THE COURT OF APPEAL
CIVIL

Unapproved
No Redactions Needed

Neutral Citation No. [2023] IECA 317

Court of Appeal Record No. 2022/206

High Court Record No. 2021/5338 (Bankruptcy)
[2022] IEHC 406

Costello J.
Haughton J.
Pilkington J.

IN THE MATTER OF A PETITION BY A DEBTOR TO BE ADJUDICATED BANKRUPT

BETWEEN/

OLIVER KRUUDA

RESPONDENT/
APPELLANT

- AND –

OÜ BEST IDEA

APPLICANT/
RESPONDENT

JUDGMENT of Ms. Justice Pilkington delivered on the 21st day of December 2023

Introduction

1. On 27 June 2022[1] Sanfey J. annulled an Order of adjudication in bankruptcy against Oliver Kruuda ("Mr. Kruuda" or "the appellant") made by Humphreys J. on 28 June 2021. This is the appeal by Mr. Kruuda against that order.

Background

2. On 11 June 2021 Mr. Kruuda, through his then Irish solicitors, issued a petition for his self-adjudication as a bankrupt in this jurisdiction.

3. By Order of Humphreys J. made *ex parte* on 28 June 2021 Mr. Kruuda was adjudicated bankrupt.

4. The next procedural step was a Notice of Motion issued on 5 October 2021, also within the bankruptcy jurisdiction, by OÜ Best Idea ("Best Idea" or "the respondent") seeking to set aside Mr. Kruuda's adjudication.

5. The application is based upon three grounds namely:

(a) Material non-disclosure;

(b) *'that this Honourable Court was precluded from making an order of adjudication (being the opening of main proceedings for the purposes of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) ('the Recast Regulations')) by reason of the prior opening of insolvency proceedings by the Courts of Estonia*

[1] The Order was perfected 3 August 2022

on 7 June 2021 by means of the appointment by the Tartu County Court of an interim trustee';

(c) *'On the basis that (pursuant to, inter alia, Regulation 19 of the Recast Regulation) the Irish courts were and are bound to recognise and give effect to the judgment of the Tartu County Court (and any other decision handed down in respect of the bankruptcy proceedings in Estonia)'.*

6. This was followed by an exchange of affidavits with extensive exhibits. Notices to cross examine were served on certain deponents, including Mr. Kruuda.

7. Sanfey J. noting the provisions of s.85(1) of the 1988 Act which states that *'every bankruptcy shall, on the first 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',* considered that he should deliver an *ex tempore* judgment in advance of that date. He did so on 27 June 2022 and thereafter delivered his written judgment on 6 July 2022, which he described as being essentially in the same terms as his *ex tempore* judgment.

8. Before considering this appeal, it is necessary to outline the chronology and decisions grounding this application for bankruptcy, both within this jurisdiction and Estonia.

The Irish Proceedings; Self– adjudication as a Bankrupt

Bankruptcy Act 1988

"Adjudication on debtor's petition.

15.— (1) Subject to subsection (2), where the petition for adjudication is presented by the debtor the Court may, where it considers it appropriate to do so, and where it is satisfied that the debtor is unable to meet his engagements with his creditors and that the requirements of section 11(4) and (5) have been complied with, by order adjudicate the debtor a bankrupt.

(2) Before making an order under subsection (1), the Court shall consider the nature and value of the assets available to the debtor, the extent of his liabilities, and whether the debtor's inability to meet his engagements could, having regard to those matters and the contents of the debtor's statement of affairs filed with the Court, be more appropriately dealt with by means of—

(a) a Debt Settlement Arrangement, or

(b) a Personal Insolvency Arrangement,

and where the Court forms such an opinion the court may adjourn the hearing of the petition to allow the debtor an opportunity to enter into such of those arrangements as is specified by the Court in adjourning the hearing."

9. To satisfy the requirement of s.15(2) above, what is referred to as a 'section 15 letter' was compiled by the debtor's personal insolvency practitioner ('PIP'), Mr. Joyce[2], who was also Mr. Kruuda's solicitor and whom the trial judge described as an experienced insolvency practitioner. Sanfey J. summarises it in the following terms;

"*20. In his letter Mr. Joyce sets out some background details in relation to Mr. Kruuda by which he acknowledges that the indebtedness of Mr. Kruuda is at least €40,000,000. He deals with the various insolvency solutions available under personal insolvency*

[2] dated 2 June 2021

legislation and concludes that each of those is inappropriate to Mr. Kruuda's circumstances. He then expresses a view on Mr. Kruuda's COMI. He says as follows:

> *"Council Regulation EC 1346/2000 (Insolvency Regulation) provides that insolvency proceedings must be issued within the Member State of the Debtor's centre of main of interest (COMI). Since October 2020, Mr. Kruuda has been conducting all of his affairs from his rented home in Dublin. Mr Kruuda (sic) Oliver currently has no other place of establishment within the European Union. It is therefore my position that Mr. Kruuda's centre of main interest (as determined in accordance with Article 3(1) of Regulation (EU) 2015/848 of The European Parliament and of The Council) is within Ireland and that therefore this is the most appropriate forum for his bankruptcy."*

10. RSC Order 76 requires;

"B. Bankruptcy Petition by a Debtor

26. (1) A debtor's petition shall be in the Form No 13 and shall:

.....

(d) where the Insolvency Regulation applies to the proceedings, contain a statement that, to the debtor's knowledge, no insolvency proceedings have been opened in respect of the debtor in any Member State or Member States (other than the State), or that such insolvency proceedings have been opened and if so, whether those insolvency proceedings are main proceedings, secondary proceedings or territorial proceedings".

11. In considering Mr. Kruuda's petition for self-adjudication in light of Rule 6(1)(d) above, Sanfey J. states;

> *"23. The debtor's petition is required to contain this statement. However, in Mr. Kruuda's application there was no such statement on the petition, the verifying affidavit, or Mr. Joyce's letter. As the Insolvency Regulation, as acknowledged by the petition, applied to the proceedings, there should have been a statement by Mr. Kruuda that to his knowledge no insolvency proceedings had been opened in respect of him in any Member State. It may be that this omission was not deliberate; indeed, the paragraph in the petition quoted at para. 16 above is somewhat garbled and lacking in coherence. However, if the statement had been made, Mr. Kruuda would have had to consider, at least from 14th June 2021, when he was undoubtedly aware of the appointment of the interim trustee[3], whether such a statement was still accurate and whether the Court should be apprised of the Estonian proceedings and order of 7th June 2021".*

12. Within Mr. Kruuda's sworn Statement of Affairs (in accordance with s. 11(5) of the 1988 Act), he confirmed that his debts exceeded his assets by some €50.5m. His indebtedness to Best Idea is recorded and he confirms there is a court judgment in force[4]. The status of that indebtedness (the form asks whether it has been accepted or disputed) is stated to be *"disputed".*

13. The relevant dates when initially considering the Irish and Estonian bankruptcy proceedings are, within this jurisdiction, 11 June 2021 when Mr. Kruuda issued a petition for his self-adjudication as a bankrupt and his adjudication by Humphreys J. on 28 June 2021.

---

[3] This refers to the appointment of an insolvency practitioner by the Estonian Court as discussed more fully below.

[4] Also confirmed within the column headed 'Account No' – 'Court Order in force case no 2-15-13527' – this is the number of the relevant proceedings in Estonia.

The Estonian bankruptcy proceedings

14. The documentation before the High Court discloses;

(a) On 30 April 2020 the Tallinn Circuit Court granted, on the petition of Best Idea, judgment in the sum of €14,985,592 against Mr. Kruuda and AS Rubla (the latter described as 'bankrupt'), in favour of Best Idea.

