to grounds B-G she found that none constituted any new ground or argument and that all of the grounds had previously been comprehensively considered and adjudicated before the courts. She found that the rule in *Henderson v. Henderson* [1843] 3 Hare 100 had "singular applicability on the facts of this application in respect of all of the grounds advanced by Mr. Wymes".

35. The trial judge went on to state, at para. 50(k):

> "With regard to s. 16(2) of the 1988 Act there has been full compliance with s. 11. For the reasons set out above I find no grounds to exercise my discretion (pursuant to the inherent jurisdiction of the court or otherwise), or to invoke the just and equitable criteria in favour of Mr. Wymes in setting aside this adjudication. For the further avoidance of doubt I find that there is no basis to annul this adjudication of bankruptcy and the application to show cause pursuant to that adjudication is refused."

The trial judge's findings on each of the appellants grounds are discussed more particularly below.

The grounds of appeal

36. In an extensive Notice of Appeal, the appellant appeals the entirety of the High Court judgment. In his oral submissions he helpfully stated that his appeal can be distilled into two parts, as follows:

    (1) The trial judge erred in rejecting Ground A, namely that no act of bankruptcy occurred in the three months preceding the Bankruptcy Petition and/or that the she wrongly rejected his claim that the Petition was invalid for the reasons set out at Ground A (i)-(iv) in para. 9 of the appellant's affidavit;
    (2) The trial judge erred in her "blanket" rejection of grounds B-G.

Alleged errors in the trial judge's treatment of Ground A

37. At the outset of his oral submissions, the appellant referred the Court to the case law which highlights the requirement for strict compliance with the 1988 Act and the relevant provisions of RSC. He pointed to the dictum of Hamilton P. in *O'Maoileoin v. Official Assignee* [1989] I.R. 647 who, in turn, quoted Bacon C.J. in *In re. Skelton, ex-parte Coates* 5 Ch. D 979:

> *"… It is the very gist and essence of the Bankruptcy Act creditors… cannot have the benefit unless they strictly comply with the terms of the Act… the bankruptcy code… is penal in nature… the requirements of the statute must be complied with strictly…"*

He referred to *In the matter of Gerard Sherlock*, a bankrupt [1995] 2 ILRM 493 where Murphy J. quoted with approval the dictum of Hamilton P. in *O'Maoileoin*. The appellant submitted that the above approach has been endorsed by the Supreme Court in *Murphy v. Bank of Ireland* [2014] IESC 37, [2014] 1 IR 642, citing McKechnie J.:

> *"(i) the bankruptcy code must be strictly construed and its essential provisions rigidly applied: particular vigilance is to be displayed regarding acts, steps and requirements which are central to the statutory regime and which give rise to the penal consequences above described;*
>
> *…*
>
> *(iii) where an act of bankruptcy is founded on a Bankruptcy Summons, the requirements of s. 8 of the Act of 1988 must be strictly satisfied, as must s. 11 regarding the follow-on petition: in both instances, this includes compliance with the relevant rules of court…"*

38. It is clear from her judgment that the trial judge had regard to the established jurisprudence in this area.

39. It will be recalled that the trial judge declined to consider the appellant's argument that no act of bankruptcy had been committed by him within three months preceding the

presentation of the petition by noting that this issue had been comprehensively dealt with and rejected by Meenan J. who, in turn, had relied on the decision of Dunne J. in *McConnon v. Zurich Bank* [2012] IEHC 587, [2012] 4 I.R. 737. The trial judge was of the view that the ground failed on the basis that it was "simply a reiteration of matters raised and dealt with by Meenan J." and that no new evidence had been adduced before her.

40. It is the appellant's case that Pilkington J. erred in not dealing comprehensively with the ground advanced and in relying on Meenan J.'s dismissal of the argument. The appellant's principal contention before this Court is that that Meenan J. wrongly interpreted the judgment of Dunne J. in *McConnon*.

41. In aid of his submission that no act of bankruptcy had been committed by him when the Petition issued on 11 June 2010, the appellant points to what he submits is the unambiguous wording of s. 11(1)(c) which means that the act of bankruptcy must in actual fact have been committed and been capable of practical crystallization before the issuance of any Petition. It is the appellant's contention that as he had applied on 15 March 2010 to dismiss the Bankruptcy Summons, and appealed the High Court's rejection of that application to the Supreme Court on 28 May 2010, and in circumstances where that appeal was only determined on 9 March 2017 and on 26 July 2017, no act of bankruptcy had occurred when the Petition issued on 11 June 2010. He asserts that this is all the more so where the Petition was stayed by order of the Supreme Court in an *ex tempore* decision of Dunne J., pending the appeal of the High Court's refusal to dismiss the Bankruptcy Summons. In support of his argument in this regard the appellant relies on the decision of Dunne J. in *McConnon.*

42. In *McConnon*, the factual position was as follows: the bankruptcy summons issued on 7 November 2011 and was served on the debtor on 11 November 2011. The notice of application to dismiss the bankruptcy summons was dated 24 November 2011 and was returnable for 16 January 2012. The application to dismiss came on for hearing before Dunne J. on 6 June 2012. The question that arose was when a bankruptcy petition might be presented by a creditor in such circumstances. This gave rise to a consideration by Dunne J. of the phrase "act of bankruptcy" and when it could be said that an act of bankruptcy had occurred.

43. In refusing the application, Dunne J. held that where there was an application to dismiss to a bankruptcy summons under s.8(5) of the 1988 Act, the three months provided for in s. 11(1)(c) for the presentation of a petition after an act of bankruptcy pursuant to s. 7(1)(g) did not run until the question of the validity of the bankruptcy summons had been determined. In light of the appellant's submissions, it is necessary to refer to the judgment of Dunne J. in some detail.

44. At paras. 21 to 22, Dunne J. stated:

> *"It will be seen that the act of bankruptcy at issue in this case is that contained in s. 7(1)(g) of the act of 1988, namely, the failure of the debtor within fourteen days after service of the bankruptcy summons to pay the sum referred to in the*

summons or secure or compound for it to the satisfaction of the creditor. It should also be noted that an application by a debtor under the provisions of s. 8(5) of the Act of 1988 should be made within fourteen days from the date of service of the bankruptcy summons. The applicant in this case has complied with that time limit. In the circumstances the question that has to be considered is whether the three month period referred to in s. 11 of the Act of 1988 continues to run where an application to dismiss the bankruptcy summons is before the court or as contended for on behalf of the respondent, whether the three month period does not commence unless and until the debtor's application pursuant to s. 8(5) is determined by refusing to dismiss the summons."

45. Dunne J. went on to state:

"[33] There is no authority in this jurisdiction to assist the court in the interpretation of the provisions of s. 8(5) and s. 11(1)(c) of the Act of 1988 and how one interplays with the other. If one was to adopt a literal interpretation of the provisions of s. 11(1) (c) of the Act of 1988, then it seems that the respondent in this case could not present a petition for adjudication of the debtor at this stage. A practical solution to the issue raised in this case would be for a creditor to present a petition notwithstanding that the debtor had sought to have a bankruptcy summons dismissed. If that were done, it would then be necessary for the petitioner to adjourn the petition for adjudication until such time as the debtor's application to dismiss pursuant to s. 8(5) had been determined. One of the difficulties presented by the facts of this case is that on the presentation of a petition, the petitioner must recite the act of bankruptcy on which the petition is founded (see O. 76, r. 19 of the Rules of the Superior Courts 1986). Can it be said that an act of bankruptcy has occurred in circumstances where the debtor has made an application to dismiss the bankruptcy summons. Obviously, if the debtor is ultimately successful in the application to dismiss, no act of bankruptcy has occurred. On the other hand, if the debtor fails to have the bankruptcy dismissed, the act of bankruptcy must have occurred as a result of the failure to pay the sum due on foot of the bankruptcy summons within fourteen days from the date of service of the bankruptcy summons.

