THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 134

Record Number: 2019/160

Whelan J.
Noonan J.
Power J.

BETWEEN/

DANSKE BANK A/S TRADING AS DANSKE BANK

RESPONDENT

- AND -

PAUL O'SHEA

APPELLANT

JUDGMENT of Ms. Justice Power delivered on the 11th day of May 2020

1. This is an appeal from the judgment and order of the High Court (Pilkington J.) made on 21 February 2019 dismissing the appellant's application to show cause pursuant to s.16 of the Bankruptcy Act 1988, as amended, (hereinafter 'the Act').

Background

2. The background facts are as follows. The respondent ('the bank') obtained judgment against the appellant ('Mr. O'Shea') on 4 March 2013 in the sum of €1,296,114.47 ('the judgment sum'). A 'Notice Requiring Payment' prior to the issue of a bankruptcy summons was served, personally, upon Mr. O'Shea on 13 January 2015 in the sum of €1,487,016.15. This amount comprised the judgment sum plus interest in the sum of €190,901.68 (calculated to 5 January 2015). On 9 March 2015 the bank obtained a High Court order granting it liberty to issue and serve a bankruptcy summons.

3. Various unsuccessful attempts were made to serve that summons, personally. On 13 April 2015, the High Court (Costello J.) granted the bank liberty to serve the bankruptcy summons by way of substituted service on the Governor or Deputy Governor of Mountjoy Prison. However, Mr. O'Shea had been released from prison before such substituted service was effected. A summons server swore that on 17 April 2015 he attempted to serve Mr. O'Shea, personally, at Chancery Place, Dublin. Having touched a copy of the summons against Mr. O'Shea's right arm and having told him that he had been served,

the deponent swears that he, Mr. O'Shea, replied '*I am not*' and ran off, laughing. On 12 October 2015 the High Court gave the bank liberty to serve the bankruptcy summons on the Governor or Deputy Governor of Shelton Abbey Prison and, ten days later, on 22 October 2015, Mr. O'Shea was duly served.

4. On 15 January 2016 the bank presented a Petition for Bankruptcy to the Examiner's Office. On 12 February 2016, by ordinary pre-paid post in accordance with a court order of 8 February 2016, Mr. O'Shea was served with the Bankruptcy Petition, a Notice of Motion and an Affidavit of Debt sworn by Mr. Michael Leonard.

5. The Notice of Motion was returnable to 29 February 2016 and, at the request of Mr. O'Shea, the Petition was adjourned. Further adjournments were granted to him, thereafter, as he attempted to engage the services of a solicitor. On 4 April 2016, Costello J. directed Mr. O'Shea to file a Statement of Affairs and to engage the services of a Personal Insolvency Practitioner. Several further adjournments of the Petition were granted at Mr. O'Shea's request.

6. On 4 July 2016 an Order of Adjudication of Bankruptcy was made. At that hearing Mr. O'Shea took issue with the service of the summons given his detention in Shelton Abbey Prison at the time. Costello J. held that service had been effected in compliance with the terms of her earlier order and noted that Mr. O'Shea had given no explanation as to why he did not move to have the summons set aside following his release.

7. On 18 October 2016 Mr. O'Shea brought an application to show cause against the bankruptcy order pursuant to s. 16 of the Act. That application was refused by Costello J. on 19 December 2016 (*Danske Bank v. O'Shea* [2016] IEHC 732). Mr. O'Shea appealed that decision. On 11 May 2018 the Court of Appeal allowed the appeal and remitted the matter to the High Court Bankruptcy List for a rehearing of the application to show cause. From the transcript of that appeal, it is clear that the main issue with which the Court of Appeal was concerned and the basis upon which it remitted the matter was whether certain bank statements which post-dated the date of the judgment against Mr. O'Shea had been sufficiently explained by the bank.

8. A re-hearing of the s. 16 application took place before Pilkington J. in the High Court on 21 February 2019. She delivered an ex tempore judgment dismissing Mr. O'Shea's application to show cause. It is in respect of that judgment of Pilkington J. that this appeal was brought.

9. For the sake of completeness, I should add that on 13 May 2019 the Court of Appeal dismissed Mr. O'Shea's appeal of the order for judgment granted by Cross J. on 4 March 2013. By that time, matters had become vested in the Official Assignee by reason of the adjudication of bankruptcy.

High Court Judgment

10. Before the High Court, Pilkington J. had three affidavits of Mr. Michael Leonard, sworn on behalf of the bank, dated 30 August 2018, 31 October 2018 and 4 February 2019,

respectively. She also had before her two affidavits of Mr. O'Shea sworn on 5 October 2018 and 21 January 2019. Both parties had also filed written submissions.

