THE HIGH COURT

[2024] IEHC 389

BANKRUPTCY

IN THE MATTER OF SECTION 79 OF

THE BANKRUPTCY ACT, 1988

AND

IN THE MATTER OF HENRY DIXON (A BANKRUPT)

BETWEEN

HENRY DIXON

APPLICANT

AND

CHRISTOPHER LEHANE (THE OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF HENRY DIXON BANKRUPT – 4630) AND MICHAEL GLADNEY

RESPONDENTS

JUDGMENT of Mr Justice Mark Sanfey delivered on the 1st day of July 2024.

Introduction

1. This judgment concerns an application by Henry Dixon ('**the bankrupt**') for the following reliefs as set out in the bankrupt's notice of motion:

"(1) an order pursuant to Section 79 of the Bankruptcy Act 1988 disallowing the claim of the Revenue Commissioners [in] so far 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 the 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."

2. The second named respondent was, at the time of the issuing of the bankruptcy petition, the Collector General. He was succeeded in that position by Joseph Howley, who swore the replying affidavits in the present application on behalf of the Revenue Commissioners ('**Revenue**'). Essentially, the bankrupt's application is opposed by Revenue; counsel on behalf of the Official Assignee ('**the OA**') attended at the hearing in order to assist the court, but took no substantive part in that hearing.

3. As we shall see, the Revenue submitted a proof of debt ('**PoD**') as an unsecured creditor in the bankruptcy in the sum of €784,501.60, which claim was admitted by the OA. In his first replying affidavit in the present application, Mr Howley acknowledged that this claim was based on an incorrect calculation, and submitted with that affidavit an amended PoD for an unsecured claim of €472,154.96. The central issue therefore is whether Revenue is entitled to submit this claim as an unsecured creditor in the circumstances which I shall outline below.

4. Both the bankrupt and Revenue were represented by senior counsel at the hearing, and made detailed legal submissions, which I have considered. I have also listened to the digital audio recording of the entire hearing to refresh my memory of the issues and arguments.

Background

5. The facts of the matter were outlined extensively in numerous affidavits exchanged between the parties, and require some attention. I shall therefore outline them in some detail.

6. Revenue obtained three judgments against the bankrupt as follows: -

(1) 18 April 2002, Circuit Court judgment for €32,947.11;

(2) 04 October 2002, High Court judgment for €632,914.68;

(3) 10 February 2009, High Court judgment for €55,650.80.

7. Revenue subsequently registered judgment mortgages against folio 44622F County Mayo, of which the bankrupt was the registered owner, on 07 March 2005, 06 September 2005 and 28 April 2009. Revenue then issued proceedings by way of special summons on 16 March 2010 seeking well charging orders in respect of the said judgments against the said folio; on 19 July 2010, orders were made by consent that the principal monies secured by the judgment mortgages stood well charged on the bankrupt's interest in folio 44622F in the County of Mayo. No order for sale was made in respect of the said lands.

8. Revenue issued a bankruptcy petition in respect of Mr Dixon on 04 July 2017. In the petition, Revenue set out particulars of a debt of €82,821.44, comprising €55,650.80 in respect of the February 2009 judgment, together with the sum of €26,861.01 in respect of interest thereon. At para.7 *et seq* of his affidavit of 10 March 2021 in relation to the present proceedings, Mr Howley sets out the circumstances in which Revenue's claim for adjudication of Mr Dixon was limited to this sum. He refers to an affidavit he swore on 26 April 2018 in the bankruptcy petition proceedings, in which he averred at paras. 10 and 11 that this course of action was adopted due to advice "…that the issue of whether execution by way of bankruptcy proceedings amounts to "an action upon a judgment" and is thus subject to a twelve-year period of limitation by virtue of s.11(6)(a) of the Statute of Limitations 1957 is one which has not been conclusively determined as a matter of Irish law…the Revenue Commissioners therefore took the decision to issue the present bankruptcy proceedings based solely on the 2009 judgment. … It is solely the judgment mortgage pertaining to the 2009 judgment which was registered on 28 April 2009 which is being given up for the benefit of all creditors of the debtor, as pleaded at para. 2 of the Bankruptcy Petition herein dated 20 February 2017".

