National Asset Loan Management Ltd v Cahillane; Re John Christopher Cahillane

[2015] EWHC 62 (Ch)

Chancery Division

Kevin Prosser QC sitting as a Deputy Judge of the High Court

20 January 2015

Jeremy Goldring QC and Susannah Markandya (instructed by Edwin Coe LLP) for the Appellant

Hilary Stonefrost (instructed by Portner & Jaskel LLP) for the Respondent

Hearing date: 11th December 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Kevin Prosser QC sitting as a Deputy Judge of the High Court:

Introduction

1. This is an appeal by the petitioning creditor, National Asset Loan Management Limited (“NALM”), against the orders of Chief Registrar Baister dated 23rd June 2014, adjourning NALM’s bankruptcy petition and making directions on an application dated 20th June 2014 by the debtor, Mr Cahillane, brought under s.375 of the Insolvency Act 1986 (“the Insolvency Act”), to rescind or vary the order of His Honour Judge Pelling QC dated 6th June 2014.

2. This is also an application dated 8th August 2014 by Mr Cahillane, to vary Chief Registrar Baister’s directions, and for specific disclosure of documents.

Background facts

3. Between 1999 and 2009, Allied Irish Bank (“AIB”) made loans to Mr Cahillane and to entities whose indebtedness he guaranteed, to fund the purchase of a number of residential properties and undeveloped land, all situated in Ireland, mostly outside Dublin (together “the Irish Properties”). The loans were secured on the Irish Properties (“the Security”). At those times, Mr Cahillane was resident in Ireland.

4. In 2010, AIB transferred the benefit of the loans including the Security to NALM, pursuant to the Irish National Asset Management Agency Act 2009. I understand that the transfers were made on the basis of valuations of the Irish Properties as at 30th November 2009.

5. On 8th December 2011, NALM appointed Mr Barry Donoghue as receiver of the Properties.

6. In 2012, Mr Cahillane ceased to be resident in Ireland, and became resident in the UK.

Service of statutory demand

7. On 15th May 2013, NALM served on Mr Cahillane a statutory demand under s.268(1)(a) of the Insolvency Act. In accordance with rule 6.1(5) of the Insolvency Rules 1986 (“the 1nsolvency Rules”), the demand specified the full amount of the debt at Euros 54,578,776 million (£47,250,260), placed a value of Euros 6,086,334 (£5,269,097) on the Security, and claimed payment of the difference, of Euros 48,492,442 (£41,981,163). S.269 of the Insolvency Act provides that in these circumstances the secured and unsecured parts of the debt are to be treated as separate debts.

Application to set aside the statutory demand

8. On 4th June 2013, Mr Cahillane applied to set aside the statutory demand, relying only on rule 6.5(4)(c) of the Insolvency Rules, which provides that the court may grant such an application if “the court is satisfied that the value of the security equals or exceeds the full amount of the debt”.

9. By a consent order dated 10th July 2013, each party was given permission to adduce expert evidence in the field of chartered surveying “to address the value” of the Irish Properties for the purposes of Mr Cahillane’s application. He was to serve his report by 21st August 2013, subsequently extended to 11th September 2013.

Expert report

10. Mr Cahillane’s expert was Mr Adams-Cairns of Savills. He was not instructed simply to provide a present valuation of the Irish Properties. This is because Mr Cahillane wished to argue that, because of the special status of NALM under Irish law, the relevant value of the Irish Properties was their potential future value. For this reason, he instructed Mr Adams-Cairns to address the following issues in his report:

“3.1.1 comment on the appropriate valuation methodology to be employed in the valuation of the Irish Properties and any special assumptions that might be employed.

3.1.2 having regard to 3.1.1, comment on the values attributed to each of the Irish Properties by [NALM] and Mr Cahillane respectively and the reasonableness of each in the circumstances. This may involve inspecting any of the properties which you consider it necessary or appropriate to.

3.1.3 comment on the impact of the following issues on your views given under 3.1.1 and 3.1.2:

(a) [NALM]’s long-term economic view valuation methodology;

(b) [NALM]’s status as a public body and its financial objectives (particularly, that it is not a commercial bank and the influence of its statutory objective in determining an appropriate valuation methodology and any special assumptions to be applied); and

(c) the current state of the Irish property market, particularly liquidity, and the prospects for growth over the next 7 years (until 2010 [sic]) that would support a long-term valuation methodology as adopted by [NALM].

