



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 292

Court of Appeal Record Number: 2021/49

[Bankruptcy Number: 4573]

Noonan J.

Haughton J.

Murray J.

**IN THE MATTER FOR A PETITION FOR ADJUDICATION OF BANKRUPTCY
OF PATRICK MCLAUGHLIN**

BETWEEN/

**ENNIS PROPERTY FINANCE DAC/PEPPER FINANCE CORPORATION
(IRELAND) DAC**

PETITIONER/RESPONDENT

- AND -

PATRICK MCLAUGHLIN

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Robert Haughton on the 3rd day of November 2021

Introduction

1. This is an appeal from orders of the High Court (Humphreys J.) spoken on 11 February 2021 and confirmed in a written judgment delivered on 5 March 2021. As the Notice of Appeal states, the appeal is limited to the orders made dismissing the appellant's application to dismiss the Bankruptcy Summons, and the order dated 11 February 2021 adjudicating the appellant a bankrupt.
2. The appeal raises the issue as to whether the trial judge was entitled to have regard to a Protective Certificate ("PC") issued by the Circuit Court under the Personal Insolvency Act, 2012 (as amended) ("the Act of 2012") as an acknowledgement of debt for the purposes of the bankruptcy proceedings.

Background

3. The background to these proceedings is that by five separate letters of sanction all dated 7 April, 2008 Bank of Scotland Ireland Limited agreed to advance monies to the appellant and his wife on a joint and several basis. These credit facilities totalled €3,204,011.65, and the appellant and his wife signed and accepted the loan agreements on 13 April, 2008. Pursuant to the said loan agreements funds were advanced to the appellant and his wife, and were drawn down on 8th May, 2008, and attributed to accounts for the dates on which existing facilities had previously expired.
4. The borrowers defaulted on the loan agreements, and on 30 September 2013 the High Court (Birmingham J.) granted judgment against them in the amount of €4,022,734.92 in favour of Bank of Scotland Plc – see *Kavanagh v McLaughlin* [2013] IEHC 453 unreported, High Court, Birmingham J., ("the judgment proceedings").

5. The McLaughlins appealed that judgment to the Supreme Court, which dismissed the appeal, and that decision is reported as *Kavanagh v McLaughlin* [2015] IESC 27. The judgment of Clarke J. at para. 2.2 notes that –

“On the morning of the appeal when the Court assembled, counsel (who had not previously been instructed in the case) appeared on behalf of the McLaughlins and indicated that he felt in some difficulty, by reason of the lateness of his instructions in the case, in being able to adequately present his clients’ case”.

The Supreme Court rejected the suggestion that the matter be adjourned.

6. The loan facilities were transferred by Bank of Scotland Plc to Ennis Property Finance DAC (“Ennis”) on 20 April, 2015. The McLaughlins brought counter proceedings against Ennis, entitled *Patrick McLaughlin & Roseann McLaughlin v Ennis Property Finance Limited & Tom Kavanagh* [2016 9951P] (“the Plenary Proceedings”). A Statement of Claim was not delivered until 10 November, 2020. In these proceedings the McLaughlins challenge the validity of the appointment by Bank of Scotland plc of the second named defendant (Tom Kavanagh, of Deloitte) as receiver and all actions taken by him, including the collection of rent, and the validity of sales undertaken by Ennis of two of the four properties provided by the McLaughlins’ as security for the said borrowings. The Plenary Proceedings seek 93 separate reliefs, and the court was advised that there is currently an application pending before the High Court in which the defendants seek to dismiss the Plenary Proceedings.

7. By order dated 11 June 2018 Ennis was substituted into the judgment proceedings in place of Bank of Scotland.

The Bankruptcy proceedings

8. Ennis made statutory demands for the outstanding sum of €2,006,898.01 on 7 August 2018. When those demands were not met, Ennis applied for Bankruptcy Summonses, on foot of an affidavit sworn by Albert Prendiville, a company director, on 25 October, 2018. That affidavit deposes to the judgment for €4,064,138.01 plus costs in the judgment proceedings, and at para. 6 avers that—

“The total amount outstanding on foot of the aforementioned judgment has been reduced by €2,057,240 by virtue of sums recovered by [Ennis] as detailed on the attached schedule, leaving a balance due on foot of the said judgment by you, Patrick McLaughlin, to [Ennis] of €2,006,898.01. In this regard, I beg to refer to a spreadsheet detailing the sums ...”

9. On foot of that application the High Court (Pilkington J.) issued two Bankruptcy Summons dated 19 November 2018, one of which is addressed to the appellant, based on a debt of €2,006,898.01. The Particulars of Demand in the Bankruptcy Summons state that Ennis “...is not claiming interest on the said sum notwithstanding its entitlement to same”.

10. The Petition then issued on 18 February 2019, and is verified by the sworn declaration of John Burke, a director of Ennis also dated 18 February 2019. The Petition sets out the debt as follows: -

“3. The aforesaid sum of €2,006,898.01 in respect of which the debtor is indebted to your Petitioner constitutes the judgment sum of €4,064,138.01 less total sums of €2,057,240.00 recovered by your Petitioner through its securities since the date of judgment.”

The Petition indicates that Ennis holds security for payment of the sum namely mortgages over 40a Kerrymount Rise, Foxrock, Dublin 18 and 12 Hawthorn Manor, Blackrock, County Dublin, with estimated values of €750,000 and €615,000 respectively. The Petition then relies on the Bankruptcy Summons issued on 19 November 2018, and its service on the appellant, and at para. 5 states that –

“... Since that date, the Debtor has failed to pay the said sum and the debt has not been secured or compounded, as your Petitioner has been informed and believes.”

The Petition therefore prays that the appellant be adjudged a bankrupt. It is clear from this that the act of bankruptcy relied upon was the failure of the appellant to pay Ennis on foot of the Bankruptcy Summons.

11. The Second Schedule to the Petition sets out particulars of realisations by Ennis of two further properties which were security for the debts. The first of these is 40 Kerrymount Rise, Foxrock, Dublin 18, where the sale closed on 20 February 2017 and the net sale proceeds were €594,789. The second is “Latona” Dalkey Road, Dublin 18, where the sale was closed on 17 November 2016 and the net sales proceeds were €1,462,451. As the schedule demonstrates the combined total of the net sales proceeds from these two sales comes to €2,057,240.00, that is the figure in respect of which credit was given by Ennis against the total amount of the debt for which judgment was given by Birmingham J., and it explains how the balance of €2,006,898.01 is claimed in the Bankruptcy Summons.

12. On 21 December 2018 the appellant issued a Notice of Application to Dismiss Bankruptcy Summons. In the grounding affidavit which he swore on 21 December 2018 he raises issues in relation to service on him of the application for the substitution of Bank of Scotland plc. by Ennis. This was not an argument that appears to have been pursued in the High Court, and is not the subject of any Ground of Appeal.

