THE HIGH COURT

[2021] IEHC 856

Bankruptcy No. 2505

IN THE MATTER OF BRIAN O'NEILL, A FORMER BANKRUPT

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 61(6) OF THE BANKRUPTCY ACT 1988

BETWEEN

CHRISTOPER LEHANE

APPLICANT

- AND -

WEALTH OPTIONS LIMITED AND BRIAN O'NEILL

RESPONDENTS

- AND –

THE REVENUE COMMISSIONERS

NOTICE PARTY

JUDGMENT of Ms. Justice Pilkington on the 29th day of January 2021

1. The applicant, the Official Assignee in Bankruptcy ("official assignee or OA") seeks directions in respect of the Estate of Brian O'Neill (a former bankrupt). The OA formally brings this application pursuant to s.61(6) of the Bankruptcy Act 1988 ("the 1988 Act") which states:

"61(6) The Official Assignee may in case of doubt or difficulty seek the directions of the Court in connection with the affairs of any bankrupt or arranging debtor."

2. The Notice of Motion seeks directions of the court in relation to the former bankrupt's estate in the following terms:

> *"1.1. Whether a Bankruptcy Payment Order pursuant to Section 85D of the Bankruptcy Act, as amended, is required in respect of any lump sum payable from pension policies held by a bankrupt or former bankrupt, and specifically whether such an Order is required in respect of any lump sum payable from pension bearing Policy Reference Number 500 401 held by Mr. Brian O'Neill and administered by Wealth Options Limited.*
>
> *1.2. Whether the applicant herein as official assignee of the Estate of Mr. Brian O'Neill in Bankruptcy is entitled to complete necessary documentation in relation to Policy Number 500 401 to avail of a lump sum payment pursuant to said policy.*
>
> *1.3. Whether Mr. Brian O'Neill is obliged, pursuant to Section 19(d) of the Bankruptcy Act 1988 to fill out and complete such documentation as may be required and/or take such other steps as are necessary to enable the Official Assignee to exercise the options available to Mr. O'Neill under the pension bearing Policy Reference Number 500 401 held by Brian O'Neill and administered by Wealth Options Limited for the benefit of creditors of his bankruptcy estate."*

Background

3. Mr. O'Neill, who was born on 29 December 1965, was adjudicated bankrupt by Order of the High Court on 22 January 2014. He was automatically discharged from bankruptcy by operation of law on 29 July 2016 (the grounding affidavit of the applicant sworn on 16 January 2019 refers to a date of discharge of 22 January 2019, but it was agreed that date was entered in error).

4. For any avoidance of doubt, to set out the position. Mr. O'Neill's discharge date arises by virtue of the amendments to the Bankruptcy (Amendment) Act of 2015

whereby up to December 2013 the period of bankruptcy was initially reduced from 12 to 3 years. However, pursuant to this amendment to the 2015 Act the period was then reduced further to 1 year. The provisions with regard to persons adjudicated bankrupt within the period 1 January 2014 to 29 January 2016 are; if the period is due to expire more than six months from the commencement date – which would be the case here, because had the Act not been amended Mr. O'Neill would have been discharged in January 2017, then six months from the commencement date makes his discharge date from bankruptcy 29 July 2016.

5. This Notice of Motion is grounded upon the affidavit of Christopher Lehane sworn on 16 January 2019 and the replying affidavit of the second named respondent Brian O'Neill ('Mr. O'Neill') sworn on 1 April 2019.

6. At the outset of the hearing the court noted an appearance on behalf of the first named respondent. It was further noted that this party would not be taking any active part in the proceedings unless required. Whilst certain correspondence between it and the OA is exhibited, I believe it fair to say that the second named respondent, Mr. O'Neill, is in reality advancing the respondents' submissions to this Motion.

7. The Revenue Commissioners are a notice party to this application, in order to provide assistance to the court as the Taxes Consolidation Act 1997 ('TCA') is specifically invoked within the sections of the 1988 Act under consideration.

8. Accordingly, oral and written submissions were made to the court on behalf of the OA, the second named respondent Mr. O'Neill and the Revenue Commissioners.

9. The pension policy at issue (Number 500 401) is held with the first named respondent, Wealth Options Limited ('the policy'). It is a personal retirement bond and as at the date of Mr. O'Neill's adjudication as a bankrupt was valued at €211,416.86.

10. Mr. O'Neill's policy is styled a personal retirement bond ('PRB'). On 6 February 2013, Mr. O'Neill made a single premium contribution of €87,329.51 comprising 50.04% of the total, the remainder comprising €87,179.80, comprising 49.96% of the total, being made by his former employer, Marketspreads Limited. The terms and conditions of the policy will be explored in more detail below.

11. The first named respondent whilst taking no part in this application, did enter into correspondence with the OA and the Insolvency Service of Ireland ('ISI'), which has been exhibited. Their position appears best set out in their letter of 18 October 2018, which they indicate is being furnished having taken "*independent advice on the matter*". Their letter accepts that the PRB held by Mr. O'Neill falls within the scope of s.44A(5) of the 1988 Act. Thereafter they note:

(a) The PRB assets did not and cannot vest in the OA at any time on the basis of para. 21 of the judgment in *Coady* and s.44(1) where assets relating to a relevant pension arrangement do not vest in the OA (*Coady* is considered below). They also reference s.85D(7) TCA;

(b) any income from the PRB at the time of adjudication vests in the OA (this they contend does not apply on the facts of this case);

(c) the right to exercise the entitlements of Mr. O'Neill to take benefits from the PRB (when allowed by tax legislation under PRB rules) vests in the OA at the date of adjudication and for a period of 5 years thereafter ending on 29 January 2019;

(d) they then assert (having quoted s.44A(3) of the 1988 Act:

"the taxable lump sum after deducting the 25% lump sum and transferring €63,500 to a AMRF is income as s.784(2B)(a)TCA 1997 in relation to the taxation of this lump sum payment arising from the ARF option states that the

amount: "shall not withstanding anything in s.18 or 19, be regarded as a payment of emoluments to which Schedule E applies and, accordingly, the provisions of Chapter 4 of Part 42 shall, subject to paragraph (b) apply to any such payment".

Therefore being regarded as emoluments, s.85D(6) of the Bankruptcy Act provides for the seeking of a BPO if the OA wishes a payment of this net amount to be paid directly to OA".