3.1.4 having regard to the alleged shortfall (based on [NALM]’s valuations), please comment on [the] amount of and the probability of any loss that would likely be sustained if [NALM]’s policies are adhered to and the Irish Properties are held up to 2020 (ie 10 years from [NALM]’s formation).”

11. On 10th September 2013, Mr Adams-Cairns informed Mr Cahillane that he would require a further extension of time until 20th September 2013. Accordingly, Mr Cahillane applied for a second extension, and for relief from sanctions. A hearing was fixed for 7th November 2013.

12. In the meantime, Mr Adams-Cairns’ expert report was served on 21st September 2013.

13. In producing his report, Mr Adams-Cairns did not inspect any of the Irish Properties. Nor did he place a present, or indeed any, valuation on them.

14. I set out what I believe to be the material parts of his report:

Section B, paragraphs 8 to 11, is headed “Factual Matters”.

At paragraph 8, Mr Adams-Cairns commented on the Irish property market generally.

At paragraph 8.3 he noted that house prices in Ireland doubled between 2000 and 2006, stabilised in 2007, and “burst” in 2008. In September 2013 average house prices in Ireland were about 50% of their 2007 peak.

At paragraph 8.4 he noted that the Irish Residential Property Price Index fell by 21% between November 2009 (the NALM valuation date) and June 2013.

At paragraph 8.5 he noted that the September 2013 level of average residential property prices was currently close to the level which they reached before 2000.

At paragraph 8.14 he said:

“If residential property values increase broadly in line with the economy at 1.5% over 2013 (which would seem broadly consistent with the Central Statistics Office data that prices in the Rest of Ireland (outside Dublin) rose by 0.7% over the first 6 months), maintain this rate in 2014 and then increase to only 1.75% in 2015 and 2% per annum thereafter until 2020 they will be some 15.4% higher at the end of 2020 than they are today.”

At paragraph 10, he discussed “valuation methodology”.

At paragraph 10.7 he said that it would be quite wrong to rely on a report provided by a selling agent in trying to assess market value.

At paragraph 10.12 he said that the most reliable valuation approach is the comparable approach; but at paragraph 10.13 he said that in the case of development sites there is frequently no suitable comparable evidence on which to rely, and valuers are obliged to resort to what is known as a residual method, which involves using comparable evidence to arrive at the likely end values for the completed development and then deducting the estimated costs of development (sale, construction, finance) and an allowance for profit with the remaining or residual amount representing the amount a developer can afford to pay for the site.

At paragraph 10.14 he identified a main difficulty with the residual approach, namely that the site value is highly sensitive to the assumptions made, in particular with regard to the build costs and the end selling price of the built units.

Then at paragraph 10.15 he referred to appendix 6 to his report which:

“illustrated with a simplistic residual valuation model how a small development of 10 houses might currently suggest a site value similar to agricultural land values. I have then shown that if house values increase by only 15% the site value might increase by a staggering 2000% (all other things being equal, including ignoring the fact that if values are rising sale rates may do so as well which would increase this differential even more).”

Indeed, Appendix 6 assumes that a development site has a current value of 8,000 similar to agricultural value, and suggests that its value could increase over a future period by 2000% to 170,000 if house prices were to increase by 15% over that period.

At paragraph 10.16 he said that this was an extreme example, but “it gives useful insight into the problems which have been experienced on development land values in Ireland when house prices first rose and had funds secured against them and then fell.”

At paragraph 10.18 he identified a second main difficulty with the residual valuation approach, namely that “simply because a residual valuation suggests a particular value or worth for a sale it does not mean that there is a purchaser in the market place prepared (or able) to [pay] such a figure and as such it may not represent market value.”

At paragraph 11 he said that papers supplied by Edwin Coe LLP giving details of the Irish Properties were incomplete. In particular, at paragraph 11.4 he said that as a result of the brief and incomplete nature of the papers he did not have a comprehensive overview of the Irish Properties.

