THE COURT OF APPEAL

CIVIL

Unapproved

No Redactions Needed

IN THE MATTER OF SECTION 79 OF THE BANKRUPTCY ACT 1988 AND IN THE MATTER OF HENRY DIXON (A BANKRUPT)

Court of Appeal Record Number: 2021/301 and 2021/309

High Court Record Number [Bankruptcy] 4630

Neutral Citation Number [2022] IECA 220

Barniville P.
Haughton J.
Pilkington J.

BETWEEN/

HENRY DIXON

APPLICANT/RESPONDENT

- AND –

CHRISTOPHER LEHANE (OFFICIAL ASSIGNEE IN BANKRUPTCY OF THE ESTATE OF HENRY DIXON)

NOTICE PARTY/RESPONDENT

- AND –

MICHAEL GLADNEY

RESPONDENT/ APPELLANT

JUDGMENT of Ms. Justice Pilkington on the 10th day of October 2022

1. This appeal concerns certain discrete issues that have arisen in the course of the administration of the bankruptcy estate of Henry Dixon ("Mr. Dixon" or "the bankrupt").

2. Following an application by the Revenue Commissioners (also "the Revenue") as petitioning creditor, Mr. Dixon was adjudicated bankrupt, by Order of Costello J., on 11th June, 2018. Mr. Dixon's bankruptcy adjudication remains in place, pending the resolution of this and other matters relating to his estate.

3. This appeal from the judgment and orders of Humphreys J. of 21st October, 2021, arises pursuant to a Notice of Motion, issued on behalf of Mr. Dixon on 18th December, 2020, in which he seeks orders pursuant to the Bankruptcy Act 1988 ("the 1988 Act"), that certain proofs of debt submitted to the Official Assignee ("OA") by the Revenue Commissioners, be disallowed.

4. The facts and circumstances regarding the proofs of debt are set out within the affidavits filed in respect of the various applications that have arisen within this bankruptcy estate. In summary, the Revenue submitted a proof of debt to the OA on 10th September, 2019 in the amount of €784,501.60 ("the original proof of debt") and subsequently on the 8th March, 2021 in the amount of €472,154.96 ("the revised proof of debt" and sometimes also referred to within the High Court judgment as "the amended proof of debt"). The High Court has disallowed both proofs of debt on different grounds.

5. Whilst the OA is named as a notice party to the motion, he chose not to appear before the High Court, taking the view that the issues raised within it arose solely between the Revenue Commissioners and Mr. Dixon.

6. The OA did, however, join in this appeal, with no objection being raised by either the appellant or the respondent. Within both written and oral submissions, counsel for the

OA largely confined himself to those issues arising from the High Court judgment regarding the correct procedures to be adopted by the OA in dealing with proofs of debt in the administration of a bankrupt's estate, with particular regard to the First Schedule of the 1988 Act.

7. In order to properly consider this appeal it is necessary initially to examine the bankruptcy process as it concerns Mr. Dixon.

Adjudication as a Bankrupt

8. Whilst there was no appeal from Mr. Dixon's adjudication as a bankrupt ("adjudication") pursuant to s. 16 of the 1998 Act seeking to show cause against the validity of that adjudication, or on any other grounds, nevertheless issues were raised within the affidavits grounding the application that help explain the ongoing issues within this appeal.

9. The bankruptcy summons which issued on 20th February, 2017, the subsequent bankruptcy petition of 4th July, 2017 and the verifying affidavit of debt sworn by Michael Gladney (the then Collector General of the Revenue Commissioners) on 4th July, 2017 all confirm the application by the Revenue, as petitioning creditor, seeking Mr. Dixon's adjudication as a bankrupt on the basis of a debt of €82,821.44 (comprising the judgment amount in proceedings entitled *Harrahill v. Dixon* [2008] 813 R, being the principal sum of €55,650.80, together with interest and costs).

10. Within the exchange of affidavits prior to his adjudication, Mr. Dixon's affidavit sworn on 29th November, 2017 sets out a history of his indebtedness to the Revenue. Humphreys J. commences his judgment by pointing out that Mr. Dixon's tax difficulties have, in some shape or form, been ongoing for the past 26 years.

11. From the documentation exhibited to this affidavit the following facts emerge;

(a) Within paragraph 5, Mr. Dixon confirms his ownership of the lands comprised in Folio 44622F County Mayo, in respect of which he is registered as sole owner in any event.

(b) Of relevance to this appeal are three judgment mortgages obtained by the Revenue Commissioners registered on Folio 44622F arising from the following proceedings instituted against Mr. Dixon:

(i) Circuit Court proceedings - *Liam J Irwin v Henry Dixon*, Record No 2002/62, judgment obtained 18th April, 2002, ("the 2002 Circuit Court proceedings")

(ii) High Court proceedings - *Liam J Irwin v Henry Dixon,* Record No 2002/530R, judgment obtained 24th October, 2002, ('the 2002 High Court proceedings'),

(iii) High Court proceedings – *Gerard Harrahill v Henry Dixon,* Record No 2008/813R, judgment obtained 10th February, 2009, ('the 2008 High Court proceedings').

(c) Folio 44622F notes the registration of the respective judgment mortgages, the 2002 Circuit Court proceedings on 6th September, 2005, the 2002 High Court proceedings on 7th March, 2005 and the 2008 High Court proceedings on 28th April, 2009.

(d) By Order of Dunne J. dated 19th July, 2010 (perfected 9th November) within proceedings *Gerard Harrahill v Henry Dixon* [2010 No. 183 Sp], with the consent of both parties, it was ordered that the monies secured by the registration of the respective judgment mortgages (as set out above) now stand well charged against Mr. Dixon's interest in the lands within Folio 44622F Co. Mayo. The sums due and owing to the Revenue Commissioners are recited

within the judgment, up to 19th July, 2010, in respect of the 2002 Circuit Court proceedings €26,518.45 plus interest and costs, the 2002 High Court proceedings €532,776.07 plus interest and costs and the 2008 High Court proceedings €55,960.43 plus interest and costs (all within exhibit 'HD 3').

(e) At paragraph 10 Mr. Dixon avers that on 26th January, 2015 a bankruptcy summons issued against him by the Revenue Commissioners seeking a total amount of €569,496.27, in respect of the three sets of proceedings recited at (b) above (exhibit 'HD4');

(f) Exhibit 'HD6' sets out a letter from Mr. Dixon's solicitors to the Revenue solicitors dated 24th November, 2017 seeking, amongst other matters, clarification in light of the present bankruptcy proceedings as to the status of the previous bankruptcy summons issued in 2015 (at (e) above). It also points out that as the present 2017 bankruptcy proceedings appear to be restricted to seeking recovery solely in respect of the 2008 High Court proceedings *'please accordingly advise as to the Revenue's position with regard to whether it still contends that any sums remain due and owing and/or are recoverable on foot of these 2002 Judgment (sic)'*

The letter continues (para 2(b)):

> *'As we indicated to the Court on 13 November 2017, in so far as our client has a liability to Judgment in the amount of circa €82,821.44, we are instructed that he is in a position to address any such liability. Our client's proposals with regard to resolving any such liability will however be dependent on what Revenue's position is with regard to any sums claimed by it pursuant to the 2002 Judgments'.*

