THE HIGH COURT
BANKRUPTCY

[2021] IEHC 594
[Bankruptcy No. 5221]

IN THE MATTER OF JOSEPH LENNON, A BANKRUPT

JUDGMENT of Humphreys J. delivered on Thursday the 30th day of September, 2021

1. On 19th October, 2018 the debtor was served with a bankruptcy summons. A bankruptcy petition was presented on 31st January, 2019 and served on 23rd February, 2019.

2. The first return date was 1st April, 2019 when there was no appearance by the debtor. The matter was adjourned to afford him an opportunity to engage with the process, although strictly speaking that was not necessary because if it is proved that the petition is properly served and if the court considers s. 14 of the Bankruptcy Act 1988 on the first return date then it can proceed to finalise the matter without further ado. Adjudication is perfectly lawful in such circumstances and one is not obliged to give a debtor multiple opportunities to engage with the process. Service of the petition is the primary opportunity, and debtors need to avail of that with the required degree of urgency.

3. From the first return date the matter appeared before the High Court on eleven occasions prior to the making of the order of adjudication, so that illustrates quite a degree of further opportunity to participate. This included a specific direction on 13th May, 2019 pursuant to s. 14(2) of the 1988 Act for the debtor to furnish a statement of affairs and to obtain the services of a personal insolvency practitioner. That direction was not complied with.

4. The matter was further adjourned on 24th June, 2019 and again on 22nd July, 2019 on the application of intended solicitors for the debtor.

5. On 29th July, 2019, the matter was again adjourned on the basis of certain information to be provided to the Collector General and on 4th November, 2019 on the debtor's application, following which the court directed him to file an affidavit setting out what steps were being taken to sell a property to discharge the debt.

6. The debtor applied for a further adjournment on 25th November, 2019 and the matter was adjourned again on 9th December, 2019 to enable the debtor to provide responses to questions regarding a proposed sale of the property.

7. The debtor applied again for an adjournment on 27th January, 2020 and the court indicated that if responses requested were not received by the adjourned date, the petition would be likely to proceed.

8. The matter was adjourned again on 17th February, 2020 with a view to facilitating the debtor in entering into a binding contract for sale, but that did not happen.

9. On 18th May, 2020, the matter was adjourned due to the Covid-19 emergency.

10. On 9th September, 2020, the petitioning creditor wrote to the debtor's solicitors asking for an update and advising that the matter was likely to be heard in October 2020.

11. On 14th September, 2020, the debtor's solicitors wrote to say that due to the Covid-19 emergency, the property had not been sold.

12. Further updates were sought on 1st October, 2020, 9th October, 2020 and 21st October, 2020.

13. On 28th October, 2020 and 14th December, 2020, the petitioning creditor advised the debtor's solicitors that the petition would be listed on 11th January, 2021, and on the latter date the order of adjudication was made.

14. On 23rd February, 2021, the bankrupt brought a motion seeking to annul the order of adjudication. That was listed on 15th March, 2021 when there was no appearance by the bankrupt. In yet a further attempt at facilitation of the debtor, I adjourned the application to 12th April, 2021 peremptorily as against the bankrupt. On the latter date I allowed three weeks for an affidavit by the bankrupt and a further week for an affidavit by the petitioning creditor.

15. On 10th May, 2021, I listed the matter for hearing on 14th June, 2021 but on that date the parties suggested that the matter might benefit from written legal submissions. I provided directions for those and the matter was listed again on 19th July, 2021 and given a hearing date of 22nd July, 2021.

Grounds of application

16. The motion of 23rd February, 2021 seeks in essence:

    (i). an order pursuant to s. 85C(1)(b) of the 1988 Act annulling the adjudication; and

    (ii). an order extending time pursuant to s. 16(1) of the 1988 Act to show cause against the validity of the adjudication. This aspect was not particularly pressed on behalf of the bankrupt.