11. At the outset, the trial judge confirmed that she was dealing only with an application pursuant to s. 16 of the Act. She recalled that an application to show cause was not an appeal against matters previously ruled upon at the adjudication stage. She agreed with the observations of Costello J. who, upon hearing the original s. 16 application, had stated at para. 14 of her judgment, that Mr. O'Shea, as debtor, '*cannot rely upon the same argument that was already advanced and rejected at the hearing resulting in his adjudication as a bankrupt*'. Pilkington J. stressed that any attempt by Mr. O'Shea to raise issues relating to the bankruptcy summons would not be considered by her because they were not matters that were before the Court at the re-hearing of the s. 16 application. The primary matter in the remittal from the Court of Appeal, in her view, was whether there had been compliance with the component parts of s.16 and, in particular, whether it was established that there was, in fact, a liquidated sum in the sense contended for under s.11 of the Act.

12. The trial judge noted Mr. O'Shea's assertions that he did not owe the amount claimed on foot of the bankruptcy summons and that his failure to pay did not constitute an act of bankruptcy because the debt was not a liquidated sum. She also noted his view that the judgment on which the bank relied and the evidence before the court established that there had been a series of 'incoming payments' made to the bank which had altered the debt owed. Having distinguished between a bankruptcy summons and a bankruptcy petition by reference to the case law, the trial judge was satisfied that the submissions offered by Mr. O'Shea related, almost exclusively, to the circumstances surrounding the adjudication of the bankruptcy summons. She reiterated that the subject before the court was a s.16 application and that Mr. O'Shea could not be permitted to continually raise matters that were not matters for adjudication at the rehearing of an application to show cause.

13. The trial judge observed that no steps had been taken by Mr. O'Shea to set aside the bankruptcy summons nor had any stay been placed on the original judgment order of Cross J. Whilst that judgment order had been the subject of an appeal, the appeal had not been prosecuted as of the date of the hearing (see para. 9). The judgment sum, therefore, remained outstanding. It was clear to Pilkington J. that the Court of Appeal had been concerned with specific bank statements which, in her view, related only to whether there had been compliance with the requirements of s. 11(1) of the Act.

14. The trial judge then considered the relevant provisions of the Act. Where a bankrupt seeks to show cause against the validity of an adjudication of bankruptcy, he or she may bring an application pursuant to s. 16 of the Act which provides as follows:

> *"(1) The bankrupt may, within three days or such extended time not exceeding fourteen days as the Court thinks fit from the service of the copy of the order of adjudication on him, show cause to the Court against the validity of the adjudication.*

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

Pilkington J. then set out the requirements of s. 11(1) of the Act (as amended) which provides as follows:

"(1) A creditor shall be entitled to present a petition for adjudication against a debtor if-

(a) the debt owing by the debtor to the petitioning creditor (or, if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to € 20,000 or more,

(b) the debt is a liquidated sum,

(c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition, and

(d) the debtor (whether a citizen or not) is domiciled in the State or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in the State or has carried on business in the State personally or by means of an agent or manager, or is or within the said period has been a member of a partnership which has carried on business in the State by means of a partner, agent or manager."

15. The trial judge recalled that if there was a failure to satisfy one of the above provisions, then the obligation to annul the adjudication was mandatory under s. 16. If, on the other hand, there had been no such failure ('*in any other case*') then the Court had permissive options—it could dismiss the application or adjourn it on such conditions as it considered fit. Pilkington J. held that the test to be applied by the court in making that latter decision was whether it would be '*just and equitable*' having regard to the interests of the bankrupt, his solicitors and any person who might advance further credit to him. That test had been approved by Dunne J. in *Harrahill v. Kennedy* [2013] IEHC 539 as the appropriate one to be applied when considering an application to show cause. Distinguishing a s.16 application from an application to dismiss a summons under s. 8(6) of the Act, Dunne J. in *Harrahill* had held that showing cause involved '*something more*' than raising an issue which must be litigated elsewhere.

16. Pilkington J. confirmed that she had read the full transcript of the Court of Appeal's ruling into the court record in order to identify the precise reason for the remittal of the application. She noted that concern had been expressed by the Court of Appeal (O'Malley J.) in relation to certain bank statements from October 2012 to October 2013. Those statements had set out the amount that was due on foot of the judgment order but

they had also indicated certain '*incoming payments*' which appeared to have been attributed in satisfaction of the undoubted debt that Mr. O'Shea had on foot of the judgment sum. O'Malley J. had noted Mr. O'Shea's contention that the bank statements indicated that its '*proofs are not in order*' in terms of the amount '*that he says that they say he owes'*. Observing that the bank's statements appeared to show payments into Mr. O'Shea's account. O'Malley J. did not know whether this was simply an error in the sequence of statements or whether it suggested that payments had been made by creditors or debtors and that such payments were then attributed by the bank to the satisfaction of the debt. She was simply *'not in a position to say'.* That being so, the issue raised a doubt as to whether the amount owed by Mr. O'Shea as of the date of presentation of the petition (15 January 2016) or the swearing of the affidavit was correct. In this regard, O'Malley J. noted that Mr. Leonard's affidavit was posited on the assumption that no payments of any sort had been made in satisfaction of the debt. If the bank had, in fact, been appropriating payments made into Mr. O'Shea's account then, it seemed to her that the sworn assertion was incorrect.