12. Mr. Howley (the Collector General) in his replying affidavit sworn on 26th April, 2018 seeks to clarify the position. At paragraph 9 he confirms that the 2015 bankruptcy summons was discontinued *"due to an error having been made in the Affidavit for Bankruptcy Summons sworn on 28th July 2015 which incorrectly stated at paragraph 4 thereof that the Creditor held no security in respect of the debt…."*. With regard to the amount sought by the petitioning creditor within the present bankruptcy application he explains why the Revenue as petitioning creditor is proceeding solely in respect of the 2009 judgment (a reference to the 2008 High Court proceedings) as follows (para. 11):

> *"Having consulted with counsel and solicitors…..the Revenue Commissioners therefore took the decision to issue the present bankruptcy proceedings based solely on the 2009 judgment. However, these bankruptcy proceedings are advanced on the basis that the judgment mortgages registered in relation to the 2002 judgments on Folio 44622F of the Register of Freeholders of County Mayo on 7th March 2005 and 6 September 2005 were found to be well charged by Order of this Honourable Court made on 19th July, 2010 and are not being released as part of these bankruptcy proceedings. It is solely the judgment mortgage pertaining to the 2009 judgment which was registered on 28th April, 2009 which has been given up for the benefit of all creditors of the debtor, as pleaded at para. 2 of the Bankruptcy Petition herein dated 20th February, 2017."*

13. The matters set out above are important as the three judgments obtained by the Revenue Commissioners against Mr. Dixon (identified as the 2002 Circuit Court proceedings, the 2002 High Court proceedings and the 2008 High Court proceedings, all registered as judgment mortgages on Folio 44622F) comprise the factual background to the issues the High Court was required to consider.

14. It is clear on the face of the Bankruptcy petition that the sum sought by the Revenue as petitioning creditor arises on foot of the 2008 High Court judgment only. Counsel for Mr. Dixon has repeatedly pointed to and relied upon paragraph 2 of the bankruptcy petition which states:

> *'"Your petitioner holds security for the payment of (or part of) the said sum but he will give up such security for the benefit of the creditors of the Debtor in the event of the Debtor's being adjudged a bankrupt*."

15. The criteria for adjudication as a bankrupt, pursuant to s.11 of the 1988 Act, in so far as it is relevant to this application, is that the debt owed by the debtor to the petitioning creditor amounts to more than €20,000 and is a liquidated sum. Sanfey and Holohan in the leading text Bankruptcy Law & Practice (2nd Ed.) ("Sanfey and Holohan") confirm (para 13-03);

> *'The claim of the petitioning creditor is deemed to have been proven by virtue of the order of adjudication'*

16. It therefore follows that upon Mr. Dixon's adjudication as a bankrupt, the amount sought by the Revenue as petitioning creditor, arising pursuant to the terms of the 2008 High Court judgment, is proven as a debt within this bankruptcy.

17. As at the date of adjudication, the Revenue remains as a secured creditor in respect of the amounts owed arising from the 2002 Circuit Court proceedings and the 2002 High Court proceedings. The entitlement of the Revenue to claim within the bankruptcy process in respect of this indebtedness is one of the principal issues within this appeal.

Post Adjudication - the s.85A application

18. On 17th May, 2019, the OA applied, pursuant to s. 85A and s. 85A(3) of the 1988 Act for an order extending Mr. Dixon's discharge from bankruptcy ("the s. 85A application").

19. An interim order was granted by the Court on 27th May, 2019 initially until 8th July, 2019 (Mr. Dixon's period of bankruptcy in the absence of any extension would have expired automatically on 10th June, 2019). It has been extended thereafter and Mr. Dixon remains a bankrupt pending the resolution of this and other issues arising within his bankruptcy.

20. Within the s. 85A application there was a significant exchange of affidavits between the OA (then Christopher Lehane) and Mr. Dixon.

21. Many of the issues raised within the s. 85A application are not relevant to this appeal; they are directed to queries as to the legal and beneficial interest of Mr. Dixon in lands comprised within Folio 11401F County of Mayo, together with allegations concerning Mr. Dixon's alleged failure to properly and accurately complete his Statement of Personal Information and Statement of Affairs. It is contended by the OA that his failures to properly deal with these matters, have hindered his progress in the administration of Mr. Dixon's estate.

22. The grounding affidavit of Christopher Lehane sworn on 17th May, 2019 avers that, in the normal course, after Mr. Dixon's adjudication as a bankrupt, the OA by letter dated 26th June, 2018, requested Mr. Dixon to furnish him with a Statement of Affairs (SOA) pursuant to s. 19(c) of the 1988 Act and a Statement of Personal Information (SPI) (Tab A to book of exhibits 'CL17May19'to this grounding affidavit).

23. In essence the purpose of the SOA is to require a bankrupt to specify, in a sworn document, his indebtedness to his creditors and in respect of each, to confirm whether each debt is "accepted or disputed" by the bankrupt. The rules are set out in s. 19(c) of the 1988 Act and RSC Order 76, rule 80.

24. The SOA itself is sworn on 28th January, 2019, (Tab D to the same book of exhibits book of exhibits "CL17May19" to the Affidavit of Christopher Lehane sworn on 17th May

2019) and marked as received on 27th February, 2019. It is completed on oath within the pre-printed form questionnaire format prescribed within S.I. 461 of 2013. Within his SOA:

(a) Mr Dixon confirms his ownership of Folio MO44622F, which he lists under the heading of 'immovable property'.

(b) Within the general heading of 'Summary of Statement of Affairs' in respect of liabilities of secured creditors the word 'Nil' is entered.

(c) Under the heading of 'Secured Creditors' with the additional rider 'specify debts due by you which have been secured against assets' (p.8 of the form) there is nothing entered by Mr. Dixon, the word 'none' appears after the definition of secured creditor appears. This is puzzling given his averments in previous affidavits as to the judgment mortgages registered against this folio and his consent to the well charging Orders of Dunne J. over the same lands. Whether Mr. Dixon considers he has any possible defences to the Revenue's claim to realise its entitlements as a secured creditor is another matter; at the time this SOA was sworn by Mr. Dixon those interests remain registered on the folio. Yet he confirms there is nothing within the definition of secured creditor requiring him to "specify debts due by you which have been secured against assets". In my view the SOA does not properly clarify the position as to any secured creditors, which is clearly apparent from the folio and the averments of Mr. Dixon as recited above.

(d) Under the heading of 'unsecured creditors' Mr. Dixon sets out and accepts his indebtedness to the Revenue Commissioners in the amount of €82,821.44, which, as set out above, formed the basis of the application for Mr. Dixon's adjudication as a bankrupt.

25. Within the OA's second affidavit sworn on 2nd July, 2019 Mr. Lehane avers (para. 7):

> *'the unsecured liabilities are comprised mostly of a revenue debt in the amount of €82,821.44 as well as amounts due to legal and financial advisors. The Revenue Commissioners were the petitioning creditor and it would appear that their claim can be satisfied in full if the assets are properly dealt with'.*

26. Mr. Dixon's replying affidavit of 3rd July, 2019 deals for the most part with issues not relevant to this appeal.

27. Within the third affidavit of Christopher Lehane sworn on 15th November, 2019 at para. 5 under the heading *"Creditors to the Estate" he* avers:

> *"I say that in my last affidavit I had indicated, based on the SOA. provided, it appeared that the unsecured liabilities amounted to €82,821.44 to the Revenue Commissioners as well as some other small amounts. However, the proof of debt commenced, but not yet completed, confirms that the sums due and owing to the Revenue Commissioners amounts to €784,501.60. The Revenue Commissioners were the petitioning creditor in this bankruptcy."*

28. Mr. Lehane could perhaps be forgiven his initial assumption as to the extent of potential creditors to this estate given Mr. Dixon's sworn statement as to his various creditors within his SOA.

