THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2021] IECA 24
Court of Appeal Record No. 2020/143

Costello J.
Murray J.
Binchy J.

IN THE MATTER OF DEIRDRE DENNIS, A DISCHARGED BANKRUPT

JUDGMENT of Ms. Justice Costello delivered on the 03 day of February 2021

1. This is an appeal against the refusal of the High Court (Pilkington J.) [Bankruptcy No. 4292] to annul the adjudication of Ms. Dennis as a bankrupt, pursuant to the provisions of s. 85C of the Bankruptcy Act 1988 (as amended) or the inherent jurisdiction of the court.

Background

2. In July 2005, Ms. Dennis borrowed the sum of €135,200 from Bank of Ireland Mortgage Bank ("the Bank") to purchase 5 Seaview Terrace, Killala, County Mayo, as her family home. The purchase price of the property was €127,000 and the Bank advanced 106% of the purchase price. The first twelve months of the loan were at a preferential rate of 2.5% variable, with the remaining twenty-four years at 3.3%. The loan was secured by a first legal charge which was registered on the Folio 47702 County Mayo on 24 October 2005.

3. In June 2007, Ms. Dennis took out a second loan of €22,000 which was to run for the same period as the initial loan. The interest rate was 4.79% variable for the first twelve months, with the remaining twenty-two years at 5.1%.

4. At the time Ms. Dennis was granted these facilities, she operated her own business. Unfortunately, in January 2008 she lost her business. This had significant impact on her ability to service the loans. In addition, AIB obtained judgment against her in the sum of €60,725.44 in relation to her business debt. In 2010, the judgment in favour of AIB was registered as a burden on the Folio.

5. Ms. Dennis' grounding affidavit sets out in painstaking detail her difficulties repaying her loans from the Bank and her struggles to deal with arrears from 2009. Her position was exacerbated by reason of the fact that she no longer enjoyed the income which was the basis upon which the mortgage was granted and her family home went into negative equity, and indeed significant negative equity from 2009 onwards as property prices suffered catastrophic collapse in the financial crisis of that time.

6. From 2009 to 2017, she strove to reach an accommodation with the Bank which would allow her to make viable repayments and to retain her family home. She made very considerable personal sacrifices on behalf of herself and her family but her income was simply insufficient to meet the repayments which the Bank was prepared to offer her. Arrears accumulated from 2009. Her personal and financial difficulties were immeasurably increased when her partner died in July 2011.

7. Various revisions were made to her repayment obligations to the Bank for a temporary period, such as interest-only in 2011/2012, and reduced payments in June 2013 onwards. In November 2013, the Bank offered her a two-year fixed rate with a monthly payment of €725. This was revised on 10 December 2013 to a two-year fixed monthly rate

of 4.96%, with payments of €144.23 per week. On 19 March 2014, the weekly repayment was increased to €196.19 to allow for repayment of principal and interest amounts.

8. Ms. Dennis continued to struggle with the requirements of the Bank and throughout 2013 and 2014 she sought to reach an accommodation with it. She was deemed ineligible to participate in the Mortgage to Rent scheme, which at least would have facilitated her continuing to reside in her home, albeit as a tenant rather than as a homeowner. In 2014, Ms. Dennis ceased making repayments in respect of her mortgage and she moved into rented accommodation. She does not explain when or indeed why she took this step. On 22 April 2015, the Bank issued a Civil Bill seeking possession of her family home. The application was grounded upon an affidavit sworn on 10 April 2015 by Ms. Helen Dorris of the Bank's Arrears Support Unit. She confirmed that the Bank had complied with the provisions of the Code of Conduct for mortgage arrears and had given Ms. Dennis the benefit of its MARP. The Bank had completed a full assessment of Ms. Dennis' circumstances in accordance with the Code of Conduct and concluded that the mortgage account was not sustainable. She set out that the sum of €137,759.30 was due and owing in respect of the principal loan account which included arrears of €24,175.78. €18,152.44 was due in respect of the second loan, of which €827.83 was arrears. The total outstanding was €155,911.74. The total arrears were €25,003.61.

