



**THE COURT OF APPEAL
CIVIL**

**High Court Record No. 2019/4894 B
Court of Appeal Record No. 2021/116
Neutral Citation No. [2022] IECA 212**

**UNAPPROVED
NO REDACTION NEEDED**

**Murray J.
Faherty J.
Binchy J.**

IN THE MATTER OF DAMIEN BRENNAN (A BANKRUPT)

BETWEEN

DAMIEN BRENNAN (A BANKRUPT)

APPLICANT

- AND -

**MICHAEL IAN LARKIN (IN HIS CAPACITY AS THE OFFICIAL ASSIGNEE IN
BANKRUPTCY)**

FIRST RESPONDENT

- AND -

DANSKE BANK A/S TRADING AS DANSKE BANK

SECOND RESPONDENT

JUDGMENT of Mr. Justice Murray delivered on the 3rd of October 2022

This application

1. On 11 June 2018 the High Court made an order providing for substituted service on the applicant of a bankruptcy summons. On 3 December 2018 it made an order providing for substituted service on him of a bankruptcy petition. On 4 March 2019 that court made an order adjudicating the applicant a bankrupt. On 16 March 2020 it made an order that the bankruptcy did not stand discharged by virtue of s. 85 of the Bankruptcy Act 1988 as amended, pending the determination of a motion brought by the Official Assignee in Bankruptcy to extend the applicant's bankruptcy.

2. On 5 May 2021 the applicant issued a motion in this court seeking orders extending time for appealing these orders of 4 March 2019 and 16 March 2020. Counsel says that it was also intended to seek such relief in respect of the orders providing for substituted service of 11 June 2018 and 3 December 2018 and that this relief was omitted from the notice of motion through a drafting error. He seeks an extension of time within which to appeal those orders also. The respondents have not articulated any clear grounds of objection to his also seeking that relief, and the court will proceed accordingly. So, the issue is whether time should be extended so as to allow the applicant to appeal each of these four orders.

3. Generally, an order of the High Court must be appealed to this court within 28 days of its perfection. This is the effect of Order 86A Rule 13(1) of the Rules of the Superior Courts ('RSC'). The facility for the extension of that time appears in Order 86 Rule 3 RSC. It states:

'the Court of Appeal may give directions and make orders:

... (b) extending or shortening any time limit set by these Rules (unless to do so would be contrary to any provision of statute).'

The general principles

4. The principles governing applications of this kind are well established and have been recently reiterated by the Supreme Court in *Seniors Money Mortgages Ireland DAC v. Gately and McGovern* [2020] IESC 3, [2020] 2 IR 441 (*'Seniors Money Mortgages'*). That decision stresses that the court has a discretion in determining whether or not to grant an extension of time for an appeal, confirms that the critical inquiry in applying that discretion is directed to the balance of justice, and requires that the discretion must be exercised having regard where that balance lies in all the circumstances of a particular case.

5. There are three questions that guide the exercise of that discretion – (a) whether the applicant formed a *bona fide* intention to appeal within the prescribed time, (b) whether the failure to appeal within that time is explicable by reference to some factor akin to a mistake, and (c) whether there are arguable grounds of appeal. These are the criteria first stated by the Supreme Court in *Éire Continental Trading Co. v. Clonmel Foods Ltd.* [1955] IR 170, at p. 173 (*Éire Continental*), and they remain the essential principles by reference to which the grounds advanced and evidence adduced by the applicant here fall to be judged. These factors will be determinative in the majority of cases (*Seniors Money Mortgages* at para. 63). However, as the decision in *Senior Money Mortgages* emphasises, these are guidelines, not a prescriptive test to be rigidly

applied in all cases. Instead, the focus must be on the particular facts and circumstances attending each application.

The bankruptcy order

6. The bankruptcy summons was issued on 23 April 2018 in standard form. It arose from the failure of the applicant to pay the second respondent an outstanding debt of €2,165,626.66. That indebtedness had been the subject of a judgment obtained by the second respondent in March 2013 against the applicant and his wife. In an affidavit sworn by him on 29 May 2018 Mr. Michael Lynchehaun – a process server - averred that service of the bankruptcy summons was unsuccessfully attempted at the applicant's last known address of East Point House, The Burrow, Portrane, County Dublin. Mr. Lynchehaun said that it was sought to serve the applicant there on 4 May, 5 May, 8 May, and 9 May 2018 and that there was no response when he rang the intercom outside the property. He said that enquiries were made by him with neighbours who said they knew the applicant. He averred that these persons had stated that the applicant resided at the property. He describes the property as a standalone house set back on grounds which are surrounded by a high wall and vegetation, saying that it was accessed from the main road through large electric gates. This description corresponds with the map appearing on the Eircode printout for the designation K36 EH10.

7. An *ex parte* order was made by Costello J. on 11 June 2018 on foot of this affidavit. That order granted an extension of time pursuant to Order 76 Rule 14(1) RSC for service of the bankruptcy summons and enabled service of the summons to be effected

by ordinary pre-paid post at East Point House, The Burrow, Portrane, County Dublin. The order further provided that '*service of any other document in these proceedings*' could be effected by posting in the same way. According to an affidavit of Ms. Kate Russell, legal executive, sworn on 18 August 2018, the bankruptcy summons, the annexed particulars of demand, a true copy of the order of Costello J. of 11 June 2018 and the affidavit of bankruptcy summons were thus served on 18 June 2018.

8. A petition of bankruptcy issued on 27 July 2018, an affidavit of debt being sworn by Mr. Michael Leonard on the same date. A notice of motion seeking an order that the applicant be adjudged bankrupt was issued on 4 September 2018, a notice of adjudication issuing on 6 September. According to an affidavit sworn by him on 16 November 2018, Mr. Lynchehaun sought to effect service of the petition at East Point House, on 21 September, 22 September and 24 September 2018, but again he received no response when he sought access via the intercom.

9. An affidavit was sworn by Mr. Clive Gardiner, a tracing agent, on 26 November 2018. He recorded that through various enquiries he had confirmed his belief that the applicant resided at East Point House, The Burrow, Portrane, County Dublin. In the course of that affidavit he outlined certain events on 16 October 2018, when he attended at this property. He described a man who, he said, was over 6 feet tall, heavily built with receding tight grey hair and wearing glasses. He described this man as being with a teenage girl at the gate of the property, refers to this man driving a black Lexus vehicle from the property and attests to his being the same person as was identified to him from a photograph as the applicant. He also linked this same car to another property owned by the applicant, and averred that a woman whom he had seen driving

a Saab vehicle similar to one he had seen at East Point House, was later witnessed by him driving this same black Lexus.

10. On 3 December 2018, an order pursuant to Order 76 Rule 25 RSC for substituted service was made by Keane J., who also deemed service by post to East Point House, The Burrow, Portrane, County Dublin, as good and sufficient service. A further affidavit of service was sworn on 20 December 2018 by Ms. Russell averring to service of the petition in this way on 10 December 2018.