29. The s. 85A application, initially listed for hearing on 21 December 2020 has been adjourned pending the outcome of this appeal and other possible applications by Mr. Dixon.

Notice of Motion before the High Court

30. On 18th December, 2020, Mr. Dixon issued his Notice of Motion, joining both the OA and the Revenue Commissioners as respondents, seeking the following orders:

"1. An order pursuant to Section 79 of the Bankruptcy Act 1988 disallowing the claim of the Revenue Commissioners is so far (sic) as it exceeds the sum of €82,821.44;

2. In the alternative an order pursuant to paragraph 23(e) of the First Schedule to Bankruptcy Act 1988, as amended, appealing the decision of the Official Assignee to admit the Revenue Commissioners as a creditor in the sum of €784,501.60."

31. Section 79 of the 1988 Act states;

'The Court may, on the application of the Official Assignee or any creditor or the bankrupt or arranging debtor, disallow, in whole or in part, any debt already proved or admitted.'

32. Mr. Dixon's grounding affidavit to this motion is sworn on 18th December, 2020 and initially rehearses the history of the matters set out above. He then avers:

(a) following service of Mr. Lehane's second affidavit on 2nd July, 2019 within the s.85A application, his solicitors wrote to the OA on 3rd July, 2019 confirming the revenue debt figure as within that affidavit of €82,821.44 and again raises the possibility of that sum being satisfied by Mr. Dixon which would then likely ensure his discharge from the bankruptcy process (paragraphs 5 & 16).

(b) Mr. Dixon's solicitors had also written to the OA's solicitors on 28th August, 2020 stating that the sum of €784,501.60 was incorrect and that the correct figure was €82,821.44, as confirmed within his SOA (paragraph 17).

(c) Paragraph 18 exhibits ('HD5') the reply to that letter dated 1st October, 2020 where the OA's solicitors, Fieldfisher, by way of introduction, state:

> *"This matter was last before the Court on 22 June 2020 when your client indicated his intention to challenge the Revenue Commissioners' Proof of Debt in his bankruptcy estate. That is you(sic) client's entitlement and we note this issue was raised as far back as July 2019. However, a challenge has not yet occurred, despite your client being afforded time to do so."*

This letter also sets out in detail how the OA administers the proof debt process and this portion of the correspondence is considered later within this judgment.

(d) That Proof of Debt form dated 10th September, 2019 is exhibited at 'HD3' as well as being referenced within paragraph 14 of Mr. Dixon's affidavit. It comprises the original proof of debt and confirms:

(i) the sum sought, as set out above, of €784,501.60, comprising a total unsecured debt of €469,119.54 and secured debt of €315,382.06.

(ii) Within the standard questions raised within the proof of debt form, in response to question no. 40 ('type of security') the box containing the option 'Judgment mortgage' is crossed.

(iii) Question no. 42 seeks 'date that security was given' and the response is '28/04/2009'.

(iv) In response to question no. 45 under the section headed 'Secured Creditor Options (you must select one option)' comprising;

(1) *'Rely on security and remain outside the bankruptcy, or;*

(2) *Abandon security and claim in the bankruptcy for full debt, or;*

(3) *Realise the asset or value security held and then claim in the bankruptcy for any balance owed in excess of the net proceeds received or valuation'*

(e) None of the options at (1) to (3) above have been selected by the Revenue. This point will be considered in more detail below, but the failure of the Revenue as a secured creditor to select or elect for any option, forms the basis of the finding by the High Court that this original proof of debt should be disallowed.

33. Mr. Howley's replying affidavit is sworn on 10th March, 2021. It exhibits a further revised proof of debt dated 8th March, 2021 ('the revised proof of debt'). This affidavit includes the following;

(a) Within paragraphs 18-20 he sets out at length why the figures within the original proof of debt were incorrect, essentially owing to the application of an incorrect basis for the calculation of interest. At paragraph 22 he apologises for the oversight.

(b) Within paragraph 20 he avers:

"Revenue therefore propose to release all of the judgment mortgages which they hold for the benefit of the Applicant's creditors generally and to file an amended proof of debt in the Applicant's estate in the total sum of €472, 154. 96 ..."

(c) The revised proof of debt dated 8th March 2021 is exhibited ('JH2'). In completing the identical Proof of Debt form, the sum of €472,154.96 appears under the heading 'total unsecured', the response to question no. 42 has the dates for the registration of all three judgments and in response to question no.45 one of the options open to a secured creditor has been selected being 'abandon security and claim in the bankruptcy for full debt' is now confirmed.

(d) Within paragraph 20 the calculation of the revised proof of debt seeking the sum of €472,154.96 is set out as follows;

(i) In respect of the 2002 Circuit Court proceedings (262/2000) €10,180.29 plus interest of €2333.38

(ii) In respect of the 2002 High Court proceedings (2002/530R) €318,282.85 plus interest of €72,952.17

(iii) In respect of the 2008 High Court proceedings (2008/813R) €55,650.80 plus interest of €12,755.47

(e) At para. 23 he avers;

'...Revenue at all times made it clear that it was seeking full repayment of all outstanding judgment debts. The Applicant will be in the same position if Revenue's proposed amended proof of debt is accepted as he would have been had Revenue retained its security in respect of the 2002 judgment debts and insisted upon full repayment of those 2002 judgment debts if and when the lands contained within Folio 44622F of the Register of Freehold Land of County Mayo were sold'.

34. Within its submissions the OA points out that the revised proof of debt, lodged after Mr. Dixon issued his motion seeking to have the original proof of debt disallowed, was accepted by the OA in the context of an existing court application and in the knowledge that it, plus Mr. Dixon's objections, would form part of the High Court's deliberation. It has done so.

35. Mr. Dixon's supplemental affidavit of 8th April, 2021 notes the length of time taken by the Revenue to file its revised proof of debt and questions why the OA would accept the original proof of debt in such circumstances. He further contends that the release of the securities held in respect of both 2002 court judgments is a *"volte face"* from the position

adopted within the original bankruptcy adjudication. He also details ongoing and significant prejudice occasioned to him and a family member arising from the stance now being adopted by the Revenue.

36. The second replying affidavit of Mr. Howley is sworn on 13th May, 2021. He denies any representation by the Revenue that they would pursue Mr. Dixon solely in respect of the 2009 judgment (the 2008 High Court proceedings).

37. Throughout the exchange of affidavits within the s.85A application legal arguments are also advanced as to the entitlement of the Revenue to enforce all or a portion of its indebtedness. The Court was advised that these issues may fall for determination elsewhere, but in any event have no direct bearing on this appeal.