9. Ms. Dennis explains that the Circuit Court proceedings were initially returnable for 27 July 2015. They were adjourned to 23 November 2015, 14 March 2016, 12 December 2016 and 13 March 2017. Ms. Dennis had discussions with MABS and she sought the assistance of a Personal Insolvency Practitioner in November 2016. On 8 March 2017, Mr. John Reid swore a supplemental affidavit on behalf of the Bank updating the figures which were almost two years out of date at that stage. In respect of the principal loan account, the amount due was €149,035.50, of which €43,098.54 was arrears. In respect of the second

loan, the sum outstanding was €18,515.71, of which the arrears were now €3,189.47. The total sum due and owing was €167,551.21. The total arrears were €46,288.01. Mr. Reid averred that no payments had been paid to the second mortgage account since 23 May 2014, or to the principal account since 19 June 2014.

10. Ms. Dennis decided that she would surrender possession of her family home to the Bank in order that it could be sold (in part) discharge of her liabilities to the Bank. She signed a Memorandum of Intention to Surrender and Return of Keys Memorandum on 13 May 2017. The proceedings were struck out on 10 April 2017 with no order as to costs.

11. In paras. 229-246 of her affidavit, Ms. Dennis explains why she filed the petition seeking her adjudication as a bankrupt. She acknowledges that her house was in severe negative equity. At para. 244 she says:-

> *"I eventually agreed to voluntarily surrender my house because I could not deal with the relentless pressure and the damning effects all of the financial stress was having on my physical and mental health."*

She says that she consulted her Personal Insolvency Practitioner after she surrendered the house and asked him to assess the options available to her. By letter dated 21 July 2017, her Personal Insolvency Practitioner advised that in the financial circumstances in which she found herself, bankruptcy was her best option.

12. A debtor who petitions for his or her own bankruptcy is required to complete a statement of affairs as set out in S.I. No. 461 of 2013. Ms. Dennis prepared a statement of affairs on 26 July 2017. This valued her home which had been surrendered at that time at €73,000. She acknowledged secured creditors in the sum of €171,015.78 and unsecured creditors of €66,560.81. This was comprised of the debt due to AIB in the sum of €60,725.44 and a debt due to the Revenue Commissioners in respect of local property tax in the sum of €937. She also acknowledged an overdrawn current account with Bank of

Ireland and disputed debt to AIB in respect of a business current account. The deficit by which her debts exceeded her assets was €161,556.59.

13. On 23 October 2017, she was self-adjudicated on foot of her petition. Her bankruptcy was automatically discharged twelve months later pursuant to the provisions of s. 85 of the Act of 1988 (as amended). She was notified of this position by a letter sent by the Insolvency Service of Ireland ("ISI") dated 14 January 2019. On 6 December 2017, the Bank sold the secured property, Ms. Dennis' family home, for the sum of €68,000.

Overcharging by the Bank

14. In 2015, the Central Bank of Ireland directed retail banks to conduct investigations into the wrongful withholding of tracker mortgages from retail clients with the result that the borrowers were charged interest in excess of that to which they were properly contractually liable. In June 2018, the Bank identified Ms. Dennis' principal account as being impacted by the failure of the Bank properly to apply a tracker mortgage to her borrowings. By letter dated 1 February 2019, it wrote in the following terms:-

> *"We have now completed our review of your mortgage loan account 29227946 under the Tracker Mortgage Examination. During the review, we identified that we failed to provide you with a tracker rate on your mortgage at a time when you were entitled to one according to your contract. We unreservedly apologise for our failure. We fully accept that it was a factor in you losing ownership of your property at 5 Seaview Terrace, Killala, Co. Mayo.*
>
> *We have now taken the following steps to put our failure right.*
>
> *We are aware that you were adjudicated bankrupt on the 23rd day of October 2017 and we submitted our claim on the bankruptcy in respect of the residual unsecured*

remaining balance of €97,580.51 on this Mortgage account and €18,687.05 on mortgage account 29316797. We have now written to the Insolvency Service of Ireland's ("ISI") Official Assignee formally withdrawing this claim.

