THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 281

Record Number: 2019/443

Whelan J.
Noonan J.
Haughton J.

IN THE MATTER OF THE BANKRUPTCY ACT 1988
AND IN THE MATTER OF DOMINIC CARNEY (A BANKRUPT)

BETWEEN/

ENNIS PROPERTY FINANCE DAC

RESPONDENT

- AND –

DOMINIC CARNEY

APPELLANT

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JUDGMENT of Mr. Justice Robert Haughton delivered on the 16th day of October 2020

Introduction

1. This judgment concerns two appeals by the Bankrupt ("Mr. Carney") against judgments and orders of Pilkington J. made on 14 October 2019 and 12 November 2019 respectively. In the appeal bearing record no. 2019/443 Mr. Carney appeals against the refusal of Pilkington J. to recuse herself from adjudicating on the application of Mr. Carney to Show Cause against the validity of the order adjudicating him a bankrupt made on 11 March

2019 ("the Recusal Appeal"). In the second matter bearing record number 2020/13 Mr. Carney appeals against the order of Pilkington J. made on 12 November 2019 dismissing Mr. Carney's application to Show Cause against the validity of the order of adjudication of bankruptcy made on 11 March 2019, ("the Show Cause Appeal"). In both appeals the respondent is the petitioning creditor.

2. As there is a common background in respect of both appeals, and as they involve the same parties and the same trial judge, and as both appeals were heard together, this judgment deals with both appeals. Having set out the background it is logical that this judgment should first deal with the Recusal Appeal, and then address the Show Cause Appeal.

Background

3. On 3 June 2005 Mr. Carney entered into a guarantee with Bank of Scotland (Ireland) Limited. The guarantee was for the debts of a company called Philisview Properties Limited and was limited to the sum of €100,000. In October 2010 Bank of Scotland (Ireland) Limited merged with Bank of Scotland plc. Subsequently Ennis Property Finance Limited acquired the facilities, the subject matter of these proceedings from Bank of Scotland plc.

4. On 10 May 2016 Ennis Property Finance Limited issued summary proceedings against Philisview Properties Limited (in Receivership), Mr. Carney and Niamh Carney (High Court record no. 2016/781S). It was necessary for the plaintiff to obtain an order for substituted service on Mr. Carney. On 14 November 2016 an order was made amending the title of the proceedings as the plaintiff had changed its name to Ennis Property Finance DAC, the respondent in these appeals.

5. On 27 February 2017 Twomey J. granted the respondent summary judgment against Mr. Carney in the sum of €100,000.

6. With a view to commencing these bankruptcy proceedings against Mr. Carney, the respondent served its Particulars of Demand on Mr. Carney on 19 April 2017. A Bankruptcy Summons then issued on 22 May 2017.

7. On 31 May 2017 Mr. Carney brought an application to this court seeking an order extending the time within which to appeal the order of Twomey J.

8. On 19 June 2017 the respondent made an *ex parte* application for substituted service of the Bankruptcy Summons, and for renewal of that summons. The renewed summons was served on 27 June 2017. The respondent refrained from seeking to have Mr. Carney adjudicated a bankrupt until this court had dealt with Mr. Carney's application seeking an order extending the time to appeal the order of Twomey J.

9. Mr. Carney's application for an extension of time to appeal was determined by this court on 6 November 2017. The Court of Appeal refused Mr. Carney's application for an extension of time, on the basis that it was not satisfied that he had raised an arguable ground of appeal. Accordingly the judgment of Twomey J. became final and

unappealable, and Mr. Carney's debt to the respondent in the sum of €100,000 could no longer be challenged.

10. Mr. Carney then brought an application to set aside the Bankruptcy Summons. That application was refused by Costello J. in the High Court in a judgment delivered on 16 July 2018 reported at [2018] IEHC 429. Costello J. rejected all arguments made by Mr. Carney, and it is important to summarise some of these because, as I record later in this judgment, it is not open to Mr. Carney to repeat the same arguments before this court on the present appeals. One ground for the application was that the judgment of Twomey J. was under appeal, but that was no longer the case after the Court of Appeal refused an extension of time in November 2017. Mr. Carney also sought to challenge the existence of any valid guarantee, but Costello J. found –

> "His arguments were rejected in the High Court and the Court of Appeal refused leave to extend time for bringing an appeal on the basis that he had disclosed no grounds of defence. This Court cannot go behind the judgments and orders of the High Court and Court of Appeal." (para. 14)

Other contentions rejected by Costello J. on the same basis were Mr. Carney's assertion that he had discharged the debt of Philisview Properties Limited by way of a promissory note, and that the respondent was seeking to mislead the High Court on the basis of allegations of fraudulent misrepresentation. She also rejected the argument that the Bankruptcy Summons had been brought for an ulterior motive or improper purpose, on the basis that there was no evidence and no inferences that the court might draw to support such suggestions. Costello J. also rejected arguments that the respondent should have pursued other means of recovery on foot of the judgment debt; and that if the receiver waited for the value of the property to rise before selling this would raise the debts due to the respondent; and that the application to extend the time for service of the bankruptcy summons was made out of time, or ought not to have been made *ex parte*; and that if Mr. Carney were to be adjudicated bankrupt he would be deprived of his constitutional right to property and rights under the European Convention on Human Rights to property as he would not be able to pursue the receiver for the return of his chattels. Costello J. did not consider that any issue of European law was engaged in the proceedings and that there was therefore no question of any reference to the Court of Justice of the European Union pursuant to Art. 267.

11. Mr. Carney appealed the order of Costello J. to the Court of Appeal, which upheld the order of the High Court. The judgment of Irvine J. delivered on 20 February 2019 reported at [2019] IECA 71 on behalf of the court states –

> "38. … I am entirely satisfied that the High Court judge correctly determined each and every one of the issues detailed at paras 14 – 16 of her judgment"

At paragraph 44 of her judgment Irvine J. states –

> "… There is simply no evidence that Ennis commenced the bankruptcy proceedings for an improper purpose."

In particular she concluded at paragraph 45 that there was no evidence from which the High Court could reasonably have concluded that the bankruptcy proceedings had been instituted to bring an end to Mr. Carney's proceedings against the receiver. She also rejected an argument that the bankruptcy proceedings were premature or that Ennis ought to have sought to avail of a range of other enforcement proceedings. From para. 52 on Irvine J. also rejects a submission by Mr. Carney that the bankruptcy rules take precedence over other Rules of the Superior Courts, and that they are all amenable to enlargement or abridgment under O. 122, r. 7. In para. 61 Irvine J. rejects Mr. Carney's submission that the High Court should have set aside the Bankruptcy Summons because "the balance of justice" warranted such an approach, stating –

> "First, that the balance of justice would favour the outcome proposed by Mr. Carney was not clearly established on the evidence. More importantly however is the fact that where the 'balance of justice' lies forms no part of the Court's assessment on an application to set aside a bankruptcy summons."

12. By order of Pilkington J. made on 11 March 2019 Mr. Carney was adjudicated a Bankrupt.

13. Mr. Carney appealed the order of adjudication of bankruptcy, and the appeal was assigned a hearing date of 26 June 2019. On 21 June 2019 this court refused Mr. Carney's application to vacate that hearing date, and by order of this court dated 26 June, 2019 that appeal was dismissed as Mr. Carney had failed to file proper books of appeal. In particular, Mr. Carney had not taken up a copy of the digital audio recording (the DAR) and consequently there was no transcript of the High Court proceedings before the Court of Appeal.

14. On 25 March 2019 Mr. Carney issued a "Notice by Debtor to Show Cause Against the Validity of Adjudication", returnable before the Bankruptcy Court on 13 May, 2019. This pleaded, by reference to section 11(1) of the Bankruptcy Act, 1988 notes four grounds for showing cause: -

> "(1) Section 11(1)(b) the liquidated sum claimed is not an absolute figure as the Petitioner has failed to realise the security asset to determine the actual debt due and has failed to mitigate its losses.
> (2) Donal O'Sullivan was not authorised to issue any Bankruptcy Summons nor any Petition for the petitioning Creditor.
> (3) That the Petition of Bankruptcy by a Person other than the Debtor was not issued with any Authority from the Petitioning Company in accordance with Section 11(1)(c) of the Bankruptcy Act, 1988.
> (4) The Petition has not been issued nor executed in accordance with the statutory requirements of the Bankruptcy Act, 1988."

15. On 13 May 2019 Mr. Carney's application to show cause was listed before Pilkington J., but as it was apparent that it would take more time to hear it than was available on that date Pilkington J listed it for hearing on 4 November 2019. On 13 May 2019 Mr. Carney made known to Pilkington J. his objection to her hearing the Show Cause application. Pilkington J. then gave leave to Mr. Carney to bring an application on notice to the respondent – the recusal application – on 14 October 2019.