High Court Judgment

38. At paragraph 30 of his judgment Humphreys J. sets out the issues that, in his view, were before the Court following the hearing of the notice of motion;

> *30. As the matter evolved in oral submissions, three threshold issues were raised by the bankrupt as to why the Collector-General's proofs of debt should be disallowed (there were further issues down the line if these were unsuccessful):*
>
> *(i) the Official Assignee should not have accepted the original proof of debt because it did not contain an election as to what was to be done with the security;*
>
> *(ii) the time limit referred to in the proof of debt form should be construed as the time limit for the purposes of the First Schedule to the 1988 Act, and consequently the Official Assignee should not have accepted either the original or the amended proof of debt without an order of the court because, on that*

interpretation, we were past time for the delivery of the proof of debt or for abandonment of a security; and

(iii) the Official Assignee should not have accepted the revised proof of debt without telling the bankrupt about it first because to do so deprived the bankrupt of the opportunity to argue that the matter should be referred to the court prior to being accepted."

39. Of these three issues only (i) and (iii) were pursued on appeal. In respect of (ii) the learned trial judge did not consider that such a time limit applied on the facts of this case, holding at paragraph 35 "…….*I think the bankrupt's time limit points just do not arise because they are based upon a mistaken premise that a time limit was in fact triggered"*. I agree with that finding and in any event there has been no cross-appeal in respect of it.

40. In accordance with his distillation of the issues, paragraphs 42 and 43 of the judgment recites the Orders of the High Court in the following terms:

"Order

42. There will, therefore, be an order under s. 79 of the 1988 Act:

(i). disallowing the Official Assignee's admittance of the original proof of debt because it did not specify the Collector-General's election regarding his security; and

(ii). disallowing the amended proof of debt because the Official Assignee did not give the bankrupt a reasonable opportunity to dispute it or argue that it should be referred to the court, prior to admitting the debt.

43. For the avoidance of doubt, the order is without prejudice to the entitlement of either party to raise any other issue in any future context in the event that

the Collector-General was to submit or purportedly submit a further proof of debt."

41. It is apparent that each proof of debt is disallowed, but for different reasons.

42. Sanfey & Holohan confirm, at para. 13.22, the widely accepted legal principle, that a creditor is not entitled to claim more than once for the same debt; being entitled to recover for actual loss only and not to make any form of profit from a debtors' bankruptcy. To do so would offend against what is known as the rule against double proof. The learned authors cite the judgment of Robert Walker J. in *Re Polytech International in Administration (No.2)* [1996] 1 BCLC 428 in stating that the rule against double proof is a longstanding principle in the law of bankruptcy which has been often described in terms of straightforward and obvious fairness, depending on substance and not form.

43. On the facts of this case there is no doubt that this is not a case of double proof but rather the Revenue's filing a revised proof of debt, which is the only one presently before the OA for his consideration. The revised proof of debt is not in respect of a separate indebtedness; it is the same indebtedness adopting different calculations as averred to by Mr. Howley in his affidavit sworn on 10th March, 2021 in respect of the s.85A application. Once the revised proof of debt was accepted by the OA then the original proof of debt was superseded by the revised or amended proof of debt.

44. However, to the extent that the High Court's reason for disallowing the original proof of debt establishes that any failure by a secured creditor to elect within the bankruptcy process should immediately result in that proof of debt being disallowed by the OA, then the position of secured creditors and their entitlement to elect within the bankruptcy process is considered within s.24 of the First Schedule of the 1988 Act ("s. 24").

45. The principal focus of the High Court judgment is, however, the High Court's interpretation of s. 23 of the First Schedule of the 1988 Act ("s.23") and secondly, in light of that interpretation, how the proof of debt procedure within s.23 should be modified or amended to reflect this.

46. Prior to considering the administration of proofs of debt it is necessary to examine the role of the OA within the bankruptcy process.

Official Assignee

47. Pursuant to s. 44(1) of the 1988 Act, all property in the possession of a bankrupt at the date of his/her adjudication vests in the OA (with certain limited exceptions not relevant to this appeal).

48. The functions of the OA are set out within s. 61 of the 1988 Act but at its core is the straightforward premise of ensuring that during the bankruptcy process, the ownership of an individual's property (both real and personal) transfers to the OA in Bankruptcy to be sold by him for the benefit of creditors. This is encapsulated within s.61(2) of the 1988 Act as follows:

> *"(2) The functions of the Official Assignee are to get in and realise the property, to ascertain the debts and liabilities and to distribute the assets in accordance with the provisions of this Act."*

49. The function of the OA was considered in *A.A. -v- B.A and A.A. -v- C.D.* [2015] IESC 102. Whilst the issue before the Supreme Court was the locus standi of a moving party to maintain his application before the Court, it also considered the role of the OA within the bankruptcy process given his adjudication as a bankrupt in this jurisdiction and also in the USA.

50. Laffoy J. (Denham C.J. and Charleton J. concurring) quotes the following passage of Hoffman L.J., as he then was, in the U.K. Court of Appeal decision of *Heath v. Tang* [1993] 1 W.L.R. 1421, which was applied in this jurisdiction by the High Court (Kelly J.) in *Quinn v. IBRC* [2012] IEHC 261 as follows;

> *"43. In Heath, Hoffman L.J., as he then was, in considering the effect of bankruptcy on a cause of action, first considered the matter at a general level, stating (at p. 1422):*
>
> > *"By section 306 of the Insolvency Act 1986 the bankrupt's estate vests in his trustee when appointed and by section 285(3), no creditor has after the making of a bankruptcy order any remedy against the property or person of the bankrupt in respect of any debt provable in the bankruptcy. The effect is that the bankrupt ceases to have an interest in either his assets or his liabilities except in so far as there may be a surplus to be returned to him upon his discharge……."*
>
> *44. By way of explanation, as was pointed out by Kelly J. in Quinn, s. 306 and s. 285(3) do not differ materially from the provisions of s. 44 and s. 136 of the Act of 1988."*

51. Charleton J. in a concurring judgment put the position as follows:

> *"28. A person whose estate is in bankruptcy is not devoid of rights. Decisions as to the gathering in of the estate and the necessary pursuit of, or defence of, litigation remain. Control is through the necessary process of bankruptcy of the estate transferred from a bankrupt to the Official Assignee. This is by reason of the personal insolvency that has necessitated the adjudication in the first place. The Official Assignee is entitled to make decisions in pursuit of the preservation or augmentation of the estate in bankruptcy. Those*

decisions will be made by a public official who is responsible and whose interest is focused on the rights of creditors and on fairness to the bankrupt. Sensible decisions in aid of the early resolution of the gathering in phase of bankruptcy which exclude speculative litigation can only inure to the benefit of the creditors and to the ultimate good of the bankrupt. The sooner and the more efficiently the process of insolvency is conducted, the better chance the bankrupt has that the system will enable discharge……"

52. Section 61 also recites specific powers which vest in the OA, including powers within s. 61(3)(b) "to make any compromise or arrangement with creditors or persons claiming to be creditors …." and within s.61(3)(c) "to compromise all debts and liabilities capable of resulting in debts and all claims…… present or future ….."

53. This was confirmed by the Supreme Court *In the Matter of James Gibbons, a Bankrupt* [1958] I.R. 98 who confirmed the Order of the High Court (Budd J.) to the effect that in compromising proceedings the OA was entitled to do so, pursuant to the then operative section of the Act[1], without first obtaining the consent of the bankruptcy judge.