13. In para. 9 the appellant denies that he is indebted to the Petitioner in the sum of €2,006,898.01 “as indicated or at all”. He then avers, that without prejudice to the foregoing arguments, the sales entered into by the Petitioner “were grossly undervalued”, and that he is arranging valuations.

14. In para. 10 he alleges that Bank of Scotland plc. “hugely overcharged me in relation to my accounts”, and that he is arranging to have them audited. This is not an argument that is open to the appellant having regard to the fact that he contested the judgment proceedings and lost in the High Court, and given that his appeal was dismissed by the Supreme Court.

15. In a supplemental affidavit sworn on 22 January 2019 the appellant repeats points about service which no longer arise. In para. 10 he avers that on 12 June 2012 Mr. Kavanagh was appointed receiver to the property 12 Hawthorn Manor, Blackrock, County Dublin, and that the property remains unsold, and he estimates its value at €950,000.00. However, he does not exhibit any valuer’s report. In para. 11 he refers to the sale of 40 Kerrymount Rise by Ennis, as mortgagee in possession. He then refers to the Plenary Proceedings in which he claims that the appointment of Mr. Kavanagh as receiver over 40 Kerrymount Rise on 12 June 2012 was invalid because it was an appointment over a family home, and that that fact was concealed from the court. In para. 12 he alleges that the mortgage in respect of 12 Hawthorn Manor, Blackrock, County Dublin “has lapsed on the sale in 2008 of 12 Hawthorn Manor to Patrick McLaughlin by Patrick and Roseann McLaughlin”. In para. 13 he notes that Mr. Prendiville’s affidavit does not inform the court that a Civil Bill for possession of 40a Kerrymount Rise, Foxrock, County Dublin was issued by Ennis on 7 January 2019.

16. In para. 14 the appellant asserts that Bank of Scotland plc. had no *locus standi* in his appeal to the Supreme Court, because Bank of Scotland agreed to sell the loans and security to another entity CarVal Investors UK Limited, and in para. 15 he then refers to a Deed of Novation dated 12th December, 2014 whereby CarVal UK Limited novated the purchase deed of 29 November, 2014 to Ennis. However this is another issue that cannot be pursued in support of the motion to dismiss the Bankruptcy Summons because the time to raise it was before the Supreme Court, and that court dismissed his appeal.

17. In paras. 16 – 18 the appellant takes issue with Mr. Prendiville’s averments in relation to the security still held by Ennis. In para. 19 he avers: -

“19. I say that contrary to section 103 of the Land and Conveyancing Law Reform Act, 2009, I did not within 28 days or subsequently receive details of the completion of the sale of two of my properties, Latona, Dalkey Road, Foxrock and 40 Kerrymount Rise, Foxrock. I say that the amount claimed by the Petitioner at para. 6 of his affidavit being in the amount of €2,057,240 as a reduction is incorrect and I beg to refer to copies of the official PSRA register as attached, which gave the combined sales prices to be €2,260,000 a shortfall of €202,760 which today remains unaccounted for.”

He then exhibits copies of the PSRA register which do show that “Latona” was sold on 18 November, 2016 for €1,610,000.00, and that 40 Kerrymount Rise, Foxrock was sold on 17 February 2017 for €650,000, which give a combined total sale consideration of €2,260,000. In para. 20 he alleges that the receiver appointed over his properties has failed to account for rents received. He also refers to “a current case before the High Court” which he avers will determine whether a receiver must be appointed as “receiver and manager”, in order for the appointment to be valid. He then exhibits a document headed “Account with Ennis” in which he sets out an account from which he alleges that Ennis is indebted to him in the sum of €663,691.20. This document appears to claim various sums, including “Impairment losses written off in Bank of Scotland (Ireland) Limited €1,625,655.20” and a related item “Interest charged on the write off amount €280,974.00”. The document also claims “credit due on outstanding mortgage tax relief at source - €19,200.00”, and “credit due to application of incorrect three month EURIBOR rate plus associated interest and costs €42,000.00”, and also “rental income due on three properties”, claimed at €429,000 plus interest of €75,000. These claimed figures give rise to a total of €4,978,829.20 which, when the “judgment amount €4,064,138.01” is deducted give rise to what the appellant claims is due to him - €633,691.20.

18. In a replying affidavit it sworn by Mr. Burke on 16 May 2019 at para. 7 Mr. Burke contends that in the Plenary Proceedings the appellant is attempting to re-litigate the matters addressed by the High Court and the Supreme Court in the judgment proceedings. At para. 8 he notes that Mr. McLaughlin “has made no effort to prosecute those proceedings”, and that the Plenary Summons was issued on 8 November 2016 and renewed on 18 December 2017 but not served on Ennis until 14 June 2018. He notes in para. 9 that Mr. McLaughlin has failed to issue a motion correcting the name of the first defendant to record its status as a “designated activity company”, and that he has failed to deliver a Statement of Claim. As noted earlier a Statement of Claim was delivered by the McLaughlins on 10 November, 2020.

19. In para. 13 Mr. Burke states –

“I also reject the respondents suggestion that the substantial rents have been received from the receivership over the Hawthorn Manor property. In the first instance, I note that while the property was occupied when the receiver was first appointed on 6 June 2012, the tenants vacated the property on 31 March 2017. Moreover, I say and believe that the receiver, Tom Kavanagh has confirmed that only €37,434.00 has been received in relation to the Hawthorn Manor property which has been used to fund receivership fees including the completion of works to the property, letting fees, insurance fees, management fees, utilities fees and costs incurred in dealing with the litigation previously affecting the receivership.”

Mr. Burke then exhibits the receiver’s financial breakdown of the Hawthorn Manor property. This indicates rental receipts of €37,434 and “Chargeholder Funding” of €35,100.00, total €72,534.00, and payments of €67,710.00, with “distributions to date” of €2,803.00 and cash in hand on 15 May 2019 of €2,021.00. This account leads Mr. Burke to aver in para. 14 that “none of the rents which had been taken in as part of the receivership had been applied in reduction of the respondent’s debts”. Mr. Burke goes on to aver that the appellants references to CarVal Investors UK Limited is of no

relevance, and there was no assignment of the legal or beneficial ownership of Bank of Scotland plc. to that entity. In para. 16 Mr. Burke then sets out the history of the loan sanctions, and how they came to be transferred from Bank of Scotland (Ireland) Limited to Ennis. He traces the lead up to the judgment proceedings which resulted in the judgment on 16 October 2013, and the dismissal of the appeal by the Supreme Court on 19 March 2015. He closes this lengthy paragraph by noting that by ordinary resolution on 19 September 2016 Ennis Property Finance Limited converted to a Designated Activity Company.

20. At paragraph 18 of his affidavit Mr. Burke states –

“With reference to paragraph 19 of the respondents second affidavit, I say that the net proceeds of sale in respect of the two secured properties were €2,057,240.”