9. Mr Howley emphasised at para. 16 of his affidavit in the bankruptcy proceedings on 26 April 2018 – repeated at para. 10 of his affidavit in the present application of 10 March 2021 – that: -

> “The Revenue Commissioners maintain the present bankruptcy proceedings on the basis of the 2009 judgment only. The Revenue Commissioners hold two judgment mortgages over folio 44622F of the Register of Freeholders of County Mayo in respect of the 2002 judgments, those are well-charged and Revenue will not consent to any sale of those lands unless the 2002 judgment debts are repaid”.

10. The bankrupt was adjudicated as such on 11 June 2018. Revenue subsequently filed a proof of debt form on 10 September 2019. This form set out a “total unsecured” claim of €469,119.54, and a “total secured” claim of €315,382.06. In his affidavit of 10 March 2021, Mr Howley averred at para. 18 that the calculations contained in the letter accompanying the PoD form “applied statutory interest pursuant to the Tax Act from the date on which the tax liabilities arose until 11 June 2018. Having consulted with counsel and my solicitors, I now understand that once judgment is obtained only interest pursuant to s.26 Debtors (Ireland) Act 1840 (as amended) can be claimed on the judgment debt. I am further advised and so believe that by virtue of s.11(6)(b) of the Statute of Limitations Act 1957 (as amended) judgment creditors can only claim interest for up to six years. In the circumstances – as outlined on the face of the draft amended proof of debt – the quantum of the debt which Revenue would have sought to prove in the bankruptcy has been eroded by the passage of time and the requirement to calculate interest in the debt backwards from the date of the proof of debt which has meant that the applicant has benefitted from the reduction in the level of judgment interest which came into effect on 01 January, 2017 to a greater extent than would have been the case had Revenue proved its debt more promptly. Revenue accepts that the applicant is entitled to the benefit of the full measure of this reduction”.

11. Accordingly, Mr Howley accepted that the calculations in the PoD of 10 September 2019 were incorrect. Mr Howley expressed Revenue's present position as follows: -

> "20. 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, short particulars of which sum are set out below, and more detailed particulars of which are attached to Revenue's draft amended proof of debt…".

12. Mr. Howley set out a breakdown of the sum of €472,154.96 as arising from the three judgments obtained, and exhibited an amended PoD form. At para. 22 of his affidavit he apologised to the court "for the overstatement of interest contained in Revenue's proof of debt dated 10 September 2019, this arose due to the incorrect statutory rates being applied rather than judgment rates".

13. Mr Howley acknowledged that Revenue was "now taking a somewhat different approach to the applicant's bankruptcy than was anticipated in [the affidavit in the bankruptcy proceedings of 26 April 2018]", but asserted that Revenue was entitled to take this approach; Revenue had "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 on 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" [para. 23].

14. Mr Howley indicated that Revenue's current approach was "also influenced by two key factors": -

> "(a) firstly, as will be addressed by counsel by way of legal submission, it is now clear that in this jurisdiction execution upon a judgment does not amount to an 'action upon

a judgment' within the meaning of s.11(6)(a) of the Statute of Limitations 1957 (as amended): this was not clear at the time that the original proof of debt was submitted; (b) secondly, my office is informed by the Insolvency Service of Ireland and so I believe that the value of the applicant's assets are sufficient to discharge those of his secured creditors who have proved in his bankruptcy (Santander mortgages in the sum of €177,409.35 and Ms Ann Mangan in the sum of €68,628.14) and still result in a sizeable dividend for Revenue and the applicant's other unsecured creditors."

15. The bankrupt sets out details of the correspondence which his solicitors conducted with the OA regarding the PoD submitted by Revenue. Essentially, the OA confirmed that it was not disputing Revenue's proof of debt; the bankrupt avers that this is what prompted him to bring the present application. At para. 1.10 of the bankrupt's written submissions in the present application, he cites paras. 9 and 10 of his supplemental affidavit of 08 April 2021, in which he avers as follows:

> "(9) I say and believe that I will be significantly prejudiced if Revenue are allowed now to alter their stated position in respect of the surrender of securities. I relied on that statement in my entire approach to the bankruptcy and have incurred significant costs as well as suffered a delay in the resolution of the bankruptcy as a result of pursuing a course of action which took at face value the clear and unequivocal statement by Revenue as to the extent of what they would seek to prove. I say and believe that Revenue should not now be allowed to resile from the position that has been adopted.
>
> (10) I say that there is clear prejudice to me and to my nephew if Revenue are allowed now to prove at the increased level. I had anticipated that without the 2002 debts, and with the support of friends and family, that I would be able to pay those creditors proving in the bankruptcy. This would avoid the need for any action [by the OA]

> against my nephew's company Hillview Farms Limited. If Revenue are allowed to prove in respect of the 2002 debts, that will deprive me of that option. The threat to my nephew's company has caused some tension between us, which has been the source of some upset to me".

