Neutral Citation Number [2007] IEHC 90

THE HIGH COURT

2004 No. 19638 P

BETWEEN

PATRICK GRACE

PLAINTIFF

AND
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 7th March, 2007.

Claim

1. The primary relief claimed, and in the event the only relief pursued, by the plaintiff in these proceedings are declarations that "all or part" of s. 85 of the Bankruptcy Act, 1988 (the Act of 1988) is repugnant to the Constitution and/or incompatible with the European Convention on Human Rights (the Convention). In response to a notice for particulars from the defendants, the plaintiff particularised the nature of his claim as follows:

> (a) the part of s. 85 which he alleges is repugnant to the Constitution and incompatible with the Convention is the requirement in sub-s. (4) that all expenses, fees and costs due and also all preferential claims existing must be paid in full as a prerequisite for availing of the twelve years exit from bankruptcy, regardless of the circumstances that gave rise to the bankruptcy, the amount of those sums and how they were incurred, and supervening events;
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> (b) that Article 40.3.1 and 2 are the constitutional provisions against which it is alleged that s. 85 is repugnant on the basis of the requirement implied in those Articles that legal proceedings be prosecuted and brought to conclusion in a reasonably expeditious manner, bankruptcy being no more than a convenient mode of collective debt recovery; and
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> (c) that articles 6.1 and 13 of the Convention are the provisions of the Convention against which it is alleged that s. 85 is incompatible, for the same reasons as are stated at (b).

2. The plaintiff also sought the release, discharge or other termination of his present status as a bankrupt. However, counsel for the plaintiff informed the court that he accepted that that relief could not be an "automatic outcome". On that basis, my understanding is that that relief was not pursued. In fact, counsel for the plaintiff indicated that he accepted the position as pleaded in paragraph 11 of the defendant's defence (that this Court does not have jurisdiction to order the release or discharge from, or the termination of the plaintiff's status as a bankrupt other than in accordance with the appropriate procedure set out in the Act of 1988) is correct.

3. The foundation of the plaintiff's claim, as set out in the written submission made on his behalf, is the assertion that s. 85 permits a state of affairs where certain bankrupts, including the plaintiff, can be kept in a state of permanent bankruptcy – those whose liabilities involve substantial preferential debts, being mainly tax liabilities. Such a state of affairs, it was asserted, contravenes the right to a reasonably speedy resolution of legal disputes, to private property, to engage in various political and economic activities and to equality under the Constitution and under the Convention. The plaintiff has not pleaded any infringement of any constitutional or Convention right other than the right to a reasonably speedy resolution of legal disputes.

4. In broad terms, the defendants defended the proceedings on the basis that the plaintiff has not established any *locus standi* to present the claim. In any event, s. 85 is neither repugnant to the Constitution nor incompatible with the Convention. Further, it was asserted that the court does not have jurisdiction under the European Convention on Human Rights Act, 2003 (the Act of 2003) to award a declaration of incompatibility on the ground that the alleged cause of action occurred on a date prior to the coming into force of that Act.

The impugned provision

5. Section 85 of the Act of 1988 deals with discharge from bankruptcy and annulment of adjudication. Sub-section (4) provides as follows:

> "A bankrupt whose estate has, in the opinion of the court, been fully realised shall be entitled to a discharge from bankruptcy when provision has been made for payment of the expenses, fees and costs due in the bankruptcy, as well as the preferential payments, and –
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> (a) his creditors have received fifty pence or more in the pound, or
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> (b) he and his friends have paid to his creditors such additional sums as would together with the dividend paid make up fifty pence in the pound, or
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> (c) the bankruptcy has subsisted for twelve years:
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> provided that in any application under paragraph (c) the court shall be satisfied that all after acquired property has been disclosed and that it is reasonable and proper to grant the application."

6. The plaintiff's challenge to that provision is grounded on the circumstance provided for in paragraph (c), that the bankruptcy has subsisted for twelve years. In that circumstance, the bankrupt is entitled to a discharge where –

> (i) the court is of opinion that the bankrupt's estate has been fully realised, which is a pre-condition to an entitlement to discharge arising,
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> (ii) provision has been made for payment of the expenses, fees and costs due in the bankruptcy, as well as the preferential payments,
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> (iii) the court is satisfied that all after acquired property has been disclosed, and
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> (iv) it is reasonable and proper to do so.