17. The Court of Appeal had decided that the appropriate procedure was not to annul the bankruptcy but rather to return to the High Court the application to show cause. In a direct response to a question posed by Mr. O'Shea, O'Malley J. had stated:

> *"At the minute the procedure is still in being. The adjudication is still in place because that was not challenged* ***in this appeal****. What has happened is we have allowed your appeal where you attempt to show cause in the High Court, and a High Court judge rejected your submissions at that stage, so* ***you are being placed back into that position****." (Emphasis added.)*

18. Having regard to the specific concern expressed by the Court of Appeal, Pilkington J. was clear that she had to establish if the sum obtained in judgment against Mr. O'Shea was a liquidated sum relating to a loan account, the last four digits of which are 9039. In this regard, she noted that Mr. O'Shea had never contended, nor had he ever suggested, that he had discharged the judgment debt. Based on the statements before the court, however, he appeared to suggest that a third party may have paid or contributed payments to the outstanding sum.

19. In considering the s. 16 application, Pilkington J. (at p. 22/23 of the transcript) reviewed the explanation given by Mr. Leonard concerning the particular bank statement which had caused '*a certain disquiet*' to the Court of Appeal. This was **Statement Number 21**, dated 1 October 2013 in respect of the account ending in the numbers 9039[1]. It was exhibited as ML1 in Mr. Leonard's affidavit sworn on 30 August 2018. He explained that the sum of €1,296,114.47 represented the amount due and owing to the bank by Mr. O'Shea as of 25 May 2012. That sum comprised the combined balances in respect of

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[1] On the transcript the trial judge refers, inadvertently, to Statement No. 22 but it is clear from the context and the date of the statement to which she refers (1 October 2013) that she was, in fact, considering Statement No. 21 because she identifies it as Exhibit ML1 and that exhibit is Statement No. 21 and it is dated 1 October 2013

seven loan facilities—five of which were overdraft facilities and two of which were term loan facilities. From 26 May 2012 to 4 March 2013 (the date upon which judgment was entered) contractual interest had been accruing on the seven loan accounts. The judgment sum of €1,296,114.47 was sought by the bank (without the accrued interest having been added thereto) and it was this sum that was entered by Cross J.

20. Mr. Leonard's affidavit went on to explain that after the judgment had been obtained, the bank had performed a number of '*internal transactions*' on the seven accounts relating to the aforesaid seven loan facilities. The ultimate purpose of these transactions was threefold:

    (a) to consolidate the borrowing accounts;

    (b) to place the judgment sum on an account with the Courts Act interest accruing (then at 8%) on it; and

    (c) to reduce the debit balances on the borrowing accounts to zero in circumstances where their combined balances (as of 25 May 2012) had formed the judgment sum of €1,296,114.47.

21. The trial judge noted (at p. 22) Mr. Leonard's explanation that upon the conclusion of that internal administrative consolidation exercise, the judgment sum was then recorded on the account in **Statement Number 22** (exhibited as ML2). This statement was in respect of the same account ending in the numbers 9039 and it was dated 16 October 2013. There were, in fact, two versions of Statement Number 22 and she noted Mr. Leonard's explanation as to how that had come about. On 15 October 2013, an error had occurred in the bank's computer system. Statement Number 22 had been generated but one internal transaction had been omitted therefrom. That error was corrected and the following day (16 October 2013) Statement Number 22 was generated again, this time reflecting the correct amount outstanding which, as stated above, was the sum obtained in judgment against Mr. O'Shea.

22. The trial judge (at p. 23) also had regard to the fact that Mr. Leonard had exhibited a series of the other statements each of which recorded a zero-credit balance. These were referred to as ML3 in the affidavit of Mr. Leonard. Pilkington J. confirmed her familiarity with the procedure whereby accounts are 'zeroed down'. She was satisfied that the terms of Statement 22 were 'entirely clear' and that the statement faithfully reflected the judgment sum referred to in the order of Cross J. of 4 March 2013. In reaching this conclusion, she stated (at p. 23/24): -

    > *"Mr. Leonard has averred, and I entirely accept, that these are simply matters that have been debited down to ensure that the amount forming the judgment sum is properly reflected. That they have been zeroed down is a procedure that I'm certainly familiar with, and that appears to be properly reflected in the statements that have been put before me.*

With regard to ML2, it has been averred by Mr. Leonard that a correct statement is statement No. 22 dated the 16th October 2013, in respect of account number ending in the digits 9039.

The statement of the previous day is incorrect, in that, a certain payment in the sum of €305.70 was omitted, and that has been included in the document of 16 October 2013, being statement No. 22.