The original hearing of the motion.

16. The present application first came before the High Court (Humphreys J) on 12 October 2021. The court delivered a reserved judgment on 21 October 2021([2021] IEHC 658), and disallowed 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" [para. 42(2)].

17. The High Court's decision was appealed, and the Court of Appeal allowed the appeal and vacated the order of the High Court: see [2022] IECA 220, Pilkington J. The Court of Appeal held in particular that:

> "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".

18. The matter was remitted to the High Court for hearing on the balance of the issues arising pursuant to the motion. The parties accept that the second relief referred to at para. 1 above should be amended in light of the amended proof of debt proffered by the Revenue Commissioners to reflect the claim now made for the sum of €472,154.96.

19. The issues which counsel suggested during the course of the hearing before this Court arose as a result of the Court of Appeal decision were:

(i) should the court accept Revenue's position that it can submit an amended proof of debt without recourse to the court?

(ii) should Revenue be allowed to relinquish its security and prove for the full amount of the debts, notwithstanding the position it adopted for the purpose of the petition?

Relevant statutory provisions

20. Section 11(2) of the Bankruptcy Act 1988 ('**the 1988 Act**') is as follows:

"(2) If a creditor who presents or joins in presenting the petition is a secured creditor, he shall in his petition set out particulars of his security and shall either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudicated bankrupt or give an estimate of the value of his security. Where a secured creditor gives an estimate of the value of his security, he may be admitted as a petitioning creditor or joint petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same manner as if he were an unsecured creditor but he shall on application being made by the Official Assignee after the date of adjudication give up his security to the Official Assignee for the benefit of the creditors upon payment of such estimated value."

21. As we have seen, the first PoD submitted by Revenue sought to differentiate between secured debts and unsecured debts. The bankrupt argued before the High Court that there was no election as to what was to be done with the security as is required by s.11(2) above, so that the original PoD should never have been accepted. Humphreys J notes at para. 32 of his judgment that the Collector General "argued in the present motion that the form was 'at best a nullity' and in any event would be superseded [sic] 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". The second PoD claims the sum of €472,154.96 only as an unsecured debt, and to that extent does not offend against s.11(2).

22. Section 76 of the 1988 Act provides that "…the provisions of the First Schedule shall apply in relation to the proof of debts". The provisions of the first schedule to the 1988 Act relevant to the present matter are as follows: -

> "(1) Every creditor shall prove his debt and a creditor who does not do so is not entitled to share in any distribution that may be made.
>
> (2) (a) A creditor may prove his debt by delivering or sending by post to the Official Assignee particulars of his debt (in this schedule referred to as a 'proof of debt').
>
> (b) Subparagraph (a) is without prejudice to the entitlement to the creditor to prove his debt at a sitting of the court.
>
> (3) 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. …
>
> (9) Subject to paragraph 24(5), a creditor may, with the consent of the Official Assignee, amend his proof of debt.
>
> (24) (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. …
>
> (3) 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."

23. Section 79 of the 1988 Act provides as follows: -

"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."

24. Section 82(1) of the 1988 Act is as follows: -

"(1) As soon as convenient after the receipt by him of sufficient funds to meet expenses, fees, costs and preferential payments and to pay a dividend to creditors in any bankrupt's estate the Official Assignee shall place on the court's file a list of creditors admitted by him or by the court, a copy of the relevant account of the bankrupts in his books, particulars of expenses, fees, costs, preferential payments and dividend payable to creditors and his report on the realisation of the estate."

25. The manner in which the OA is to deal with claims is set out at para. 23 of the first schedule as follows: -

"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 for 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."