54. The supervisory role of the Courts is now reflected within s.61 (6) and (7) as follows;

"(6) The Official Assignee may in case of doubt or difficulty seek the directions of the Court in connection with the affairs of any bankrupt or arranging debtor.

(7) The exercise by the Official Assignee of the powers conferred by this section shall be subject to the control of the Court, and any creditor or other person who in the opinion of the Court has an interest may apply to the Court in relation to the exercise or proposed exercise of those powers."

[1] S. 279 Irish Bankrupt & Insolvency Act 1857 (20 & 21 Vict. c 60)

The First Schedule to the 1988 Act

55. To begin with s.23 itself, which states:

> *"23. The Official Assignee shall deal in the following manner with claims:*
>
> *(a) He shall prepare a list certified by him of the claims.*
>
> *(b) This list shall record—*
>
> *(i) the claims allowed by him, which shall be deemed to be admitted, and*
>
> *(ii) the claims either disallowed by him or which he considers should not be admitted without reference to the Court.*
>
> *(c) He shall refer disputed debts to the Court for adjudication.*
>
> *(d) The decision of the Official Assignee in regard to a claim shall be confirmed in writing to the creditor.*
>
> *(e) Any person aggrieved by the decision of the Official Assignee may appeal to the Court.*
>
> *(f) The Official Assignee shall place a copy of the list on the Court file.*
>
> *(g) The list shall be open to public inspection on payment of a prescribed fee but no fee shall be charged to creditors inspecting the list."*

56. The learned trial judge, at paragraphs 37 and 38 of his judgment, sets out his analysis of s. 23 as follows:

> *"37. It is implicit in para. 23(b) that there are three possible outcomes for a claim – acceptance, rejection, or referral to the court. Hence where the First Schedule envisages referral to the court, that is to the exclusion of the other options, in the sense that what is involved is a referral rather than a decision whether positive or negative first.*

38. As noted above, the First Schedule to the 1988 Act, para. 23(c) says that the Official Assignee 'shall refer disputed debts to the court for adjudication', rather than simply accept such debts by his own decision. It is agreed that that includes disputes as between debtor and creditor. Whether it includes disagreement between the Official Assignee and the creditor isn't an issue here but I don't think it does, a point I will come back to. The requirement to refer disputed debts to the court has the implication that the debtor has to know about the debt prior to the acceptance of the debt by the Official Assignee. Given the mandatory obligation to refer disputed debts to the court, it was not lawfully open to the Official Assignee to accept a proof of debt or an amended proof of debt without having given the bankrupt a prior reasonable opportunity to know about it and dispute it. The right of appeal isn't an answer either because the debt shouldn't have been accepted in the first place without notice, and to do so circumvents the statutory intention that disputed debts are referred to the court rather than being accepted."

57. As noted above, the OA, whilst named as a notice party to Mr. Dixon's notice of motion, chose not to appear before the High Court. The transcript of the High Court hearing makes it clear that the trial judge was assiduous in ensuring that the OA was aware of the application. It also discloses that during the course of the remote hearing the judge spoke directly to counsel for the OA to confirm the OA's position. His judgment records at para 31.

" ..... I will note at this juncture that as the submissions evolved it essentially became tantamount to saying that the Official Assignee did not operate the statutory scheme correctly. The Official Assignee was aware of the motion but did not choose

to participate; and while I would probably have welcomed his assistance, it is really up to interested parties in these kind of situations to decide whether to get involved."

58. The Revenue, in highlighting its role as the most frequent petitioning creditor within the bankruptcy process and the OA as the administrator of that process argue, as their principal objection, that if the interpretation of s.23 by the High Court is upheld then it has the effect of significantly diminishing the role of the OA, in particular in his administration of proofs of debt.

59. Both parties also take issue with the High Court, following its interpretation of the initial steps within the process as set out within s.23, as to the correct procedure for dealing with proofs of debt. The High Court sets out that procedure in the following terms;

> *"40. The bankrupt here has various legal arguments he wishes to make as to why the debt shouldn't be accepted and under those circumstances I don't think that the argument that the bankrupt would have had nothing of value to contribute can realistically be accepted as an objection in limine. The correct procedure is:*
>
> *(i). When a proof of debt or amended proof of debt is received by the Official Assignee, that needs to be notified to the bankrupt.*
>
> *(ii). The bankrupt has to be given a reasonable opportunity to either: (a). dispute the debt; or (b). argue that even though the amount itself is undisputed, the matter should for some other reason be referred to the court.*
>
> *(iii). If the debt is disputed, the Official Assignee cannot admit it, but must refer to the court as long as an affidavit is filed. I think if the debt is disputed but no affidavit is filed, the proof can simply be rejected as*

improper in form rather than on the merits, as a way of reconciling paras. 7 and 23(c).

(iv). If the debt is not disputed as such, but some other argument is advanced as to why the matter should be referred to the court, the Official Assignee should consider that argument and make his own decision about whether to admit the debt or not or whether to refer it to the court.

41. This procedure wasn't followed here and on that basis I would set aside the acceptance of the amended proof of debt. I would accept that this may seem administratively inconvenient but that follows what the statute says, convenient or otherwise. Courts should factor in what is practical and purposive if and when the statute gives them a choice, but sometimes it doesn't. If the Official Assignee wants to get involved in some future application to argue differently he can do that but that can't affect the present application. Maybe there might be something to be said for legislative streamlining, by providing that the Official Assignee could simply make a decision subject to appeal to the court. But again I don't see that as something I can read into the statute given the mandatory terms of para. 23(c). The existing right of appeal under para. 23(e) has to be read as subject to that express provision and as covering in effect matters other than simply disputing a debt (appeal shouldn't arise there because the Official Assignee isn't supposed to make a decision in such a case)……"

The judgment continues:

".....Even bearing all that in mind, while I've attempted to clarify how the legislation can be made to work best within its terms as they stand at the moment,

that's not to say that amending the legislation (to allow the Official Assignee to simply make a first instance decision in all cases and to expressly state who should be notified of any individual claim prior to doing so) wouldn't make the process work more smoothly – it probably would and might well be worth considering. Order 42…."

60. The High Court criticises the OA for not adopting the correct procedure in considering proofs of debt. In submissions to this Court, counsel for the OA has confirmed that the procedure proposed by the learned trial judge differs significantly from the one previously adopted by the OA's office. The OA also points to implications arising from this judgment which extend beyond the confines of the administration of Mr. Dixon's bankruptcy.

61. Both the Revenue and OA take particular issue with the finding that s.23(c), in requiring the OA to refer disputed debts to court for adjudication, must mean that the bankrupt must be made aware of the debt and be given an opportunity to dispute it.

62. As I interpret s. 23(b) and (c), the decision vested in the OA in (c) to refer any disputed debt to court arises, in turn, from his categorisation of the list of claims within (b); one of those categories being those claims he considers should be referred to the Court.

63. The language in s.23(a), (b) and (c) refers to functions directly vested in the OA (the phrase 'he shall' appears throughout). In my view the reference to the Court within s.23(c) is to those matters that the OA alone considers should be referred to the Court upon his finding of a dispute in respect of a creditor's claim. At that stage, contrary to the High Court's view, the determination of a dispute in respect of any creditor's proof of debt is initially the preserve of the OA. This is his initial investigation as to the nature and extent of creditors within a bankrupt's estate, which is one of the OA's principal functions. S.61

of the 1988 Act is clear that the OA is obliged by statute to initially ascertain the debts due and owing to the various creditors. It is his first opportunity to do so.