16. On 14 October 2019 the recusal application came before Pilkington J. and appears to have been put back to the afternoon on the basis that it was opposed and would take some time. It proceeded in the afternoon and in an *ex tempore* judgment Pilkington J. refused the application. Mr. Carney's application for a stay was also refused, costs were reserved, and an order was made granting Mr. Carney access to the DAR record of the hearing.

17. On 29 October 2019 Mr. Carney filed the Recusal Appeal. On 1 November 2019 Mr. Carney applied to this court for an order restraining Pilkington J. from hearing the Show Cause application until the determination of the Recusal Appeal. That application was refused by the Court of Appeal.

18. Accordingly Mr. Carney's Show Cause application proceeded before Pilkington J. on 4 November 2019. In an *ex tempore* judgment delivered on 12 November 2019 Pilkington J. dismissed the Show Cause application, granted costs to the respondent (as Petitioner's costs in the Bankruptcy of Dominic Carney), and directed that Mr. Carney have access to the DAR. An agreed note of the judgment was put before this court for the purposes of the Show Cause Appeal.

Moot

19. A peculiarity of these appeals is that Mr. Carney is now discharged from bankruptcy. He was adjudicated a bankrupt on 11 March 2019, and there was no stay on the order of adjudication in the High Court or on appeal. By effluxion of time (one year), and there being no extension of the bankruptcy period, Mr. Carney emerged from bankruptcy on 11 March 2020.

20. Accordingly the bankruptcy process is complete, and if the court were to allow the Recusal Appeal it would mean, in theory, that the Show Cause application would have to be heard, and of course heard by another judge. That would be a meaningless exercise at this stage. Alternatively if the court were to dismiss the recusal appeal but Mr. Carney were successful in the Show Cause appeal, it could not have the effect of undoing the bankruptcy, the period of which has already run its course. Both appeals were in this sense moot.

21. After hearing the parties in relation to this preliminary concern, the court rose, and when it resat ruled that, despite both appeals being moot, it would proceed to hear them. There were a number of reasons why the court took this decision. Clearly a court, including an appellate court, has a discretion to hear a matter that is before it notwithstanding that it may be moot. Bankruptcy is a question of personal status, and there is a stigma attached, although this may be less significant now that the bankruptcy

period has reduced from twelve years to one year, and the process of going through bankruptcy is relatively straightforward. However, the fact that a person is adjudicated bankrupt may have long term implications, particularly if they have occasion to seek credit after they have been discharged from bankruptcy. A loan application may require an applicant to answer the question "are you or were you at any time in the past a bankrupt?". For these reasons, and because Mr. Carney was adamant that he wished to pursue his appeals, and the parties were before the court and ready to proceed, it was decided to proceed to hear and determine the appeals.

The Recusal Appeal

22. A transcript of the DAR in respect of Pilkington J's *ex tempore* judgment on the recusal issue importantly identifies at the start that in pursuing the application and in argument Mr. Carney was asserting objective bias, not subjective bias. She states (at page 2, line 8): -

> "He doesn't, as I understand it, and never has, sought to argue any actual bias but is stating that on the totality of matters I have shown objective bias …"

Having considered relevant authorities Pilkington J. states (page 2, starting at line 33): -

> "But I am satisfied, having very carefully considered as I always do my duties to all parties in front of me and indeed to the Court and my role under the Constitution, that I can discern no objective bias in any of the matters that were before me. I considered carefully whether Mr. Carney should be adjudicated bankrupt. Mr. Carney ascribes a certain motivation to my putting the matter to the end of the list. I did so because often, and I mean this not disrespectfully, where lay litigants are concerned the application can take longer than ten or fifteen minutes that I can only afford it in the bankruptcy list on a Monday and I did it for that reason, but Mr. Carney takes a different view and that, of course, is entirely his prerogative. But I did not do so on any bases that lie under the general rubric of bias. It was to deal in what I trust it was an efficient administration of justice before the Bankruptcy Court on that day.
>
> In my adjudication of Mr. Carney as a bankrupt, if there are any issues that he has with regard to any matter where he feels that the law was either incorrectly applied or that he has any other issue, that is a matter for appeal to the Court of Appeal. The adjudication of bankruptcy has been made by me, and if Mr. Carney wishes to take any issue whatsoever with regard to any issue surrounding the statement of affairs or indeed any other issue on that adjudication then he does so to the appella[te] court. He has a constitutional right of appeal…
>
> [line 22]… and if he has any issue with his adjudication as bankrupt and the order arising from it and the matters that he feels may or may not have been dealt with by this Court then that is a matter for appeal. There is nothing – and if he wishes to add to that appeal any pleading with regard to bias that is also entirely a matter for him and it is thereafter a matter for the Court of Appeal to so adjudicate. The

> Court of Appeal, to the best of my knowledge, has not made any adjudication upon any allegation of objective bias by me and accordingly, in my view, I am entitled to consider the matter to thereafter take whatever steps I believe to be appropriate.
>
> In my view, I properly considered all of the grounds and formed an objective decision as to the adjudication of Mr. Carney as a bankrupt. He was thereafter entitled to appeal and he is thereafter, as he has done, made an application – issued an application to show cause, again as is his absolute entitlement pursuant to the terms of the Bankruptcy Act, 1988. That matter is listed at 2pm on the 4th November, 2019 and, as far as I am concerned, that matter proceeds on that day."

23. In his Notice of Appeal Mr. Carney sets out some eight grounds, which I will address broadly in order. In doing so I have considered Mr. Carney's written and oral submissions as well as those of the respondent. While it is clear that Mr. Carney maintains his appeal on the basis of objective bias and "a litigant's apprehension that the trial would not provide the applicant with a fair hearing" (para. 1 of his written submission), and while the authorities which he relies on by and large relate to the test of objective bias, some of his argument tended to wander into subjective bias, which had not been argued in the High Court. It is also appropriate to note here that in the grounding affidavit of Mr. Carney sworn on 4 October 2019 in support of his application for recusal he states in para. 14 –

> "… That there was an apprehension of bias, for reasons unknown, that the presiding judge was not adjudicating with impartiality against a litigant in person as per Judge's Oath."

Ground One:
The judge erred in fact or in law and/or a combination of fact and law by not applying the Principles of Natural Justice, namely, NEMO JUDEX IN CAUSA SUA, laid down in common law jurisdictions, whereby there has been a preliminary Judgment of the issues the Judge is seeking to adjudicate on.

24. Mr. Carney pointed to no evidence or argument that would justify this ground of appeal. Clearly there is no relationship between the respondent and the learned High Court judge, other than that of petitioner in a bankruptcy matter, and the judge assigned to deal with it in cases listed in the Bankruptcy Court. The respondent in its submission at para. 11 states that when the application for a stay was before this court on 1 November 2019 Mr. Carney made clear that this Ground of Appeal was essentially an objection to the fact that Pilkington J. had heard the petition to have Mr. Carney adjudicated a bankrupt and was going to hear the application to show cause. That statement was never controverted by Mr. Carney.

25. While Mr. Carney raised various grounds and arguments, in my view his primary objection is indeed that because Pilkington J. heard the application for adjudication and made the order on 11 March 2019 adjudicating Mr. Carney a bankrupt, that she should recuse herself from hearing his Show Cause application. But that is not a good basis to ask a

judge to recuse herself. I have no doubt that Mr. Carney was unhappy with the order of adjudication, and that he decided that he did not want the same judge to hear his Show Cause application. However if Mr. Carney was aggrieved by the order of adjudication then his remedy lay in appealing that decision to the Court of Appeal. He did in fact pursue an appeal, but, as I have recounted, the Court of Appeal dismissed that appeal on 26 June 2019. The trial judge's comments in relation to her judgment in respect to his constitutional right of appeal in respect of the adjudication were therefore appropriate, and correct in law.

26. Furthermore, it is clear that Mr. Carney's application to show cause should not be equated with an appeal in any in respect, so that argument that the same judge was determining an issue at first instance, and again deciding it on appeal, does not bear scrutiny

27. Section 16 of the Bankruptcy Act, 1988 governs showing cause. Section 16(1) sets out certain time periods that have to be met by a bankrupt who wishes to show cause (and on this no issue arises), and s. 16(2) provides –

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

28. Section 11(1) sets out four criteria that must be satisfied for the court to make an adjudication:-

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

29. It is clear from the wording of section 16(2) of the Act that if any one of these criteria is not satisfied then the court must annul the order of adjudication. The issue of what the

court can or should do if the criteria are set aside was considered in *Harrahill v. Kennedy* [2013] IEHC 539 where Dunne J. held that-

> "The test under s. 16(2) is, as I have said, slightly different and I am satisfied that apart from a failure to comply with the criteria set out in s. 11(1) the court can annul the adjudication if satisfied that it is just and equitable having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him. Raising an issue that could be tried elsewhere does not seem to me to be the correct basis upon which to consider an application under section 16(2)."