26. Order 76, r.65 of the Rules of the Superior Courts provides for the requirements for advertisement of the fixing of a time for sending a proof of debt:

> "(1) The Official Assignee or a trustee may give notice, by advertisement in Iris Oifigiúil and otherwise as he shall think fit, of the fixing of a time within which proofs of debt shall be sent to him. Such advertisement shall be in the form number 21.
>
> (2) In addition to advertisements, such notice shall be given by the Official Assignee or trustee to all the creditors entered in the bankrupt's statement of affairs or any other creditor of whom the Official Assignee or trustee is aware, who shall not already have lodged proofs or claims with him."

Should the revised PoD have been admitted?

27. A petitioning creditor's debt which has been approved for the adjudication is deemed to be a debt proved and admitted in the bankruptcy: see O.76, r.35 of the Rules of the Superior Courts. As Humphreys J pointed out at para. 20 of his judgment, "…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". The Court of Appeal expressly approved this statement as correct at para. 87 of its judgment.

28. In the present case, Revenue wrote to the OA on 23 June 2021 to submit Revenue's amended proof. By letter of 07 July 2021, the Insolvency Service of Ireland notified Revenue that its amended PoD had been accepted by the OA: see paras. 5 to 6 of the affidavit of Brendan Ryan sworn on behalf of Revenue on 20 July 2021 in the present application.

29. The bankrupt argues that it was not open to the OA to accept the amended PoD without the permission of the court. The bankrupt's primary argument is expressed as follows at para. 1.16 of his written submissions:

> "Can Revenue now reverse its declared position, release their security in the 2002 judgments, and file an amended Proof of Debt as they have indicated they wish to do?"

Court order required to amend PoD?

30. Various cases were cited by counsel for the bankrupt as authority for the proposition that, if there is to be a change in the PoD, or security is to be relinquished, an order of court requires to be made, and the bankrupt's views must be taken into account. These cases included *Re Duggan, A Bankrupt, Ex Parte Greacen* [1897] 31 ILTR 56 and in *Re Michael Clenaghan, A Bankrupt* [1961] 95 ILTR 89. The latter case, a decision of Budd J, involved an application by a bank to amend its security in circumstances where the value of that security had increased since the bank had first valued it. The court held that it had power to amend the security under Order LXXXVIII of the Rules of the Supreme Court (Ireland) 1905, but chose in the circumstances not to make the amendment; Budd J took the view that the power to amend "should only be resorted to in a matter of valuation, in some very extreme instance". The court did however, at the request of the applicant bank, grant a well-charging order and order for sale to the bank.

31. Counsel also referred to the Northern Irish decisions of *In Re Robinson, Deceased* [1958] NI 166 and *In Re Sythes* [1962] NI 38. In *Robinson*, a judgment creditor who failed to value his security as required by the first schedule to the Bankruptcy Amendment Act (Northern Ireland) 1929 was given leave to withdraw his PoD and substitute another, in circumstances where other creditors were not prejudiced. In *Sythes*, McVeigh J followed his own judgment in *Robinson* in coming to a similar conclusion.

32. It does not seem to me that any of these decisions is of assistance to the court in the present instance. They were made under different statutory regimes. The real issue for this Court is whether the statutory regime under the 1988 Act envisages that court intervention is required to allow Revenue to release its security in the 2002 judgments and amend its unsecured debt.

33. The criteria for adjudicating a debtor bankrupt on a creditor's petition are set out in the 1988 Act, and at s.11 in particular. The options open to a secured creditor are set out at s.11(2) quoted at para. 20 above. In his petition, such a petitioner must choose between surrendering his security, or valuing it and establishing his entitlement to petition by proving for an unsecured balance which exceeds the statutorily required amount of the debt of €20,000: see s.11(1)(a) of the Act. A third option is available to such a creditor; he may rely entirely on his security and choose not to petition for adjudication of the debtor. The creditor who complies with the requirements of s.11(1) – including a secured creditor who proves an unsecured amount in excess of €20,000 – is entitled to an order of adjudication against the debtor: see s.14(1).

34. The proof of debt process set out in the first schedule is an entirely separate process to that of determining whether a debtor should be adjudicated. It is a detailed and self-contained procedure which determines the manner in which creditors prove their debts. In its judgment, the Court of Appeal emphasised the degree of autonomy which the first schedule gives to the OA. He may fix a time within which proofs of debt shall be sent to him: para. 3 (although in the present case it is accepted by the parties that he did not do so). He can require an affidavit in support of the claim if he thinks fit: para. 7. He may require a creditor "to furnish additional information or proof or to attend before him": para. 22. As the Court of Appeal points out at para. 67 of its judgment, this paragraph "lends support to the proposition that it is the OA who must initially assess the proofs of debt".