(b) On 14 May 2021 Best Idea filed a bankruptcy petition against Mr. Kruuda with the Tartu County Court seeking his adjudication in bankruptcy.

(c) On 7 June 2021 Judge Raag, in Tartu County Court, ordered that an interim trustee be appointed to Mr. Kruuda's estate and details the function of that trustee pursuant to the terms of the Bankruptcy Act. Her Order also prohibited Mr. Kruuda from disposing of his assets without the consent of that trustee.

(d) On 14 June 2021 Mr. Kruuda's Estonian attorney, Mr. Lind of the firm Attela, applied to the Tartu County Court setting out the grounds upon which the Court was not legally entitled to appoint the interim trustee. Mr. Lind further confirms that an application has been made seeking to challenge the Tartu County Court's jurisdiction.

(e) The first reference to jurisdiction in the context of Ireland appears to arise in a submission from Mr. Lind to the Interim Trustee (Ene Ahas) dated 22 June 2021 in a document headed 'Response to Request for Information / Submission of Evidence'. Within this document he claims that the Court has no jurisdiction to hear the bankruptcy. He asserts that Mr. Kruuda's place of residence is Ireland and therefore its jurisdiction takes precedence. Submissions are then exchanged between the parties, including one on behalf of Best Idea, dated 1 July 2021 confirming Mr. Kruuda's application to the Irish bankruptcy Court. There is

then an exchange of substantive submissions by the Interim Trustee and lawyers on behalf of Mr. Kruuda and Best Idea.

(f) Judge Raag delivered judgment on 19 October 2021, at Tartu County Court. In dismissing Mr. Kruuda's application for the dismissal of the bankruptcy petition, she declared Mr. Kruuda bankrupt from 19 October 2021 and also confirmed that the previous Orders for securing the bankruptcy petition made on 7 June 2021 were to remain in force. After confirming;

'*that the debtor has received the procedural documents in time and has participated in the proceedings through his representative'*, the Court then states it had carefully considered the documentation, the arguments advanced regarding Regulation 2015/848 and held *'The court is convinced that the centre of the main interests of the debtor Oliver Kruuda must be considered to be in Estonia'*. It also stated;

'In a situation where according to Article 2(7)(ii) and clause (5) of Regulation No 2015/848, the appointment of an interim trustee in accordance with Estonian Law by order of 07.06.2021 must be considered initiating of the main insolvency proceedings, then in the present case the court must proceed from the fact that there were no other decisions on initiation of insolvency by that time and the Tartu County Court had to decide whether or not to declare the debtor bankrupt'.

(g) On appeal to the Tartu Circuit Court on 27 January 2022 the Court (Judges Kerstna-Vaks, Roostoja and Parsimagi) refused Mr. Kruuda's appeal and confirmed his adjudication as a bankrupt. In considering EU Regulation 2015/848 the Court held;

"*As the County Court appointed an interim trustee with its 7 June 2021 ruling, which also prohibits the debtor from disposing of his property without the consent of the interim trustee, the County Court is holding proceedings concerning all the debtor's debts within the meaning of Article (1) (a) of the EU Regulation. For the purposes of Article (2) (5) of the EU Regulation, an interim trustee of Estonia is considered to be an insolvency practitioner pursuant to Article (2) (5) of Annex B to the EU Regulation. Pursuant to Article 2(7) of the EU Regulation, a decision to open insolvency proceedings means a court's decision to open or confirm the opening of insolvency proceedings, and a court decision appointing an insolvency practitioner. Pursuant to Article 2 (8) of the same Regulation, the time of the proceedings, regardless of whether or not the decision is final. This means that according to Estonian law, the appointment of an interim trustee on 7 June 2021 must be considered as the opening of main insolvency proceedings within the meaning of Articles 2 (7) and (5) of the EU Regulation. In Ireland, the trustee has been in proceedings since 28 June 2021. Prior to that, the right to dispose of the debtor's assets was not restricted by an Irish court and the trustee had not been appointed. Consequently, the County Court decides on the declaration of bankruptcy of the debtor*." (my emphasis)

15. Thereafter on 18 April 2022 the Supreme Court of Estonia declined to accept Mr. Kruuda's appeal from this decision of the Tartu Circuit Court.

Issues before the High Court

16. In respect of Best Idea's interlocutory application, the High Court considered the following issues;

(a) The circumstances in which the court can annul an Order of adjudication in bankruptcy, pursuant to s. 15 (1) of the 1988 Act, in the exercise of its inherent jurisdiction and on the grounds of material non-disclosure.

(b) Whether the Court can also invoke s.135 of the 1988 Act ('s. 135') to annul this Order.

(c) Regulation (EU) 2015/848 of the European Parliament and of the Council on Insolvency Proceedings (Recast) ("the Recast Regulation").

17. Before considering each of these issues in turn it is worth noting that Sanfey J. was considering them all in the context of the legal implications of any *self-adjudication* in bankruptcy pursuant to s.15 of the 1988 Act, beginning with the petition presented by a debtor;

"No creditors are placed on notice of it. The petition is scrutinised by court officials for basic compliance with the Act and Rules and is then listed before the Court. If the order is made, certain consequences flow from the order as a matter of law. Most notably –

- *The bankrupt's property vests in the Official Assignee for the benefit of the creditors (Section 44(1));*
- *Creditors cease to have any remedy against the bankrupt, apart from their rights under the Act, and no proceedings may be commenced against the bankrupt save with leave of the Court (Section 136);*
- *No distress can be levied on the goods of a bankrupt after adjudication (Section 139);*

- *The bankrupt obtains an automatic discharge on the first anniversary of his adjudication, save in certain circumstances (Section 85(1));*
- *The order of adjudication is a judgment opening main proceedings for the purpose of Article 2(7) of the Insolvency Regulation. On the making of such an order, the jurisdiction of Ireland in the matter must be recognised in all of the Member States.*" (paragraph 66)

18. I propose to consider each of these issues in turn.

Inherent jurisdiction - Material Non-disclosure

19. The Court initially considered the well-known legal principles set out in *Bambrick v.Cobley*[5]. Clarke J. (as he then was) held that the court had a discretion to discharge an interlocutory injunction, where a failure to disclose material facts had been established. In considering the criteria which the court should apply in the exercise of its discretion in such circumstances Clarke J. held;

> *"…Clearly the court should have regard to all the circumstances of the case. However, the following factors appear to me to be the ones most likely to weigh heavily with the Court in such circumstances:*
>
> *1. The materiality of the facts not disclosed.*
>
> *2. The extent to which it may be said the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than*

[5] [2006] 1 IRLM 81 at 89

an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the Plaintiff was, nonetheless, significantly culpable in failing to disclose.

3. The overall circumstances of the case which lead to the application in the first place. Applying those criteria to the facts of this case it does seem to me that the non-disclosed facts were of significant materiality. For the reasons set out above there is a very real possibility that the court will either have made no order or potentially required short service and considered an order only in respect of the significantly lesser sum had it been apprised of the full facts."

20. The trial judge then turned to consider the decision of Baker J. (then a judge of the High Court) *In Re James Nugent (a debtor)* [2016] IEHC 127 ('*Nugent*').

21. In this case an application had been made pursuant to s.97 of the Personal Insolvency Acts 2012 – 2015 and the inherent jurisdiction of the Court, seeking to set aside an extension of a protective certificate on the grounds that the *ex parte* application by the PIP was made with a lack of candour.

22. Baker J. considered the nature and scope of the court's jurisdiction in such circumstances. Her judgment, together with the cases cited within it, is considered at length by Sanfey J.

