Neutral Citation: [2015] IEHC 228

THE HIGH COURT

BANKRUPTCY

2012/2480

2012/2479

IN THE MATTER OF THE ADJUDICATION OF BANKRUPTCY BY THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND AGAINST BRIAN O'DONNELL AND MARY PATRICIA O'DONNELL

BETWEEN

BRIAN O'DONNELL AND MARY PATRICIA O'DONNELL

APPLICANTS

AND

CHRISTOPHER LEHANE

OFFICIAL ASSIGNEE

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered the 16th day of April, 2015

1. This is an application to annul an adjudication of bankruptcy dated 3rd September, 2013, brought by the two debtors who are husband and wife, pursuant to s.85C of the Bankruptcy Act 1988, as inserted by s.157 of the Personal Insolvency Act 2012. Insofar as it is relevant the section reads as follows:-

> *"(1) A person shall be entitled to an annulment of his adjudication –…*
>
> *(b) in any other case where, in the opinion of the Court, he ought not to have been adjudicated bankrupt."*

2. This jurisdiction is a discretionary jurisdiction which should be exercised with great caution. 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."*

3. In *Re Gorham* [1924] 2 I.R. 46 Pim J. identified 3 circumstances where it would be proper to exercise the inherent jurisdiction of the Court to annul 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 process of the Court. In *SFS Markets Ltd v. Rice* [2015] IEHC 42, I held as follows:-

> *"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."*

The debtors' case

4. The debtors advance their applications on two general grounds. The debtors argue that the petitioner, the Governor and Company of the Bank of Ireland ("the Bank") was not a creditor of either of them. They accept that they borrowed in excess of €65 million over a period of years in the 2000s but they say that the money was not advanced by the Bank. They say that their agreements and borrowings were all with Bank of Ireland Private Banking ("BOIPB"). They say that the Bank and BOIPB, which are part of the same group, deceived the debtors as to the true state of affairs. They argue that the facility letters in respect of which monies were advanced both to the debtors and to their related companies (which they guaranteed) were all on BOIPB headed paper and indicated that BOIPB was in fact the lender and not the Bank. They say that all of the statements of account in respect of the facilities were all from BOIPB.

5. In addition they say that BOIPB was not a licensed bank and that therefore it was not merely unlawful but constituted a criminal offence for BOIPB to hold itself out as and to carry on the business of a bank. They say that for this reason, the Bank, its servants and agents including its solicitors and counsel have sought to conceal what the debtors say is the true state of affairs and have sought to mislead various divisions of the High Court and the Supreme Court in relation to these matters.

Background to the adjudication of bankruptcy

6. The petitions to adjudicate the debtors bankrupt were grounded upon judgments obtained in a number of related summary proceedings commenced by the Bank as plaintiff in December, 2010. The proceedings were all entered into the Commercial List of the High Court. The debtors were represented by solicitors and senior and junior counsel. The summary proceedings were compromised by a detailed written settlement agreement ("the Settlement Agreement") running to 8 pages entered into on the 4th March, 2011. It was a condition of the Settlement Agreement that if the debtors were in default in respect of any of the scheduled payments that they would consent to judgment being entered against them in the sums then shown to be due (allowance having to be made for any payments made or interest accrued). The debtors missed a repayment due under the terms of settlement and the Bank re-entered the proceedings and on the 12th December, 2011, Kelly J. in the High Court entered judgment in favour of the Bank in the sum of c. €71.5 million. The debtors say that papers re-entering the proceedings before the High Court were not properly served upon them and that therefore the judgment was not in fact properly obtained. They did not appeal the judgment at that time.

7. The debtors were examined as to their means and assets before the High Court over a period of 5 days. The debtors then applied

to be adjudged bankrupts in England. In petitioning for their own bankruptcy they admitted that they were indebted to the Bank in the sum of c.€71.5 million. They argued that they were entitled to petition for bankruptcy in London as their centre of main interests ("COMI") was now in England. The application was opposed by the Bank and after a lengthy hearing the High Court held that at the relevant date (the date of the presentation of the petition) the debtor's COMI was not in England and therefore they could not open main insolvency proceedings in London. They appealed the decision to the Court of Appeal and ultimately were unsuccessful.

8. The Bank presented petitions on the 1st June, 2012, and the 7th June, 2012, to have the debtors adjudicated bankrupt in this jurisdiction. These petitions were adjourned on various occasions to await the outcome of the proceedings in England. Once the English proceedings had concluded without the debtors being adjudicated bankrupt in that jurisdiction, the Irish bankruptcy petitions were brought on for hearing. They were heard by Charleton J. over 4 days in July, 2013 and he delivered judgment in August, 2013, finding that the debtors' COMI was in Ireland. On the 2nd September, 2013, he adjudicated each of the debtors bankrupt. These are the Orders of adjudication which the debtors now seek to have annulled.