[34] Section 11(1)(c) of the Act of 1988, on its face, appears to be clear and unambiguous. It provides for the petition to be presented within three months of the occurrence of the act of bankruptcy. It makes no reference whatsoever to what should occur in the event that an issue is raised as to whether an act of bankruptcy occurred at all. Looking at the Act as a whole and bearing in mind the penal nature of an adjudication of bankruptcy could it be said that on an interpretation of the Act as a whole the provisions of s. 11(1) (c) of the Act of 1988 are to be applied strictly without regard to the provisions of s. 8(5) of the Act? It is inconceivable that a court would allow a debtor to be adjudicated a bankrupt if an application to dismiss a bankruptcy summons was extant. Is it therefore necessary or appropriate that a creditor must present a petition in circumstances where the petition on presentation

must inevitably be adjourned to abide the outcome of the debtor's application to dismiss the summons?

[35] The act of bankruptcy relied on in this case is the failure to pay the sum of €32,266,470 within fourteen days of the service of the summons on the debtor. The summons provided the necessary information that the applicant could be adjudicated on the presentation on the presentation of a petition unless he had applied within the prescribed time to dismiss the summons. The applicant did make such an application. The act of bankruptcy, assuming that the summons was not dismissed, would have occurred fourteen days after the service of the bankruptcy summons, that is, by the 25th November, 2011. A petition has not been presented within three months of that date. Given that it is inconceivable that a petition presented within the time limit provided for in s. 11(1) (c) of the Act of 1988 would have been acted upon pending the conclusion of the application to dismiss the bankruptcy summons, even though there is no provision in the Act of 1988 to provide for that contingency, should the respondent be in a different position to the applicant? In other words, if the applicant's application to dismiss the summons fails, should the respondent be forced by virtue of the lapse of time to recommence the same procedure again by issuing a further bankruptcy summons? It seems to me that looking at the provisions of s. 8. (5) and s. 11 (1)(c) of the Act of 1988 together there is some ambiguity in the legislation. On a literal interpretation of s. 11(1)(c) of the Act of 1988, I think that one would have to say that the creditor in this case would have to begin the process all over again leading to the issue of a further bankruptcy summons, leading, no doubt, to a similar application to dismiss. However, I do not think that s. 11(1)(c) of the 1988 Act can be looked at in isolation from s. 8 (5) of the Act of 1988. Counsel for the respondent pointed out in his submissions that if there was not, in effect, a stay on the three month period pending the determination by the court of the validity of the bankruptcy summons, then the applicant would have to pay the debt due notwithstanding the challenge to the validity of the bankruptcy summons in order to avoid committing an act of bankruptcy. As I have said, it seems to me that when one looks at the Act as a whole and at the purpose of the legislation, it would be illogical to interpret those sections as giving what amounts to a stay to a debtor pending the determination as to whether or not an act of bankruptcy has occurred while not affording the creditor what amounts to the same facility in respect of the determination of the time when the act of bankruptcy could be said to have occurred. Accordingly, I am satisfied that an act of bankruptcy has been committed by the applicant. I am of the view that the respondent is now in a position to present a petition on foot of that act of bankruptcy."

46. In aid of his argument that no act of bankruptcy had occurred, the appellant places particular reliance on Dunne J.'s statement at the end of para. 35, to wit: "*the respondent is now in a position to present a petition on foot of that act of bankruptcy.*" (emphasis added) The appellant submits that when the *dictum* of Dunne J. in *McConnon* is applied to his challenge to the Bankruptcy Summons, which was made within the permitted

timeframe (as the Bankruptcy Summons itself advised he could do), it leads to the inexorable conclusion that no act of bankruptcy had occurred when the within Petition issued on 11 June 2010. He states that no act of bankruptcy on his part could have been extant until the validity of the Bankruptcy Summons had been fully determined (including the outcome of his Supreme Court appeal).

47. To my mind, the appellant's reliance on *McConnon* as authority for the proposition he advances is entirely misconceived. Indeed, the fallacy of his argument is exposed by the very paragraphs in *McConnon* on which he seeks to rely.

48. At para. 33, when considering the interplay between s. 8(5) and s. 11(1)(c) of the 1988 Act, Dunne J. posits two scenarios to address the dilemma that might present where a bankruptcy summons has issued, followed by a petition within the requisite timeframe, but in circumstances where the debtor has made an application to dismiss the summons.

49. As is clear from her judgment, Dunne J. found, looking at the 1988 Act as a whole, and bearing in mind the penal nature of an adjudication in bankruptcy, that it was inconceivable that a court would allow a debtor to be adjudicated a bankrupt if an application to dismiss the bankruptcy summons was intact. As she observed at para. 33, if the debtor is ultimately successful in the challenge to the bankruptcy summons, no act of bankruptcy has occurred. Crucially, however, she goes on to state:

> *"…if the debtor fails to have the bankruptcy dismissed, the act of bankruptcy must have occurred as a result of the failure to pay the sum due on foot of the bankruptcy summons within fourteen days from the date of service of the bankruptcy summons."*

50. With regard to the specific facts in *McConnon*, Dunne J. found that the act of bankruptcy, assuming the summons was not dismissed, would have occurred fourteen days after the service of the bankruptcy summons, that is, by 25 November 2011.

51. As a matter of fact, in *McConnon*, a petition had not been presented within three months of 25 November 2011. To that extent, *McConnon* is different to the factual matrix in the present case where a petition was in fact presented within the three months following the expiry of the fourteen-day period afforded by statute to the appellant to discharge the debt. In *McConnon,* however, the absence of a petition having issued within three months of the expiry of the fourteen-day period did not mean that the creditor could not present a petition following the rejection of the application to dismiss the bankruptcy summons. As Dunne J. stated in para. 33, if the debtor failed to have the bankruptcy summons dismissed, "*the act of bankruptcy must have occurred as a result of the failure to pay the sum due… within fourteen days from the date of service of the bankruptcy summons"*.

52. Dunne J. rationalised her conclusion that the creditor was "*now in a position to present a petition on foot of that act of bankruptcy"* on the basis that when the 1988 Act was viewed as a whole it would be illogical to interpret s. 8(5) and s. 11(1)(c) "*as giving what*

amounts to a stay to a debtor pending the determination as to whether or not an act of bankruptcy has occurred while not affording the creditor what amounts to the same facility in respect of determination of the time when the act of bankruptcy could be said to have occurred."

53. In the present case, the Petition in fact issued on 11 June 2010, within three months of the expiry of the requisite fourteen days which the appellant had to discharge the debt. The Petition was stayed pending the determination of the application to dismiss the Bankruptcy Summons. It is patently clear, based on Dunne J.'s rationale in *McConnon,* that the act of bankruptcy in this case occurred once the appellant failed to pay the sum due within fourteen days of the date of service of the Bankruptcy Summons.