In order to meet our obligations to the Official Assignee we have also advised him of the redress and compensation, set out below, due under the Examination so that he can confirm what portions of these funds are to be paid to him for the benefit of your creditors. The redress and compensation payments that will be made available under the Examination are as follows:

Refund of Interest to date property sold 15/06/2012 to 06/12/2017	*€23,529.89*
Compensation	
Fair value @ 5%	*€1,176.49*
Additional Compensatory Amount	*€50,000.00*
Additional Monetary Payment (Independent Advice)	*€1,000.00*
Capital appreciation	*€5,906.62*
Sustainability payment	*€15,149.72*
Total	*€96,762.72"*

(emphasis as in original)

15. On 4 March 2019, Ms. Dennis was sent a further letter which explained the results of the mortgage review, the financial breakdown and the details of the overpayment of interest she had made. This letter confirmed that the Bank charged an incorrect interest rate between 15 June 2012 and 6 December 2017 (the date the house was sold) and accepted that *"it was a factor in you losing ownership of your property"*. At p. 8 of the letter, it identified that during that period she paid the sum of €34,588.44 when the total

repayment, if the correct tracker rate had been applied, should have been €11,058.55. The total overpayment was €23,529.89.

16. These two letters came as a total shock to Ms. Dennis. She avers that she was distraught to see the level of overcharging in her case, particularly given the enormous sacrifices she detailed in the correspondence which she undertook while trying to service the debt then claimed by the Bank. The detailed calculation of the overcharge of interest reveals that up to 29 March 2015 the total interest overpaid came to €11,596.72. It will be recalled that as of 1 April 2015, Ms. Dorris has sworn that the arrears in respect of her principal loan was in the sum of €24,175.78 whereas the correct figure, it is now clear, ought to have been €12,579.06.

The compensation payments

17. The Bank knew that Ms. Dennis had been adjudicated bankrupt and so it wrote to the Official Assignee withdrawing its claim in her estate and to allow him to confirm what portion of the funds to be paid by way of compensation and repayment to Ms. Dennis were to be paid by him for the benefit of Ms. Dennis' creditors. On 10 May 2019, the Bank wrote to Ms. Dennis' solicitors stating that if she wished to accept the balance of the funds that were not being paid to the Official Assignee she should complete a Payment Instruction Form which had been enclosed in the correspondence of 4 March 2019. On 21 February 2019, the Official Assignee made a formal demand for payment of part of the compensation monies to him on behalf of the creditors of her estate other than the Bank.

18. On 21 May 2019, the ISI explained its position in a letter to Ms. Dennis' solicitors:-

> *"Further to your letter dated 30 April 2019 and 20 May 2019 the position of the Official Assignee is as follows:*
>
> - *Your client was self petitioned bankrupt on 23rd October 2017 and was discharged on the 23rd October 2018.*

- *We have administered the estate per our statutory function.*
- *We note that the bankruptcy notice has not been annulled.*
- *The compensation paid under the tracker redress programme related to a pre-adjudication event and the Official Assignee's policy regarding redress was followed.*
- *As there are other creditors claiming in the estate, namely AIB and the Revenue Commissioners, an amount of €60,672.72 was claimed.*
- *There has been no distribution from the estate to date.*
- *The property at 5 Seaview Terrace was sold by the secured creditor, as there was no positive equity the estate received no distribution from the sale."*