7. In summary, the plaintiff's case is that, as regards circumstance (c), the requirement at (ii) should not apply.

8. As regards bankruptcies where the order of adjudication was made after 1st January, 1960, the scheme of s. 85 is to give the bankrupt an entitlement to be discharged in the circumstances and subject to satisfaction of the conditions set out in sub-s. (3) and in sub-s. (4), which I have just quoted. Sub-section (3) outlines two situations in which a bankrupt is entitled to be discharged. The first is where provision has been made for the payment of the expenses, fees and costs due in the bankruptcy, as well as the preferential payments, and the bankrupt has either paid his creditors in full with such interest as the court may allow or has obtained the consent of all of his creditors. The second situation is where the court discharges the adjudication order under s. 41 so as to give effect to a composition with his creditors which has been approved under the provisions of ss. 38 to 41 inclusive. It is the bankrupt who must initiate and follow through on the composition procedure provided for. It is the bankrupt who must initiate the process to obtain a discharge where either sub-s. (3) or sub-s. (4) of s. 85 apply (sub-s. (7) of s. 85).

The facts

9. The plaintiff, who was apparently a sole trader, was adjudicated a bankrupt by order of this Court made on 11th March, 1991 on foot of a petition presented by Thomas F. Mulherin, Collector General, on 22nd November, 1990 in which it was asserted that the plaintiff was indebted in the sum of IR580,759.69 in respect of arrears of income tax (Pay As You Earn), pay-related social insurance contributions, Value Added Tax and interest thereon and also a High Court judgment dated 4th October, 1989 and interest thereon. These proceedings were initiated on 3rd December, 2004, more than twelve years after the date of adjudication.

10. The Official Assignee is not a party to these proceedings. The only evidence tendered to the court on behalf of the plaintiff was the evidence of his wife, Ann Grace. The only evidence tendered on behalf of the State was the evidence of Bill Holohan, solicitor, who had acted for the Official Assignee in the bankruptcy proceedings.

11. A feature of this case which is a cause for concern is that, with their replies to a notice for particulars dated 12th April, 2005, the plaintiff's solicitors furnished to the Chief State Solicitor a medical certificate dated 30th March, 2005 issued by the plaintiff's general practitioner, Dr. Brendan Thornton. In the certificate, Dr. Thornton gave the plaintiff's date of birth as 20th January, 1933. He certified that the plaintiff was suffering "from a progressive dementia whose onset was several years ago". He stated that the plaintiff was then currently on medication specifically for the management of dementia. He had had a significant level of deteriorating mental function dating back from the previous four or five years. He was then currently incapable of caring for himself and he was certainly not capable of earning an independent living. All activities of daily living required either help or supervision. He was then attending a Dementia Centre in Limerick City. In a further certificate put before the court, which was dated 13th November, 2006, Dr. Thornton certified that the plaintiff had severe dementia and was functionally dependent for all activities of daily living. He further certified that he was in no fit state to attend court or be a witness.

12. Mrs. Grace's evidence was that the plaintiff was diagnosed with dementia in June, 2003. This was not disputed at the hearing. Mr. Holohan interviewed the plaintiff on behalf of the Official Assignee in June, 2003. The interview was not productive. A view was formed that an examination by the court would not elicit any further information. Mr. Holohan's evidence was that the view at the time was that either the plaintiff was genuinely forgetful or had consigned the events to the past, but there was nothing to indicate mental deficiency.

13. The aspect of all of this which causes concern is that a question mark must hang over the competence of the plaintiff to give instructions for the prosecution of these proceedings, probably at the time they were initiated and certainly from March, 2005. Notwithstanding that, the claim was prosecuted in his name and defended. It would appear that the proceedings are not properly constituted having regard to Order 15 of the Rules of the Superior Courts, 1986.

14. I found Mrs. Grace to be an impressive, and despite the conflict of interest referred to below, a reliable witness. However, she had only second hand knowledge of some of the factual matters which arose and she had no knowledge at all of other factual matters. Apart from that, the evidence disclosed a fundamental conflict of interest between Mrs. Grace, on the one hand, and the plaintiff and the Official Assignee, on the other hand, and it is a conflict which would preclude Mrs. Grace from acting as the plaintiff's next friend. While counsel for the plaintiff conceded at the hearing that the facts surrounding that conflict are irrelevant to the plaintiff's case, in my view, it is not something the court can ignore against the background of the admitted evidence of the plaintiff's medical condition. Prior to his bankruptcy, in 1988, the plaintiff had transferred his dwelling house and 80-acre farm to Mrs. Grace and his daughter. In 1992 the Official Assignee instituted proceedings against Mrs. Grace and the plaintiff's daughter, as I understand it, to set aside that transfer. Those proceedings have not been prosecuted to completion. Counsel for the plaintiff made the concession that those facts were not relevant in the context of an objection on behalf of the defendants that the conduct of the Official Assignee was not in issue and had not been pleaded. Obviously, that being the position and the Official Assignee not being a party to these proceedings, it would be improper to draw any inference from those facts as to why the proceedings were not prosecuted to completion and none is drawn. However, the precondition to entitlement to a discharge under s. 85(4) that the estate of the bankrupt has been fully realised, allied to the absence of the Official Assignee from the proceedings and to the conflicted position of the only witness in support of the plaintiff's case, raises the question whether there is any evidence on which the court can conclude that the precondition is complied with, the onus being on the plaintiff to adduce such evidence. I will return to this question when dealing with the issue of *locus standi* and mootness because I consider it to be relevant to those issues.