In support of this he exhibits a spreadsheet setting out a breakdown of how the figure was arrived at. This spreadsheet sets out the sale prices, as confirmed in the PRSA register, and then sets out further receipts such as rent, chargeholder funding and LPT apportionment, and then sets out in respect of each of the two sold properties the relevant payments, such as capital gains tax, receiver’s fees, legal fees, auctioneer’s fees, repairs and maintenance etc. The resulting bottom line figure is total net proceeds of €2,057,240, which is the credit given to the appellant.

21. Although a further affidavit was sworn by the appellant, dated 10 November 2020, in support of his application to dismiss the Bankruptcy Summons, this merely exhibits and relies on the Plenary Proceedings, including the Statement of Claim which he delivered on 10 November 2020. Of significance is that nowhere in this affidavit does the appellant contest any of the figures as set out by Mr. Burke in the Spreadsheet just mentioned, or in the Receipts and Payments account in respect of the property 12 Hawthorn, Blackrock, (Exhibit “JB 3”), to which I have referred earlier.

Adjournments and the Protective Certificate

22. Having set out this evidence it is appropriate to refer to how the Petition and related motions progressed before the High Court. A first hearing date was fixed for 18 November 2019. A new solicitor appeared for the appellant (and his wife) on that date, and sought an adjournment, which was granted by the court, with costs to the petitioner. A second hearing date was fixed on 29 November 2019. On that date the matter was again adjourned because the McLaughlins had engaged a Personal Insolvency Practitioner (PIP) who asked for more time. The adjournment was made peremptorily against the McLaughlins.

23. The McLaughlins then applied, under the Act of 2012, for a Protective Certificate, which, if granted, would allow them an initial period of 70 days in which to explore the possibility of a personal insolvency arrangement (PIA) with their creditors, including secured creditors. In order to make that application, which is made initially to the Insolvency Service of Ireland (ISI) – who then apply to the Circuit Court - the appellant was required by s.91(1)(e) to complete “a Prescribed Financial Statement” (PFS), and to make a statutory declaration “confirming that the statement is a complete and accurate statement of the debtor’s assets, liabilities, income and expenditure”.

24. The appellant completed a PFS and made a statutory declaration on 12 December 2019, and in these he acknowledged that he owed Ennis €2,006,898.00. Based on this the first application for a PC was made through ISI, but was refused because it was submitted to the Circuit Court on behalf of the petitioner that the debtors were admitting the debt in the PIA process, but denying it in the Plenary Proceedings.

25. This caused the appellant and his wife to obtain a letter dated 12 December, 2019 from their then solicitors, Lyons Solicitors, stating, *inter alia* –

“... We hereby confirm having been duly authorised so to do for and on behalf of Patrick McLaughlin and Roseann McLaughlin that any proceedings they may have issued concerning either Bank of Scotland, plc and/or Ennis Property Finance DAC will immediately be

discontinued. In this regard, appropriate Notices of Discontinuances have been drafted up for completion by our clients and we confirm same will be stamped and lodged with the Central Office of the High Court, forthwith.”

This letter was sent by the McLaughlins’ PIP, Mitchell O’Brien, to ISI, and in his covering letter Mr. O’Brien confirmed the following: -

- “(1) I was informed by the Debtors during my consultation with them on Friday 6 December 2019 – any/all proceedings previously instigated by them against Ennis Property Finance DAC have been or will immediately be discontinued; and
- (2) I spoke with the debtors this morning by phone to have them confirm to me once more that any/or proceedings previously instigated by them against Ennis Property Finance DAC have been or will immediately be discontinued, and they confirmed same to me.”

26. On the following day, 13 December 2019, a solicitor and counsel for ISI, and a solicitor and counsel representing the McLaughlins, attended before the Circuit Court, and as a result of that hearing the Circuit Court (Her Honour Judge Enright) granted an order in the following terms: -

“ORDER

On the understanding that that the Plenary hearings in the High Court will be withdrawn and the application for dismissal of the bankruptcy proceedings will be withdrawn, thereby resulting in the vacation of the *lis pendens*, the Court grants the protective certificate.”

The reference to “Plenary hearings” was clearly a reference to the Plenary Proceedings, and the appellant did not seek to argue otherwise. There followed a PC in the usual form, and this sets out in a table of “Specified debts” including “as per Prescribed Financial Statement... €2,006,898.00” as the debt due to Ennis as “creditor to whom debt is owed”.

27. This PC was issued minutes before the third date/time fixed for the hearing of the Petition and the appellant's Motion to Dismiss the Bankruptcy Summons on 13 December 2019. As a result of the appellant/his legal advisors bringing the PC to the attention of the High Court, the Petition and the appellant's motion to dismiss were adjourned generally with liberty to re-enter. The court was obliged to adjourn the petition and motions, notwithstanding that they were listed for hearing peremptorily against the McLaughlins.

28. The McLaughlins' PIP then prepared and proposed a PIA, but this did not find favour with the requisite percentage of the McLaughlins' creditors/secured creditors.

29. In the meantime, during 2020, the relevant loans and security were transferred by Ennis to Pepper Finance Corporation (Ireland) DAC ("Pepper"). On 5 December 2020 the bankruptcy proceedings were mentioned by counsel for Pepper to the court in the Monday List, and, as the PIA process had ended, an order was made re-entering the matters before the High Court for hearing on 1 February 2021. Leave was also given to Pepper to issue motions, to be heard at the same time, seeking the substitution of Ennis by Pepper in the judgment proceedings, and leave to execute accordingly, and substitution likewise in the bankruptcy proceedings. Those substitution motions issued in January 2021, and were made returnable to 1 February, 2021. When the matter came before the trial judge on 1 February 2021 he adjourned it to the 11 February 2021, with certain directions including granting liberty to the appellant to file a further affidavit.

30. On 11 February 2021, at a remote hearing, the McLaughlins did not appear initially, but counsel appeared as a courtesy to the court and suggested a further adjournment. The trial judge did not accede to that application, and proceeded to hear the various motions, including the appellant's motion to dismiss the Bankruptcy Summons and the Petition. These were heard later in the day when the appellant did appear in person.

The High Court Judgment

31. In rejecting the appellant's motion to dismiss the Bankruptcy Summons, the trial judge stated

—

“20. Turning then to the motions to dismiss the Bankruptcy Summons, Mr. McLaughlin made lengthy and, I'm afraid, largely irrelevant submissions stretching back over multiple aspects of the history of the proceedings including the hearing in the Supreme Court; for example, seeking an investigation into alleged illegality in previous court proceedings and making allegations of money laundering. He tried to seek time to adduce further witnesses and documentation which was very much consistent with previous attempts to subvert or at least not to recognise hearing dates. Counsel for the Petitioner eventually suggested that the court should rule on whether he was entitled to reopen the question of the debt. Having heard the parties, I decided that he was not entitled to do so. Having sworn to that debt it would be an abuse of the process to allow him to deny it now.