To my mind the terms of that statement are entirely clear on their face. And the judgment sum is again faithfully reflected, as it is throughout all of the statements, as being the judgment sum […] ordered by Mr. Justice Cross in the original adjudication of the summary judgment application."

23. The trial judge then addressed the Court of Appeal's specific concern as to whether there had been '*incoming payments*' credited to Mr. O'Shea's account. She noted that Mr. Leonard, on affidavit, had explained that the terms used by bank to describe the internal administrative transactions referred to above were recorded on account statements as '*incoming payment, correction*' and '*outgoing payment, correction*' and '*outgoing payment*'. These were '*entry narratives*' relating to the combining of balances and the reversal of charges in respect of the borrowing accounts. Such entry narratives were pre-defined templates used within bank's computer system. The trial judge accepted Mr. Leonard's sworn evidence that no monies or payments whatsoever had been received by or paid to the bank in respect of the judgment sum which, together with accrued interest, still remained unpaid and unsatisfied in its entirety. She further accepted his testimony that the judgment had not been sold, transferred or assigned by the bank to any party or entity. Having considered the explanation in respect of the '*entry narratives*' Pilkington J. was satisfied that no such payments had been made and that the judgment debt remained outstanding since March 2013. By way of '*additional comfort*' to the Court of Appeal, she noted that Mr. O'Shea had confirmed to her that '*no sum whatsoever has been paid by him*' in discharge of that debt.

24. Pilkington J. summarised matters by noting that the issue before her was a net one. She confirmed that she had considered all of the papers, submissions and authorities that had been presented to her and was satisfied, in the light of the case law, as to how s. 16 of the Act was to be applied. She stated (at p. 27): -

"I am satisfied the debt is a liquidated sum. I am satisfied it is the judgment sum, as was initially set out in the judgment of Mr Justice Cross in 2013, which judgment remains unsatisfied. And I am satisfied that the Petitioner has properly set out the extent of the liquidated sum in a manner that I am satisfied with. And accordingly, in my view the criteria in section 11 have been satisfied."

25. Finally, the trial judge considered the court's competence to exercise its equitable jurisdiction upon the hearing of a s. 16 application. She confirmed that she had exercised her discretion in favour of considering all the documentation that was put before the court. She concluded that on both statutory and equitable grounds Mr. O'Shea

had failed to show cause to annul the adjudication of bankruptcy. Accordingly, she dismissed the application.

Grounds of Appeal

26. In his Grounds of Appeal, Mr. O'Shea complains that the trial judge erred in her adjudication, in her findings and in law in that: -

    (1) these were based on evidence that was contradictory, misleading and misrepresented the true facts of the case;

    (2) she held that biased and prejudicial evidence was incontestable in circumstances where there were accountancy miscalculations, interest manipulation and interest overcharging practices which disadvantaged him and caused unfairness and inequality;

    (3) she failed to demand or request the support of independent evidence by qualified persons to remove anomalies and miscalculations identified in the evidence;

    (4) she accepted and relied upon evidence that was fundamentally defective and conflicting;

    (5) she relied upon and accepted evidence in support of the bank's claim of a liquidated sum when such evidence had omissions and/or conflicting contradictions and counter-statements that demonstrated miscalculations and accountancy anomalies;

    (6) she failed to have due regard to the direction of the Court of Appeal of 11 May 2018 where flaws and irregularities had been identified;

    (7) she admitted that she had not read all the papers concerning the application; and

    (8) she failed to accept that an act of bankruptcy could not have occurred when Mr. O'Shea was never served with the bankruptcy summons.

27. Each party to this appeal assisted the Court with written submissions which were supported, further, by oral arguments advanced during the course of the hearing.

Legal Principles

28. The principles applicable to an appellate adjudication are well known. It is, primarily, a matter for the trial judge to consider the evidence of witnesses, to assess their reliability and credibility and to make a finding of fact based on evidence (*Hay v. O'Grady* [1992] 1 IR 210). MacMenamin J. set out a concise statement of the relevant principles in **M.C. v. F.C.** [2013] IESC 36 where he stated (at para. 3):

> *"This Court does not engage in a complete re-hearing of a case on appeal. It proceeds rather on the facts as found by the trial judge and his inferences based on these facts. As Hay v. O'Grady makes clear, if the findings of fact made by a trial judge are supported by credible evidence, then this Court is bound by those findings, even if there is apparently weighty evidence to the contrary. This Court*

will only interfere with findings of the High Court where findings of primary fact are not supported by evidence, or cannot in all reason be supported by the evidence."

As Clarke J. (as he then was) pointed out in *Doyle v. Banville* [2018] 1 I.R. 505, at p. 510, it is important that the trial judge's judgment engages with '*the key elements of the case*' made by both sides and explains why one is preferred over the other. An appellate court is not obliged to go through every tangential piece of evidence to find something that the trial court may have failed to consider. The trial judge's obligation is to address the competing arguments of both sides in whatever terms may be appropriate on the facts and issues arising.