23. In *Nugent* the Court considered whether it had an inherent jurisdiction to set aside an order made *ex parte* and in doing so cited the judgment of McCracken J. in *Voluntary*

Purchasing Groups Inc. v. Insurco International Ltd. & Another[6]. Whilst, as Baker J. pointed out in *Nugent*, this judgment arose in the context of the old RSC O.39[7] she relied upon it, in cogently setting out the court's inherent jurisdiction to set aside an order made *ex parte*. McCracken J. stated:

> *"In my view, however quite apart from the provisions of any rules or statute, there is an inherent jurisdiction in the Courts in the absence of an express statutory provision to the contrary, to set aside an Order made ex parte on the application of any party affected by that Order. An ex parte Order is made by a judge who has only heard one party to the proceedings. He may not have had the full facts before him or may even have been misled, although I should make it clear that it is not suggested in the present case. However, in the interests of justice it is essential that an ex parte Order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the Court. It would be quite unjust that an Order could be made against a party in its absence and without notice to it which could not be reviewed in the application of the party affected."*

24. This is followed by consideration of the judgment of Hogan J. (then a judge of the High Court) in *Re Belohn and Merrow Limited* [8] in which one of the issues was the Court's jurisdiction to set aside an *ex parte* order for the appointment of an interim examiner. At paragraph 13 he stated;

---

[6] [1995] 2 ILRM 145 at 147

[7] The case concerns the power of the Irish courts to set aside an *ex parte* order allowing foreign tribunals to obtain evidence in Ireland for use in civil proceedings outside the jurisdiction.

[8] [2013] IEHC 157

"*13. Applying these principles, it is plain that any interim order made ex parte interferes with the contractual rights of secured creditors, even if the examinership procedure does not present the reputational issues which were also in view in both Dellway Investments and Custom House Capital. The mere fact that the order interferes with a constitutionally protected right - whether as a property right (such as a contractual right of that kind) or a right to fair procedures - does not in and of itself make this process unconstitutional, for as Costello J. put it in Daly v. Revenue Commissioner [1995] 3 I.R. 1,11, "legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved." But all of this does mean that any interim order made in examinership process is of a necessity a provisional one, precisely because the court could not constitutionally be given the power by means of a final order to override such due process and property rights prior to at least hearing the affected parties and for all the reasons given by the Supreme Court in D.K. and applied by that Court in Dellway Investments*."

25. Thereafter Baker J. commenting upon the above states at para. 25:

"*25. Hogan J. in Re Belohn Limited and Merrow Limited, having determined that the application before him was permissible, did not expressly deal with the question of whether the statutory provisions allowing for the appointment of an interim examiner would be determinative of his approach to the application to set aside. I consider however that there is implicit in his finding in that case, where he did set aside the appointment of an interim examiner on the grounds of non disclosure, that the order to set aside was 'essentially restitutionary in nature' as it involved the setting aside of an order which was tainted by non disclosure. His judgment it seems to me is a strong*

authority for the proposition that the application to set aside is determined by the court on broad principles of fairness and the solemnity of the court and its process. The decision of Hogan J. guides my approach to the question in the present case, and I consider that my jurisdiction is not constrained by the statutory provisions contained in s.97, and must be seen in the broader context of the requirement of candour and disclosure in ex parte applications, and because the operation of a constitutionally complete ex parte procedure must involve a degree of respect for the court by those who make such application."

26. At para. 51 Baker J states, and I believe this passage is of particular significance to the facts of this case:

"It is not necessary for the purposes of this application that I should take a view as to whether the PIP, or the debtor, deliberately sought to present the matter to me in a way that points to a lack of bona fides. As a matter of law the test before me is whether there was a significant and material failure to disclose matters which should have been disclosed and the test is an objective one as to what could have influenced me in the exercise of my jurisdiction in making the order ex parte. I am satisfied that the test is met."

27. In considering *Nugent,* Sanfey J. held:

"I am satisfied, however, that the Bambrick v Cobley principles apply to ex parte applications in bankruptcy and in particular to applications by debtors for an order of adjudication. The reasoning set out by Baker J. in re Nugent in relation to personal insolvency applications by a PIP, in my view, applies a fortiori to Section 15 applications by debtors. The Court is required by Article 4 of the Insolvency

Regulation to examine whether it has jurisdiction pursuant to Article 3; in doing so, it is entirely reliant on information supplied by the bankrupt. Any factors to which the Court would be likely to have regard in coming to its decision as to its jurisdiction are significantly material to that decision and must be disclosed. (paragraph 70)"

28. In considering the issue of the Court's inherent jurisdiction Sanfey J. was also mindful (paragraph 67) that s.15(1) of the 1988 Act makes clear that the court has a discretion whether or not to make the order and in exercising that discretion is reliant upon the information furnished by the debtor.

29. Sanfey J. was therefore satisfied, applying the principles in *Bambrick v. Cobley,* that there was an established jurisdiction in the court to review orders on the grounds of material non-disclosure. He also considered that there was now ample authority for the proposition that such a jurisdiction, particularly following the reasoning of Baker J. in *Nugent,* applied *a fortiori* to s.15 applications by a debtor seeking *self-adjudication* as a bankrupt.

Evidence of Mr. Kruuda

30. Notices to cross examine were served in respect of certain deponents, including Mr. Kruuda. The trial judge summarised his evidence as follows (paragraph 73);

"He denied the propositions put to him by counsel for Best Idea that he knew that the Irish court would have wanted to know about the appointment of the interim trustee or that he knew that it would upset his plans to become bankrupt in Ireland if the Irish court learned of the appointment."

31. The Court continued at paragraph 74;

'*He said that while Mr. Joyce assisted in preparing the Irish application, he had no contact with Mr. Joyce between 14 and 28 June. He said that he was advised by his Estonian lawyer, Mr. Lind, that the Estonian situation was "not a problem" as regards the Irish application. He denied the suggestion by counsel that the Estonian situation would "at the very least be relevant to an Irish court" or that "he consciously decided not to tell the Irish court".*

32. Sanfey J. continues at paragraph 78:

"Mr. Kruuda denies any culpability for this state of affairs. He says that he was assured by Mr. Lind that the Estonian proceedings were "not a problem" (see Day 2 of the transcript page 74, lines 14 to 16) and that he asked Mr. Lind, when he found out about the Estonian proceedings, what he should do and Mr. Lind said "do nothing". In this regard see Day 2, page 77 lines 3 to 16. His position is that on the basis he did not consider that he should apprise the Court of the Estonian proceedings. Significantly, he did not contact Mr. Joyce, who had prepared the Section 15 letter and submitted the bankruptcy documentation on 11th June, for advice on this issue."

33. In respect of Mr. Kruuda's evidence, the trial judge summarised it as follows:-

"82. I had the benefit of seeing and hearing Mr. Kruuda give evidence in person and was thus in a position to evaluate that evidence. It may be that he did not make a conscious decision as such to withhold information about the Estonian bankruptcy from the Irish court. However, he must have known that the appropriate course would be to consult an Irish lawyer about whether this information should be brought to the

attention of the Court. In my view, it is more likely that Mr. Kruuda's conscious decision was not to seek advice in this regard in case the advice caused problems for his application to the Irish court. While Mr. Kruuda may not have had advice that he should apprise the Irish court of the Estonian proceedings, his failure to do so was not what Clarke J. in Bambrick called "an innocent omission"."

