



THE COURT OF APPEAL

UNAPPROVED

Neutral Citation No. [2021] IECA 60
Court of Appeal Record Number: 2021/70
High Court Record Number: Bankruptcy 3872P

**Costello J.
Haughton J.
Murray J.**

**IN THE MATTER OF A BANKRUPTCY PETITION
BETWEEN ALLIED IRISH BANKS PLC
AND JAMES FLYNN
AND**

**IN THE MATTER OF AN APPLICATION
BY EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY
PURSUANT TO ORDER 17, RULE 4
OF THE RULES OF THE SUPERIOR COURTS**

BETWEEN/

ALLIED IRISH BANKS PLC/EVERYDAY FINANCE DAC

PETITIONER/RESPONDENT

- AND -

JAMES FLYNN

RESPONDENT/APPELLANT

JUDGMENT of Ms. Justice Costello delivered on the 14th day of March 2022

1. The issue in this appeal is a net one: whether the High Court (Pilkington J.) was correct to order that the bankruptcy petition issued by AIB plc (“AIB”) be carried on between Everyday Finance DAC (“Everyday”) as petitioning creditor and James Flynn (“the appellant”) pursuant to O. 17, r. 4 of the Rules of the Superior Courts.

Background

2. The facts may be briefly stated. On 20 April 2016, the appellant consented to judgment in favour of AIB in the sum of €2.5m. in the High Court. The judgment was obtained on

foot of a personal guarantee of the liabilities of Fortberry Limited to the bank. The judgment was not satisfied and on 17 July 2017 a bankruptcy summons issued against the appellant upon the application of AIB. The bankruptcy summons was served on the appellant on 16 August 2017 and no sum was discharged within the 14 days allowed therein. The appellant did not challenge the validity of the bankruptcy summons. On 14 November 2017, AIB issued a petition seeking to adjudicate the appellant bankrupt. The act of bankruptcy relied upon was the failure to pay the sum claimed in the summons. On 8 March 2018, the appellant swore an affidavit in the bankruptcy proceedings stating that he proposed to seek a protective certificate (a “PC”) under the Personal Insolvency Acts 2012-2015 (“the Act of 2012”) and he exhibited his application for a PC. The application included a personal financial statement (a “PFS”) verified by a statutory declaration acknowledging the appellant’s indebtedness to AIB in the sum of €2.5m. On the basis that the appellant was seeking, and subsequently obtained, a PC from the Circuit Court, he was granted several adjournments in the bankruptcy proceedings.

3. The appellant appointed a personal insolvency practitioner (“the practitioner”) to act on his behalf. Having obtained a PC from the Circuit Court, the practitioner proposed a personal insolvency arrangement (a “PIA”) on behalf of the appellant. The proposal for the arrangement was not supported by the majority of the creditors of the appellant. On the instructions of the appellant, the practitioner brought an application under s. 115A of the Act of 2012 asking the High Court to confirm the coming into effect of the proposed arrangement, notwithstanding that it had not been supported by the requisite majority of the appellant’s creditors.

4. On 2 August 2018, AIB and Everyday entered into an Irish Law Deed of Conveyance and Assignment and an Irish Law Deed of Transfer whereby, according to AIB and Everyday, Everyday acquired all the interests of AIB in the loans the subject of the transfer,

including all interests in the underlying security. They say this included, *inter alia*, the judgment debt owed by the appellant to AIB and the extant bankruptcy proceedings.

5. One of the matters of which a practitioner must satisfy the court on an application brought under s. 115A(9) of the Act of 2012 is that at least one class of creditors has accepted the proposed arrangement by a majority of over 50% of the value of the debts owed to that class. The case made by the practitioner on behalf of the appellant was that this condition had been satisfied in circumstances where one creditor of the appellant, Carley & Connellan Solicitors, voted in favour of the proposed arrangement. The practitioner contended that Carley & Connellan constituted a separate class for the purposes of s. 115A(9)(g). This was disputed by the objecting creditor, Everyday. Everyday acted as the *legitimus contradictor* to the application of the practitioner in the hearing before the High Court (McDonald J.) of the s. 115A application.

6. An affidavit was sworn by Mr. Darren Das on 27 February 2019, on behalf of Everyday, averring to the transfer of the loan and securities. He said:-

“I say and believe that by way of Irish Law Deed of Conveyance & Assignment and by way of Irish Law Deed of Transfer dated 2 August 2018 between the (sic) Allied Irish Banks, P.L.C.(hereinafter the “Original Lender”) and the Objecting Creditor, the Objecting Creditor acquired all interests of the Original Lender in the Loans, save the [appellant’s credit card], the subject matter of the within application including all interests in the underlying security.”

7. The balance of his affidavit proceeded on the basis that Everyday was the successor in title to the debt owed by the appellant to AIB and which was acknowledged in his application for a PC and in the proposed arrangement presented by the practitioner to the creditors and to the court. Replying affidavits were sworn both by the practitioner and the appellant. Neither contested the validity of the assignment or disputed that Everyday was

the successor in title to AIB and a creditor of the appellant in the sum of €2.5m. Neither sought further proof of the assignment and transfer. The practitioner acknowledged that a number of debts were sold and transferred during the PC period. The appellant referred to AIB as the “*objector’s predecessor*” in para. 14 of his affidavit and at para. 48 he said “*I say that the bank sold the company debt [of Fortberry limited] to Everyday Finance Limited*”. At para. 60 he stated “*I say and believe that my arrangement is not unfairly prejudicial to the objector*” and at para. 63 he said that there was no evidence “*that the objector would fare better in bankruptcy and achieve a greater euro return [than] (sic) has been provided.*” The appellant did not deny that the proposed arrangement would require the objecting creditor, Everyday, to accept a write-off of the sum of €2,591,904.17, which represented 99.57% of the sum owing to Everyday.