15. The evidence which was regarded as relevant was evidence in relation to four actions in this Court which the plaintiff had initiated before he was adjudicated a bankrupt. The actions in question and the evidence adduced in relation to them were as follows:

> (1) Proceedings by the plaintiff against Independent Star Limited and Others (Record No. 1990 No. 3720 P), being proceedings for libel arising out of articles published in the Star newspaper about the plaintiff in 1988. It is common case that this cause of action did not vest in the Official Assignee and that the plaintiff was entitled to prosecute it outside the bankruptcy proceedings. Mrs. Grace's evidence was that the case was settled in 1993 for IR£20,000, but that it was settled without the plaintiff's permission, which had ramifications to which I will return later. The evidence of Mr. Holohan was that he was informed by the solicitors on record for the defendants, Dillon Eustace, Solicitors, that the matter had been settled in 1993 for IR£30,000 together with legal costs.
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> (2) Proceedings by the plaintiff against Radio Telefis Éireann (Record No. 1990 No. 467 P), being proceedings for libel arising out of the broadcast by the defendant of material in relation to a newspaper article which was the subject of the proceedings at (1). It is common case that these proceedings have not been prosecuted to completion. Mrs. Grace's evidence was that a decision was made in December, 2004, I am not clear by whom, that there was no point in proceeding. Mr. Holohan's evidence, as a result of a contact he had with the solicitor who acted for the plaintiff in the proceedings, was that they "withered on the vine".

(3) Proceedings by the plaintiff against Comhlucht na hÉireann um Arachas Cpt (Record No. 1990 No. 5910 P). In these proceedings the plaintiff was claiming damages for breach of contract and negligence arising out of alleged mismanagement by the defendant of the Town Hall Shopping Centre in Rathmines where the plaintiff ran a restaurant business between 1978 to 1989. Prima facie this cause of action would have vested in the Official Assignee. There is no evidence of any formal arrangement between the Official Assignee and the plaintiff in relation to it. However, like the proceedings referred to at (2) above, Mr. Holohan's understanding from the solicitor who acted for the plaintiff in the proceedings was that they "withered on the vine". Mr. Holohan further testified that these proceedings were investigated and the conclusion was that they were not viable.

(4) Proceedings by the plaintiff against Michael Cronin, practising under the style of Cronin & Company, Accountants, (1990 No. 17385 P). In these proceedings the plaintiff claimed damages for breach of contract and negligence against the accountant who handled his revenue affairs in the years between 1986 and 1989 in which he alleged that his indebtedness to the Revenue Commissioners was due to mishandling of his tax affairs by the defendant. By an assignment dated 10th March, 1992 the Official Assignee assigned the right of action to the plaintiff on the conditions set out in the agreement. Mrs. Grace disavowed any knowledge of the conduct or outcome of these proceedings. However, the evidence of Mr. Holohan was that the proceedings were dismissed in late 2004 for want of prosecution. I understand from Mr. Holohan's evidence that the viability of these proceedings was assessed and that, while the conclusion was that there was some substance in the action, it was dependent on the evidence of the plaintiff which would not be forthcoming because of his medical condition.

16. Mrs. Grace testified that, as a result of the settlement of the libel action against Independent Star Limited and Others referred to at (1) above, the plaintiff initiated proceedings against the solicitor who acted for him in those proceedings some time in 1994 or 1995. The proceedings were settled in June, 2000 for IR£100,000 and the plaintiff did not have to pay any costs out of the settlement. Mr. Holohan testified that the Official Assignee was unaware of these proceedings or their outcome until Mrs. Grace testified in court in these proceedings. Mrs. Grace gave evidence of the disbursement of the sum of IR£100,000 by her on the plaintiff's instructions. Apart from paying for a medical procedure, a cataract operation, which the plaintiff underwent, all of the monies were distributed to family members, Mrs. Grace, a daughter and two sons, in varying amounts.