19. Subsequent correspondence ensued and on 29 August 2019, Mr. Gerry Gill, Head of Asset Management of the Bankruptcy Division of the ISI, wrote to Ms. Dennis' solicitors confirming that in her statement of affairs, dated 26 July 2017, she had listed Allied Irish Banks and the Revenue Commissioners as creditors alongside the Bank. So, while the Bank had subsequently withdrawn its claim, this left the other two creditors. He confirmed that the ISI administered the estate in accordance with its statutory function and that no dividend had been paid to the remaining creditors, but that a dividend was due to be paid on 8 November 2019. Having confirmed that the remaining creditors in the estate were due a sum of €60,672.72, he concluded that her estate remained an active bankruptcy estate. The compensation from the Tracker Redress Programme related to a pre-adjudication event and the Official Assignee's policy regarding redress was followed. He stated that as the Bankruptcy Notice had not been annulled, the ISI was obliged to carry out its statutory function until the situation changed.

20. There was a considerable exchange of correspondence between Ms. Dennis' solicitors and the Bank and its solicitors and on 1 November 2019, the Bank enclosed a

bank draft in her favour in the sum of €36,000, being the balance of payments due to her following the Tracker Mortgage Examination.

The annulment application

21. In light of all of the above, Ms. Dennis decided to apply to annul her adjudication and she issued a Notice of Motion seeking that relief on 19 November 2019. The application was heard on 9 March 2020. Counsel for the Bank indicated that it was not seeking to be heard on the motion which proceeded solely on the basis of the submissions of Ms. Dennis. On 15 June 2020, the High Court refused the application and Ms. Dennis appealed the refusal.

The law

22. Ms. Dennis seeks relief pursuant to s. 85C of the Act of 1988 (as amended). This provides:-

> *"(1) A person shall be entitled to an annulment of his adjudication -*
>
> *(a) where he has shown cause pursuant to section 16, or*
>
> *(b) in any other case where, in the opinion of the Court, he ought not to have been adjudicated bankrupt.*
>
> *(2) An order of annulment shall provide that any property of the bankrupt then vested in the Official Assignee shall be revested in or returned to the bankrupt, and that order shall for all purposes be deemed to be a conveyance, assignment or transfer of that property to the bankrupt and, where appropriate, may be registered accordingly.*
>
> *(3) A person whose bankruptcy has been annulled may apply to the Official Assignee for the issue of a certificate that the bankruptcy has been annulled."*

23. In the alternative, she seeks the same relief pursuant to the inherent jurisdiction of the court. In addition to s. 85C, the provisions of s. 135 of the Act of 1988 (as amended) may be relevant. This provides:-

> *"The Court may review, rescind or vary an order made by it in the course of a bankruptcy matter other than an order of discharge or annulment."*

24. It is accepted by counsel for Ms. Dennis that the statutory jurisdiction to annul an adjudication of bankruptcy is an exceptional and a limited jurisdiction. In *SFS Markets Limited v. Rice* [2015] IEHC 42, I gave judgment on an application to annul an adjudication of bankruptcy and I stated as follows:-

> *"[10.] ... Section 85C(1) reproduces s. 85(5) of the Act of 1988 prior to its amendment. Section 85C(1) (and s. 85(5) before that) is intended to give statutory effect to the previously existing jurisdiction of the High Court to annul a bankruptcy on equitable grounds or under its inherent jurisdiction. In O'Maoileoin (A Bankrupt) v. Official Assignee [1999] IEHC 75 Laffoy J. confirmed that the court had an equitable jurisdiction to annul a bankruptcy which had existed for over a century before the coming into effect of the Bankruptcy Act 1988. It is important to note that it is a discretionary jurisdiction in that the court may annul adjudication where in the opinion of the court a person ought not to have been adjudicated bankrupt. In Re Gorham [1924] 2 I.R. 46 Pim J. identified three circumstances where it would be proper to exercise the inherent jurisdiction of the court to annual a bankruptcy. These were where there was a doubt as to whether the bankrupt was alive at the time of the adjudication, where the bankruptcy had been obtained by fraud or where the bankruptcy was an abuse of the process of the court. In Gill v. Philip O'Reilly & Co. Ltd [2003] 1 I.R. 434 at p. 441 Fennelly J. held:-*

'The machinery of bankruptcy… cannot be undone without extremely compelling reasons.'