8. On 11 November 2019, McDonald J. in the High Court gave judgment on the application pursuant to s. 115A of the Act of 2012 ([2019] IEHC 752). At para. 3 he held that the appellant owed the sum of €2,603,054.84 to “*Everyday as successor in title to Allied Irish Banks Plc*”. At para. 24 he confirmed that each of the unsecured creditors listed at para. 3 (which included Everyday) had a right to claim against the appellant the full amount of the debt due to them. At para. 29 he again reiterated that Everyday retained the right to pursue the appellant in respect of his personal liability on foot of the guarantee given by him in respect of the debts of his company, Fortberry Limited. He held:-

“29. ... In fact, the only right which Everyday has against Mr. Flynn is a purely personal right to pursue him on foot of the judgment for payment of a debt. In circumstances where none of the debts is disputed, this is precisely the same right as any of the other unsecured creditors have. The fact that Everyday holds security over the property of Fortberry does not affect this conclusion. Crucially, Everyday holds no security over the property of Mr. Flynn. As an unsecured creditor of Mr. Flynn,

Everyday retains the right to seek repayment from him notwithstanding its concurrent right to rely on its security against Fortberry.” (emphasis added)

9. McDonald J. held that the debt due to Carley & Connellan Solicitors was not in a separate class to the other unsecured creditors of the appellant. In those circumstances, he held that the conditions set out in s. 115A(9)(g) of the Act of 2012 could not be satisfied and, as a consequence, the application made by the practitioner under the section must fail. With the dismissal of the s. 115A application, the PC lapsed, and it was open to the creditors to pursue the appellant for his debts.

10. On 4 September 2019, solicitors for Everyday issued a motion in the bankruptcy list seeking:-

“An Order pursuant to Order 17, Rule 4 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court substituting Everyday Finance Designated Activity Company of 16 Briarhill Business Park, Ballybrit, Galway being a company incorporated within Ireland for the Petitioner in the above entitled proceedings and that the proceedings shall be carried on with Everyday Finance Designated Activity Company as Petitioner.”

11. The application was made on the basis that the loan and judgment debt underlying the petition had been sold by AIB to Everyday. It maintained that an event had occurred within the meaning of O. 17, r. 4 since the commencement of the bankruptcy proceedings whereby the interest of AIB in the facilities, and underlying security, and the proceedings themselves had been wholly transferred to Everyday. It said that this had occurred in such a manner that it was necessary and expedient that Everyday should now be made a party in the proceedings, and that the proceedings should continue thereafter in the sole name of Everyday in place of AIB.

12. The appellant swore a replying affidavit on 12 February 2020. The points he made were succinctly summarised by the trial judge at para. 12 of her judgment as follows:-

- “(a) That he has not committed an act of bankruptcy in respect of Everyday.*
- (b) The penal effect of any adjudication of bankruptcy upon any person is highlighted.*
- (c) The query is re-iterated as to whether AIB’s judgment has been transferred to Everyday and equally whether the relevant guarantee has been transferred.*
- (d) That if Everyday wishes to petition for his bankruptcy, it should make an application for a bankruptcy summons which would afford him an opportunity to seek its dismissal.*
- (e) That in the current circumstances, this Court could not investigate the merits of the dispute for the dismissal of the bankruptcy summons and he has an issue in respect of it in the present circumstances.*
- (f) That he would suffer a very real and grave prejudice if Everyday were permitted to carry on AIB’s petition as it would deny him an opportunity to set aside the bankruptcy summons obtained by Everyday rather than AIB.*
- (g) That there is an ulterior purpose defence in respect of AIB and it would be unfair if AIB were permitted to sidestep that defence by transferring the loan.*
- (h) That what is transferred is not related to the matters against which judgment was obtained against him.”*

13. In submissions to the High Court, the appellant argued that the Bankruptcy Act 1988 (as amended), together with O. 76 of the Rules of the Superior Courts constituted a discrete and self-contained bankruptcy code. Accordingly, it was contended, O. 17, r. 4 had no application to bankruptcy proceedings. Secondly, he said that there must be strict adherence to the criteria laid down in the legislation in the enforcement of any bankruptcy summons.

He asserted that if the motion was granted, Everyday will not be obliged to issue and serve a bankruptcy summons and the appellant will have no opportunity to challenge such a summons on the basis that the judgment debt had not been validly transferred to it. It was also argued that the granting of the order would deprive the appellant of the opportunity of challenging the validity of the purported transfer at the hearing of the bankruptcy petition itself.

The decision of the High Court

14. The trial judge first considered the argument that Everyday was obliged to issue its own bankruptcy summons and that it could not proceed on foot of the summons which had been issued by AIB. At para. 18 of her judgment she said:-

“18. The bankruptcy summons was properly issued and pursuant to its terms Mr. Flynn, upon a failure to discharge the debt, has committed an act of bankruptcy. If the court were to accept the suggestion(s) on the part of the respondent as to how the matter should now proceed, then in my view issues surrounding this bankruptcy summons and the act of bankruptcy committed by Mr. Flynn remain unresolved, in the face of a valid summons.”

15. Thus, the trial judge was not satisfied that the appellant was entitled to require an assignee of a debt to issue its own bankruptcy summons in order to establish that an act of bankruptcy had occurred and, in order that the debtor could challenge the assignee's bankruptcy summons.

