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THE COURT OF APPEAL
CIVIL

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High Court Record Numbers: 2014/5484P, 2014/5848P
Neutral Citation: [2024] IECA 237

Whelan J.
McCarthy J.
Butler J.

BETWEEN/

DOMINIC CARNEY

PLAINTIFF/ APPELLANT

- AND -

BANK OF SCOTLAND PLC (FORMERLY BANK OF SCOTLAND (IRELAND) LIMITED)

DEFENDANT

- AND -

GEARÓID COSTELLOE

DEFENDANT/ RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 3rd day of October 2024

Introduction:

1. This judgment deals primarily with a preliminary issue raised by the official assignee in bankruptcy in respect of two motions brought by the appellant in the context of long

running proceedings initially initiated by him in the High Court in 2014. The official assignee contends that when the appellant was adjudicated a bankrupt in 2019, the outstanding litigation vested in the official assignee and, notwithstanding the appellant's subsequent discharge from bankruptcy a year later, it remains vested in him. Consequently, the appellant lacks *locus standi* to pursue this litigation.

2. The appellant disagrees and contends that the official assignee disclaimed the proceedings, thus allowing him to pursue them and, in any event, that the unrealised assets in his estate as a bankrupt reverted to him three years after the date of his adjudication. The resolution of these issues will depend on the interpretation and application of certain provisions of the Bankruptcy Act 1988 as amended ("the 1988 Act").

3. It might be noted at the outset that this issue has not been the subject of consideration by or a ruling of the High Court. The matter has come before this court on foot of two motions brought by the appellant seeking to re-open a judgment and order of this court made as long ago as the 24th October 2017 (Finlay Geoghegan J. [2017] IECA 295). In order to understand how this has come about it is necessary to look at the history of the proceedings between the parties and of related proceedings taken by the second respondent (the receiver) in the Circuit Court. I will then look at the relevant statutory provisions and the arguments made on foot of them by the appellant and the official assignee. The court also heard arguments on the substantive issues in the appellant's motions including arguments made by the receiver, but these will only fall to be dealt with if the appellant succeeds on the official assignee's preliminary issue.

Factual and Procedural Background:

4. A company called Philisview Properties Limited offered a premises known as Westview on Washington Street in Cork City as security for a loan to Bank of Scotland

Ireland Limited (BOSI) in 2005 and a deed of mortgage and charge reflecting this was duly executed. The appellant was a director of that company which he claims leased various units in the premises back to him or to other companies run by him which ran different business (including a laundrette, a café and apparently a hotel) in them. The appellant's sister also had some involvement in the premises or perhaps in the businesses operated from the premises. While she was a defendant in the Circuit Court proceedings, she is not a party to these proceedings.

5. There was a default in repayment of the loan for which the premises were a security as a result of which on 20th November 2013 the bank appointed the second respondent as a receiver under the relevant provisions of the deed of charge. As it happens, in the preceding years Bank of Scotland Ireland Limited merged with its parent, Bank of Scotland PLC (BOS) by way of a cross-border merger and the assets of BOSI, including this loan and its related security, were transferred to BOS. About a year after the receiver was appointed the loan in question was transferred by BOS to Ennis Property Finance Limited on 29th November 2014. The receivership was novated some months later on 20th April 2015. These various transfers are not relevant to the point I have to decide but form the basis of many of the pleas made by the appellant in the High Court proceedings in which he challenges the validity of the mortgage, of its transfer and of the appointment of the receiver.

6. The receiver experienced difficulty in securing possession of the premises largely due to the conduct of the appellant. The receiver invoked the forfeiture clause in the mortgage and secured possession on 11th March 2014. Notwithstanding this, two days later the appellant forcibly re-entered the property. As a result of these events the receiver issued equity proceedings in the Circuit Court in Cork on 14th March 2014. He also sought an interlocutory injunction directing the appellant and his sister to cease their occupation of the premises and restraining them from interfering with the premises. There was a detailed

exchange of affidavits and a hearing took place over two days before the Circuit Court (albeit not for the full two days). On 7th April 2014 the Circuit Court granted the interlocutory relief sought by the receiver. The appellant appealed this order to the High Court but apparently due to a misunderstanding on his part he failed to turn up for a call-over list and in March 2015 the appeal was struck out in his absence. For reasons which are unexplained, he did not apply to reinstate it. When an appeal is struck out due to a genuine error of this nature there is usually little difficulty in having it reinstated.