17. The only preferential claims of which the court has evidence are claims aggregating €75,632.51 in respect of PAYE/PRSI, VAT and income tax, as claimed in a letter of 2nd June, 2005 from the office of the Collector General to the Official Assignee. No evidence was adduced as to the expenses, fees and costs due in the bankruptcy.

18. There was correspondence between the plaintiff's solicitors and the Official Assignee in 1998 which indicates that, in the context of the proceedings against Michael Cronin referred to at (4) above, the plaintiff was then contemplating a composition with his creditors and again in 2001 and 2002, but nothing came of the correspondence or the proposal which was in contemplation.

19. Mrs. Grace accepted that after his adjudication, the plaintiff did not seek gainful employment for his own personal reasons, rather than because of any legal constraint. She was unable to say whether after to 1998 he was seeking a discharge, as opposed to a composition, because the subject of his bankruptcy and his dealings with the Official Assignee was a very fraught one, which, she implied, she was not eager to confront. In response to a question put to her in cross-examination, Mrs. Grace stated that the reason the plaintiff did not go through with the composition which was mooted in 1998 was probably due to the state of his mind.

20. What emerges from the evidence is that, on the basis of the information furnished in the letter of 2nd June, 2005 from the Collector General to the Official Assignee, is that the plaintiff's preferential revenue debts amount to €75,632.51, whereas his non-preferential debts in respect of PAYE/PRSI, VAT and income tax amount to €1,001,169.50. While no finding can be made as to his ability prior to the institution of these proceedings to pay the preferential debts and the expenses, fees and costs of the bankruptcy, the latter not having been quantified, the fact is that following his adjudication the plaintiff he received either IR£120,000 (€152,368.57) or IR£130,000 (€165,065.95) from the settlement of two legal actions which he prosecuted. I will consider the relevance of this evidence in the context of the defence of *locus standi* raised by the defendants.

21. Before doing so or considering the substantive issues, however, I propose considering the authorities relied on by counsel for the plaintiff. While that may seem like "putting the cart before the horse", I believe it is an approach which gives a useful perspective on the gravamen of the plaintiff's case.

The authorities

22. In the context of his invocation of article 6 of the Convention, counsel for the plaintiff referred to four authorities of the European Court of Human Rights (ECHR). Article 6.1 of the Convention, insofar as it is relevant for present purposes, provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitle to a fair and public hearing within a reasonable time by an independent and partial tribunal established by law …"

23. The first of the authorities referred to by counsel for the plaintiff was *Luordo v. Italy* [2003] E.C.H.R. 372. Counsel stated that he was relying on this decision only for the purpose of illustrating that bankruptcy proceedings are civil proceedings for the purposes of the Convention. The basis on which article 6.1 was invoked in that case was that during the bankruptcy, which lasted for fourteen years and eight months, under the Italian Bankruptcy Code the bankrupt's legal proceedings concerning disputes over property issues arising in respect of assets forming part of the bankrupt estate were to be taken or defended by the trustee in bankruptcy and the bankrupt was precluded from intervening in such proceedings save insofar as they concerned an allegation of criminal bankruptcy or if permitted by law. The ECHR held that there had been an infringement of Article 1 of Protocol No. 1, which secures the right to peaceful enjoyment of possessions (para. 71). In relation to the article 6.1 argument it found that the restrictions on the applicant's ability to take legal proceedings concerned disputes or issues of a pecuniary nature, so that the civil limb of article 6 was applicable (para. 84). Having stated that the "right to a court" is not absolute, the ECHR stated as follows at paras. 86 and 87:

> "86. The Court considers that the purpose of the restriction on the applicant's capacity to take legal proceedings is to assign the role of representing the bankrupt in Court in respect of issues arising over the bankrupt's pecuniary rights to the trustee in bankruptcy as, once the bankruptcy order has been lodged, he is responsible for the administration of the bankrupt's assets. Indeed, it is self-evident in the Court's view that disputes over such matters may have major repercussions on the assets and liabilities of the bankrupt estate. The Court consequently finds that the restriction is intended to protect the rights and interests of others, namely those of the bankrupt's creditors. The court must go on to examine whether the consequences suffered by the applicant were proportionate to the legitimate aim pursued.
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> 87. The restriction on the applicant's right of access to a court is not in itself open to criticism. However, the risk with