16. At para. 19 she said:-

“I am also far from satisfied that the issues raised on behalf of the respondent debtor are not open to him in respect of any petition for the adjudication of Mr. Flynn as a bankrupt. The express criteria within s. 11 of the Bankruptcy Act, 1988 (as amended)

must still be satisfied as well as the remaining criteria for any adjudication in bankruptcy.”

She continued “*much turns upon the Deed of Transfer from AIB to Everyday*”.

17. At paras. 22 and 23 she held:-

“22. I am satisfied that the transfer itself is valid and its effect clear pursuant to its terms; the interests clearly stated and delineated above are, from 2nd August 2018, transferred to Everyday. The only outstanding issue, in my view, is to determine whether that transfer includes the interests of Mr. Flynn.

23. If this court holds that there has been a valid assignment of Mr. Flynn’s interest, then as AIB’s interest has been transferred to another entity (in this case, Everyday), and I am satisfied that it has been so transferred, then Everyday becomes the petitioning creditor. Self-evidently, consequent upon the assignment of all its interests AIB have no further interest in the debt or any other interest in the monies. These interests have collectively been assigned pursuant to the terms of the deed of transfer.”

18. Relying upon the test in *IBRC v. Morrissey* [2014] IEHC 527, [2014] 2 I.R. 399 she held that she was satisfied that there was sufficient *prima facie* evidence of the transfer of the interests of AIB of the indebtedness of the appellant, which is the subject of the bankruptcy summons in the proceedings, to Everyday. Based upon the decision of this court in *Stapleford Finance Limited (as substituted) v. Lavelle & Anor* [2016] IECA 104, she held that there had been a transfer of interest and that Everyday can be substituted and maintain these proceedings as the petitioning creditor.

The appeal

19. The notice of appeal filed by the appellant sets out nine grounds where he contends the trial judge erred:-

- (a) In permitting O. 17, r. 4 of the Rules of the Superior Courts to be used as a mechanism to substitute a petitioner in a bankruptcy application.
- (b) In investigating the merits of the application rather than refusing it where an issue arose for trial and in thereby permitting Everyday Finance DAC to circumvent the “an issue would arise for trial” standard as set out in s. 8(6)(b) of the Bankruptcy Act 1988.
- (c) In applying a test of “sufficient *prima facie* evidence” which is incompatible with s. 8(6)(b) of the Bankruptcy Act 1988 and the penal nature of bankruptcy.
- (d) In permitting Everyday to prosecute a bankruptcy petition against the appellant, notwithstanding the fact that the appellant has committed no act of bankruptcy in respect of Everyday.
- (e) In permitting Everyday to prosecute a bankruptcy petition against the appellant on foot of a summons and petition issued by a different company.
- (f) In accepting that there has been a valid transfer from AIB plc to Everyday notwithstanding the absence of sufficient proof of this.
- (g) In granting the order notwithstanding the failure of Everyday to obtain leave of the High Court to issue execution as against the appellant.
- (h) In granting the order notwithstanding the failure of Everyday to comply with s. 11(2) of the Bankruptcy Act 1988.
- (i) In granting the order notwithstanding the failure of Everyday to comply with the Rules of the Superior Courts and in particular the following rules of Order 76: Rule 19(1)(c) and (g), Rule 19(4), Rule 20(2), Rule 21, Rule 23 and Rule 28.

The last two grounds of appeal appear to involve new arguments which were not advanced before the High Court. The appellant did not seek leave of this court to raise new grounds

which were not previously advanced by him, nor submit any basis upon which this court ought to permit him to do so.

Discussion

20. The first issue is whether it was open to Everyday to rely upon O. 17, r. 4 in bankruptcy proceedings. The rule provides:-

“Where by reason of death, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability,... it becomes necessary or desirable that any person not already a party should be made a party,... an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the Court upon an allegation of such change, or transmission of interest...”.

21. The first requirement of O. 17, r. 4 is that there is either a death or “other event” occurring after the commencement of a cause or matter. The transfer of a debt is an “event” occurring after the commencement of the proceedings within the meaning of the rule (*Stapleford Finance Limited v. Lavelle* [2016] IECA 104). It was not disputed that this was so (though the validity of the transfer was contested).

22. The issue raised was whether, and if so to what extent, the rule applied to bankruptcy proceedings. The rule applies to “a cause or matter”. While not contending that a bankruptcy *petition* was not a “cause or matter”, counsel for the appellant argued that O. 17, r. 4 did not apply to any bankruptcy *proceedings*. His argument was not confined to *petitions*.

23. As I have earlier noted, he submitted that the Bankruptcy Act 1988 (as amended) and O. 76 RSC comprise a self-contained bankruptcy code and O. 17, r. 4 is not part of this code and, accordingly, it is impermissible to have recourse to it in *any* bankruptcy proceedings.

24. In my judgment, the submission is misconceived. There are many rules other than those in O. 76 which self-evidently do apply to bankruptcy proceedings: for example, O. 40

in relation to affidavits, O. 122 in relation to time limits, O. 5, r. 15 in relation to the presentation of a petition and O. 125 in relation to interpretation and forms (see, *Society of Lloyds v. Loughran* (Unreported, High Court, Finlay Geoghegan J., 2nd February 2004)). In Wiley on *The Judicature Acts (Ireland)* pp. 347-349, there are numerous cases cited in which the predecessor to O. 17, r. 4 was applied to various proceedings involving a bankrupt party. In addition, O. 76, r. 14(1) refers to rules of service in O. 9, r. 2 and O. 76, r. 63 applies the provisions of O. 15 Part II as far as possible to that rule. The fact that there are provisions in O. 76 which apparently duplicate rules appearing elsewhere does not lead to the corollary that it is an impenetrable, self-contained order. Certain rules overlap/duplicate provisions.