They continue*:*

"If the OA now wishes to exercise the early retirement option under the PRB and opts for the ARF option then Wealth Options can do the following:

(1) pay the 25% lump sum (assuming Mr. O'Neill has not taken any other prior tax free lump sums from a relevant pension arrangement) directly to the OA;

(2) transfer €63,500 to a AMRF for Mr. O'Neill (assuming Mr. O'Neill has not previously invested €63,500 in AMRF or annuity from a relevant pension arrangement);

If the OA chooses the balance to be paid to them as a taxable lump sum, Wealth Options can only do so on receipt of a Bankruptcy Payment Order from the OA. Otherwise, Wealth Options will retain the balance in the PRB until Mr. O'Neill's period of bankruptcy ends in January 2019(sic), at which time we will then accept instructions from Mr. O'Neill with regard to transfer of the balance to an ARF or payment as a taxable lump sum. If the OA serves an appropriate Bankruptcy Payment Order on Wealth Options before this time, we will then pay the next sum less appropriate taxes to the OA.

Please find attached our retirement option forms for completion and return.

We look forward to hearing from you as to where you would like us to send the 25% tax free lump sum."

12. By letter dated 15 January 2019 the bankruptcy division of ISI wrote to Wealth Option enclosing a Retirement Claim Form (referenced and sent to them in their letter of 18 October 2018 as quoted above) in respect of Mr. Brian O'Neill. In dealing with the options within the form – with regard to Option 1 entitled 'Tax Free Cash' the box entitled 'the maximum allowable' is ticked. Option 2 headed 'purchase of an annuity' is left blank. Option 3 headed – 'Invest in an ARF/AMRF'; the box where Wealth Options state they require a completed ARF/AMRF application form is ticked. That completed form does not appear within the papers. Option 4 is headed 'taxable cash lump sum' and the OA nominates payment to the bank account of the OA and the form then states it requires one of the following;

- Confirmation of a guaranteed income for life of at least €12,700 per annum – this box is left blank.
- Confirmation that you have invested €63,500 in an AMRF – that box is ticked.
- A tax credit certificate is also required – this box is left blank.

13. Counsel for Mr. O'Neill takes issue with certain aspects of this letter regarding the completion of the documentation referred to above and seeks to highlight certain deficiencies; specifically, that no ARF/AMRF application has been furnished within option 3 and the OA's confirmation that €63,500 has been invested in an AMRF within option 4 is ticked and there is no evidence of any such investment (notwithstanding that the letter from Wealth Options suggests that is a matter for the pension provider). The OA for his part exhibits correspondence where Mr. O'Neill or Wealth Options was

requested to furnish certain documentation and information and complaint is raised that Mr. O'Neill did not engage in that regard specifically his options regarding his pension preferences.

14. It is the OA's position that pursuant to s.44A(4) of the 1988 Act that the OA can exercise these options on behalf of Mr. O'Neill.

15. The option that the OA wishes to exercise is, in my view, clearly set out within the letter from Wealth Options of 18 October 2018. The pensions provider takes a view, which is clearly expressed, in respect of these options, but both the OA and the pension provider appear clear in their understanding of the options the OA wished to avail of.

Issues

16. This application revolves around a question of statutory construction concerning ss. 44, 44A and 85D of the 1988 Act and sections of the TCA referred to within that legislation. Both parties have quoted extensively from the case of *Lehane (as Official Assignee) v. James Coady & Aviva Life & Pensions Limited*, a decision of Costello J. at [2017] IEHC 653 ("*Coady*"), which has carefully considered these sections of the 1988 Act. Reference is also made by the OA to s.19(2) of the 1988 Act and this will be considered separately.

17. The *Coady* case will be considered in detail below but it must be noted from the outset that, whilst the considerations of the relevant sections within the 1988 Act is of great assistance and I entirely endorse the findings of Costello J. in that regard, the pension arrangement or policy being considered within that case is different to that enjoyed by Mr. O'Neill.

18. As much turns upon the interpretation of the relevant sections of the 1988 Act they are set out below (s.44 in part, ss.44A and 85D in full).

Legislation

19. Section 44, section 44(A) (inserted pursuant to s.150 of the Personal Insolvency Act 2012 with affect from 3 December 2013) and s. 85 D of the 1988 Act are as follows:

Section 44 – Vesting of Property in Official Assignee

44. (1) Where a person is adjudicated bankrupt, then, subject to the provisions of this Act, all property belonging to that person shall on the date of adjudication vest in the Official Assignee for the benefit of the creditors of the bankrupt.

20. It is the degree to which s. 44A impacts upon s. 44 that is at the heart of this case as it was in *Coady*. Section 44A is the operative section that requires interpretation in this case, as in *Coady*, and accordingly is set out in full below.

Section 44A – Pensions in Bankruptcy

Section 44A. (1) Subject to subsection (2), where a person is adjudicated bankrupt, and he or she is, or may become entitled to, payments under a relevant pension arrangement, assets relating to the arrangement (other than payments already received by the bankrupt, or that the bankrupt was entitled to receive, under the arrangement) shall not vest in the Official Assignee for the benefit of the creditors of the bankrupt.

(2) Where a bankrupt has an interest in or entitlement under a relevant pension arrangement which would, if the bankrupt performed an act or exercised an option, cause that debtor to receive from or at the request of the person administering that relevant pension arrangement—

(a) an income, or

(b) an amount of money other than income,

in accordance with the relevant provisions of the Taxes Consolidation Act 1997, that bankrupt shall be considered as being in receipt of such

income, and such amount of money shall vest in the Official Assignee or the trustee in bankruptcy.

(3) Subsection (2) applies where —

(a) the bankrupt is entitled at the date of being adjudicated a bankrupt to perform the act or exercise the option referred to in subsection (2),

(b) was entitled at any time before the date of the adjudication, to perform the act or exercise the option referred to in subsection (2), but had not performed the act or exercised the option, or

(c) will become entitled within 5 years of the date of the adjudication to perform the act or exercise the option referred to in subsection (2).

(4) Where subsection (2) applies, the Official Assignee or the trustee in bankruptcy may where he or she considers that it would be beneficial to the creditors of the bankrupt to do so, perform an act or exercise an option referred to in subsection (2) in place of the bankrupt.

(5) In this section and in sections 44B and 85D a reference to a relevant pension arrangement means:

(a) A retirement benefits scheme, within the meaning of section 771 of the Taxes Consolidation Act 1997, for the time being approved by the Revenue Commissioners for the purposes of Chapter 1 of Part 30 of that Act;

(b) an annuity contract or a trust scheme or part of a trust scheme for the time being approved by the Revenue Commissioners under section 784 of the Taxes Consolidation Act 1997;

(c) a PRSA contract, within the meaning of section 787A of the Taxes Consolidation Act 1997, in respect of a PRSA product, within the meaning of that section;

(d) a qualifying overseas pension plan within the meaning of section 787M of the Taxes Consolidation Act 1997;

(e) a public service pension scheme within the meaning of section 1 of the Public Service Superannuation (Miscellaneous Provisions) Act 2004;

(f) a statutory scheme, within the meaning of section 770 (1) of the Taxes Consolidation Act 1997, other than a public service pension scheme referred to in paragraph (e);

(g) such other pension arrangement as may be prescribed by the Minister, following consultation with the Ministers for Finance, Social Protection and Public Expenditure and Reform.