34. In reviewing the overall circumstances of the case the Court found:

(a) That Mr. Kruuda was certainly aware of the Estonian proceedings no later than 14 June 2021 when his Estonian lawyer communicated with the Tartu County Court on his behalf. The County Court was itself of the view that Mr. Kruuda was aware of those proceedings as early as 1 June 2021.

(b) Mr. Kruuda's lawyers had already submitted within the Estonian jurisdiction that Mr. Kruuda's COMI was in Dublin and had set out the legal basis for that contention.

(c) No reference to the Estonian bankruptcy proceedings was made in the s.15 letter. It expressed the view that Mr. Kruuda's COMI was in Ireland.

(d) Mr. Kruuda did not appraise the High Court on or before 28 June 2021 that bankruptcy proceedings had been initiated against him in Estonia on 14 May 2021 and that an Interim Trustee had been appointed by Tartu County Court to his estate on 7 June 2021 with certain consequential orders with regard to the disposal of his assets. (see paragraph 72).

35. Arising from all of these matters Sanfey J. made four findings;

"*84. I have therefore concluded that:*

1. The circumstances of the Estonian bankruptcy and appointment of the interim trustee were highly material to the High Court's obligation to satisfy itself that it had jurisdiction and the discretion of the Court as to whether or not to make the order of adjudication;

2. This information should have been disclosed to the High Court when Mr. Kruuda's application came before it;

3. It is probable that the High Court, if apprised of the Estonian bankruptcy and surrounding circumstances, would not have made the adjudication order on 28th June 2021 but would, at minimum, have sought further information and would likely have insisted that Best Idea be informed of the Irish application and be made a notice party to it;

4. Mr. Kruuda is significantly culpable in failing to bring the Estonian bankruptcy and its surrounding circumstances to the Court's attention."

Section 135 of the 1988 Act ('s.135')

36. This section states:

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

37. At paragraph 52 the trial judge noted that the 1998 Act does not make any provision for a formal review by the Court of the process of self-adjudication by a debtor and at paragraph 55 that s.135 is '*very general and is devoid of context',* a quotation relied upon by the appellant. Within the same paragraph Sanfey J. also noted that no reported decisions were cited to him regarding the ambit of s.135.

38. Whilst Sanfey J's judgment was directed more to the issues surrounding inherent jurisdiction and material non-disclosure than s.135, in my view it is clear that the conclusions he reached on these grounds also formed the basis of his ruling that an order could also be made pursuant to s.135. He confirmed this at paragraph 85 when he stated that the Court in exercising its discretion to rescind the Order of 28 June 2021 did so *'pursuant to the inherent jurisdiction of the Court and consider[s] that such an order can also be made pursuant to the Court's power under section 135…..'*

The Jurisdiction Issue – The Recast Regulation

39. Sanfey J. stated that, notwithstanding he had decided this case upon domestic law principles, in light of the time and resources spent by the parties in arguing this issue before him, he would set out his views on what he termed *"the jurisdiction issue"*. A significant portion of his judgment comprises a distillation and analysis of the extensive evidence, written and oral, presented to him on this issue.

40. The trial judge pointed out that pursuant to Article 5 of the Recast Regulation a debtor challenging the decision regarding the opening of main proceedings on the grounds of international jurisdiction must do so in the country claiming jurisdiction and that a person who considers that main proceedings should have been commenced in a different Member State cannot simply move to bankrupt a debtor in that other State.

41. As Sanfey J. pointed out, by the time he came to give his decision, the issue as to whether the appointment of an Interim Trustee constituted the opening of main proceedings had been definitively determined by the Courts in Estonia. That process came to an end with

the decision of the Tartu Circuit Court in January 2022 and the refusal of the Supreme Court in Estonia to accept an appeal arising from that decision.

42. Sanfey J. found at paras. 93 and 94 of his judgment that it is not, applying the Recast Regulation, for this Member State to now consider or examine the correctness of the decision of the Estonian Courts on 7 June 2021. He considered that that would be entirely contrary to the Regulation of automatic recognition of jurisdiction.

43. Sanfey J. therefore concludes his judgment as follows;

> *93. It seems to me that to do so would be improper and entirely contrary to the principle that the jurisdiction of the Member State of the courts first seised must be respected. An examination of the correctness of the decision of 7th June 2021 has been conducted by the appropriate courts in Estonia. It is not for this Court to second-guess the findings of the Estonian courts. To ignore their findings or to proceed as if these decisions did not exist would be to ignore reality and would be entirely contrary to the system of automatic recognition of jurisdiction provided by the Insolvency Regulation.*
>
> *94. ……. Mr. Kruuda has availed fully of his right to appeal the decision of 7th June 2021 in Estonia. That process came to an end with the decision of the Tartu Circuit Court in February 2022 and the refusal on 18th April 2022 of the Supreme Court of Estonia to accept Mr. Kruuda's appeal of the Circuit Court decision. This Court must respect that process and decline to embark on a further examination of the issues'.*

The Appeal

44. The Official Assignee in Bankruptcy ("OA") appeared and made submissions before this Court. These were limited to certain issues raised which, in the view of the OA, could potentially impinge upon the operation of the bankruptcy process within this jurisdiction. He did so with particular regard to s.135 of the 1988 Act and did not make any submissions in respect of the Recast Regulation.

45. In considering this Appeal I propose to adopt the same headings as were used within the High Court – the issues of inherent jurisdiction and material non-disclosure, s.135 of the 1988 Act and the Recast Regulation.

46. Before doing so however the appellant makes an overarching point that the Order of Humphreys J. constitutes a final order and Sanfey J. is therefore *functus officio*. It does not appear any application was made before Sanfey J. to this effect.

47. Within his submissions to this Court, the Appellant cites a number of cases where the courts consider the circumstances in which final orders can be set aside.[9] Both Best Idea and the OA point out that these cases, all *inter partes* litigation, consider the basis upon which a court might exercise its inherent jurisdiction to set aside or amend a final Order, which was determined or concluded by a lower court.

[9] Including *Hughes v O'Rourke* [1986] ILRM 538, *Talbot v McCann Fitzgerald* [2009] IESC 25, and *Belville Holding Limited v Revenue Commissioner*s [1994] 1 ILRM 29.

48. The OA, in particular, has strongly resisted any suggestion that Sanfey J. is *functus officio*. He points to the nature of the bankruptcy jurisdiction and in particular to the clearly expressed provisions within the 1988 Act, which have always provided for a judge of concurrent jurisdiction to adjudicate upon applications within bankruptcy.

49. Both Best Idea and the OA emphasise that the bankruptcy jurisdiction operates in precisely the opposite fashion to that contended for by the appellant. The Order of Humphreys J is not a final order but rather is the beginning of the bankruptcy process and the initiation of the ongoing supervisory role of the Bankruptcy Court. This point is also developed further when considering s.135.

Inherent Jurisdiction and Material Non-Disclosure

50. The appellant questions the entitlement of Sanfey J. to exercise the inherent jurisdiction of the Court to set aside an *ex parte* order. Further Mr. Kruuda contends that *Bambrick v Cobley* principles do not apply to an application for *self-adjudication* in bankruptcy. No case law is cited in support of these propositions, but rather the appellant seeks to distinguish the nature of the cases relied upon by the trial judge where material non-disclosure had been found by a Court, from cases within the bankruptcy jurisdiction.

51. To the extent that there was any non-disclosure, Mr. Kruuda argues that it was not relevant or material or was an innocent omission which was of insufficient importance or culpability to warrant his adjudication being set aside by the Court. He correctly points out that setting aside an order of adjudication in bankruptcy is a serious step for a court to take.