29. As noted (see para. 15), the Act sets out different ways in which a challenge may be brought against an adjudication of bankruptcy and different legal tests will apply depending on the nature of the challenge made. Pursuant to s. 8(5) of the Act, a debtor served with a bankruptcy summons may apply to the court to dismiss the summons. Section 8(6)(b) provides that the court '*shall dismiss the summons if satisfied that an issue would arise for trial*'. In *Minister for Communications, Energy and Natural Resources v. M.W* [2009] IEHC 413 [2010] 3 I.R. 1, McGovern J. applied the Supreme Court *ex tempore* judgment in *St Kevin's Company against a Debtor* (Unreported, 22 January 1995) and held that the correct interpretation of s. 8(6)(b) was that the Court should not undertake an investigation into the merits of the case once it was satisfied that an issue arose on the summons. In such circumstances, it was mandatory for the Court to dismiss the summons if it was satisfied that an issue arose between the parties and the issue would have to be litigated separately, outside of the bankruptcy process. On appeal, the Supreme Court (Dunne J.) in *Minister for Communications, Energy and Natural Resources v Wood & Wymes* [2017] IESC 16 affirmed that the threshold test of whether there is a '*real and substantial issue*', as articulated by McGovern J., must be applied. Such issue should not be '*fanciful or unreal*'.

30. An alternative challenge to an adjudication of bankruptcy, and the one that arises on this appeal, may be made pursuant to s. 16 of the Act which permits a debtor to bring an application to show cause against the validity of an order of adjudication. In *In the matter of Sean Dunne (a bankrupt)* [2015] IESC 42, the Supreme Court (Laffoy J.) confirmed that the burden of proof rests on the bankrupt to satisfy the court that the requirements of s. 11(1) have not been fulfilled. When considering the court's equitable jurisdiction within the scope of s. 16 of the Act, Dunne J. in *Harrahill* was satisfied that the section was not concerned with providing a forum for an applicant to raise an issue that could be tried elsewhere. This was not the correct basis upon which to consider an application to show cause under s. 16 (2). The appropriate test was whether it would be '*just and equitable*' to annul the adjudication in circumstances other than where there has been a failure to comply with the provisions of s. 11(1) of the Act.

Discussion

31. Mr. O'Shea has been involved in considerable litigation before the superior courts since early 2013 arising from loan facilities afforded to him by the bank. Since several applications have been heard by the courts over the course of the years, it is important to

delineate, precisely, the contours of *this* application in order to establish the precise matters that are before this Court on this appeal.

Not an Appeal of the Judgment Order

32. In several of Mr. O'Shea's grounds of appeal he takes issue with the judgment sum. Throughout his submissions he seeks to put in issue the amount claimed by the bank referring, for example, to the '*disputed judgment*' which gave rise to the bankruptcy proceedings. There is a dispute, he claims, as to the alleged debt both before '*and most definitely after Summary Judgment'*. At the hearing of this appeal, he submitted that there was '*doubt in the figures on every occasion*' and that he was '*not being heard*'. The bank argues that the judgment sum was not the subject of the matter remitted to the High Court.

33. The first and most obvious observation to make is that this is not, nor can it be treated as, an appeal against the order of 4 March 2013 entering summary judgment against Mr. O'Shea. This is not the first time a court observes that Mr. O'Shea did not seek a stay on that order. Furthermore, an appeal which he had initiated in 2014 in respect of that 2013 order, was not prosecuted prior to the adjudication of his bankruptcy in 2016. Six years post the judgment entered against Mr. O'Shea, the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84 stressed the importance of banks providing particulars in terms of how sums claimed are calculated. That was in the context of the requirement on banks to meet the obligations of O. 4, r. 4 of the Rules of the Superior Courts. Had an appeal against the judgment order been prosecuted, then the impact, if any, of the *O'Malley* judgment on Mr. O'Shea's case could have been addressed. However, the appeal initiated in respect of the judgment sum was not prosecuted and was overtaken by the bankruptcy proceedings. It was dismissed by this Court in May 2019.

34. In any event, it is clear from the transcript of the judgment of O'Malley J., that the main issue with which the Court of Appeal was concerned and the basis upon which it remitted the s. 16 application back to the High Court was whether certain bank statements which ***post-dated the date of the judgment*** against Mr. O'Shea had been sufficiently explained by the bank (my emphasis). Consequently, for this and for the other reasons set out above, I am satisfied that the order granting summary judgment in the sum of €1,296,114.47 and the question of how that judgment sum came to be calculated cannot be challenged in these proceedings as they are not matters that are, properly, before this Court.