> such a system is that it may unreasonably limit the right of access to a court, particularly if the proceedings are protracted as they were in the instant case in which they lasted fourteen years and eight months. In that connection, referring to its findings with respect to Article 1 of Protocol No. 1, the Court considers that, contrary to what the Government have affirmed, the delays in the proceedings were not attributable to the failure of the attempts to sell the applicant's house at auction or to the applicant's conduct.
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> Consequently, it finds that there was no justification for restricting the applicant's right of access to a court for the full duration of the proceedings, since while in principle a restriction on the right to take legal proceedings is necessary to achieve the aim pursued, the necessity will diminish with the passage of time. In the court's view, the length of the proceedings thus upset the balance that had to be struck between the general interest in securing the payment of the bankrupt's creditors and the applicant's personal interest in having access to a court. The interference with the applicant's right was accordingly disproportionate to the aim pursued."

24. Accordingly, the court held that there had been an infringement of the right of access to a court as guaranteed by article 6.1.

25. By contrast to the bankrupt in the *Luordo* case, after his adjudication the plaintiff was entitled to prosecute proceedings against Michael Cronin on foot of the assignment of the cause of action by the Official Assignee to him. He had the right under ss. 38 to 41 of the Act of 1988 to enter into a composition with his creditors and it is clear on the evidence that he contemplated that initiative, and he also had the right to invoke the discharge provisions contained in s. 85. Under the Act of 1988 he was the driver of all those initiatives, not the Official Assignee or any other organ or agent of the State.

26. The second authority relied on by counsel for the plaintiff was *Tierce v. San Marino* [2003] E.C.H.R. 304. The article 6.1 issue in that case was the applicant's contention that the length of the proceedings seeking termination of her lease and an eviction order against her for non-payment of rent (from commencement in March, 1993 to the decision on her appeal in October, 2001) had infringed the reasonable time principle enshrined in article 6.1. The ECHR reiterated the jurisprudence on the reasonable time principle (at para. 30) as follows:

> "The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in its case law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities and what is at stake for the applicant in the litigation …"

27. The court concluded that the length of the proceedings, which lasted for approximately eight years and nine months, was mainly due to the complexity of San Marino litigation procedure. It found that there had been a violation of article 6.1.

28. The next decision relied on, *Davies v. United Kingdom* [2006] 2 B.C.L.C. 351, concerned disqualification proceedings brought by the Secretary of State for Trade and Industry against the director of a group of companies (the Blackspur Group), which had gone into liquidation owing an estimated £34 million. The proceedings were commenced in July, 1992 and terminated in January, 1998 on the basis of a settlement under which the applicant agreed to pay the Secretary of State's costs. Having stated that the reasonableness of the length of proceedings is to be assessed in the light of the circumstances of the case, having regard in particular to its complexity and the conduct of the parties to the dispute and of the relevant authorities, the ECHR continued (at para. 26) as follows:

> "In the present case the court must also bear in mind that, given that the applicant was a company director and that disqualification proceedings would have had considerable impact on his reputation and his ability to practise his profession, special diligence was called for in bringing the proceedings to an end expeditiously …"

29. On the facts, the court found that the United Kingdom was responsible for the greater part of the delay. It considered that the proceedings against the applicant were not pursued with the diligence required by article 6.1 and that there had been a violation of that provision, in that his civil rights and obligations were not determined within a reasonable time.

30. The fourth authority relied on by counsel for the plaintiff, *Eastway v. United Kingdom* [2006] 2 B.C.L.C. 361, concerned an application for disqualification of another director of the Blackspur Group. The ECHR applied its decision in the *Davies* case.

31. Counsel for the plaintiff did not cite any authority to support the plea that there has been an infringement of article 13 of the Convention, nor did he cite any authority in support of his contention that the section 85(4) is repugnant to the Constitution. However, the basis on which Article 40.3 was invoked was that it guarantees a right to a speedy trial in the same way as the Convention guarantees such right. In other words, the plaintiff did not develop that constitutional argument independently of the argument based on article 6.1 beyond the position taken in the reply to the notice for particular referred to earlier.

32. As the main focus of the plaintiff's submissions was on the Convention and the jurisprudence of the ECHR, rather than on the Constitution, I propose considering the case made on incompatibility with the Convention first. There was no debate before the court as to whether it is appropriate for the court to consider Convention issues or constitutional issues first.