52. Both Best Idea and the OA, in endorsing Sanfey J's judgment, highlight the consequences of any self-adjudication in bankruptcy in the context of the entire bankruptcy process, including creditor(s), the OA, the Recast Regulation and of course the debtor, as quoted at paragraph 17 above. In particular they highlight the findings of the trial judge[10] as to the implications of this material non-disclosure upon the adjudication of Humphreys J.

53. Both Best Idea and the OA submit that the requirement of full disclosure is an inherent aspect of the fair and constitutional administration of justice and on the facts of this case when considering an *ex parte* application. In such circumstances they argue that the Court should have the benefit of as full a disclosure as possible.

54. Both also contend that the objective relevance and materiality of the matters not disclosed on the facts of this case fully justify the application of the principles in *Bambrick v Cobley.* They also endorse the decisions of Hogan J. in *Belohn and Merrow Limited* and Baker J. in *Nugent* in support of their contention that the issue of non-disclosure is an objective test, with that test being applied to the materiality of the matters that have not been disclosed. In this they point to the central relevance of the Estonian bankruptcy proceedings which were not disclosed at all in the appellant's application before Humphreys J.

55. Both Best Idea and the OA rely, in particular, when considering the requirements of full disclosure in an *ex parte* bankruptcy application, upon the case of *Miller v. McFeely.*[11] In this case, also referred to by Sanfey J[12], there was an extant petition in bankruptcy, by a creditor of Mr. McFeely, before the Irish courts. Following the issue of a petition for Mr.

[10] At paragraph 84.3 of the judgment, as quoted at paragraph 35.
[11] [2012] EWHC 4409.
[12] paragraph 71

McFeeley's bankruptcy in this jurisdiction, but prior to its hearing, Mr. McFeely made an application for self-adjudication as a bankrupt in Northern Ireland. In his petition he declared that there were no other proceedings against him and he was adjudicated bankrupt.

56. The petitioning creditor in the Irish bankruptcy proceedings brought an application appealing that adjudication. Proudman J. rescinded the Northern Irish Bankruptcy Order and stated at paragraph 7:

> *"One of the principal reasons for my decision was the fact that Mr. McFeely's bankruptcy petition was in the nature of an ex parte application and he was, therefore, under a duty of full disclosure to inform the Court of all relevant matters."*

She continues in the following paragraph:

> *"Mr. McFeely did not tell Registrar Nicholls (who dealt with the application routinely on paper) that there was a substantive bankruptcy hearing in Dublin on the Monday after the Thursday on which he presented his own petition to the Court. Indeed, as I have said, he ticked the box which indicated that there were no proceedings against him. That was enough, by itself, to justify a recission of the Bankruptcy Order."*

57. By analogy Best Idea and the OA contend that the same duty applies on the facts of this case, that the failure to advert to the Estonian bankruptcy proceedings within the self-adjudication application was, to mirror the language of this judgment, enough to justify a recission of the Bankruptcy Order.

Section 135 of the 1988 Act

58. Within this appeal the parties, perhaps in light of Sanfey J's comments regarding the paucity of authorities cited to him concerning s.135 and the very general nature of this section, have expanded their respective submissions on this point.

59. The Appellant argues that s.135 cannot be invoked by a creditor. In particular he relies upon the decision of this Court in *In The Matter Of Deirdre Dennis, a discharged bankrupt*[13] *('Deirdre Dennis'*) and the decision of Costello J. in the High Court in *SFS Markets Limited (Formerly Marketspreads Limited) v Fergus Rice ('SFS').*[14]

60. Both *Deirdre Dennis* and *SFS* relate to applications by a debtor for an annulment of their respective adjudications in bankruptcy pursuant to S 85C (1) of the 1988 Act.[15]

61. In *Deirdre Dennis* Costello J. considered the entitlement of the Court to annul an applicant's self-adjudication in bankruptcy pursuant to s.135, in circumstances where her bankruptcy had already been discharged by operation of law.

62. In refusing the appellant relief pursuant to s.85C of the 1988 Act, the Court also considered s.135. It did so in specific circumstances of the case where the High Court judge had found that this section could not be invoked as Ms Dennis's bankruptcy had been

[13] [2021] IECA 24
[14] [2015] IEHC 42
[15] It states *"Annulment of adjudication in bankruptcy.*
85C-(1) A person shall be entitled to an annulment of his adjudication –
(a) where he has shown cause pursuant to section 16, or
(b) in any other case where, in the opinion of the Court, he ought, not to have been adjudicated bankrupt."

discharged. Costello J. pointed out that the wording of s.135 referred to an 'order of discharge' which had not occurred on the facts of this case where there had been an automatic discharge pursuant to s.85 of the 1988 Act. Accordingly, s.135 could be invoked on the facts of this case.

63. In considering s.135 Costello J. stated (paragraphs 41 and 43):

"41 ...I interpret the provision as permissive: in relation to interim orders, the court is given express statutory authority to revisit previous orders made during the bankruptcy. The court, expressly, may not review, rescind or vary an order of discharge. There was no order of discharge in this case. Ms Dennis was automatically discharged from bankruptcy by operation of law...."

……

43. It is not necessary to interpret s. 135 as prohibiting the court from annulling an adjudication in cases where the discharge has occurred automatically by operation of statute, and not pursuant to an order of the court, in order to give effect to the intention of the legislature. The legislature is presumed to know of the continuing effects of bankruptcy post discharge. The reforms effected to the Act of 1988 since 2008 have been to ease the burden of insolvency, and bankruptcy in particular, for those insolvent persons who cooperate with the due administration of their estates for the benefit of their creditors. Disadvantaging such persons who receive an automatic discharge because they have not warranted an application to extend their period of bankruptcy by debarring them thereafter from applying to annul their adjudication in appropriate cases would seem to me to run counter to the thrust of the legislative reform in the whole area of personal insolvency in the last decade'.

64. *SFS* also considers s.85C(1). This case involved a contested bankruptcy application in which the judgment debtor, following a judgment of Dunne J, upholding his adjudication, sought to appeal that Order and also to seek identical reliefs before the bankruptcy judge. Costello J. refused the application on the basis of an abuse of process where an appeal had already been issued by the judgment debtor and in any event, if she was mistaken in that view, with regard to his substantive application the debtor was not entitled to rely upon his own default as a basis for an annulment of his bankruptcy, she held that his argument that Dunne J had failed to properly consider s14(2) of the 1988 Act in adjudicating the debtor bankrupt pursuant to s.11 of the 1988 Act was, in any event, without merit.

65. In analysing the criteria for a debtor's application for setting aside his adjudication as a bankrupt Costello J. stated;

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

66. The Appellant submits the criteria to be applied within s.135, including any application by a creditor seeking to set aside an adjudication in bankruptcy should be the criteria within *SFS* namely a finding of fraud or abuse of process. In his submission, Humphreys J had already determined the bankruptcy application and s.135 cannot, he submits, further extend the criteria beyond that within *SFS*.

67. The appellant further points to the comments of Sanfey J. to the effect that the 1988 Act does not make any provision for a formal review by the Court of the process of self-

adjudication by a debtor and is '*very general and is devoid of context'*. In this regard the appellant contends that in essence on the facts of this case Sanfey J. is in effect exercising an appellate function.

68. Best Idea and the OA reject the appellant's submission that the criteria with s.85C is applicable to s.135 of the 1988 Act; both submit that s.85C simply has no relevance to the issues raised within this case as it clearly relates to circumstances, as in *Deirdre Dennis* and *SFS,* where a debtor seeks an annulment of his or her adjudication. Mr. Kruuda seeks the opposite.