This test was followed by Costello J. in *Danske Bank v. O'Shea* [2016] IEHC 732 where Costello J. observed –

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

30. It is clear from this that Mr. Carney's application to show cause was not to be regarded as an appeal from the order of adjudication. Accordingly there was nothing wrong with the same judge hearing both the adjudication, and the Show Cause application, and the fact that Pilkington J., having heard and decided the adjudication, then listed the Show Cause application for hearing before her cannot be said to breach the *principle nemo judex in causa sua*. In no sense could it be said that Pilkington J. had an interest in the outcome of the Show Cause application.

31. Moreover, the learned High Court judge was assigned to the Bankruptcy List. It frequently happens that the judge so assigned hears several applications related to the same bankruptcy. For example an application to issue a Bankruptcy Summons, followed by an application to set aside a Bankruptcy Summons, or an adjudication followed by a Show Cause application; and frequently such judge will be called upon to consider and determine a variety of applications such as might arise post adjudication, for example an application by the Official Assignee for an extension of the bankruptcy term. In my view no objective observer would apprehend objective bias in such circumstances – there would need to be something additional, external to the process, for that to arise.

Ground Two:
The Judge erred in fact or in law and/or a combination of fact and law where she failed to apply the Principle that the public must see justice be done, for justice being done alone is not enough. The public must have confidence in the judiciary that justice is served in the best possible manner.

32. In my view it is clear that the trial judge had regard to this principle, which underpins the jurisprudence related to objective bias, when applying the test of objective bias to Mr. Carney's recusal application.

The test for objective bias has been considered in the Supreme Court on numerous occasions. In *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 IR 412 at p. 441, Denham J. stated the test in the following terms: -

> "The submissions in relation to the test to be applied roved worldwide. However, there is no need to go further than this jurisdiction where it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."

That judgment was approved by the Supreme Court in *O'Callaghan v. Mahon* [2008] 2 IR 514, where Finlay J. set out the following principles (at p. 672 – 673): -

> "The principles to be applied to the determination of this appeal are thus, well established:-
>
> (a) objective bias is established, if a reasonable and fair-minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision-maker will not be fair and impartial;
> (b) the apprehensions of the actual affected party are not relevant;
> (c) objective bias may not be inferred from legal or other errors made within the decision- making process; it is necessary to show the existence of something external to that process;
> (d) objective bias may be established by showing that the decision maker has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses."

In *O'Shea v. Butler* [2015] IECA 48, at page 6 Kelly J. approved of the following passages from the UK Court of Appeal in *Locabail UK Limited v. Bayfield Properties Limited* [2000] 2 WLR 870: -

> "The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predisposition. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves."

Kelly J. also quoted with approval the following passage from the judgment of Mason J. in the High Court of Australia in *Re: JRL ex parte CJL* [1986] 161 CLR 342:

"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe, that by seeking the disqualification of a judge they will have their case tried by someone thought to be more likely to decide the case in their favour."

33. In the High Court Mr. Carney cited, amongst other cases, the judgment of Irvine J. in this court in *Commissioner of An Garda Siochána and Ors. v. Penfield Enterprises Limited* [2016] IECA 141, where at para. 59 she stated: -

"59. Returning to the core issue on this appeal, the real question is, armed with knowledge of all of the relevant facts, what would the reasonable, objective and informed person think of the pronouncements made by the trial judge on 10th October 2014? Would they apprehend that, regardless of the public declaration made by the judge pursuant to Article 34.6.1 of the Constitution to administer justice without fear or favour and his own stated belief that he would be able to provide an impartial hearing, he had prejudged the issue or had demonstrated hostility or prejudice against the appellants such that they might not receive a fair hearing on the contempt motion?"

34. It is clear from the DAR record of the judgment in the High Court that Pilkington J. addressed herself correctly to the law relating to objective bias, and in reality there is no issue in this court as to the applicable law or the test to be applied.

35. It follows that the subjective apprehension of Mr. Carney as an "actual affected party" has no relevance.

36. In his grounding affidavit Mr. Carney relied on previous encounters with Pilkington J. This sets out that he was before her on some three occasions before bringing the recusal application in the High Court.

37. The first was on 12 November 2018 when he brought a motion to set aside the *ex parte* order for substituted service of the Bankruptcy Summons that had been made by Costello J. on 27 June 2017. Pilkington J. struck out the motion and refused to release the DAR, and as we have seen, that order was appealed to this court which upheld the order of Pilkington J.

The second occasion was when Pilkington J. adjudicated Mr. Carney a bankrupt on 11 March 2019. As we have seen, that order was appealed by Mr. Carney but the appeal was dismissed by this court on 26 June 2019.

The third occasion was on 13 May 2019 when Mr. Carney's Show Cause notice of motion was first returned before Pilkington J. and assigned a hearing date on 4 November 2019. It is not in controversy that Mr. Carney at that time indicated he did not want her to hear the Show Cause motion, and that he is advised by the court that if he was to pursue it he would need to bring a notice of motion seeking recusal. Mr. Carney complains that on

that occasion Pilkington J. stated that she was "the only bankruptcy judge" and that this was given as a reason for putting back the Show Cause motion which would have taken some fifteen or twenty minutes or more and therefore needed to be listed for a Monday afternoon.

I cannot see any basis in these previous encounters for an assertion of objective bias. The reasonable and fair minded objective observer, who is not unduly sensitive but in possession of the relevant facts, would be familiar with the practices of the Bankruptcy Court on a Monday and would see nothing in these occurrences to raise a reasonable apprehension that the judge would not be fair or impartial. So far as the substituted service hearing is concerned the trial judge's striking out of the motion was upheld by the Court of Appeal, and similarly the appeal against the adjudication was dismissed. This court must assume that the trial judge can disabuse her mind of any irrelevant personal beliefs and predisposition, and further disregard any prior orders that have no relevance to the issue that she is called upon to decide.

Mr. Carney may have been under the misapprehension that the Show Cause application was in the nature of an appeal, and that therefore it was inappropriate for Pilkington J. to hear and determine it. However it is clear from *Harrahill* and *Danske Bank* that the Show Cause application is not an appeal, and indeed that arguments made at an earlier stage in the bankruptcy proceedings, in particular at the adjudication stage, cannot be re-ventilated, and, potentially, decided in a different way.

38. Accordingly in respect of this ground I conclude that in correctly identifying the test for objective bias Pilkington J. effectively applied the principle that justice must not only be done, but must be seen to be done, and I further conclude that she correctly applied the test of objective bias to the facts before her.

Ground Three:
The judge's inexperience in a bankruptcy matter, that carries a sentence "Penal in Nature" whereby the learned judge was only a High Court judge for less than nine months, failed to disassociate herself from the fraternity whereby she practiced for some twenty years and her expertise is publicly known to be in conveyancing and land law.

39. In my view this ground of appeal is scandalous and entirely without merit. I also note that it has nothing to do with objective bias and was not a ground raised in the High Court.

Ground Four:
The judge erred in fact or in law and/or a combination of fact and law by allowing the Judge's personal attitudes, relationships or beliefs to enter into the case. When a judge has personal attitudes, relationships or beliefs in the case that he/is hearing, he/she should recuse himself/herself from deciding in the case and to uphold the principle of Natural Justice.

40. This ground does not relate to objective bias. Further there was no evidence on affidavit to justify any such assertions or arguments. Furthermore this argument was not made in the High Court, and must be rejected.

Ground Five:
The judge erred in fact or in law and/or a combination of fact and law by publicly announcing "In my personal practice I am inclined not to grant a stay in Bankruptcy matters, in my view, the petition is either adjudicated on or it is not." Giving the applicant the apprehension of the Judge's own beliefs as to how the judge will deal with the application, instead of deciding the matter on its facts.

41. The transcript indicates that what Pilkington J. stated was –

> "But just in terms of your [stay] application, it's my almost universal practice not to grant a stay in bankruptcy matters because in my view the position is either adjudicated on or it is not."

42. It is plain why this should be so. The bankruptcy period was originally twelve years but was reduced to three years, and when this matter was before Pilkington J had been reduced to one year. Given that appeals from the High Court could take in excess of a year to come to trial, by which time, in the absence of a stay, the person concerned would be discharged from bankruptcy, the granting of a stay would often be contrary to the best interests of the bankrupt. Mr. Carney was adjudicated bankrupt on 11 March 2019 and some seven months had expired by the time Pilkington J. came to consider the recusal application.

43. In any event Mr. Carney's complaint would appear to be that Pilkington J. treated him the same way as she tended to treat other parties who were adjudicated bankrupts, and that could not be a good basis to claim objective bias. Clearly whether or not to grant a stay on an order refusing to recuse is a matter for the discretion of the judge so deciding. This was also not a matter raised in the High Court, and for these reasons must be rejected.

Ground Six:
The judge erred in fact or in law and/or a combination of fact and law whereby the judge's loyalty to the institution referred to as the BAR, can result in the judge being so committed to the institution's goals and interests that she compromised the fairness of the decision.