Section C, paragraphs 12 to 14, is headed “My Opinion”.

At paragraph 12.1 Mr Adams-Cairns said that “on balance it appears that values in Ireland have probably started to rise”.

At paragraph 12.2 he said:

“Whilst I have no statistical or research data to support a projection I note that a modest recovery in prices over the next 7 years as outlined at 8.14 above could easily result in an increase in residential property values over the period of around 15%.”

At paragraph 13.4, he said that he would anticipate that the market values of the Irish Properties in September 2013 “could possibly be around 20% lower than were reported for November 2009 for the completed residential properties and significantly lower for the development properties”.

Then at paragraph 13.5 he said:

“If this is correct, and this portfolio is broadly typical of many of those held by [NALM] then [NALM] is going to be dependent on market improvement if it is going to cover its acquisition and holding costs let alone provide a paper profit at the end of the anticipated period. This having been said, it is not inconceivable that the improvement in the residential market over the next 7 years of the order of 15% (as set out above) combined with an increased availability of finance will lead to an increase in the market value of residential development sites of the magnitude of these I have illustrated in my Appendix 6. If this was to happen then it could result in a substantial paper profit and sufficient, based on the acquisition costs to cover the nominal loan balances.”

At paragraph 13.17 he said that the situation in the case of the development properties was “starker” than in the case of investment properties. “At present it seems probable that some of these sites will only command depressed sale prices which may only be in line with agricultural or forestry values…Sales now will only crystallise losses”.

At paragraph 14, he discussed the values attributed to each of the Irish Properties by NALM’s agency advisors and by Mr Donoghue (not, I note, by Mr Cahillane, as he was instructed to do).

At paragraph 14.1 he expressed the view that in some cases, it was clear that the selling agents had no knowledge of the planning history and so it would be quite wrong and misleading to take figures given by the agents as indicative of market value.

At paragraph 14.2 he said that as a rule a property will find its own level in the market if it is properly marketed; the exercise should normally give a more accurate assessment of value than the subjective opinion of a valuer, particularly in a depressed market with few comparables on which to rely. However, at paragraph 14.3 he said that with the thin state of the market he had some concerns that property which is exposed to the market without highlighting the full potential may be devalued and could as a result be undersold.

At paragraph 14.4 he referred to four of the Irish Properties by way of illustration, noting differences between the values placed on them by the selling agents on the one hand and by Mr Donoghue.

Valuations placed on the Irish Properties by Mr Cahillane are not commented on or referred to.

Section D, paragraph 15, is headed “My conclusions and declaration”.

At paragraph 15.1 he said that it appears that the Irish property market is improving and “It seems likely to me that residential values could be expected to increase by around 15% over the next 7 years, the availability of finance is likely to improve and if so some residential site values are likely to increase by dramatically more.”

At paragraph 15.2 he referred again to the fall in values since November 2009, and expressed the view that disposals of the development sites at this point in the cycle “are likely to yield little return”.

At paragraph 15.3 he said that the agents who NALM had recently approached with regard to the sale of the properties had not been asked “to consider the likely future economic performance” of the assets and Mr Donoghue does not consistently accept their opinions.

15. In a witness statement dated 28th October 2013 in support of the application for a second extension, Mr Adams-Cairns noted that the issues raised in his instructions were not confined to forming an opinion of the current values of the Irish Properties “but required a report which involved having regard to values on the basis of certain special assumptions”. He also explained that he had found it difficult to report on the basis of his instructions; in particular, when considering the “reasonableness” of the values attributed to the Irish Properties by NALM, he did not have access to the valuations procured by NALM at the time of the transfers from AIB. It was his preliminary view that any such valuations would assist him, NALM’s expert, and the court in due course “in coming to a correct and balanced view on the issues to which expert evidence has been directed”.