35. As the Court of Appeal goes on at para. 68 of its judgment to point out, "…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 para. 24(5), a creditor may, with the consent of the Official Assignee, amend his proof of debt'".

As the Court of Appeal points out, para. 24(5) has no relevance in the present circumstances.

36. The OA must deal with claims in the manner specified at para. 23 of the first schedule as quoted at para. 25 above. Indeed, the bankrupt has availed of para. 23(e) as a person aggrieved by the OA's decision to allow the amended proof of debt.

37. However, it is clear that the decision to allow – or not – an amendment to a PoD is one solely for the OA. This is the way this particular statutory regime operates. There is no basis for suggesting that a PoD cannot be amended with the consent of the OA, which has been granted in the present case, or that a court order is required before such an amendment can take place. Such a proposition would be entirely at odds with the statutory regime, and para. 9 of the first schedule in particular.

38. Further, it does not seem to me that there is any basis in the 1988 Act or otherwise for suggesting in principle that the OA, in carrying out his duties under the first schedule, cannot consent to an amendment of a proof of debt in which a creditor relinquishes his security and thus increases the amount of the unsecured debt. The Revenue has outlined in the present case the reasons why it took this course of action; those reasons will have been considered by the OA in deciding whether or not to consent to such an amendment. The OA could have refused to consent; however, he did indeed consent, and was plainly entitled to do so, subject to the bankrupt's right – which he has exercised – of appealing the OA's decision in accordance with para. 23(e) of the first schedule, and invoking s.79 of the 1988 Act.

39. In addition, para. 24(3) of the first schedule provides that "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." It is clearly implicit in this paragraph that a secured creditor may surrender his security until the time fixed by the Official Assignee for receipt of proofs of debts; in the present case, no such time was fixed.

Section 79 and paragraph 23(e) first schedule generally.

40. If the Revenue was in principle entitled to amend its PoD, with the consent of the OA, by surrendering its security and proving for the entire of the debt owed to it, on what basis can the bankrupt apply to court under s.79 of the 1988 Act for an order disallowing the debt admitted in whole or in part? On what basis may the bankrupt invoke the power to appeal to the court pursuant to para. 23(e) of the first schedule as a person "aggrieved by the decision of the Official Assignee?"

41. It should be noted that the OA has a separate obligation under para. 23(c) to "refer disputed debts to the court for adjudication". This is expressed in mandatory terms – "shall" refer – so that if the bankrupt contends that some or all of a debt is not in fact owed by him, the OA cannot admit the PoD but must refer it to the court for adjudication.

42. In this matter, the bankrupt does not dispute the debts owed by him pursuant to the various judgments. The bankrupt has not sought to assert that the 2002 judgments are statute-barred; counsel for Revenue, in response to a query from the court as to whether this were a live issue between the parties, submitted that the law in this regard was now "entirely settled". The matter is addressed at paras. 38 to 48 of the Revenue's written submissions; Revenue's contention is that the decision of Gearty J in *Start Mortgages v Piggott* [2020] IEHC 293 adopting the rationale expressed by Irvine and Charleton JJ in *Ulster Investment Bank Limited v Rockrohan Estate Limited* ([2009] IEHC 4 (High Court) and [2015] IESC 17 respectively) and holding that the provision limiting actions on judgments contained in

s.11(6) of the Statute of Limitations cannot apply to execution on a judgment, has effectively determined the legal position. The bankrupt does not contest this assertion, and I am not called upon to make any decision in this regard.

43. The bankrupt, while not disputing the debts owed, contends that the release by Revenue of its security and filing of an amended PoD claiming the entire amount of the indebtedness as an unsecured creditor is an abuse of process, and that Revenue is estopped from changing its position in this way. The bankrupt submits that the claim of Revenue in the bankruptcy should be disallowed pursuant to s.79 insofar as it exceeds the original claim of €82,821.44 on foot of the 2009 judgment. Revenue would then have whatever rights attached to the 2002 judgments as regards execution outside the bankruptcy.