<u>Section 85D – Bankruptcy Payment Orders</u>

Section 85D states as follows:

85D.— (1) The Court may, on application being made to it by the Official Assignee or the trustee in bankruptcy, make an order requiring a bankrupt to make payments to the Official Assignee or the trustee in bankruptcy from his income or other assets for the benefit of his creditors (a 'bankruptcy payment order').

(2) An application for a bankruptcy payment order may not be made after the bankrupt has been discharged from bankruptcy, but where an application for such an order is made before the discharge of the bankrupt, the Court may make

a bankruptcy payment order after the date of discharge as if the bankrupt had not been so discharged.

(3) Subject to subsections (3A) and (3B), an order made under subsection (1) shall have effect for no longer than 3 years from the date of the order coming into operation, and where, during the order's validity, the Court has varied the order under subsection (5), such variation shall not cause the order to have effect for a period of more than 3 years, and in any event, any order made under subsection (1) or varied under subsection (5) shall cease to have effect on the 4th anniversary of the date on which the bankrupt was adjudicated bankrupt.

(3A) (a) Where a bankruptcy payment order would, but for section 12 of the Bankruptcy (Amendment) Act 2015, expire on any day during the period of 6 months from the commencement of that section, the bankruptcy payment order concerned shall, subject to subsection (3B), stand discharged on that day unless it has otherwise been discharged or annulled.

(b) Where a bankruptcy payment order would, but for section 12 of the Bankruptcy (Amendment) Act 2015, expire at any time after the expiration of 6 months from the commencement of that section, the bankruptcy payment order concerned shall, subject to subsection (3B), stand discharged on the later of—

(i) 6 months after that commencement, or

(ii) 3 years from the date that bankruptcy payment order was made,

unless it has otherwise been discharged or annulled.

(3B) Where the Court has made an order under section 85A(4), the bankruptcy payment order made under subsection (1) shall have effect for no longer than 5 years from the date of that bankruptcy payment order coming into operation, and where, during that bankruptcy payment order's validity, the court has

varied that order under subsection (5) such variation shall not cause that order to have effect for a period of more than 5 years, and in any event, any bankruptcy payment order made under subsection (1) or varied under subsection (5) shall cease to have effect on the 8th anniversary of the date on which the bankrupt was adjudicated bankrupt.]

(4) In making an order under subsection (1) the Court shall have regard to the reasonable living expenses of the bankrupt and his or her dependants and the Court may also have regard to any guidelines on reasonable living expenses issued by the Insolvency Service under the Personal Insolvency Act 2012 or by the Official Assignee.

(5) The Court, on the application of the bankrupt or the Official Assignee or the trustee in bankruptcy, may vary a bankruptcy payment order granted under subsection (1) where there has been a material change in the circumstances of the bankrupt.

(6) The court in granting an application under subsection (1) may order any person from whom the bankrupt is entitled to receive any salary, income, emolument, pension or other payment to make payments to the Official Assignee or trustee.

(7) For the purposes of this section, where a bankrupt is, or may become entitled to, payments under a relevant pension arrangement, an asset relating to the arrangement (other than payments already received by the bankrupt, or that the bankrupt was entitled to receive, under the arrangement) shall not be regarded as an asset.

(8) A payment which a bankrupt receives, or is entitled to receive, under a periodic payments order, other than any part of such payment that relates to

damages in respect of future loss of earnings, shall not be regarded as income or an asset for the purposes of this section.

21. As set out above all parties invoke the *Coady* decision and it is therefore necessary to consider it in some detail. It also serves as a very useful counterpoint to the issues within this case.

Coady

22. Costello J. delivered judgment in this case on 25 October 2017. Mr. Coady was adjudicated bankrupt on 30 June 2014 and his bankruptcy was automatically discharged on 29 July 2016.

23. Mr. Coady had entered into a pre-retirement Personal Pension Policy ("PPP") with the Notice Party (Aviva Life & Pensions Limited t/a Aviva Life & Pensions Ireland – "Aviva"). He reached his normal retirement date in accordance with the terms of his policy on 19 September 2015, prior to his discharge from bankruptcy.

24. Accordingly, based upon the facts in that case, as in this, the issues were what rights, if any, vested in the OA in relation to the PPP upon his adjudication as a bankrupt, and whether a BPO pursuant to s.85D was required. As in this case, directions were sought pursuant to s.61(6) of the 1988 Act.

25. Unlike the facts in this case, in *Coady*, the discharged bankrupt took no part in proceedings. The parties comprised the OA and Aviva.

26. Pursuant to the PPP contract, from 19 September 2015 *"the amount payable will be the fund value subject to the policy conditions"*. The policy is described as:

> *"The single premium invested is €27,320. Your policy is a Unit Linked pension. When the pension is paid, units are purchased in the investment fund of your choice."*

27. The policy states that retirement had to be after his 60th birthday. Mr. Coady was born on 19 September 1950 so had reached his 65th birthday on 19 September 2015. In any event at the vesting date the policy states the following:

> *"At vesting date we will calculate a fund value by multiplying the number of units allocated to your policy by the unit price set out at the next pricing point. The amount achieved when units in the With Profit Fund are cancelled will allow for any market value adjustment factor for any additional bonuses added to the units… You can use the fund value under this policy to avail of any options provided for by legislation."*

28. The construction of the relevant sections is, of course, against the background of the various options available to the bankrupt, pursuant to the terms of his pension policy and that any manner of effecting it, must at all times be in compliance with TCA 1997. The same of course applies to this case and indeed the relevant sections are clear; in the determination of any issue(s) concerning the confluence of an individual bankruptcy and his/her pension arrangement(s), compliance with the TCA is an essential pre-requisite.

29. In construing the relevant sections, as Costello J. points out s.44(1) of the 1988 Act essentially provides that, subject to the provisions of the entirety of s.44, all property belonging to an individual bankrupt vests in the OA, as at the date of his/her adjudication as a bankrupt, for the benefit of the creditors. I agree with that construction. S.44(1) is of course subject to s. 44A, headed 'Pensions in Bankruptcy'.

30. Section 44A(1) states, that it is referable to 'a relevant pension arrangement' and I agree with Costello J. that that is in turn a refence to those relevant pension arrangements enumerated within s.44A(5). As set out above the first named respondent in this case accepts that Mr. O'Neill's policy comes within the ambit of s.44A(5) and I

agree that properly reflects the statutory requirement. That is a different subsection to the pension arrangement in *Coady*.