44. This is another scandalous ground of appeal which I consider to be entirely without merit. Further it is not grounded in any evidence and was not raised in the High Court.

Ground Seven:
The judge erred in fact or in law and/or a combination of fact and law whereby failing to apply the Irish Jurisprudence to alleviate an apprehension of bias to the effect that any relationship, interest or attitude which actually did influence or might be perceived to have influenced… or which might be perceived would influence a decision

or judgment specifically showing "[t]he attitude may be one of good will or ill will [emphasis added]."

45. This appears to raise objective bias. Somewhat similar wording is adopted in Ground Eight:-

> "**Ground Eight**
> ***The judge erred in fact or in law and/or a combination of fact and law by not applying the common law principle exceptio recusatio where it would be justiciable to remove herself from the said application and remove any apprehension of bias.***"
>
> This ground then recites certain legal principles –
>
> (1) Equality at arms.
>
> (2) A right to peaceful enjoyment of private property.
>
> (3) Equality before the law.
>
> (4) Separation of powers.
>
> (5) Using the courts to usurp Bunreacht na hÉireann 1937.
>
> The notice then refers to specific provisions of the Constitution, in particular Articles 40.1, 40.3.1, 40.3.2, 40.4.1, 43.1, 34.5.1, 15.5.1, 38.1.

46. I take these two grounds together as effectively raising once again Mr. Carney's contentions as to objective bias. However I have already dealt with this in discussing Ground Two. I again conclude that the trial judge correctly identified the principles applicable to objective bias, and correctly applied them in deciding not to recuse herself from hearing the Show Cause application.

47. In his oral submissions Mr. Carney sought to rely on a decision of the European Court of Human Rights of *Golubovic v. Croatia*, 43947/10, of 27 November 2012. The applicant was a professor of philosophy in the University of Zagreb, and he had been suspended from work on grounds of redundancy. He brought a civil action contesting the decision, which he won in the Zagreb Municipal Court. The Faculty appealed to the Zagreb County Court, which quashed the first instance judgment and remitted the matter for rehearing. The applicant was again successful before the Municipal Court, but again the County Court quashed the first instance judgment and ordered a retrial on the basis that there had been misinterpretation of the relevant law. The applicant was successful for a third time in the Municipal Court, and on a third occasion the County Court quashed the first instance judgment and ordered a re-examination. On the fourth occasion the Municipal Court dismissed the action, and on 18 January 2005 a panel of judges at the Zagreb County Court, including Judge D.M. dismissed the appeal. The applicant then appealed to the Croatian Supreme Court, *inter alia* challenging Judge D.M. on grounds of bias because

in parallel civil proceedings he had sat as the President of the panel at first instance, and delivered a judgment against the applicant. The applicant lost before the Supreme Court and the Constitutional Court, and he then brought a case before the ECHR where he was successful, the court stating –

"55. In this connection the Court notes that on 22 March 2001 the panel of the Zagreb Municipal Court, over which Judge D.M. presided, dismissed the applicant's civil action challenging his forced redundancy in the case no. Pr-1158/95. That judgment was quashed on 20 November 2001 and the case was remitted to the Zagreb Municipal Court for a re-examination. Thus, although the judgment in question did not become final, it did suggest that Judge D.M. had already formed a view as to the merits of the applicant's case since he had held that the Faculty's decision to make the applicant redundant had been unlawful. (see. para. 27)

56. The same judge also sat on the appeal panel of the Zagreb County Court which on 18 January 2005 dismissed the applicant's appeal against the first instance judgment in the civil proceedings concerning the applicant's action challenging the decision to suspend his employment (case no. Pr-1158/94). Moreover, the appeal panel in its judgment referred to the judgment of 22 March 2001 handed down by Judge D.M. and by which the applicant's civil action had been dismissed.

57 … The fact that Judge D.M. did not participate in the adoption of the decision that was challenged by the appeal is of no relevance, since he had already formed a view as to the merits of the applicant's claims before his case was brought before the Zagreb County Court."

48. Mr. Carney relied on the following statement at para. 49 of the court's judgment: -

> "As to the objective test, when applied to a judicial body sitting as a bench it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance or, in other words, 'justice must not only be done, it must also be seen to be done'. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw…"

49. I am satisfied that *Golubovic v. Croatia* does not assist Mr. Carney. It is, on its facts, an extraordinary case, and clearly distinguishable. It is noted at para. 19 of the judgment that Judge D.M.'s judgment in the civil proceedings had been quashed and the case remitted to the Municipal Court for re-examination "after which that judge had on the resumption of proceedings expressed a hostile attitude towards the applicant's representative on several occasions…"

Mr. Carney accepts that there is nothing in the transcript or in these proceedings which evidences or indicates that there was ever any hostile attitude on the part of Pilkington J.,

or, as he put it that there was "any badness between us". The case also has no application because there Judge D.M. sat in an appellate court hearing the same matter when he had already formed a view as to the merits in the parallel challenge to the forced redundancy. Moreover, Mr. Carney in his recusal application in the High Court, and on appeal before this court, based his case on objective bias, not subjective bias. Clearly the decision of the ECHR was significantly based on ascertainable facts – particularly the hostile attitude shown towards the applicant's representative – raising doubts as to the impartiality of Judge D.M. Finally as I have said earlier there was no real dispute as to the test of objective bias under Irish law and the applicable jurisprudence.

50. In his Notice of Appeal Mr. Carney also recites certain articles of the European Convention on Human Rights, Art. 6 (right to fair trial), Art. 8 (right to respect for private and family life), and Art. 13 (right to an effective remedy), but he does not develop any factual basis or arguments that would justify this court in further considering the recusal appeal in the context of those articles. In my view Mr. Carney comes nowhere near making a case that in some way the law applicable to recusal in this jurisdiction falls short of the standards required by the European Convention on Human Rights.

51. In a similar vein the Notice of Appeal asks this court to make a reference to the Court of Justice of the European Union, but in my view European Union law is not engaged by this appeal.

52. In his submissions Mr. Carney raises certain matters not contained in his Notice of Appeal. One relates to the order of Pilkington J. dismissing the application by Mr. Carney seeking to set aside the order for substituted service of the bankruptcy summons made by Costello J. in June 2017. However in my view Pilkington J. cannot be criticised for dismissing that application by Mr. Carney which was made after a considerable delay, and was subsequent to Costello J. on 16 July 2018 refusing to set aside the bankruptcy summons.

53. Mr. Carney also complains that the respondent's petition was put to the end of the list at the adjudication hearing – a fact which is not disputed. It seems clear that this was done in ease of other litigants and practitioners in court, on the basis that the petition was going to take longer than any other matters in the list. It is standard – and good – practice for High Court judges to manage their Monday lists in this way, and this is not a basis on which to ask a High Court judge to recuse herself.

54. The next matter raised by Mr. Carney is the listing of the Show Cause motion. It was first listed on the return date, 13 May 2019. Mr. Carney had served a Notice to Cross-Examine the respondent's deponent, and this meant that the hearing was no longer suitable for a Monday morning list. Pilkington J. was the only assigned bankruptcy judge, and it was therefore in accordance with standard practice that the Show Cause motion would be listed for a Monday afternoon. This explains why, since it could not be dealt with on 13 May, 2019, it was fixed for hearing on the afternoon of Monday 4 November 2019.

55. It is also clear that Pilkington J. did not refuse Mr. Carney's recusal application on the basis that there were no other judges available to deal with bankruptcy matters. The record of her judgment shows that the application was refused on its merits, applying the correct legal principles.

56. Mr. Carney also claims that the trial judge "had a pre-written judgment". This is disputed by the respondent, and there is no evidence that supports Mr. Carney's contention. Pilkington J. did deliver an *ex tempore* judgment, but the delivery of such judgments is frequently assisted by a judge's reference to their own notes. My own reading of the transcript does not indicate the more ordered characteristics of a pre-written or reserved judgment. Nor was there any obligation on the trial judge to reserve her judgment or produce a written judgment; she was quite entitled, as she did, to have regard to the fact that the Show Cause application was listed for hearing on 4 November 2019, that Mr. Carney was six months through bankruptcy as this stage, and that further delays such as would be occasioned by reserving judgment would be undesirable. I also note that in the respondent's submissions at para. 25, in disputing this complaint, it is stated by Mr. Gorman B.L. that "in the course of the judgment, the learned High Court judge, in the normal way, referred to her own notes, not a pre-written judgment." Given the absence of any evidence from Mr. Carney to support his contention, I believe that that is a statement to which I am entitled to give some weight.

57. Mr. Carney also raises an argument that the order of adjudication gives as a reason for adjudicating him bankrupt his failure to file a Statement of Affairs. However, the only reference to this is in a draft order – it does not appear in the adjudication order. In any event this argument can have no bearing on the recusal application or this appeal, particularly as the appeal against the adjudication order was dismissed by the Court of Appeal on 26 June 2019 and it is not open to Mr. Carney to go behind that decision.