Abuse of process

44. At para. 3.7 to 3.15 of his written submissions, the bankrupt refers to a number of cases in which the issue of abuse of process is addressed. The bankrupt then submits as follows:

> "3.16.1 By analogy to the rule in *Henderson v Henderson*, and having regard to the importance of finality in legal proceedings, a party ought not be allowed to adopt a position or advance a claim which it has consciously and expressly abandoned.
>
> 3.16.2 To allow a party to represent its position and subsequently to resile from that position would risk undermining the principle of finality in legal proceedings, would encourage looseness in pleadings and in the preparation of affidavits, and would increase the cost of litigation as parties would have to prepare to meet a wider range of potential cases from their opponents.
>
> 3.16.3 The concern about the undermining of the principle of finality in legal proceedings, is all the more central in situations where the representation is made in the context of an application for an interlocutory order, an application for a procedural

order such as for discovery, or where it is made in the context of [a] standalone application such as the application to have a person made bankrupt. Allowing the party to resile from its stated position begs the question: would the outcome have been different in the earlier application. It is submitted that courts should be slow to engage in the sort of retrospective analysis of earlier applications necessary to answer that questions [sic], and should instead adopt a position that does not allow a party to abandon their stated position.

3.16.4 It is clear that Revenue adopted a calculated and advised position in the approach taken. They were aware at all times that their approach took the question of the enforceability of the 2002 debts off the table, so to speak. Where that issue could have been raised in the context of the application to have the applicant declared bankrupt, by analogy to *Henderson v Henderson*, it is an abuse of process for Revenue to seek to have the issue raised now."

45. This latter point addresses the essence of the bankrupt's objection. As he puts it at para. 3.17 of his written submissions, "…the applicant did not have the opportunity to canvass the status of the 2002 judgments and their enforceability in the context of the application to have him declared bankrupt. If Revenue are allowed to resile from the stated position, and if the applicant wishes to so challenge the 2002 debts, he now does so at the considerable disadvantage of already having been made a bankrupt". It is argued that to allow Revenue to change its position from that adopted for the purpose of the petition in bankruptcy would be to allow an abuse of the bankruptcy process.

Estoppel

46. A related argument is made by the bankrupt at paras. 3.18 to 3.23 of his written submissions: that the Revenue is estopped from changing its position. The bankrupt's position is summarised at para. 3.24 as follows: -

"3.24.1 The statement by Revenue as to their intention in respect of the 2002 judgments gives rise to an estoppel by conduct and by convention that operates to prevent them for departing from that position.

3.24.2 It would be unconscionable to allow Revenue to now prove in the bankruptcy in respect of the 2002 debts. This is particularly so where it leaves the applicant in the position of having to challenge the enforceability of the 2002 debts, if he chooses to do so, having already been made a bankrupt.

3.24.3 Revenue's approach has considerably prejudiced the bankrupt in that it has made the bankruptcy process significantly more complicated, and it is submitted in particular that Revenue's approach is the real root cause of the OA's application to extend the bankruptcy.

3.24.4 Had the applicant been successful in challenging the enforceability of the 2002 debts, he believes he would have been able to avoid bankruptcy altogether.

3.24.5 Further, the applicant has relied on Revenue's representation of their intended conduct in how he has conducted himself."

The application of section 79 and paragraph 23(e) generally.

47. Section 79 of the 1988 Act does not provide any detail as to the criteria to be applied by a court in deciding whether or not to disallow a debt proved or admitted in the bankruptcy. Likewise, para. 23(e) of the first schedule does not elucidate how an applicant must establish that he or she is "aggrieved" by a decision by the OA to admit a debt.

48. The margin note for s.79 reads "Disallowance of debts already proved (1857, section 263)." This suggests that s.79 finds its genesis in s.263 of the Irish Bankrupt and Insolvent Act, 1857, one of the main forerunners of the 1988 Act. Section 263 is as follows: -

"Whenever it shall appear that any debt proved or admitted is not justly due, either in whole or in part, the assignees or any creditor may make representation thereof to the

court, and it shall be lawful for the court to summon and examine upon oath any person whose evidence may appear to the court to be material, either in support of or in opposition to any such debt; and if the court shall be of opinion that such debt is not due, either wholly or in part, the court shall be at liberty to expunge the same, either wholly or in part, from the proceedings, and make such order therein as to costs as the court shall see fit."