21. He claimed that he had to do so because there was a Supreme Court Order. But he said he had a motion pending to seek to have the matter set aside, which turned out to be a reference to the current motion to dismiss the Bankruptcy Summons. The logic of his position is that he can derail the bankruptcy by invoking the personal insolvency process in which he admits the debt, but can rely on the motion in the bankruptcy to argue that the debt does not exist. That is a circular heads-I-win-tails-you-lose process. The inconvenient background problem is that the Supreme Court, upholding Birmingham J., has found him liable for the debt. That isn't some technicality that can be scrubbed from history by the present motion.

22. ...

23. ...

24. The question on the motions to dismiss the summonses is whether an issue arises for trial, but unfortunately no such issue has been made out. Of particular note in that regard is the admission of the debt and, as contended for at para. 25 of Pepper's submissions, it is not open to the respondents to deny that liability here. Furthermore, having undertaken through solicitors to discontinue the 2016 proceedings in order to obtain an order from the Circuit Court, it is not now open to the debtors to pray in aid those proceedings in order to seek a dismissal of the Bankruptcy Summonses now, as correctly submitted at para. 29 of Mr. O'hUiginn's submissions. No valid point for a potential trial was identified. Again there is a reinforcing additional factor in the case of Ms. McLaughlin that she did not appear at all in this matter. In all the circumstances I dismissed both motions to set aside the Summonses."

32. The trial judge then considered the respondent's petitions and expressed himself satisfied that "the criteria for the order sought had been met and that the balance of justice favoured adjudicating the debtors bankrupt..." (para. 25).

33. Accordingly, as recorded in para. 26 of his judgment, the trial judge made the following orders on 11 February 2021: -

- (i) in the judgment proceedings he granted an order under O. 17, r. 4 RSC substituting Pepper as plaintiff and under O. 42, r. 24 allowed leave to Pepper to issue execution pursuant to the order of the court (Birmingham J.) perfected on 16 October, 2013, and he dispensed with any requirement to re-serve the proceedings.
- (ii) he made no order as to the costs of the substitution motion;
- (iii) in both bankruptcy matters he made orders under O. 17, r. 4 RSC substituting Pepper as Petitioner, with no order as to costs;

- (iv) he dismissed both motions to dismiss the Bankruptcy Summonses; and
- (v) he adjudicated both of the McLaughlins bankrupt, with costs to be costs in the bankruptcy.

The order adjudicating the appellant a bankrupt, given under seal of the Court, is dated 11 February, 2021.

Notice of Appeal

34. The appellant's Notice of Appeal is dated 16 April 2021 (no appeal was filed by or on behalf of his wife). It was filed by solicitors then acting on his behalf, and was settled by counsel. In section 2 it sets out the "relevant orders made in the High Court", and specifies that it is an appeal in relation to the order dismissing the appellant's application to dismiss the Bankruptcy Summons, and the adjudication of him as a bankrupt. There is no appeal in respect of the substitution and leave to execute orders.

35. It is notable also that there was no appeal in respect of the trial judge's refusal, on 11 February 2021, to adjourn the proceedings further, and no ground of appeal is addressed to that refusal. I mention this because Outline Legal Submissions prepared by James Maher, assistant solicitor in Greg Ryan Solicitors, acting on behalf of the appellant, sought to argue that the trial judge erred in law in refusing to adjourn the hearing of the Petition, which in turn prompted the respondent in its written legal submissions to respond to that claim. This argument was not pursued by Mr. Maher in his oral submissions, save perhaps briefly in his reply submission.

36. The key ground of appeal, identified as such by Mr. Maher in making oral submissions to the court, was Ground 1, which states: -

“1. The learned judge erred in law in determining as a preliminary point that the Appellant could not revisit any issue on the debt as claimed for in the Bankruptcy Summons on the basis of statutory steps taken by the Appellant in relation to an application for a protective certificate pursuant to the Personal Insolvency Act 2012.”

The ensuing three grounds of appeal are related to this point: -

“2. The learned judge erred in law in determining the said preliminary point based on an unknown booklet of documentation that had: -

- (a) not been supplied to the Appellant in advance of the hearing;
- (b) not been notified to the Appellant in advance of the hearing;
- (c) not been grounded and/or exhibited to an affidavit.

3. The learned judge erred in law in allowing said evidence to be admitted improperly and without notice to the Appellant.

4. The learned judge erred in law by depriving the Appellant of the opportunity to make submissions on the subject of the preliminary point with adequate time allowed and/or opportunity to prepare same.”

Grounds 5 and 6 are *pro forma* pleas that the trial judge erred in dismissing the appellant’s application to dismiss the Bankruptcy Summons, and in adjudicating the Appellant bankrupt.

Respondent’s Notice

37. This joins issue with the appellant’s Notice of Appeal. Ground 2 explains that the “unknown booklet of documents” was a booklet comprising the application papers for the PC, as filed on the Appellant’s behalf in Kilkenny Circuit Court in proceedings bearing record number

C:IS:DUBL:2019:002483. It is asserted that the High Court was entitled to have regard to that booklet, and that the PC itself was proof of the Appellant's acknowledgment of the debt due and owing. Ground 4 pleads in the alternative that the Appellant "was found to be liable for the petition debt on foot of a High Court judgment which has been affirmed by the Supreme Court". The Respondent's Notice lists the documents relied upon, and these include the appellant's Prescribed Financial Statement and statutory declaration dated 12 December 2019, the letter from Lyons Solicitors to the ISI dated 12 December 2019, the letter of the same date from Mr. O'Brien, the PIP, to ISI, and an email from Mr. O'Brien to the Petitioner's solicitors dated 13 December 2019, as well as the PC/order granted by the Circuit Court on 13 December 2019.

Appellant's submissions

38. In line with his written legal submissions, Mr. Maher on behalf of the appellant argued that the "booklet of documents" including the PC, was not properly before the High Court, and was inadmissible evidence. He argued that the Act of 2012 in its preamble professes to having the object of reforming the law of bankruptcy and of setting up "non-judicial" debt resolution processes, including that of a PIA, as availed of by the appellant. In particular he pointed to s. 95(4) which provides that a hearing in respect of a PC shall, unless the Court considers it appropriate to hold it in public, "be held otherwise than in public". Mr. Maher argued that if the court hearing a bankruptcy petition could have regard to the PFS declared by an applicant for obtaining a PC, or have regard to the content of the PC, as confirmation/acknowledgement of the debt detailed in a Bankruptcy Summons, this would rob the 2012 Act of its efficacy, and deny a debtor the opportunity to avail of the "non-judicial" alternative to bankruptcy.