69. The OA has broader concerns regarding s.135 and the circumstances where he may rely upon it. He points out that in any *ex parte* application where, upon adjudication all assets vest in the OA, he apprehends that in certain instances he may be the only entity privy to the full details of a bankrupt's estate and its ongoing administration. He particularly points to circumstances in the administration of an estate arising from a self-adjudication in bankruptcy where the OA may consider that the Court has been misled or does not for whatever reason have the entirety of the necessary material or information before it. Arising from this there may be circumstances where the OA contends he may need to invoke s.135.

70. The OA also calls in aid paragraph 69 of the High Court judgment as follows:

> *"The bankruptcy regime in Ireland has developed, in a relatively short period of time, from one of the most punitive and long-lasting in Europe to one of the most benign from the point of view of debtors. There are many instances of foreign debtors looking to establish COMI in this jurisdiction in order to avail of the Irish system, as a perusal*

of the weekly bankruptcy list would show. In principle, there is absolutely nothing wrong with a debtor doing this."

71. In considering s.135 itself, Best Idea and the OA seek to provide case law to assist the Court as to how it might be interpreted and applied. They do so with reference to s.375 of the U.K. Insolvency Act 1986 ('s.375' and 'the 1986 Act') which states;

"Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction."

72. In particular both rely upon *Papanicola (Trustee in bankruptcy of Samuel Sykes Mack) v. Humphreys* [2005] EWHC 335 ('Papanicola'), which in turn refers extensively to the judgments of Millett J. in *In Re A Debtor (No. 12 of 1970)* [1971 1 WLR 1212 and by the same judge, then Millett L.J., in *Fitch v. Official Receiver* [1996] 1 WLR 242 ("*Fitch"*)

73. The primary focus within the decision of Mr. Justice Laddie in *Papanicola* is the court's detailed consideration of the principles available to it in reviewing orders pursuant to s.375.

74. Having considered *In Re a Debtor* and *Fitch* Laddie J. then sets out the principles to be applied as to the entitlement of a court pursuant to s.375 to review, rescind or vary an order under its bankruptcy jurisdiction as follows;

"25. It seems to me that a number of propositions can be formulated in relation to s.375…:

(1) The section gives the court a wide discretion to review vary or rescind any order made in the exercise of the bankruptcy jurisdiction.

(2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour.

(3) Those circumstances must be exceptional.

(4) The circumstances relied on must involve a material difference to what was before the court which made the original order. In other words there must be something new to justify the overturning of the original order.

(5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time.

(6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any explanation by the applicant given for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion.

26. The second and fourth of these propositions merit some expansion. Inherent in s. 375 is the concept that something has changed so that it is appropriate for the court to reconsider its own earlier order. If there is no change in circumstances, the only way to challenge the order is by appeal. The court is not to review its order simply on the basis that the applicant wants to present essentially the same facts and the same arguments but more forcefully or attractively. This is apparent from the following passage in Fitch :

"[A]n appellate court can quash a bankruptcy order only if it is satisfied that, on the evidence which was before the court which made the order or on new evidence which is admitted in accordance with the rule in Ladd v. Marshall [1954] 1 W.L.R. 1489 ,

the order should not have been made. An application under section 375(1) is essentially different. It must be based on a change in circumstances since the order was made or, more rarely, on the discovery of further evidence which could not be adduced on appeal." (p 246)

27. The same requirement that there should be something new appears to be inherent in Millett J's judgment in In re A Debtor (32/SD/1991) :

"Where an application is made to the original tribunal to review, rescind or vary an order of its own, however, the question is not whether the original order ought to have been made upon the material then before it but whether that order ought to remain in force in the light either of changed circumstances or in the light of fresh evidence, whether or not such evidence might have been obtained at the time of the original hearing. The matter is one of discretion, and where the evidence might and should have been obtained at the original hearing that will be a factor for the court to take into account; but the rationale of the rule in Ladd v. Marshall , that there should be an end to litigation and that a litigant is not to be deprived of the fruits of a judgment except on substantial grounds, has no bearing in the bankruptcy jurisdiction. The very existence of section 375 is inconsistent with such a rationale." (p 318–9)

28. This passage supports the sixth proposition set out in paragraph 25 above."

75. The appellant contends that s.375 may be of limited assistance to the court because within the 1986 Act the power to annul a bankruptcy Order is to be found within s.282 of the 1986 Act and not within s.375. It is as follows:

"Courts power to annul Bankruptcy Order.

(1) The Court may annul a Bankruptcy Order if it at any time appears to the court –

(1) that, on any grounds existing at the time the order was made, the order ought not to have been made, or

……"

76. As there is no comparable clause to s.282 within the 1988 Act the Appellant submits there is no analogy between s.375 and s.135 of the 1988 Act. This argument was not advanced in the High Court.

77. The OA in considering the history of s.135, points out that it has formed a part of previous iterations of the bankruptcy legislation in this area and cites the following passages from the Budd Committee Report.[16] Paragraph 45.9.3 states:

"*To review, rescind or vary any order. Section 6 of the 1872 Act provided that*

"*From and after the commencement of this Act the Court of bankruptcy and insolvency in Ireland, as constituted by the said Act, shall be called "The Court of Bankruptcy in Ireland," and the judges of the said Court and their successors shall be called the judges of the Court of Bankruptcy.*

The Court of Bankruptcy in Ireland shall continue to be a court of law and equity and a principal court of record, and may review, rescind or vary any order made by it in pursuance of the said Act or of this Act; and each of the judges of the said Court shall have all the powers, jurisdiction, and privileges possessed by any judge of Her Majesty's High Court of Chancery, or by any judge of Her Majesty's Superior Courts of Common Law at Dublin…""

[16] Bankruptcy Law Committee Report on the Law and Practice concerning Bankruptcy and the Administration of Insolvent Estates of Deceased Persons

Paragraph 45.12.5 states:

> *"Power of the court to review and rescind.*
>
> *The intention of Section 6 of the 1872 Act was to make the Bankruptcy Court self-sufficient and to prevent assets been fritted away on legal proceedings. The discovery of fresh evidence was sufficient to allow a rehearing. The powers used sparingly and with great caution and in these circumstances would provide that the Court should continue to have jurisdiction to review, rescind or vary any order of the Court which, of course, would be appealable, to the Supreme Court. While the right to review, rescind or vary is confined to proceedings under the 1857 and 1872 Acts it should in the interests of creditors be extended to cover anything done under bankruptcy jurisdiction whether under the legislation which we propose or under other enactments."*

78. Within the judgment of Millett L.J. in *Fitch*, after pointing out that the jurisdiction under s.375 replaced the earlier section within the 1883 Bankruptcy Act he stated that it is *"…unique to insolvency, (having recently been extended from bankruptcy to company winding up), in that it allows the court to review and rescind or vary an order made by a court of coordinate jurisdiction. It applies to any order made in the exercise of the bankruptcy jurisdiction. It is available to rescind a bankruptcy order as it was formerly available to rescind a receiving order. The court's power to review and if thought fit rescind a bankruptcy order is, in theory at least, virtually unlimited."* (p.246, my emphasis).

Recast Regulation - Request for a Reference to the ECJ

79. Within this Appeal the appellant took the Court to those portions of the judgments of the Estonian courts, particularly that of 7 June 2021, where he contended that, at best, it was questionable whether the court's obligations under the Recast Regulation had been fully complied with.

80. He did so particularly in support of his ongoing contention that the appointment of the interim trustee by the Tartu County Court on 7 June 2021 did not constitute the opening of main proceedings pursuant to the Recast Regulation and in such circumstances Humphreys J. was not precluded from making the Order of Adjudication.