11. On 21 January 2019, the petitions to adjudicate the applicant and his wife bankrupt were listed before the High Court. There was no appearance by either of them. The applications were adjourned to 11 February. The court directed the second respondent to write to the applicant and his wife advising them of the adjourned date and notifying them of the need to swear affidavits if they intended to contest the petitions. Letters to that end were sent to the applicant and his wife on 21 January 2019. Follow up letters to similar effect were sent on 4 February 2019. There was no appearance on the adjourned date, and the petitions were again adjourned, the directions as to the sending of correspondence to the applicant and his wife being repeated. These letters were sent on 20 February, with follow up letters sent on 27 February. All were addressed to the applicant at '*East Point House, The Burrow, Portrane, County Dublin.*' The evidence is that none of these were returned by An Post as undelivered or otherwise.

12. The matter came again before the High Court on 4 March. There was no appearance by either the applicant or his wife. Orders adjudicating the applicant and his wife bankrupt were made on that date.

13. It is to be repeated that the evidence is that none of the papers served by way of ordinary pre-paid post – that is the bankruptcy summonses and the petition - were returned by An Post as undelivered or otherwise. Nor was any of the correspondence sent following the issue of the petition so returned. At no point did the applicant’s wife make any contact with the second named respondent to suggest that she did not receive the bankruptcy summons or the bankruptcy petition or any of the correspondence sent prior to the adjudication.

Communications following the bankruptcy order

14. On 22 March 2019 the Insolvency Services of Ireland (‘ISI’) wrote to the applicant at ‘*East Point House, The Burrow, Portrane, County Dublin.*’ The letter enclosed a copy adjudication order dated 4 March 2019 and a warrant of seizure. According to an affidavit of service sworn by Mr. Stephen Ryan, assistant to the bankruptcy inspector, these documents were served by hand by him at ‘*Eastpoint House, Beech Lane, The Burrow, Portrane, Co. Dublin K36 EH10*’.

15. On the same date, a second – and longer - letter issued from the ISI to the applicant at the same address. That letter referred to the adjudication of bankruptcy and requested that the applicant complete an attached Personal Information form. It advised the applicant of his duty of co-operation and to make full disclosure and provided a telephone number to which any queries could be directed. On 14 May a letter was sent by the ISI (again to the same address) noting that the ongoing failure of the applicant to co-operate with the ISI meant that the applicant was in breach of the duties imposed upon him by s. 19 of the Bankruptcy Act 1988. On 17 May ISI wrote to the applicant

and his wife seeking information to assess their income against reasonable living expenses. A letter similar to that of 14 May, was sent on 2 July 2019.

16. On 9 July 2019, the applicant's solicitor wrote to ISI (recording ISI's reference as B12308SP) in the following terms:

'We act for Mr. Damien Brennan of East Point House, The Burrow, Portrane, Co. Dublin.

Your correspondence addressed to our client has been passed to us.

Our instructions are to advise you that our client did not receive any correspondence by hand as stated in your letter of the 22 March 2019.¹

Our client's post box performs a communal service for all people in the locality. It is open and accessible at all times.

Furthermore, there resides in the locality another family with the same surname Brennan.

Unfortunately, our client has only recently been provided with a letter dated 10 June 2019.²

Our client also advises that he has never received an email from you.

¹ This suggests that Mr. Flynn had been provided with one of the letters of 22 March 2019. However, in his affidavits of 18 March and 14 July 2021 Mr. Flynn avers that in this letter he advised ISI that his client had *not* received a letter of 22 March. In the latter affidavit he says that the applicant's mother (since deceased) provided the instructions leading to the sending of the letter of 9 July 2021 '*but no actual correspondence*'. He avers that he understands that the information given to him came from a telephone call with ISI.

² As noted in ISI's affidavit evidence, this is an error: no correspondence issued from it to the applicant on 10 June. Counsel for the first respondent contended at the oral hearing of this appeal that this must have been a reference to ISI's letter of 2 July. That letter referred to attempts to contact the applicant by post *and mail*.

We would be obliged if you would provide us with proof that your letter of the 22 March 2019, was indeed hand delivered and proof of emails sent to our client.

Our client did not receive any Bankruptcy Petition whatsoever and we would appreciate if you would provide a copy of all proceedings immediately as our instructions are to seek to have same set aside.'

(Emphasis added).

17. On the 19 August 2019, the applicant's solicitor sent a further letter to ISI, noting that he had not received a response to his letter of 9 July. This correspondence was not replied to until over one year later, in September 2020.

The application to extend the bankruptcy

18. Absent an order to the contrary, the applicant would have stood discharged from bankruptcy one year after adjudication. However, on 2 March 2020, the first respondent issued a motion from the Examiners Office of the High Court. The motion sought orders (a) pursuant to s. 85A(3) of the Bankruptcy Act 1988, as amended, barring the automatic discharge of the applicant from bankruptcy pending the further investigation of his assets and the making of an order under s. 85A(4) of that Act, and (b) an order pursuant to s. 85A(4) extending the term of the bankruptcy for a further period of eight years from the date of adjudication. That application was returnable to 16 March 2020. An affidavit was sworn on 4 March 2020 by Mr. Colm Hughes, an employee of the Insolvency Service of Ireland. He averred to service of that notice of

motion and the affidavit grounding it by delivery through the letterbox of a property at East Point House, Beech Lane, The Burrow, Portrane, County Dublin on 2 March 2020.

19. As a motion issued in the bankruptcy, this was adequate service (see Order 121 rule 1 RSC and *Lehane v. Burke* [2017] IEHC 426 at paras. 11,12 and 18). The applicant does not contend otherwise. At no point in this application does he aver that he did not receive this motion and, indeed, makes clear that he was aware in advance of the application that the first respondent intended to seek such an extension. He does not state how he became aware of this.

20. The applicant did not appear in the High Court on 16 March. On that date, an order was made as follows:

'IT IS ORDERED pursuant to Section 85A(3) of the Bankruptcy Act, 1999 that the matters complained of by the Official Assignee in Bankruptcy be further investigated and that the Bankruptcy of Damien Brennan shall not stand discharged by virtue of Section 85 of the Bankruptcy Act, 1988 pending the making of a determination of the said Motion.'

21. By letter dated 23 March 2020, ISI advised the applicant of this order. The applicant at no point denies receiving this letter. The balance of the application was adjourned to 12 October 2020. In the meantime (and by letter dated 16 September 2020) solicitors acting on behalf of ISI replied to the applicant's solicitor's letters of 9 July and 19 August 2019. There, the solicitors for ISI advised the applicant's solicitor of the

interim order of 4 March and informed them the latter that the application was listed again on 12 October 2020.

22. By letter of 8 October 2020, the solicitors for the applicant responded. They said:

- (i) That the address used for the delivery of post (*'East Point House, Beech Lane, Burrow Road, Portrane, Co. Dublin'*) had (by reason of the inclusion of reference to *'Beech Lane'*³) caused correspondence to be misplaced and undelivered to the applicant.
- (ii) That they had submitted papers to counsel to set aside *'the claim'* against the applicant's wife.
- (iii) That they did not have time to address the matter of the actual amount of money owed by the applicant but they were in the process of obtaining same and should be in a position to furnish same over the coming weeks
- (iv) They enclosed personal information form, income assessment form and statement of affairs in respect of the applicant.