Hearing before Registrar Jones

16. At the hearing on 7th November 2013, before Registrar Jones, Mr Cahillane argued that Mr Adams-Cairns’ report addressed the relevant value of the Security which, because of NALM’s special status, was the potential future value. The Registrar rejected this argument, holding that the relevant value was the present value. He concluded that Mr Adams-Cairns’ report did not address the matter in issue, in that it did not provide a valuation to show that the present value of the Irish Properties equalled or exceeded the full value of the debt, as required by rule 6.5(4)(c) of the Insolvency Rules. Therefore there was no dispute for the purposes of the application, and it would be an incorrect exercise of his discretion to grant an extension of time. Therefore the Registrar refused Mr Cahillane’s application for a second extension of time to adduce expert evidence. He also dismissed the set aside application, and gave NALM permission to present a bankruptcy petition forthwith.

Appeal to HH Judge Pelling QC

17. With the permission of Birss J, Mr Cahillane appealed to the High Court against those orders. The appeal was set down for hearing on 3rd June 2014.

18. In the meantime, on 21st November 2013, NALM presented a bankruptcy petition.

19. On 30th May 2014, Mr Cahillane applied for permission to rely, at the hearing of his appeal, on a supplemental report dated 26th May 2014 from Mr Adams-Cairns.

20. At paragraph 3.2 of his supplemental report Mr Adams-Cairns referred to the latest data showing that by the end of 2013 the Irish Central Statistics Office’s Residential Property Price Index stood at 70 (it had stood at 65.6 as at June 2013), which meant that the market recovered by 7% in contrast to the 1.5% he had assumed in his first report.

At paragraph 3.4 he referred to a newspaper article which reported that the recovery was being led in Dublin with smaller gains nationally, while country property outside Dublin was still broadly flat.

At paragraph 3.9 he said that while he thought it unlikely that that the increase in values in Dublin over 2013 were likely to be sustained over 2014 and beyond, it did appear that his estimates were more likely to have been over cautious than overoptimistic.

21. In my view, the supplemental report merely updates the original report regarding potential future values; like the original report, it does not suggest that the present value of the Irish Properties equals or exceeds the full amount of the debt.

22. Mr Cahillane’s appeal was heard by HH Judge Pelling QC on 6th June 2014. Mr Callihane contended, as he had contended before Mr Registrar Jones, that given NALM’s special status the relevant value of the Security was the potential future value. The Judge rejected this argument, holding that the focus is on the estimated present value of the Security. He dismissed the appeal on the ground that Mr Adams-Cairns’ report did not even realistically or arguably support a contention that the present value of the Security equalled or exceeded the full amount of the debt.

23. The Judge made it clear that he would have allowed the appeal had he concluded that the report contained any realistically arguable basis for challenging the statutory demand. In particular, at paragraph 18 of his judgment, he referred to Appendix 6 to the report and said this:

“What is missing from the report…is any schedule or table which demonstrates that if there were increases in value, such as is anticipated hypothetically in the report and in Appendix 6, then that would in fact result in the sum outstanding being covered by the value of the Security either at the date when the statutory demand was served or at any other future date.”

24. Having regard to the Judge’s express agreement with Registrar Jones that the relevant value of the Security is the present value and not a future value, it seems to me that by “or at any other future date” at the end of paragraph 18 of his judgment the Judge was referring to the date of a relevant hearing after the service of the statutory demand, and not to an unspecified future date after any such hearing. Thus, the missing schedule or table is one addressing increases in value occurring before the date on which the statutory demand was served or the date of a relevant hearing, not increases in value occurring afterwards. After all, a prediction of future increases in value could not possibly be relied on to demonstrate that the sum outstanding was covered by the present value of the security.

S.375(1) application

25. On 20th June 2014 Mr Cahillane applied to the High Court under s. 375 of the Insolvency Act for an order that Judge Pelling’s orders be rescinded or varied. (He also applied for permission to appeal to the Court of Appeal against the orders, but on 18th November 2014 Patten LJ refused permission.)

26. S.375 of the Insolvency Act provides, so far as material, as follows:

“(1) Every court having jurisdiction for the purposes of the Parts in this Group [that is, the Parts of the Act relating to individual insolvency] may review, rescind or vary any order made by it in the exercise of that jurisdiction.