7. Notwithstanding that the substantive proceedings remained live in the Circuit Court, the appellant issued separate proceedings in the High Court against the bank and the receiver in July 2014. A statement of claim was delivered in March 2015. The High Court proceedings raised a vast array of issues which can be and, as we shall see were, netted down by both Binchy J. and Finlay Geoghegan J. to a number of core arguments. These centre on the validity on the mortgage and charge; the validity of the receiver's appointment; whether the appellant holds a valid leasehold interest in the premises which entitled him to remain there; a claim for damages for the wrongful acts of the receiver and a claim for the return of certain personal property which the appellant contends remained in the premises and which the receiver had not returned to him or permitted him to recover.

8. Meanwhile the Circuit Court proceedings continued to be progressed by the receiver. The appellant sought discovery, largely unsuccessfully, but for reasons which are unclear he did not file a defence. Consequently, on a motion for judgment in default of defence final orders were made by the Circuit Court on 19th May 2015 in identical terms to those made at the interlocutory stage.

9. The receiver then issued a motion in the High Court proceedings seeking to have the plaintiff's claim struck out under Order 25 of the Rules of the Superior Court on the grounds that the cause of action was *res judicata* by reference to the concluded Circuit Court

proceedings or under Order 19 Rule 28 on the grounds that the claim was frivolous and vexatious. That application was heard by Binchy J. over a number of days concluding on 12th of January 2016 when he granted the order sought under Order 25 and dismissed the appellant's proceedings. Although the appellant had relied on the fact that the two sets of proceedings sought materially different relief, Binchy J. concluded that the final orders granted by the Circuit Court were predicated on that court being satisfied that the mortgage and charge was valid, that the receiver was validly appointed and that there was no reason, such as intervening leases, why relief should not be granted.

10. The appellant appealed that decision to the Court of Appeal which delivered an *ex-tempore* ruling on 24th October 2017. In summary, save for one discrete issue, the Court of Appeal upheld the decision dismissing the proceedings but did so on somewhat different grounds than the High Court. Instead of holding that the proceedings were *res judicata* by reason of the final Circuit Court orders, (a point which the Court of Appeal did not find it necessary to decide) Finlay Geoghegan J. held that the appellant was precluded from raising the issues sought to be raised in High Court proceedings by virtue of the rule in *Henderson v. Henderson* as applied in this jurisdiction *inter alia* by the Supreme Court in *Re Vantive Holdings* [2010] 2 IR 118 and by the Court of Appeal in *Vico Ltd v. Bank of Ireland* [2016] IECA 273. The discrete issue which was not caught by the application of this rule was the appellant's claim for the return of his personal property which remained in the premises after the receiver had secured possession. Finlay Geoghegan J. dealt with that issue as follows at paras. 12 and 13 of her judgment:-

> "*12 … The one exception is insofar as he has included a proprietorial claim for the return of certain property, personal property or chattels, as they are referred to. I want to be very clear, this is not anything to do with the premises, but relates to personal property or chattels, which are clearly capable of being removed from the*

premises without damage. The justice of the situation does, if necessary, permit Mr. Carney to pursue the claim for the return of the personal property which he contends, and obviously if he can prove it, is, his own personal property …

13 … In permitting this very limited claim to be pursued, I am not in any way determining that Mr. Carney has established any entitlement to the personal property. He is permitted to pursue that claim, but only in relation to those personal assets which he has already identified in an affidavit which he swore in the High Court on 24th June, 2015. At Exhibit E to that affidavit, he set out an inventory of items that he claims, and that is the limit of the claim. What is not permitted to be pursued is any claim for damages for any alleged wrongdoing by the receiver. Those were matters, which, if it was so contended could and should have been raised by way of defence when the receiver pleaded in the Circuit Court proceedings that he had peaceably entered the premises as he was entitled to do so."

11. Finlay Geoghegan J. identified the relevant passages of the appellant's proceedings as the relief sought at para. 4 of the plenary summons and at para (e) of the prayer for relief in the statement of claim together with the final sentence of the plea made at para. 12 in the body of the statement of claim. The appellant did not seek leave to appeal this judgment to the Supreme Court.

12. There matters rested for nearly a year. The appellant did not progress that part of his claim which the Court of Appeal had permitted him to pursue. Instead, on 27th July 2018 he made an *ex parte* application to the Master of the High Court for leave to amend his plenary summons in order to introduce a claim for damages against the receiver for the retention of his personal property. As may be appreciated, an application to amend pleadings in proceedings which have already been largely dismissed on foot of a previous contested application is fraught with difficulty. This is especially so if that application is made on an

ex parte basis. Unsurprisingly, the Master of the High Court transferred the application to the judge's list and directed that the receiver be put on notice. The motion was heard and refused by Barniville J. (as he then was) on 15th October 2018.

