



**THE COURT OF APPEAL
CIVIL**

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Neutral Citation No. [2023] IECA 141

Court of Appeal Record No. 2022/244

High Court Record No. 5049P

**Noonan J.
Pilkington J.
Butler J.**

**IN THE MATTER OF A PETITION FOR ADJUDICATION OF BANKRUPTCY
BY JOHN ATKINSON AND BRIDGET ATKINSON AGAINST NOREEN HYNES**

BETWEEN/

JOHN ATKINSON AND BRIDGET ATKINSON

Plaintiffs/Respondents

- AND -

NOREEN HYNES

Defendant / Appellant

JUDGMENT of Ms. Justice Pilkington delivered on the 9th day of June 2023

- 1.** This appeal arises from an adjudication of bankruptcy against the appellant by Sanfey J. on 10 October 2022.

2. Two identical bankruptcy petitions were issued by the respondents against Noreen Hynes (also ‘Ms Hynes’ or ‘the appellant’) and her estranged spouse Alan Hynes.
3. Both were adjudicated bankrupt on 10 October 2022. The *ex tempore* judgment records that immediately after adjudication, each made a separate application for a stay and both were refused.
4. Both then issued Notices of Appeal. On 13 January 2023, prior to the hearing of this appeal, Costello J. refused a further application for a stay, which had been sought by Ms Hynes in the Friday directions list. The issue of a stay is considered below.
5. Mr Hynes did not appear at the hearing of his appeal and Noonan J. delivered an *ex tempore* judgment dismissing it.
6. This judgment therefore deals solely with the appeal by Ms Hynes, who appeared as a litigant in person.
7. The procedural history leading to Ms. Hynes’ adjudication as a bankrupt is as follows.

Procedural History

8. By order of the High Court dated 23 day of June 2009 the respondents, in proceedings entitled “*John Atkinson and Bridget Atkinson Plaintiffs and Alan Hynes and Noreen Hynes Defendants*”, bearing record no. 2009/358S obtained judgment in default of appearance in the sum of €200,000 plus costs (‘the 2009 judgment’).

9. Thereafter Alan and Noreen Hynes issued a motion seeking an order pursuant to O.13, r.12 RSC to set aside the 2009 judgment. By Order of Quirke J. on 1 March 2010 the court directed that the 2009 judgment was to be stayed for a period of six weeks from that date *“on condition that the defendants do lodge in court to the credit of this action as in the lodgement schedule hereto the sum of €200,000 within six weeks from the date hereof”*. After giving directions for the exchange of pleadings in the principal action, the court also directed, at sub paragraph (iv) of its Order, that the stay would expire if the defendants failed to lodge the monies within this time limit.

10. No monies were paid by either party and accordingly the stay expired.

11. On 1 March 2021 (some 11 years later) the court granted leave to issue a Bankruptcy Summons against Noreen Hynes seeking the sum sought in the 2009 judgment, together with interest and costs¹.

12. Following the issue of the Bankruptcy Summons Ms Hynes, then legally represented, brought an application in the bankruptcy list seeking to set it aside.

13. Humphreys J. delivered judgment on 30 September 2021². In refusing her application, he pointed to the period of time that had passed since entry of the 2009 judgment and also the failure to comply with the terms of the Order of Quirke J., in particular the failure to make the payment necessary to secure a stay and possible resolution of the bankruptcy

¹ The rules governing the procedure for the issue and service of a bankruptcy summons are within RSC O.76 Part III and the bankruptcy petition within Part VI

² [2021] IEHC 598

proceedings. He rejected the application to re-litigate the proceedings which had led to the 2009 judgment and in doing so also rejected a submission by Ms Hynes that she was not a party to the underlying debt. He held that Ms Hynes had failed to satisfy him as to the existence of any bona fide defence as to why a bankruptcy summons should not issue. In circumstances where he found that the respondents had complied with the statutory requirements of the Bankruptcy Act 1988 in issuing and serving the summons, he directed that the bankruptcy petition should now proceed.

Bankruptcy Petition

14. The Bankruptcy Petition issued by the respondents against Ms Hynes on 8 June 2021 seeking the sum of €200,000, costs of €316.63 together with accrued interest of €95,634.97 less recovery by the Sheriff of €4,369.24.

15. This petition which travelled with a separate bankruptcy petition issued by the respondents against Mr. Hynes was adjourned on a total of eight separate occasions prior to the hearing in October 2022 – 18 October 2021, 29 November 2021, 13 December 2021, 20 December 2021, 21 March 2022, 20 June 2022, 4 July 2022 and 25 July 2022, comprising the entirety of a legal year.

The 1988 Act

16. The relevant statutory criteria that must be complied with in order to adjudicate an individual bankrupt are set out within ss. 11(1) & 14 (1) and (2) of the Bankruptcy Act 1988 (“the 1998 Act”) which state:

‘Presenting petition.