23. It is to be noted that there was no suggestion here that it was intended to take any steps *vis-à-vis* either the bankruptcy order or the order extending same, and indeed that the applicant appeared to be co-operating in that process. The application to extend the

³ This was subsequently corrected by the solicitors; the reference should have been, they say, to the *exclusion* of the reference to Beech Lane causing the confusion.

bankruptcy was then adjourned from 12 October to the 9 November and thereafter to the 14 December. By letter of 19 October the applicant's solicitors expressed their disappointment that the matter had not been adjourned for a longer period, stating that they would not be able to provide information sought by ISI by 9 November. They referred to their client's '*severe mental distress*' and to his '*mental incapacity*'. Meanwhile, the applicant's solicitor wrote to ISI's solicitors on 4 November seeking copies of the entire proceedings and advising that '*the incorrect address has been used at varying times throughout these proceedings*'. Having come on record in the proceedings for the applicant on 10 December, on 14 December his solicitor advised the court that he had submitted all information requested except the details of the debt due and owing to the second respondent.

24. The first communication received by the second named respondent following the bankruptcy application on 4 March 2019 was a letter dated 21 December 2020 from the applicant's solicitors. This referred to the applicant as being of '*The Square, Donabate*' and stated that he was '*currently before the Official Assignee in Bankruptcy*'. It sought an up to date statement of his indebtedness because it was required to be furnished in the applicant's statement of affairs to the Official Assignee.
25. On 24 and 26 March 2021, the second respondent and the applicant's solicitor exchanged e-mails regarding the Statement of Assets and Liabilities. In the course of that correspondence the applicant's solicitor requested that the second respondent confirm that the address it held on file for the applicant was '*East Point House, Beech Lane, the Burrough, Portrane, County Dublin*'. No complaint was made about the

bankruptcy process or the fact that the applicant had been adjudicated bankrupt on 4 March 2019.

26. Meanwhile on 8 February, ISI's solicitors wrote back repeating a statement they had made in their letter of 22 December 2020 that because it was not ISI's function to look behind the order of adjudication, the question of obtaining the pleadings and correspondence relating to the bankruptcy petition was a matter between the applicant and the second respondent. On 18 March 2021 the applicant's solicitor swore an affidavit in the adjourned extension application. He said the following:

- (i) On 8 July 2019, he was contacted by the applicant's mother and it was following that contact that he wrote the letter of 9 July to which I have referred earlier.
- (ii) He corrected what he said was an error in his letter of 8 October: in fact he explained the *inclusion* of reference to 'Beech Lane' would have ensured that correspondence was received.
- (iii) He said that '*in the absence of full instructions from Mr. Damien Brennan due to significant illness including psychiatric issues*' he felt it appropriate to bring this error to the attention of the court.
- (iv) He outlined dealings he had had with the second respondent which, he said, raised serious concerns and '*supported Mr. Damien Brennan's instructions that he had not received the formal Demand, the Summons*

and Petition or any other documents pertaining to the Adjudication of Bankruptcy.’ He had, he said, thereafter sought copies of all documents from the Registrar of the Examiner’s Court and that these were provided on 11 March.

- (v) He averred to the address used in relation to the service of the Summons (*‘East Point House, The Burrow, Portrane, County Dublin’*). He says that this was clearly incorrect, and that the Eircode (K36 EH10) is for *‘East Point House, Beach Lane. The Burrow, Portrane, County Dublin’*.
- (vi) He advised of his intention to seek orders for the setting aside of the adjudication.

27. The application to extend the bankruptcy stands adjourned pending this application.

The applicant’s case

28. The applicant says that he was never made aware of these various proceedings by way of personal service, nor were any of his family members served with them. He avers that he first became aware of his bankruptcy when his brother found a reference to it online. He does not, in his grounding affidavit, state exactly when this occurred, and he does not explain how or why his brother happened upon this reference to him. In point of fact he does not state *where* online this reference was found, although the exhibit to his affidavit suggests it was on the Courts Service website (an extract from which is exhibited). It has never been explained *why* his brother was searching on the

Courts Service website. Nor does he relate the information obtained by his brother to the fact that the applicant's mother had, by 8 July 2019, had some contact with ISI and was in a position to advise the applicant's solicitor of the dates of correspondence from ISI and, it seems, the reference number it had attributed to his case. While the applicant exhibits a copy of what he describes as '*the print out*' from the Courts Service website, all he says about the circumstances in which this came to his attention is the following:

'I say and believe that your deponent first became aware of these bankruptcy proceedings from my brother who accessed it online'.

29. What the applicant does say is that in 2019 he was physically and mentally vulnerable, with cardiovascular and significant mental health issues. He avers that he developed a serious heart problem as a direct result of the bankruptcy proceedings. He says that these conditions left him in a position where he was unable to engage in or comprehend the proceedings initiated against him and, as he was focused on recuperation, was not fit to engage in litigation of which he had no knowledge or comprehension. Therefore, he deposes, he was unable to instruct his solicitor, Mr. Flynn. However, he also says that he approached the late Mrs. Vera Brennan (his mother) about the matter and the confusion arising therefrom. His affidavit records that she made contact with Mr. Flynn, who '*made certain inquiries*'. Although not so stated, this implies that he learnt of the making of the bankruptcy order *prior* to 8 July 2019 (which is the date on which Mr. Flynn says that Mrs. Brennan contacted him).

30. From there, the applicant asserts that over 2020, his health improved and that he engaged with Reddy Charleton, solicitors for the first named respondent, and liaised with the second named respondents:

'I say and believe that, over the course of 2020, your deponent's health began to improve. Your deponent became aware that the bankruptcy process was still ongoing and that the Official Assignee intended to apply for an extension of same.'

31. This confirms that, somehow, the applicant became aware *prior to* 16 March 2020 that the bankruptcy process was continuing, and it implies that by then his condition had begun to improve. He reiterates his claim that the address at which service was attempted (*East Point House, The Burrow, Portrane*) does not exist, and if it does, he and his family do not reside there, as he resides at *Eastpoint House, Beach Lane, Portrane, County Dublin*. He also refers to the affidavit of the tracing agent, Clive Gardiner, and says that the physical description of the applicant he provides was not exhibited and does not match the applicant's physical appearance at all. It is his claim that the orders for substituted service should not have been made on the basis of the evidence in those affidavits and he argues that that the lack of service renders the adjudication order unlawful as his right to be heard was denied. He avers that the order for an extension of bankruptcy was made without jurisdiction as it was made after his discharge from bankruptcy. He also says that he could not form an intention to appeal in 2019 and 2020 due to his significant health issues and lack of knowledge due to defective service.

32. The applicant relies upon a report prepared by Mr. John Downey of Downey Planning as exhibited in an affidavit from his solicitor of 1 June 2021. Mr. Downey records himself as expert in ascertaining the correct address for properties and sites, having had to utilise the correct address in planning applications. He confirms that the address of the applicant is '*Eastpoint House, Beach Lane, Portrane, Co. Dublin*'. He bases this conclusion on:

- (i) The fact that Google Maps, while not detailing the name of any particular house clearly states that the road on which Eastpoint House is located is called '*Beach Lane*'.
- (ii) The Eircode website details the address of the subject property as '*Eastpoint House, Beach Lane, Portrane, Co Dublin*'.
- (iii) The statutory planning register of the competent planning authority and a full planning search confirms that all previous applications referred to this area in a multitude of different names including '*Linders Lane*' and '*The Burrow*'.