Further proceedings
9. The debtors appealed the judgment and Orders of Charleton J. adjudicating them bankrupt to the Supreme Court on the grounds that their COMI was not in Ireland. Judgment was delivered by the Supreme Court on the 25th February, 2015, and the appeal was rejected.

10. At some point in time which was not identified to the Court, it came to the attention of the debtors that Kelly J. held shares in the Bank in December, 2011 when he entered judgment against them in favour of the Bank in the sum of c.€71.5 million pursuant to the Settlement Agreement of 4th March, 2011. The debtors now seek to appeal the judgment of Kelly J. on the basis that he was a judge in his own cause and they have brought a motion which is currently pending before the Supreme Court seeking liberty to extend the time in which to appeal that decision. Apparently they have not sought to appeal the decision on the basis of service of re-entry papers in December, 2011 (though they have complained that they were not properly served with these papers at the time).

11. It is against this history that the debtors argue that the Settlement Agreement of 4th March, 2011, and the judgment of 12th December, 2011, were each procured by the deceit of the Bank of the true facts as asserted by the debtors. They state that this amounts to a basis upon which this Court should annul the adjudications of bankruptcy. They rely upon the decision in *Re Gorham* in that regard referred to at para. 3 above.

The petitioner's submissions
12. The Bank, the petitioning creditor, argues that this application amounts to an abuse of process and ought to be dismissed on that ground. They point to the following facts in support of that proposition.

> (1) All of the papers that were necessary to enable the Bank to obtain summary judgment against the debtors in the related summary proceedings were in the possession of the debtors at the very latest prior to 3rd March, 2011, when the Bank's applications for liberty to enter final judgment was listed for hearing in the High Court. The debtors do not deny that they had all of the relevant documentation which included all of the facility letters, all of the statements of account, all of the letters of demand and all of the guarantees in respect of related companies of the debtors. At the time the debtors were represented by solicitors and senior and junior counsel. At no point did the debtors or any one on behalf of the debtors state that the Bank was not the creditor but rather that the borrowings had been taken out with BOIPB.
>
> (2) The debtors entered into a detailed Settlement Agreement of these proceedings. In each of these proceedings the Bank and not BOIPB was the plaintiff. The Settlement Agreement was with the Bank and not BOIPB. The Settlement Agreement acknowledged the debt due to the Bank and not to BOIPB. The Settlement Agreement confirmed that the debtors had the benefit of legal advice prior to entering into the Settlement Agreement. Their signatures executing the Settlement Agreement were witnessed by their solicitor. The Bank says that no point was ever raised that the monies were not owed to the Bank but rather were due to BOIPB. The debtors do not state otherwise.
>
> (3) When judgement was obtained against the debtors on 12th December, 2011, the debtors did not seek to appeal that decision on the basis no debt was due and owing to the Bank.
>
> (4) Similarly, when the debtors were examined as to their means before Kelly J. in the High Court, no point was made as to the identity of their creditor.
>
> (5) Very significantly, they in fact relied upon the judgment of the High Court of December, 2011 in petitioning for their own bankruptcy in England.
>
> (6) When the Bank's petitions for bankruptcy were heard before Charleton J., no issue was taken as to the status of the Bank as a judgment creditor of the debtors.
>
> (7) On the appeal against adjudication to the Supreme Court, likewise, no issue in relation to BOIPB was taken.
>
> (8) The debtors have not pointed to any new evidence that was not at all times available to them.

13. The issue in respect of BOIPB was first raised by the debtors late in 2014. The Bank argues that this is simply far too late and that it is an abuse of process to bring forward arguments piecemeal in this fashion especially in circumstances where there has been such considerable and no doubt vastly expensive litigation. The Bank relies both on prior decisions in relation to delay and the principle of law known as the rule in *Henderson v. Henderson*.