11.—(1) A creditor shall be entitled to present a petition for adjudication against a debtor if—

(a) the debt owing by the debtor to the petitioning creditor (or, if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to more than €20,000,

(b) the debt is a liquidated sum,

(c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition

Adjudication: creditor's petition.

14.— (1) Subject to subsection (2), where the petition is presented by a creditor, the Court shall, if satisfied that the requirements of section 11(1) have been complied with, by order adjudicate the debtor 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 any statement of affairs of the debtor 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'.

Judgment of Sanfey J.

17. Sanfey J identified the only question before him was “*whether or not I should give Mr. Hynes and Mrs. Hynes an opportunity to retrieve their position in circumstances where they say that money is likely to become available, which would enable them to pay off the petitioners’ debt.*” (page 13 of the transcript).

18. One of the circumstances, advanced by Ms Hynes, is her protracted litigation against the firm of Seamus Maguire & Co bearing record no 2013 No. 14299P (‘the Seamus Maguire & Co litigation’), which she anticipated would be resolved in her favour in terms that would ensure she could discharge her liability to the respondents. Sanfey J. had regard to this litigation and suggested that its ultimate resolution might not be as immediate or straight forward as Ms Hynes anticipated.

19. He also pointed to the fact that, as well as having regard to the debtors, the position of the petitioning creditors/respondents must also be considered. The court took account of the fact that the time between the issuing of the petition and the matter coming before the court was in excess of a year and that the court had extended considerable forbearance to both Mr and Ms Hynes with regard to the number of adjournments it had granted.

20. He also pointed to the fact that, upon an adjudication of bankruptcy, whilst assets of course vest in the Official Assignee (‘OA’), any outstanding litigation could be pursued as the OA sees fit, which could yield assets for a bankrupt’s estate. He stated (page 15 of the transcript);

‘While your assets, including any rights to litigation rest with the official assignee, you can rest assured that the official assignee will pursue any litigation which he

sees fit to pursue, or to continue the pursuit of any litigation which will yield assets for the estate. In the meantime, on the assumption that Mr and Ms Hynes co-operate with the official assignee you'll be out of bankruptcy in a year's time. And it seems to me that being adjudicated bankrupt in circumstances where you have no defence to the respective positions against you, may be the best thing that could happen. And in circumstances where I have petitioners who have debtors who have no defence to their claim. I don't think it's appropriate to extend the indulgence of the court any longer'.

21. The trial judge emphasised that no defence had been advanced to the primary aspect of the claim, namely whether there was any reason why s.11(1) of the 1988 Act had not been complied with. In his view, in such circumstances it was not appropriate to extend the indulgence of the court any further.

22. In considering the bankruptcy petition itself, the court was satisfied as to service, and also noted Ms Hynes' prior unsuccessful application to set aside the bankruptcy summons before Humphreys J. and that his judgment had not been appealed. Having carefully considered these matters the trial judge made an order that both Alan and Noreen Hynes be adjudicated bankrupt and awarded the costs to the petitioners.

Grounds of Appeal

23. Ms Hynes stated that she was seeking to appeal the judgments and Orders of both Sanfey and Humphreys JJ. She expressed her understanding that both could be considered within this appeal in what she described as a composite whole. The Court pointed out that this is not the case, as the time to appeal the judgment of Humphreys J. had long since expired

and that this appeal is solely one from the judgment of Sanfey J. Ms Hynes then proceeded on that basis.

24. Ms. Hynes' appeal was, as in the High Court, directed to why she should not be adjudicated bankrupt on the basis that a period of forbearance, adjournment or stay upon her adjudication would ensure that she would be in a position to discharge her indebtedness and remove any necessity for it.

25. She relied upon certain specific matters which she asserted had occurred after the delivery of Sanfey J.'s judgment, which he could not have considered and which would assist in her case that more time should be granted to enable her to discharge this indebtedness.

26. The appellant raised the following issues;

- (a) She confirmed she is a one third owner of a named property with two other family members. In providing details of it, she pointed out that it was a substantial property and that there was now "sale agreed" of the sale of her interest to a third party. This issue was not raised before Sanfey J.

The funds arising from that sale would, in her submission, put her in a position to discharge the totality of the debt sought by the respondents (now almost €300,000). In her supplemental submissions (received *de bene esse* by this court) at paragraph 17, the potential repayment figure appears less than the figure sought by the respondents within the bankruptcy.

One issue of concern is, taking Ms. Hynes's submission at face value, the fact that a contract for sale or some form of agreement appears to have taken place against the background of her adjudication as a bankrupt. Ms. Hynes confirmed that she had approached a solicitor to act in respect of the conveyance and that she is aware that executing any conveyance with regard to this property would of necessity involve the OA in respect of furnishing his consent to such a sale.