54. In the High Court, the trial judge addressed the appellant's argument by relying on the *dictum* of Meenan J. in [2018] IEHC 213 (the Adjudication judgment). Meenan J. addressed the appellant's argument in the following terms:

> *"Mr Wymes argues that there was no 'act of bankruptcy' and consequently no basis on which the petition against him could be presented in circumstances where he had applied to have the bankruptcy summons dismissed within fourteen days provided for under the Act of 1988. I see no basis for this argument. The decision of the Supreme Court to dismiss the summons had the effect that it was as if the application had not been made. As such, the obligation to pay the debt within fourteen days remained and a failure to do so would constitute an 'act of bankruptcy'. Such a view is supported by the decision in McConnon v. Zurich Bank [2012] 4 I.R. 737." (at para.14)*

55. In my judgment, the approach of Meenan J. was an entirely correct analysis of the *dictum* of Dunne J. in *McConnon*. As the issue raised by the appellant had been considered and rejected by Meenan J., I am satisfied that the trial judge was entitled to decline to engage with the argument advanced by the appellant in relation to how *McConnon* should be read.

56. Before this Court, the appellant submitted that if his construction of *McConnon* was not adopted the effect of that would be the making of a retrospective finding of an act of bankruptcy against him following the determination of his application to dismiss the Bankruptcy Summons. There is no merit in this submission. As stated by Meenan J., "*the decision of the Supreme Court to dismiss the summons had the effect that it was as if the application [to dismiss the Bankruptcy Summons] had not been made*".

57. In all the circumstances, the argument that Pilkington J. wrongly relied on Meenan J. and/or wrongly applied *McConnon* is rejected.

58. Moreover, as is clear from para. 41 of her judgment, the trial judge was satisfied that the factual matrix with which she was presented established that an act of bankruptcy as defined by s. 7(1)(g) had occurred and that the respondent had served the Bankruptcy Petition in accordance with s. 11(1)(c) of the 1988 Act.

59. I turn now to the other challenges made to the validity of the Petition.

60. It is contended that the act of bankruptcy set out in the Petition was not, by reference to s. 7(1) of the 1988 Act, an act of bankruptcy identified in statute or recognised at law. It is argued that the Petition merely recites that the appellant had committed an act of bankruptcy as he had not "since the service of the Summons paid the sum referred to in the Summons or secured or compounded it to the satisfaction of the petitioning creditors …" The appellant cites O.76, r. 19(1)(b) RSC as requiring that "a petition shall recite the specific act of bankruptcy on which the petition is founded". In support of his argument, he relies on Forde and Simms *Bankruptcy Law* (2nd. Ed. Round Hall, 2009) at (4-48) which states:

> "A Petition must be founded on one or other of the acts of bankruptcy [in the Act]".

The appellant highlights the absence from the Petition of the requirement to discharge the debt within fourteen days, as required by s. 7(1)(g) of the 1988 Act. It is alleged that the Petition left the matter open- ended in circumstances where a debtor was entitled to know to the last minute of the last day, the time at which an act of bankruptcy is committed. He contends that the frailties he highlights were fatal and amounted to the invalidity of the Petition.

61. Counsel for the respondent submits that there is no merit in the appellant's arguments in the above regard. I agree. What is required by s. 7(1)(g) is that a debtor has been served with the bankruptcy summons and that it has not been satisfied within fourteen days of service. The Bankruptcy Petition in issue here, when read as a whole, records therein the date of service of the Bankruptcy Summons which was 1 March 2010. The Petition itself is dated 11 June 2010. It recites the non-payment of the sum due. As a matter of logic, anyone reading the Petition would glean that more than fourteen days had passed before the Petition issued. Thus, in substance, the Petition recites the indebtedness and the act of bankruptcy.

62. I am satisfied that the appellant has not made out a case pursuant to O. 76, r. 21 RSC. A perusal of the pleadings shows that the Petition was accompanied by two affidavits sworn, respectively, by Ms. McCabe, Principal Officer with the Department of Communications, Energy and Natural Resources and Mr. David O'Hagan of the CSSO.

63. I am also satisfied that when the trial judge opined at para. 46 that what was set out in the Petition was supported by affidavit evidence, she was referring to the affidavits of Ms. McCabe, and David O'Hagan.

64. Accordingly, there was no error in the findings of the trial judge regarding these matters.

65. Even if the frailties complained of by the appellant were found to exist (which I do not find), I am satisfied that they were not such as would impugn the adjudication of bankruptcy in this case. Authority for this proposition is found in the decision of Finlay Geoghegan J. in *Society of Lloyds v. Loughran* (Unreported, High Court, Finlay Geoghegan

J. 2 February 2004) There, the issue was whether a bankruptcy petition which had not been sealed or signed in accordance with O. 76, r. 20(2) RSC ought for that reason be set aside by the court. Finlay Geoghegan J. permitted the petition to proceed under O.124 RSC stating, with reference to *O'Maoileoin* and *In re Collier, ex parte Dan Ryland Ltd*. (1891) 64 L.T. 742, that while in general there ought to be compliance with the rules of court even on a petition there was nothing in the authorities which absolutely precluded the court from exercising its discretion in a proper case under O. 124 RSC. In that case the learned judge was satisfied that no prejudice was asserted by the debtor by reason of the failure to seal and sign the petition in compliance with O. 76, r.20.

66. To my mind, where the substance of the indebtedness is apparent from reading the Petition in issue here, the absence to a specific reference to "fourteen days" would not, all other matters being equal, be such as would preclude the exercise of a discretion under O.124.

Grounds B-G

Did the manner in which the trial judge dealt with Grounds B-G constitute a fettering of her discretion?

67. I turn firstly to the appellant's overarching complaint regarding the High Court's assessment of grounds B-G, namely that the trial judge fettered her discretion by incorrectly determining that the scope of an application to show cause was too narrow for grounds B-G to come within the purview of s.16 of the 1988 Act. The respondent refutes the contention that the trial judge exercised her discretion in the manner complained of by the appellant. It is submitted that grounds B-G were in fact considered by the trial judge but that they were rejected because (a) they had already been determined by the courts and (b) they were not matters which would lead the trial judge to change her mind.

68. As already referred to, there is well-established jurisprudence as to the approach to be adopted by the courts in an application to show cause under s.16 of the 1988 Act. I have earlier set out the two-pronged approach described by Costello J. in *Danske Bank v. O'Shea*, namely that in such application, it first falls to be considered whether the bankrupt has established that there was a failure to satisfy the requirements of s.11(1) of the Act of 1988. If so the court shall annul the adjudication. If not, then the court must consider whether grounds have been established where it would be just and equitable so to do.

69. As already noted, in *In the matter of Sean Dunne* Laffoy J. had occasion to address the scope of s.16(2). What was under consideration there was an appeal from a decision of McGovern J. in the High Court to dismiss the appellant's application to show cause against an adjudication of bankruptcy. On appeal, the appellant raised three central issues, namely: the jurisdiction issue; the domicile issue; and the service issue.

70. At para. 81 of her judgment, Laffoy J. summarised the approach of the trial judge to the service issue, noting that he relied on s. 85(5)(b) of the 1988 Act (later substituted by s. 85C(1)(b)) to conclude that a challenge to the adjudication on the basis of service would

be permissible only if there was some new evidence that had not been available before the judge who made the adjudication.