11. Thus, in considering the debtor's application the court is exercising a discretionary equitable jurisdiction such as is normally used in the case of a fraud or abuse of the process of the court and it should not exercise the jurisdiction without extremely compelling reasons."

25. The court has a discretion whether to annul an adjudication, but it is a precondition to the exercise of that jurisdiction that the court be of the opinion that a person *"ought not to have been adjudicated bankrupt"*. The issue in this case is whether the High Court erred when it concluded that Ms. Dennis had not made out a case that she ought not to have been adjudicated bankrupt in October 2017.

Ms. Dennis' case

26. Ms. Dennis argues that her decision to present a petition to adjudicate herself bankrupt was based upon grossly inaccurate information from the Bank. The effect of that inaccurate information, she says, is that she was led to believe that her level of indebtedness to the Bank was far greater than now transpires to be the case. She says that she acted in reliance on the accuracy of the information provided to her by the Bank and that she was advised by her Personal Insolvency Practitioner at the time, based on that information, that she had no alternative but to apply for self-adjudication. She argues that the acknowledgement of the Bank that it overcharged interest of €23,529.89 amounts to an acknowledgement by it that the entire debt was not a valid debt. She invites the court to *"determine and conclude"* that had a proper examination been carried out on her mortgage account *"in a timely manner in accordance with the directions relating to tracker mortgages from the Central Bank of Ireland in 2015"*, she would not have sought refuge in bankruptcy. On this basis, she says that she *"ought not to have been adjudicated*

bankrupt" and that it would be just and equitable to annul her adjudication in the circumstances of the case.

27. Counsel for Ms. Dennis relies upon the decision in *Re Mead* [1916] 2 I.R. 285 at pp. 295-296 where Ronan L.J. stated:-

> *"The rule in bankruptcy is that the debts provable against the bankrupt must be legal debts and not debts of honour. If judgment is produced in bankruptcy proceedings, the Court of Bankruptcy has no power to set it aside, but it may look into the circumstances to see whether or not there is any real debt behind it, and if there is not, the Court will not adjudicate in respect of it.*
>
> *…*
>
> *The authorities decide that where judgment has been obtained either in default of appearance of the debtor or by his consent – even his reasoned consent – the Court of Bankruptcy may still go behind that judgment and enquire into the true facts lying behind."*

28. Counsel submits that the court is entitled to look at the reality of what was actually due and owing by Ms. Dennis to the Bank in October 2017 when she presented her petition in bankruptcy. He emphasises that the debt must be real and must be due to the creditor. He invites the court to conclude that because the debt due to the Bank was *overstated* by Ms. Dennis in her sworn statement of affairs, albeit as a result of an error induced solely by the Bank, that this comes within the precedent and, therefore, grounds the application for annulment.

29. He argued that the trial judge erred in her approach to the application and in particular, when she based her decision on a finding that the matters complained of took place outside of the bankruptcy process and, therefore, could not afford a ground for annulling the adjudication.

30. He argued that the jurisdiction to annul was not confined to cases of fraud or an abuse of process. It applies to exceptional circumstances, such as occurred here, where if the true facts had been known the debtor would never have petitioned for her own bankruptcy. He emphasised that the court should approach the application having regard to what would have happened in October 2017 had the true facts been known.

31. In discussion with the members of the court, he accepted that the question of whether the order *"ought not to have been made"* defined the applicable legal test, not whether she *would* not have presented her petition.