(2) An appeal from a decision made in the exercise of jurisdiction for the purposes of these Parts by a county court or by a registrar in bankruptcy of the High Court lies to a single judge of the High Court; …”

27. It was common ground before me that the jurisdiction conferred by s. 375(1) ought to be rarely exercised, and also that the issue to be determined on an application to review etc an order is not whether the original order ought to have been made upon the material then before the original tribunal, but rather whether that order ought to remain in force in the light either of changed circumstances or 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.

28. The s.375(1) application was supported by the second witness statement of Mr Adams-Cairns, dated 20th June 2014, which refers to paragraph 18 of Judge Pelling’s judgment and then says, at paragraphs 5 and 6:

“5. I am able to assist in the preparation of a schedule of the type described by the judge at paragraph 18 of his judgment. Such a schedule was not incorporated into my report for several reasons. First, I am based in London and the preparation of such a schedule would have required physical inspection of the properties; this was simply not possible within the timescales set for production of the original report. Secondly, as I explained at paragraph 11.4 of my original report, the information provided to me by Edwin Coe LLP was unsatisfactory [in] terms of trying to have a comprehensive insight into the properties and their planning status. Thirdly, I am not an economic forecaster competent to provide reliable predictions as [to] the future performance of different segments of the Irish property market. In my original report I illustrated the volatility of development values in my Appendix 6. Just as development values have collapsed there is no logical reason why they should not recover. The main unknown is as to timing which as I have said I am not qualified to opine. However, if I am given forecasts for the future recovery of the relevant housing market together with a clearer insight into the properties themselves I should be able to estimate the impact this is likely to have on the development opportunities and the geared way in which their value is likely to increase. I am prepared to endeavour to obtain any economic forecasts on which a further supplemental report could be based (incorporating the appropriate schedule).

6. I fully anticipate that such an exercise of the individual properties will corroborate the underlying concept of the analysis at Appendix 6 of my original report.”

29. In my view, the schedule referred to by Mr Adams-Cairns could not possibly fill in the gap identified by Judge Pelling. It could not demonstrate that the present value of the Irish Properties equals or exceeds the full amount of the debt. It could only demonstrate that any forecasted recovery in the relevant housing market over a future period is likely to bring about a “geared” increase in value of the Irish Properties over the same period, thereby (as Mr Adams-Cairns himself puts it) corroborating the concept underlying the analysis at Appendix 6 to his original report. As I explained above, the analysis at Appendix 6 is that the value of a development site could increase over a future period by 2000% if house prices were to increase over the same period by 15%.

Hearing before Chief Registrar Baister

30. At a hearing of the bankruptcy petition, before Chief Registrar Baister on 23rd June 2014, NALM applied for a bankruptcy order, and for the s.375 application to be dismissed; and Mr Cahillane applied for the petition to be adjourned pending the hearing of his s.375 application.

31. In support of the application for the petition to be adjourned, counsel for Mr Cahillane referred to paragraph 18 of Judge Pelling’s judgment, and then to Mr Adams-Cairns’ second witness statement as saying (and I quote from the transcript) ““I can produce a report and, in my view, it will show that [NALM] itself is fully secured taking into account the values of the development properties””. Counsel for NALM clearly understood this to be a claim that the report would show that NALM was fully secured taking into account the present value of the development properties. I say this because counsel for NALM said (and I quote) “What the debtor appears now to be saying is that he could come up with a report that would say that the present value of the equity was not the 6 million-odd attributed to them by the creditor but the 50 million-odd which is the [amount due] under the loans…The contention is just implausible and the debtor has had plenty of time to prepare a report…and has not done so”. Counsel for Mr Cahillane did not say that this was a misunderstanding, in that the report would only address future, not present, values. On the contrary, counsel for Mr Cahillane said (and I quote) “all we are asking here is time to put in the material the judge said he would like to have seen.” In these circumstances, it appears to me that the Registrar was being told that Mr Adams-Cairns could fill in the gap identified by Judge Pelling by demonstrating that debt was fully covered by the present values of the Irish Properties.

32. I now set out the material parts of the Registrar’s judgment:

“4. [Mr Cahillane’s] valuer did not…as I understand it, have full access, whether because it was refused or otherwise makes no matter for the moment, to the relevant Irish properties. The result, it is said, is that the learned judge did not have before him the true picture of the potential value of the assets in respect of which [NALM] holds security.

