THE HIGH COURT

[2021] IEHC 122

[2012 No. 11977 P]

BETWEEN

TOM KAVANAGH AND ENNIS PROPERTY FINANCE DAC

PLAINTIFFS

AND

PATRICK MCLAUGHLIN AND ROSEANN MCLAUGHLIN

DEFENDANTS

AND

THE HIGH COURT

BANKRUPTCY

[No. 4573 P]

IN THE MATTER OF A PETITON FOR ADJUDICATION OF BANKRUPTCY OF PATRICK MCLAUGHLIN

BETWEEN

ENNIS PROPERTY FINANCE DAC

PETITIONER

AND

PATRICK MCLAUGHLIN

RESPONDENT

AND

THE HIGH COURT

BANKRUPTCY

[No. 4574 P]

IN THE MATTER OF A PETITON FOR ADJUDICATION OF BANKRUPTCY OF ROSEANN MCLAUGHLIN

BETWEEN

ENNIS PROPERTY FINANCE DAC

PETITIONER

AND

ROSEANN MCLAUGHLIN

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on Friday the 5th day of March, 2021

1. Seven related matters were listed before the court: a motion in the original debt proceedings substituting the name of the new plaintiff as assignee; motions to substitute the name of the new intended petitioner Pepper Finance Corporation (Ireland) DAC in the bankruptcy matters; applications by the respondents to the bankruptcy proceedings to dismiss the bankruptcy summonses and finally the bankruptcy petitions themselves.

The 2012 debt proceedings

2. On 30th September, 2013 the High Court (Birmingham J.) granted judgment against the debtors in the amount of €4,022,734.92 on foot of loan agreements with Bank of Scotland (Ireland) Ltd. which were subsequently transferred to Bank of Scotland plc (see *Kavanagh v. McLaughlin* [2013] IEHC 453 (Unreported, High Court, Birmingham J., 30th September, 2013)).

3. The matter was then appealed to the Supreme Court which dismissed the appeal (*Kavanagh v. McLaughlin* [2015] IESC 27, [2015] 3 I.R. 555). The judgment of Clarke J.

noted that "on the morning of the appeal when the Court assembled, counsel (who had not previously been instructed in the case) appeared on behalf of the McLaughlins and indicated that he felt in some difficulty, by reason of the lateness of his instructions in the case, in being able to adequately present his clients' case", (para. 6).

4. The court rejected the suggestion that the matter should be adjourned. The key reason for doing so was articulated by Clarke J. as being that, "[w]hile a party is more than free to change its legal representation, it cannot do so in circumstances which affect the run of the case or, at least, cannot do so without taking a significant risk that the court will not be sympathetic to an adjournment where that course of action would sufficiently affect the orderly conduct of the court's business (to the detriment of other litigants) and might also prejudice the interests of other parties to the case" (para. 7).

The 2016 counter-proceedings

5. The loan facilities were transferred by Bank of Scotland to Ennis Property Finance and the debtors brought counter-proceedings against the latter, *McLaughlin v. Ennis Property Finance Ltd.* [2016 No. 9951P]. Those proceedings sought 93 separate reliefs of a miscellaneous nature. There are currently two motions in the Chancery List in those proceedings: one by the plaintiffs for judgment in default of defence, and one by the defendants to dismiss the proceedings.

6. On 11th June, 2018 Ennis was substituted into the judgment proceedings in place of Bank of Scotland. Ennis made statutory demands for the outstanding sum of €2,006,898.01 on 7th August, 2018. Those demands were not met and bankruptcy summonses were issued on 19th November, 2018.

2019 bankruptcy proceedings

7. The debtors were alleged to have committed an act of bankruptcy by failing to pay on foot of the bankruptcy summonses and bankruptcy petitions were presented on 6th March, 2019. A first hearing date was fixed on 18th November, 2019.

The first hearing date

8. History then repeated itself in that a new solicitor appeared for the debtors on the hearing date and sought an adjournment. Pilkington J. granted that adjournment with costs to the petitioner. A second hearing date was fixed on 29th November, 2019.

The second hearing date

9. On the latter date the matter was adjourned again because the debtors' personal insolvency practitioner asked for more time. The adjournment was made peremptory against the debtors. A first application for a protective certificate was then made, but was refused because it was submitted to the court on behalf of the petitioner that the debtors were admitting the debt in the personal insolvency process, but denying it in the 2016 proceedings.