33. The applicant notes that in an '*Income and Expenditure*' document sent to the second respondent in early 2016 it is said '*Mr. Brennan has had serious health issues and is currently unable to work*'. He adduces three letters from two persons attesting to certain difficulties he faced over this period. Professor Brendan McAdam (a consultant cardiologist) wrote to the applicant's solicitor on 11 December 2020. His letter records:

- (i) That the applicant has been under his care '*for a number of years with some cardiovascular issues*'.
- (ii) That he had been '*recently seen*' in his clinic and had developed '*new medical issues over the last 6-12 months*'.
- (iii) That those issues – which involved his losing the power of his legs – were of uncertain origin, whether cardiac or neurological.
- (iv) That as a consequence of these '*worrying and potentially dangerous symptoms*' he had been advised to stop driving or any form of dangerous or risky activities.

34. Professor McAdam wrote a second letter to the applicant's solicitor dated 29 April 2021. There, he observed:

- (i) That the applicant had been unwell '*since 2019*' with episodes of losing power in his legs and falling over.
- (ii) That the cause of this had not been identified.
- (iii) That his physical deterioration had had a '*profound effect on him mentally as he feels quite down at times and stressed due to his*

symptoms’, and that he had been referred to the psychology department to *‘help with these issues*’.

- (iv) That these psychological issues coincided with the development of his physical symptoms in 2019 and that the applicant had advised Professor McAdam that he had *‘a huge amount of stress and anxiety in his life over the years mainly due to financial issues*’.
- (v) That in Professor McAdam’s opinion *‘there is some connection between his mental and physical deterioration and the huge amount of stress and pressure he has been under over the years*’.
- (vi) That his problems could, potentially, *‘be of a neurological nature*’.

35. The applicant avers that he does not have the resources to attend a psychologist or psychiatrist. He tenders evidence from Bernadette Meade, a psychotherapist and counsellor, who issued a report on 20 March 2021. She said that the applicant had attended her when he was experiencing symptoms of post-traumatic stress disorder, anxiety and depression. She said that the applicant had advised her that these symptoms had begun after certain unfair and unjust business dealings whereby he was forced into bankruptcy. She says that his mental health has deteriorated to a point where he is now not fit for work.

36. In the course of an affidavit he has sworn for the purposes of the application, the applicant’s solicitor outlines the dealings he had with the matter. He refers to the

applicant as not being in a position physically or mentally to deal with the case, and outlines attempts made by him to obtain access to the full papers. He says that '*in the absence of those instructions and a full set of papers, JT Flynn & Co. were not in a position to take concrete action sooner than they did*'. He says that a full set of papers was provided on 11 March, that the initial focus was on obtaining an adjournment of the matter from its fixed date of 22 March 2021 and that following the obtaining of that adjournment this application was filed on 5 May 2021.

The orders for substituted service, and the bankruptcy order

37. As I have noted, the decision in *Senior Money Mortgages* confirms the understanding that the three questions framed by the court in *Éire Continental* do not prescribe an inflexible test. So, while these questions underpin the general approach of the court in exercising its discretion and will be determinative in the vast majority of cases (*Goode Concrete v. CRH plc* [2013] IESC 39 at para. 3.3), they must be considered, and that discretion exercised in relation to all the circumstances of the individual case. If these conditions are satisfied it does not necessarily follow that time will be extended, and if they are not satisfied it does not mean that an application to extend time will be refused (*Brewer v. Commissioners of Public Works* [2003] 3 IR 539 at p. 548).

38. The applicant attributes his failure to appeal within time (and advocates the justice of his being allowed now to do so) by reference to three considerations - the fact he was not served at his home address and did not know of the proceedings, his illness and the fact neither he nor his solicitor had the necessary documentation. At one point in the affidavit grounding this application the applicant says that in 2019 he '*was focussed*

on his recuperation and was not fit to engage in adversarial litigation of which he had no knowledge or understanding, and so no instructions were provided by your deponent. In light of his lack of instructions and lack of documentation, Mr. Flynn did not come on record in these proceedings'. He concludes his affidavit by summarising the reasons for the application as follows:

'I say and believe that your deponent did not form an intention to appeal during the 28 day period following the making of the order on 4th March 2019 because your deponent had never been served or informed of the proceedings during that time. Over the course of 2019 and 2020, your deponent's significant health issues, along with the absence of any documentation to explain what had happened in the process, inhibited your deponent's ability to engage and pursue and appeal. Following the provision of instructions to Mr. Flynn, Mr. Flynn began to engage with the bankruptcy process, completing Statements of Affairs and Personal Information and responding to the Official Assignee's applications to court.'

(a) The address used for service

39. This application – both as to the reason the appeal was not brought sooner and as to the merits of the appeal against the orders for substituted service and the orders for adjudication – is thus heavily dependent on the applicant's contention that the address at which service was attempted (East Point House, The Burrow, Portrane) does not exist, and if it does, that he and his family do not reside there, as he resides at Eastpoint House, Beach Lane, Portrane, County Dublin. It is, he says, the omission of '*Beach*

Lane’ that principally causes the difficulty, although his version of the address also excludes reference to ‘*The Burrows*’.

40. The legal principles applicable to the issue are not in dispute. It is axiomatic that the fact that a party did not received papers duly served will not of itself afford a basis for setting aside an order obtained in his or her absence (see *Pepper Finance Corporation (Ireland) DAC v Persons Unknown in Occupation of the Property Known as 21 Little Mary St, Dublin 7* [2021] IECA 277 at para. 89). Where an appeal or set aside application is based upon the contention that an order for substituted service was made at an incorrect address the court should inquire whether it can be said with a high degree of assurance that there were errors in the address and these errors were immaterial and harmless (per Hogan J. in *Corrib Company Ltd. v. Murray* [2017] IECA 102, at para. 27). In *Corrib Company Ltd. v. Murray* the court was not so satisfied in circumstances in which the post was directed to ‘*Crimblin, Moneygall, Co. Offaly*’ when the address was ‘*Crimlin Little, Moneygall, Co. Tipperary*’. In that case, the post was returned as not called for, and the court was of the view that the two errors in the address were not ‘*simply trifling or harmless*’.

41. That test demonstrates the relevance of the materiality of the alleged error, and that in turn makes the issue of whether it might reasonably be concluded that correspondence sent to that address would reach the residence of the party in question critically important. In this case, in contrast to *Corrib Company Ltd v. Murray*, the evidence is that the post was never returned, and it seems clear that the applicant received some correspondence that was sent to the address at which he was served. In particular, he never denied receiving the motion to extend the bankruptcy and his counsel accepted

in the course of argument that he had received ‘*some documents*’ relating to the bankruptcy (although the affidavit evidence does not disclose what these documents were, or when and how he received them).