49. This section would seem to be directed more towards the question of whether or not a debt was owing in a particular case, *i.e.,* more akin to the obligation of the OA to refer disputed debts to the court for adjudication at para. 23(c) of the first schedule. However, the wording of s.79 is very broad, and I am prepared for the purpose of this judgment to accept that the bankrupt is entitled to invoke it as a means of persuading the court to disallow the proof of debt to the extent that the sum proved is in excess of the sum of €82,821.44, *i.e.,* the debt upon which the bankrupt was adjudicated.

50. Accordingly, the court would appear to have a wide discretion as to the exercise of its powers on hearing an application under either of those provisions. It would perhaps be helpful however to suggest some principles which might guide the court in such a case, and I tentatively offer the following in that regard: -

(1) Given the degree of autonomy which the 1988 Act affords the OA in the matter of admission of proof of debts, and the recognition by the Court of Appeal in the present case of the primary role of the OA in that regard, the burden of convincing the court to disallow a proved or admitted debt is on the applicant.

(2) An applicant under para. 23(e) must show that they are "aggrieved" *i.e.,* that their interests are adversely affected by the proof or admission of the debt.

(3) The damage to, or adverse effect on, the interests of the applicant must be such as to demonstrate that the admission of the debt would work a real injustice or otherwise be contrary to the scheme and intent of the bankruptcy regime as set out in the 1988 Act as amended, and O.76 of the Rules of the Superior Courts.

(4) Objection may not be taken to admission of a debt solely on the ground that its admission will reduce future dividends to other creditors.

(5) However, admission of a debt is prospective only as regards payment of dividends to creditors *i.e.,* it cannot affect any dividends already paid to creditors.

The present case.

51. When addressing the issue of abuse of process, counsel for the Revenue laid particular emphasis on the circumstances surrounding the bankrupt's adjudication. In this regard, he relied on a careful and comprehensive note by the bankrupt's solicitor of the hearing of the petition before Costello J of this Court on 11 June 2018, which note was exhibited to the bankrupt's grounding affidavit.

52. It was contended by counsel for the bankrupt at the hearing that the bankrupt was in a position to "meet the 2009 judgment", but that there were questions as to how the other liabilities under the 2002 judgments arose. It was submitted that the bankrupt "wanted to have clarity before he dealt with a PIP [personal insolvency practitioner]", although counsel for Revenue stated that the bankrupt had been directed by the court to consult a PIP the previous November or December so that the court could consider in accordance with s.14(2) of the 1988 Act whether a personal insolvency arrangement might be more appropriate, and had not done so.

53. The court found that Revenue was relying solely on the 2009 judgment; that an act of bankruptcy had clearly occurred by failure to discharge the amount sought on Revenue's

bankruptcy summons; there had been compliance by Revenue with the requirements of s.11 of the Act; and the bankrupt had not availed of the direction to seek the opinion of a PIP as to alternatives to bankruptcy. In the circumstances, the court made the order of adjudication.

54. Counsel for Revenue at the hearing before me submitted that Revenue had been entirely candid about its position and the reasons for its decision to rely only on the 2009 judgment. Rather than take steps to have this judgment discharged – as the bankrupt intimated to the court that he was in a position to do – the bankrupt had "played chicken" with Revenue, seeking further time to deal with all the judgments, and had simply "run out of road" and been adjudicated in view of the clear compliance by Revenue with its proofs as petitioning creditor and the failure of the bankrupt to take any meaningful steps to address his indebtedness.

55. Revenue's adjudication of the bankrupt was not appealed. It had been obtained after a full hearing in the High Court. The affidavit of Mr Howley of 26 April 2018 in support of the petition had set out clearly at para. 11 Revenue's position that it was relying solely on the 2009 judgment and surrounding security only for that judgment. The bankrupt was well aware at all times, that if adjudicated bankrupt, Revenue could proceed with further action on foot of the 2002 judgments.

56. It should also be noted that, as a result of his adjudication, any interest which the bankrupt had in the lands at folio 44622F vested in the OA pursuant to s.44 of the 1988 Act, subject to the various securities – including those under the 2002 judgments – registered against the property. From the date of his adjudication, issues of disposal of the assets of the estate or conduct of the process of proof of debts were matters solely for the OA – not the bankrupt.

57. As we have seen, Revenue submitted a PoD on 10 September 2019, but subsequently realised that the interest in that PoD form was overstated, and replaced it with a PoD form of

22 June 2021 in the sum of €472,154.96. The form expressly stated that the judgment mortgages were being abandoned, and that Revenue was claiming in the bankruptcy for the full debt. This PoD was accepted by the OA on 07 July 2021.