25. The ordinary language used in O. 17, r. 4 leads to the conclusion that a bankruptcy petition falls within its terms. There is no reason, in principle, why O. 17, r. 4 should not apply to a bankruptcy petition and counsel for the appellant advanced no authority for the proposition that the rule could not apply a bankruptcy petition. He contended that because there was no analogue within O. 76 permitting substitution in any bankruptcy proceeding it could never occur. I do not accept that this is correct.

26. Finally, I am of the view that the Rules of Court are there to facilitate not to obstruct the conduct of legal proceedings. The construction contended for by the appellant operates to impose a constraint on the progression of a bankruptcy action where a debt has been transferred in circumstances where no good reason for such an obstruction has been articulated. In my view, this construction is and can be correct only if it runs counter to the language of the provision (which it does not) or is clearly required by law. As I am not persuaded that this is so, I cannot agree that it was not open to Everyday to apply to be substituted in the proceedings pursuant to O. 17, r. 4.

27. It is worth observing that in *Kavanagh & Ennis Property Finance DAC v. McLaughlin & Anor.* [2021] IEHC 122, following a transfer of the debt of the debtor, the High Court

made an order under O. 17, r. 4 substituting Pepper Finance Corporation (Ireland) DAC as the petitioner in a bankruptcy petition in place of Ennis, and adjudicated the debtor bankrupt pursuant to a petition presented by Ennis but continued by Pepper. The debtor appealed the order dismissing his application to dismiss the bankruptcy summons and the order of adjudication, but there was no appeal in respect of the order of substitution. The appeal proceeded on the basis of the substitution order made under the rule and this court expressed no concern as to the rule relied upon, though it should be stated that it was not an issue in the appeal (*Ennis Property Finance DAC/Pepper Finance Corporation (Ireland) DAC v. McLaughlin* [2021] IECA 292). Nonetheless, the decision supports the proposition that there is no such fundamental objection to reliance upon the rule in bankruptcy proceedings as was contended by the appellant.

28. The second argument advanced by the appellant was based upon his challenge to the validity of the assignment. He argued that the assignment is not a valid assignment, that the proofs advanced were flawed, and that he must be afforded an opportunity to challenge the validity of the assignment. He contended that he was entitled to challenge the assignment by challenging the bankruptcy summons rather than at the hearing of the petition.

29. There are two principal difficulties with this approach. First, the appellant contends that he committed no act of bankruptcy “*in respect of Everyday*” and that Everyday has never served a bankruptcy summons on the appellant. He says he has been thereby deprived of the opportunity to challenge a bankruptcy summons issued by Everyday and has, as a result, been placed “*at a profound disadvantage*”. However, this submission ignores the nature of an act of bankruptcy: it is not necessary that it be personal to the petitioner. The appellant takes – and took – no issue with the bankruptcy summons issued by AIB which was served on him on 16 August 2017. As he failed to pay or otherwise compound with his summoning creditor, he has committed an act of bankruptcy. As the trial judge said at para.

18 of her judgment, there was a valid bankruptcy summons and the failure to pay amounts to an act of bankruptcy. This act of bankruptcy is not erased because AIB assigned its interest in the judgment debt (and the proceedings) to Everyday. The appellant has committed an act of bankruptcy and it is not necessary to prove a separate, new act of bankruptcy in order for him to be validly adjudicated bankrupt on foot of this act of bankruptcy. Bankruptcy proceedings are collective proceedings. While they may be initiated and prosecuted by one creditor, they are for the benefit of all creditors of the debtor (and indeed, from a certain perspective, the debtor). They are thus different to normal *inter partes* litigation.

30. That acts of bankruptcy need not be personal to the petitioning creditor is evident from the provisions of s. 7 of the Bankruptcy Act 1988 (as amended). This identifies such acts as follows:-

“7. (1) An individual (in this Act called a “debtor”) commits an act of bankruptcy in each of the following cases—

(a) if in the State or elsewhere he makes a conveyance or assignment of all or substantially all of his property to a trustee or trustees for the benefit of his creditors generally;

(b) if in the State or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof;

(c) if in the State or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudicated bankrupt;

(ca) the individual has been subject as a debtor to a Debt Settlement Arrangement which has been terminated under section 83 of the Personal Insolvency Act 2012;

(cb) the individual has been subject as a debtor to a Debt Settlement Arrangement which under section 84 of the Personal Insolvency Act 2012 is deemed to have failed;

(cc) the individual has been subject as a debtor to a Personal Insolvency Arrangement which has been terminated under section 122 of the Personal Insolvency Act 2012;

(cd) the individual has been subject as a debtor to a Personal Insolvency Arrangement which under section 123 of the Personal Insolvency Act 2012 is deemed to have failed;

(d) if with intent to defeat or delay his creditors he leaves the State or being out of the State remains out of the State or departs from his dwelling-house or otherwise absents himself or evades his creditors;

(e) if he files in the Court a declaration of insolvency;

(f) if execution against him has been levied by the seizure of his goods under an order of any court or if a return of no goods has been made by the sheriff or county registrar whether by endorsement on the order or otherwise;

(g) if the creditor presenting a petition has served upon the debtor in the prescribed manner a bankruptcy summons, and he does not within fourteen days after service of the summons pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor.”

31. Many of these do not relate to any particular creditor but rather affect (prejudicially) the entire body of creditors. This reinforces the fact that there is no requirement for Everyday

to prove at the hearing of the petition that there has been an act of bankruptcy personal to it, and that all it must prove is that there was an act of bankruptcy committed by the appellant.