71. At para. 82, Laffoy J. rejected this approach, stating:

> *"82. At the outset, I expressed approval of the approach adopted by the trial judge in treating the application of the appellant on the basis of being an application pursuant to s. 16 in combination with what is now s. 85C(1)(b) of the Act of 1988, subject to a reservation in relation to the procedure adopted, which will be addressed at the end of the judgment. Determining the appropriateness of the pragmatic approach adopted by the trial judge involves considering from a procedural perspective whether the issues raised by the appellant, other than the issues as to compliance with the requirements of s. 11(1)(d), of which only one remains on the appeal, the domicile issue, constitute this application an 'other case' where the appellant might possibly establish that he 'ought not to have been adjudicated bankrupt' within what is now s. 85C(1)(b) of the Act of 1988. I am satisfied that they do. While there seems to be some disparity between the broad approach adopted by the trial judge to the overall determination of the issues, that is to say, not merely determining them by reference to s. 16, and the narrow approach he adopted to the determination of the service issue, in concluding that that could only be determined if there was fresh evidence on the application before him which had not been before the court on the hearing of the petition, having regard to the manner in which the issues are before this court, I am satisfied that the proper course is to consider whether the appellant has made out a case that the adjudication of the appellant should be annulled on the ground that the petition was not properly served, and that it is open to the court to do so for the following reasons. First, I am not satisfied that the discretion conferred on the court to annul a bankruptcy order by s. 85C(1)(b) is fettered in the manner suggested by the trial judge. Secondly, in any event, there was no affidavit evidence as to the appellant's version of the events in relation to the service of the petition on him before the High Court on the hearing of the petition on 29 July 2013. All of the affidavit evidence adduced on behalf of the appellant was filed on the application to show cause."*

72. On the facts of the case, Laffoy J. concluded, at paras. 86 and 87, that the appellant was not entitled to have the adjudication order annulled on the basis of the service issue as he had not suffered any prejudice. She went on to state, at para. 88:

> *"There is no doubt but that the court has jurisdiction under what is now s. 85C(1)(b) to annul an adjudication order if it is of the opinion that it ought not to have been made. From a procedural point of view it would have been preferable, in my view, if the appellant had separated the application to show cause under s. 16 from the other challenge to the validity of the order and specifically invoked s. 85(5)(b), as it then was, in relation to the latter claim. However, as I have said, the trial judge took a pragmatic view about the matter and, apart from his conclusion*

that the defective service issue could not be pursued in the absence of fresh evidence, I agree with the approach he adopted. There has been no impediment to the proper consideration of the appellant's case."

73. It is accepted by the respondents herein that for the purposes of its jurisdiction to annul an adjudication either pursuant to s.11(1) or s.85C (1) of the 1988 Act, the court is not confined to a consideration as to whether fresh evidence has been adduced.

74. In the within appeal, the appellant's complaint is that the trial judge failed to follow the approach set out by Laffoy J. in *In the matter of Sean Dunne* and instead adopted a more restrictive approach which, he asserts, Laffoy J. had criticised. He contends that the trial judge (wrongly believing that Laffoy J. had endorsed McGovern J.'s view that there could only be an adjudication challenge if there was some new evidence which was unavailable before the judge who made the adjudication) failed to consider grounds B-G.

75. The first issue to be determined is whether the trial judge wrongly interpreted what Laffoy J. stated in *In the matter of Sean Dunne*.

76. As can be seen, in *In the matter of Sean Dunne* the application to show cause had not invoked s. 85(5)(b) (now s. 85 C (1)(b)) of the 1988 Act. McGovern J., however, considered the application not only pursuant to s. 16 but also s. 85(5) of the Act of 1988. Laffoy J. approved the approach adopted by McGovern J. but expressed her disagreement with his approach to the issue of the service of the bankruptcy summons, i.e. McGovern J.'s conclusion that the defective service issue could not be pursued in the absence of fresh evidence.

77. In the present case, at para. 35 of her judgment, the trial judge discussed Laffoy J.'s decision in In the matter of Sean Dunne in the following terms:

> "…Laffoy J. endorsed the conclusion of McGovern J. (para. 81) that in the absence of fresh evidence it was impermissible for the bankrupt to seek to reopen the question of validity of service because that would effectively amount to an appeal. She also endorsed his view that there could only be a challenge to the adjudication if there was some new evidence that had not been available before the judge who made the adjudication.

78. To my mind, the trial judge was incorrect in stating that Laffoy J. endorsed the view of McGovern J. that the service issue could only be revisited in an application to show cause if new evidence was adduced. It is clear that para. 81 of Laffoy J.'s judgment comprises only her summary of the approach adopted by McGovern J. on the service issue, an approach which Laffoy J. rejected, as evident from the succeeding paragraphs of her judgment.

79. At para. 36 of her judgment, the trial judge quotes Laffoy J.'s conclusion (at para. 86) that the appellant in *In the matter of Sean Dunne* had suffered no prejudice despite the allegedly defective service. To my mind, inherent in Laffoy's J.'s conclusion at para. 86 of

her judgment is the authority of the court to assess an application to show cause (or appeal therefrom) regardless of whether fresh evidence has been adduced, as, in the words of Laffoy J., "*the proper course is to consider whether the appellant has made out a case that the adjudication of the appellant should be annulled…*" (at para. 82)

80. Notwithstanding the slightly erroneous manner in which the trial judge characterised what had been said by Laffoy J., I am satisfied that the judgment of Pilkington J. in its entirety shows that she was cognisant of the wide range of her jurisdiction, namely that she was bound to consider whether the appellant had made out a case that the adjudication should be annulled, and that she did not limit herself to considering whether the appellant had adduced fresh evidence. At para. 27 of her judgment, she noted the construction put on s.16 by Dunne J. in *Harrahill v. Kennedy* (already referred to earlier in this judgment). At para. 28, she was especially alert to the fact that the appellant, in addition to invoking s. 11(1) of the 1988 Act, was seeking relief "upon any just and equitable or other criteria that might be considered sufficient to annul the adjudication". This is also clear from para.50(b) of her judgment. At para. 29, she noted that in *Danske Bank v. O'Shea* [2016] IEHC 732, Costello J. considered that s.16 envisaged a two-stage process, namely that if the bankrupt establishes non-compliance with the requirements of s.11, the adjudication shall be annulled. If not, then the court must consider if it is just and equitable to annul the adjudication. This was consistent with the guidance given by Dunne J. in *Harrahill v. Kennedy*, and indeed with the Laffoy J.'s dictum in *In the matter of Sean Dunne*.

81. Contrary to the appellant's submissions, I do not consider what the trial judge stated at paras. 47-48 of her judgment (where reference is made to the appellant having raised "numerous matters extraneous to the present application") to be tantamount to a fettering of her discretion.

82. It is the case that the trial judge found (at para.49) that grounds B-G had been considered previously. She stated:

> "…no judgment of any Court (and I have carefully considered the judgments of the Supreme Court) has found that any of these grounds advanced should operate, to quote from s.135 of the 1988 Act, to "review, rescind or vary an order made by it in the course of a bankruptcy matter…" In addition, all of the matters should (and indeed have) been raised previously within the bankruptcy process and cannot be advanced within this application to show cause."

83. However, as is also clear from para. 49 of her judgment, notwithstanding what she had said about matters having been considered previously, she did in fact address each of the grounds (B-G) which were raised by the appellant to invoke the court's just and equitable jurisdiction.

84. In those circumstances, there is no substance in the complaint that the trial judge had determined from the outset that grounds B-G were extraneous and outside the scope of an application under s. 16(2) and that, therefore, they were not considered.