39. Mr. Maher contended that such a result cannot have been intended by the Oireachtas and would be disproportionate. In that regard he emphasised that the courts regard the bankruptcy legislation as a penal code, which affects life, liberty and fortune, and that bankruptcy carries a stigma. He argued

that the trial judge erred in finding that the appellant had acknowledged the debt in full, and that were the High Court permitted to place such reliance on the PC and the documentation leading to it that it would run the risk that the court would be precluded from exercising its judicial power in relation to the assessment of validity of a Bankruptcy Summons, and in the adjudication of bankruptcy. He suggested that such reliance would preclude a debtor from raising any issue in relation to the debt.

40. Having made these submissions Mr. Maher relied on the dispute as to the amount of the debt raised in paras. 19 and 21 of the appellant's second affidavit, together with the exhibits referred to in those paragraphs, and on that basis he sought dismissal of the Bankruptcy Summons.

Respondent's submissions

41. In reply, counsel on behalf of the respondent relied on the judgment of Birmingham J. in respect of the debt, affirmed in the Supreme Court, and the statutory declaration declared by the appellant, and referred to in the PC, stating the precise amount of the debt as sought in the Bankruptcy Summons. Counsel noted that no ground was pursued that the sum of €2,006,898.01 was not due, save that the appellant relied on an allegation that the sale by the receiver was at an undervalue, or that the receiver's expenses were not justified. Counsel noted that no action had been commenced against the receiver on either account, nor had any such proceedings been taken against the Official Assignee.

42. With regard to the Act of 2012, counsel argued that, in allowing a debtor to obtain a PC, it provided an extraordinary remedy that prevented any enforcement action for a period of 70 days initially, having the effect, as here, of halting proceedings at any time without the need for any undertaking such as would usually be required if an interim or interlocutory injunction was granted. Counsel noted that this 70 day window may be extended up to 150 days, during which the debtor's PIP will prepare a PIA proposal which will be put to the debtor's creditors, and will become operative if the appropriate proportion of creditors vote in favour. Counsel also referred the court to the

Personal Insolvency (Amendment) Act, 2015 which inserts s. 115A in the 2012 Act which now enables a PIP/debtor to apply to court to approve a PIA where it has been rejected by creditors. In addition there may be an appeal from the Circuit Court decisions, and the overall effect is that obtaining a PC can ultimately delay a creditor in securing enforcement by two to three years.

43. Counsel argued that the *quid pro quo* in respect of these provisions is that the debtor must place their cards face up, and give a truthful and honest account of their financial affairs in the PFS which must be verified by statutory declaration, and put before the Circuit Court. Counsel argued that in the instant case the PC would not have been issued unless the appellant had made a full and truthful declaration and acknowledged the debt due to Ennis (now Pepper), and in addition had agreed to discontinue the Plenary Proceedings and withdrawal of the application to dismiss the bankruptcy proceedings. Counsel confirmed that, despite the undertakings given by Lyons Solicitors on behalf of the appellant, the Plenary Proceedings had not been discontinued, and self-evidently the appellant's motion to dismiss the Bankruptcy Summons was never withdrawn. Counsel asserted that that motion was unstateable, and that the trial judge was entitled to have regard to the "booklet of documents" and in particular the PC and the PFS upon which it is based. Counsel argued that the Act of 2012 cannot be said to be "non-judicial" in providing alternatives to the bankruptcy process; he argued that it was a judicial process, and that there was judicial oversight, and that it could be relied upon in the bankruptcy process where the alternatives provided by the 2012 Act did not lead to debt resolution.

44. In response to Mr. Maher's reliance on paras. 19 and 21 in the appellant's second affidavit, he contended that these, and the exhibited accounts, were bare assertions, and at best might give rise to a cause of action against the receiver, but not against the petitioner.

45. In his replying submissions Mr. Maher made a brief argument to the effect that the appellant was not afforded fair procedures in the High Court, and in particular that he was not given a fair

opportunity himself or through his legal advisers to address Pepper's written and oral submissions on the acknowledgment of debt in the personal insolvency process.

Discussion

46. Mr. Maher's replying submission can only be regarded as an indirect or collateral attack on the refusal of the trial judge to adjourn the hearing on that day. In fairness to Mr. Maher he did not pursue any such argument in his primary oral submission, and that is not surprising because there are insurmountable problems for the appellant with such a challenge. Firstly, the trial judge's refusal of an adjournment was not part of the order identified in the Notice of Appeal as being the subject of the appeal; secondly, no ground of appeal was addressed to an argument that the trial judge erred in refusing to adjourn the hearing. Further, at no stage was any application made to amend the grounds of appeal. It was not therefore permissible for Mr. Maher to address arguments to this issue either in his written or oral submissions.

47. Even if the appellant were permitted to pursue such a challenge, the decision on whether or not to adjourn a hearing is one for the discretion of the trial judge, and an appellate court should be slow to intervene with the exercise of such discretion. In para. 15 of his judgment the trial judge gives eleven reasons for rejecting the application for an adjournment. It is not necessary in the circumstances to set out these reasons here. Suffice it to say that in my view all the reasons given by the trial judge appear cogent, and cumulatively seem to me to be compelling. In all the circumstances this is not a case in which this court should interfere with the trial judge's exercise of his discretion to refuse the adjournment sought on the morning of the hearing.

The Personal Insolvency Process

48. Turning to the one substantive point in the appeal, it is appropriate to refer to the relevant provisions of the Act of 2012. The long title, upon which Mr. Maher placed reliance reads: -

“AN ACT TO AMEND THE LAW RELATING TO INSOLVENCY, TO AMEND THE BANKRUPTCY ACT 1988, TO PROVIDE FOR THE ESTABLISHMENT AND FUNCTIONS OF A BODY TO BE KNOWN AS SEIRBHÍS DÓCMHAINNEACHTA NA HÉIREANN OR, IN THE ENGLISH LANGUAGE, THE INSOLVENCY SERVICE OF IRELAND, AND, IN PARTICULAR, IN THE INTERESTS OF THE COMMON GOOD (INCLUDING THE STABILITY OF THE FINANCIAL SYSTEM IN THE STATE) AND HAVING REGARD TO THE FOLLOWING OBJECTIVES—

(A) THE NEED TO AMELIORATE THE DIFFICULTIES EXPERIENCED BY DEBTORS IN DISCHARGING THEIR INDEBTEDNESS DUE TO INSOLVENCY AND THEREBY LESSEN THE ADVERSE CONSEQUENCES FOR ECONOMIC ACTIVITY IN THE STATE,

(B) THE NEED TO ENABLE CREDITORS TO RECOVER DEBTS DUE TO THEM BY INSOLVENT DEBTORS TO THE EXTENT THAT THE MEANS OF THOSE DEBTORS REASONABLY PERMITS, IN AN ORDERLY AND RATIONAL MANNER, AND