As matters stand Ms Hynes has been adjudicated bankrupt since October 2022. There does not, as yet, appear to have been any interaction with the OA. The role of the OA may be more central than Ms Hynes appears to envisage.

- (b) The appellant's second point, which links to her third point below, again refers to the Seamus Maguire & Co litigation. This matter was raised before Sanfey J. but she stated, in this appeal, that matters are now further advanced.

Whilst the trial judge indicated that he did not know if the matter was going to come to trial anytime soon, Ms. Hynes indicated to this court that a Notice of Trial has now been served. I think it is fair to say that this case has had a series of difficulties, one of which is that Ms Hynes has sought a period of time in order to allow her to engage new solicitors. That process appears to be ongoing. However the role of the OA with regard to this litigation is also unknown.

Throughout this and other submissions, but particularly with regard to this litigation, Ms. Hynes expressed on a number of occasions and sometimes in strong and colourful language the degree to which, in her opinion, her issues with regard

to this litigation (from its inception) had not always been properly considered by the courts. She stated that she feels downtrodden by the entire process. This litigation is certainly protracted.

(c) Again, with regard to the Seamus Maguire & Co litigation, Ms Hynes also drew attention to a specific document or items of data (identified by her) she was seeking, which she claims has been wrongfully withheld and upon which she is now seeking assistance from the Data Protection Commissioner ('DPC'). In her view if it was furnished it would considerably assist the passage of this litigation.

27. On the basis of the matters set out above, Ms Hynes seeks an order overturning the Order of bankruptcy in its entirety. Separately she also appears to suggest that any order, if not overturned, should certainly not, using her word, be "*activated*" prior to the resolution of the Seamus Maguire & Co litigation.

28. Throughout her submissions to this court Ms. Hynes clearly stated that she does not wish to be adjudicated bankrupt. She considers that there was no proper basis for that adjudication and seeks either by way of a stay or possibly some form of adjournment to allow the other matters set out above to be resolved so she can discharge her debt. At para. 3 of her supplemental submissions she states:

"Had the Appellant been given due access to fair proceedings and the right to be heard in her 2013 case, involving defendant solicitor-officers of the Court, there would be no reason for bankruptcy proceedings."

- 29.** The respondents submit;
- (a) no appeal has been taken with the trial judge's finding that s.11(1) of the 1988 Act has been complied with. Accordingly, they submit that Ms Hynes was properly adjudicated bankrupt,
 - (b) that Sanfey J. correctly exercised his discretion in refusing a stay, as did Costello J. on 13 January 2023.
 - (c) with regard to the matters that Ms Hynes considers should take precedence to any bankruptcy adjudication, counsel pointed out that the sale agreed in respect of the property in which she has an interest is in circumstances where the OA does not appear to be a party.
 - (d) counsel also points to certain apparent difficulties in the progress and conduct of the 2013 Seamus Maguire & Co litigation and that the respondents, not a party to that litigation, have yet to obtain payment on foot of a 2009 judgment.
 - (e) complaint is made that certain matters aired in this appeal were not ventilated before Sanfey J. and in particular highlights the appellant's submission with regard to her difficulty in accessing certain items of personal data and the potential role of the DPC.

Adjudication as a bankrupt

- 30.** Of central importance is the finding of Sanfey J. that the respondents have satisfied s. 11(1) and s.14(1) of the 1988 Act. No arguments were advanced to the contrary and I agree

with his conclusion. These comprise the essential proofs that must be satisfied for any adjudication in bankruptcy. There is no appeal in respect of these findings so the adjudication of Ms Hynes as a bankrupt must stand.

31. With regard to her submissions before this court, Ms Hynes accepts that upon adjudication as a bankrupt the OA has a role in dealing with her affairs. However what she perhaps fails to appreciate is that upon adjudication her assets vest in the OA, as set out clearly by the trial judge and as quoted at paragraph 20 above. The role of the OA will be central in the administration of her estate.

32. The remaining issue, advanced by Ms Hynes is, notwithstanding her adjudication, whether she is entitled to some form of adjournment, stay, or forbearance in respect of that Order.

An application to stay or adjourn an adjudication of bankruptcy

33. I appreciate that Ms. Hynes' submission to this court appears, in seeking to resist any adjudication as a bankrupt, to make her grounds for doing so as broad as possible to include, as well as a stay, some form of forbearance or possible adjournment by the court.