14. As I have pointed out at paras. 2 and 3 above, an adjudication of bankruptcy cannot be undone without extremely compelling reasons. The onus is on the moving party, the bankrupt, to satisfy the Court that the bankrupt ought not to have been adjudicated bankrupt. I*n Re Sean Dunne (a bankrupt)* [2013] IEHC 583 McGovern J. was dealing with an application to annul an adjudication on the basis of alleged defects in service. At para. 11 of the judgement he held:-

> *"24. Having regard to the contents of s.85(5)(b) [1] it seems to me that a challenge to the adjudication on the basis of service in this case would be permissible only if there was some new evidence that had not been available before the judge who made the adjudication."*

15. This is authority for the proposition that the bankrupt must adduce new evidence which had not been available before the judge who made the adjudication in bankruptcy if the Court is to annual the adjudication. In this case it is striking that the debtors do not

point to evidence in relation to the identity of the creditor which was not available to the Court (or to the debtors) at the hearing of the petitions to adjudicate them bankrupt. They do point out that they were unaware at the time and therefore did not draw to the attention of the Court, the fact that BOIPB did not have a banking licence pursuant to the relevant provisions of the Central Bank Acts. However, as BOIPB did not present the petitions in each of these cases and has not claimed to be a creditor of either of the debtors, this fact is not relevant to the issue as to whether or not the Bank was a creditor of the debtors in the amount claimed when the petitions were presented.

16. In addition it is argued the debtors' application clearly breaches the rule in *Henderson v. Henderson* (1843) 3 Hare 100. In *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1 Bingham L.J. at p. 31 stated as follows:-

> *"… Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings would be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."*

17. This passage has been cited and approved by the Supreme Court in *Carroll v. Ryan* [2003] 1 I.R. 309, *A.A. v. Medical Council* [2003] 4 I.R. 302 and in *Re Vantive Holdings* [2010] 2 I.R. 118. In that latter case Murray C.J. quoted at pp. 124-125 from the judgment of the trial judge as follows:-

> *"The rule in Henderson v. Henderson is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate."*

Murray C.J. then stated at p.125 as follows:-

> *"[22] Viewing it through the prism of estoppel and res judicata the rule in Henderson v. Henderson (1843) 3 Hare 100 strictly speaking applies to proceedings between parties where those proceedings determine the rights or obligations between those parties. It is intended, inter alia , to promote finality in proceedings and to protect a party from being harassed by successive actions by another party when the issues between them either were or could have been determined with finality in the first proceedings….*
>
> *[25] Underlying the rule in Henderson v. Henderson (1843) 3 Hare 100 is the policy of the need to protect the due and proper administration of justice from an abuse of process and uphold the principle of finality in legal proceedings."*

Discussion

18. I accept these principles and they are applicable to the facts in this case. Thus, I have to assess whether or not the debtors have advanced any new evidence as the basis for the annulment of the adjudications. In the alternative, I have to consider whether they ought to have advanced the arguments which they now seek to urge on this Court at the hearing of the petitions, the appeals in respect of the adjudications on foot of the petitions or any of the other proceedings between the parties in relation to the judgment and the bankruptcy proceedings outlined above.

19. The debtors have not sought to rely upon or to adduce any new evidence such as arose in *Re Sean Dunne (a bankrupt).* They are seeking to advance arguments which they were either in a position to make, or could, with reasonable diligence, have made since March, 2011. That being so, the issue to be decided is whether or not there were any special circumstances such as would take the debtors outside the strict scope of the rule in *Henderson v. Henderson*. To put it another way, would it be an abuse of process to permit the debtors to advance the arguments in relation to BOIPB which they now seek to advance in all of the circumstances?

20. It follows therefore that unless the debtors can establish that there was fraud or concealment of the true facts by the Bank then these applications must fail. There is no dispute regarding the relevant facility letters, security documents and statements of account in this case. The debtors do not deny that they had possession of all of the relevant documents at the relevant periods. When asked to identify the concealment upon which they relied and the matters which were concealed, Mr. O'Donnell, the first debtor, stated that they were "bamboozled" into the Settlement Agreement. He emphasised that the Bank sought to conceal the fact that BOIPB was not a licensed bank and he placed considerable emphasis on the Bank's failure to address this issue. He said that the Bank, its representatives, including the solicitors and counsel instructed to act on its behalf, deceitfully concealed the unlicensed status of BOIPB in order to deceive the debtors in relation to the entitlement of the Bank to judgment in the case.