(C) THE NEED TO ENABLE INSOLVENT DEBTORS. TO RESOLVE THEIR INDEBTEDNESS (INCLUDING BY DETERMINING THAT DEBTS STAND DISCHARGED IN CERTAIN CIRCUMSTANCES) IN AN ORDERLY AND RATIONAL MANNER WITHOUT RECOURSE TO BANKRUPTCY, AND TO THEREBY FACILITATE THE ACTIVE PARTICIPATION OF SUCH PERSONS IN ECONOMIC ACTIVITY IN THE STATE, TO PROVIDE FOR ADDITIONAL MECHANISMS AND ARRANGEMENTS RELATING TO INSOLVENCY TO FACILITATE THE ACHIEVEMENT OF THOSE OBJECTIVES, TO PROVIDE FOR THE APPOINTMENT, FUNCTIONS, POWERS AND JURISDICTION OF

NEW JUDGES OF THE CIRCUIT COURT TO BE STYLED SPECIALIST JUDGES OF THE CIRCUIT COURT AND, FOR THAT PURPOSE, TO AMEND THE COURTS (ESTABLISHMENT AND CONSTITUTION) ACT 1961 AND THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961 AND CERTAIN OTHER ENACTMENTS, TO PROVIDE FOR THE REGULATION, SUPERVISION AND DISCIPLINE OF PERSONAL INSOLVENCY PRACTITIONERS, AND TO PROVIDE FOR CONNECTED MATTERS.”

It will be noted that this makes express reference to the role of the Circuit Court.

49. The Act of 2012 provides for three processes for the resolution of debt. The first is a Debt Relief Notice, which allows the write-off of qualifying debt up to €20,000, subject to a three-year supervision period. The second is a Debt Settlement Arrangement, for an agreed settlement of unsecured debt over five years. The third is the Personal Insolvency Arrangement (PIA) which provides for an agreed settlement of secured debt up to €3,000,000 (a figure which can be increased with the consent of all secured creditors) and unsecured debt over six years. Although the three methods were, as initially promulgated, “non-judicial”, in the sense that the agreed resolution of the debt could only occur outside of court, nevertheless provision is made in the Act of 2012 for the ISI to make the application to the Circuit Court for the PC that allows for the initial protection period of 70 days for preparation of a proposal, and during which no debt recovery or enforcement can be pursued.

50. Since the amendment in the Personal Insolvency (Amendment) Act, 2015 there is the potential for significant further court involvement. A PIP may, under s. 115A, apply to the court where a PIA proposal has been rejected by creditors. Such an application, if in order, has the effect of further extending the PC previously granted by the court, and under s. 115A(9) the court may confirm the

coming into effect of the PIA notwithstanding that it has been rejected by creditors. The court may do so where satisfied that there is –

“...a reasonable prospect that confirmation of the proposed Arrangement will –

- (i) enable the debtor to resolve his or her indebtedness without recourse to bankruptcy,
- (ii) enable the creditors to recover the debts due to them to the extent that the means of the debtor reasonably permit, and
- (iii) enable the debtor –
 - i. not to dispose of an interest in, or
 - ii. not to cease to occupy,all or part of his or her principal private residence.”

– amongst the other matters specified in that subsection.

51. It should be noted that s.115A, which was operative at the time the appellant obtained his PC, is far reaching. It confers on the court powers analogous to those vested in a court under the Companies Act, 2014 to approve a scheme proposed by an Examiner in the examinership process, and it means that the court can impose debt reduction on creditors in certain circumstances and notwithstanding that a PIA proposal has earlier been rejected by such creditors.

52. Chapter 4 of the Act of 2012 governs “Personal Insolvency Arrangements”. Section 91(1) provides that a debtor is not eligible to make a proposal for a PIA unless he or she satisfies various criteria. Criterion (d) is that the debtor is insolvent, and criterion (e) provides –

“(e) that the debtor has completed a Prescribed Financial Statement and has made a statutory declaration confirming that the statement is a complete and accurate account of the debtor’s assets, liabilities, income and expenditure.”

The PFS is required by s.50, ss. (1) of which stipulates that the debtor “...shall provide information that fully discloses his or her financial affairs to the personal insolvency practitioner.” Subsection (2) requires the PIP to examine this information and “assist the debtor in completing the PFS. Subsection (3) provides:

“(3) The debtor, when completing the [PFS] referred to in *subsection (2)*, is under an obligation to make a full and honest disclosure of his or her financial affairs and to ensure that, to the best of his or her knowledge, the [PFS] is true, accurate and complete.”

The process obliges the debtor to engage a personal insolvency practitioner, and that PIP must complete a statement under s. 54 confirming that the information contained in the debtor’s which the is complete and accurate.

53. Section 91(1) sets out criteria that must be satisfied before a debtor can made a PIA proposal – *inter alia* these are that the secured debt must be less than €3 million, the debtor must be domiciled in the State or ordinarily resident her for 1 year, at least one of the creditors must hold security over property in the State, and the debtor must be insolvent. Most relevant to this appeal are criteria (e) and (f):

“(e) that the debtor has completed a [PFS] and has made a statutory declaration confirming that the statement is a complete and accurate statement of the debtor’s assets, liabilities, income and expenditure;

(f) that the [PIP] has completed a statement under *section 54* in respect of the debtor;”.

54. Section 93(1) then provides that where a PIP “*has been instructed*” to make a proposal for a PIA, the PIP notifies the ISI of the debtor’s intention to make a proposal, and to apply on behalf of the debtor for a Protective Certificate. In my view this is a critical instruction. The scheme of the Act of 2012 is such that the insolvent debtor at this point has engaged a PIP, has made complete and accurate disclosure in the PFS with the assistance of the PIP, has made a statutory declaration verifying the PFS, and has the benefit of the advice of the PIP. The decision is now made by the debtor, with the benefit of the PIP’s expert advice, to go down the PIA route, to make a PIA proposal, and for that purpose to obtain a PC to give the breathing space to make the PIA proposal and put it to creditors or seek confirmation from the court as the case maybe – or, to allow creditors to pursue enforcement, including possibly seeking to adjudicate the debtor a bankrupt. The debtor makes this choice with his/her eyes open, and if the decision is to pursue a PIA route, all ensuing actions and events are predicated on the debtor making full and honest disclosure, and the benefit of the Act of 2012 can only apply to debtors who satisfy, *inter alia*, that criterion. The debtor is now bound by the disclosure made in the PFS, recorded in due course in the PC.

55. The application for the PC then commences with application to the ISI, and must be accompanied by various documents including the statutory declaration, and the PFS with a schedule of creditors and the amount due to each of them, and also, under s.93(2)(f), the debtor’s written consent to disclosure to ISI, the processing of the application by the ISI, and –

“...the disclosure by the [ISI] to creditors of the debtor concerned, of the personal data of that debtor to the extent necessary in respect of the [PIA] procedure provided for in this Chapter”.

Thus it is contemplated that the contents of the PFS will be disclosed to secured creditors, such as Ennis/Pepper in the instant appeal. Also under s.93(2)(g) the PIP must furnish the “debtor’s written consent to the making of any enquiry under s. 94 relating to the debtor by the [ISI]”.