32. The appellant is not unfairly prejudiced by this conclusion. He had the opportunity, if he so wished, to challenge the validity of the bankruptcy summons served upon him on 16 August 2017. He must be taken to have accepted its validity, or at the very least, to have waived his right to challenge it, by his inaction. Section 8(5) of the Act of 1988 permits a debtor served with a bankruptcy summons to “*apply to the Court in the prescribed manner and within the prescribed time to dismiss the summons.*” Once the prescribed time has elapsed, the debtor may no longer challenge the validity of the summons. The provisions of s. 8(6)(b), upon which the appellant relied in the High Court and before this court, can only apply where there is an application to dismiss a bankruptcy summons. There is no such application, hence the reliance upon s. 8(6)(b) is misconceived. The fact that it may be possible to apply to dismiss a bankruptcy summons if a new summons is served on him or her does not mean that a debtor must be afforded an opportunity to do so. It does not introduce an obligation to issue a second bankruptcy summons where there is no basis for requiring a creditor to do so, absent the alleged right to the opportunity to challenge a new bankruptcy summons.

33. It is also worth recalling that the commission of an act of bankruptcy by the appellant had the effect of conferring on AIB the right to petition for his bankruptcy. This right is a legal chose in action within the meaning of s. 28(6) of the Judicature Act (Ireland) 1877, and is a right or chose that is connected to and supports the primary contractual right of AIB in the debt and the monetary judgment obtained against the appellant. AIB presented the petition and by the time of the assignment to Everyday, the chose in action had advanced to the point where AIB had the right to present the petition and seek an adjudication of

bankruptcy. The assignment had the effect of assigning to Everyday the benefit of all steps taken by AIB up to that point in furtherance of AIB's chose in action.

34. It follows that, in my judgment, there is no requirement that Everyday issue and serve a new bankruptcy summons; at the hearing of the petition it may rely upon the bankruptcy summons issued and served by AIB on the appellant, the fact that the appellant has not paid the sum claimed or compounded with AIB and the fact that AIB issued a petition on foot of that act of bankruptcy on 14 November 2017.

35. The second problem with the appellant's claim that the order of substitution deprives him of a fair opportunity to challenge the validity of the assignment of the judgment debt arises from the conduct of the PIA application. The appellant sought a PC with a view to endeavouring to put in place a personal insolvency arrangement, and when he did so he acknowledged the debt due to AIB. He may not go behind that acknowledgement and he has not sought to deny the debt due to AIB. In May 2018, he was notified of the agreement of AIB to sell the loans and related security, including the judgment debt, to Everyday. In August 2018, he and the practitioner were informed that the transfer had occurred. In October 2018, he was contacted by the company appointed to administer the loans by Everyday with details of the new accounts to which payment should be made. There was no doubt that the appellant had ample opportunity to investigate the validity of the assignment and, if necessary, to challenge it. He chose not to do so. I infer that this is because the appellant was anxious to pursue the proposed PIA and thus it was in his interests to accept that Everyday was the assignee of the judgment debt and therefore would be bound by the terms of the PIA, if the s. 115A application was approved by the High Court. It was in his interests that Everyday was admitted as a creditor and the assignee of AIB in the PIA application.

36. There was evidence from a director of Everyday that it was the assignee of the debt. The evidence was not challenged by either the practitioner or the appellant. Neither required further proof of the assignment. They permitted Everyday to participate in the High Court proceedings as the objecting creditor without objection. Everyday's sole entitlement to participate in the proceedings was as an assignee of the debt due to AIB. If it was not the assignee it lacked *locus standi* to play any role in the proceedings, still less that of the objecting creditor. This was expressly accepted by the appellant. The High Court found that Everyday was the assignee of AIB and was a creditor of the appellant to whom €2,603,054.84 was owed. The entire case before McDonald J. was predicated upon this.

37. None of this was brought to the attention of this court, nor, it is to be inferred, to Pilkington J. in the High Court. It seems that the solicitors and counsel in the appeal were not instructed in respect of the PIA application and thus were unaware of details of the appellant's prior acknowledgment of Everyday as the assignee of AIB's interest and as a creditor of the appellant. However, the appellant was so aware, and the court would expect that he would be aware of the significance of the proceedings before McDonald J. He averred in his affidavit sworn in the s. 115A application that he did so "*from a perusal of the files, documents, records, and correspondence relating to my PIA proposal*" and thus he was familiar with these matters even if he did not have the file when he came to deal with his bankruptcy petition. There is no suggestion that either his practitioner or his former solicitors withheld the file from him and his current solicitors. He personally, expressly acknowledged that Everyday was the assignee of AIB. It is difficult to understand why he apparently did not instruct his current representatives of the detail of the PIA application, of his affidavit and of the judgment of the High Court, and why he failed to bring this to the attention of the High Court or this court.

38. In *McLaughlin*, this court recently considered the relationship between a protective certificate, an application for a PIA and bankruptcy proceedings. Haughton J. delivered the judgment, with the agreement of Noonan and Murray JJ. He reviewed the Act of 2012 (as amended) and emphasised the significance of a PC in curtailing the rights of creditors and the requirement that a debtor truthfully and accurately complete a PFS, which is verified by a statutory declaration, as a precondition to obtaining a PC. At para. 54 he stated that once a debtor decides, with the benefit of advice from his PIP, to pursue a PIA “*all ensuing actions and events are predicated on the debtor making full and honest disclosure....*”. The debtor is only entitled to the benefit of the Act of 2012 if he satisfies, *inter alia*, this criterion and, as a consequence, he is bound by the disclosure made in the personal financial statement. Haughton J. approved the passage from *Personal Insolvency Law* (Burke and Comyn, Bloomsbury Professional, 2014) at p. 5 where the authors stated “[i]t is a requirement under the PIA 2012 that a debtor acts in good faith and cooperates fully with the process...”. At para. 57 Haughton J. held:-

“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.”