Non-retrospectivity of the Act of 2003

33. It was submitted on behalf of the defendants that the decision of the Supreme Court in *Dublin Corporation v. Fennell* [2005] 2 I.L.R.M. 288 makes it clear that the Act of 2003 is not retrospective and that no declaration of incompatibility may be granted in proceedings in respect of an act which took place prior to the coming into operation of that Act. The defendants' contention that the court has been asked to apply the Act retrospectively is based on an analysis which points to the commencement of the bankruptcy process in 1990 and the plaintiff's adjudication in 1991, from which the legal disabilities of which the plaintiff now complains flowed, as being the events by reference to which the court should assess whether the invocation by the plaintiff of the Act of 2003 has a retrospective or a prospective effect.

34. I have no doubt that, if the plaintiff in these proceedings was seeking to challenge the validity of his adjudication as a bankrupt in reliance on the provisions of the Convention and the Act of 2003, he would not be entitled to do so. That situation would be entirely analogous to the situation which arose in the *Fennell* case where, on an appeal to the Circuit Court against an order of the District Court granting Dublin City Council possession of premises on foot of a notice to quit served pursuant to s. 62 of the Housing Act, 1966, both the notice to quit and the order of the District Court having preceded the coming into operation of the Act of 2003, Mrs. Fennell sought to invoke the provisions of the Act of 2003 and, in particular, ss. 2 and 3 thereof. Kearns J., with whom the other judges of the Supreme Court agreed, having examined the texts and authorities on the issue of retrospectivity of statutes, concluded (at p. 318) that the Act of 2003 cannot be seen as having retrospective effect or as affecting past events. He also concluded that,

although the appeal to the Circuit Court was prospective in the sense that it still had to be heard, the provisions of the Act of 2003 could not be invoked on the hearing of the appeal, stating as follows at p. 319:

> "The parties' legal rights and obligations were, in my view, fixed and determined once the wheel was set in motion by the service of a notice to quit, an act which triggered the provisions, requirements and consequences of s. 62 of the Housing Act, 1966. That is the moment when the invocation of legal rights determined the applicable law and the position of the parties. The requirement to protect the respective positions of the parties thereafter is all the greater in a situation where vested rights are involved and where changes proposed by the 2003 Act are agreed to be substantive rather than procedural."

35. The position here, however, is that the plaintiff is not challenging his adjudication. What he is challenging is the requirement in s. 85(4) of the Act of 1988 that his discharge from bankruptcy is dependent on provision having been made for the payment of the expenses, fees and costs during the bankruptcy, as well as the preferential payments as it currently applies to him. It is in respect of that requirement, as it impacts on him at this point in time, that he seeks a declaration of incompatibility with the State's obligations under the Convention pursuant to s. 5 of the Act of 2003.

36. Section 5 was not in issue in the *Fennell* case. In determining whether, if the plaintiff was entitled to a declaration of incompatibility, the declaration would have retroactive effect, it is necessary to consider the effect of such a declaration. Sub-section (2) of s. 5 provides that a declaration of incompatibility shall not affect the validity, continuing operation or enforcement of the relevant statutory provision, nor does it preclude the making of representations in proceedings before the ECHR. Sub-section (3) provides that the Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before each House of the Oireachtas within the time span stipulated. Sub-sections (4) and (5) provide for the payment of *ex gratia* compensation to a party to the proceedings in which the declaration is made in respect of injury or loss or damage suffered by him or her as a result of the incompatibility.

37. If the plaintiff could establish that the impugned requirement in s. 85(4) is incompatible with the State's obligation under the Convention, the declaration would only operate prospectively to require the Taoiseach to comply with sub-s. (3) of s. 5 and to entitle the plaintiff to pursue a claim for an *ex gratia* payment of compensation under sub-ss. (4) and (5). The declaration would not affect any legal rights and obligations of the plaintiff or any other party. For instance, the declaration would not disentitle the Official Assignee to the payment of the expenses, fees and costs due in the bankruptcy, nor would it disentitle the Revenue Commissioners to the preferential payments due. Accordingly, in my view, the making of a declaration of incompatibility would not have a retroactive effect and the plaintiff is not barred from pursuing it.

The claim for a declaration of incompatibility

38. The plaintiff's claim for a declaration of incompatibility in reliance on article 6.1 of the Convention is utterly misconceived.