42. To that extent the case bears some resemblance to *Danske Bank A/S/ v Kirwan* [2016] IECA 99. There Irvine J. refused to extend time to appeal an order for substituted service and a subsequent order deeming service good as the defendant had failed to demonstrate any *bona fide* grounds for appeal from the order for substituted service. The High Court had made an order for substituted service of a summary summons at the address recorded on loan offers made to the defendant by the plaintiff bank, in a manner similar to that set out in condition 22. In its affidavit evidence the plaintiff averred to its belief that the defendant continued to reside at the address, shown there by the enquiries made, and confirmed that three attempts had been made to effect service at the address, as seen by the affidavits of service provided to the court here. In these circumstances, Irvine J. was satisfied that, even if the defendant was not residing at the address at the time the order was made, the arguments he wished to advance on appeal, to the effect that the plaintiff was aware that he was not residing at the address on which service was effected, were unstateable.

43. It will be recalled from my earlier summary that the evidence suggests that the applicant’s mother was in possession of correspondence from ISI prior to her attending the applicant’s solicitor in July 2019. The ISI letters – as I explain shortly – were sent to ‘*East Point House, The Burrow, Portrane, County Dublin*’. It is not surprising that this post was received: the correct house name was given, the district was identified, and it was not suggested that there was another house of that name in Portrane. Indeed

given – as the applicant’s own expert witness says – that the applicant’s house was in an area sometimes called ‘*The Burrow*’, the fact that the address for service included that reference made it even less likely that the omission of ‘*Beach Lane*’ made any difference.

44. Moreover, the court was presented with an array of materials showing that the address used for service had been provided to a variety of parties on many occasions and in many different contexts by the applicant himself or by persons acting on his behalf. This makes it more difficult again to say that either the inclusion of ‘*The Burrow*’ or the omission of reference to ‘*Beach Lane*’ is a material error, at least without explanation as to how the applicant himself presented materials which included both ‘*The Burrow*’ and ‘*Beach Lane*’ in his address.

45. It follows that it is not sufficient – as was suggested in argument - that the applicant averred that ‘*at no stage during this process was your deponent ever made aware that a bankruptcy summons had been applied for, that a bankruptcy petition had issued or that an order of adjudication has been made*’, and that he was not cross examined on that claim. It was incumbent on him to also provide – himself – a clear explanation of how it came about that the address at which service was made and which he says is not his address, was provided by him to third parties and represented as his address.

46. Thus, the address used for service (or very close variants of this address) was used by and/or attributed to the applicant:

- (i) In the facility letter issued to *and signed by* the applicant and his wife on 12 January 2007 (*'East Point House, The Burrow, Portrane, Co. Dublin'*). This was not merely the address attributed to the applicant and his wife in this letter (although the address given for his wife was slightly different – *'Eastpoint House'*) but it was also almost exactly the description of the property used to secure the advance provided for therein (*'Eastpoint House, The Burrow, Portrane, Co. Dublin'*). The address appears at five different points in this facility letter.

- (ii) In the Family Home Declaration sworn by the applicant and his wife on 12 January 2007 (*'Eastpoint House, The Burrow, Portrane, Co. Dublin'*). This confirmed that this property was a family home within the meaning of the Family Law Act 1995.

- (iii) It is to be noted that the loan conditions specifically provided that documentation could be served at the address provided in the loan agreement, and condition 22 said:

22.1 Notices under this Agreement or any provision of the Consumer Credit Act or any regulations made thereunder may be delivered to you by hand or sent by prepaid ordinary post in an envelope at the address specified in this Agreement or any altered address as may be advised to our branch referred to on page 1 above.

22.2 A communication so addressed and posted shall be deemed to be received and shall (in the absence of evidence to the contrary) be deemed to be duly served for the purposes of the Consumer Credit Act at noon on the second business day (not being a Saturday) following the effective date of posting or on the date when it would be delivered in ordinary course of post, if later.

- (iv) Correspondence sent by the applicant to the second respondent on 21 September 2015 (and purportedly signed by the applicant) was headed as follows:

*Damien Brennan
East Point House
The Burrow
Portrane
Co Dublin*

- (v) In an Income and Expenditure Statement submitted by the applicant's accountant to the second named respondent on 12 January 2016 purportedly on behalf of the applicant and his wife ('*East Point House, The Burrows, Portrane, Co. Dublin*'). This document was signed by both the applicant and his wife.

- (vi) In correspondence sent by the Insolvency Service of Ireland to the applicant at *'East Point House, The Burrow, Portrane, County Dublin'*, (whose letter to Mr. Brennan on 22 March 2019 contained the Eircode K36 EH10) which correspondence was acknowledged by the applicant's solicitor in his letter of 9 July 2019 (*'[y]our correspondence addressed to our client has been passed to us'*).

- (vii) In correspondence sent by the applicant's solicitors to the ISI on 9 July 2019 (*'We act for Mr. Damien Brennan of East Point House, the Burrow, Portrane, Co. Dublin'*).

- (viii) In correspondence sent by the applicant's solicitor to the second respondent of 8 December 2020 (*'Mr. Damien Brennan of East Point House, Beach Lane The Burrow, Portrane Co Dublin'*).

- (ix) In a letter exhibited by the applicant from his own psychotherapist and counsellor dated 20 March 2021 (*'Re: Mr. Damien Brennan, East Point House, Beach Lane, The Burrow, Portrane/Donabate, Co. Dublin.'*).

- (x) In a letter dated 22 March 2021 from the applicant's solicitors to the second named respondent (*'We act for Mr Damien Brennan of East Point House, Beech Lane, The Burrow, Portrane'*).

47. One would expect the applicant to provide by way of response to this evidence, some explanation that would allow the court to conclude that, notwithstanding the foregoing,

the difference between the address given by him on these various occasions and used for service, and what he now says was actually his address, was material. In point of fact – and having regard to the foregoing this is particularly surprising – the applicant himself does not respond to the affidavit evidence tendered by the respondents at all: the only reply is from his solicitor, which takes the form of two affidavits – one sworn on 1 June 2021 and the second on the 14 July.

48. In these affidavits, the applicant’s solicitor says as follows:

- (i) The loan offer and the Family Home declaration were prepared by National Irish Bank, while the letter of 21 September 2015 and Income and Expenditure account of 12 January 2016 were prepared by an accountant. *‘In view of Mr. Brennan’s serious health issues the errors were overlooked and were not signposted to him at the time of execution of the said documentation’.*
- (ii) The two addresses are not *‘interchangeable’*, in which connection reference is made to Mr. Downey’s report and to the Eircode reference for the property.
- (iii) In his second replying affidavit, the applicant’s solicitor says the following:

‘... in respect of correspondence sent in the early stages of this office’s involvement, there were inaccuracies contained therein due to the difficulty in obtaining precise detailed instruction and the lack of all documentation pertaining to the bankruptcy application. Your deponent incorrectly referenced the actual incorrect address of the Applicant as

East Point House, The Burrow, Portrane, County Dublin as the Square, Donabate, County Dublin for which I apologise to this Honourable Court.

... in respect of the correspondence sent to Danske Bank, the Bank required an address to be nominated in order to access documentation. As access to documentation was the essential purpose of that correspondence, this office included the address which we suspected Danske Bank had on file. Clearly, Danske Bank will not release the documents if they believe the address nominated in correspondence is incorrect. The correspondence sent to Danske Bank should be understood in the context of co-operating with Danske Bank, and ought not to reflect on the merits of the within application for an extension of time to appeal'.