39. The requirement that a debtor acts honestly and in good faith applies throughout the process. This means that if there is a material change of any of the matters upon which the

application is based the debtor must disclose this fact and, if necessary, amend the information in his PFS. This duty applies even though he may not be responsible for the change in question. For instance, a debt may be paid in full by another debtor who was jointly and severally liable for the disclosed debt so that his liability to that creditor has been discharged. The debt now may be due to that debtor who was jointly liable for the debt, rather than to the creditor disclosed in the PFS. It is essential that the identity of the creditor be altered in his PFS as the new debtor must be entitled to participate in the process and this could have a very material outcome to the approval/rejection of the proposal prepared by the debtor's PIP. It will be necessary for the debtor to decide whether he accepts the change of creditor and to raise any issue he may have as to the identity of his creditor at the time the new creditor asserts its claim in lieu of the original creditor. This applies whether the change is based upon subrogation or assignment and transfer of a debt. Just as the debtor cannot deny the debt admitted in the PFS in subsequent bankruptcy proceedings, the debtor cannot admit the creditor for the purposes of the PIA process and then, when it fails to be adopted, deny that the creditor accepted in that process is a creditor in the context of bankruptcy proceedings.

40. The appellant now wishes to challenge the validity of the assignment to Everyday. He submits, in supplemental submissions, that he is entitled to do so as “[t]he appellant took it at face value that there had been a valid transfer to Everyday, but it is apparent from the papers now available to the Appellant in the context of the Bankruptcy proceedings that there is a significant question as to whether the benefit of the consent judgment has in fact transferred from AIB to Everyday.” He asserts that the proceedings before McDonald J. were “against the backdrop of an assumption that Everyday was in fact a secured (sic) creditor of the Appellant...”. He says there would be a significant injustice if he were bound in the bankruptcy proceedings by a “concession made in the PIA application” when he had

not then seen the transfer documents. Finally, he submits that the identity of the creditor “*was somewhat academic in the context of the PIA application, since both AIB and Everyday seemed equally determined not to agree to a PIA*”.

41. In my judgment, these submissions do not alter the fact that the appellant both expressly and implicitly accepted that Everyday was a creditor and that it was the transferee of the judgment debt owed to AIB. The fact that he did not explore the validity of the transfer and did not discover the (alleged) flaws in the documents of transfer until after the conclusion of the PIA process does not mean that he should now be permitted to do so. He had ample opportunity to challenge the transfer at a time when he had the benefit of legal advice and advice from the practitioner. On the case now made to the court, the identity of the creditor was “academic”, an extraordinary submission which in any event cannot avail him now. In my judgment, it would be wrong to permit the appellant to raise this point now, having sought to rely on a contrary position in the s. 115A application which could have been greatly to his advantage and to the grave disadvantage of Everyday, where he sought to write-off more than 99.5% of its debt against its wishes. He may not adopt two contrary positions depending on the litigious advantage to be had from a particular stance. It will be recalled that s. 50(3) of the Act of 2012 imposes an ongoing obligation of good faith on a debtor who pursues a PIA and he is bound by this continuing requirement. The appellant does not state that he did not have sufficient legal or financial advice at the time of the s. 115A application to enable him to assess the implications of the assignment of the debt, or that he did not have sufficient opportunity to investigate and, if needs be, challenge the validity of the assignment. In my judgment, he should not be permitted to do so in light of his reliance on the validity of the assignment in the s. 115A application in an attempt to gain an advantage to permit him thereafter to challenge the same assignment in order to avoid a detriment. On the facts of this case, it is no longer open to him to contest the validity of the assignment.

He may not do so at the hearing of the petition and he cannot rely on any impairment of his ability to challenge the validity of the assignment as a basis for asserting that Everyday ought not to have been substituted as petitioner in these proceedings.

42. The third argument advanced by the appellant is that it is not possible for the assignee of the judgment debt to meet the mandatory requirements of s. 11 of the Act of 1988 and therefore it is an act of futility to substitute Everyday into the proceedings in place of AIB and, on this basis, the order ought to have been refused. The appellant says that this is because the petitioner (1) gives an undertaking to indemnify the official assignee as to the costs, fees and expenses incurred or to be incurred by the official assignee in the event of adjudication, (2) undertakes to advertise notice of the adjudication, and (3) the petitioner indicated in the petition that it intended to realise its security which it valued at €1,350,000 and undertakes to account to the official assignee for any sum realised from the sale of the asset which exceeds the debt due. The appellant argued that it was not possible for an assignee to take over these undertakings. Everyday says that this is not so, and, in any event, it is premature to decide these issues which will be dealt with at the hearing of the petition.

43. This argument is a new argument which was not made in the High Court. At all times, the appellant has been legally represented and it was open to him to have advanced these arguments before Pilkington J. had he seen fit to do so. He has not sought leave of the court to advance new arguments or even acknowledged that this is required before he may do so. He has not advanced any basis upon which this court could exercise its discretion to allow him to do so. However, the respondent failed to take issue with the appellant raising new arguments in the notice of appeal and the matter did not form part of the debate at the hearing of the appeal. For this reason, I will not dismiss the argument on this basis.

44. Section 121 of the Irish Bankrupt and Insolvent Act 1857 permitted Creditor A to proceed to adjudicate a debtor on a petition presented by Creditor B upon proof of the debt

of Creditor A “*and of the other requisites to support such petition (except the debt of the petitioning creditor)*”. Similar undertakings would have been given by Creditor B under the 1857 Act to those given under the Act of 1988 and clearly this posed no bar as a matter of principle to a different creditor taking over the petition and substituting its undertakings for those given by Creditor B.