10. The debtors then sought to rectify that by way of a letter from Lyons Solicitors on 12th December, 2019 that the proceedings "will immediately be discontinued" and confirmed that notices to that effect would be lodged with the Central Office forthwith. A letter from

the personal insolvency practitioner to the ISI on 12th December, 2019 also stated that any and all such proceedings would immediately be discontinued. That unfortunately never happened.

11. On 12th December, 2019, the respondents swore a statutory declaration verifying the prescribed financial statements which in turn acknowledged the debt in full.

The third hearing date

12. A third hearing date was fixed for 13th December, 2019, but ten minutes before the petition was due to be heard by the High Court, a protective certificate was granted by Judge Mary Enright in Dublin Circuit Court. That was on the basis of the undertaking to discontinue the 2016 proceedings. On that basis the petition was adjourned.

The fourth hearing date

13. On 1st February, 2021, the matter appeared in the mention list and I fixed a fourth hearing date to take place on 11th February, 2021, for the petitions and all related matters. Ms. McLaughlin did not appear, but Mr. McLaughlin did on that occasion and suggested that the matter would take three days. Having heard both sides I fixed the matter for a one-day hearing to include all seven applications and also fixed time for a replying affidavit and submissions.

14. On 11th February, 2021, the matter was duly heard, and I wish to record my gratitude to Mr. Niall Ó hUiginn B.L. for Pepper Finance Corporation, for his assistance. There was no appearance on behalf of Ms. McLaughlin. I am also grateful to Ms. Béhinn Murphy B.L. who appeared as a courtesy to the court indicating that her solicitor had received instructions from Mr. McLaughlin, but hadn't come on record due to not getting the file from the previous solicitors. Having dealt with the substitution motions, I granted a further indulgence by not finalising matters but by leaving the remaining issues until after the luncheon adjournment to give a final opportunity to engage with the court. Mr. McLaughlin himself then joined the remote hearing in the afternoon not having done so in the morning and not having furnished the necessary undertakings until only minutes before eventually participating. Having heard submissions, I informed the parties of the orders being made, but I now set out written reasons for so doing in order to assist the parties.

Adjournment proposal

15. At 11 a.m. on the fourth hearing date, the debtors did not appear, but as noted above counsel appeared as a courtesy to the court and suggested that the matter should be adjourned further. I did not accede to that suggestion for a number of reasons which I can summarise as follows:

    (i). the debtors themselves had not at that point appeared for the hearing;

    (ii). Ms. McLaughlin had not made any sufficient attempt to instruct solicitors;

    (iii). Mr. McLaughlin waited two weeks from meeting his proposed solicitors on 20th January, 2021 to instructing them to act for him, which he only did on 2nd

February, 2021 one day after I fixed the hearing date and only nine days before the hearing;

(iv). he purported not to know what was listed for hearing despite this having been explained to him on 1st February, 2021;

(v). the debtors had already had considerable indulgence from the court and the petitions were now on their fourth hearing date (three having been adjourned previously on their application, one peremptorily);

(vi). the debtors had already been allowed the facility of going through the personal insolvency process;

(vii). they went through that process on the basis of a letter that they would withdraw the 2016 proceedings which was not honoured;

(viii). they acknowledged the debt in the personal insolvency process yet were seeking to deny it in the 2016 proceedings and in the application to dismiss the summonses;

(ix). there had been a pattern of new legal teams at the last minute - in the Supreme Court, at the first hearing date, and now at the fourth hearing date;

(x). apart from changes of legal team, there was also a pattern of upending hearing dates at the last minute for other reasons; and

(xi). insufficient evidence had been put forward to clarify that the debtors actually had a point of substance to make and it had not been established as to what purpose an adjournment would serve other than the generic purpose of obtaining the file and having a consultation and taking further instructions.

16. In all of those circumstances and having due regard to the judgment of Clarke J. in *Kavanagh v. McLaughlin* referred to above, I considered that the balance of justice favoured proceeding with the matter.

Motions regarding a change of moving party and leave to issue execution

17. I granted the motion in the 2012 proceedings to substitute Pepper Finance as a plaintiff under O. 17, r. 4 RSC and granted leave to issue execution under O. 42, r. 24 and dispensed with the requirement to re-serve the proceedings on the basis that grounds had been made out and such an order was just and appropriate in all the circumstances. Mr. McLaughlin had not seen fit to provide the necessary undertakings to enable him to join the remote hearing at the time that the matter was dealt with, but when he did join the call he did not put forward any sufficient reason as to why that matter should be revisited.