13. The appellant's current concern stems from his profound disagreement with this order. The appellant's position is that he must be allowed to claim damages from the receiver in respect of the wrongful retention of his personal property and not merely to claim the return of that property. He intended to appeal Barniville J.'s order but missed the deadline for doing so. Having missed the deadline for lodging an appeal the appellant then issued two motions directly in the Court of Appeal on 26 November 2018, the first seeking "*clarification*" of the judgment of Finlay Geoghegan J. and the order made on foot of it. The appellant does not in reality point to any inconsistency between the judgment and order but rather takes issue with the content of the judgment and the fact that he is precluded from pursuing his proceedings insofar as they seek damages for the alleged wrongful actions of the receiver. The second of his two motions is described as "*the enlargement motion*". This is directed at requiring the Court of Appeal to consider his application to amend his pleadings. In substance this is an appeal against the refusal of leave to amend by the High Court although it is not framed as a motion to extend the time for bringing an appeal against the order made by Barniville J.

14. These motions were not progressed with any speed, most likely because the appellant's attention was deflected by a petition brought against him by Ennis Property Finance Limited to have him declared a bankrupt. The petition was strenuously contested by the appellant who believes it was brought for "*an ulterior motive*". Ultimately on 13th March 2019 the appellant was adjudicated bankrupt. The appellant continued to litigate the basis for that adjudication and brought an application to show cause which remained live, albeit undetermined, for virtually the entire of the period during which he remained in bankruptcy.

15. The appellant was automatically discharged from bankruptcy twelve months after the date of his adjudication on 12th March 2020. Although his motions had been in the Court of Appeal directions list in late 2019 and early 2020, they were adjourned from time to time whilst clarification was sought as to the effect on the proceedings of the appellant's bankruptcy. Unfortunately for the progression of these matters, the appellant's discharge from bankruptcy coincided with the outbreak of Covid-19 and the imposition of public health measures which, for a time, slowed down the operation of court lists. When the matters came back into this court's list for directions, the presiding judge directed that the official assignee be put on notice of the matters and be granted liberty to file an affidavit in the proceedings. This was done by the official assignee, Mr. Larkin, on 8th September 2023.

16. In his affidavit the official assignee positively avers that he has "*formed the view that there will be no or limited commercial benefit to my pursing the Court of Appeal proceedings for the creditors of the estate*" and consequently that he does not intend to pursue them. He asserts that the proceedings have vested in him, and the appellant no longer has *locus standi* to pursue them. This is disputed by the appellant who contends either that the official assignee did not exercise his discretion to claim the property "i.e. the litigation" or, alternatively, that he had disclaimed the litigation.

Bankruptcy Act 1988:

17. All of this brings me to the preliminary issue raised by the official assignee which is the central issue I have to determine. It may be useful to address the arguments of both parties by reference to the statutory provisions on which they are based.

18. Bankruptcy in Ireland is governed by the Bankruptcy Act 1988 which has been amended on multiple occasions. In particular, a number of amendments were made between 2012 and 2015 which reduced the period of bankruptcy initially from 12 years to 3 years and

then further reduced it to one year. Parallel to this the Personal Insolvency Act 2012 introduced a separate statutory scheme as an alternative to bankruptcy. The 2012 Act also established the Insolvency Service of Ireland to oversee and administer arrangements under the 2012 Act. The office of the official assignee in bankruptcy was brought within the Insolvency Service of Ireland. The general effect of the new measures was to introduce more flexible and less draconian mechanisms to deal with an individual's personal insolvency and to make emergence from bankruptcy or insolvency quicker and more straight forward.

19. The central provision of the 1988 Act on which the official assignee relies is section 44(1). This provides:-

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

20. Property is defined in section 3(1) as including at paragraph (a):-

> *"(a) includes money, goods, things in action, land and every description of property, whether real or personal,"*.

Thus, the official assignee argues, in my view correctly, that as of 13th March 2019 when the appellant was adjudicated a bankrupt, all of his property vested in the official assignee by operation of law. As property is defined as including a "*thing in action*", i.e., property theoretically owed to someone by virtue of a legal rights to sue, the appellant's property which vested in the official assignee on that date included the High Court litigation in which the appellant sought to recover personal property from the premises which he claimed belonged to him. Insofar as the property the subject of the litigation actually belongs to the appellant, then it too vested in the official assignee.

Section 44(5) – Claiming After-Acquired Property:

21. The appellant does not seriously dispute this. Instead, he makes three arguments. Firstly, he points to section 44(5) in conjunction with certain correspondence issued by the official assignee to suggest that the litigation did not in fact vest in the official assignee. The relevant portion of section 44(5) provides as follows:-

> " *... property which is acquired by or devolves on a bankrupt before the discharge or annulment of the adjudication order (in this Act called "after-acquired property") shall vest in the Official Assignee if and when he claims it."*

Although it is a little unclear, the appellant's argument appears to be that because the official assignee did not "*claim*" the litigation during the period of his bankruptcy he cannot come to court after the bankruptcy has concluded, as he did in 2023, and assert that the litigation has vested in him.