Discussion

32. I am not persuaded by the submissions of counsel on behalf of Ms. Dennis. First, they are inconsistent with the decision *In Re Harry Dunn* [1949] CH. 640, an authority which was apparently not drawn to the attention of the High Court. There, the Court of Appeal considered whether to annul an adjudication on the grounds that the debtor ought not to be adjudged bankrupt for the purposes of similarly worded English legislation. The debtor in that case owed a gaming debt of £1,610. Gaming debts are unenforceable at law. The debtor agreed in a letter written to the bookmaker, and in consideration of the bookmaker not proceeding against him, that the Bookmakers' Protection Association should adjudicate on the sum claimed to be owing by him to the bookmaker, and that he would be bound by that decision. The Bookmakers' Protection Association found that the sum of £1,610 was due and, following that determination, the bookmaker sued the debtor. In order to avoid the claim, the debtor filed a petition for his own bankruptcy. In his statement of affairs, the only debt disclosed was the sum due to the bookmaker. He subsequently sought to annul his adjudication and an issue arose as to whether he *"ought not to have been adjudged bankrupt"* in the circumstances. Evershed M.R. stated at pp. 646-647 of the judgment:-

"I think if I may venture a criticism of the language used, it is not perhaps entirely correct to say that the matter ought to be adjudged in the light of the facts as they appeared to be at the date when the receiving order was made, namely September 13. I think Mr. Aronson is right in saying that in judging whether the order ought to have been made, the court is entitled to have regard to the actual state of affairs at that date, and that, of course, may appear from evidence subsequently filed, and certainly would not appear from the bare statement of the formal petition, which alone was before the court when the order was made.

But I do not think one is entitled (for the purposes of the first limb of the sub-section) to take into account in determining whether the order ought to have been made facts which have occurred after the date of the order. ... The fact that a creditor after adjudication may release the debt could not, I think, prima facie affect the question whether the order ought, in the first instance, properly to have been made. I will go a little further and say that I am not satisfied that it must be affirmatively shown that there was at the date of the bankruptcy debts which were enforceable and from which there was no escape. I think on the facts here shown, when the debtor was faced with the claim on the writ for [£1,610], and <u>when it is not shown – as I think it is not shown – that that writ could have been set aside as being mere waste paper, then the court is not entitled to say this order ought not to have been made.</u>" (emphasis added)

33. Denning L.J. gave a concurring judgment. He rejected the idea that it would be a misuse of bankruptcy proceedings if they were allowed to be used in cases where there was no enforceable debt. He stated:-

"It is probably correct to say that here there was no enforceable debt. If the matter was fully investigated it would probably be found that the bookmaker's claim was not

enforceable: for, assuming that Hyams v. Stuart King is still good law, there was no fresh and real consideration such as would fall within it. But I do not think the enforceability of the debt is the test. Even if the debt was unenforceable, nevertheless if the debtor honestly believed on reasonable grounds "that he was unable to pay his debts" the adjudication was good and should not be annulled ab initio. ... the proper inference from the evidence is that the debtor honestly believed on reasonable grounds that this debt was enforceable at law; and he knew he could not pay it. In that belief he quite properly filed his petition and was quite properly adjudged a bankrupt. In those circumstances it is not a case which falls within s. 29. It cannot be said that he ought not to have been adjudged bankrupt. It now turns out, indeed, that there are no debts, but that only means that the bankruptcy proceedings will have to be wound up." (emphasis added)

34. The petitioning bankrupt *mistakenly* believed that a debt was enforceable when it was not, and on that basis sought his own adjudication as bankrupt. The subsequent revelation that he was incorrect, and that the debt was not enforceable, was not sufficient to warrant the conclusion that he ought not to have been adjudicated a bankrupt in the first place and the annulment of the order.