49. These explanations only serve to expose the absence of any evidence from the applicant or, for that matter, from his wife explaining how – if the address *East Point House, The Burrow, Portrane, County Dublin* did not (as the applicant contends) correspond to his actual address, this was the address given by them repeatedly to others, including the second respondent. If it had been the case that the applicant was presented with important banking documentation containing an incorrect address for him – and which he did not provide himself to the second respondent - and he nonetheless signed it because it was ill and did not notice the error, he should have so averred. His wife was not ill (or at least there is no suggestion in the evidence before the Court that she was), but she also signed documents recording this as her address.

It is to be here again noted that the applicant and his wife agreed that this was the address to be used by the second respondent for service of certain documents.

50. The fact that correspondence came from the applicant's accountant does not explain how the accountant made the same error (and again where he got the address from) and no explanation at all is provided for how the psychotherapist made the mistake of referencing '*The Burrows*' in the address she gave (although she did refer to '*Beach Lane*'). It will be particularly noted that in his letter of 9 July 2019 to the ISI that the applicant's solicitor referred to his client of being '*of*' the very address which, it is now claimed, does not actually exist. Where the address came from is not explained, beyond that it was an error. Nor is it explained what, precisely, was meant by the strange claim in the letter of 9 July 2019 that this was a '*communal post box*'. Neither is it explained why, instead of providing the second named respondent with an address for the applicant now contended to be the wrong address, the second named respondent was not simply advised that the address which the solicitor '*suspected Danske Bank had on file*' (itself a cryptic proposition) was not the applicant's actual address.

51. Together with the fact that some correspondence sent to this address was received by the applicant, that the address used for service recorded correctly the name of the applicant's house, that there is no evidence that there is another house of that name in Portrane, and that the evidence is that '*The Burrow*' was used to designate the area in which the applicant's home was located, the failure of the applicant to provide an explanation as to how he himself used the address at which the proceedings were served mandates the conclusion on the evidence before the court that the omission of '*Beach Lane*' and/or inclusion of '*The Burrow*' were (if errors at all) not material, and

renders it impossible to conclude that the use of that address is a factor that in any way directs the '*balance of justice*' towards allowing an extension of the time to appeal.

(b) When and how did the applicant learn of the bankruptcy order?

52. The second relevant factor is closely related to the first. Given that the central point made by the applicant as regards the orders for substituted service and the original bankruptcy order is that he was never served with the proceedings and, therefore, was neither aware of them nor in a position to form an intention to appeal within the relevant time period, the point at which and means by which the applicant actually became aware of the orders is critically important. Without knowing when he found out that the bankruptcy order had been made, it is impossible to determine the point at which, acting reasonably, the applicant ought to have appealed, and without knowing *how* he found out it is not possible to ascertain whether in fact he ought to have learnt of the orders sooner.

53. However, the applicant is vague as to when he discovered that the order had been made, and provides incomplete account of how this came to light - the fact that his brother discovered that such an order was made through on-line searches illuminates little without an explanation of what prompted him to conduct the search leading to that discovery in the first place. The lack of clarity around when and how the applicant learnt of the bankruptcy order, and his failure to attest to this in a direct and forthright manner is less than helpful.

54. That said, the evidence that he has put before the court is consistent only with his having learnt of this *before* 8 July 2019: he says that he approached his mother about the matter and that she made contact with Mr. Flynn, who ‘*made certain inquiries*’. We know that those inquiries were made on 9 July 2019.

(c) *The applicant’s incapacity*

55. Third, while the applicant and his solicitor both aver as to his suffering from stress and mental health issues, in the absence of appropriate medical evidence this is vague and is not sufficient to enable the court to conclude that there was, as the applicant must establish, good reason why appeals were not brought timeously upon the applicant becoming aware of the orders and, specifically, that the applicant was not in a position to give instructions to his solicitor. It will be recalled that the letter of 9 July 2019 sought the papers and advised of instructions ‘*to seek to have same set aside*’. There is no medical evidence before the court from which it could be concluded that the applicant was not in a position to give those instructions.

56. In particular, while there is certainly evidence before the court that the applicant has, since 2019, been unwell with cardiovascular issues and was suffering from stress to the point that he was unable to work, and while as his counsel emphasised in his oral submissions there is material showing that the second respondent was on notice that the applicant was in 2019 in poor health, there is *no* expert medical evidence suggesting that these issues could have impeded or prevented the applicant in any real or practical sense from understanding or participating in the bankruptcy process, or from instructing a Personal Insolvency Practitioner or solicitors to act on his behalf. Indeed,

that evidence does not even clearly establish that the applicant was undergoing treatment of a kind that would have affected his ability to deal with these matters when he learnt of the bankruptcy orders (whenever, exactly, that was).

57. This, it must be said, is more than a merely technical omission in the applicant's proofs having regard to the evidence given by the applicant and, indeed, his solicitor. Proper medical evidence of the applicant's inability to give instructions (had it been tendered) would have identified the exact reason he was unable to give instructions and would have indicated – at least approximately – when the applicant *was* in a position to give instructions to proceed with his appeal. For example, on 8 October 2020 his solicitor provided the Official Assignee with some outstanding information sought by him (including a Statement of Affairs), suggesting both that the applicant was by then in a position to give instructions and that he was proposing to co-operate with the bankruptcy process: in that same letter the solicitor threatened a set aside application on behalf of the applicant's wife (but not the applicant). Even from that point, seven months elapsed before this application was brought. Indeed, the applicant himself does not anywhere actually state precisely *when* he was in a position to give instructions.

(d) Assessment

58. It follows from the foregoing that the applicant has not established that the address used for service of the bankruptcy papers was materially wrong, that based on the evidence before the court that he knew by July 2019 of the making of that order and that he has not laid an evidential foundation for his claim that he lacked capacity to instruct lawyers to represent his interests in relation to the bankruptcy at that time. In

particular, it is clear from his own evidence that at some (unspecified) point in 2020 he was in a position to give instructions in relation to the matter and at the very latest was able to do so by October 2020. Viewed in that light, the application to extend time depends on his not having the documentation required to prosecute his appeal.

59. I cannot see any version of the '*balance of justice*' that would, on these facts, countenance an extension of time to appeal of twenty-two months pending receipt of the papers used to obtain the bankruptcy adjudication. It is certainly the case that the applicant's solicitor sought those papers from the first respondent in July 2019, following up that request on 19 August 2019. That letter was not responded to until September 2020, and the papers themselves were not in his possession until March 2021 (when, the evidence is, the solicitor had to use his own funds to pay the €615.00 required to obtain their release).

60. But putting to one side the fact that it is hard to assess the strength of this factor without knowing what papers and correspondence regarding the bankruptcy the applicant had actually received (and it should be repeated that it is clear that he had some documents but does not specify what they were), and no matter how sympathetically one might wish to view the applicant's predicament, by the time the letter of 9 July 2019 was sent to ISI the applicant was already out of time to appeal the making of the bankruptcy order. ISI was not the party that had petitioned for the bankruptcy and was thus not responsible for the alleged failure of service, and it was not until December 2020 that contact was made with the second respondent. Even at that point, the second respondent was not asked by the applicant for the papers nor was it interrogated as to how they had been served.