22. The appellant attempted to rely on section 44(5) to argue that the property interest reflected in the litigation had not vested in the official assignee as the official assignee had not exercised his discretion to claim it. In this regard he relied on correspondence sent to him by the official assignee at the time of his discharge from bankruptcy. The letter in question (dated 5th March 2020) advised him as to the treatment of the bankruptcy assets in the following terms:-

> "*Assets which were owned by you on the day you were adjudicated bankrupt and which vested in the official assignee by operation of law and any assets acquired by you and claimed by the official assignee as part of your bankruptcy estate continued to stay in the ownership of the official assignee for realisation (generally, sale) after your discharge*".

23. In my view the appellant has misread both the correspondence from the official assignee and the text of section 44(5). That subsection must be read in the context of section 44 as a whole. As previously set out, section 44(1) automatically vests all property belonging

to a person who is adjudicated a bankrupt in the official assignee as of the date of the adjudication. Section 44(5) deals with a distinct category of property, namely property which is not owned by the bankrupt as of the date of the adjudication, but which is acquired by him during the period of bankruptcy and before his discharge from bankruptcy. The text of section 44(5) is quite clear as to this distinction and expressly describes the property to which it refers as "*after-acquired property*". After-acquired property does not automatically vest in the official assignee. Instead, he has a discretion regarding it such that it will not vest in him unless and until he formally claims it.

24. In this case the High Court litigation was instituted in 2014 and, thus, constituted property belonging to the appellant on the date on which he was adjudicated bankrupt in 2019.Consequently, it automatically vested in the official assignee as of the date of the adjudication and the official assignee was not required to exercise any discretion under s.44(5) in order to claim it.

25. The correspondence sent by the official assignee on 5th March 2020 accurately reflects this element of the statutory scheme. From its tone it seems likely that much of the content of this letter is standard-form information provided by the official assignee to all persons who are being automatically discharged from bankruptcy. In describing what will occur to the bankruptcy assets, the letter advised the appellant that assets owned by him on the date of the adjudication would remain vested in the official assignee as would any assets claimed by the official assignee as part of his bankruptcy estate. It does not purport to state that the assets which automatically vested in the official assignee either required to be or were so claimed.

Section 85 - Disclaimer of Onerous Property:

26. The second and third arguments made by the appellant are that the property in question, i.e. the right to pursue the litigation, reverted to him either because it was disclaimed by the official assignee or because it automatically reverted to him by operation of law at the end of a three-year period. In order to understand these arguments, it is necessary to look at both section 56 and section 85 of the 1988 Act.

27. The disclaimer of onerous property is dealt with in section 56 of the 1988 Act. Under section 56(1) the official assignee may disclaim any property which consists, *inter alia,* of an "*unprofitable contract*" or other property which is "*unsaleable*" or which "*gives rise to a liability to pay money or preform any other onerous act*" (see s.56(1)(b)(I) and (III)). However, there are statutory procedures attaching to disclaimer under section 56. At the material time a disclaimer had to be in writing and, more significantly for present purposes, required the leave of the High Court. On an application being made in this regard by the official assignee, the High Court could direct the official assignee to give notice to "*interested parties*". The requirement for leave of the High Court was removed in July 2023 by s.34(a) of the Courts and Civil Law (Miscellaneous Provisions) Act 2023 but the requirement that the disclaimer be in writing remains. Further, under the amended provisions (section 56(1A)(a)) written notice must be given by the official assignee of any disclaimer to "*each person who … has an interest in the disclaimed property* …". The court was informed that the scope of this provision has not yet been considered or adjudicated on by the Superior Courts. Nonetheless, at a minimum it is likely to generally include the bankrupt and possibly the petitioning creditor.

28. It is not suggested by the appellant that the official assignee disclaimed the proceedings after July 2023. Instead, he contends that certain exchanges can be construed as a disclaimer of this litigation by the current official assignee's predecessor. Firstly, the matter appeared in the directions list on a number of occasions in 2019 and 2020. On none of those occasions

did the official assignee interject in the proceedings or notify the parties of his intentions. On the contrary, counsel for the receiver initially indicated to the court that the official assignee was taking seisin of the action and, at a later stage, he indicated that the official assignee "*remained neutral*".

29. The official assignee disputes the appellant's contentions that any of his predecessor's acts or indeed his correspondence can be construed as a disclaimer and, in any event, contends that they do not satisfy the statutory requirements for valid disclaimer either as they stood then or indeed as they stand now.