5. I am not entirely convinced of that, but [counsel for Mr Cahillane] says that it is not just a matter of valuing individual properties, it is a matter of valuing them in the context of economic forecasts, the effect of which could be to increase considerably the value of the portfolio beyond the value of the individual properties. Furthermore, she relies on rumour (and I will put it no higher than that) that in fact [NALM] intends to sell its asset base. She points out that, if that is so, sooner or later one is likely to know the true value of the underlying assets rather than rely on valuations.

6. [Counsel for NALM] has, understandably, got no fixed instructions on that, but refers, equally understandably, to the fact that her clients have been trying to sell assets for a considerable time and have not succeeded in doing so.

7. One of the things that makes me twitchy, if I may put it that way, about [NALM]’s approach to today is its unwillingness to pin its valuations to the mast by simply saying that it will waive its security, or waive its security beyond a certain sum, which leads me to a suspicion that there may be something in what [counsel] argues on behalf of Mr Cahillane; so that, if he is able to put in the further evidence he now wishes to, he may well be given the chance to upset the findings of the registrar and the judge on appeal.

8. It seems to me that the consequences for Mr Cahillane in terms of prejudice, compared to the relatively small amount of prejudice to [NALM] from an interruption while this application is dealt with, favour giving Mr Cahillane the benefit if the doubt. For these reasons I will allow [Mr Cahillane]’s application to go forward.”

33. I confess that it is not entirely clear to me what the Registrar meant, at paragraph 5 of his judgment, about “valuing them [that is, the properties] in the context of economic forecasts, the effect of which could be to increase considerably the value of the portfolio beyond the value of the individual properties”. There is no question of the Irish Properties having an enhanced value as a portfolio.

34. In any event, the Registrar gave directions for the parties to file and serve evidence for the purposes of the s.375 application (Mr Cahillane to do so by 18th August 2014), adjourned the bankruptcy petition generally with liberty to apply, and gave NALM permission to appeal in respect of both orders.

Disclosure application

35. On 7th August 2014 Mr Cahillane applied for an extension of time in which to file and serve evidence in support of his s.375 application. He also applied for specific disclosure against NALM and AIB of:

(i) all valuations relating to the portfolio of Irish Properties, including valuations created when the loans were made and/or when AIB transferred the Security to NALM;

(ii) all documents (including economic forecasts) relating to the calculation of long-term economic value of the portfolio;

(iii) the assignment between AIB and NAMA dated 20th December 2010.

This appeal

36. NALM contends that Chief Registrar Baister’s refusal to make a bankruptcy order was a wholly wrong exercise of his discretion, on four grounds. First, that the s.375 application is bound to fail, either because s.375 does not confer jurisdiction to review, vary or rescind an appellate order, or because the application is hopeless and doomed to fail on the merits. Secondly, that the Registrar ought not to have taken into account the fact that NALM had not released part of its security. Thirdly, that the Registrar erred in concluding that Mr Cahillane had not had an adequate opportunity to obtain expert evidence. Fourthly, that the Registrar placed too much emphasis on the balance of prejudice. I will consider these grounds in turn.

37. I will first consider whether the s.375(1) application is bound to fail on jurisdiction grounds.

38. NALM invited me to apply the interpretation of s.375(1) favoured by Briggs J. in Appleyard v Wewelwala [2012] EWHC 3302 (Ch.). In that case, the trustee in bankruptcy had been appointed, and had incurred expenses, pursuant to a bankruptcy order which was subsequently overturned on appeal. The trustee applied to the court for payment of his expenses. Briggs J. considered that s.375(1) did not give the court jurisdiction to review the appellate order. At paragraph 16 of his judgment he said:

“In my judgment s.375(1) contemplates review, at first instance, of the exercise of jurisdiction at first instance. It would be surprising if it contemplated review, at first instance, of the exercise of appellate jurisdiction since, on its language, it would then permit a Bankruptcy Registrar (for instance) to review the decision of a High Court judge on appeal.”

This is clearly an obiter dictum, because Briggs J decided that he was not being asked to review the appellate order at all, and that he had jurisdiction to hear the application as part of the inherent jurisdiction of the court.