39. The plaintiff's case is not that his "right to a court", in the sense in which that expression was used by the ECHR in the *Luordo* case, has been infringed. His case is that the continuance of the bankruptcy proceedings, and his status as a bankrupt, infringes the reasonable time principle enshrined in article 6.1, to use the terminology which the ECHR used in the *Tierce* case. The State's obligation in relation to the reasonable time principle is to ensure that the civil process is brought to a conclusion by a judgment within a reasonable time. The State's obligation is explained in the following passage from Jacobs and White on The European Convention on Human Rights (Oxford University Press), 4th Edition, commencing at p. 187:

> "The object of the provision in article 6(1) is to protect the individual concerned from living too long under the stress of uncertainty and, more generally, to ensure that justice is administered without delays which might jeopardise its effectiveness and credibility.
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> In civil cases there is usually no problem in deciding when the period to be taken into consideration commenced: this is usually the date on which proceedings were initiated, for example by the issuing of a summons or writ. … The period to be taken into consideration lasts until the final determination of the case, and therefore includes appeal or cassation proceedings, proceedings to assess damages or sentence, and enforcement proceedings. The State can be held responsible only for delays which are attributable to it; if the parties to the litigation or the defendant in a criminal case have caused or contributed to the delay, those periods are not taken into account.
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> The reasonableness of the length of proceedings is assessed in the light of all the circumstances of the case, having regard in particular to the complexity of the issues before the national courts, the conduct of the parties to the dispute and of the relevant authorities, and what was at stake for the applicant."

40. The plaintiff's case is not that the bankruptcy process has been unduly protracted because of dilatoriness on the part of organs or agents of the State, for example, this Court, the Official Assignee, the Revenue Commissioners in proving their claim and so forth. The plaintiff's case is that on the expiration of twelve years from adjudication a bankrupt should be discharged from bankruptcy without being required to pay the expenses, fees and costs of the bankruptcy and the preferential payments. Such a case, which involves substantial interference with the rights of third parties, is not a case which can be advanced on the basis of the reasonable time principle enshrined in article 6.1.

41. It may be that, because of the requirement to discharge expenses and preferential payments as a precondition to being discharged from bankruptcy, the plaintiff has no prospect of being discharged and will remain a bankrupt for the remainder of his life unless, as counsel for the plaintiff put it, he wins the lottery. However, that circumstance does not render the requirement contained in s. 85(4) incompatible with article 6.1 of the Convention.

42. Although the plaintiff invoked article 13 of the Convention, no case was advanced on the basis of article 13.

Locus Standi

43. The rule in relation to *locus standi* in challenging the constitutionality of a statutory provision was summarised by Henchy J. in his judgment in *Cahill v. Sutton* [1980] I.R. 269 (at p. 286) as follows:

> "The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."

44. Applying that test, the Supreme Court held that the plaintiff, Ms. Cahill, was disentitled to raise the allegation of unconstitutionality of s. 11(2)(b) of the Statute of Limitations, 1957, which provides that an action claiming damages for breach of contractual duty, in which the damages claimed consist of or include damages for personal injuries, shall not be brought after the expiration of three years from the date of accrual of the cause of the action. The breach of contract alleged by Ms. Cahill occurred in March, 1968. Her proceedings commenced on 11th April, 1972, outside the limitation period. The basis of her contention that s. 11(2)(b) was invalid having regard to the provisions of the Constitution was the absence of any saver to the time bar which would be applicable to a situation where the would-be plaintiff did not know, and could not possibly have known, of the accrual of the right of action within the permitted period (cf. judgment of O'Higgins C.J. at p. 276). However, the factual position was that Ms. Cahill became aware of the breach of contract in 1968. On the basis of those facts Henchy J. stated (at p. 286):

> "Even if the Act of 1957 contained the saving clause whose absence is said to amount to an unconstitutionality, she would still be barred by the statute from suing. So the alleged unconstitutionality cannot affect her adversely, nor can it affect anybody whose alter ego or surrogate she could be said to be. As to such other persons, although the statute was passed in 1957, the plaintiff is unable to instance any person who has been precluded from suing for damages because of the absence from the statute of the saving clause for which she contends. Therefore, her case has the insubstantiality of a pure hypothesis. While it is true that she herself would benefit, in a tangential or oblique way, from a declaration of unconstitutionality, in that the consequential statutory vacuum would enable her to sue, that is an immaterial consideration in view of her failure to meet the threshold qualification of being in a position to argue, personally or vicariously, a live issue of prejudice in the sense indicated."