30. In my view the argument made by the official assignee on this issue is correct. Disclaimer is not now and certainly was not prior to July 2023 a casual act which could come about through inadvertence, omission or a failure to act promptly on the part of the official assignee. The object of a bankruptcy is to enable the official assignee to realise the bankrupt's estate for the benefit of the bankrupt's creditors. Whilst onerous property will not add to the value of the estate in the hands of the official assignee, those affected by a decision to disclaim property on the grounds that it is onerous are entitled to be put on notice of any such decision and to apply to court (under section 56(4)) if they are seriously concerned that the property being disclaimed is not onerous and would, if realised, add to the value of the estate. Certainty, disclaimer cannot arise simply because proceedings are extant in a list and the official assignee, who may not necessarily be aware of the litigation at the date of the adjudication or appraised of the issues involved in it, does not make an immediate decision as to what attitude he will take towards that litigation.

31. This is so not withstanding that the official assignee has an express power under section 61(3)(d) to "*institute, continue or defend any proceedings relating to the property*". It does not follow from the existence of a power to continue to prosecute or to continue to defend existing proceedings (as the case may be), that a failure to do either of these things

amounts to a disclaimer of the litigation by the official assignee. "Disclaimer" has a specific meaning in the context of the Bankruptcy Act 1988 and denotes the express rejection by the official assignee of a portion of a bankrupt's property that would otherwise transfer to the official assignee by operation of law under s.44(1). As noted, disclaimer is a formal act which requires certain statutory steps to be complied with. Property which is disclaimed reverts to or remains vested in the bankrupt. However, the non-continuance of existing proceedings neither requires nor amounts to a disclaimer of those proceedings and therefore they do not revert to the bankrupt merely because the official assignee has not actively pursued them.

32. It might have been more straightforward if, on being notified of the fact that the appellant's motions were live in the Court of Appeal directions list, the official assignee had taken a positive decision to withdraw the motions and/or the proceedings rather than adopting a "wait and see" approach. This may have arisen because the adjudication was the subject of an application to show cause for virtually the entire period of the bankruptcy or perhaps because of the complex history of prior litigation between the appellant and the receiver to which the official assignee had not been a party. Undoubtedly the fact the applications remained in the list, ostensibly being prosecuted by the appellant at a time at which he was an adjudicated bankrupt, gave rise to a certain level of ambiguity.

33. At this juncture it may be useful to acknowledge the discretion the official assignee has to make a decision as to whether it is commercially viable to pursue outstanding litigation that forms part of a bankrupt's estate. The appellant's case against the receiver regarding the personal property which it is alleged was wrongfully retained by him is strenuously disputed by the receiver on a number of grounds.

34. The property in question is described in an inventory or list drawn up by the appellant in 2015 in the context of the litigation with the receiver. Whilst the initial exchanges between the appellant and the receiver primarily concerned business records which were allegedly in

the premises, the 2015 list included a much larger number of items. These included various heavy items which gave rise to issues as to how these items were to be removed and how many people would require access to the premises in order to remove them. The receiver points out that businesses were being operated within the Washington Street premises by three separate companies, all of which are now dissolved. Much of the property included in the inventory was alleged to have been used by these companies for the purpose of operating those businesses. The appellant would have to establish his personal title to this property before he could successfully claim that the receiver had wrongfully retained it.

35. Further, there is dispute between the appellant and the receiver as to whether the receiver afforded the appellant sufficient access to the property to recover his personal belongings. Given that the appellant had wrongfully re-entered the property after the receiver had taken possession thus forcing the receiver to seek injunctive relief, it is perhaps unsurprising that the receiver was initially reluctant to allow him unrestricted access to the property for any purpose. However, later correspondence from 2018 suggests that the receiver was prepared to afford the appellant, both personally and as the director of the relevant companies, the opportunity to attend the premises and remove his property and that of the companies. At this stage the appellant appears to have attempted to impose a number of preconditions on the receiver regarding the recovery of his property. When these preconditions were not met, the appellant did not engage further with the receiver.

36. Of course, it is not necessary for this court to resolve the factual disputes between the receiver and the appellant on this issue. They are relevant only insofar as they indicate that the claim made by the appellant is far from straight forward. It would require establishing the appellant's title to an array of items, at least some of which would seem more logically to have belonged to the limited liability companies and the businesses they operated from the premises rather than to the appellant personally. It would also require a court to accept

that the appellant's refusal of the receiver's offer to allow him to recover the property was reasonable. Finally, any court hearing the case would have to consider the effect of the appellant's very significant delay in pursuing the proceedings on his entitlement to the relief sought - namely return of the property, and on the value of any property which is now no longer available to be returned in light of that delay. These are all factors which would have to be considered and weighed in the balance by the official assignee in making a decision as to whether the potential benefit to the bankrupt's estate (and by extension to his creditors) justified the costs and risk involved in pursuing this litigation. It is clear that the official assignee has determined that the potential benefit does not justify either the risk or the costs involved and that would seem to be a decision which was legitimately open to him to make.