35. In that case, the only debt was the debt due to the bookmaker and thus, the petitioning debtor was not in fact unable to pay his debts as they fell due. Ms. Dennis' case is by no means as strong as Mr. Dunn's. At most, a portion of the debt claimed by the Bank was not due, but there was no doubt about the debts due to AIB and to the Revenue Commissioners (albeit that was clearly subthreshold). In her statement of affairs, Ms. Dennis declared that the deficit in her estate was €161,556.59. It now transpires that this was overstated by the total amount of the overcharged interest and should have been €138,026.70. There was nonetheless a considerable sum properly due to the Bank and she

accepted the debts due to AIB (€60,725.44) and the Revenue Commissioners (€937). The total arrears claimed by the Bank, before she agreed to surrender possession to the Bank, was €46,288.01, but it ought properly to have been €22,758.12.

36. Section 15(2) requires that, before a court adjudicates a debtor pursuant to their own petition, the court must consider whether the debtor's inability to deal with their debts could more appropriately be dealt with either by means of a Debt Settlement Arrangement or a Personal Insolvency Arrangement. The court must also be satisfied that the provisions of ss. 11(4) and (5) have been complied with. Subsection (4) requires the debtor to accompany the petition with an affidavit which avers that prior to presenting the petition the debtor has made reasonable efforts to reach an appropriate arrangement with his creditors to the extent that their resources permit. The petitioner is required to exhibit a letter from a personal insolvency practitioner confirming this advice to the petitioner. Thus, there are significant checks to ensure that a debtor is not adjudicated a bankrupt when the statutory criteria are not met. This is relevant to the hurdle which Ms. Dennis must overcome if she is to secure an annulment of her adjudication as a bankrupt.

37. In these circumstances, the only conclusion, to my mind, is that neither as a matter of fact nor of law can this court conclude that Ms. Dennis ought not to have been adjudicated bankrupt.

38. Counsel for Ms. Dennis argued forcefully that the circumstances where a court will annul an adjudication pursuant to the inherent jurisdiction of the court are not limited to fraud or an abuse of process. He argued that the misfortune which befell Ms. Dennis makes it just and reasonable to grant the relief sought on equitable grounds.

39. It is important to emphasise that bankruptcy is a collective process. Understandably, Ms. Dennis is focused upon her dealings with the Bank, but once she was adjudicated bankrupt this had implications for her other creditors, not just the Bank. She enjoyed the

benefit of relief from process by these creditors. It is appropriate that the court should have regard to the possible implications of annulment on her other creditors; see *Danske Bank v. O'Shea* [2016] IEHC 732 and *O'Maoileoin (A Bankrupt) v. Official Assignee* [1999] IEHC 75. In this case, there is a prospect of discharging the debts of her other creditors in full if the order is refused. If it is granted, the compensation payment currently held to the benefit of the estate will revest in Ms. Dennis and it is by no means clear, given the passage of time, that the debts admitted to be due to her other creditors will be recoverable.

40. While I have reached my decision by a different route to that of the trial judge, for these reasons, I agree with her decision and I would not allow the appeal.

41. I should add that insofar as the trial judge was of the view that s. 135 of the Act precluded a review of the adjudication of the order, I would respectfully disagree. I interpret the provision as permissive: in relation to interim orders, the court is given express statutory authority to revisit previous orders made during the bankruptcy. The court, expressly, may not review, rescind or vary an *order* of discharge. There was no order of discharge in this case. Ms. Dennis was automatically discharged from bankruptcy by operation of law. She was issued with a certificate of discharge by the ISI, but this is not to be equated with an order of discharge. A literal interpretation of the section does not yield the conclusion reached by the trial judge.