64. There is, in my view, no provision within s.23(c) or anywhere within the 1988 Act, for a referral of a proof of debt to a bankrupt prior to the OA's initial determination in respect of that debt. If such a provision did exist then perhaps there would be no necessity for the High Court to establish amendments within the existing procedure.

65. There are clearly defined rights of recourse open to any bankrupt aggrieved with the decision of the OA (as in this case) pursuant to s.23(e) or Order 79 of the 1988 Act (the section grounding Mr. Dixon's notice of motion). S.23 (e) states that any person aggrieved by the decision of the OA may appeal to the Court – this alone, in my view, makes it clear that the OA has the power to make any such adjudication in the first place. If all claims are initially to be submitted by the OA to a bankrupt for his/her decision, then it is not the OA who has made any decision but rather that the initial decision must rest with the bankrupt in accepting or disputing the debt or seeking a referral to the Court for some other reason.

66. S.22 of the First Schedule states;

> *"22. Before deciding on a claim, the Official Assignee may require a creditor to furnish additional information or proof or to attend before him."*

67. As s.22 states that the OA, in accepting the claim, is not precluded from seeking additional information, it lends support to the proposition that it is the OA who must initially assess the proofs of debt.

68. That the initial proof of debt process is administered by the OA would also appear to be confirmed by the terms of s.9 of the First Schedule which provides as follows:

"Subject to paragraph 24(5)[2], a creditor may, with the consent of the Official Assignee, amend his proof of debt."

69. Whilst the application, before the High Court and on appeal, of necessity focuses primarily upon the proof of debt process, nevertheless it is only a part of the administration of a bankrupt's estate. The suggestion within the High Court judgment that the only means by which a bankrupt becomes aware of a disputed debt is, at the outset, for the OA to forward a proof of debt to him/her is, in my view, failing to have regard to the entirety of the bankruptcy process and in particular the role of the bankrupt in the completion of a sworn SOA.

70. Within the bankruptcy process:

(a) After adjudication as a bankrupt the next step is for that individual, in his/her sworn SOA, to set out an exhaustive list of his/her debts. Within the same document he/she must set out whether, in respect of each separate debt, it is accepted or disputed. This document then forms an initial basis for the OA's investigations into a bankrupt's affairs. Mr. Dixon's SOA is considered in detail at para. 24 above.

(b) The first opportunity to set out Mr. Dixon's indebtedness therefore rests with him, prior to the OA considering any proof of debt. It is for him to swear on oath, for the benefit of the OA, whether each individual debt (if more than one) is accepted or disputed.

(c) That the SOA provides the initial information to the OA as to the extent of a bankrupt's indebtedness is borne out on the facts of this case by Mr. Lehane's

[2] S.24(5) of the First Schedule refers to the position where a secured creditor wishes to amend the valuation of their security and the terms upon which that may be accepted. It is not relevant on the facts of this case.

affidavits filed in support of the s.85A application; in his affidavit of 2nd July, 2019 he assumes an indebtedness as set out within the SOA; thereafter he only revises this in his affidavit of 15th November, 2019 in light of his receipt of the Revenue's original proof of debt.

71. At para. 13.03, Sanfey & Holohan *op cit.* under the heading *"Procedure for proving debts"* having initially detailed the requirement to file a Statement of Affairs the authors then state:

"It is the Official Assignee's function to ascertain the liabilities of the bankrupt as at the date of adjudication. Any creditor who wishes to pursue a claim against the estate of the bankrupt must prove his debt…"

72. The authors continue within the same paragraph:

"In his proof of debt, the creditor must specify all of the vouchers or other evidence by which the debt can be substantiated. The creditor is also required to give particulars of any counterclaim that, to the creditor's knowledge, the bankrupt may have. Details of any security held by the creditor for the debt must be given. As the Official Assignee is a trustee for the general body of creditors, he is bound to object to any claim by a creditor if a valid objection exists. Any creditor may make an objection to a claim by another creditor. <u>The Official Assignee, however, is not entitled to reject the claim of any creditor in the absence of any contradictory or inconsistent evidence as to the debt. Once the creditor swears as to the existence of a debt either on examination or on affidavit, this is the prima facie proof of it</u>."

(emphasis added).

73. Both the Revenue and the OA rely upon the detailed description of the proof of debt process in the OA's solicitor's letter to Mr. Dixon's solicitors dated 1st October, 2020.

Whilst the letter predates the filing of the revised proof of debt the portion dealing with the proof of debt procedure, beginning at paragraph 3, is as follows:

> *"The Revenue Commissioners brought their bankruptcy petition based on a debt in the amount of €82,821.44 on foot of a Bankruptcy Summons in the same amount. They have submitted a proof of debt form in the amount of €784,501.60 on the basis of other taxes due, a copy of which is attached hereto. In the ordinary course, there is nothing unusual with a petitioning creditor being owed amounts in excess of the figure in the bankruptcy summons and proving for same in the bankruptcy estate. Our client's proof of debt process is to issue a Proof of Debt form to every creditor on the Statement of Affairs and to the petitioning creditor where a Statement of Affairs is not received. A final Proof of Debt is not issued to creditors unless there are dividends to be dispersed in the estate. An initial indication of Proof of Debt was received from the Revenue Commissioners in July 2019, the final proof of debt was received in September 2019."*

It continues:

> "*As you know, our client is not disputing the Revenue's Proof of Debt. Our client has no difficulty with your client dealing with Revenue Commissioners directly or bringing an application to challenge the debt claimed, as he is entitled to. However, any application to dispute the debt is a matter between your client and the Revenue Commissioners.*
>
> *... In the meantime, we will notify the Revenue Commissioners that the Proof of Debt is disputed by your client."*

74. In this bankruptcy administration, the proof of debt process is far from complete. The ultimate distribution of a bankrupt's estate is governed by s.82 of the 1988 Act in which, provided there are sufficient funds to pay a dividend to creditors, the OA then

places a list of creditors admitted by him or the Court on the Court file (s.82(1)). There is thereafter a sitting of the Court, within certain statutory time limits, in which the OA presents his report as to the creditors and seeks orders on foot of it. The timing and precise rules in respect of this portion of the administration are also set out within RSC Order 79, rule 64, and Sanfey and Holohan at para. 13.44.

75. Arising from the High Court judgment, the procedure arising from its interpretation of s.23 would appear to require:

(a) That each bankrupt must, from the outset, be notified by the OA of every proof of debt – in respect of each he can dispute the debt (an affidavit is required but thereafter a referral to court is mandatory) or argue for referral to the court for some other reason (the OA can decide under this criteria whether such a referral should be made).

(b) No criteria other than the filing of an affidavit is required so it appears a bankrupt loses little if anything in requiring a court adjudication (arguably in respect of each proof of debt).

(c) The High Court judgment suggests or admits of the possibility that further amendment of the existing legislation may be required in light of this proposed procedure.

76. Accordingly, if the High Court judgment is correct, if an affidavit is filed to dispute a debt, a court referral is mandatory. No discretion or adjudication rests with the OA. But, as Charleton J. points out in *A.A. v B.B.*, quoted at para. 51 above, the OA's function within the bankruptcy process, in seeking to ensure the speedy and efficient administration of any bankrupt's estate, is to make decisions regarding the bankrupt's estate, with a focus on the rights of creditors and also acting in fairness to a bankrupt.