58. Finally Mr. Carney refers us to Regulation EU 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). He opened to the court Recital (10) which provides –

> "The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs. It should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons, for example by reducing the amount to be paid by the debtor or extending the payment period granted to the debtor. Since such proceedings did not necessarily entail the appointment of an insolvency practitioner, they should be covered by this Regulation if they take place under the control or supervision of a court. In this context, the term "control" should include situations where the court only intervenes on appeal by a creditor or other interested parties."

Mr. Carney said that he "didn't feel I'd got a second chance".

59. Firstly it appears that Costello J. did grant adjournments to see if a personal insolvency arrangement could be put in place. Mr. Carney advised this court in his oral submission that he met a Personal Insolvency Practitioner who advised him that such an arrangement could not be put in place in his case. Mr. Carney complains in tandem with this that the respondent refused to negotiate with him, although it is clear from correspondence that is exhibited – see the letter of 18 June 2018 from the respondent's agent Pepper Asset Servicing to Mr. Carney – that he was given an opportunity to meet to review his debt and consider alternative arrangements. In fact it does not appear that Mr. Carney has paid any money towards discharge of the debt arising from the judgment of Twomey J., and which gave rise to his bankruptcy. It is entirely a matter for the respondent as to whether or not it engages with Mr. Carney in a negotiation, and Regulation EU 2015/848 and Recital (10) provide no basis upon which Mr. Carney can assert that the trial judge was incorrect in her refusal to recuse herself.

60. I would therefore dismiss the Recusal Appeal, and I will now address the Show Cause Appeal.

Show Cause Appeal

61. I have set out in the Background the four grounds on which Mr. Carney based his application to show cause against the adjudication, but it is convenient to repeat these here:

> "(1) Section 11(1)(b) the liquidated sum claimed is not an absolute figure as the Petitioner has failed to realise the security asset to determine the actual debt due and has failed to mitigate its losses.
>
> (2) Donal O'Sullivan was not authorised to issue any Bankruptcy Summons nor any Petition for the petitioning Creditor.
>
> (3) That the Petition of Bankruptcy by a Person other than the Debtor was not issued with any Authority from the Petitioning Company in accordance with Section 11(1)(c) of the Bankruptcy Act, 1988.
>
> (4) The Petition has not been issued nor executed in accordance with the statutory requirements of the Bankruptcy Act, 1988."

62. It is not necessary to set out here all of the evidence that was before the High Court when determining the show cause application, which included the evidence before the court at the date of adjudication. However I will refer to salient parts, together with some of his arguments.

63. As is clear from the principal affidavit sworn by Mr. Carney on 25 March 2019 to ground his application, that the Donal O'Sullivan referred to in the Notice of Motion is the director/officer of the respondent whom Mr. Carney asserted "issued the Bankruptcy Summons and the Petition without Authority of the Petitioning Company". Mr. Carney

further asserted that there was non-compliance with s.158 of the Companies Act, 2014, subsection (1) of which opens "The business of a company shall be managed by its directors…" (plural); he argued that Mr. O'Sullivan as a single director could not act in the bankruptcy on behalf of the respondent without a board resolution, and generally challenged the authority of Mr. O'Sullivan to act on behalf of the company. In his affidavit he also asserted that the "liquidated claim is not an absolute figure" (para.5) and at paragraph 8 he avers that the judgment of Twomey J "was predicated upon misrepresentation as the alleged Guarantee and Indemnity did not form part of the original loan agreements". He also referred to an approach by an agent for the respondent suggesting that if Mr. Carney allowed the sale of "chattels that are contained within the property" the respondent would not proceed with the petition (para.16) and he referred to offers to resolve matters outside court and that "to date no reply to my proposal has been forthcoming" (para.17). He asserted that the petition was invalid as it was presented for ulterior motives and was vexatious, and he asserts (at para.15) that it was a "collateral attack, specifically in the matter between the alleged Debtor and agents of the Petitioner, case no. 2014/5848P" – which concerns proceedings brought by Mr. Carney against the receiver appointed by the respondent over certain property of the principal debtor. He also argued before the High Court that the Petition was not issued in accordance with the Order 76 rule 20 RSC, sub rule (2) of which stipulates:

> "(2) A petition by a creditor limited company or body corporate shall be sealed with the seal of the company or body corporate and signed by two directors or by one director and the secretary. Such seal and signature shall in all cases be attested."

64. In an affidavit sworn by Mr. Carney on 2 April 2019 he further pursued his allegation that the bankruptcy proceedings were brought for an improper/ulterior purpose in the context of his proceedings against the receiver of Philisview Properties Limited. He also refers in para. 5 to the fact that he did not provide a Statement of Affairs, and yet the draft Order of adjudication referred to the trial judge having regard to the debtor's Statement of Affairs.

65. The principal replying affidavit was sworn by Mr. O'Sullivan on 8 April 2019, and it opens with the following paragraph:

> "1. I am a Director of Ennis Property Finance Designated Activity Company ("the Company"). I make the Affidavit for and on behalf of the Company and with its consent and authority. I do so from facts within my own knowledge save where otherwise appears and where so otherwise appears I depose to same and I believe the same to be true and accurate."

Mr. O'Sullivan then sets out the history and the refusal of the Court of Appeal to extend time for an appeal from the order and judgment of Twomey J., and he denies that that judgment is not liquidated or absolute or that it was obtained by misrepresentation, an allegation that he says was rejected by the High Court and Court of Appeal when addressing Mr. Carney's application to set aside the Bankruptcy Summons. He clarifies that a Mr. Gearoid Costello was appointed by the respondent as receiver over certain

assets of Philisview Properties Limited (whose debts Mr. Carney had guaranteed to the extent of €100,000), but avers that "Even after the property is sold by the Receiver Philisview will continue to owe the Company in excess of €100,000" (para.8). He denies that there are any ongoing negotiations. He denies the petition was issued to prevent Mr. Carney pursuing his proceedings against the receiver. He points out that Mr. Carney's claims in relation to company authority to issue the bankruptcy proceedings cannot be pursued since the High Court already adjudicated on this and the Court of Appeal did not permit him to pursue this as it was not in his Notice of Appeal. He adds, in paragraph 13:

> "Having said that, and for the avoidance of any doubt, I can confirm that the Company was the one that decided to seek to bankrupt Mr. Carney and authorised your deponent to swear Affidavits grounding the proceedings."

Mr. O'Sullivan then rejects the suggestion that the respondent's bankruptcy application is vexatious or an abuse of the process.

In an earlier affidavit sworn on 19 June 2018 (in support of the Petition) Mr. O'Sullivan clarifies the extent of the indebtedness of Philisview Properties Limited to the respondent as being €3,894,191.95, and states that the receiver had agreed to sell the property owned by Philisview for €1.5m. He avers that there will be a "very significant shortfall in the debt owed by Philisview once the Property is sold. As is set out in my earlier affidavit, the sum due and owing by Mr. Carney is €100,000. This sum will clearly continue to be owed by Philisview once the Property has been sold." (para.11)

66. In a further replying affidavit sworn on 1 May 2019 Mr. O'Sullivan addresses the Statement of Affairs point raised by Mr. Carney. He states, at paragraph 4:

> "I understand that it is normal for a draft Bankruptcy Order to be prepared by a petitioning creditor and that is what happened in this case. The draft Order contained a (standard) clause indicating that the trial judge had regard to the debtor's statement of affairs. Obviously the learned High Court judge did not have regard to Mr Carney's statement of affairs as none was filed by him. However, for the avoidance of any doubt, Mr Carney had an opportunity to file a statement of affairs, and was, I am informed, directed by the Court to do so. Despite the said direction – and written requests from the Company's Solicitors, Messrs. LK Shields, to Mr Carney on 9 October 2018 and 7 November 2018 calling on him to provide a sworn Statement of Affairs - he failed, refused and neglected to so do. I beg to refer to a true copy of the said letters upon which marked with the letters "DOS1" I have signed my name prior to the swearing hereof."

The High Court judgment

67. In her *ex tempore* judgment on 12 November 2019 Pilkington J. recites s. 16 of the Bankruptcy Act, 1988 as the basis for the Show Cause application. She also recites in her judgment s. 11(1) of the 1988 Act. She quotes an extract from the judgment of Dunne J in *Harrahill v. Kennedy* where it was held that if the Bankrupt establishes that there was a failure to satisfy the requirements of s. 11(1) then the court must annul the adjudication,

and if not then the court must consider whether it would be "just and equitable to do so having regard to the interests of the Bankrupt, his creditors and any persons who might advance further credit to him". She identified that the burden of proof in showing cause rested upon Mr. Carney. She notes that the motion is not appeal from an order of adjudication. She quotes Costello J. in *Danske Bank v. O'Shea* to the effect that an application to show cause is not an appeal against matters previously ruled upon at adjudication, and that it follows that a debtor cannot rely upon the same argument previously advanced and rejected.