85. I turn now to the trial judge's actual treatment of these grounds.

Ground B: The claim that the indebtedness was statute barred

86. It was argued in the court below that the claimed indebtedness was statute barred. The appellant's written submissions to the High Court advanced the proposition that the relevant date for the purpose of the Statute of Limitations Act 1957 ("the Statute") was 19 May 1998, the date upon which an interim Certificate of Taxation for £283,918.00 had issued against him and Mr. Wood. The trial judge noted that the appellant's claim that the bankruptcy proceedings were statute barred was dealt with and rejected by Meenan J. at [2018] IEHC 213 who, in turn, noted the decision of Dunne J. on this point in [2017] IESC 58. At para. 18 of his judgment, Meenan J. stated:

> *"Mr. Wymes claims that the debt due by him is statute barred. Section 11(6)(a) of the Statue of Limitations Act, 1957 (as amended) provides: -*
>
> *'(6)(a) An action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable.*
>
> *(b) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.'*
>
> *Again, this issue has been determined by the Supreme Court judgment of 26th July, 2017, where Dunne J. stated: -*
>
> > *'As has previously been explained, the creditor in this case, the Minister for Communications, Energy and Natural Resources ('the Minister') obtained an order in February 1997 for costs in the High Court against the debtors, Mr. Wood and Mr. Wymes. The order for costs provided that in default of agreement the costs would be taxed and ascertained. The process of taxation was long and drawn-out and ultimately a final certificate of taxation in respect of the High Court order issued on 31st July, 2003. Until that time the amount of costs due by Mr. Wood and Mr. Wymes was unascertained. It goes without saying that until such time as the final amount due for costs was ascertained by the issue of the final certificate of taxation, the Minister was unable to recover same.'*
>
> *It follows, that this is not a ground upon which Mr. Wymes can resist the application before this Court."*

87. In his written submissions to this Court, the appellant states:

> "It would… be correct that the ground was dealt with/rejected by Meenan J., who in turn noted the Supreme Court judgment on the point at [2017] IESC 58. However, as crucially appears from that judgment, no statute-barred issue was raised, argued, heard or determined in the dismiss applications, the subject of that judgment." (emphasis in original)

88. He submits that the settled case law is that an order that an interim costs payment be made created a debt in respect of which a statutory demand can be sent or a petition presented. He relies on the decision of Chadwick J.in *Bishopsgate Investment Management Ltd. v. Maxwell* [1993] T.L.R 67. He asserts that applying that case law, the costs judgment against him became enforceable in the interim costs amount of £283,918.00 on 19 May 1998, on which there was no stay. Applying the twelve-year limitation period provided for in s. 11(6)(a) of the Statute, it is thus argued that the Statute had run as of 18 May 2010. He further states, in his written submissions to this Court, that the issue that the claim was statute barred arose as an issue for the first and only time after the issuance of the Petition in June 2010 (later decided in January 2018) and that, accordingly, there could not have been and was nothing on this point in the earlier 2017 Supreme Court judgments which concerned only the applications to dismiss the Bankruptcy Summons. He asserts that Meenan J., in [2018] IEHC 213, dismissed this ground in circumstances where it was "sparingly/partially and not fully considered by him" and in circumstances where the "key" date was not considered or decided by Meenan J.

89. The first point to be noted is that the appellant's Statute argument was dealt with and rejected by Meenan J. whose Adjudication Order was not appealed. In the absence of any appeal of Meenan J.'s determination on the issue, the matter must be considered *res judicata*. Accordingly, the trial judge was correct to note that the appellant's Statute argument was dealt with and rejected by Meenan J.

90. Even if that were not the case, I am satisfied that the appellant's reliance on the decision of the English High Court in *Bishopsgate Investment Management Ltd. v. Maxwell* cannot assist him. In the first instance, in that case what was under consideration was a different statutory regime to the bankruptcy code in issue here. In *Bishopsgate Investment Management Ltd. v. Maxwell*, the defendant sought to challenge a statutory demand under s. 268(1)(a) of the Insolvency Act 1986 which was served on him following his failure to pay the plaintiff's solicitors an interim payment of £500,000 by a certain date as ordered by the court. The argument raised by the defendant was that the order for interim payment did not create or constitute a debt or was otherwise incapable of supporting a statutory demand or of founding a bankruptcy petition against the defendant on the basis that it did not have the necessary quality of finality to constitute a debt for the purposes of a statutory demand under s. 268. Chadwick J. found the defendant's obligation to pay the £500,000 did constitute a debt for the purposes of Part IX of the Insolvency Act 1986. While Chadwick J. acknowledged that a bankruptcy notice under the Bankruptcy Act 1914 could not have been served in respect of an interim payment order, and that a bankruptcy notice under s. 1(1)(g) of the Bankruptcy Act 1914 could only be served where a creditor had obtained a final order or judgment against the debtor, he went on to find that this requirement had not survived changes that had been made in 1985. Upon a consideration of the provisions of the Insolvency Act 1986 he found that there was no longer need for an act of bankruptcy in the old sense i.e. as defined by the Bankruptcy Act 1914. In this jurisdiction, however, an act of bankruptcy is one of the prerequisites to the issuing of a bankruptcy petition (s.11(1)(c) of the 1988 Act refers). In

all those circumstances, the appellant's reliance on *Bishopsgate Investment Management Ltd. v. Maxwell* is misguided.

91. As far as the present case is concerned, I note that the Certificate of Taxation, the equivalent of a judgment, is dated 31 July 2003. It is submitted by the respondents that this is the correct date from which to calculate time for the purposes of the Statute. It is also submitted that as the Petition was presented within seven years of the 2003 date, there is no question of the matter being statute barred. Counsel for the respondents asserts that his submissions in this regard are supported by the dictum of Dunne J. in [2017] IESC 58, as quoted above.

92. Reliance is placed by counsel for the respondent on the decision of the English Court of Appeal in *Chohan v. Times Newspapers Limited* [2001] EWCA 964 (Civ), [2001] 1 W.L.R. 1859, where it was held by the English Court of Appeal that a costs order was only enforceable within the meaning of the Limitation Act 1980 (the equivalent UK provision) once taxed and ascertained. As stated in Chohan at para. 33, "*there was nothing to enforce until the amount of costs had been certified.*"

93. By way of alternative argument, counsel for the respondent urges the Court to follow the decision of the English Court of Appeal in Ridgeway Motors (Isleworth) Ltd.v. ALTS Ltd. [2005] EWCA 92 (Civ), [2005] 1 W.L.R. 2871 where it was held that a winding up petition (or, obiter, a bankruptcy petition) was neither an action upon a judgment nor execution of that judgment and that no limitation period applied when a judgment debt was relied on in such a petition.

94. To my mind, insofar as this Court should venture to consider the appellant's argument on the Statute ground, I am satisfied that no issue on the Statute arises. While Dunne J. at [2017] IESC 58 was not considering an argument raised under s. 11(6)(a) of the Statute (being concerned only with the appellant's arguments pursuant to s. 11(6)(b) of the 1988 Act), she nevertheless expressed her view as to when time would begin to run for the purposes of enforcing the debt in issue in this case. I am entirely satisfied that the learned judge's view that *"[i]t goes without saying that until such time as the final amount due for costs was ascertained by the issue of the final certificate of taxation, the Minister was unable to recover same*" is determinative of the argument raised by the appellant with regard to the Statute. Moreover, the decision in *Chohan*, as referred to above, chimes with the approach of Dunne J. at [2017] IESC 58.

95. In all of these circumstances, I am satisfied that the applicant's reference to the "key" date of 19 May 2003 is misguided. The Statute did not begin to run until the Certificate of Taxation issued on 31 July 2003. I agree with the *dictum* of Dunne J. that the respondent could not have embarked on bankruptcy proceedings until the Certificate of Taxation issued. In light of my findings, there is no need in this case to embark upon a consideration of whether the decision in *Ridgeway Motors (Isleworth) Ltd. v. ALTS Ltd*. should be followed in this jurisdiction.

Grounds C and D: Alleged existence of an accommodation between Mr. Wood and the Petitioners and/or the Petition was tainted by ulterior, collateral and improper purpose/economic duress.