31. Section 44A(1) states that the assets relating to the arrangement, as defined, do not vest in the OA for the benefit of the creditors of the bankrupt. The exception (again within the section) being those payments already received by the Bankrupt or that the Bankrupt was entitled to receive under the arrangement. I agree with Costello J. that the phrase within that section of s.44A(1) "*the arrangement*" is a reference *to "relevant pension arrangement"*.

32. So, s.44A(1) is clearly an exception to the vesting entitlements set out within s.44(1). In this case as in *Coady* the payments set out within parenthesis in that section do not apply on the facts of this case. So in s.44A(1) assets relating to the relevant pension arrangement (set out and defined with s.44A(5)) shall <u>not</u> vest in the OA.

33. Section 44A(2) is the nub of the issue and it relates to where a bankrupt has an interest or entitlement under that relevant pension arrangement "which would" if the bankrupt performed an act or exercised an option, cause that bankrupt (described as a 'debtor' within the section itself) to receive from or at the request of the person administering that relevant pension arrangement –

"(a) an income, or

(b) an amount of money other than income,

in accordance with the relevant provisions of the Taxes Consolidation Act 1997, that bankrupt shall be considered as being in receipt of such income, and such amount of money shall vest in the Official Assignee or the Trustee in Bankruptcy."

34. I agree with Costello J. that the reference to 'debtor' within that section is to be construed as meaning 'bankrupt'.

35. S. 44A(1) deals with the pension asset itself and s. 44A(2) deals with two matters that flow from that asset; income and an amount of money other than income, at all times in compliance with TCA.

36. For reasons explored in detail below it is the distinction within s. 44A(2) between 'income' and 'an amount of money other than income' that informs much of this litigation.

37. Again, it is accepted by all that compliance with the TCA is a pre-requisite throughout s.44A.

38. As s.44A(2) is operative, then ss. (3) and (4) also apply.

39. Section 44A(3) states that ss.(2) applies where certain criteria are met – within the three options set out ss.(3)(c) applies to the facts of this case and is in the following terms:

> *"(c) will become entitled within five years of the adjudication to perform the Act or exercise the option referred to in ss.(2)."* The terms 'act' and 'exercise an option' being phrases directly referable to ss.2 and in my view to be construed accordingly.

40. Section 44A(4) states that the OA or the Trustee in Bankruptcy may (if considered beneficial to the creditors of the bankrupt to do so), perform an act or exercise an option referred to in ss.(2) "in place of the bankrupt."

41. So how is s. 44A(2) to be construed particularly in distinguishing 'income' and 'an amount of money other than income'. The distinction is self-evidently important because the section is clear, as construed in *Coady*, that matters comprising 'income' vest in the bankrupt and 'an amount of money other than income' vests in the OA. I agree with Costello J. that the phrase 'such amount of money' is directly referable to the phrase 'an amount of money other than income' with s.44A(2)(b).

42. In that context Costello J. in *Coady* interpreted the sub-section as follows:

"30. Depending on the particulars of the relevant pension arrangement, there may be different options open to the Official Assignee. Subsection (2) states that where the exercised option causes the debtor to receive an income in accordance with the relevant provisions of the Taxes Consolidation Act 1997, <u>the bankrupt will be considered in receipt of such income.</u> It would appear that the reference to the debtor must be to the bankrupt but otherwise the intent of the subsection is clear: if the exercise of the option of the relevant pension entitlement results in the payment of income, the bankrupt and not the Official Assignee is considered as being in receipt of the income (my emphasis).

31. But, the exercised option may also cause the bankrupt to receive an amount of money other than income in accordance with the relevant provisions of the Act of 1997. In the present case I take this to refer to the entitlement of the bankrupt to receive up to 25% of the value of the assets in a tax-free lump sum, up to a maximum of €200,000. The issue here is how to construe the second part of subs. (2), which states that

'that bankrupt shall be considered as being in receipt of such income, and such amount of money shall vest in the Official Assignee or the trustee in bankruptcy'.

I believe the reference to 'such income' is to option (a) in the subsection and therefore the bankrupt shall be considered as receiving the money and it does not vest in the Official Assignee. Option (b) refers to an amount of money other than income and shall be included in the phrase 'such income'. If the two

options are not treated differently, then there is no reason to distinguish between (a) and (b). So (b) is treated differently to (a).

32. The intent of the draughtsman is that income should be treated in one way so that the bankrupt shall be considered as being in receipt of such income, and on the other hand, an amount of money other than income, is to be treated differently. It follows that 'such amount of money' in the second part of subs. (2) refers to option (b) in the subsection. The sum referred to at (b) therefore vests in the Official Assignee under the subsection."

43. In other words, how are the phrases (a) "*an income*" and (b) being "*an amount of money other than income*" to be interpreted in conjunction with the following passage *"that bankrupt shall be considered as being in receipt of such income, and such amount of money shall vest in the Official Assignee or the Trustee in Bankruptcy"*. Is it referable to the bankrupt being in receipt of (a) the income portion only as distinguished from (b) being an amount of money other than income which vests in the Official Assignee or Trustee in Bankruptcy or is it to be interpreted as being that both (a) and (b) vest in the Official Assignee or the Trustee in Bankruptcy. Putting the same point another way does the bankrupt retain the income and the Official Assignee *"an amount of money other than income"* or does the Official Assignee become entitled, subject to the proviso set out above, to both (a) and (b).

44. Thereafter Costello J. concludes her construction argument as follows:

"32. The intent of the draughtsman is that income should be treated in one way so that the bankrupt shall be considered as being in receipt of such income, and on the other hand, an amount of money other than income, is to be treated differently. It follows that 'such amount of money' in the second part of subs. (2)

refers to option (b) in the subsection. The sum referred to at (b) therefore vests in the Official Assignee under the subsection.

33. This construction ties in with s.44A (1) to which subs. (2) is an exception. Subsection (1) states that certain assets of the bankrupt shall not vest in the Official Assignee. The exception to this subsection, subs. (2)(b), states that an amount of money other than income does vest in the Official Assignee, while subs. (2)(a), consistent with the scheme of the Act of 1988, excludes income of the bankrupt from assets that vest in the Official Assignee.