Not an Appeal of the Adjudication of Bankruptcy Order

35. The second observation to be made is that this appeal is not concerned with the circumstances surrounding either the service of the bankruptcy summons or the order of adjudication of bankruptcy. Mr. O'Shea urged the Court to rule on what he submitted was a wrongful bankruptcy adjudication. Relying on *O'Maoileoin v Official Assignee* [1989] I.R. 647 and the dictum of Hamilton J. in *Re Sherlock* [1995] 2 ILRM 493, he argued that the law requires a court to exercise extreme caution where there may be a discrepancy or

an error in the amount claimed by the petitioning creditor. He submitted that the amount claimed by the bank was '*in excess of that which was due*' and that a zero balance on the statements pertaining to six of his seven accounts, proved that the debt was not a liquidated sum as the bank had so claimed on the bankruptcy petition. In the bank's submission, these arguments were impermissible on this appeal.

36. The background facts establish that the bank was granted liberty to issue and serve a bankruptcy summons on Mr. O'Shea on 9 March 2015. There is evidence, on affidavit, of Mr. O'Shea's attempt to evade service (para. 3 above) following which an order for substituted service was made and he was duly served. Having been served with a bankruptcy petition in February 2016, the High Court granted him multiple opportunities to prepare for the hearing of the petition and several adjournments were ordered over a five-month period at his request (see para. 5). When making the Order of Adjudication of Bankruptcy on 4 July 2016, Costello J. held that service of the bankruptcy summons had been properly effected and noted that Mr. O'Shea made no attempt, thereafter, to have the summons set aside (see para. 6).

37. Upon the Court of Appeal's remittal of the s. 16 application, Pilkington J. ruled that any attempt by Mr. O'Shea to raise issues relating to the bankruptcy summons were not to be considered by her because they were not matters which were before the court. In my view, she was entirely correct to find that Mr. O'Shea, as debtor, could not rely upon the same arguments that had already been advanced by him and rejected by the court at the hearing which resulted in his adjudication as a bankrupt (see para. 11). Should any residual doubt exist in relation to whether the validity of the bankruptcy adjudication forms part of this appeal, it is resolved, in my view, by the express finding of O'Malley J., who, in a direct response to a question posed by Mr. O'Shea, replied that '*. . . The adjudication is still in place because that was not challenged* ***in this appeal***.' That being so, the adjudication of bankruptcy was not a matter remitted back to the High Court and it is not a matter before this Court on this appeal.

Appeal of a Remitted Application to 'Show Cause'

38. The principal focus in this appeal is the High Court's ruling on the remittal of Mr. O'Shea's application to show cause pursuant to s. 16 of the Act. Such an application is not to be confused with an application to set aside a bankruptcy summons under s. 8(5) of the Act where a summons must be dismissed if the court is satisfied that a real and substantial issue arises between the parties which requires to be litigated separately (see *Minister for Communications v M.W.*). To succeed in an application to show cause, an applicant must either prove that there has been non-compliance with s. 11(1) of the Act or establish, to the satisfaction of the court, that it is '*just and equitable*' to annul the bankruptcy adjudication.

39. An examination of the transcript from the High Court demonstrates that, from the outset, the trial judge engaged with '*the key elements of the case*'. She distinguished, correctly, between an application to set aside a bankruptcy summons and an application to show cause, noting that it was only the latter application which arose for her consideration.

Thereafter, she identified and applied the appropriate test applicable to an application to show cause as confirmed in *Harrahill* (see para. 15).

40. Having considered '*the broad drift of the argument on both sides*' the trial judge examined whether the requirements of s. 11(1) had been met. Mr. O'Shea had claimed that the debt was not a liquidated sum because there was evidence that proved '*a series of incoming payments*' to the bank which had altered the debt. In his view, the bank had '*done a U-turn*' in presenting its explanation to the High Court and he objected to the confusion that was apparent in the statements generated by the bank. In considering whether there existed a liquidated sum pursuant to s. 11(1) of the Act, Pilkington J. scrutinised the explanation provided by the bank in relation to what Mr. O'Shea had described as a series of incoming payments. She set out the bank's explanation which was that after the judgment had been obtained, it had conducted an internal administrative exercise whereby it consolidated the sums outstanding on Mr. O'Shea's seven accounts. One of those accounts (the account ending in 9039) was the account used to carry out this exercise. It involved the combining of balances from the other 6 accounts (described on Statement Number 21 as '*incoming payment, correction*') and the reversal in interest charges (described as '*outgoing payment*' or '*outgoing payment, correction*') which had accrued between 26 May 2012 and the date of the judgment order—4 March 2013. The interest charges which had accrued during that period had not formed part of the judgment sum.