45. Second, s. 572(5) of the Companies Act 2014 provides:-

“Where a petitioner does not proceed with his or her winding-up petition, the court may, upon such terms as it shall deem just, substitute as petitioner any person who would have a right to present a petition in relation to the company, and who wishes to proceed with the petition.”

46. Conroy in his commentary on the Act in *The Companies Act 2014: Annotated and Consolidated – 2018 Edition* (2nd ed., Round Hall, 2018) at p. 793 states that this is a new provision which incorporates the substance of a provision previously appearing in the Rules, noting that a similar provision continues in O. 74, r. 18. He states:-

“It enables the court to substitute as petitioner any person who would have a right to present a petition in relation to the company and who wishes to proceed with the petition where the original petitioner does not proceed with his or her petition. The rationale for the substitution mechanism is to ensure that, once the prima facie right to the winding up of a company has arisen, the company should not escape from that position except by dealing fairly with all of its creditors, not by paying off only the petitioner: Re Lycatel Ireland Ltd. [2009] 3 I.R. 736. The power to substitute a petitioner arises whether or not the petition has been advertised: Re Lycatel Ireland Ltd. The elevation of this rule of court to primary legislation arises from the general aim articulated by the [Company Law Reform Group] of making all of the main

provisions governing Irish company law discernible from the main body of the Statute (s. 3.12 First Report).”

47. The two provisions are not precisely analogous to the situation where the petitioning creditor assigns the underlying debt, but they show that there is no objection *in principle* to one creditor proceeding on foot of a petition presented by a different party and assuming or undertaking on its own behalf the undertakings given upon the presentation of the petition. It follows that there is no insuperable barrier to one creditor proceeding with the petition of another creditor based upon the undertakings of the petitioner, as the appellant argued.

48. During the hearing, counsel for the appellant pointed to the repeal of s. 121 of the 1857 Act and the fact that no analogous provision was adopted in the 1988 Act. Section 121 of the Act of 1857 was not carried forward into the Bankruptcy Act 1988 whereas the similar provision to O. 74, r. 18 was elevated into primary legislation by the Companies Act 2014. It was submitted that the Oireachtas thereby intended that it should no longer be possible for one creditor to take over the petition of another. If that were so, it followed that an assignee of the petitioner likewise ought not to be permitted to continue the existing petition proceedings.

49. In Sanfey and Holohan *Bankruptcy Law and Practice* (2nd ed., Round Hall, 2010), the authors note at p. 24 that s. 121 of the Act of 1857 was not carried forward because in the view of the Budd Committee in The Bankruptcy Law Committee Report, it was rarely used. Section 121 did not deal with the situation where the petitioner/creditor assigned the debt to a third party assignee so the failure to re-enact s. 121 or an equivalent section is not determinative of the issue in this appeal. Neither is the absence of primary legislation permitting the substitution, as was argued by the appellant. This is clear from the passage I have quoted from Conroy’s annotation of the Companies Act 2014. It was perfectly possible to provide for one creditor to proceed on the petition of another creditor to wind up a

company under a provision in the Rules. The reason the provision was “*elevated*” to primary legislation was a policy decision. It did not alter the legal right so to do.

50. Assignments of debt have long been recognised as legitimate, and assignees of debt are entitled to be substituted in proceedings at any stage up to and including after judgment, and to proceed by way of execution on foot of judgments obtained by the assignor of the debt. This was recently confirmed by the Supreme Court in *SPV Osus Ltd. v. HSBC & Ors* [2018] IESC 44, where O’Donnell J. (as he then was) referred to s. 28(6) of the Judicature Act (Ireland) 1877 and stated at para. 18 of his judgment:-

“... However, the very existence of s. 28(6) is relevant in one respect. It illustrates the fact that there is no absolute rule against assignment of rights of action. In some cases, such as assignment of debts, assignment is permissible, and arguably to be encouraged.”

51. Thus, the issue, in fact, is whether the absence of a rule specifically providing for the substitution of an assignee of a debt to a petition in bankruptcy means that it cannot be done.

52. In my view, the appellant’s argument becomes circular: O. 17, r. 4 cannot apply to bankruptcy because bankruptcy is a separate code to which the rule cannot apply. Because there is no express rule in bankruptcy or statutory provision permitting substitution, it cannot be permitted. But this argument only holds if it is accepted that O. 17, r. 4 cannot apply in the first place. As I have already indicated, in my judgment, O.17, r. 4 does apply to proceedings in bankruptcy and thus there is a rule of court which permits the substitution of, in this instance, an assignee of a debt in the proceedings.

53. The application before the court was an application under O. 17, r. 4 and the focus should be on whether the rule applies in the circumstances. Whether the assignee could obtain an Order of Adjudication is a separate issue and one which should be decided at the hearing of the petition, rather than on this appeal. The appellant sought to engage with the

merits of that argument which I believe should be determined on another occasion. The appellant will have an opportunity to agitate his arguments that it is not legally permissible for Everyday, as assignee, to proceed on foot of the petition issued by AIB at the hearing of the petition and indeed, if necessary, on an application to show cause. The issues can be, and ought properly to be, dealt with at the hearing of the petition. The fact that they have been raised does not mean that they should be decided pre-emptively at this stage on an application to substitute the assignee under O. 17, r. 4. I would reject this ground of appeal also.