58. For the reasons I have set out above, I am of the view that the 1988 Act has a process by which a debtor is adjudicated, and a separate process by which the debtors, including the petitioning creditor, prove their debts. As Humphreys J and the Court of Appeal point out, it is permissible for the petitioning creditor to make an increased claim at the proof of debt stage. The Act also specifically envisages the petitioning creditor having the power to relinquish its security "after the time fixed by the Official Assignee for receipt of proofs of debt…". As no such time was fixed by the OA in the present case, Revenue availed of the opportunity to abandon its security and submit proof of the full and correct amount of the debt, in accordance with the procedures set out in the Act.

59. In these circumstances, it seems to me that Revenue carried out its role as petitioning creditor entirely in accordance with the statutory regime. There can be no question of it having perpetrated an abuse of process in circumstances where it has acted entirely in accordance with the provisions of the Act. None of the cases cited on behalf of the bankrupt in his written submissions envisages an abuse of process arising in such circumstances.

60. It is suggested that the harm suffered by the bankrupt is that Revenue's approach "took the question of the enforceability of the 2002 debts off the table…". Revenue openly acknowledged at paras. 10 and 11 of Mr Howley's affidavit of 26 April 2018 in support of the petition that this was its intention. Revenue required to establish an act of bankruptcy; it duly did so to the satisfaction of the court on the basis solely of the 2009 judgment.

61. The bankrupt contends that the subsequent abandonment of security puts him in the position where, if he wishes to challenge the 2002 debts, "…he now does so at the considerable disadvantage of already having been made a bankrupt". This is misconceived;

since the bankrupt's adjudication, only the OA has the *locus standi* to address the validity of the 2002 debts. He has now done so by consenting to their admission, a function he is entitled to discharge according to para. 9 of the first schedule. From the date of his adjudication, the bankrupt had no further role in dealing with the 2002 judgments.

62. It is a common occurrence for secured creditors to abandon their security and prove as an unsecured creditor for the whole of the debt owed to them. Such a creditor does this, not for altruistic reasons, but for its own strategic benefit. The effect of such an action is to increase the value of the pool of creditors who hope for a dividend in the bankruptcy; however, it often frees up the secured assets which the OA can realise for the benefit of the creditors. In the present case, the bankrupt exhibits an expert valuation from a firm of auctioneers from 06 January 2020 of the lands at folio 44622F in the sum of €550,000. He contends at para. 15 of his affidavit of 08 April 2021 that the sale proceeds of this land have been sufficient to discharge all of his creditors, including Revenue, "as of 2010 and as of that date of swearing hereof, and at all times in between". If that statement is true today, one looks forward to the OA or another secured creditor realising the property to the benefit of all creditors, secured and unsecured.

63. One wonders why, if the bankrupt was in the position – as he assured the court hearing the petition – to discharge the 2009 judgment, he did not do so and avoid adjudication. He would then have been in a position to defend any action taken by Revenue on foot of the judgment mortgages arising from the 2002 judgments. Instead, he was adjudicated bankrupt, and lost his ability to deal with the assets of his estate. Revenue has availed of its right to surrender its security in accordance with the bankruptcy regime. The issue of abuse of process does not arise.

64. It follows also that there can be no question of Revenue being estopped from changing its position. The reliance solely on the 2009 judgment for the purpose of

establishing an act of bankruptcy did not represent an assurance or commitment that it would not abandon its security for the purpose of proof of debt. If the bankrupt "relied on the fact that the Revenue were pursuing me for the 2009 judgment alone during the bankruptcy" as he alleges at para. 9 of his affidavit of 08 April 2021, he was not entitled to do so, and the prejudice which he alleges in the succeeding paragraphs of that affidavit does not flow from the actions of Revenue. Regrettably, the bankrupt is the author of his own misfortune.

Conclusion

65. In all the circumstances, I do not consider that I should accede to the bankrupt's application, which will be dismissed.

66. I will list the matter before me at 10.30 am on 10 July 2024 for submissions as to the orders to be made, including as to costs. If the parties wish to proffer a written submission in this regard, they may do so on or before Friday 05 July 2024. Any submission in excess of fifteen hundred words will not be considered.