41. The trial judge accepted the explanation put forward by the bank noting that the terms of the statements it exhibited were '*entirely clear on their face*'. Statements in respect of each of the seven loan facilities were adduced before the High Court as exhibit ML3 (para. 22). Six of those statements record the initial loan facility and show a reduction of the outstanding amount to zero. The bank explained that the outstanding amounts were transferred to one loan account ending in 9039. The trial judge was satisfied that there had been no '*incoming payments*' made to that account as alleged by Mr. O'Shea but rather that an internal administrative exercise had been conducted which consolidated several outstanding debts into one account. In view of the foregoing, Mr. O'Shea's submission to this Court that the bank has still not explained '*the source of the incoming payments*', must be rejected.

42. In response to what Mr. O'Shea described as '*confusion*' in the statements produced by the bank (notably, two versions of Statement Number 22) Pilkington J. examined the explanation given by the bank in this regard. She accepted that the initially incorrect generation of Statement Number 22 (dated 15 October 2013) was followed by the generation of a corrected version of Statement Number 22 the following day (para. 21). She was satisfied that the judgment sum was faithfully reflected throughout all the statements as being the sum referred to by Cross J. in his order granting summary judgment. She accepted the sworn evidence of Mr. Leonard that there had been no incoming payments to Mr. O'Shea's account nor had the judgment been sold, transferred or assigned by the bank to any other party. The entire judgment sum (€1,296,114.47) together with all accrued interest (totalling €1,487,016.15) remained due and owing by

Mr. O'Shea. Pilkington J. was satisfied that the bank had properly set out the extent of the liquidated sum. In view of the evidence before the court, she held that the debt in question was a liquidated sum; that it was the judgment sum as initially set out in the order of Cross J.; and that it remained unpaid. She was, therefore, satisfied that the criteria set out in s. 11(1) were satisfied.

43. To the extent that the trial judge was entitled to consider exercising her equitable jurisdiction, I am satisfied that she examined the composite nature of the appeal having regard to the fact that the matter had been remitted by the Court of Appeal. Furthermore, she confirmed, expressly, that she had considered the papers in question and had exercised her discretion in favour of examining all the documentation that was put before the Court, including, all exhibits and affidavits filed after the Court of Appeal had remitted the matter.

She was satisfied that no ground had been established—whether statutory or equitable—to show cause against the validity of the adjudication of bankruptcy.

The Resolution of the Issue Raised by the Court of Appeal

44. During the hearing of this appeal, Mr. O'Shea submitted that the Court of Appeal, in May 2018, had agreed that there was a problem with the statements and it remitted the matter back to the High Court. In his view, however, the trial judge did not '*deal with the statements*'. There remained '*no clarity*' regarding the '*lodgements*', particularly, those relating to Statement Number 21. The paperwork was '*less than clear*'. There was '*doubt in the figures*' and '*no clarity on the statements*'. Once there was 'doubt' then, in his view, '*the brakes should be put on*' until the doubt was '*sorted out*'. Mr. O'Shea did not put forward any evidence to substantiate that '*lodgements*' had been made in to his account such as would contradict the bank's explanation as to what had occurred in this case. He confirmed to this Court that he had made no payments against the outstanding debt nor did he know of any other person who had made payments on his behalf. His case, at its height, was that there was confusion and lack of clarity concerning the bank's statements and that because of this confusion, it was not clear that a liquidated sum was due and owing at the time he was adjudicated a bankrupt. He asserted his right to clarity. He also submitted that there were '*two versions*' of Statement Number 22 and that the transactions displayed thereon did not correspond with the zeroing transactions on the other accounts. Finally, Mr. O'Shea took issue with how the trial judge had responded to his concerns about her handling of Statement Number 21. In his view, she had failed to deal with it and when he had raised this matter at the end of the hearing, she had stated '*That is for you to deal with elsewhere*.'

45. Counsel for the bank replied by setting out, once again and for the benefit of this Court, how a number of internal transactions had been performed on Mr. O'Shea's seven borrowing accounts and how these transactions had been reflected in Statement Number 21. She confirmed to this Court her client's sworn testimony that there were no lodgements of any kind made to any of Mr. O'Shea's accounts after judgment against him had been obtained. What are referred to as '*incoming payments*' on Statement Number 21 are, in fact, the transfers of the outstanding sums from Mr. O'Shea's other loan

accounts to the account ending 9039. Counsel reiterated her client's evidence to the High Court that Mr. O'Shea has never made any payments to reduce his indebtedness nor have any monies ever been lodged to any of his accounts by any third party nor were any monies ever received from any third party to reduce his indebtedness. She submitted that the '*disquiet*' caused to the Court of Appeal by the '*entry narratives*' had been addressed, fully, on affidavit and that there could be no further doubt as to what had transpired. In her view, the bank was entitled to engage in its own internal procedures after judgment had been obtained and, indeed, Mr O'Shea had benefited from those procedures insofar as interest which had accrued between 2012 and 2013 had been '*zeroed*' down.