21. I reject the submission that the Bank or its representatives concealed the true identity of the lender from the debtors. I find it extremely difficult to believe that persons borrowing such very substantial sums would not consider very carefully all of the documentation provided prior to entering into such significant commitment. In any event, they clearly had an obligation so to do and cannot escape the consequence of their own failure in that regard. Certainly the express terms of the facility letters and security documentation cannot be described as concealment by the Bank. Mr. O'Donnell does not advance the case (and indeed it would be a very surprising one given his professional experience) that he and his wife did not understand the documentation at the time they entered into it. Even if they misunderstood these obligations, the debtors were legally represented and had the benefit of legal advice

in relation to the Bank's summary proceedings. Likewise, they were legally represented when they entered into the Settlement Agreement (indeed this is acknowledged in the agreement itself). While undoubtedly settlement negotiations in respect of such significant personal liabilities were extremely stressful, there is no reason whatsoever to believe that their legal advisors were not in a position to explain the implications of the settlement they were proposing to enter into. This is particularly so where the question of the identity of the creditor is not a difficult concept to understand. The counter party to the Settlement Agreement was clearly identified as the Bank and the proceedings being compromised were clearly set out. In each case the Bank was the plaintiff. Furthermore, more than 3 years elapsed since the Settlement Agreement was concluded in March, 2011. There is no explanation forthcoming whatsoever as to why this fundamental point was not raised at an earlier point in time and, if need be, the judgment of December, 2011 appealed on this ground.

22. In my opinion, the reliance by the debtors on the judgment when they present their petitions for their own bankruptcy in London is fatal to their claim. All of the documentation necessary to establish the case they now seek to make was available to them when they presented their own petitions in bankruptcy. The same argument applies in relation to both the hearing of the petitions in bankruptcy in this jurisdiction and the appeals to the Supreme Court. In answer to a question as to how they came to the realisation, as they see it, that they had no dealings with the Bank but that all of their dealings were with BOIPB, Mr. O'Donnell stated that they were going through the documentation late in 2014 and they "twigged it". Whether or not BOIPB was licensed to carry on business as a bank or purported to do so is irrelevant to this argument. In any event, as its status was apparent from the website it cannot be said to have been concealed much less fraudulently concealed by the Bank.

23. In my judgment the debtors have not made out any case that there was at any material stage concealment by the Bank of the identity of the creditor or of the party suing the debtors for c.€71.5 million. Even in argument they have not identified any concealment on the part of the Bank at any stage. They had many opportunities to raise the argument they now seek to raise in this application in relation to the identity of their creditor. To permit them so to do now would be a gross breach of the rule in *Henderson v. Henderson*. There has been no fraud or abuse of process by the Bank at any stage in the various hearings in courts in this jurisdiction and in England. Far from there existing compelling reasons to annul the adjudications in these cases, no grounds have been advanced which, in my opinion, lead to the conclusion that they ought not to have been adjudicated a bankrupt. I refuse the applications in each case.

24. I have reached this conclusion taking the debtors case at its height. Even if the Court were to to accept that the borrowings were with BOIPB and not the Bank, it is inescapably the fact that the debtors either had all the relevant information at all material times or could with due diligence have had that information. For at least part of the time they were sued by the Bank they had the benefit of legal advice. The debtors had every opportunity to advance this proposed defence to the Bank's claim since 2011. The debtors cannot now seek to base a case for the annulment of the adjudication on arguments which could have been advanced on so many previous occasions.

Abuse of process

25. I also reject the application on the separate grounds that to grant the relief sought would itself amount to an abuse of process. Initially the debtors engaged in very significant litigation and never raised the point in relation to the identity of their creditor. Now, they have raised this point or sought to raise the point in a number of cases. In proceedings bearing High Court record no. 2012/7293P by the Bank against the debtors and two of their adult children, Blake and Bruce O'Donnell, the Bank have alleged that the defendants in those proceedings are involved in a fraudulent scheme to place assets beyond the reach of the Bank. The debtors' Counterclaim in those proceedings raises the issue of the identity of the creditor. A motion to strike out the debtors' Counterclaim in those proceedings is currently pending before the Commercial List in the High Court. The debtors issued proceedings on 9th October, 2014 against the Bank and certain of its employees, Arthur Cox, Mr. Tom Kavanagh and counsel bearing High Court record no. 2014/8585P which appear, from the Plenary Summons, to raise the same issue in those proceedings. Two of their adult children, Blake and Bruce O'Donnell have issued mirror proceedings bearing High Court record no. 2014/8584P which likewise seem to raise these issues. The debtors issued further proceedings on the 1st December, 2014, bearing High Court record no. 2014/10125P against the Bank and certain of its employees seeking recision of the Order of the High Court of the 12th December, 2011, on the basis of fraud, conspiracy and deceit which presumably relies upon the same factual assertions relied on in the Motions before this Court. In the submissions filed by the debtors in the Supreme Court Motion seeking to extend time to appeal the original judgment Order of Kelly J. of 12th December, 2011 (which is grounded upon the shareholding of the honourable judge in the Bank), the debtors have made the same arguments which they have advanced before this Court which are to the effect that the loans were advanced by BOIPB and not the Bank and that the original judgment Order was therefore obtained on the basis of fraud.