54. The next issue was whether the trial judge was correct in holding that there was *prima facie* evidence that Everyday took an assignment of the debt owed by the appellant to AIB. As I have discussed, the appellant argued that he was entitled to challenge a bankruptcy summons to be issued by Everyday and that the test to be applied was that in s. 8(6)(b) of the 1988 Act. The appellant pointed to what he said were issues with the proof of the assignment submitted by Everyday. He argued that an issue for trial arose, within the meaning of the jurisprudence on s. 8(6)(b), and so the matter must be litigated outside of the bankruptcy process. For this reason, counsel did not really engage with whether the trial judge was correct to hold that there was *prima facie* evidence of the assignment, but applied a test more favourable to the appellant: was there an issue for trial? However, I have already held that this approach is not correct. The assignee of the debt is not required to recommence the process by serving its own demand and then issuing a bankruptcy summons in its own name; it is entitled to move forward with the existing proceedings and to be substituted into the proceedings pursuant to O. 17, r. 4, provided that it satisfies the requirements of that rule.

55. The purpose of requiring a party such as Everyday to satisfy the court that there has been a change of interest so that the litigation should continue with Everyday in substitution for AIB is to avoid unnecessary expense and waste of court time. Such a change of interest

could occur years after proceedings have been commenced and after significant sums have been spent in costs by both parties. It is clearly in the interests of justice that there should be an appropriate mechanism to allow the proceedings to continue so that all of this is not lost, but also to ensure that another party is not unfairly disadvantaged by a change in the identity of a party to the existing litigation and has an opportunity to contest the substance of the issues arising from the change in interest. For this reason, the rules allow an application under O. 17, r. 4 to be brought *ex parte* and the applicant is merely required to establish, on a *prima facie* basis, that there has been a change of interest, in this case an assignment of a judgment debt. The protection afforded to the continuing party is that *normally* he is entitled to contest the validity or effect of the change of interest, in this case the assignment. This case is different to the usual cases in which the application of the rule arises as the appellant has previously accepted that Everyday is the assignee of and successor in title to the debt and he may no longer contest this issue. Furthermore, the High Court held as a fact that Everyday was the successor to AIB's debt based upon the evidence from Everyday adduced to the court and the absence of any challenge to the validity of the assignment by the appellant. Thus, it has been established on the balance of probabilities that Everyday is the assignee of the debt and the successor to AIB.

56. The trial judge assessed the evidence before her and was satisfied that there was *prima facie* evidence that Everyday was the assignee of debt due to AIB. She was not informed of the details of the evidence in the s. 115A proceedings or the findings of McDonald J. To my mind, had she been, it would have reinforced her conclusions. I am satisfied that had the full picture been before her there could be no doubt that it was appropriate to substitute Everyday in place of AIB on the basis that it was the assignee of the debt and that a change of interest within the meaning of the rule had been established. For the purpose of the rule, it was merely required to show this on a *prima facie* basis, but the matter was accepted on

the balance of probabilities in the High Court previously, a higher threshold. Crucially, it is not open to the appellant to contest the validity of the assignment or that Everyday is the successor to AIB, and so it is not necessary to address the details of his arguments as to the alleged flaws in the documentary proof of the assignment.

57. The final issue was whether Everyday could be required to provide undertakings to the court in relation to the bankruptcy proceedings as an adjunct to the substitution application. The appellant contended that Everyday should not be substituted in the petition because it could not in fact satisfy the requirements of s. 11 of the 1988 Act and, in particular, it was not possible for it to take over or reaffirm the undertakings given by the petitioner when the petition was issued. Likewise, it was said, it could not assume the valuation of the security previously given by AIB, nor its undertaking to account for any realisation of the security in the bankruptcy.

58. Counsel for Everyday argued that this submission was premature and did not arise on a substitution application. I agree with the submission. The High Court has yet to hear the petition. Everyday will be required to satisfy the provisions of s. 11. In addition, it is worth recalling that as an assignee of a chose in action, Everyday takes “*subject to all equities which would have been entitled to priority over the right of the assignee if [the Judicature] Act had not been passed.*” (s. 28(6)). McDermott *Contract Law* (1st ed., Tottel, 2001) at para. 18.118 summarises the position in a passage which was cited with approval in *Sheehan v. Breccia* [2016] IEHC 67, at para. 141, by Haughton J.:-

“An assignee takes subject to any equities that have matured at the time of the notice to the debtor. The effect is that the debtor may plead against the assignor all defences that the debtor could have pleaded at the time when he received the notice of the assignment.”

59. It is for the High Court on the hearing of the petition to decide these issues. It is not appropriate to refuse to substitute a party on the basis that the underlying action must fail because the new party cannot satisfy a matter which will need to be proved at trial. The application is not a mini trial of the action. These points, be they valid or otherwise, are not for consideration on an application under O. 17, r. 4, still less should a court refuse to make an order of substitution on the basis that the forthcoming action – in this case a petition – must fail.

Conclusion

60. Order 17, rule 4 applies to bankruptcy proceedings. Everyday was entitled to apply to be substituted as petitioning creditor in place of AIB under the rule. In the PIA application, the appellant acknowledged that Everyday was the assignee of the debt at issue in these proceedings and that it was the successor to AIB. The High Court found as a fact that Everyday was the successor to AIB and that it was a creditor of the appellant in the sum of €2,603,054.84. The appellant was required to act with good faith in the conduct of the PIA process. He may not resile from his acknowledgment that Everyday is the successor in title to AIB and the assignee of the debt in the bankruptcy proceedings. There was *prima facie* evidence that the assignment of debt effected a change of interest within the meaning of the rule. Whether Everyday may, as a matter of law, take over the undertakings given by AIB as petitioning creditor or adopt the valuation of the security given by AIB is not an issue which falls for consideration on an application for substitution. The matters raised are issues for the hearing of the petition by the High Court.

61. For these reasons, I would refuse the appeal and affirm the decision of the High Court.

62. 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.

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