39. Briggs J’s interpretation of s.375(1) has very recently been considered by Mr David Donaldson QC sitting as a Deputy High Court judge in Sands v Layne [2014] EWHC 3665 (Ch). At paragraphs 14 and 15 of his judgment he cited the above passage from Briggs J’s judgment and then said this:

“14….Any element of surprise which that might occasion would at least in my case be significantly be tempered by the fact that such a situation would appear to exist in the case of an application to set aside a bankruptcy order under s.282(1) of the Act. In any event, any sense of institutional discomfort can be overcome by a practice of adjourning the application to a judge of the appropriate court or level, as indeed happened in Appleyard. More fundamentally, I find myself unable to agree with the suggestion that such a result could be consistent with the language of s.375(1), which I read as contemplating review by a court only of an order made by it. The real question is rather to my mind whether the sub-section empowers an appellate court (in casu the High Court) to revisit an order which was made for the first time by it on appeal, which might include a positive order against the bankrupt refused by the county court or registrar as well as one setting aside an order made below- I can see no basis in the language of s.375(1) for distinguishing between these two possible situations.

15. In the context of s.375 as a whole and its distinction between first instance and appellate review, it appears to me to be at least fairly arguable that subsection (1) should be interpreted as restricted to the review by first instance courts of decisions made by them. Such a reading is however capable of producing results which some may regard as anomalous. In these circumstances I confess that my view on this point of statutory construction has wavered, and continues to do so. Ultimately, however, I am unable to say that in its result the decision of Briggs J. was clearly wrong in its result [sic], and it is therefore appropriate that I should follow and apply it.”

40. I respectfully agree with Mr Donaldson’s misgivings about Briggs J’s interpretation of s.375(1). In particular, I agree that it is liable to produce anomalous results: assuming that circumstances have changed or fresh evidence has emerged since the time of the original order, such that in principle the order ought no longer to remain in force, I do not see why the fact that the order was made on appeal should prevent it from being varied or rescinded.

41. Moreover, I would go further than Mr Donaldson and, with respect to Briggs J, say that on balance I consider his interpretation of s.375(1) to be wrong. I would not go so far as to say I am satisfied that it is wrong. But this does not matter given that, as mentioned above, his interpretation is obiter.

42. By contrast, Mr Donaldson’s adoption of Briggs J’s interpretation is ratio and not obiter. However, Mr Donaldson appears to have considered, wrongly in my respectful view, that Briggs J’s interpretation was not obiter; this is why he described it as a decision, and why he considered that he should follow and apply it unless he thought it was clearly wrong in its result. In these circumstances, I do not consider that judicial comity requires me to follow the decision of Mr Donaldson either.

43. Accordingly, I consider that I am free to follow my own view as to the correct interpretation. I hold that s.375(1) does give the court jurisdiction to review, vary or rescind the appellate orders of HH Judge Pelling QC.

44. I next consider the merits of the s.375(1) application.

45. Mr Cahillane points out that NALM is not an ordinary bank: it is a statutory body with specific functions and objectives, and the statute pursuant to which it was created includes express provisions about the valuation methodology to be adopted. It is expected to take a long-term view of the value of the Irish Properties as a matter of policy.

46. Mr Cahillane contends that there is therefore an important issue as to whether, looking at NALM’s position in the context of its functions and objectives, the value of the Irish Properties is in reality significantly higher than the value put on them by NALM and, indeed, whether their value, viewed in the proper context, exceeds the value of the debt.

47. I do not agree with this contention. A debtor applying to set aside a statutory demand under rule 6.5(4)(c) must prove on the balance of probabilities that the value of the security, determined on a forced sale basis as at the time of the statutory demand or possibly at the time of a hearing, equals or exceeds the full amount of the debt: see Platts v Western Trust & Savings Ltd [1993] BPIR 339 at pp. 345B-c and 347G-H. Rule 6.5(4)(c) so requires, in my view, irrespective of the identity, status, functions, objectives and policies of the creditor.

48. Mr Cahillane also contends that the basis on which NALM values the Irish Properties at only Euros 6 million is “obscure”. This may be so, but in my view, that is irrelevant, given that it is for Mr Cahillane to prove that the debt is fully covered, not for NALM to prove that it is not.