61. By then, the applicant was already represented before the court, yet the court itself does not appear to have been approached for another three months. From October 2020 (by which time the applicant clearly understood he had been the subject of a bankruptcy order, was claiming that he had not been served with the petition and was, on his own account, in a position to deal with the matter) the applicant – far from pressing for the papers to see how he had been made bankrupt without his knowledge – was acting as if he was co-operating in the bankruptcy. And even ignoring all of this, two months elapsed from actually obtaining the papers to his proceeding with his application for a late appeal. Bearing all of these factors in mind, it must be emphasised that one important aspect of the ‘*balance of justice*’ is the entitlement of parties who have obtained final orders to rely upon them thereafter, and the avoidance of the uncertainty that attends the unravelling of those orders many years after they were made (*Goode Concrete v. CRH plc* at para. 3.3, *Havbell v. Flynn* [2020] IECA 303 at para. 54).

62. In these circumstances it is difficult to see how the applicant can say he formed the intention to appeal the bankruptcy order or orders for substituted service only at the point at which he learned of the latter, harder again to see how he can explain the lapse of more than 28 days from that point, and impossible to see what his ground of appeal actually is. He never identifies any substantive ground of appeal he has against the bankruptcy order: he goes no further than to say that he was deprived of the opportunity of engaging in the personal insolvency process, and that the failure to serve him gives rise to a ground of appeal against it. However, the service was in compliance with the

orders of the court, and the address used was – as I have found – not materially incorrect.

63. And insofar as those orders for substituted service were concerned, while the applicant raises issues around the quality of the evidence used to obtain these orders, the basic fact that numerous attempts had been made to serve him at the property called ‘*Eastpoint House*’ is not disputed and, it follows from its use by the applicant himself, that (a) the second respondent was not acting unreasonably in using that same address and (b) that the applicant has not established that documents sent to that address would not in normal course reach him. In these circumstances (and aside from everything else) I can see no basis for any arguable ground of appeal against these orders.

64. Before leaving these orders I should make one final point. The normal course of action where a party contends that an order made in their absence and where they say that they were not properly served with it is to apply to set it aside (see *Pepper Finance Corporation (Ireland) DAC v Persons Unknown in Occupation of the Property Known as 21 Little Mary St, Dublin 7* [2021] IECA 277 at para. 87). The respondents in this application did not make any issue of the failure of the applicant to do this. In those circumstances I have proceeded to address the matter without regard to this consideration.

The merits of the appeal against the order extending the bankruptcy

65. With regards to the order extending the bankruptcy, the applicant contends this order was granted after he was automatically discharged from bankruptcy. He was to be

discharged on 3 March 2020, but the order was made on the 16 March. Therefore (he says) there was no extant bankruptcy to extend.

66. Section 85A of the Bankruptcy Act 1988, as amended, provides as follows:

'85A. — (1) The Official Assignee, the trustee in bankruptcy or a creditor of the bankrupt may, prior to the discharge of a bankrupt pursuant to section 85, apply to the Court to object to the discharge of a bankrupt from bankruptcy in accordance with section 85 where the Official Assignee, the trustee in bankruptcy or the creditor concerned believes that the bankrupt has —

(a) failed to co-operate with the Official Assignee in the realisation of the assets of the bankrupt, or

(b) hidden from or failed to disclose to the Official Assignee income or assets which could be realised for the benefit of the creditors of the bankrupt.

(2) An application under subsection (1) shall be made on notice to the bankrupt and where made by the trustee in bankruptcy or a creditor, notice shall also be given to the Official Assignee.

(3) Where it appears to the Court that the making of an order pursuant to subsection (4) may be justified, the Court may make an order that the matters complained of by the applicant under subsection (1) be further investigated and pending the making of a determination of the application the bankruptcy shall not stand discharged by virtue of section 85.

(4) *Where the Court is satisfied that the bankrupt has —*

(a) failed to co-operate with the Official Assignee in the realisation of the assets of the bankrupt, or

(b) hidden from or failed to disclose to the Official Assignee income or assets which could be realised for the benefit of the creditors of the bankrupt,

the Court may, where it considers just to do so, order that, in place of the discharge provided for in section 85, the bankruptcy shall stand discharged on such later date —

(i) being not later than the 8th anniversary of the date of the making of the adjudication order, as the Court considers just, or

(ii) being not later than the 15th anniversary of the date of the making of the adjudication order, which the Court considers just in view of the seriousness of the failure to co-operate referred to in paragraph (a) or the extent to which income or assets referred to in paragraph (b) were hidden or not disclosed, or both, as the case may be.

67. In the absence of authority addressing this specific issue, I think it clear that the applicant has an arguable ground of appeal on this question. Section 85 provides that every bankruptcy shall, on the first anniversary of the date of the making of the adjudication order in respect of that bankruptcy, unless prior to that date the bankruptcy has been discharged or annulled, stand discharged. This is subject to *inter alia* s. 85A. That provision enables an application to court *prior to the discharge of the bankrupt*.

No such application, the applicant says, was made and, clearly, the court did not make any order prior to the first anniversary. Moreover, he says that the requirement of an application to court is not satisfied by the issuing and service of a motion before that date because there is no provision suspending the discharge between the expiry of the first anniversary of the bankruptcy order, and the actual making by the court of an order under s. 85A(4).

68. In *Seniors Money Mortgages*, the court was clear that ‘*the threshold of arguability may rise in accordance with the length of the delay*’ (at para. 65), and in this case - even in relation to just the discrete issue of the extension of the bankruptcy - the delay was very substantial. The order was made on 16 March 2020, it is not denied that the applicant was served with the papers for the motion, and the applicant’s own evidence is that he knew that it was proposed to make the application to extend the bankruptcy. There is no evidence that the applicant was not aware of the order shortly after it was made, he was certainly aware of it when his solicitor engaged in correspondence in October 2020, and the application was not brought until May 2021. The fact and date of the extension order, it should be said, is recorded on the Courts Service website and, again, is contained in the extract exhibited by the applicant. On his own evidence, the applicant was in better health as 2020 progressed. And even if all of that is wrong, it still took two months to issue an application to extend time for appeal from the point at which the applicant’s solicitor had all the papers.

69. It is therefore critical that there is a strong counterpoint to the contention that the extension order could not be made after the expiry of a year. In many different circumstances the courts have held that legislative provisions requiring the bringing of

an application to court within strict time limits are triggered when a motion seeking the relevant relief is issued and served on the opposing party. This was most notably the conclusion reached in *KSK Enterprises Ltd. v. An Bord Pleanála* [1994] 2 IR 128, when the Supreme Court decided that an application for leave to seek judicial review for the purposes of s. 19(3B)(a) of the Local Government (Planning and Development) Act 1992 (which had to be ‘made’ within two months of the date of an impugned decision) was so ‘made’ when the motion was issued and served on all affected parties. Part of the reason for that conclusion was the view of the court that to decide that an application could only be made for leave to apply for judicial review under the section where an actual application of some description was made in court or where it could be established that an application would have been made in court if the court had been able to reach it in a list on the day concerned, was to create too imprecise a cut-off point in time for the making of an important application. A similar conclusion was reached by the Supreme Court in construing s. 39(1) of the Criminal Justice Act 1994, as amended, in *Reilly v. Director of Public Prosecutions* [2016] IESC 59.