26. Furthermore, the adult children of the debtors brought proceedings in July, 2012 seeking, *inter alia*, to restrain the Receiver, Mr. Tom Kavanagh, from taking possession of the property at Gorse Hill, Vico Road, Killiney, Co. Dublin and sought a series of declarations to the effect that the Bank's security was invalid and unenforceable ("the Gorse Hill proceedings"). The Gorse Hill proceedings were heard and the reliefs rejected by the High Court and the Supreme Court on appeal. Following the decision of the Supreme Court, the adult children of the debtors issued further injunctive proceedings against the Bank, BOIPB, the Receiver and others (bearing High Court record no. 2015/1553P) on 25th February, 2015, seeking again, *inter alia*, to restrain the Receiver from taking possession of Gorse Hill and an order overturning the Orders made in the Gorse Hill proceedings and a declaration that the Bank's security is invalid and unenforceable. The application for an injunction was grounded, *inter alia*, on the argument that the Bank did not lend any monies to the debtors or their related companies but that the true creditor was BOIPB. The application for an injunction was refused by McGovern J. in the Commercial List of the High Court on 3rd March, 2015. He stated in his judgment:-

> *"In the course of the arguments before the Court on this motion, Mr. Blake O'Donnell laid considerable emphasis on the fact that the monies were not lent by Bank of Ireland but rather by Bank of Ireland Private Banking. It is quite clear that the monies were lent by Bank of Ireland and this point concerning Bank of Ireland Private Banking was raised in the High Court and was rejected. The matter was not pursued on appeal although in the course of her judgment, Laffoy J. in the Supreme Court referred to the fact that it was clearly the Bank that had lent the money. This matter is also res judicata."*

27. Following the refusal of the relief in the second Gorse Hill proceedings and having been informed that the debtors were claiming a right of residence in Gorse Hill, the Bank and the Receiver issued further proceedings against the debtors on 3rd March, 2015 (bearing High Court record no. 2015/1736P), seeking, *inter alia*, an injunction against the debtors from trespassing upon Gorse Hill. During the hearing of the trespass injunction application on 5th March, 2015, the debtors again raised this issue namely that the monies were lent by BOIPB and not the Bank in order to resist the injunction sought. McGovern J. rejected the arguments advanced by the debtors on the basis that they were *res judicata* and ordered the debtors to vacate Gorse Hill. The debtors appealed that matter to the Court of Appeal and yesterday it delivered judgment rejecting the appeal. In so doing the Court emphasised that it was not determining any issue of fact or law in dispute between the parties in relation to the substantive issues in the proceedings but had regard to the present status of the Settlement Agreement as a valid and binding agreement. The issues raised in those proceedings remain to be

determined in due course.

28. Parties cannot raise the same point in multiple proceedings in different hearings before different courts. This clearly amounts to an abuse of process and runs the grave risk of there being different decisions of different courts possibly in different divisions of the High Court on the same point. This is exacerbated when the point is raised in the High Court and the Court of Appeal. The debtors have chosen to raise this issue in various proceedings as outlined above. Therefore, they cannot now raise the same point in these Motions pursuant to s. 85C of the Act of 1988, as amended, seeking to annul the adjudications of bankruptcy. This was a point I made in my judgment of *SFS Markets Ltd. v. Rice* [2015] IEHC 42. At para. 16 of the judgment I held:-

> *"Having invoked the appellate jurisdiction of the courts by serving a notice of appeal (which has not been discontinued) he has elected to pursue this remedy. He cannot seek an alternative remedy at the same time on the very self same grounds. He is, therefore, estopt from seeking to annul the adjudication of bankruptcy on those self same grounds. I find it most significant that the debtor was not able to cite any case where an adjudication of bankruptcy was annulled in a situation where an appeal against the order of adjudication was pending. In the circumstances I decline to exercise my discretion to annul the adjudication on this ground alone."*

29. In this case also I declined to exercise my discretion to annul the adjudications on the basis that the debtors have elected to pursue this argument in other litigation and thus have elected for such remedy to which they may be entitled to in the alternative litigation. In reaching this decision I am particularly conscious of the fact that a judgment is pending before the Court of Appeal in relation, *inter alia*, to the identity of the debtors' creditor.

30. I am making no decision on the merits in relation to the debtor's argument that the Bank is not a creditor of the debtors. I am leaving that factual matter to be decided by another court.