Section 94(1) empowers ISI to request any further information it requires from the debtor or the PIP, and under subsection (2) a failure to provide the information may lead to the application being deemed to be withdrawn. Subsection (5) empowers ISI to make “such enquiries as it considers necessary to verify the completeness or accuracy of any matter referred to in the Prescribed Financial Statement of the debtor or in relation to the assets, liabilities, income or expenditure of the debtor”.

56. In my view sections 93 and 94 are very important to the scheme of the Act of 2012 in relation to PIA. They emphasise that a pre-requisite to a debtor obtaining a PC is a full and honest disclosure of assets and liabilities, verified by statutory declaration, and subject to all necessary verifying enquiries by ISI. In *Personal Insolvency Law* (Burke and Comyn, Bloomsbury Professional, 2014) the authors state at page. 5 –

“A debtor who is seeking to use one of the new mechanisms must complete a Prescribed Financial Statement, giving full and honest information about their financial circumstances. A statutory declaration to this effect will also be required to be made by the debtor. It is a requirement under the PIA 2012 that a debtor acts in good faith and cooperates fully with the process. A debtor must also give written consent to the accessing of certain personal data held by banks and other financial institutions so that their financial situation can be verified. Government departments and agencies have the power to release certain information about debtors engaging in the mechanisms.”

57. That is a correct summary of the intent of the legislature insofar as it sets forth strict criteria requiring full and honest disclosure by a debtor as a pre-condition to entry into the PIA process. It cannot have been the intention of the legislature that a debtor minded to successively deceive his or her creditors, the PIP, ISI and the Circuit Court, should be entitled to the benefit of a PC and subsequently, when unsuccessful in the PIA process, to then deny the debt admitted in the statutory declaration/PFS in the context of bankruptcy proceedings. Such an intention would fly in the face of

the express provision in s. 50(3) of the 2012 Act that places a legal obligation on a debtor seeking a PC/PIA to make a full and honest disclosure of their financial affairs.

58. Under s. 95(1) of the 2012 Act where ISI is satisfied that the papers are in order it submits the application to one of the “new judges” of the Circuit Court. This provision then provides –

“(2) Where the appropriate court receives the application for a protective certificate and accompanying documentation pursuant to *subsection 1(a)*, it shall consider the application and documentation and, subject to *subsection (3)* –

(a) if satisfied that the eligibility criteria specified in s. 91 have been satisfied and the other relevant requirements relating to an application for the issue of a protective certificate have been met, shall issue a protective certificate, and

(b) if not so satisfied, shall refuse to issue a protective certificate.

(3) The appropriate court, where it requires further information or evidence for the purpose of arriving at a decision under *subsection (2)*, may hold a hearing, which hearing shall be on notice to the Insolvency Service and the personal insolvency practitioner concerned.

(4) A hearing referred to in *subsection (3)*, unless the appropriate court considers it appropriate to hold it in public, shall be held otherwise than in public.”

59. It is evident from this provision that the Circuit Court is also reliant on a debtor’s PFS and statutory declaration, and if not satisfied that there is eligibility, or that all relevant requirements relating to the application have been met, it may refuse a PC. Thus, the duty of complete and honest disclosure by a debtor is owed to the court, as well as the creditors, the PIP and ISI.

60. Even without having regard to s. 115A of the 2012 Act, the provisions just outlined in relation to PIA's are such that the process cannot be properly characterised as "non-judicial". It involves an application to the appropriate court, and that court must consider the application and relevant documentation, and must make a determination, and that determination is in turn one that can be the subject of an appeal to a higher court. It is also notable that S.I. 317/2001 promulgates the "Circuit Court Rules (Personal Insolvency) 2013", and as set out in O. 73 of the Circuit Court Rules 2001 (As Amended) this provides that all proceedings – which would include an application for a PC – are to be issued out of the appropriate Circuit Court office, and sub rule (e) provides that –

“where any party may be affected thereby, the court may cause the matter to be listed on notice to that party, and having heard that party may:

- (i) cancel any order, notice, certificate or other document which has issued for or on behalf of the court in error...”

This provision allows an affected creditor a right in certain circumstances to be heard by the Circuit Court to advocate for the cancellation of a protective certificate issued “in error”.

61. I also accept counsel's submissions on behalf of the respondent that the advantages/protection that a PC affords militate against Mr. Maher's argument that its content cannot be used as an acknowledgment of debt. Section 96(1) sets out the far-reaching effect of a PC. Whilst it is in force a creditor on notice of such certificate cannot –

- “(a) initiate any legal proceedings;
- (b) take any step to prosecute legal proceedings already initiated;
- (c) take any step to secure or recover payments;

- (d) execute or enforce a judgment or order of a court or tribunal against the debtor;
- (e) take any step to enforce security held by the creditor in connection with the specified debt;
- (f) take any step to recover goods in the possession or custody of the debtor (whether or not title to the goods is vested in the creditor or the creditor has security over the goods);
- (g) contact the debtor regarding payment of the specified debt, otherwise than at the request of the debtor;
- (h) in relation to an agreement with the debtor, including a security agreement, by reason only that the debtor is insolvent or that a protection certificate has issued –
 - (i) terminate or amend that agreement, or
 - (ii) claim an accelerated payment under that agreement.”

In the instant appeal it meant that the bankruptcy proceedings, including the motion to dismiss, had to be adjourned. It meant that Ennis/Pepper could not pursue any further steps to enforce the judgement proceedings, or to realise the remaining two secured properties.

62. The seriousness of the debtor’s obligations to make a full and honest disclosure under the 2012 Act is also evident from s. 126 which creates an offence where a debtor in respect *inter alia* of an application for a PC “knowingly or recklessly provides information which is false or misleading in a material respect”. Further offences related to concealment or falsification of documents are created by s. 128, and in that context “financial record” is given a broad definition that includes “a book, document or record relating to that person’s financial affairs”.

63. The PC in the instant appeal is an order of the Circuit Court given on 13th December, 2019. Within the PC there is confirmation that the court reached its determination “on the basis of the PFS completed” by the appellant, and the supporting documentation accompanying the ISI application. The table in the PC identifies the debt in question in the sum of €2,006,898.00, and Ennis as the creditor to whom the debt was owed. The High Court has as part of its order substituted Pepper for Ennis following on the transfer of the debt and security to Pepper, and that is not the subject matter of any appeal. Accordingly Pepper acquired, and now has the same entitlement as, Ennis would have had, to rely on the acknowledgment of debt in the PC.

64. Mr. Maher was unable to point to any provision of the 2012 Act which might render inadmissible the PC in bankruptcy proceedings. As an order of the Circuit Court, it is a matter of public record, notwithstanding that the application of ISI was heard “otherwise than in public” under s.95(4). Indeed it is not hard to see why the PC must be a public document – it is required to prevent enforcement action by all creditors, including officials such as revenue or county sheriffs, during the protection period. This is underscored by section 133 of the Act of 2012 which requires ISI to establish and maintain various registers, including a register of all PCs. Under subsection (4) members of the public may inspect the register at all reasonable times and take copies or extracts from entries.