34. In summary, payments received or payments which a bankrupt was entitled to receive at the date of the adjudication under a relevant pension arrangement vest in the Official Assignee. The underlying assets relating to the relevant pension arrangement do not. If a bankrupt has an entitlement to perform an act or exercise an option under the relevant pension arrangement the Official Assignee may perform the act or exercise the option in place of the bankrupt. If the act or option would cause the bankrupt to receive an income the bankrupt is considered to be in receipt of income. If, on the other hand, the act or option would cause the bankrupt to receive an amount of money other than income, the money, that is the lump sum but not the assets from which the lump sum is paid, vests in the Official Assignee."

45. That, in turn, leads to the question as to whether s.85D of the 1988 Act requires to be invoked namely the necessity for a Bankruptcy Payment Order ("BPO").

46. It is noteworthy that in respect of s.44A(2) that the sub-section "(a) income" if it is to be delineated from (b) states *"that bankrupt shall be considered as being in receipt of such income"*.

47. Section 85D has a general application within the administration of the bankruptcy process. It provides a mechanism whereby the OA may apply to court for an Order requiring a bankrupt to make payments from his income or other assets. That is amplified in sub-section (6) which, as set out above, the court may order a third party from whom a bankrupt is entitled to receive monies (including salary income emolument, pension or other payments) to make such payments to the OA.

48. Section 85D states very clearly that any such application may not be made after a discharge from bankruptcy. Thus, it cannot be made on the facts of this case.

49. Within *Coady*, Costello J. held that s.85D applied, by direct analogy with the drafting within s.44(A)(2) and consistent with it, that the income from the annuity, coming as it does within s.86(D)(6), required a BPO. In my view consistent with this view and the differentiation with s.44(A)(2) that, on the facts of this case the other items (the 25% taxable lump sum and the taxable lump sum) comprising 'money other than income' are not subject to a BPO. In *Coady* the annuity remained an asset within s.44A(1), in this case the exercise of the option by the OA has the effect that only any income from the AMDR constitutes income subject to s.85D of the 1988 Act.

50. It is also noteworthy, as pointed out by Costello J. in *Coady* of the similarities in the construction between s.85D(7) at s.44(A)(1). In short the manner in which s.44A distinguishes pension interests and entitlements, is mirrored in s.85D as to those requiring a BPO.

The Issues

51. It is the OA's position that the differentiation within s.44A(2) of *"an income"* or *"an amount of money other than income"* is of significance particularly in light of the comments in *Coady*; with only the first criteria (income) requiring a BPO and by

definition the second not (money other than income). In this regard they rely also upon the principles of statutory interpretation and the Interpretation Act 2005.

52. Both the grounding affidavit sworn by the applicant on 16 January 2019 together with the oral and written submissions seek to distinguish the facts of the present case from *Coady*.

53. In any event this application, (as confirmed by the applicant in his affidavit), is where the OA wishes to consider the exercise of an option in respect of the former bankrupt's pension entitlements. In respect of his pension provider, Mr O'Neill has furnished its policy terms and conditions and these are in turn set out within and exhibited to Mr. Lehane's affidavit. Clause 4, Section 3 of the Terms and Conditions within Mr. O'Neill's policy provides as follows:

> *"provided rules imposed by the Revenue Commissioners at the time are complied with you may choose to provide benefits on retirement in one or more of the following forms:*
>
> *(i) a tax free lump sum retirement benefit;*
>
> *(ii) a taxable lump sum retirement benefit;*
>
> *(iii) a pension;*
>
> *(iv) a contingent pension payable to your spouse or other dependants on your death;*
>
> *(v) an approved minimum retirement fund and/or*
>
> *(vi) an approved retirement fund.*
>
> *The calculation of the annuity rate will take into account the form in which you take your benefits. Before you can select options (ii) or (vi) above, certain Revenue requirements concerning minimum guaranteed life time income and minimum investment in an annuity and/or approved minimum retirement fund*

must be met. The amount of the fund that you can take as a tax free lump sum retirement benefit will depend on whether you were a proprietary director of the company from whose pension scheme a transfer payment was made into this contract. Options (ii), (v) and (vi) above are only available if you were a proprietary director. These options may also be available on that part of your fund represented by additional voluntary contributions."

54. As will be explored below, the revenue submission is clear (and I accept the position) that the proprietary director requirement has now been abolished and that portion of the terms and conditions contended for by counsel for Mr. O'Neill no longer apply.

55. Assuming that the OA is entitled to exercise the option on the part of the bankrupt, he has expressed that he wishes to exercise the bankrupt's entitlement as follows:

(a) the utilisation of the 25% lump sum benefit;

(b) the AMRF (Approved Minimum Retirement Fund) option. This is where the individual seeking to avail of this option does not have a specified income of €12,700 per annum that person must invest €63,500 in an AMRF;

(c) the balance as a taxable lump sum.

(d) These options are clearly delineated within the terms of the policy itself as quoted above.

56. Therefore there is the initial 25% lump sum (subject to its terms and conditions). Thereafter, the investment of the €63,500 (within an AMRF). With regard to the AMRF the submissions of the Revenue again confirm that, with effect from 1 January 2015, the payment transfer on one occasion only in any tax year of up to 4% of the value (at the

time of payment of transfer) of the assets within an AMRF to the owner of the policy is permissible.

57. In Mr. O'Neill's replying affidavit, sworn on 1 April 2019, he exhibits an expert's report from a Mr. Slattery, a former Principal Officer in the Office of the Revenue Commissioners Financial Services (Pensions) Business Unit and that that report concluded that insofar as the TCA was concerned all distributions are regarded as Schedule E "income". This report is considered further below, when considering the Revenue Commissioners' submissions.

58. At para. 14 of his affidavit sworn on 1 April, which matters are mirrored within his submissions he avers:

> *"I say that I am conscious of the fact that the OA appears to be seeking (sic) on a practical aspect of legal interpretation which is academic to me in light of the fact that the OA never sought BPO in my case. I am, in particular, concerned by the facts that it appears to me that the significant legal expense is being or may be visited on my bankruptcy estate and on me personally arguing a matter in respect of which I do not have a practical interest in my individual circumstances."*

59. It is common case that as Mr. O'Neill is a discharged bankrupt, no application for a BPO can be made pursuant to s.85D(2).

60. The contention of Mr. O'Neill, in summary, is that any income or assets within his pension policy do not vest in the Official Assignee, the asset portion by virtue of s.44A(1) of the 1988 Act, the income portion because no BPO was sought during his period of bankruptcy.

61. I accept entirely that in the *Coady* decision, the initial 25% tax free amount, which was operative on the facts of this case also, was held to constitute "*money other*

than income" in accordance with s.44A(2)(b) and accordingly vests in the OA. Thereafter the court went on to consider the annuity, which it held as an asset was "*caught*" by s.44A(1). That left the court to consider the question of income, which it held vested in the bankrupt, and whether if it was to be "*acquired*" by the OA required a BPO, pursuant to s.85D. The court held that a BPO was required. The factual scenario is, as has been reiterated throughout this judgment, different on the facts of this case and therefore, whilst I agree entirely with the decision of Costello J. in *Coady,* the issues raised in this case are, in certain important instances, clearly separate and distinct and require to be construed accordingly.