96. The trial judge found the appellant's claim that the Petition was tainted by ulterior, collateral and improper purposes and/or economic duress (Ground C) had been dealt with comprehensively by Dunne J. in [2017] IESC 16 at pages 18 to 20, as had the contention of the existence of an accommodation between Mr. Wood and the Petitioners (Ground D). In [2017] IEHC 16, in considering these grounds, Dunne J. opined as follows:

> *"Abuse of process/collateral purpose*
>
> *Mr. Wymes referred to the well known case of McGinn v. Beagan [1962] I.R. 364 from which it is clear that if the purpose for which a summons was issued was not to secure payments of debts due but was for an improper reason then if the Court is satisfied that the bankruptcy process is being used for an ulterior and collateral purpose then that will not be permitted. It was contended that Mr. O'Hagan, the Chief State Solicitor, had been in discussion with Kevin Nagle, the 'local solicitor in Cork of Mr. Wood'. The essence of the complaint made by Mr. Wymes in this regard is that there were discussions between Mr. O'Hagan and Mr. Nagle in relation to a proposed municipal park for Cork in circumstances where lands of Mr. Wood were 'being earmarked by the local authorities for this purpose'. It is contended that Mr. Nagle negotiated with Mr. Wymes in the period between March 2009 to November 2009 in relation to Mr. Wymes' prior security claim over the lands of Mr. Wood in relation to the indebtedness of Mr. Wood to Mr. Wymes. It is further contended that the negotiations that took place between Mr. Nagle and Mr. Wymes took place in circumstances where Mr. Wymes was unaware of any previous discussions between Mr. O'Hagan and Mr. Nagle. In these circumstances, it is contended by Mr. Wymes that 'there are substantive grounds for believing that the threatened bankruptcies have an ulterior and collateral purpose for the exercise of pressure so as to facilitate and enable the securing of lands of Mr. Wood by the local authorities at a bargain undervalue, if not fire sale, price'. Thus it is alleged that there was an abuse of process and a collateral and ulterior purpose in issuing bankruptcy proceedings.*
>
> *In this context it is worth recording what was stated in relation to this argument by the learned trial judge. He stated at p. 102 of the transcript in respect of his ex tempore judgment as follows:*
>
> > *'The evidence of this appears to be primarily related to an argument concerning Cork lands which were owned by Mr. Wood, and in respect of which Mr. Wymes may have had some charge, or interest, or equity. The arguments made to the effect that this in some way related to the process of bankruptcy being pursued by the petitioners, is something I simply do not understand. I think it is at best wild speculation, and merely because Mr. O'Hagan, or others on his behalf, may have been at one point in some discussions with the applicants, or either of them, in regard to these lands,*

does not mean that the use of the Bankruptcy Code to pursue their claims for the costs, which have been taxed and ascertained many years ago is an abuse of process.'

On that basis he rejected the argument made by Mr. Wymes.

It appears that there are serious disputes between Mr. Wood and Mr. Wymes in relation to the settlement of obligations between themselves, apparently the subject of other proceedings. It seems to me that regardless of the fact that discussions may have taken place between Mr. Nagle and Mr. O'Hagan some years ago in relation to a resolution of the indebtedness of Mr. Wood to the State in respect of the costs at issue in these proceedings, it is difficult to see any factual basis beyond speculation and suspicion on the part of Mr. Wymes for suggesting that there was a collateral or ulterior motive on the part of the State in pursuing these bankruptcy proceedings. That there were discussions to settle the outstanding liabilities of Mr. Wood is not enough. It is clear from the conduct of the Minister in relation to this matter that the purpose of these proceedings is to recover the amount due from Mr. Wood and Mr. Wymes through the bankruptcy process. There was nothing to stop Mr. O'Hagan on behalf of the Minister from entering into negotiations to attempt to resolve the issue with Mr. Wood. The fact that those negotiations were not successful is neither here nor there. There is no basis for concluding that the issue raised in this regard by Mr. Wymes is any more than an assertion unsupported by any cogent evidence and as such is not one that could succeed and accordingly I reject his submissions on this issue."

97. The trial judge considered that the same claims as had been made by the appellant in the Supreme Court were again advanced by him before Meenan J. in the Adjudication proceedings [2018] IEHC 213 and rejected on the basis that these claims had been articulated and rejected by Dunne J. in [2017] IESC 16 (see paras. 20 and 24 of [2018] IEHC 213).

98. In his written submissions to this Court, the appellant takes issue with the trial judge's finding. He asserts that the matters raised by him in his affidavits and written submissions to the High Court "could not have been raised, considered and adjudicated previously". He further contends that Meenan J.'s reliance on Dunne J.'s rejection of the claims in [2017] IESC 16 (and the trial judge's due reliance on Meenan J.'s conclusions) cannot stand because the Supreme Court in [2017] IESC 16 had dealt with matters known and averred to in 2010 and could not therefore have considered matters which the appellant describes as "new cogent highly significant compelling evidence which later emerged (including 2017/8)". In this regard, the appellant refers to paras. 161-213 of his grounding affidavit.

99. First, he contends that his averments in his grounding affidavit to "Messrs Nagle/ Wood and the petitioners '*in concert/conjunction towards others securing [lands in Cork] at a grossest of undervalues*' and the existence of Wood/State arrangements" have not been

contested. I am entirely satisfied that Dunne J.'s *dictum*, as quoted above, disposes of the appellant's entitlement to revisit this particular allegation.

100. Secondly, the appellant further alludes to an alleged offer to him in 2015 (in tandem with his scheduled appeal to the Supreme Court) to walk away from certain interests he had in lands, with a fraction of what he was owed, if he agreed to give the State some 157 acres of land situate in Cork "at a discount to full value". Thirdly, he refers to alleged actions by Mr. Wood which he alleges were for the purposes of enabling Mr. Wood to transfer certain lands (in which the appellant has a claimed financial interest) to Cork City Council. It is contended that these matters were not caught by the findings of the Supreme Court in [2017] IESC 16 and that, accordingly, Meenan J.'s erroneously concluded that the Supreme Court had conclusively determined grounds C and D.

101. The first thing to be observed is that no appeal was brought by the appellant from Meenan J.'s bankruptcy adjudication. Accordingly, I am entirely satisfied that the trial judge was correct in declining to engage with grounds C and D any more extensively than she did, on the basis that both grounds had been dealt with and rejected previously. As to the distinction drawn by the appellant between what was before Dunne J. in [2017] IESC 16 and latterly before Meenan J. and Pilkington J., I find no reasonable basis for drawing any such distinction. As correctly observed by Meenan J., *"[t]he fact that these issues are ongoing does not alter the position*. (at para. 20). In other words, any dealings between Mr. Wood and State parties and/or between Mr. Wood and other third parties cannot, by dint of the appellant's bare assertions, convert the respondents' use of the bankruptcy code to recover costs found to be due and owing (and in respect of which a final Certificate of Taxation has issued) into an abuse of process.

102. I find no basis upon which to interfere with the manner in which the trial judge exercised her discretion with regard to grounds C and D.

103. I should add that insofar as the appellant averred at para. 320 of his grounding affidavit, in support of his claim of the alleged accommodation between Mr. Wood and the State, that Mr. Wood was not adjudicated a bankrupt, that is patently not the case, as evidenced by the extract from Iris Oifigiuil dated 29 June 2018 wherein Mr. Wood is cited as having been adjudicated bankrupt on 23 March 2018.