31. For the sake of completeness and in view of the fact that very grave accusations were made in court and on affidavit, I wish to state that the debtors have adduced no evidence whatsoever that any of the bank officials, solicitors or counsel whom they have accused of being engaged in deceit or fraudulent concealment were engaged in any wrongful or improper behaviour at any stage. Making such serious allegations which are so damaging to the reputations of the persons concerned without proper, or indeed any, evidence to support the allegations itself constitutes an abuse of the process of the Court.

Admissibility of the affidavit of Mr. Brian O'Connor

32. Mr. Brian O'Connor swore an affidavit on behalf of the Bank in opposition to the debtors' applications. The debtors objected to the affidavit on a number of grounds and sought to have it struck out. Firstly, it was argued that Mr. O'Connor was not an employee or officer of BOIPB and therefore could not swear an affidavit on its behalf. Mr. O'Connor did not purport to swear an affidavit on behalf of BOIPB. He swore an affidavit on behalf of the Bank and the Bank was the only respondent to the Motion. Therefore this argument was irrelevant.

33. Secondly, it was argued that Mr. O'Connor was not an officer of the Bank and that therefore he could not properly swear an affidavit on its behalf. In submission Mr. O'Donnell argued that the test for officer was a director or secretary of the Bank, applying the definition of an officer derived from the Companies Acts 1963-2013. In written submissions and in argument the debtors sought to apply the definition of officer derived from the Central Bank of Ireland's Consumer Protection Code 2012 where an "officer" is defined as:-

> *"…in relation to a regulated entity, means a director, chief executive, manager or secretary, by whatever named called, or an office or position, the holder of which reports directly to a director, chief executive, manager or secretary".*

34. It was argued that as Mr. O'Connor did not report directly to either a director, chief Executive, manager or secretary that therefore he did not qualify as an officer of the Bank within the meaning of the Code of 2012.

35. However, this argument ignores the recent decision of O'Malley J. in *Ulster Bank Ireland Limited v. Dermody* [2014] IEHC 140. O'Malley J. had to consider whether an employee of Ulster Bank Limited could swear an affidavit for the purposes of the Bankers' Books Evidence Act 1879-1959 on behalf of Ulster Bank Ireland Limited. At para. 50 of her judgment O'Malley J. held that the deponent in that case could not be an officer of the plaintiff Bank within the meaning of the Acts as he was an employee of another company within the group. She held as follows:-

> *"I accept that for the purposes of the Acts an employee may be considered to be an officer of the bank. However, Mr. Evans is not an employee of the plaintiff, but of a separate legal entity."*

36. This is a clear decision of the High Court that an employee of a bank may be considered to be an officer for the purposes of the Bankers' Books Evidence Acts 1879-1959 and therefore entitled to swear affidavits on behalf of the Bank where the deponent is an employee of the relevant Bank. It is clear that Mr. O'Connor is an employee of the Bank and therefore he is an officer within the meaning of the Bankers' Books Evidence Acts for the purposes of swearing affidavits pursuant to those Acts and otherwise on behalf of the Bank. The definitions of officer relied upon by the debtors are not applicable in this case and this ground for striking out Mr. O'Connor's affidavit likewise must fail.

37. It was argued that the deponent could not be authorised to give the affidavit evidence on behalf of the Bank unless there was evidence of the authorisation such as a minute of the resolution of the Board of the Bank. This is clearly incorrect. It is neither appropriate nor necessary that a deponent who states that he or she is authorised to swear an affidavit on behalf of a limited liability company produce evidence of the authorisation by means of either a board resolution or minute recording such a resolution. No authority for the proposition was advanced. On the other hand, Mr. O'Connor averred that it was part of his job that he swear affidavits on behalf of the Bank and that accordingly he was authorised so to do. It was not necessary therefore that he exhibit an express authority to swear the affidavit before the Court could accept that he was duly authorised to swear the affidavit on behalf of the Bank. This objection to his affidavit also must be rejected.