62. I note that the OA within his affidavit has pointed to the fact that two other (albeit with considerably less assets) pension policies held by Mr. O'Neill were forwarded by Irish Life to the OA on the basis of Irish Life acceptance that pursuant to *Coady* the OA was entitled to them. It is argued that the same should apply to this pension. That contention is not one I can determine in the absence of full documentation being furnished in respect of these policies. I can only deal with Mr. O'Neill's pension policy.

63. Within the second named respondent's submission and indeed his replying affidavit sworn on 1 April 2019 he seeks a construction of s.44A(2) of the 1988 Act which lays particular emphasis on the importance of the phrase "*in accordance with the relevant provisions of TCA 19*". In turn links to Mr. Slattery's expert report that Mr. O'Neill has procured. At para. 8 of his affidavit puts his position as follows:

> *"I say that it is of significance that Section 44A(2) of the Bankruptcy Act 1988 as amended relates to an income or an amount of money other than income "in accordance with the relevant provisions of the Taxes Consolidation Act 1997", a fact which appears to be overlooked or conflated by the OA in his affidavit.*

The OA appears to suggest that the fact that a payment of tax as income under the Taxes Consolidation Act does not mean that it would be treated as income under the Bankruptcy Act, notwithstanding the fact that the definition of "an income" in Section 44A(2) is expressly by reference to the Taxes Consolidation Act 1997.

…

I say that I believe that it is clear that the relevant pension policies were comprised exclusively of only:

> *(a) an interest or entitlement under a relevant pension arrangement which would if I performed an act or exercised an option cause me to receive an income in accordance with the Taxes Consolidation Act 1997; and/or*
>
> *(b) assets relating to the pension arrangement other than the foregoing which do not vest in the OA by reason of Section 44A(1) of the Bankruptcy Act 1988."*

64. With regard to the first option, being in receipt of an income, Mr. O'Neill states that a BPO would be required and cannot now be sought and with regard to the second, the relevant pension assets would simply be excluded and not vest in the OA. He then states;

"I would have been considered to be in receipt of this income in the event that a Bankruptcy Payment Order ("BPO") was applied for, but no such application was made. It is acknowledged by the OA that he cannot now apply for a BPO."

65. Counsel for the respondent in oral and written submissions relied very heavily upon the decision in the UK Court of Appeal in *Horton (as Trustee in Bankruptcy of Michael Gerard Henry) v. Henry* [2016] EWCA Civ 989 and [2017] 1 WLR 391.

Portions of that judgment are quoted at some length. It must be pointed out that the legislative enactments with regard to pension arrangements in respect of an individual adjudicated bankrupt differ significantly within the UK legislation to that within this jurisdiction. I appreciate that the second named respondent was seeking to suggest or recommend the sentiment expressed by the UK Court of Appeal in that case but in my view the statutory framework is entirely different and therefore that is a submission directed far more to legislative amendment, rather than any question of statutory interpretation.

66. To simply illustrate this point; within that judgment the court held that, this case and the previous decision of *Raithatha v Williamson* [2012] EWCH 909 (Ch.) had failed to '*appreciate the effect of the fundamental changes brought about by section 11 of the WRPA with regard to the protection of rights under private pensions plans in bankruptcy or the alignment of such protection to that which had previously been afforded to rights under occupational pension schemes'* (para. 55). Section 11 of the Welfare Reform and Pensions Act in setting out the effect of bankruptcy on pension rights approved arrangements, states;

> *"(1) Where a bankruptcy order is made against a person on a petition presented after the coming into force of this section, <u>any rights of his under an approved pension arrangement are excluded from his estate"</u>* (my emphasis).

67. Accordingly, given the significantly different statutory framework, in my view I do not perceive this judgment of assistance in considering a significantly different legislative framework within this jurisdiction.

68. In summary, Mr. O'Neill's position is that the OA's contention that he is entitled to all of the pension asset in excess of €63,500 is manifestly contrary to the clear intent

of s.44A which is designed to protect pension assets from vesting in the OA for the benefit of a bankrupt's creditors.

Notice Party – The Revenue Commissioners

69. As neither party took any issue with the categorisation and explanation of the complex rules governing pension arrangements as helpfully set out within the submission of the Revenue Commissioners, I have adopted those submissions as to the manner in which they set out and deal with the options and taxation implications of the pension benefits.

70. The Revenue's submission makes plain that it has had sight of the motion, grounding affidavits and the submissions of both parties. The Revenue quotes, with regard to the documentation furnished by Mr. O'Neill, those benefits available to him upon retirement. Clause 4, section 3 of the document entitled "Personal Retirement Bond Terms and Conditions" is quoted in full at para.53 above from the applicant's grounding affidavit.

71. Since 22 June 2016 the notice party confirms that the Proprietary Director Test no longer applies and where reference to that test exists in any published terms or conditions, the published position of the Revenue Commissioners supersedes those terms and conditions. The submissions from the Revenue Commissioners have further confirmed that a legislative amendment was not required to affect this change. Therefore to the extent that counsel for Mr. O'Neill sought to rely upon that proviso, it is now no longer operable and I accept that as correct. His pension arrangement therefore falls to be construed without reference to that proviso.

72. To again reiterate the facts; Mr. O'Neill turned 50 on 29 December 2015 and his period of bankruptcy spanned 22 January 2014 – 29 July 2016.

73. The Revenue note that an application was executed on behalf of the OA to the Trustees of the Pension Scheme on 15 January 2019 which is within the five-year period set out pursuant to s.85D of the 1988 Act but definitely outside of the period of his bankruptcy.

74. In determining Mr. O'Neill's entitlement to a pension or a lump sum the Revenue point out, correctly in my view, that he must exercise one of the available options in order to determine what is to be done with the funds within the policy. In certain circumstances the 1988 Act makes provisions for the OA to step into the shoes of a bankrupt in such circumstances. The Revenue reiterate that *Coady* confirms that such an action by the OA must be done in accordance with the relevant provisions of the TCA 1997 as clearly the OA can be in no better position than a bankrupt or a taxpayer receiving similar payments who is not subject to the bankruptcy process. I agree.

75. The Revenue points out that this present application by the OA is really to determine the status of any lump sum payment that may arise on foot of the policy and whether that vests in the OA without a BPO. To that extent therefore the Revenue submits that the issue of whether it is an ARF or AMRF is not, strictly speaking, relevant in determining that question. The only issue is that in the case of an AMRF the OA will be required to invest €63,500 for the benefit of Mr. O'Neill which the OA would be required to do owing to the provisions in that regard in TCA 1997.