45. In applying the primary rule as to *locus standi*, as enunciated by Henchy J. in *Cahill v. Sutton*, to this case the question which arises is whether the plaintiff can assert that his interest has been adversely affected by the requirement in s. 85(4) that provision be made for the expenses, fees and costs during the bankruptcy, as well as preferential payments, before his entitlement to a discharge arises on the basis that the bankruptcy has subsisted for twelve years. It seems to me that the answer to that question depends upon whether he has established that, if that requirement were excised, he would be entitled to a discharge. While the plaintiff's bankruptcy has subsisted for in excess of twelve years, there are other conditions to be complied with before an entitlement to a discharge would arise. I have already adverted to the fact that one condition, the precondition that the plaintiff's estate has been fully realised, is of relevance in the context of mootness. I consider that, irrespective of the views of the parties that the conduct of the Official Assignee in prosecuting the proceedings to set aside the transfer by the plaintiff of his house and farm to Mrs. Grace and his daughter is irrelevant, the pendency of those proceedings is of relevance to the issue of the plaintiff's *locus standi*, because their mere existence, *prima facie*, excludes the conclusion that the plaintiff's estate has been fully realised. The plaintiff, on whom the burden of showing that he has standing rests, has not discharged the onus of establishing that a precondition to his entitlement to a discharge has arisen. Therefore, to adopt the words of Henchy J. in *Cahill v. Sutton*, his case "has the insubstantiality of a pure hypothesis".

46. As well as relying on the rule as to *locus standi* as enunciated in *Cahill v. Sutton*, the defendants also submitted that the plaintiff lacks standing to challenge the constitutionality of s. 85(4) because he has not pursued all avenues open to him to secure his discharge from bankruptcy, by analogy to the position adopted by O'Hanlon J. in *E. v. E.* [1982] I.L.R.M. 497 and the implicit acceptance of the principle of exhaustion of other remedies by Barrington J. in *Brennan v. Attorney General* [1983] I.L.R.M. 449. In my view, there is substance in that submission. The proceeds of the two actions which the plaintiff settled could have been utilised in an attempt to procure a composition with his creditors. The Official Assignee's proceedings to set aside the transfer of the house and farm could have been pressed with a view to procuring a discharge under s. 85(4) and to this end he could have sought the assistance of the court pursuant to s. 61(7) of the Act of 1988. Against that background, the plaintiff's constitutional challenge, viewed objectively, seems to be particularly unmeritorious. If this Court were to entertain the plaintiff's challenge, thereby allowing the plaintiff to by-pass remedies available under the Act of 1988 to enable a bankrupt to procure his discharge, I have no doubt that, to adopt the words of O'Higgins C.J. in *Cahill v. Sutton* (at p. 277) "it would result in a jurisdiction which ought to be prized as the citizen's shield and protection becoming debased and devalued".

47. It was also submitted on behalf of the defendants that, insofar as the plaintiff seeks to rely on particular legal consequences flowing from bankruptcy, such as his inability to set up a building society or stand for election to the European Parliament, the plaintiff has not established any evidential basis that these restrictions have a detrimental impact on his personal situation. That is so, as far as it goes. However, it is peripheral to the core issue on standing, which is whether the requirement in s. 85(4) of payment of the expenses and preferential debts constitutes a live issue of prejudice to the plaintiff's interest. As I have found, it does not because, absent such requirement, as things stand the plaintiff could not procure his discharge.

48. For the foregoing reasons, I have come to the conclusion that the plaintiff does not have *locus standi* to challenge the constitutionality of s. 85(4).

49. Even if he had *locus standi*, I consider that the plaintiff's invocation of Article 40.3 and his contention that the impugned statutory provision is an infringement of an implied requirement that legal proceedings be prosecuted and brought to a conclusion in a reasonably expeditious manner is as misconceived as his case founded on article 6.1 of the Convention.

Inequality

50. As I understand it, the inequality contended for on behalf of the plaintiff was inequality between the position of an undischarged bankrupt, who may be consigned to a perpetual state of bankruptcy because of inability to pay a preferential claim of the Revenue Commissioners, and the position of the Revenue Commissioners the payment of whose preferential debt is necessary to procure a discharge from bankruptcy, which was characterised as exceptional discrimination in their favour. The comment made on behalf of the defendants on that argument was that it appears to involve no more than an assertion of disequilibrium as between the individual citizen and the revenue authorities, which is not in any way constructed into or related to any legal claim of infringement of the equality guarantee contained in the Constitution. In my view, that comment is justified. The plaintiff's argument, which I must emphasise is wholly unconnected to the plaintiff's case as pleaded, does not advance the plaintiff's constitutional challenge or his assertion of incompatibility with the Convention.

51. In the circumstances it is neither necessary nor appropriate to express any view on the submission made on behalf of the defendants that the question whether a bankrupt who has failed to discharge certain debts and expenses should be released from the status of bankrupt after a particular period is a matter of policy for the Oireachtas and the policy should not be second-guessed by the courts.

Order

52. There will be an order dismissing the plaintiff's claim.