38. The fourth basis upon which the debtors sought to exclude Mr. O'Connor's affidavit was an alleged failure to comply with the provisions of the Bankers' Books Evidence Acts 1859-1959. Insofar as the debtors object that Mr. O'Connor is not entitled to exhibit the facility letters and the statement of account, this is a moot point as Mr. O'Donnell himself exhibits these documents in his affidavit. Thus, they are before the Court, whether as exhibits to Mr. O'Donnell's affidavit or Mr. O'Connor's. In any event, the second affidavit of Mr. O'Connor clearly complies with the provisions of the Bankers' Books Evidence Acts. He says that he is a director of a specialist property group in the Bank and that he is authorised to make the affidavit on behalf of the Bank and that he does so from facts within his own knowledge save where otherwise appears and where so appearing he believes same to be true. He outlines his

direct personal involvement in the proceedings against the debtors from when they were issued on 23rd December, 2010, to date. He confirms that since September, 2014 he has been team head in the specialist property group:-

> *"I was therefore – and remained – at all material times an officer of the Bank. I have been involved in all aspect of the Bank's enforcement steps against the applicants, and began working on the Applicants' file in or around October 2010, prior to the Bank issuing summary proceedings on 23 December 2010… My function in the Specialist Property Group of the Bank requires the swearing of affidavits in respect of proceedings involving debtors, as I have done on many occasions, and I am authorised to do so on behalf of the Bank in accordance with standard Bank procedures. …I confirm that the documents at exhibit BOC1 Tab 5, 6 and 7 of my first affidavit of 9 March 2015 were generated in the usual and ordinary course of business of the Bank and remained in the possession of the Bank and are part of the ordinary records of the Bank."*

39. Mr. O'Donnell did not exhibit the Settlement Agreement of 4th March, 2011, in his affidavit. Mr. O'Connor did. Insofar as objection is taken to his exhibiting the Settlement Agreement on the basis that it offends the rule against hearsay, this argument must be rejected. The Settlement Agreement of 4th March, 2011, was executed on behalf of the Bank by Mr. O'Connor. He is the person who has first hand knowledge of the Settlement Agreement and therefore the most appropriate person to exhibit it in an affidavit before the Court. It does not offend the rule against hearsay to exhibit a document the deponent himself executed.

40. For the sake of completeness I should point out that most of Mr. O'Connor's affidavit does not in fact contain hearsay evidence. It recites the history of the litigation engaged in between the Bank and the debtors. As Mr. O'Connor was part of the team in the Bank acting in respect of these cases, this evidence is not hearsay at all. He states of his own knowledge that he was aware of the various actions and the various decisions as recited above in this judgment. I therefore reject the application that Mr. O'Connor's affidavit ought not to have been admitted in evidence at the hearing of this application.

Debtors' application for discovery and for leave to deliver interrogatories

41. Order 76, r. 62 of the Rules of the Superior Courts provides as follows:-

> *"Any party to any proceeding under this Order may with the leave of the court deliver interrogatories to or obtain discovery of documents from any other party to such proceeding, and the provisions of Order 31 shall apply as far as practicable."*

42. It is thus clear that the debtors must obtain the leave of the Court before they may deliver interrogatories in any proceedings under O.76 which deals with bankruptcy matters. The Motion seeking (a) an order compelling the Bank to reply to interrogatories that he had delivered without leave of the Court and (b) orders for discovery was grounded upon an affidavit of Mr. Brian O'Donnell sworn on the 8th February, 2015. He argued that an order directing the reply to interrogatories and an order for discovery was required on the following basis:-

> *"4. We are concerned that the Respondent's replying affidavit is likely to be non-comprehensive and we anticipate misleading. To enable the Respondent's claims to be investigated and, if necessary challenged, we require discovery and interrogatories to be delivered to enable the speedy resolution of this dispute.*
>
> *5. The Applicants wrote to the Respondent on 26th January 2015 requesting voluntary discovery and received no response. The Applicants wrote to the Respondent on 3rd February 2015 requesting that Mr. Richard Boucher, Director and Chief Executive Officer and past affidavit swearer on behalf of the Respondent, respond to interrogatories delivered. No response has been received. I beg to refer to a copy of the said letters and interrogatories upon which I have marked "BOD2" prior to the swearing hereof.*
>
> *6. I say and believe that the Respondent has no intention of cooperating with these proceedings unless compelled and I request that the Honourable Court grant our motion for discovery orders along the lines of our letter for voluntary discovery and an order that Mr. Richard Boucher answer our interrogatories on affidavit."*

43. It is quite clear that the delivery of the request for voluntary discovery and the delivery of interrogatories (without the prior leave of the Court) was in advance of receipt of the replying affidavit of Mr. O'Connor and thus was premature. It was entirely misconceived to ground it upon an assumption that the respondent would not co-operate or that it would deliver a misleading affidavit. On this basis alone I reject the applications. Lest I be in error in that regard, I should point out that each and every one of the interrogatories in respect of which the applicants seek to examine the respondent relates to Bank of Ireland Private Banking Limited. As the debtors themselves have pointed out, BOIPB is a separate legal entity to the respondent to these proceedings, the Bank. Therefore these proposed interrogatories are all misconceived. I refuse leave to deliver the proposed interrogatories.