17. There appear to be essentially four grounds, the first two being substantive defences and the second two being more procedural in nature:

    (i). The bankrupt made a proposal to the petitioning creditor's solicitors involving the sale of his family home. Information was sought on that on 23rd July, 2019 although it took the debtor until February, 2020 to reply to that. He believed that the proceedings would be compromised and says that he is confident the property can be sold in the coming months (para. 14 of supplemental affidavit). The bankrupt considers that the asset can be sold imminently and the amount received will comfortably settle the debt, and says that he has other assets although they cannot be readily liquidated and consequently the impact of adjudication is "significant and far reaching".

(ii). It was submitted that there are alternatives to bankruptcy for the purposes of s. 14 of the 1988 Act. It was emphasised that the bankrupt was not present when adjudicated and was, therefore, unable to appraise the court of "the progress in respect of the sale of the subject property and in particular respond to the Petitioner's requests for the specific details it had sought".

(iii). The bankrupt's absence from the hearing seemed to be in itself relied on as an issue.

(iv). A claim of default by the bankrupt's previous solicitors was made. It is said that they did not furnish the bankrupt with documents or information (para. 4 of affidavit), did not tell him that further actions were required (para. 9), and did not reply to correspondence (para. 9). The bankrupt says that he still does not have full papers (para. 10).

Law in relation to the threshold for an application to show cause or annul a bankruptcy

18. In general terms the law should not provide an elephant trap for the unwary. It should assist rather than misdirect. Hence, if, for example, an administrative process allows for an internal appeal, an applicant should not be disadvantaged for availing of that and then challenging the ultimate outcome (either by judicial review, onward appeal, or any other procedure). In the bankruptcy context, a bankrupt should not be disadvantaged for making a show-cause application rather than appealing the original adjudication order. Sanfey and Holohan in *Bankruptcy Law and Practice*, 2nd ed. (Dublin, Round Hall, 2010) say at para. 2-98 that, "[a]s with any order of the court, the order of adjudication may be appealed to the Supreme Court [now the Court of Appeal]. This is an alternative to showing cause against the adjudication but one would have thought that showing cause would be a simpler and more expeditious method of disputing the adjudication. The dismissal of the show cause may also be appealed."

19. The most efficient outcome would therefore be that the primary mechanism to challenge an order for adjudication would be to apply to show cause within time and then to appeal any refusal of that order to the Court of Appeal. To require a party to appeal the order of adjudication itself and have a show-cause motion adjourned in the High Court in the meantime, which itself could be the subject of a second appeal in due course, would delay matters seriously without corresponding benefit, and would pointlessly double the work of the Court of Appeal in this area. The logical consequence is that, in line with the slightly laxer approach to *res judicata* in bankruptcy (as in family law), as underpinned by statute (s. 135 of the 1988 Act), a show-cause application can legitimately encompass the revisiting of any matter that could have been raised on an appeal against the original order of adjudication.

20. The threshold, however, becomes significantly higher if, as here, one allows time to expire and then seeks to extend time to show cause, or seeks to annul the bankruptcy under s. 85C of the 1988 Act, a procedure to which a time limit does not apply. As Fennelly J. said in *Gill v. O'Reilly & Co. Ltd*. [2003] IESC 6, [2003] 1 I.R. 434 at 441,

"[t]he machinery of bankruptcy … cannot be undone without extremely compelling reasons" (see also *In Re Dennis* [2021] IECA 24, [2021] 2 JIC 0301 (Unreported, Court of Appeal, Costello J., (Murray and Binchy JJ. concurring), 3rd February, 2021), *SFS Markets Ltd. v. Rice* [2015] IEHC 42, [2015] 1 JIC 1609 (Unreported, High Court, Costello J., 16th January, 2015), *In Re Gorham* [1924] 2 I.R. 46). For the avoidance of doubt, the "extremely compelling reasons" test applies if one hasn't operated the normal procedures in a timely manner, or if one is seeking to set aside an order outside the normal process (such as under s. 85C). It is not the threshold for seeking to show cause within time.

21. I turn now to the application of the law to the defences alleged here as being grounds for the setting aside of the order of adjudication. In essence the defences break down into two related "substantive" defences regarding compromise and alternatives to bankruptcy, and two "procedural" defences regarding being absent from the hearing and default by solicitors.