18. Mr. McLaughlin submitted that a court has the jurisdiction to set aside any *ex parte* order on application made by the other party subsequently and, of course, he is absolutely correct about that. But unfortunately for him the substitution motions were not sought *ex parte*. They were sought by motion on notice which was served on him. So the option of

making some further application to set them aside at a later stage can't arise on the basis simply of an allegation that such orders would normally be made *ex parte.*

19. In addition, on the basis of the evidence and submissions made, I granted the motions for Pepper to be substituted as petitioners in the bankruptcy proceedings.

Motions to dismiss

20. Turning then to the motions to dismiss the bankruptcy summons, Mr. McLaughlin made lengthy and, I'm afraid, largely irrelevant submissions stretching back over multiple aspects of the history of the proceedings including the hearing in the Supreme Court; for example, seeking an investigation into alleged illegality in previous court proceedings and making allegations of money laundering. He tried to seek time to adduce further witnesses and documentation which was very much consistent with previous attempts to subvert or at least not to recognise hearing dates. Counsel for the petitioner eventually suggested that the court should rule on whether he was entitled to reopen the question of the debt. Having heard the parties, I decided that he was not entitled to do so. Having sworn to that debt it would be an abuse of process to allow him to deny it now.

21. He claimed that he had to do so because there was a Supreme Court order. But he said he had a motion pending to seek to have the matter set aside, which turned out to be a reference to the current motion to dismiss the bankruptcy summonses. The logic of his position is that he can derail the bankruptcy by invoking the personal insolvency process in which he admits the debt, but can rely on the motion in the bankruptcy to argue that the debt does not exist. That is a circular heads-I-win-tails-you-lose process. The inconvenient background problem is that the Supreme Court, upholding Birmingham J., has found him liable for the debt. That isn't some technicality that can be scrubbed from history by the present motion.

22. He also resisted attempts to have him use the time economically, and repeatedly demanded three days for the hearing. However, as noted above he had asked for three days when the date was fixed, but having heard submissions I decided that the matter should be listed for one day. Unfortunately, everyone in every case is potentially liable to have to live within reasonable periods for oral submissions as may be fixed by the court. In fact, more than one normal court day was allocated because the matter was dealt with on 11th February, 2021 between 11 a.m. and 12.55 p.m. and then again between 1.30 p.m. and 4.30 p.m.

23. While Mr. McLaughlin pleaded for more time to the last, I don't think it would be that inaccurate to say that he spent most of the time that he did have reading out documents that were already before the court (despite me telling him this wasn't necessary) or making submissions on irrelevant matters. Unfortunately, one is left with the impression that there has been overall a strategy to delay and obstruct the orderly processing of this matter, notwithstanding the affording of multiple indulgences.

24. The question on the motions to dismiss the summonses is whether an issue arises for trial, but unfortunately no such issue has been made out. Of particular note in that

regard is the admission of the debt and, as contended for at para. 25 of Pepper's submissions, it is not open to the respondents to deny that liability here. Furthermore, having undertaken through solicitors to discontinue the 2016 proceedings in order to obtain an order from the Circuit Court, it is not now open to the debtors to pray in aid those proceedings in order to seek a dismissal of the bankruptcy summonses now, as correctly submitted at para. 29 of Mr. Ó hUiginn's submissions. No valid point for a potential trial was identified. Again there is a reinforcing additional factor in the case of Ms. McLaughlin that she did not appear at all in this matter. In all the circumstances I dismissed both motions to set aside the summonses.

Petitions

25. Following further submissions I was satisfied that the criteria for the orders sought had been met and that the balance of justice favoured adjudicating the debtors bankrupt and consequently made that order.

Order

26. In summary, the orders made on 11th February, 2021 were as follows:

(i). in the plenary action I granted an order under O. 17, r. 4 RSC substituting Pepper Finance as a plaintiff and under O. 42, r. 24 allowing leave to issue execution pursuant to the order of the court of 16th October, 2013 and dispensing with any requirement to re-serve the proceedings;

(ii). I made no order as to costs on the motion in the plenary action;

(iii). in both bankruptcy matters, I made orders under O. 17, r. 4 RSC substituting Pepper as petitioner with no order as to costs;

(iv). I dismissed both respondents' motions to set aside the bankruptcy summonses; and

(v). I adjudicated both respondents bankrupt with costs to be costs in the bankruptcy.