44. No case has been advanced as to why the discovery sought is either relevant or necessary to the issues to be decided in the s.85C application. Indeed, the letter seeking voluntary discovery was not in fact exhibited in the affidavit grounding the application. The case advanced by the debtors was that they did not know the true nature of the relationship between themselves and the Bank and themselves and BOIPB and that the Bank and/or BOIPB fraudulently concealed the nature of this transaction from them. This appears to be the justification for seeking discovery from the Bank. The debtors themselves in fact relied upon documents emanating from BOIPB, which they say establishes that BOIPB was their creditor and not the Bank. The affidavit grounding the application makes no attempt whatsoever to comply with the O.31 of the Rules of the Superior Courts. It does not identify any documents that are either relevant or necessary for resolving any of the issues which fall to be decided as part of the hearing of the s.85C Motion. Accordingly, I refuse this application for discovery.

Application for adjournment

45. Towards the end of his submissions on behalf of the debtors in respect of the s.85C application and the application to strike out the affidavit of Mr. O'Connor sworn on behalf of the Bank, Mr. O'Donnell applied for an adjournment of the hearing of the Motions. He objected to the fact that his applications for discovery and interrogatories had not been dealt with prior to the substantive hearing of the application to annul the adjudications of bankruptcy in respect of himself and his wife. The Motions to annul the adjudications in bankruptcy had been listed for hearing on the 26th March, 2015, since the 9th March, 2015. In the intervening period, the matter was mentioned before me in the Bankruptcy List. The matter was listed for mention on 23rd March, 2015, to ensure that the various Motions were ready to proceed. On that occasion the debtors indicated that they were in a position to proceed. The matter was listed for hearing on 26th March, 2015, along with the various other related Motions. Mr. O'Donnell had the opportunity to fully present his case in relation to both the objection to Mr. O'Connor's affidavit and in relation to the substance of his application to annul the adjudications in bankruptcy on behalf of himself and his wife. It was only at the very end of his submissions that he applied for an adjournment on the basis that the discovery and interrogatories Motions had not been dealt with prior to the substantive

hearing of the s.85C Motions. Had he wished to deal with the Motion for Discovery and leave to deliver interrogatories in advance of the substantive hearing of the s.85C Motion, this application could and should have made on any one of the dates when the matter appeared in the Bankruptcy List prior to 26th March, 2015. In the circumstances I refuse the application for an adjournment of the hearing of the Motions in respect of which the debtors are the moving parties.

Summary

46. I refuse the applications of the debtors to annul their adjudications in bankruptcy pursuant to s.85C of the Bankruptcy Act 1988, as amended, as sought in their Notice of Motion returnable for 8th December, 2014. I refuse the debtors' application for discovery against the respondent. I refuse the application for leave to deliver interrogatories to the respondent. I refuse the debtors' application for an order pursuant to s.85C of the Bankruptcy Act 1988, as amended, pursuant to their Notice of Motion dated 26th February, 2015, based upon the fact that the respondent failed to deliver a replying affidavit within the time allowed for the deliver of the replying affidavit by this Court. In relation to the Notice of Motion dated 18th March, 2015, and returnable for 25th March, 2015, I refuse to strike out the evidence of Mr. O'Connor in his affidavit of 9th March, 2015, as sought in paras. 1 and 2 of the Notice of Motion for the reasons set out above. I refuse the application to issue a notice to produce Mr. O'Connor's board authorisation to swear an affidavit on behalf of the Bank. At para. 5 of the Notice of Motion the debtors seek liberty to join BOIPB as a respondent to the s.85C application. BOIPB did not present the petition for bankruptcy in respect of either of the debtors and does not claim to be a creditor of either of the debtors and therefore it would be inappropriate to grant this relief. I refuse this relief sought in para. 5 of that Notice of Motion. The final relief sought in that Notice of Motion is to consolidate the s.85C applications with plenary proceedings brought by the debtors against the Bank and four personal defendants whom I believe to be officials of the Bank. They also seek liberty to join BOIPB as a defendant to those plenary proceedings. In view of the fact that I have heard and determined the applications brought under s.85C it is not appropriate to consolidate these Motions with the plenary proceedings. I refuse the reliefs sought in the Motion in relation to the plenary proceedings. However, if the debtors wish to apply in the plenary proceedings to add a defendant to those proceedings the decision of this Court is not to be taken as debarring them from making any such application.

Now s.85 C of the Bankruptcy Act, 1988 as inserted by s.157 of the Personal Insolvency Act 2012.