81. Arising from this the appellant submits that concerns must remain. In such circumstances, pursuant to Article 267 of the Treaty on the functioning of the European Union, he seeks a referral to the Court of Justice of the European Union. Such a request was made in more general terms before the High Court, but the terms of that reference are particularised before this Court in the following terms:

> *"Whether the appointment of an Interim Trustee by Tartu County Court on 7 June 2021 constituted the opening of main proceedings for the purposes of [the Recast Regulation] where;*
>
> > *(i) The appointment of an Interim Trustee is not listed in the Schedule and therefore not notified to other Member States that this is a relevant type of insolvency proceeding in Estonian law which is capable of falling within the definition of insolvency proceedings concerning the Recast Regulation; and*

(ii) where an individual has moved to centre of main interest from Estonia to Ireland, in full compliance with the requirements of insolvency law in Ireland, and prior to the opening of insolvency proceedings by creditors against the individual in Estonia, can the individual open main insolvency proceedings in Ireland, where he has established his COMI?"

82. The respondent highlights those portions of Sanfey J's judgment, particularly his conclusion at paragraphs 93 and 94 of his judgment[17] and contend that the appellant has failed to set out why the trial judge's findings are incorrect.

83. Best Idea also highlights what it submits to be the factually correct position that the Courts in Estonia have definitively decided that Mr. Kruuda's COMI was, at the material time, in Estonia. Estonia asserted jurisdiction on the basis that the main proceedings were opened there on 7 June 2021; it follows, it submits, that any challenge must also be exercised within that jurisdiction. It points out that Mr. Kruuda had advanced extensive submissions to the Estonian courts prior to the Court's adjudication on 7 June and in all subsequent steps. It endorses the findings of Sanfey J. that the Estonian courts have determined that the Interim Trustee Order constituted the opening of main proceedings and further that Mr. Kruuda's COMI is in Estonia. It submits that is an end of the matter and that, arising from Article 19 of the Recast Regulation[18], Mr. Kruuda cannot now ventilate the same argument before the Irish Courts and certainly not to examine the correctness of the Judgments delivered by the

[17] Quoted at paragraph 43 above

[18] Article 19 (1) states that 'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings'.

Estonian Courts. It also emphasises that any reference to the European Court was for Mr. Kruuda to advance before the Estonian courts.

Discussion and conclusions

84. In a wide ranging and considered judgment Sanfey J., in setting aside Mr. Kruuda's adjudication as a bankrupt, was satisfied that there had been material non-disclosure in his application before Humphreys J. and on that basis and in the exercise of his discretion, pursuant the inherent jurisdiction of the Court, rescinded the Order of adjudication dated 28 June 2021. He also confirmed that he made this order pursuant to s.135 of the 1988 Act.

85. In considering the questions of inherent jurisdiction and material non-disclosure in the context of an application for self-adjudication in bankruptcy, pursuant to s.15(1) of the 1988 Act, in my view there are important matters that inform the background when assessing this question.

86. Such an application is, self-evidently, made *ex parte*. Any *ex parte* application for self-adjudication requires that the debtor appraise the Court of the full facts and circumstances so as to make an informed decision. These principles are clearly set out in *Bambrick v Cobley* which I accept can be applied in assessing an application for self-adjudication pursuant to s. 15(1) of the 1988 Act.

87. The next is the requirement, within s.15(1) itself, that the Court is required to exercise its discretion.

88. As highlighted in *Miller v McFeeley* the exercise of a discretion, in the context of an application for a self-adjudication in bankruptcy, can only be properly exercised by a Court when it is in full possession of all facts so as to properly exercise that discretion. I endorse that conclusion.

89. As *Nugent* made clear the test, to be objectively determined by the Court, was whether there was a significant and material failure to disclose matters that could have assisted Humphreys J. in the exercise of his discretion in making his *ex parte* order of adjudication. In my view, Mr. Kruuda should have disclosed information relating to his Estonian bankruptcy proceedings to Humphreys J. in order that he could properly consider the application and the exercise of his discretion.

90. I endorse the comments of Baker J. in *Nugent* that the crux of any issue regarding material non-disclosure is whether it raises the possibility (as opposed to a clear certainty) that a different course may have been adopted by the judge determining the application. I agree with Baker J's analysis of the test to be applied in considering whether this Court should make a finding of material non-disclosure.

91. I agree and accept the finding of Sanfey J. that when Humphreys J. made an order of adjudication against Mr. Kruuda on 28 June 2021 he had been told nothing of the bankruptcy proceedings initiated against him in Estonia, in particular the Order of 7 June 2021 ordering the appointment of an interim trustee. This is an objective fact.

92. On Mr. Kruuda's own evidence, after submitting his application for bankruptcy in this jurisdiction he had no contact with his local Irish solicitor Mr. Joyce between 14 June to 28

June 2021. Mr. Joyce no longer represents him and no affidavit was sworn by him in these proceedings. Mr. Kruuda gave clear evidence that, in so far as he sought legal advice concerning his Irish bankruptcy, he did so exclusively from Mr. Lind, his Estonian lawyer. That he failed to consult his Irish lawyer (or any Irish lawyer) on matters of Irish law is puzzling to say the least, particularly where he already had the services of an experienced insolvency practitioner available to him.

93. Of particular importance in this case is the fact that the trial judge had the opportunity of considering Mr. Kruuda's oral evidence. His assessment and conclusions regarding that evidence are clearly set out in his judgment. Those findings, based upon the evidence before him, are compelling. In such circumstances this Court also has regard to the decision in *Hay v O'Grady*[19], in determining that the findings of fact by the trial judge in this case are supported by credible evidence. In turn this is bolstered by the fact that the trial judge carefully considered and assessed Mr. Kruuda's evidence in the witness box.

94. In considering these matters I agree with the conclusion reached by Sanfey J. that this appellant's failure to disclose the existence of the Estonian bankruptcy proceedings was not an innocent omission, within the meaning of the assessment of the court's approach to an application to set aside an *ex parte* order in *Bambrick v Cobley*.

95. Mr. Kruuda may well consider he acted correctly in respect of the material disclosed to Humphreys J .but the test is not a subjective one; objectively I cannot accept that a failure to reference the Estonian bankruptcy proceedings within his self-adjudication application

[19] [1992] 1 IR 210

was anything other than material non-disclosure. It was directly relevant to the issues upon which Humphreys J. was called upon to adjudicate.

96. The chronology in respect of both the Irish and Estonian bankruptcy proceedings make the omission even more stark**.** On 7 June 2021 Judge Raag made her Order in the Estonian Court, Mr. Kruuda's application for self-adjudication in this jurisdiction was issued on 11 June 2021. It was information available to the appellant at the time of the making of the Order of adjudication and which should have been before the court. This information was not of a complex nature or beyond the understanding of Mr. Kruuda or those advising him. It was a straightforward fact and it should have been disclosed.

97. It is clear that Mr. Kruuda still takes issue with the Order of the Estonian Court of 7 June 2021 and continues, before this Court, to take issue with it. It is not his beliefs, or those advising him, as to the status and correctness of the 7 June Order that are of importance. It is this Court's objective finding, in adopting the criteria set out within *Nugent* and endorsed by the trial judge, that these matters were relevant and material to the issues Humphreys J. was called upon to adjudicate. In my view they were clearly relevant and material and the failure to disclose them is in my view material non-disclosure.

98. The succinct quotation of McCracken J in *Voluntary Purchasing Groups Inc. v. Insurco International Ltd. & anor* makes it clear that there is an inherent jurisdiction in the Court (absent an express statutory provision to the contrary) to set aside an Order made *ex parte* on the application of any party affected by that Order. The point is reiterated in *Belohn and Merrow Limited* and endorsed within *Nugent*.