70. Many of these same considerations apply in relation to the legislation in issue here. It would arguably frustrate the legislative intent were the Official Assignee fixed with a strict time limit of one year before which he had to not only issue and serve, but also have heard and determined an application for an extension of the bankruptcy period (even an interim extension). This would leave the matter exposed to the vagaries of the court lists, his ability to serve the bankrupt, and the fact of his having done so in sufficient time in advance of the one-year period to allow the bankrupt instruct counsel and deliver such opposing evidence as he required. It is – to say the very least – plausible to say that ss. 85 and 85A should be construed so that the period of one year

fixed by s. 85 expires unless an application is made under s. 85A by the issuing and service of a notice of motion in accordance with s. 85A(2). Upon the issuing of such a motion, the bankruptcy continues unless and until an order is made refusing that application, or (if an order is made under s. 85A(4) or (5)) continuing the bankruptcy accordingly.

71. I must stress that I am not deciding this issue one way or the other: the point is that the applicant's contention is not unanswerable and that there is a credible argument supported by potentially analogous authority, to the contrary.

The balance of justice and the appeal against the order extending the bankruptcy

72. However, while the fact of an arguable appeal is critical to an application to extend time for appeal, it is not dispositive of it. It is to be repeated that the application to extend time is being made fourteen months after the order which it is sought to appeal. This is, on any version, a significant delay, and it is clear that '*where there is a significant delay before seeking an extension, the applicant will need to show a correspondingly strong case*' (*Seniors Money Mortgages* at para. 71). In that case, the period was one year, and that was variously described as '*inordinate*' and '*significant*'.

73. Here, there are weighty considerations that lean against the exercise of the court's discretion in favour of the applicant, even on this ground. I have referred to all of these earlier, but in summary, first, the applicant never denies that he was served with the motion to extend time and, indeed, avers that he knew that the first respondent intended

to seek such an extension of time. At para. 5 of his affidavit sworn on 5 May 2021 he said the following:

*'I say and believe that, over the course of 2020, your deponent's health began to improve. Your deponent became aware that the bankruptcy process was still ongoing and that the Official Assignee **intended to apply** for an extension of time'*

74. Yet, there is no explanation for his failure to appear to oppose the application. As I have noted, there is no medical evidence that he was so unwell that he could not give instructions, and on his own evidence he was at some point in 2020 better (although he fails to identify when).

75. Second, he fails to explain when he became aware of the making of this order. For the reasons I have outlined earlier, the court cannot be expected to exercise its discretion so as to extend the time to appeal an order when the applicant fails to identify when, if not how, he actually became aware of the order.

76. Third, while a deal of emphasis is placed on the fact that the applicant's solicitor did not have the papers, he had the information required to appeal this aspect of it – the date of the bankruptcy order and the date of the extension – and, if not, these could have been easily established.

77. Fourth, and, in any event, he did not move within 28 days of obtaining the full set of papers on 11 March. Having failed to appear at the application for an extension, the applicant did nothing for thirteen months to appeal the matter. He continued to treat

with the Official Assignee in the bankruptcy process, never once suggesting that the continued bankruptcy in which he was participating was, in fact, invalidly proceeding.

78. I cannot see, in these circumstances, how the applicant can establish either that he formed a *bona fide* intention to appeal within the prescribed time or that the failure to appeal within that time is explicable by reference to some factor akin to a mistake. Finally, in assessing that balance it is relevant (but not in itself dispositive) that the High Court has at this point made only an interim order extending the bankruptcy. It remains open to the applicant to resist the extension of the bankruptcy by, *inter alia*, demonstrating his co-operation with the first respondent.

Conclusion

79. In conclusion, the Supreme Court in *Senior Money Mortgages* has made clear the flexibility of the court's discretion in determining whether to extend time for an appeal. In this case, it is my view that that discretion should be exercised against such an extension of time. In reaching that conclusion – and conscious in particular of the requirement emphasised by Collins J. in *Havbell v. Flynn* at para. 50 that the court have regard to whether a refusal to extend time may produce an '*unjust result*' - I repeat and underline the following features of the case.

(a) The period of delay in this case in seeking an extension of time to appeal the bankruptcy order is some 22 months. This is clearly both inordinate and significant.

- (b) By 9 July 2019 solicitors had been engaged who were acting for the applicant and who were saying that relevant correspondence had been passed to them and had instructions to bring an application to appeal.
- (c) The application is dependent upon the applicant's claim that the relevant papers were served at an incorrect address. It has not been established that the alleged error in the address used for service (that is the omission of '*Beach Lane*' or the inclusion of '*The Burrow*') constituted a material error, and it is in particular clear that *some* papers sent to that address were received by the applicant.
- (d) In particular, at no point is there any suggestion in the evidence that there are two houses called '*East Point House*' in the relevant area and indeed the planning report exhibited by the applicant's solicitor makes it clear that this is the name of the applicant's house *and* that that house is in an area which is called '*The Burrow*'. It is relevant that the evidence is that none of the papers or correspondence sent by the respondents was returned.
- (e) Moreover, the contention that this address was wrong is directly and clearly contradicted by a significant number of documents in which that same address was acknowledged/and or provided by him and/or different advisors acting on his behalf. The applicant has not himself explained how it came about that this address was used by him.

- (f) Insofar as the applicant contends that he was by reason of his medical condition unable to either comprehend the situation in which he found himself or to give instructions to his solicitors this has not been established by sufficient evidence.
- (g) The applicant has not proven that he has an arguable ground of appeal in relation to the orders granting substituted service or adjudicating him a bankrupt.
- (h) While he has established an arguable case that the extension of the bankruptcy was effected in error having regard to ss. 85 and 85A of the 1988 Act, he should not be afforded an extension of time to make that case having regard:
 - (i) To the fact that there is a credible counterpoint to this contention.
 - (ii) To the long period that has expired since the order was made.
 - (iii) To the evidence that confirms the knowledge of the applicant that such an application was to be made to the court.
 - (iv) To the absence of any evidence that the applicant was not served with the papers for that application.
 - (v) To the fact that the applicant following the making of that order continued to treat with the bankruptcy process without suggesting at any point until the issuing of this motion in April 2021 that he adopted the position that, in fact, his bankruptcy had concluded.

80. I also believe that some significance should be attached to the coy manner in which the applicant has negotiated important aspects of this case. I have noted his failure to himself reply to aspects of the respondents' affidavit evidence. But aside from this (a) he never engages with the issue of whether the property described by those who assert that they deposited documents there corresponds with the description of his home, (b) he does not explain when precisely his brother ascertained that he had been adjudicated bankrupt, (c) he does not explain *why* his brother came to check the Courts Service website, (d) he is vague about what documents he actually had, (e) there is an unacceptable lack of clarity around whether correspondence was actually received from ISI before 9 July 2019 and (f) there is a notable – and in my view significant – lack of clarity around when exactly he claims he was in a position to raise these issues.

81. This application must, accordingly, be refused. It is my preliminary view that costs must follow against the applicant. If the applicant wishes to contend otherwise he should notify the Court of Appeal office within fourteen days of the date of this judgement, whereupon a date will be fixed to deal with costs. Faherty J. and Binchy J. agree with the order I propose and the reasons for it.