42. Neither does a purposive interpretation. The scheme of bankruptcy has changed since 1988 in response to the financial crisis of 2008/9. At the start of that crisis, the period of bankruptcy was twelve years before a bankrupt could automatically be discharged. This period was reduced to three years, unless an order was made extending the period of bankruptcy, and it was further reduced to a period of one year, subject to extension by order of the court (s. 85 of the Bankruptcy Act 1988, as amended by s. 10 of

the Bankruptcy (Amendment) Act 2015). There are certain effects of the adjudication which continue after discharge and are far more likely, in practice, to continue after discharge after one year than when the period was twelve years. For example, the bankruptcy estate remains vested in the Official Assignee to administer (s. 85(3), as amended); after-acquired property must be accounted for (ss. 44(5) and 127); a discharged bankrupt may be subject to a bankruptcy payment order for three years (s. 85D, as amended by s. 157 of the Personal Insolvency Act 2012); the family home may not be revested in the discharged bankrupt until three years after the making of the adjudication order, provided the Official Assignee has not issued proceedings for the sale of the property prior to the automatic revesting (s. 85(3A), as amended by s. 10(c) of the Bankruptcy (Amendment) Act 2015). Thus, there may be cases where it would be beneficial to a discharged bankrupt to have her adjudication annulled. It follows that a bankrupt may have a real and substantial interest in obtaining an annulment of her bankruptcy, despite the fact that she has been discharged from bankruptcy. This is more likely to be the case now, when a bankrupt ordinarily will automatically be discharged after one year from the date of adjudication, than it was when the equivalent period was twelve years, unless an order of discharge was granted. If there was an *order* of discharge, the bankruptcy judge would consider the case before granting the order of discharge. This no longer occurs in the vast majority of bankruptcies, including that of Ms. Dennis, where discharge occurs automatically by operation of law, unless an application pursuant to s. 85A of the Act is brought during the currency of the bankruptcy for an order to postpone the automatic discharge and that order is granted.

43. It is not necessary to interpret s. 135 as prohibiting the court from annulling an adjudication in cases where the discharge has occurred automatically by operation of statute, and not pursuant to an order of the court, in order to give effect to the intention of

the legislature. The legislature is presumed to know of the continuing effects of bankruptcy post discharge. The reforms effected to the Act of 1988 since 2008 have been to ease the burden of insolvency, and bankruptcy in particular, for those insolvent persons who cooperate with the due administration of their estates for the benefit of their creditors. Disadvantaging such persons who receive an automatic discharge because they have not warranted an application to extend their period of bankruptcy by debarring them thereafter from applying to annul their adjudication in appropriate cases would seem to me to run counter to the thrust of the legislative reform in the whole area of personal insolvency in the last decade.

Conclusion

44. The provisions of s. 135 of the Bankruptcy Act 1988 (as amended) do not oust the jurisdiction of the court to annul the adjudication of a bankrupt pursuant to s. 85C of the Act.

45. The court may do so if it is of the opinion that the bankrupt ought not to have been adjudicated. The court will only exercise its discretion to annul an adjudication for extremely compelling reasons.

46. If, at the time a debtor presented a petition for her own bankruptcy, she believed she was unable to pay her debts as they fell due, the process of bankruptcy is nonetheless validly invoked. The validity of the process does not depend on the accuracy of her belief. The fact that she was misled at the time as to the extent of her indebtedness by a creditor overstating her liabilities, does not mean that she ought not to have been adjudicated a bankrupt within the meaning of the Act.

47. Whether this was so involves a different analysis and the outcome will depend, amongst other things, on whether she was in fact insolvent. In this case, even making allowances for the overstating of her liabilities to the Bank, she was clearly insolvent and

so it cannot be said that once the petition was validly presented that she ought not to have been adjudicated a bankrupt in October 2017. While she argued that notwithstanding her insolvency she could have met her repayments due to the Bank had they been correctly calculated, on the evidence in this case she would not have been able so to do.

48. In exercising its discretion whether to annul an adjudication, the court must have regard to the fact that insolvency proceedings are collective proceedings and have regard to the implications of such an order for all of the creditors of the bankrupt. It must weigh whether it would be just and reasonable to annul the adjudication. On the facts in this case, it would not.

49. For these reasons, I would not allow the appeal. As there is no respondent to this appeal the court will make no order as to costs.

50. Murray and Binchy JJ. have indicated their agreement with this judgment which is to be delivered electronically.