77. The effect of the High Court judgment appears to be that if it is the case that only a bankrupt may decide whether the debt is disputed or not (provided an affidavit is furnished) then the OA has no ability to decide or consider the issue other than to refer it to court. If this is correct, then it is also difficult to reconcile the two clear existing avenues of appeal (ss.79 and 23(e)) which provide for a reference to the Court in respect of a decision of the OA. If no decision has been made by the OA, then such a reference is difficult to understand.

78. It, therefore, appears that if the procedure now provided for by the High Court is upheld, then the OA will have no *initial* decision-making function in respect of any proof of debt claim where a bankrupt chooses (for any or indeed no reason) to file an affidavit to dispute the amount sought in any creditors proof of debt claim.

79. At the heart of the trial judge's analysis of s.23 is his view that the bankrupt must be put on notice of his indebtedness once a proof of debt is submitted; that he /she must know of it in order to dispute it. The High Court's judgment disallows the revised proof of debt on the basis that the OA did not give the bankrupt a reasonable opportunity to dispute it or argue it should be referred to the court prior to admitting the debt.

80. However, on the facts of this case, the position is more nuanced. From the outset Mr. Dixon has been acutely aware of his indebtedness. It was he who initially and accurately sets out the full details of that indebtedness in his initial affidavit seeking to resist adjudication, at the very start of this bankruptcy process. The Revenue has not at any stage taken issue with these details and the OA's solicitor in their letter of 1st October, 2020 (para. 73) put Mr. Dixon fully on notice of the original proof of debt and their confirmation within it that they will notify the Revenue that Mr. Dixon wishes to dispute that proof of debt. The issue in this case, from Mr. Dixon's perspective, has always been how his indebtedness is dealt with within the bankruptcy process, or indeed outside of it.

81. Mr. Dixon has consistently maintained (as clearly illustrated in his correspondence between his solicitors and those acting for the Revenue and the OA) that within this bankruptcy process the Revenue can only claim the amount sought by it as petitioning creditor and which Mr. Dixon accepted as a debt due to them within his sworn SOA.

82. No case law or statutory reference(s) have been advanced in support of this proposition. As set out above, s. 24(3) of the First Schedule imposes a time limit upon a secured creditor as to the manner in which they wish to deal with their security within the bankruptcy process. But that is the only inhibition that the 1988 Act imposes in such circumstances. The requirement within s.24(3) as it applies to secured creditors above, is set out within s.3 of the First Schedule for general creditors as follows:

> *"The Official Assignee may fix a time within which proofs of debt shall be sent to him. A proof submitted thereafter shall not be allowed except by order of the Court."*

The procedure is also clearly set out within RSC Order 76, rule 65 and no such order was made in this case.

A further alternative for dealing with proof of debts

83. It is noteworthy that, within this appeal, counsel for Mr. Dixon has submitted an alternative procedure to that outlined by the High Court as to the proper procedure for administering proofs of debt. Whilst this submission does not arise in respect of any cross-appeal by the respondent in respect of the procedural requirements set out in the High Court judgment, it again highlights the fact that Mr. Dixon's complaint was never that he was unaware of, or not on notice of, the extent of his indebtedness.

84. The submission advanced by Mr. Dixon as to the correct procedure that should be followed in respect of the proof of debt process, which differs markedly from that of the learned High Court judge, is as follows:

(a) The Official Assignee shall accept Proofs of Debt;

(b) The Proofs of Debt or Amended Proofs of Debt are to be made available to the bankrupt in the event of a difference between the SOA and the proof of debt;

(c) In the event of a difference the Bankrupt shall have a reasonable period within which to make comment on any of the Proofs of Debt; Creditors can make any objections of theirs known to the Official Assignee should they chose;

(d) Thereafter, the Official Assignee will prepare a list of claims; the list shall record: the claims allowed by the Official Assignee; the claims disallowed by the Official Assignee; and any claim which he considers shall not be admitted without reference to the court;

(e) The last mentioned category shall include any claim where a stateable dispute has arisen; but where a dispute does not reach that threshold, it will remain at the discretion of the Official Assignee as to whether that claim is allowed, disallowed or referred to the Court;

(f) The Official Assignee shall confirm in writing his decision in respect of any claim with the creditor concerned;

(g) Disputed debts i.e. where the dispute is stateable are referred to the court; and

(h) Any person aggrieved can appeal a decision of the Official Assignee to the Court.

85. In my view, the submissions advanced on behalf of Mr. Dixon as to the correct procedure for the OA to consider a proof of debt, is a useful insight into the difficulties that Mr. Dixon has in respect of the administration of this estate.

86. Mr Dixon's suggestions regarding the proper procedure to be adopted, arise from his argument regarding the entitlement of the OA to accept any proof of debt (in this case

submitted by the Revenue) which is at variance with the amount sought within the bankruptcy petition, which debt was accepted by the bankrupt within his sworn SOA.

87. Why should different and more exacting rules apply to a petitioning creditor? The only difference is, as set out above, that in adjudicating an individual bankrupt, the amount sought by the petitioning creditor within that process is deemed proven upon adjudication. At paragraph 20 of his judgment the High Court judge, in considering the position of a petitioning creditor post adjudication, states:

> *"…. However, that does not mean that the petitioning creditor is stuck with the amount in the petition. He or she can prove for a different amount in principle, but doesn't have to."*

I agree with that proposition.

S.24 of the First Schedule – Secured Creditors & the right of election

88. Upon adjudication the rights of any creditor against a bankrupt are limited to its rights within the 1988 Act (without leave of the Court pursuant to s.136 of the 1988 Act). A secured creditor may realise its security outside of the bankruptcy process and this in turn relates to a right of election that such a creditor must make within it. This is dealt with within s.24, which is in turn reflected within the options to elect, as set out in question no. 45 of the proof of debt form as it relates to secured creditors.

89. Section 3 of the 1988 Act defines *"secured creditor"* as meaning *"any creditor holding any mortgage, charge or lien on the debtor's estate or any part thereof as security for a debt due to him"*.

90. Accordingly, upon the facts of this case, upon adjudication the Revenue remained a secured creditor in respect of both the 2002 Circuit Court proceedings and the 2002 High Court proceedings.

91. Counsel for Mr. Dixon contends that this failure to elect impugns the OA's administration of this estate in admitting it as a proof of debt at all. At paragraph 32 the High Court judge states:

> ***"Lack of election in the original proof of debt***
>
> *32. An election as to what is to be done with the security is mandatory both in the proof of debt form and in logic. So the original proof of debt should not have been accepted in the absence of such an election. The Collector-General argued in the present motion that the form was "at best a nullity" and in any event would be superseded if the amended proof of claim form was to be accepted. So ultimately no huge argument was put forward by the Collector-General to the effect that the first form was valid. I consider that it was not and should not have been admitted."*

92. In my view on the facts of this case, consideration of the entitlement of the OA to accept the initial proof of debt was superseded by his acceptance of the revised proof of debt.

93. However, the High Court judgment appears to be clear that any proof of debt, lodged by a secured creditor, must be disallowed for a failure, within question no.45 of the proof of debt form, to elect for the manner in which its debt is to be considered within the bankruptcy process.