Section 85(3A) - Revesting of Bankrupt's Property

37. In light of the conclusions reached in the preceding sections of this judgment, it should follow that as the litigation automatically vested in the official assignee on the appellant's adjudication as a bankrupt, the appellant no longer has *locus standi* to pursue his applications before this court. However, the appellant contended that on his discharge from bankruptcy, the right to pursue the extant litigation which had not been dealt with by the official assignee during the bankruptcy reverted to him. The main dispute between the appellant and the official assignee on this issue was as to the meaning and effect of certain provisions in section 85 of the 1988 Act.

38. The official assignee relied on a combination of section 85(1) and (3) to argue that when a bankrupt is automatically discharged from bankruptcy, the unrealised property of the bankrupt's estate remains vested in the official assignee. Since the Bankruptcy (Amendment) Act, 2015 a bankrupt is automatically discharged after a period of one year. The relevant provisions are as follows:-

"*85 (1) Subject to subsection (2) and section 85A, every bankruptcy shall, on the 1st anniversary of the date of the making of the adjudication order in respect of that bankruptcy, unless prior to that date the bankruptcy has been discharged or annulled, stand discharged.*

(3) Subject to subsection (3A), where a bankruptcy is discharged in pursuance of this section the unrealised property of the bankrupt shall remain vested in the official assignee for the benefit of the creditors".

The combined effect of these provisions is that while the bankrupt personally emerges from bankruptcy on the expiration of one year, the assets which formed part of the bankrupt's estate in bankruptcy continue to be held and administered by the official assignee for the benefit of his creditors. Put simply, the bankrupt emerges from bankruptcy, but his assets do not.

39. The appellant's contrary argument is based on the provisions of section 85(3A) and, in order to understand the argument, it may be useful to set that subsection out in full:-

"(*3A) Subject to subsections (3B) to (3F), where on the 3rd anniversary of the date of the making of the adjudication order in respect of a bankruptcy –*

(a) the unrealised property of the bankrupt referred to in subsection (3) includes an estate or interest in what was, at the date of the making of the adjudication order, the family home, shared home or principal private residence of the bankrupt, and

(b) in the case of the family home or shared home, the Official Assignee has not applied to the Court for an order for sale of that home,

that estate or interest shall, on that 3rd anniversary, stand re-vested in the bankrupt without the need for any conveyance, assignment or transfer".

The appellant also places reliance on the provisions of sections 85(3D) under which subsection (3A) does not apply where prior to the third anniversary of the adjudication in bankruptcy the official assignee applies to court for an extension and the court substitutes such longer period as it considers just in all the circumstances. He argues that as the official assignee did not apply for an extension in this case, the property in the extant litigation reverted to him in April 2022.

40. On the basis of these provisions the appellant argues that the official assignee's interpretation of sections 85(1) and (3) is correct but only for a period of three years after the date of the adjudication. In other words, on the date of adjudication the bankrupt's estate vests in the official assignee and, when the bankrupt is automatically discharged one year later his estate remains vested in the official assignee. However, on the appellant's construction of the sections it only remains vested in the official assignee for a period of three years from the date of the adjudication (i.e. a period of two further years after automatic discharge) unless the official assignee successfully applies to the High Court for the substitution of a longer date.

41. In my view this is simply a misreading of section 85(3A). That subsection does not apply to the entire of the estate of the bankrupt. Instead, it only applies to that portion of the unrealised property of the bankrupt which comprises a family home, shared home or principle private residence (all of which I will for convenience refer to as a "family home"). The appellants seeks to read section 85(3A)(a) as if it were a definition of the unrealised property of the bankrupt and as merely confirmatory that that property to which the sub-section applies can include a family home. This fails to take account of two important elements of the way this subsection is drafted.

42. Firstly, in the opening clause in section 85(3A) the word "*where*" is significant. If the appellant's construction were correct, that introductory clause would be entirely unnecessary

since the subsection would simply apply to the entire of the unrealised property of the bankrupt. Secondly, the subsection distinguishes between the unrealised property of the bankrupt as referred to in subsection (3) generally and the "*estate or interest*" in the bankrupt's family home. The final clause of s.85(3A) applies only to that estate or interest, i.e., the family home, and it is only that estate or interest which stands revested in the bankrupt without the need for any further conveyance, assignment or transfer. Thus, s.85(3A) operates to revest a bankrupt's family home in the bankrupt if it no court order has been applied for to authorise the sale of the family home within 3 years from the date of the adjudication and the 3 year period has not been extended by court order. It does not apply to any other part of the bankrupt's unrealised property.