68. I pause there to state that the appellant in his Notice of Appeal and in his submissions does not fault the trial judge in respect of any of this part of her judgment. He does not contest that the relevant sections are s.16 and s.11(1), as identified by the trial judge. He also does not contest the authority of the judgment of Dunne J in *Harrahill v Kennedy* and indeed in Ground II he asserts that:

> "The Judge erred in fact and law or a combination of fact and law by misapplying the principles set out in Harrihill (*sic*) v Kennedy 2013 IEHC 539 whereby the Judge did not evaluate the application of a "Just and Equitable" principle"

Further Mr. Carney does not contest that the burden of proof is on him to Show Cause. Later in her judgment the trial judge correctly cites the judgements of the High Court and the Supreme Court in *Sean Dunne a Bankrupt* [2015] IESC 42 (see para. 17 of the judgment of Laffoy J in the Supreme Court) as authority for this.

69. The trial judge then traces the relevant history of the matter up to that point, starting with the judgment of Twomey J. for €100,000, interest and costs, and referring to the order of the Court of Appeal which on 7 November 2017 refused an extension of time to Mr. Carney to appeal the order of Twomey J. She recites the notice of 19 April 2017 containing particulars of demand, that preceded the issue of the Bankruptcy Summons. These facts are not contested by Mr. Carney in this appeal.

70. The trial judge then refers to the Bankruptcy Summons which issued pursuant to leave on 22 May 2017, and she notes the it was served on 22 June 2017 pursuant to an order for substituted service. She then refers to Mr. Carney's application seeking dismissal of the Bankruptcy Summons pursuant to s.8(6) of the Bankruptcy Act, 1988, in respect of which she states –

> "… I should say Costello J. exhaustively went through all of the grounds advanced by Mr. Carney and found that there was no bases as a matter of law to set aside the Bankruptcy Summons. That Order of Costello J. in turn resulted in an appeal to the Court of Appeal where Irvine J. delivered the judgment of that court on 20th February, 2019. Again, noting the manner in which Costello J. had dealt exhaustively with all of the grounds advanced by Mr. Carney and the Court of Appeal having independently considered the basis of Mr. Carney's appeal and the grounds advanced before it concluded that Mr. Carney had not established any

lawful basis which would justify setting aside the Bankruptcy Summons and the appeal was accordingly dismissed."

71. This sequence of events is not contested by Mr. Carney. It meant that in respect of the application to Show Cause Mr. Carney was not entitled to rely on grounds or arguments previously relied on before Costello J or the Court of Appeal in refusing to set aside the bankruptcy summons. The trial judge was correct in that finding, on the authority of *Harrahill v Kennedy* and *Danske Bank v O'Shea*. Similarly it means that Mr. Carney cannot be permitted to rely on grounds that were raised and rejected by Costello J and the Court of Appeal in this Show Cause Appeal. I will return to this aspect later in this judgment.

72. The trial judge then referred to the recusal application which she had refused on 14 October, 2019, which she correctly noted was the subject matter of an appeal, and she noted the refusal of a stay of that order by the Court of Appeal on 1 November 2019, which meant that the Show Cause application proceeded before her as listed.

73. In Ground IV Mr. Carney protests that the trial judge erred in proceeding with the Show Cause application on 4 November 2019 while his appeal in respect of her refusal to recuse herself was still pending, thus rendering the Recusal Appeal moot. This ground cannot stand because the trial judge refused a stay on her order declining to recuse herself, and Mr. Carney failed in his application to the Court of Appeal on 1 November 2019 for a stay. The trial judge was there fully entitled to proceed with the Show Cause application on 4 November 2019, and that ground of appeal must fail.

74. The trial judge then referred to the adjudication of Mr. Carney as a bankrupt, and the appeal of that matter which was dismissed by the Court of Appeal on 26 June 2019 on the basis that it did not consider that such appeal could continue without Mr. Carney obtaining a copy of the Digital Audio Recording (DAR).

75. Again Mr. Carney does not contest the accuracy of this recital. It is therefore important to note that following the Court of Appeal's dismissal of his appeal it was no longer open to him to rely on any of the contentions that he had advanced at the adjudication hearing before Pilkington J on 11 March 2019 as to why he should not be adjudicated bankrupt.

76. The trial judge then refers to the fact that Mr. Carney was permitted to call and cross-examine one witness, Mr. Donal O'Sullivan, the director of the respondent and the deponent of all relevant affidavits filed on behalf of the respondent. The trial judge returns to this later in her judgment.

77. Then, in a critical part of her judgment, the trial judge states:

> "Firstly, with regard to the criteria within Section 11(1), I am satisfied that the Order of Twomey J. is clear in its terms. It is judgment for a liquidated sum, in excess of €20,000, there is no requirement to determine the actual debt in the manner contended for by Mr. Carney, in any event the security asset that he refers

to is itself the subject of further and other litigation, if it was a security asset within his power and possession then in my view he could easily liquidate it and seek thereby to reduce or entirely mitigate the debt, in my view therefore the criteria in Section 11 (a) and (b) have been satisfied."

78. Mr. Carney does not contest this finding in his Notice of Appeal. In my view it is unimpeachable. In so far as he attempted, in his oral submissions, to go behind this order, by again arguing that the guarantee and/or judgement, were obtained by misrepresentation, this was impermissible both because the order of Twomey J was affirmed on appeal and is now beyond challenge, and because he did not raise this in his Notice of Appeal.

79. The trial judge then addresses allegations made by Mr. Carney concerning Mr. Donal O'Sullivan – that he was not authorised by the respondent (1) to issue the Bankruptcy summons, or (2) to issue the Petition or swear his grounding affidavits. As to (1) she stated:

> "Dealing firstly with the Bankruptcy summons, that is not a matter that can be dealt with in any application to show cause in respect of a bankruptcy petition. Mr. Carney, and he is aware of this, say this is precisely what is sought to do. If he or any other person has any difficulty with the issuing of the bankruptcy summons, then the appropriate matter is to deal with it by way of an appeal of the summons, it cannot in my view be properly be raised in any subsequent litigation pursuant to Section 16 of the 1988 Act. Accordingly the submission that there was no authority with regard to the issuing of a bankruptcy summons is rejected."

80. Mr. Carney does not plead any ground of appeal in relation to this. In my view the trial judge was correct in rejecting the argument on the basis that it could only be made in a challenge to the issue of the bankruptcy summons, and not post-adjudication on a show cause application under s.16. Mr. Carney does not appear to have raised this as an issue before Costello J or the Court of Appeal in his challenge to the issue of the bankruptcy summons, but whether he did or did not, it is not a matter that he can raise at the show cause stage.

81. As to (2), Pilkington J. rejected this stating:

> "In respect of Mr. Carney's contention with regard to absence of authority, the Court of Appeal did not permit Mr. Carney to make that application in circumstances where it was not made within his original notice of appeal in respect of the bankruptcy summons."

She then referred to Mr. Donal O'Sullivan's evidence on affidavit, and under cross examination by Mr. Carney, in which Mr. O'Sullivan confirmed his appointment as a director of the respondent company and that the company had issued "a global authorisation" to him to issue instructions to seek the bankruptcy of Mr. Carney and to swear grounding affidavits and take the requisite steps to issue the petition. While Mr.

Carney took issue with the fact that the respondent board's authorisation was not before the court, Pilkington J. referred to Exhibit DCSC 12 which was the appointment of Mr. O'Sullivan as director and named him as an authorised signatory as one of three directors/three alternate directors, together with a letter of consent to Mr. O'Sullivan to act in that capacity.

82. The trial judge next rejected the argument that the respondent had in some way failed to mitigate its losses, holding that this related to other assets claimed by Mr. Carney which were the subject of ongoing differences between himself and the receiver appointed in respect of those assets, and "none of these matters are pertinent to the present application". She rejected his allegations in respect of "nefarious motives and motivations behind the petition in bringing these proceedings". She found that "this matter is simply an adjudication pursuant to the terms of the Bankruptcy Act 1988", while accepting his entitlement to show cause.

83. The trial judge then addressed an argument relied on by Mr. Carney pursuant to O. 76, r. 20(2) of the RSC. It was not contested that the petition had only been signed by one director, Mr. O'Sullivan. Pilkington J. stated: -

> "The case law that has been open to the court and particularly the widely known and accepted decisions of *Lloyds Bank v. Loughran* (unreported, High Court, Finlay Geoghegan J., 2 February 2004) and reiterated in *Danske Bank v. McFadden* [2014] 2 IR 417, and indeed in the Supreme Court in *Sean Dunne a bankrupt* [2015] IESC 42, the court has clearly held that there is a distinction between the statutory requirements as to the form and content of a bankruptcy summons and the requirements of the rules in respect of the petition. While Finlay Geoghegan J. in *Loughran* emphasises, that there should be full compliance with the terms of the Bankruptcy Act, and I accept that, nevertheless I do not believe that there has been an infraction in respect of this petition. Now, Mr. Carney called on Mr. O'Sullivan as a witness, and Mr. O'Sullivan confirmed in clear and cogent terms the nature of his authority to deal with and effect the issuing of this petition. In my view, that evidence which is uncontradicted must in the circumstances of the case bind Mr. Carney, and he is bound by it. In my view that is sufficient evidence, and I am not in sense (*sic*) suggesting that the director must be called upon to give evidence on each and every occasion, but I cannot see, given the manner in which Mr. Carney chose to conduct his application to show cause, that he can still claim that the requisite authority is not held by Mr. O'Sullivan on behalf of the petitioner".