99. In my view the facts of this case also permit the court to exercise its discretion pursuant to its inherent jurisdiction to annul Mr. Kruuda's adjudication in bankruptcy of 28 June 2021. This is on the basis that, in an *ex parte* application, he failed to even mention the fact of the Estonian bankruptcy proceedings, where such proceedings were directly relevant to Humphreys J's adjudication. These proceedings were only brought to the attention of the bankruptcy court pursuant to the application of Best Idea. This provides a sufficient basis for the exercise of the Court's inherent jurisdiction to annul the adjudication.

100. It follows that the findings of material non-disclosure and the exercise of the court's inherent jurisdiction also provide a sufficient basis for this Court to uphold the judgment of the High Court and dismiss this Appeal.

101. In addition, Sanfey J. found that these findings could also be relied upon to invoke s.135 of the 1988 Act. That he was not entitled to do so was argued in some detail by the appellant before this Court.

102. Whilst it is true, as Sanfey J. points out, s.135 is broadly drafted and has attracted little judicial scrutiny, such a provision, entitling a Court to 'review, rescind or vary' an order within the bankruptcy jurisdiction certainly predates the 1988 Act.

103. On its face the interpretation of s.135 appears straightforward. The phrase *"the Court"* must refer to the Bankruptcy Court. On the facts of this case, it is only the Bankruptcy Court that has dealt with this matter (albeit two separate judges but each within the same jurisdiction). "*An order of discharge or annulment"* must refer to an order which takes an individual out of bankruptcy. All other matters *"in the course of a bankruptcy matter"* where

a court may *'review, rescind or vary an order'* must include, in relation to this bankruptcy, orders for self-adjudication.

104. Having regard to *Heather Hill Management Co CLG & anor v An Bord Pleanala & ors* (*Heather Hill*)[20] this Court must have regard to the clear wording of s.135. In my view this section is clear. Within its bankruptcy jurisdiction, a Court may 'review, rescind or vary' an order made by it subject to the two provisos that there is no order of discharge or annulment, which does not apply here. That it is rarely invoked does not detract from an entitlement to do so.

105. It is noteworthy that the excerpt from the Budd Committee report[21] specifically emphasises that the right to review, rescind or vary should in the interests of creditors be available within the bankruptcy jurisdiction.

106. In relying upon *Deirdre Dennis* and *SFR* the appellant sought, in my view, to conflate applications by those seeking the annulment of their bankruptcy pursuant to s.85C(1) with s.135. Both cases concerned debtors seeking to annul their adjudication as bankrupts; entirely the opposite position arises here. Within *Deirdre Dennis* the court was seeking to maintain an expansive position as to the circumstances in which s.135 might be invoked and in my view it supports the proposition that s.135 affords a broad discretion for the bankruptcy judge within this jurisdiction. Nothing within it or *SFS* in my view restricts the criteria for the application of s.135.

---

[20] [2022] IESC 43 and also *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60
[21] Paragraph 77 above

107. *Deirdre Dennis* recites numerous instances in which the bankruptcy jurisdiction can be invoked both prior to an automatic release from bankruptcy pursuant to s.85 but also thereafter. In my view it illustrates very clearly by reference to these numerous examples, the nature of its ongoing concurrent jurisdiction.

108. In my view assistance can be sought from the criteria for determining when a court can review, rescind or vary an Order of the bankruptcy court within those set out by Laddie J. in *Papinacola*. Of course, each case must be determined on its own facts, but the propositions set out by Laddie J. seem to provide a useful guidance for any consideration of s.135.

109. In considering s.135 I have also noted Sanfey J's point that the Irish bankruptcy jurisdiction is now more benign from the perspective of debtors than previously. Costello J. also makes this point in *Deirdre Dennis.* Arising from this, the OA is mindful that he, within the bankruptcy jurisdiction, must be in a position to invoke s.135.

110. No issue appears to have been taken against this submission, indeed the respondent is supportive of its application. Given the role of the OA in his administration of the bankruptcy process, in my view it is appropriate that s.135 can be invoked by him.

111. One matter is certainly clear; the order of adjudication made by Humphreys J. is not a final order; it is the beginning of the bankruptcy process to which Mr. Kruuda is now subject. Any suggestion that Sanfey J. was *functus officio* is entirely without merit.

The Jurisdiction Issue

112. Counsel for the appellant took this court to certain documentation within the Estonian proceedings to argue that aspects of its judgment, particularly that of 7 June 2021, did not comply with the Recast Regulation and should remain an ongoing concern.

113. Arising from this, the appellant argues that this Court should seek a referral to the Court of Justice of the European Union in the terms quoted above.

114. What is puzzling, and this is also adverted to by Sanfey J., is why, given this appellant's strenuous arguments regarding the failure of the Estonian Court to properly consider and apply the Recast Regulation, he failed to seek any referral to the CJEU from the Estonian courts. No explanation has been furnished for this apparent omission. It is to be borne in mind that Mr. Kruuda had the benefit of legal advice and representation in Estonia, which merely underscores the glaring nature of the omission. That the initial application for a reference to the CJEU is made to the Irish Courts is, in my view, not something this court should entertain.

115. Before the High Court and on appeal this Appellant has contended that doubts remain as to whether the Estonian courts gave proper consideration to the question of whether the appointment of an interim trustee (on 7 June 2021) constituted the proper opening of proceedings in accordance with the terms of the Recast Regulation. It is clear that this appellant seeks, either as a basis for determining whether there should be a reference to the CJEU, or otherwise, for this Court to now independently examine this issue. I can see no basis for it to do either. Indeed in my view to re-examine the position within this Appeal would be to again review the matter which has already been determined by the Estonian

courts in accordance with the Recast Regulation and is not permissible and directly contrary to the Recast Regulation.

116. By the time the case was heard before her, Judge Raag had, on 7 June 2021, addressed the issue of Mr. Kruuda's COMI and the question of the entitlement of the Estonian courts to assume jurisdiction pursuant to the Recast Regulation. These findings were clearly and expressly upheld by the County Court decision on 19 October 2021. The Estonian Supreme Court, in refusing to consider a further appeal by Mr. Kruuda, meant that the Estonian judicial process was then at an end.

117. It also follows, in my view, on the basis of the mutual recognition of judgments within Article 19 of the Recast Regulation, any application or reference to the CJEU by this court would be wholly inappropriate in the circumstances of this case. In my view, it is abundantly clear that Mr. Kruuda could have availed of such an opportunity to make an application for a reference to the Estonian Courts but for whatever reasons chose not to do so. He cannot, in my view, now seek by another route, a route which in my view is not available to him, to now seek that an Irish court ask the CJEU to determine the correctness of the Estonian proceedings.

Conclusion

118. Accordingly this Court upholds the findings of Sanfey J that, on the basis of this appellant's material non-disclosure in his application before Humphreys J., in the exercise of its inherent jurisdiction and pursuant to the provision of s.135 of the 1988 Act, the Order of adjudication of Humphreys J. dated 28 June 2021 is annulled.

119. This Court also declines, for the reasons set out above, to make a referral to the Court of Justice of the European Union.

Outcome of the appeal

120. For the reasons set out above I would dismiss the appeal.

Costs

121. In view of the terms of this judgment the Court considers that, prior to any adjudication as to costs, it requires a short oral hearing before final determination of this issue.

122. As this judgment is being delivered electronically Costello & Haughton JJ. have indicated their agreement with it and the Orders I have proposed.