76. I note at this point that in *Coady* Costello J. confirmed that the annuity would remain in the name of the bankrupt and likewise in my view it is clear that, on the facts of this case the AMRF remains in the name of Mr. O'Neill. I further note that this accords with the view of the pension provider Wealth Options.

77. In detailing the Revenue's position, it confirms its view that the policy at issue is a "relevant pension arrangement" for the purposes of s.44 of the 1988 Act. That is common case.

78. The charge to income tax for a Retirement Benefit Scheme is to be found in s. 779 TCA 1997 and provides pursuant to ss.(1) that, in essence, pensions paid under any scheme are chargeable to tax under Schedule E.

79. Section 784C TCA 1997 deals with AMRF for the reasons outlined above, withdrawals are subject to certain initial consideration but where withdrawals are made they are also taxable under Schedule E and the Qualifying Fund Manager is responsible for that deduction and payment to the Revenue on these withdrawals and also in respect of ARF. Where a taxable lump sum is taken on foot of the policy this is also taxable under Schedule E with again a tax being payable by the first named respondent in this instance.

80. As set out above Mr. O'Neill retained an expert Mr. Slattery on his behalf to provide an expert report. Within that report, under the heading "Commutation" he states:

> *"At the point of retirement, all pension arrangements provide an option to exchange retirement income for a once off lump sum payment. This process is referred to as Commutation. The effect of commutation is to reduce the level of future income. The payment of a lump sum to a retiree is clearly not "income" and must be treated as "an amount other than income".* This interpretation suggests that the receipt of a retirement benefit that is not a lump sum must be considered as *"income"*.

81. With regard to that quotation in respect of Mr. Slattery's opinion, the Revenue point out that there is no definition of "income" in the TCA 1997.

82. The Revenue contend on the basis of the legislation that in essence Schedule E governs any monies received on foot of an employment or exercising an offer or *"on any person to whom any annuity, pension or stipend"* all of which are known as emoluments and as such emoluments being defined in s.982 TCA 1997 *"anything accessible to income tax under Schedule E, and referenced to payments of emoluments include references to payments on account of emoluments."* As pointed out this was a broad section and encompasses many sources of payments and indeed a number of examples are set out of pension related payments that are all subject to Schedule E.

83. Notwithstanding the explanations above, the Revenue confirm and acknowledge that whilst a number of different payments arising from the pension product may be taxable under Schedule E that does not mean that all payments come under the single umbrella of a definition of *"income"*. Their submission concludes as follows:

> *"It is respectfully submitted that it is not necessarily open to this Honourable Court to determine the Official Assignee's applications with reference to the TCA 1997 over and above the Bankruptcy Act. Rather, this Honourable Court has to be satisfied that there has been compliance with the TCA 1997 for the purposes of s.44A and 85D of the Bankruptcy Act."*

84. In my view that is an accurate and proper application of the law as to the interaction between the specific sections of the 1988 Act upon which I am required to interpret and TCA 1997.

85. In my view, accepting Mr. Slattery's opinion regarding the all-embracing definition of income does not significantly advance matters. It does not mean that it follows that all of the pension therefore falls within s.44(A)(2) of the 1988 Act as *'income'* and therefore pursuant to its terms all matters coming within that sub-section

will vest in the bankrupt. One of the functions of the 1988 Act is that it seeks to delineate what happens in respect of a bankrupt's estate from his/her adjudication as a bankrupt, the manner in which that estate is to be dealt with thereafter, is itself dependent upon the pertinent facts and circumstances of each estate. If Mr. Slattery's view was adopted all matters within this pension policy would simply be defined as 'income' and be administered as such. As was pointed out in *Coady* s. 44A(2) and indeed s. 85D(6) and (7) offers a more subtle delineation of the distribution of a relevant pension arrangement upon bankruptcy.

Observations and Conclusions

86. Mr. O'Neill on the facts of this case takes issue with certain figures within his pension policy as to the utility of the OA exercising an entitlement in the manner suggested, in contending that in reality there were minimal funds available, certainly after the initial 25% funds had been utilised. That in my view is a matter within the discretion of the OA and not, certainly in the absence of a comprehensive expert report dealing with these specific matters, a matter for this court to deal with or undertake mathematical calculations in respect of this pension policy.

87. Mr. O'Neill properly disclosed the terms of this pension policy within his Statement of Affairs furnished to the OA. Although it appears not all of the correspondence was exhibited there was email correspondence between the first and second named respondents and the OA/ISI in respect of this pension policy.

88. It appears common case that this pension arrangement is one within the s.44A(5) of the 1988 Act.

89. I accept that the OA can exercise his option pursuant to the provisions of s.44A(4) of the 1988 Act and did so within the five-year period provided.

90. It is clear that the pension provider in its letter of 18 October 2018 (considered above) was aware of the nature of the option sought to be exercised by the OA but considered, upon receipt of legal advice, that the request could not be acceded to.

91. Complaint has been made as to certain deficiencies within the form completed by the OA. However it is clear that the second named respondent, with regard to his pension entitlements, did not engage with the OA in this regard. He expressed his view, took issue with the OA's actions and there matters rested.

92. In my view, again, adopting the construction of Costello J. in *Coady*, that s.44A(2)(B) has carefully and deliberately delineated "*income*" from "*money other than income*".

93. I do not construe the requirement that it be exercised in accordance with TCA as requiring, that as schedule E effectively applies to all of the matters under consideration in this case, that all schedule E income for the purposes of the Bankruptcy Act, must therefore be considered as *"income"* within its relevant sections. I construe that section requiring compliance with the TCA 1997 as requiring that all the requirements for the establishment of a pension, the discharge of any taxes or any other matters required under Schedule E or any other section, is adhered to within the entirety of s.44A headed "Pensions in bankruptcy". Moreover, I see nothing within the submissions of the Revenue Commissioners which seeks to advance that proposition in the manner contended for by the second named respondent.

94. It is clear from at least about 2015 there has been correspondence on behalf of the OA and ISI with the first named respondent and indeed with Mr. O'Neill personally. It was clear that from the outset Mr. O'Neill adopted a particular stance which he has maintained throughout this litigation. That, of course, is his prerogative. But it is yet another distinguishing feature between this and the *Coady* case.