65. Neither Mr. Maher nor counsel referred the court to section 133 (5) of the Act of 2012, but this judgment would be incomplete if I did not do so. Subsection (5) provides that the ISI may issue a certificate referring to the name of any person to whom a PC is issued and in effect, and specifying details of the PC, and such a certificate is “evidence” of the matters to which it refers. Such a certificate was not put in evidence in the High Court in the instant matter. While that would have been one method of proving the content of the PC, in my view it is not the only way, and it is equally open to a party to produce in court the Circuit Court order that is the PC.

66. This is precisely what happened in the High Court, where the order of the Circuit Court that was the PC was produced by or on behalf of the appellant shortly before the Petition and motion to dismiss the Bankruptcy Summons were due to be heard, and this led to the adjournment of the hearing generally with liberty to re-enter on 13 December 2019. In using the PC in this fashion the appellant chose to deploy the PC, and he used it to obtain the adjournment granted on that day. That of course had the effect of deferring the hearing until the end of the PIA process. In circumstances where the PC was produced by or on behalf of the appellant, and relied upon by him to his advantage in the High Court, and to the disadvantage of the Petitioner, in my view the appellant was thereafter estopped from pursuing any argument, whether in the High Court or before this court on appeal, to the effect that the contents PC could not be relied upon by the respondent as an acknowledgment and record of accepted debt.

67. I must therefore reject Mr. Maher's submissions. In my view the trial judge was entitled to rely on the PC and the admission by the appellant of debt in the PFS, such that it was no longer open to him to deny that liability. It is not open to a debtor in the appellant's position to approbate and reprobate. As the trial judge found, the appellant cannot "... derail the bankruptcy by invoking the personal insolvency process in which he admits the debt, but... rely on the motion in the bankruptcy to argue that the debt does not exist".

68. Even if I am wrong in this conclusion, there was ample evidence before the trial judge from which he could conclude that the Bankruptcy Summons was valid and effective, and a sound basis on which to adjudicate the appellant bankrupt. The judgment in the High Court for €4,022,734.92, affirmed on appeal by the Supreme Court, speaks for itself and is not one that can now be questioned by the appellant in the context of bankruptcy proceedings or in the Plenary Proceedings. Mr. Burke's evidence clearly explains how the credit against that judgment was calculated following the sale of two of the properties comprising the security, and how the Bankruptcy Summons was based on an

outstanding debt of €2,006,898.01. In his second affidavit, and in particular in the spreadsheet to which I referred in some detail earlier, Mr. Burke fully explains the credits and justifies the figure as set out in the Bankruptcy Summons. He also fully explains the position with regard to rentals from the Hawthorn Manor property. That affidavit was sworn by Mr. Burke on 16 May 2019 and the appellant had ample time in which to contest Mr. Burke's evidence. However, the appellant only swore a short affidavit on 10 November 2020, exhibiting the Statement of Claim in the 2016 Plenary Proceedings, and he did not avail of the opportunity to contest any of Mr. Burke's figures.

69. Insofar as Mr. Maher relied on the contents of the affidavits sworn by the appellant on 22 January 2019, and exhibits in that affidavit, these cannot be relied on in light of the subsequent admission of debt in the PFS the subject of the statutory declaration made by the appellant on 12 December 2019, and recorded in the PC, in the sum of €2,006,898.00.

70. Even if the PC and the statutory declaration are to be ignored, the appellant's averments in paras. 19 and 21 of that affidavit are no more than bare assertions. In para. 19 the appellant refers to "a shortfall of €202,760" in the credit given to him, but this is fully explained in Mr. Burke's subsequent affidavit, to which there is no response from the appellant. The "Account with Ennis" which the appellant exhibits, and upon which he bases an extravagant claim that, rather than him being a debtor, the Petitioner owes him €633,691.20, is based on figures – such as "impairment losses written off in Bank of Scotland (Ireland) Limited" and "interest charged on the write off amount", that bear no relationship to contractual indebtedness arising on the loan accounts as between Bank of Scotland (Ireland) Limited or its successors and the McLaughlins, and it is based on assertion and speculation. Insofar as that "Account with Ennis" and the averments in para. 21 seem to relate to rental income and/or the sale of two of the properties comprised in the security, I agree with counsel that such claims could only be made against the receiver and not against the respondent. The trial

judge correctly concluded that the motion issued by the appellant does not disclose any issue in respect of the debt particularised in the Bankruptcy Summons that arises for trial.

71. Insofar as the appellant attempts to raise other matters in his affidavit, these were rejected by the trial judge, and were not the subject matter of any appeal. Insofar as they could be said to be encompassed in the claims now made by the appellant in the Plenary Proceedings, and the subject matter of the Statement of Claim delivered on 10 November 2020, the trial judge correctly observed

—

“Furthermore, having undertaken through solicitors to discontinue the 2016 proceedings in order to obtain an order from the Circuit Court, it is not now open to the debtors to pray in aid those proceedings in order to seek a dismissal of the Bankruptcy Summonses now ...”

In fact, pursuant to the appellant’s agreement, and the said solicitor’s undertaking - which are repeated in the accompanying letter from Mr. O’Brien the PIP to the ISI - both the Plenary Proceedings and the motion to dismiss the Bankruptcy Summons should long ago have been discontinued/withdrawn by the appellant. The appellant’s failure to comply with his undertaking, and his attempted reliance on the Plenary Proceedings in this appeal, are in my view an abuse of the process.

72. I would therefore dismiss this appeal, and affirm the orders of the High Court dismissing the appellant’s application to dismiss the Bankruptcy Summons, and the adjudication of the appellant as a bankrupt.

73. As this judgment is being delivered electronically in accordance with the usual practice I will indicate what I propose should be the order of this court in respect of the costs of the appeal. Under s. 169(1) of the Legal Services Regulation Act, 2015 a party who is entirely successful in civil proceedings is entitled to an award of costs against the party who is not successful, unless the court

otherwise orders having regard to the particular nature and circumstances of the case and the conduct of the proceedings, including the considerations (a) – (g) as set out in that section. In this appeal the respondent was entirely successful and is *prima facie* entitled to its costs, and I do not believe that there are circumstances that would justify the court in ordering otherwise. I would therefore propose that the respondent be entitled to its costs of the appeal. Should the appellant wish to dispute this or seek a different order he should so indicate by email to the Court of Appeal Office within 14 days of the date of electronic delivery of this judgment, and a short costs hearing will be arranged. Should the appellant seek such a hearing, and should he be unsuccessful in disputing the proposed order, he will be at risk of an order that he also pays the costs of such hearing.

Noonan and Murray JJ. have indicated their agreement with this judgment and the orders which are proposed.