49. In the light of the requirements imposed on Mr Cahillane by rule 6.5(4)(c), I have no doubt that the s.375(1) application is bound to fail on the merits. This is because the further evidence sought to be adduced, consisting of a further supplemental report by Mr Adams-Cairns together with the valuations sought by the disclosure application, could not possibly enable Mr Cahillane to prove on the balance of probabilities that the present value of the Irish Properties equals or exceeds the full amount of the debt.

50. As for the proposed further supplemental report, it will be recalled that in his second witness statement Mr Adams-Cairns claimed that he could assist with preparation of a schedule in order to fill in the gap identified by Judge Pelling. However, as I explained above, the schedule which the Judge had in mind is one referring to increases in value occurring in a period ending on or before the date on which the statutory demand was served or the date of a hearing, not increases in value occurring afterwards, because future increases in value could not possibly be relied on to demonstrate that the sum outstanding was covered by the present value of the Security. And as I also explained above, Mr Adams-Cairns is not claiming to be able to produce a schedule to demonstrate that the present value of the Irish Properties equals or exceeds the full amount of the debt. Instead, he is claiming to be able to produce a schedule to demonstrate that any recovery in the relevant housing market over a future period (evidence for which would perhaps be derived from one or more economic forecasts obtained pursuant to the disclosure application) is likely to bring about a “geared” increase in value of the Irish Properties over the same future period. Thus, while the proposed further supplemental report may well demonstrate that the Irish Properties (so far as they are development sites) could increase substantially in value over a future period, it certainly would not demonstrate that the present value of the Irish Properties equals or exceeds the full amount of the debt.

51. As for the valuations, it appears that NALM and AIB created valuations between 1999 and 2009 when the loans were made, and again in November 2009 for the purposes of the transfer of the Security by AIB to NALM. But those valuations cannot possibly demonstrate that the present value (whether determined at the time of service of the statutory demand, in May 2013, or at the time of a later hearing) of the Irish Properties equals or exceeds the full amount of the debt. This is because there is no evidence that the present value equals or exceeds the value when the loans were made, or in November 2009. On the contrary, as Mr Adams-Cairns noted in his original report, as at September 2013 average residential property prices were at pre-2000 levels; and the value of the Irish Properties fell by at least 20% between November 2009 and September 2013, significantly more in the case of the development properties.

52. In conclusion, in my opinion, the further evidence sought to be adduced cannot realistically or arguably support a contention that the present value of the Security equalled or exceeded the full amount of the debt, and for this reason I respectfully consider that Mr Chief Registrar Baister’s suspicion, that if Mr Cahillane can put in that further evidence then he may be able to fill in the gap identified by Judge Pelling, is unfounded.

53. I shall allow NALM’s appeal on this ground alone. However, for completeness I will deal briefly with the other grounds.

54. As for the second ground, in my view the Registrar was wrong to take into account the fact that NALM had not released part of its security. NALM was perfectly entitled to decide not to release part of its security. The Registrar was not entitled to draw an adverse inference against NALM. Nor does NALM’s decision provide any support for the Registrar’s suspicion (which in any event, as mentioned above, is unfounded in my view) that, if Mr Cahillane is able to put in the further evidence, then he may be able to upset the findings of Registrar Jones and of HH Judge Pelling.

55. As for the third ground, I do not think that the Registrar concluded that Mr Cahillane had not had an adequate opportunity to obtain expert evidence.

56. As for the fourth ground, if the further evidence had been realistically capable of filling in the gap identified by Judge Pelling, then in my view the Registrar would have been justified in giving Mr Cahillane an opportunity to adduce it. On that basis, and considering this as a separate ground, I do not agree that the Registrar placed too much emphasis on the balance of prejudice.

The disclosure application

57. In these circumstances, the disclosure application must fail. The disclosure was required to enable Mr Adams-Cairns to complete his proposed further supplemental report, but that report cannot possibly fill in the gap identified by Judge Pelling.

Conclusion

58. I therefore allow the appeal, dismiss the s. 375(1) and disclosure applications, and make the bankruptcy order.