43. In my view it is clear that these provisions, which operate in ease of a bankrupt, are intended to afford particular protection to a bankrupt's family home. They did not appear in the Bankruptcy Act, 1988 as originally enacted but are consistent with the nature of the changes made to the Bankruptcy Act in 2015 and the introduction of the personal insolvency scheme in 2012. For example, under section 61(4), a provision also introduced in 2015, the official assignee cannot make a disposition of property of a bankrupt which comprises a family home without the prior sanction of the High Court.

44. However, it is also clear that these provisions operate by creating a special regime for the family home of a bankrupt and do not alter the core structure of the regime which is reflected in section 85(1) and (3). Thus, I am satisfied that the official assignee's interpretation of these provisions is correct. Notwithstanding the appellant's automatic discharge from bankruptcy, his estate remained vested in the official assignee. The special provisions applicable to a bankrupt's family home have no relevance to the property which is the subject of this application, namely the extant litigation or the personal property the subject of that litigation. The court has not been instructed that any part of the appellant's

estate in bankruptcy, much less any part of the premises in Washington Street, comprise the family home of the appellant. Therefore, no part of the bankrupt's estate revested automatically in him on the expiration of three years from the date of his adjudication.

Identity of the Official Assignee:

45. Finally, before concluding on this issue it might be noted that the appellant raised but did not pursue two issues regarding the identity of the official assignee. The first issue is clearly without substance and concerned different versions of the official assignee's name, in circumstances where the official assignee commonly uses his middle name rather than his first or full name. The second issue was somewhat more complex and arose because there had been a change in the identity of the person acting as official assignee as between the time the official assignee adopted a "neutral stance" when the appellant's applications were in the directions list in late 2019/early 2020 and the filling of the new official assignee's affidavit in response to these applications on 6th September 2023.

46. Somewhat surprisingly there is no express statutory provision revesting the estate of a bankrupt in the new holder of the office of official assignee (which is not a corporation sole) when there is a change in the identity of that person. The issue was raised and dealt with recently by this court in *Larkin v. Gaynor* [2022] IECA 224 in slightly different circumstances which concerned the conveyance of property which formed part of a bankrupt's estate, and which had been registered in the name of the then-official assignee. The Court (Faherty J.) accepted that the property in question automatically vested in the incoming official assignee from the moment he succeeded to that role. That decision was based largely on the authority of *In Re Fitzpatrick* [1939] IR 252. However, *Fitzpatrick* predated the enactment of the 1988 Act and was based on an interpretation of section 60 of

the Irish Bankrupt and Insolvent Act, 1857 the terms of which are different to the 1988 Act. As the appellant did not pursue this point it is unnecessary for me to address it further.

Conclusions on the Preliminary Issue:

47. On adjudication as a bankrupt, the appellant's interest in the extant High Court proceedings vested in the official assignee by operation of law. Significantly, and something which the appellant may not have fully appreciated, any interest that the appellant might have in the personal property the subject of that portion of the proceedings he had been permitted to pursue by the Court of Appeal also vested in the official assignee. Neither the personal property (assuming that it was ever vested in him in the first place) nor the litigation relating to it revested in the appellant on his automatic discharge from bankruptcy twelve months later. The 1988 Act distinguishes between earned discharge from bankruptcy where the bankrupt's debts and the costs of the bankruptcy have been fully met and automatic discharge from bankruptcy which occurs simply because of the efflux of time. Where a bankrupt is entitled to an order discharging him from bankruptcy under section 85B because his debts and the costs of the bankruptcy have been fully met, then under section 85B(2A) the order discharging him shall also provide that any of the bankrupt's property then vested in the official assignee is to be revested in or returned to the bankrupt. There is no equivalent provision on an automatic discharge from bankruptcy and, consequently, the appellant's estate remained vested in the official assignee not withstanding his discharge under section 85(1).

48. Similarly, neither the personal property nor the litigation relating to it revested in the appellant on the expiration of three years of the date of the adjudication. The provisions of section 85(3A) apply only to the bankrupt's family home insofar as the family home forms

part of the unrealised property of the bankrupt on the expiration of three years from the date of his adjudication. This special treatment of a bankrupt's family home does not apply to other unrealised property in a bankrupt's estate. Therefore, the appellant no longer has any interest in the litigation nor in the property the subject matter of the litigation.

49. For these reasons the preliminary issue raised by the official assignee must succeed and the appellant cannot pursue either the High Court proceedings or the motions brought before this court in those proceedings. It follows automatically that those two motions must fail as the appellant does not have *locus standi* to bring any application in proceedings which have vested in the official assignee.