95. Because of the stance taken by Mr. O'Neill (and by extension the first named respondent) and their denial of any entitlement that the OA has exercised any option in the absence of a BPO (to the extent that they conceded any was available at all) this has rendered it difficult (if not impossible) for the OA to exercise such an option. However, they did, in the letter quoted extensively above, furnish the form and the Official Assignee sought to complete it in as clear a form as appears to have been possible in all the facts and circumstances. It was presumably also possible for the parties to seek clarification if any matters were unclear.

96. In my view, as a matter of principle, the OA as the Trustee in Bankruptcy in this case can exercise the option pursuant to his entitlement set out in S44A(4). In my view, he has sought to exercise both entitlements within the 5-year time period provided within the parameters of the facts of this case. I say that with particular reference to the stance adopted by the first named respondent in respect of the exercise of any option by the OA and the position of the second named respondent as set out above.

97. Within the Notice of Motion the OA invokes s.19(2) of the Bankruptcy Act 1988 which states very simply that the bankrupt shall:

> *"give every reasonable assistance to the Official Assignee in the administration of the estate."*

98. This question asked of the court within the Notion of Motion is whether Mr. O'Neill was obliged pursuant to that section to fill out and complete such documentation as may be required and/or take such steps as are necessary to enable the OA to exercise the option available to Mr. O'Neill under the relevant pension. I confess to finding that question difficult to understand. The sub-section is clear as to the requirement upon Mr. O'Neill and in my view it embraces any reasonable request with regard to any item appearing within his Statement of Affairs (in respect of which he clearly sets out the

pension held with the first named respondent, Wealth Options Limited). The section does not thereafter provide any prescriptive analysis as to the degree of co-operation required of a bankrupt. However, that may in turn lead to the OA seeking directions of the court with regard to any specific case. It is impossible (and perhaps not even appropriate) for a court to determine what may or may not occur with regard to any potential pension arrangement concerning an existing or discharged bankrupt.

99. S.19(2) of the 1988 Act is clear in its terms. It requires co-operation and the OA is entitled, with regard to the specific assets of a bankrupt, to seek that co-operation. Thereafter much will depend upon the facts of each individual case and may, in the absence of specific practice directions or other matters again require that directions must be sought before the bankruptcy judge depending on the facts of the case. However, giving the generality of the question I do not believe that it would be appropriate for me to give a more specific response as in my view Mr. O'Neill was obliged to co-operate, or in the words of the section to give "*every reasonable assistance*".

100. In my view, if the OA clearly and demonstratively indicates a wish to exercise his rights pursuant to s.44A(4) then he is entitled to the assistance of the bankrupt in that regard. However, equally the bankrupt (or discharged bankrupt as in this case) is entitled to take a different view to that of the OA and accordingly the OA may require to seek to have that issue determined. However, where the second named respondent has adopted that view then it is more difficult for him to complain thereafter as to the *"quality"* and the nature of the option sought by the OA where he has, for whatever reason, declined to specifically engage within that process.

101. In my view (all subject to adherence with the TCA 1997) and with regard to the option exercised by the OA;

(a) The initial 25% lump sum benefit is, pursuant to S44A(2) *'an amount of money other than income'* and therefore vests in the OA. This is consistent with *Coady*. For the reasons set out above in my view a BPO pursuant to s.85(D) is not required.

(b) *Coady* correctly points out in respect of an annuity that this is held by the pension's provider in the name of the bankrupt or discharged bankrupt. In this case there has been the exercise of an option for an AMRF. That policy is held in the name of Mr. O'Neill by his pension provider and constitutes an asset held by the pension provider in the name of the bankrupt or discharged bankrupt (as with the annuity in *Coady*). Any monies accruing to him from the AMRF, constitutes Mr. O'Neill as being in receipt of that income. In respect of this, again as in *Coady*, pursuant to the provisions of s.85D a BPO is required in respect of that income. It was not sought within the period of Mr. O'Neill's bankruptcy and therefore cannot be sought now.

(c) The taxable lump sum was a specific option within Mr O'Neill's pension policy. It is also in my view to be construed as 'an amount of money other than income' and therefore vests in the OA. In my view, for the reasons set out above, a BPO pursuant to s.85(D) of the 1988 Act is not required in respect of what I describe as the 25% tax free lump sum and the exercise by the OA of the option of the taxable lump sum.

(d) At the risk of excessive repetition, all of the above can only be based upon TCA 1997 compliance.

102. I note that this matter does not come before this Court as a representative action or test case. It was not opened to the court on that basis but in respect of the case of Mr. O'Neill only. Reference is undoubtedly made by the OA to other issues when it was

stated that obtaining guidance in respect of certain matters would be of considerable assistance. Counsel for Mr. O'Neill pointed out, on more than one occasion, that his client is being put to expense in respect of proceedings where he is at full risk upon costs and where, he contends, the issues, in so far as his pension policy is concerned, have largely been determined. However Mr. O'Neill (as opposed to Mr. Coady) has taken an active role in this matter in correspondence and before this Court. He has adopted a firm position in respect of his pension entitlements.

103. The law concerning the interaction of pension arrangements and bankruptcy is a complex one. As a general comment the legislation in separate jurisdictions informing their laws in respect of a pension and its interaction with an individual's bankruptcy must be approached with circumspection. It is in part of course based upon considerations as to how the balance is to be achieved between an individual's pension and his/her adjudication as a bankrupt. Possibly directions akin to practice directions might be required as to any requirements of the OA, a bankrupt or former bankrupt and their pension provider in the administration of pensions in bankruptcy. This Court must, self-evidently, restrict its task to an interpretation of the sections of the 1988 Act solely in respect of the three issues raised with this Notice of Motion. For the reasons set out above the court's response to the directions sought are as follows;

1.1 For the reasons set out above no BPO pursuant to s.85D is required

1.2 For the reasons set out above the OA is entitled. Clearly it is preferable if this is done in conjunction with the pension provider and the bankrupt but in the exercise of s.44(A)(4) an entitlement does vest in the OA

1.3 Not entirely understood and is presented in very general form. The provision of s.19 including s.19(d) requires a bankrupt's co-operation, which specifically

defines that as *'reasonable assistance'*. Thereafter, as matters stand, it may require directions before the court.

104. This judgment is to be delivered electronically.

105. In the circumstances the respondent and the notice party will have 6 weeks from the date of delivery of this judgment to file a submission in writing not exceeding 1000 words in respect of costs. The appellant will have 4 weeks thereafter in which to file a submission in reply, or any such further period of time agreed by the court (particularly where the parties are seeking to resolve the issue as to costs without further recourse to the courts). Upon receipt of the submissions, the court may determine the costs without further hearing. If a further hearing is expressly sought and compelling reasons advanced as to the necessity for doing so, a remote hearing will be facilitated. Parties should be aware that any further hearing as to costs may result in the court making additional orders in respect of costs.