Offer of compromise

22. As regards the possible sale of the bankrupt's house, he has had almost three years to sell it since the bankruptcy summons was served. His proposals or hopes are well short of the requirement for exceptional circumstances warranting an annulment of the bankruptcy. Proposals and similar good intentions will apply in a vast number of cases, and, in themselves, don't meet the necessary threshold.

Section 14 of the 1988 Act and alternatives to adjudication

23. There is no analogy here with *FCR Media Ltd. v. Farrell* [2014] IEHC 252, [2014] 5 JIC 1301 (Unreported, High Court, McGovern J., 13th May, 2014), where there had been an inadvertent failure to have regard to s. 14 of the 1988 Act. The court at the time of granting the order of adjudication in the present case had regard to s. 14. The submission was made that the court would have had more material under s. 14 had the debtor been in attendance, so would have had more to work with. That does not amount to an exceptional or compelling reason and indeed would apply in a vast number of cases where a debtor having been adjudicated could think of further matters for the court to consider. Indeed more generally, any unsuccessful litigant (represented or otherwise) can potentially think of new and better points once armed with an adverse decision. Appellants often try this approach in practice, although from a systemic point of view (or at least a trial court's point of view) it doesn't normally seem an appropriate procedure.

24. The bankrupt's position is not helped by the fact that the court made a direction on 13th May, 2019 requiring the filing of a statement of affairs and the engagement of a personal insolvency practitioner; a direction that was not complied with.

25. Section 11 being satisfied gives rise to a *prima facie* entitlement to an order of adjudication subject to consideration of s. 14 of the 1988 Act: see *ACC Loan Management Ltd. v. P*. [2016] IEHC 117, [2016] 1 JIC 1907 (Unreported, High Court, Baker J., 19th January, 2016), *Bank of Ireland v. Smyth* [2017] IEHC 5, [2017] 1 JIC 1601 (Unreported, High Court, Costello J., 16th January, 2017), *Gladney v. P. McG*. [2020] IEHC 152, [2020] 3 JIC 0205 (Unreported, High Court, Pilkington J., 2nd March, 2020).

26. As pointed out by Costello J. in *SFS Markets Ltd. v. Rice*, a debtor's own failure to adduce evidence of assets and liabilities does not deprive the court of its jurisdiction to make an order adjudicating the debtor a bankrupt (para. 18).

27. All of that said, in my view we go back to the point that the proposed sale of the property is not, at this stage, an adequate alternative. As noted above, the bankrupt has had nearly three years since the bankruptcy summons to arrange this, and a reasonable time has to be considered to have been afforded at some point. I think we are past that point here.

28. I can turn now to the procedural defences.

The bankrupt not being present at adjudication

29. The bankrupt was represented by solicitors, and his solicitors got notice of the date of the hearing at which the adjudication took place. If one hadn't been notified of an *inter partes* matter as required, that would be different, because an order made without fair procedures should just be set aside (*Serafin v. Malkiewicz* [2020] UKSC 23) (though bearing in mind that a party has an ongoing obligation to engage with proceedings, and lack of notice due to non-engagement is not unfair). But assuming notice, merely not being present for the making of an order, while perhaps unfortunate, does not in itself give rise to a right to set aside that order without some substantive basis being shown for a defence to the order. Unfortunately that substantive defence is lacking here.

Alleged default by solicitors

30. Default by previous solicitors is relatively easy to allege. We have not heard their side of the story of course. But even assuming there was some default on their part, which I am not deciding, that in itself is not enough. There must be some actual defence to the bankruptcy: see by analogy *Pepper Finance Corporation (Ireland) DAC v. McLaughlin (A Bankrupt)* [2021] IEHC 296 (Unreported, High Court, 5th May, 2021) at para. 12. Again the same point applies – the bankrupt hasn't shown an actual defence to the proceedings.

Order

31. Whether one considers the bankrupt's points as grounds for annulment or for extension of time I don't think they provide adequate, still less exceptional, grounds for an order revisiting the adjudication.

32. Accordingly, I will dismiss the bankrupt's motion.