50. That said, it would clearly have been preferable for the official assignee to have taken some positive step to deal with these proceedings – presumably by issuing a notice of discontinuance – when notified in late 2019/ early 2020 that the appellant was attempting to reopen the judgment and order of this court made in 2015. However, I note that under Order 17 Rule 2 of the Rules of the Superior Court in any case where, *inter alia,* an estate has devolved by operation of law, the court may if necessary for the complete settlement of all the questions involved, direct that any party be served with notice and "*shall make such order for the disposal of the cause or matter as may be just*". In the circumstances of this case where the official assignee, who has been formally notified pursuant to the directions of this Court, has indicated that he does not see any commercial benefit to the creditors of the appellant's estate in bankruptcy in pursing these proceedings, it seems to me that the appropriate order to make is one refusing the appellant's motions and striking out the entire proceedings.

51. For the sake of completeness, I should note that the issues dealt with above have been the subject of a judgment of the High Court (Roberts J. *ex tempore* judgment delivered on 13th day of January 2023) on foot of an application by Bank of Scotland PLC to dismiss the

proceedings as *res judicata* or on the basis on the rule in *Henderson v. Henderson*. Roberts J. allowed that application and determined that the only party with *locus standi* as plaintiff in relation to the proceedings remained the official assignee and dismissed the plaintiff's proceedings as against the first named defendant – an order to which the official assignee consented. The effect of this judgment is identical as regards the second named defendant.

Appellant's applications

52. Given the conclusion set out above, it is strictly speaking unnecessary to address the substance of the appellant's applications. If it were so necessary it would also require the Court to consider the propriety of allowing a party to bring "motions" in a concluded appeal, a number of years after the judgment has been delivered and final order drawn up. Needless to say, the circumstances in which a party can seek to revisit a decision of this court are extremely limited and truly exceptional (see *In the matter of Greendale Developments Limited (in liquidation)* [2000] 2 IR 514). The appellant does not come near satisfying the very high threshold necessary to justify the reopening of a final decision of this court. To his credit, the appellant does not really dispute that these applications were brought because he missed the time limit for appealing against the decision of Barniville J. refusing his application to amend his pleading. That could never justify the reopening of an earlier concluded appeal in the same case.

53. That said, I will look very briefly at the two applications to explain why, even if the appellant retained a sufficient interest in the proceedings to be allowed to bring them, they would have to be refused. The first application seeks to speak to the Court of Appeal order suggesting that it does not accurately reflect the judgment as it does not permit the appellant to seek damages from the receiver from his personal property. I have already set out the relevant paragraphs of Finlay Geoghegan J.'s judgment at para. 10 above. It is clear from

these passages that Finlay Geoghegan J. was expressly limiting the appellant's entitlement to pursue the proceedings to his proprietorial claim for the return of certain personal property to him. She also expressly excluded any claim for damages for any alleged wrongdoing by the receiver. In my view the order drawn up fully and fairly reflects the substance and intent of these paragraphs of the judgment. Therefore, there is no question of speaking to the order nor of making any change to the judgment or the order.

54. In reality, the appellant does not dispute that the order reflects the judgment as delivered. Rather, he contends that he must be allowed to seek damages in respect of the receiver's unlawful retention of his property – presumably meaning damages beyond the value of the property itself. Manifestly, this is precisely which Finlay Geoghegan J. directed he should not be allowed to do. The appellant did not seek leave from the Supreme Court to appeal this aspect of the Court of Appeal's judgment. He cannot now seek to revisit the judgment nor the order which, as I have said, accurately reflects the intent of the judgment.

55. Equally, the appellant cannot ask this court to "enlarge" the narrow basis on which he has been permitted to proceed. Enlarging the proceedings to include a claim for damages against the receiver would be entirely contrary to the decision of Finlay Geoghegan J. in 2017. The appellant did not seek to appeal that decision. Therefore, were it necessary to do so I would refuse both of the appellant's applications.

56. In circumstances where the official assignee has been successful on the preliminary issue raised by him (and had he not been successful I would in any event have refused both of the appellant's motions) and where the High Court proceedings against the second named defendant have now been dismissed, my provisional view is that the appellant should bear the costs of both the official assignee and of the receiver before this Court. The High Court and Court of Appeal dealt with the costs of the receiver's application to strike out the

proceedings and the appellant's initial appeal from the High Court order and I do not propose to revisit those orders. Similarly, Barniville J. dealt with the costs of the application before him. As it is not apparent that any further steps were taken to advance that portion of the proceedings permitted by the Court of Appeal nor that any additional costs were incurred, I do not propose to make any order attendant on the dismissal of the proceedings.

57. My colleagues Whelan and McCarthy JJ. have had the opportunity of reading this judgment before it was delivered and have indicated their agreement with it.