Ground E: Alleged oppression by reason of the prolongation of the bankruptcy process

104. In the court below, the appellant claimed oppression by reason of the delay and/or prolongation of the bankruptcy process. The trial judge rejected this ground, at para. 49, stating, *inter alia*:

> "…It must be pointed out in clear terms that the reason the bankruptcy process has been prolonged does not lie with any action by the Petitioners. There can be no suggestion of any oppression suffered by Mr. Wymes."

She further noted that the ground had been rejected by Dunne J. in [2017] IESC 16. In turn, Dunne J. was satisfied that the delay arguments had been considered and rejected

by McGovern J. in his *ex tempore* judgment of 29 April 2010 dismissing the challenge to the Bankruptcy Summonses. McGovern J. dismissed the appellant's complaint of delay between March 2000 and 31 July 2003 on the basis that that issue could have been raised in the earlier (successful) challenge to the Bankruptcy Summonses which had issued in February 2009. As to the appellant's argument regarding post-judgment delay, this was rejected by McGovern J. on the basis that the bankruptcy process had not come "*out of the blue*" and that, given the history of the matter, there was no basis "*for any expectation on the part of the debtors in this case that the Minister was going to forego the claim for costs"*.

105. McGovern J. also alluded to the judgment of Dunne J. in *Bula Ltd. v. Tara Mines Ltd*. [2008] IEHC 437. In the latter case, Dunne J. had found no merit in the appellant's criticism (in his affidavit on behalf of Bula Ltd.) of the time taken by the taxation process. Nor did she find merit in the complaint as to the delay in execution of the period in respect of which the respondent could not execute by virtue of the stay on the costs order pending the appeal to the Supreme Court. She found the only conceivable prejudice that might accrue to Bula was the question of interest being charged on the costs but she found that the right to interest was "*not something which …could be regarded as a source of prejudice to a party that has not paid the monies found to be due on foot of a certificate of taxation such that it could outweigh the right to execute*". (at p. 13)

106. At p. 16 of her judgment, Dunne J. went on to state:

> *"It seems to me to be clear from [the jurisprudence of the European Court of Human Rights] that a court may have regard to the provisions of Article 6.1 of the European Convention on Human Rights in a case such as this. However, on the facts of this particular case, I do not think that the decision of the European Court of Human Rights in [McMullen v. Ireland (App. No. 42297/98) (Unreported, European Court of Human Rights, 29 July 2004)] is of any assistance to Bula. I note the view of the court in that case that it considered the delay in the proceedings after the issuance of the taxation certificate in that case to be entirely attributable to the applicant who had failed to pay the costs established on taxation. One could make the same comment in this case about the conduct of Bula who, likewise, had failed to pay the costs established to be due on taxation to the Minister."*

107. At [2018] IEHC 213 (the Adjudication proceedings), Meenan J. addressed the complaint of delay in the following terms, therein referring to the *dictum* of Dunne J. in [2017] IESC 16:

> "*15 The issue of delay was raised as a defence by Mr. Wymes. It is common case that there has been a delay in bringing these proceedings on for trial. However, much of the responsibility for this delay rests with Mr. Wymes himself who has engaged in protracted, and ultimately, unsuccessful, litigation. This issue was dealt with in the application to dismiss the bankruptcy summons before McGovern J. in the High Court and again by Dunne J. in the Supreme Court. I refer to the following passage from the judgment of Dunne J. in the Supreme Court, delivered 9th March, 2017:-*

'Having considered the submissions of Mr. Wymes on the subject of delay it seems to me that one thing can be said clearly. Delay in the execution of an order for costs or taking proceedings such as bankruptcy proceedings in order to recover a debt which has been conclusively found to be due by the courts as in this case on foot of an order for costs does not render the order for costs enforceable. In other words, it does not seem to me that delay in executing an order for costs or in applying for a bankruptcy summons by itself could give rise to an issue requiring a bankruptcy summons to be dismissed. It is not without significance that considerable latitude is given to the process of execution under the Rules of the Superior Courts which provides for a very lengthy period of time within which to execute judgments, albeit after a period of six years, leave of the Court may be required before pursuing the matter further, as occurred in the Bula case referred to above. That latitude is very much in contrast to the time limits applicable to the commencement of proceedings to be founds in the Statute of Limitations. Thus, if delay is an issue which could have a bearing on whether or not the bankruptcy summons should be dismissed, it seems to me that the delay in question must give rise to prejudice of some kind. The question then arises as to whether or not prejudice asserted by Mr. Wymes in this case can feed into that consideration."

16. The Supreme Court found that there was no such prejudice."

108. Before this Court, the appellant contends that the trial judge erred in concluding that the delay ground had been rejected by the Supreme Court in [2017] IESC 16. He asserts that what was before the Supreme Court in [2017] IESC 16 were three periods of delay, namely, from March 2000 to when the final Certificate of Taxation issued on 31 July 2003, the five and a half year period from the date of the final Certificate of Taxation to the date of the first Bankruptcy Summons on 9 February 2009 and the period from 9 February 2009 to the date of issue of the second Bankruptcy Summons on 15 February 2010. He argues that his defence of oppression from "process prolongation to March 2018" could not have been raised previously and especially could not have been dealt with by Dunne J. at [2017] IESC16 as the defence was incapable of advancement at the time of the issuing of the Bankruptcy Summons in February 2010 and the Petition in June 2010.

109. Undoubtedly, at first blush, there is a certain logic to the appellant's argument about what was under consideration in [2017] IESC 16. However, it is clear from the judgment under appeal here that the trial judge was alert to the case being made by the appellant in the application to show cause. She expressly noted that he was claiming "[o]ppression consequent to the bankruptcy process being prolonged to March 2018 although readily available as a remedy since 31 July 2003…" However, as can be seen, the trial judge concluded that the prolongation of the bankruptcy "does not lie with any action by the petitioners". To my mind, this was a conclusion entirely open to the trial judge given the history of the matter before her. Furthermore, in the Adjudication proceedings ([2018] IEHC 213), Meenan J. concluded that "*much of the responsibility for this delay rests with*

Mr. Wymes himself who has engaged in protracted, and ultimately, unsuccessful, litigation", a finding which has not been appealed.

110. In his written submissions to this Court, the appellant (at paras. 4.82-4.83) contends that there was nothing done by him to hinder the bankruptcy process and that he "bore no responsibility for the inordinate multi-year delays from July 2003 - February 2009 in bankruptcy proceedings". To my mind, in pursuing this line of argument, the appellant seeks to revisit matters adjudicated on by Dunne J. in [2017] IESC 16 wherein she stated "*…it does not seem to me that delay in executing an order for costs or in applying for a bankruptcy summons by itself could give rise to an issue requiring a bankruptcy summons to be dismissed.*" As already referred to, she also found that no prejudice from the delays that had occurred from July 2003 to the issue of the bankruptcy summons in February 2010 had accrued to the appellant.