I pause here to explain that in *Lloyds Bank v. Loughran* Finlay Geoghegan J had to consider a petition by a company to adjudicate the respondent a bankrupt where the petition was not signed by two directors and O 76 r 20 had not been complied with. Order 124 r 1 RSC provides that "non-compliance with these rules should not render any proceedings void unless the Court shall so direct…". Finlay Geoghegan J refused to dismiss the petition and the court exercised its discretion in this regard because the debtor had not asserted any prejudice, had not denied the debt, and had attempted to

evade service of documents. This was followed by Dunne J in *Danske v McFadden*, and Costello J in *Danske v O'Shea*. It is clear that in the passage just quoted from the *ex tempore* judgment the trial judge was following this line of authority.

84. The trial judge then dealt with Mr. Carney's reliance on a decision of Stewart J. in the matter of *McGarry and Ors. v. O'Brien* [2017] IEHC 740, in combination with s.158 of the Companies Act, 2014, in support of the proposition that the appointment of Mr. O'Sullivan as a director was insufficient to authorise the issue of the petition. The trial judge rejected this argument in the following terms: -

> "… Firstly, *McGarry* is an application seeking interlocutory relief, so the court was only required to determine whether there was a fair question to be tried. Within the facts of that case, it was an action essentially to restrain certain actions of the receiver and one of the matters raised amongst many was whether there had been a proper actual appointment of the defendant receiver, and whether there had been proper compliance with section 158 of the Companies Act 2014, which envisaged directors in the plural as opposed to the singular, exercising powers on behalf of the company and also the delegation to a board of directors. In my view the facts of this case are markedly different, there is no appointment of a receiver. No authority is being challenged in that regard, rather the entitlement of a board director to give instructions to issue a plenary summons, not relevant to this application, but relevant to this application to issue the petition on behalf of the petitioning creditor. None of these matters were raised by Stewart J., who is dealing with a significantly different set of facts. On the basis of interlocutory injunctive relief, she did find there was a fair question to be tried in respect of those issues, but to the best of my knowledge, that issue has not been determined definitively, in the manner contended for by Mr. Carney."

85. The trial judge concluded –

> "Accordingly I am satisfied on the basis of the matters set out before me, with regard to the criteria of section 16 there has been no breach of section 11, all of the criteria within section 11 had been satisfied, there is no ground advanced by Mr. Carney which would come within the second heading or criteria within section 16, which would render it just and equitable, to my mind, to exercise discretion to set aside the adjudication in those circumstances, and accordingly for the reasons set out the application to show cause is refused."

Notice of Appeal

86. In his Notice of Appeal Mr. Carney asserts that the trial judge erred in fact or law on some eight grounds which may be summarised as follows:

I. The Petition was brought in contravention of the Companies Act, 2014.

II. The trial judge misapplied the principles set out in *Harrahill v Kennedy* and did not evaluate the application upon a "Just and Equitable" principle.

III. The trial judge failed to give an honest bankrupt a second chance, contrary to Council Regulation (EU) 2015/848, and the respondent never claimed it would be prejudiced if the adjudication was annulled.

IV. The trial judge erred in proceeding on 4 November when the Recusal Appeal was pending; the trial judge "managed to orchestrate that his application for recusal now becomes moot".

V. The respondent failed to comply with Irish Law and *misapplied Lloyds Bank v Loughran* (this ground appears to raise failure to comply with O 76 r. 20(2)).

VI. The trial judge erred in distinguishing *McGarry v O'Brien*.

VII. The trial judge was misled by the oral evidence of Mr. O'Sullivan which was allegedly based on a "document of authority" that was not exhibited and which Mr. Carney submits does not exist.

VIII. The trial judge did not give a written judgment, although delivering an *ex tempore* judgment some eight days later, forcing Mr. Carney to pay for the cost of the transcript.

Mr. Carney then refers to some general principles in support of his grounds: the principle of clean hands, equality before the law, and enumerated provisions of the Constitution in Articles 15, 34, 38, 40 and 43.

Decision

87. Mr. Carney does not contest that the applicable provisions are sections 16(2) and section 11(1) of the 1988 Act, nor does he contest that the trial judge correctly identified the applicable principles set out in *Harrahill v. Kennedy* and *Danske Bank v. O'Shea* or that the burden was on him as the debtor to show cause.

88. It is beyond argument that the trial judge was correct in finding that the criteria set out in s. 11(1) were satisfied. The judgment of Twomey J. against Mr. Carney for €100,000 on foot of the guarantee clearly exceeded €20,000, and was final and unappealable by the time the Show Cause application was heard in the High Court. It was not permissible for Mr. Carney to argue before the High Court or this court that the guarantee or judgment were in some way flawed. The debt was clearly a liquidated sum. The act of bankruptcy on which the petition was founded had occurred within three months before the presentation of the petition. Mr. Carney's domicile within the State within a year before the date of presentation of the petition and his ordinary residence in the State was not contested.

89. Given that the s.11(1) criteria were satisfied, the only possible issue for the trial court arising on foot of the Show Cause application was whether under s.16(2) it was just or equitable that the adjudication should be set aside.

90. Having considered the papers and Mr. Carney's written and oral submissions, I am satisfied that it was not open to Mr. Carney to raise or pursue any issue concerned with the authority of Mr. O'Sullivan to give instructions on behalf of the respondent in relation to the issue of the Petition after the Court of Appeal refused to allow him to do so in his challenge to the Bankruptcy Summons (judgment of that court of 20th February, 2019) on the basis that such a challenge was not made in his Notice of Appeal on that appeal. Further, any such argument, along with his arguments to the effect that Mr. O'Sullivan lacked authority to swear grounding affidavits, could not be raised after the Court of Appeal in its decision of 26 June 2019 dismissed Mr. Carney's appeal against the adjudication.

91. Quite apart from that in my view the trial judge had evidence before her from Mr. O'Sullivan on affidavit and as a result of his cross-examination by Mr. Carney, from which she was entitled to hold that he had authority to give instructions in relation to the Petition and to swear supporting affidavits.

92. Moreover it is clear that O 76 r.20(2) RSC is a procedural rule of court, and the court has a discretion to find a proceeding valid notwithstanding non-compliance with its strict terms. The trial judge was entitled, pursuant to O. 124, to exercise her discretion to treat the Petition as validly issued, because that order provides –

> "1. Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."

In the absence of any direction that the Petition was void, it was and remained at all times valid, and a proper basis for the adjudication of Mr. Carney as a bankrupt.

93. In so deciding in my view the trial judge correctly relied on the decision in *Lloyds v. Loughran* in which Finlay Geoghegan J. concluded that making the order for adjudication was "in the interests of the proper administration of justice and to be doing justice between the parties". That judgment was followed by Dunne J. in *Danske Bank v. McFadden* [2014] 2 IR 417 where it was noted that the court had a discretion, and having regard to the fact that no prejudice had been asserted by the debtor and that he had not disputed the debt, the court refused to dismiss the Petition. Those two judgments were in turn followed by Costello J. in *Danske Bank v. O'Shea* [2016] IEHC 732. In that case the respondent claimed he did not owe the debt, but the court held that a bald assertion that a debt was not owed was not a good reason to depart from the *McFadden* judgment.

94. In the present appeal Mr. Carney has not denied the existence of the judgment of Twomey J., despite his attempt in argument to this court to deny the validity of the guarantee. He has paid nothing on foot of that judgment. This is also a case in which orders for substituted service had to be obtained against Mr. Carney. Further, Mr. Carney has singularly failed to demonstrate any prejudice arising from the technical non-compliance with O. 76, r. 20(2). Finally the replying affidavits sworn by Mr. O'Sullivan

expressly state that they were sworn with the consent and authority of the respondent, and Mr. Carney was bound by Mr. O'Sullivan's answers under cross-examination when he made it clear that as a director he had global authority in relation to the issue of the Petition and the swearing of supporting affidavits.

95. For the foregoing reasons I am satisfied that Mr. Carney's Grounds of Appeal must fail, and his Show Cause appeal must be dismissed. However for the sake for completeness I will address his Grounds of Appeal to the extent that they may not have been expressly covered.

96. Ground I: This ground of appeal is not fully explained, but appears to relate to Mr. Carney's reliance on the authority of *McGarry v. O'Brien* [2017] IEHC 740, and may conveniently be taken with Ground VI which argues that the trial judge erred in distinguishing *McGarry v O'Brien*.