94. The relevant sections of s. 24 are as follows:

> *"(1) If a secured creditor realises his security, he may prove for the balance due to him after deducting the net amount realised and receive dividends thereon but not so as to disturb any dividend then already declared. If he surrenders his security for the general benefit of the creditors, he may prove for his whole debt.*

(2) If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date on which it was given and the value at which he assesses it, and he shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

95. The options open to a secured creditor within s.24 are encapsulated by Sanfey & Holohan as follows (para. 13.23):

"The rules provide that, if a secured creditor realises his security, he may lodge a proof of debt for the balance due to him after crediting the proceeds of realisation against the debt. He can then share in dividends but cannot upset any dividends which have already been declared. Alternatively, the creditor may surrender his security for the benefit of the general creditors and then claim for the full amount of his debt as an unsecured creditor. The third option open to the secured creditor is to keep the security (either permanently or for sale at a later date), while putting a value on it. In this case, the creditor, in his proof of debt for the difference between the estimated value and the debt due to him, must give particulars of the security, the date on which it was given and the value he puts upon it. The creditor is then entitled to receive dividends only in respect of the balance".

96. Therefore, if a secured creditor wishes to engage within the bankruptcy process those three options set out within this quotation, which are in turn reflected within s.24(1) and (2) and paragraph 45 of the *pro forma* proof of debt form, specifically requires any secured creditor to elect for one of these three options.

97. The only restriction set out as to the potential surrender of security by a secured creditor is within para. 24(3) in the following terms:

"A secured creditor shall not be entitled to surrender his security after the time fixed by the Official Assignee for receipt of proofs of debt, except by order of the Court."

98. On the facts of this case the High Court rejected the argument that any time limit had been fixed and I agree with that conclusion, which was not appealed.

99. No sanction is set out within s. 24, the 1988 Act or within the proof of debt form itself, or elsewhere, for a failure to properly complete it and specifically in circumstances where a secured creditor has failed to elect within the bankruptcy process.

100. It is clear that if a secured creditor wishes to prove within the bankruptcy process both the provisions of s. 24 of the First Schedule, reflected within the Proof of Debt form, requires such an election to be made. Within the original proof of debt form, no election was made. I have doubts as to whether, *prima facie*, this creates an immediate basis for disallowing it. Of course it is always preferable that due care and attention is paid to all documentation submitted within any proof of debt form and I note the Revenue accepts that completion of the initial proof of debt did contain omissions.

101. In my view, the only statutory restriction upon the right of election by a secured creditor is the time limit fixed by s. 24(3) above (not imposed by the OA in this case). If no election is made, then it seems to be that the status quo is preserved as far as any secured creditor is concerned. The secured creditor remains precisely that and therefore I am unsure as to why there is any necessity to disallow a proof of debt in such circumstances.

Conclusion

102. In my view, the procedure proposed by the High Court for dealing with proofs of debt differs significantly from the proof of debt process administered by the OA pursuant to the First Schedule of the 1988 Act.

103. Any amendment to the First Schedule of the 1988 Act of the type envisaged by the High Court, in respect of the procedure to be adopted in the administration of the proof of debt process, would itself require legislative amendment.

104. Since s.10 of the Bankruptcy (Amendment) Act 2015 there is now an automatic discharge from bankruptcy one year after adjudication, subject to any order of the court pursuant to s.85A, as in this case. It is a noteworthy feature of the legislative amendments to the bankruptcy process that, in general terms, efforts have been made to ensure that this process is as speedy and efficient as possible, to the benefit of both bankrupt and creditor(s).

105. One of the potential difficulties with the procedural steps for the administration of proofs of debt as envisaged by the High Court is that it would, in my view, risk prolonging the bankruptcy process. It could also have the effect of ensuring that the costs of the OA in the administration of a bankrupt's estate (which are generally considered priority payments) would operate to the detriment of the amount ultimately available for the unsecured creditors of any bankrupt's estate.

106. It is also important that the primacy of the role and function of the OA in bankruptcy is maintained, subject of course to the supervisory function of the Courts, as presently provided for within the 1988 Act.

107. It is a feature of this case that, on its facts, the OA's investigations in respect of any proofs of debt has not yet been finalised. Mr. Dixon's application pursuant to s.79 of the 1988 Act was issued at a time when the OA was only initiating his investigations as to the estate's creditors. This has been in part confirmed by the High Court in its ruling where, after disallowed both proofs of debt, stated it was "*without prejudice to the entitlement of either party to raise any other issue in any future context in the event that the Collector-General was to submit or purportedly submit a further proof of debt"* (para. 45).

108. In respect of the High Court Orders regarding both proofs of debt, the sums disallowed include the amount within the 2008 High Court proceedings. That sum (€82,821.44) has been agreed and accepted by Mr. Dixon within his SOA, and more importantly by the Court in its adjudication of Mr. Dixon as a bankrupt. Mr. Dixon's notice of motion grounding this application seeks an order "disclaiming" any revenue claim in excess of that figure. In my view, the High Court in seeking to disallow the totality of the proofs of debt must have regard to this distinction in respect of this specific claim within each proof of debt.

109. The Revenue's original proof of debt has been superseded by the revised proof of debt. It was superseded upon the OA's acceptance of the Revenue's revised proof of debt, which is without doubt in respect of the same indebtedness owed by the bankrupt Mr. Dixon.

110. In such circumstances I do not consider it appropriate to disallow the original proof of debt which is no longer before the OA and will form no further part in this bankruptcy process.

111. In considering the revised or amended proof of debt; it was disallowed on the stated basis that "*because the Official Assignee did not give the bankrupt a reasonable opportunity to dispute it or argue that it should be referred to the court, prior to admitting the debt".*

112. On the facts of this case Mr. Dixon knew the extent of his indebtedness from the outset. His dispute relates to how this indebtedness should be considered within the bankruptcy process.

113. In this case no statutory or other prohibition has been opened to this Court that operates to prevent the Revenue, as a secured creditor, exercising his right of his election within this bankruptcy process.

114. In interpreting s.23 (a), (b) and (c) of the 1988 Act the initial entitlement to determine a creditor's proof of debt must rest with the OA. There is no basis for disallowing this revised proof of debt for the reasons advanced by the High Court as the bankrupt's recourse to the Courts is clearly afforded to Mr. Dixon within s.23(e) of the First Schedule and s.79 of the 1988 Act.

Outcome of this Appeal

115. The procedures for dealing with the administration of proofs of debt are those set out within the First Schedule to the 1988 Act.

116. The revised proof of debt is not disallowed and remains as a proof of debt to be considered by the OA within the administration of the bankruptcy estate of Mr. Dixon.

Relief

117. I would allow the appeal and vacate the Orders of the High Court of 21st October, 2021 (perfected on 10th November, 2021).

Costs

118. In light of the matters set out above my provisional view in respect of costs is as follows:

As the Appellant has succeeded in full on this appeal, the Revenue is entitled to its costs. The Respondent (Notice Party) is entitled to its costs before this Court only, as costs in the bankruptcy.

If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty-one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, if

necessary. If no indication is received within the twenty-one-day period, the Order of the Court, including the proposed costs order, will be drawn and perfected.

119. As this judgment is being delivered electronically, Barniville P. and Haughton J. have indicated their agreement with it and the orders I have proposed.