111. In aid of his submissions, the appellant cited the decision of Baker J. in *ACC Loan Management v. P* [2016] IEHC 117 as authority for the proposition that the court has an inherent jurisdiction to stay bankruptcy proceedings that have become oppressive. I do not believe that the decision in that case assists the appellant in any great regard. In *ACC Loan Management v. P*, what was in issue was a petition presented for adjudication of bankruptcy. The question that arose was whether the application for adjudication should be stayed to allow the debtor to avail of the newly available personal insolvency options as provided in the Personal Insolvency Act 2012. In the present case, the appellant has been adjudicated bankrupt: what is at issue is the trial judge's dismissal of his application to show cause. Of course, it is well-established that the High Court's inherent jurisdiction comes into play where the Court finds that, in the words of Dunne J. in *Harrahill v. Kennedy* [2013] IEHC 539, "*it is just and equitable to annul the adjudication*", a jurisdiction which effectively engages the provisions of s. 85 (C) (1)(b) of the 1988 Act. It is clear, however, that in the instant case, for the reasons set out in the judgment (and with which this Court cannot find fault) the trial judge did not find that a case had been made out to annul the adjudication of bankruptcy on the grounds of delay or oppression. Again, the words of Meenan J. at [2018] IEHC 213 are apposite:

> *"Much of the responsibility for this delay rests with Mr. Wymes himself who has engaged in protracted, and ultimately, unsuccessful, litigation"*

Ground F: Invalidity of the Petition by virtue of an extant form of execution

112. The appellant argued in the High Court that a form of execution had issued and remained to be proceeded with and, accordingly, the Petition was invalid. The trial judge addressed this claim by noting that this point had been addressed by McGovern J. in [2009] IEHC 412 and that both the Supreme Court in [2017] IESC 16 and Meenan J. in [2018] IEHC 213 had noted the point but did not allow it to be re-agitated. She noted that in any event the courts had found it was not a defence to the appellant's adjudication as a bankrupt and that it was not a ground that could be re-litigated within the application to show cause.

113. It is worth citing what McGovern J. in his judgment in [2009] IEHC 413, [2010] 3 I.R. 1 had to say on the issue:

> *"I do not accept the respondents' contention that a form of execution has issued in respect of the claimed debt insofar as the applicants have registered judgment mortgages against property belonging to the respondents but have not proceeded upon them. A registration of a judgment mortgage is not a process of execution: see In re Lambe's Estate [1869] I.R. 286 and Barnett v. Bradley (1890) 26 L.R. Ir. 209. Where a party registers a judgment mortgage, it can then proceed to obtain a well charging order and an order for sale. But the mere registration of a judgment mortgage is not, without more, execution." (at para. 20)*

114. The same argument was again raised before McGovern J. in the appellant's challenge to the Bankruptcy Summons which issued in February 2010. McGovern J. expressly declined to revisit this issue having rejected the argument in his earlier judgment. At [2017] IESC 16, Dunne J. upheld the approach of McGovern J., rejecting the appellant's reliance on s.135 of the 1988 Act in order to surmount the *res judicata* doctrine and thus re-visit the decision of McGovern J. that a judgment mortgage was not a form of execution. She stated:

> *"Section 135 is an unusual provision insofar as it does permit the Court to review an earlier order made in the then extant proceedings. While s. 135 may be unusual in allowing a court to review an order previously made in proceedings then before the Court, I cannot see how s. 135 can be relied on to allow an issue decided in other proceedings to be revisited in these proceedings."*

115. In his submissions to this Court, the appellant argues that by virtue of what he described as the "vacuity of an actual Supreme Court finding on the issue" this defence was open to him to pursue before the trial judge. There is absolutely no merit in this submission. There was no "vacuity" in the decision rendered by the Supreme Court: Dunne J. dealt with the argument by finding that the matter was *res judicata*. As the appellant's argument that the registration of a judgment mortgage is an extant form of execution has been conclusively rejected by McGovern J. in the High Court in the challenge to the first bankruptcy summons and where his refusal to permit that argument to be revisited in the challenge to the 10 February 2010 Bankruptcy Summons has been upheld by the Supreme Court the issue is most decidedly *res judicata*. The within proceedings are thus not some kind of trojan horse whereby the validity of the Bankruptcy Petition can now be impugned based on arguments that have been rejected in earlier proceedings.

Ground G: The public interest/importance argument

116. The appellant contends that he ought not have been adjudicated a bankrupt because the litigation which gave rise to the costs order was in the public interest. In the court below, the submission that the proceedings were of public interest and importance was rejected on the basis that this issue had been addressed by Meenan J. in the adjudication proceedings and accordingly it was not a ground that could be re-litigated in the application to show cause.

117. In [2018] IEHC 213 Meenan J. stated:

> *"19. Mr. Wymes submits that he ought not to be adjudicated bankrupt as the litigation that gave rise to the order for costs was in the public interest. The standard rule with regards cost orders is that 'costs follow the event', as per O. 99, r. 1(4) of the Rules of the Superior Courts. However, the court has discretion to depart from this rule where the litigation involves matters in the public interest, for example, constitutional issues. If a court is being requested to exercise this discretion, then the appropriate time to make such a request is when the issue of costs is being determined by the trial judge. It would appear that no such application was made to the trial judge in 1997 or, if it was, it was refused. This Court cannot revisit an issue of costs which was determined in 1997."*

118. To my mind, nothing put forward by the appellant in this appeal persuades this Court that Pilkington J. erred in declining to consider this ground any more extensively than she did.

An overview of the trial judge's treatment of grounds B-G

119. Clearly, the trial judge determined that the issues raised in grounds B-G were *res judicata* and/or subject to the rule in *Henderson v. Henderson*. As I have earlier outlined, that does not equate to the conclusion that she failed to have regard to the proper scope of s. 16(2), or that she failed to address grounds B-G. It is not a question of the trial judge having determined that the issues raised by the appellant were outside the remit of the court's just and equitable jurisdiction. The trial judge did not fail to engage with grounds B-G. Inherent in her treatment of the issues raised was whether the appellant had made out a case that the adjudication should be annulled by reason of the matters canvassed under the umbrella of grounds B-G. As set out above, she engaged by noting that each of grounds B-G had been considered and rejected by the Superior Courts in the myriad litigation which preceded the application to show cause. In those circumstances, save where the trial judge made express findings as to the merits of certain of the grounds advanced (and where she was satisfied for the reasons she set out that they were not matters that would lead to an exercise of her discretion in favour of the appellant), her decision to decline to engage with other arguments canvased under grounds B-G any more extensively than she did was due consideration in all the circumstances of this case.

120. Thus, I find that, in substance, the trial judge approached the application to show cause by considering whether the appellant had made out a case that the adjudication in bankruptcy should be annulled. The fact that she found that no such case was made out does not equate to her having failed to consider the grounds.

121. There is no question of the trial judge having fettered her discretion or that she approached her assessment of grounds B-G through too-narrow a prism. To reiterate, the fact that she declined to embark on a re-examination of issues which had been canvassed by the appellant time and time again in this long-running bankruptcy saga did not constitute an abandonment or fettering of her discretion. It is apposite to return to the words of Costello J. in Danske Bank v. O'Shea:

> *"[a]n application to show cause* ***is not an appeal against matters previously ruled upon on the occasion of an adjudication****. It follows that the debtor cannot rely upon the same argument that was already advanced and rejected at the hearing resulting in his adjudication as a bankrupt." (emphasis added)*

In circumstances where all of the arguments raised by the appellant were dealt with and rejected either in the adjudication proceedings or in earlier challenges to the Bankruptcy Summons, I am not persuaded that there is any basis upon which this Court should set aside or otherwise interfere with the trial judge's assessment of grounds B-G.

122. For all of the reasons set out in this judgment, I would dismiss the appeal.

123. Both Kennedy J. and Ní Raifeartaigh J. are in agreement with this judgment and with the Order I propose. That is an Order dismissing the appeal. Having failed in his appeal, costs will normally follow the event. It is the intention of the Court to so order fourteen days from the date of this judgment unless either party applies within that time to request that the Court should otherwise order. If so applying, the appellant must first notify the office in writing of his intention to object within the fourteen-day period and should file short written submissions within one week of his so notifying the Court. The respondents will then have a further week to file their submissions.