97. In *McGarry v. O'Brien* Stewart J. was concerned with an application for interlocutory injunctions restraining the defendant receiver from dealing in any way with two properties in County Sligo. The court determined that the plaintiffs had raised a fair question to be tried as to whether Mr. O'Brien had been properly appointed as a receiver by one director of the secured creditor, Havbell DAC. Stewart J. considered in detail the appointment, and arguments raised as to the validity and extent of a Power of Attorney invoked to make the appointment, as well as s. 158(1) of the Companies Act, 2014 which commences "(1) The business of a company shall be managed by its directors…". On one construction this would mean that the relevant power could only be exercised by more than one director, or possibly the board of directors. Stewart J. concluded "that fair questions to be tried have been established with the validity of the appointment of the defendant and the precise powers vested in by the deed of appointment." However she did not attempt to answer those questions, and the decision is not therefore authority for the proposition that Mr. O'Sullivan as a director did not have authority to give instructions leading to the issue of the Petition, and to swear grounding affidavits. The trial judge was therefore correct to find that that decision was not an authority for the proposition contended for by Mr. Carney, and she was entitled to distinguish it.

98. More importantly, as Mr. Carney did not raise this issue at the adjudication hearing, and failed in his appeal of the adjudication, it cannot be raised again, and insofar as he has raised it in my view the trial judge was correct in her determination on the evidence that Mr. O'Sullivan had the requisite authority. It is also pertinent to point out that the onus was on Mr. Carney at the Show Cause application not just to raise an issue as to Mr. O'Sullivan's authority, but to establish that it would be just and equitable for the adjudication to be annulled. In light of his failure to establish any prejudice, and other factors to which I have referred earlier the trial judge cannot be faulted in her conclusion that it would not be just or equitable for the order to be annulled.

99. As to Ground II, for reasons elaborated above Mr. Carney failed to discharge the burden on him of showing that it would be just and equitable to annul the adjudication, and in my

view he has failed to demonstrate that the trial judge was wrong in her application of the principles.

100. Ground III is that the High Court judge ignored Regulation (EU) 2015/848. This was not a claim that was raised in the High Court. It was not expanded upon in Mr. Carney's written submissions, but he did address it in his oral submissions. I have fully addressed these in my earlier judgment at paragraphs 58-59 in addressing the Recusal Appeal. For the same reasons in respect of the Show Cause appeal Mr. Carney's assertion that he wasn't given a "second chance" cannot succeed. I note further from the respondent's submission that while Mr. Carney did engage with a personal insolvency practitioner, no protective certificate was applied for and no personal insolvency arrangement was prepared.

101. Ground IV is that the trial judge erred in fact and law by proceeding with the application on the date listed for hearing when the Recusal Appeal was still pending. However this plea cannot be maintained because Mr. Carney applied to the Court of Appeal for an order preventing Pilkington J. hearing the Show Cause application pending the hearing of the Recusal Appeal, and that application was refused by the Court of Appeal on 1 November 2019. There was therefore nothing to prevent Pilkington J. from hearing the Show Cause application. Further as Pilkington J. was the assigned Bankruptcy judge, she was required to adjudicate on matters listed in the Bankruptcy List.

102. Ground V is that the High Court judge erred "by applying the principles laid down" in *Lloyds Bank v. Loughran*, and I have already addressed this and found that the trial judge correctly rejected the O 76 r. 20 (2) point.

103. In Ground VII Mr. Carney asserts that the High Court judge allowed herself to be misled by Mr. O'Sullivan's oral evidence which "was allegedly based upon a document of authority that had never been exhibited to the court". Mr. Carney submitted that no such document exists and that Mr. Sullivan was acting without authority, and he again raises contravention with the Companies Act, 2014. These were all arguments that relate to the validity of the petition, and to the authority of Mr. O'Sullivan to give instructions for its issue and his authority to swear affidavits. For reasons previously given I am satisfied that it was not open to Mr. Carney to make these arguments in the High Court or on appeal before this court given the prior dismissal by the Court of Appeal of his appeals in respect of the Bankruptcy Summons and the adjudication order.

104. In Ground VIII Mr. Carney is critical of what he describes as the High Court's refusal to provide him with a written judgment. That is not a good ground of appeal as it does not go to the merits of the High Court's judgment. In any event there was no obligation on Pilkington J to deliver a written judgment. She was entitled to deliver, as she did, an *ex tempore judgment*. Moreover Mr. Carney has not been prejudiced in any way by the absence of a written judgment as he was given liberty to take up the DAR, and in the event he appears to have agreed a note of the judgment with counsel for the respondent.

105. In his submissions Mr. Carney again alleges that the respondent is using the bankruptcy process for an ulterior purpose. This was not a ground raised in his Notice of Appeal and so cannot be pursued. In any event this is the same allegation that was made by Mr. Carney when he sought to set aside the Bankruptcy Summons. It was rejected in the High Court and again by the Court of Appeal, and was again rejected in the High Court when dealing with the application to have Mr. Carney adjudicated a bankrupt. It simply cannot be raised again in this appeal. Apart from that there does not appear to be any evidential basis for such allegation.

106. For these reasons I would dismiss the Show Cause appeal and affirm the order of the trial judge.

Addendum – Abuse of the process

107. Having carefully considered Mr. Carney's Notices of Appeal and his written and oral submissions in both of these appeals, I am of the view that not only has he presented no good reason to the court for allowing either appeal, but both appeals are entirely without merit.

108. When the history of these proceedings is considered, a pattern emerges of Mr. Carney failing to raise any real defence to the principal debt or guarantee, or to the notice of demand or the bankruptcy summons, or to the adjudication or validity of the adjudication of bankruptcy. Further there is a pattern of Mr. Carney appealing every possible decision in the bankruptcy process notwithstanding that he has no good ground for an appeal, and notwithstanding that he has been discharged from bankruptcy. Indeed he as much as admits that whenever a court takes a decision with which he disagrees he will appeal it as far as he can, regardless of whether he has grounds to appeal. Mr. Carney has sought to obstruct and frustrate the respondent at every turn, and in the process he has consciously sought to cause maximum cost and expense to the respondent in having to respond to his arguments and appeals. Mr. Carney would seem to be of the view that the respondent will never be able to recover such costs and expenses from him.

109. It has become clear that his strategy has been to drag matters out to frustrate the respondent and the entire bankruptcy process, and to cause the respondent expense. I believe this may be due to a perception on the part of Mr. Carney, for which no objective basis has been shown, that the respondent sought and pursued his bankruptcy for an improper motive.

110. I have recently opined that this sort of conduct is an abuse of the process. In a judgment delivered ex tempore on 1st October, 2020 in *Re Kelly Trucks Limited (in Liquidation): Gerard Murphy v. Anne Kelly* [2020] IECA 275 I stated:

> "4. The court process is designed to enable appropriate courts to hear and determine real and genuine issues and disputes, and appeals, but no real or genuine issues have been raised or pursued by Mrs. Kelly. She has been afforded every opportunity by this court to address the substantive orders made by Murphy J on 28 February 2019 but she has pointedly failed to avail of those opportunities. She

has weighed heavily on the patience of this court and has, in my view, taken up court time and incurred further costs for the respondents without any justification whatsoever.

5. Accordingly I find that Mrs. Kelly's attempt to pursue the same arguments in her Notices of Appeal, in her written and oral submissions and in her latest Notice of Motion, and the manner in which she repeatedly sought to pursue the same unstateable arguments before this court, to be an abuse of the process."

111. I am of view that both the Recusal Appeal and the Show Cause Appeal were unstateable, and that the wide ranging submissions of Mr. Carney both written and oral, were replete with irrelevant or inadmissible material, and were unstateable, and I regret to say that in my view the pursuit of both appeals was an abuse of the court process.

Orders and Costs

112. Both the Recusal Appeal and the Show Cause Appeal will be dismissed, and the orders of Pilkington J of 14 October 2019 and 12 November 2019 respectively will be affirmed.

113. As to the costs of the appeals, I am of the view that as the respondent has succeeded entirely in both of these appeals the respondent is entitled to its costs against Mr. Carney, the same to be adjudicated by a Legal Costs Adjudicator in default of agreement. This flows from s.169 of the Legal Services Regulation Act, 2015. However I would direct that the costs orders to this effect in each appeal will not be perfected for 14 days from the date of the electronic delivery of this judgment, and in the event that either party seeks some other order as to costs in either or both appeals they must file and serve a single written submission in the Court of Appeal Office before the expiration of the said period of 14 days, and there shall be a further 14 days thereafter for the filing of any reply submission. Such written submissions shall not exceed 1500 words. In the event that submission(s) are filed the court will consider and determine any costs issue that arises and its ruling(s) will be notified to the parties electronically.

Whelan and Noonan JJ having read the within judgment in advance of delivery have indicated that they agree with it and the orders and directions proposed to be made by Haughton J.