Decision

46. I have had the opportunity to read the transcript of the Court of Appeal's decision remitting Mr. O'Shea's s. 16 application to the High Court. O'Malley J. considered that a doubt arose as to whether bank statements appearing to refer to payments into the account of Mr. O'Shea meant that certain payments *had* been made against the outstanding debt. If they had, then such payments required to be reconciled with the bank's evidence on affidavit that no payments were received at all in respect of the outstanding debt. Clarification in respect of this apparent contradiction between ostensible 'payments in' and the bank's own testimony that no payments had been made, was the nub of the issue that caused concern to the Court of Appeal. Neither the judgment sum nor the order adjudicating bankruptcy was of any concern to O'Malley J. She was quite definite in stating that the adjudication of bankruptcy was '*still in place*' and was not challenged in the appeal (para. 17). Insofar as she expressed a doubt as to whether the amount owed by Mr. O'Shea '*as of the date of presentation of the petition*' (15 January 2016) was correct, it is manifestly clear from the transcript that such doubt arose in the context of statements appearing to show payments into Mr. O'Shea's account after judgment had been obtained, which were attributed to the satisfaction of the debt. Being unable to reconcile what appeared to be a contradiction between the bank's evidence and the bank's statements, she remitted the matter.

47. Since the resolution of that ostensible contradiction was the sole matter that concerned O'Malley J. it was, quite rightly, central to the trial judge's consideration of the remitted application. The judgment of Pilkington J. demonstrates that she addressed her attention, specifically, to the issue raised by the Court of Appeal. She considered, carefully, the submissions of the parties and examined, in detail, the bank's explanation of its internal transactions. Her careful analysis of that explanation which centred on the templated '*entry narratives*' used by the bank when administrative adjustments are made to accounts, demonstrates that the doubt articulated by O'Malley J. was addressed, expressly, in the judgment and resolved to the satisfaction of the trial judge.

48. Accordingly, I am satisfied that there was no failure either on the part of the bank and/or the trial judge to address the question raised by the Court of Appeal. Upon remittal, the bank furnished additional affidavit evidence addressing, specifically, the issue that had been raised and the trial judge considered and accepted the bank's explanation.

Furthermore, she confirmed, as an '*additional comfort*' to the Court of Appeal, that Mr. O'Shea had never contended, nor had he ever suggested, that he had discharged the judgment debt. Given that the judgment sum was comprised of several unpaid loans, it was, in my view, an entirely acceptable and practical exercise for the bank to amalgamate the sums due on all seven loan facilities and to consolidate them into one 'judgment' account. In the absence of any evidence to indicate that either Mr. O'Shea or any other person made payments in respect of the outstanding debt, the clarity sought by Mr. O'Shea in respect of what he described as 'lodgements' made to his account has been provided.

49. Mr. O'Shea contended both in his written and oral submissions that the trial judge failed to address Statement Number 21 '*at all*'. This was the statement that had caused the Court of Appeal '*a certain disquiet*'. It is clear from the transcript that a detailed consideration of Statement Number 21 was undertaken by the trial judge (see para. 19). Her inadvertent reference to 'Statement No. 22' was clearly unintended because both the date on the statement she was considering at the time and the exhibit number to which she referred were consistent only with Statement Number 21. Furthermore, his objection to the fact that there were different versions of Statement Number 22 (dated 15 and 16 October 2013) has been answered by the bank's explanation as to how this came about (see para. 21). That explanation is entirely plausible, and it was accepted by the trial judge. I see no reason to disagree.

50. Insofar as Mr. O'Shea had sought certain documents pursuant to the Data Protection Act 2018 and had asked the Court to issue a direction in respect of the provision of same, the trial judge found, rightly, that these were matters for the Data Protection Commissioner and she rejected the application. No criticism of her response to the data application can be made as such a matter was not properly before the court in the application to show cause.

Conclusion

51. The first five grounds of Mr. O'Shea's Notice of Appeal deal with alleged miscalculations and inaccuracies in the accounting practices of the bank and the trial judge's alleged failure to reject what he refers to as 'biased', 'prejudicial' and 'defective' evidence furnished by the bank. Matters relating to the bank's administrative practices have been considered in this judgment. The findings made by a trial judge in respect of those practices were supported by credible evidence and I see no reason or justification for interfering with her findings in this regard. Those grounds of appeal are rejected. The sixth ground of appeal relates to an alleged failure on the part of the trial judge to have due regard to the 'direction' of the Court of Appeal where alleged flaws and irregularities were identified. This ground has been considered. There was no such failure. This ground is rejected. There is no evidence that the trial judge failed to consider all the papers and, consequently, the seventh ground of appeal is rejected. Finally, the eighth ground must also be rejected because the question of the service of the bankruptcy summons was not a matter before the Court on the application to show cause.

52. The trial judge found that on both statutory and equitable grounds Mr. O'Shea failed to show cause to annul the adjudication of bankruptcy. I agree.

53. For the reasons set out in this judgment, I would dismiss the appeal.

Whelan J. and **Noonan J.** are in agreement with this judgment and with the reasoning set out therein.