34. In my view a possible adjournment or the exercise by this court of some form of forbearance does not, in itself, assist Ms Hynes. Her adjudication as a bankrupt dates from October 2022 and has been upheld by this court. In such circumstances where her appeal against adjudication has been unsuccessful, it appears that her application must, of necessity, involve an application for a stay of her adjudication. It cannot just be an adjournment of this court's judgment, which in itself would of course be highly unusual. Her application in

seeking some form of order that prevents her adjudication in bankruptcy can only be construed as an application for a stay upon her adjudication as a bankrupt.

35. The position with regard to a stay (within the context of High Court bankruptcy proceedings) is set out within the judgment of Baker J. in *ACC Loan Management Limited v. P³* (*'ACC Loan Management'*) which was in turn referred to by Costello J. in a subsequent decision of *Bank of Ireland v. Smyth⁴*. Both consider the criteria for a stay and in particular the initial question as to whether the moving party has established a fair or arguable case.⁵

36. Costello J. endorses the finding of Baker J. in *ACC Loan Management*, where the court considered that, in establishing a fair and arguable case, it should initially have regard to the provisions of s.14(1) of the 1988 Act. That section is quoted above but provides that if the Court is satisfied that the requirements of s.11(1) have been complied with, then it should adjudicate the debtor bankrupt. Arising from this, Baker J. states:-

“This creates, in my view, a prima facie entitlement on the part of a petitioning creditor that the Adjudication Order be made, and s.14(2) must be seen as an exception.”

37. In *Bank of Ireland v. Smyth* Costello J., endorsing the approach in *ACC Loan Management v. P* stated:

“Section 14(1) requires simply that the requirements of s.11(1) of the Act of 1988 have been complied with. There is no requirement that it be shown that there are assets available to be recovered or that the debtor is possessed of monies from which

³ [2016] IEHC 117

⁴ [2017] IEHC 5

⁵ See *Okunade v Minister for Justice and Equality* [2012] 2 IR 152

creditors may be repaid. And it is clear why this is so: creditors usually will not be fully informed of the extent of the debtor's assets and liabilities."

38. Of course, the factual position in this case is different in that s.14(2) of the 1988 Act was not invoked by the appellant, either before the High Court or on appeal. As pointed out by Sanfey J. within the quotation at paragraph 17 above, the net issue in the High Court was whether an opportunity should be afforded to Ms Hynes to retrieve her position so as to discharge the debt. That remains the position on appeal.

39. With regard to the application for a stay in the High Court the trial judge at page 20 of the transcript sets out the position very clearly as to why a stay upon an adjudication of bankruptcy requires particular consideration;

'But as regards putting a stay on the adjudication, I'm not prepared to do that. An adjudication in bankruptcy has effects in law. The most important one being that when an order of adjudication is made, the estate of the bankrupt rests⁶ in the official assignee and he effectively is the one that makes the decisions in relation to the estate from that point on. And because of those effects in law, it's virtually never the case that a stay on bankruptcy is ordered by the court that's making the adjudication order. So I have to refuse your application.'

40. An application for a stay was made before this court on 13 January 2023 and Costello J. delivered an ex tempore judgment.

⁶ perhaps intended to be read as 'vests', but the import is clear in any event

41. Her judgment records Ms. Hynes' arguments including a submission that she had been blocked from obtaining certain information in relation to the *Seamus Maguire & Co* litigation, that she should be entitled to re-open the 2009 judgment proceedings, that no monies were owed by her to the respondents and in any event if she was given more time, she would be in a position to discharge the debt. These submissions are very similar to those advanced before this court.

42. Costello J. pointed out that a stay in such circumstances can be unfair to creditors, that the *Seamus Maguire & Co* litigation had been in existence since 2013 and had not yet been brought to trial after a period of some nine years. In her view, the creditors should not have to wait any longer to recover their debt. It would also, in her view, constitute an abuse of process of the court, in seeking to re-litigate the judgment debt proceedings of 2009.

43. Costello J., in noting Sanfey J.'s refusal to grant a stay, also pointed out that it is extremely rare for a court to grant a stay on an adjudication of bankruptcy. On the facts of this case she found that a stay was in essence being sought pending a determination of other unrelated proceedings. In such circumstances Ms Hynes' application for a stay was refused.

44. The appellant's application for a stay arises after refusals by the trial judge and Costello J. It is highly unusual to seek to renew it for a second time before this court. In my view, the Court should only entertain such an application in exceptional circumstances and no such circumstances have been advanced by Ms Hynes.

45. I fully accept that Ms. Hynes has no wish to be adjudicated bankrupt. I also accept that she has endeavoured to put before the Court matters which she hopes will come to

resolution shortly and enable her to dispose of her indebtedness to the respondents. However, that indebtedness has been in existence since 2009. Within her supplemental submissions Ms. Hynes again wishes to revisit the 2009 judgment. This issue has already been adjudicated by Humphreys J., whose judgment was not appealed. As the trial judge pointed out, a balance must be sought between the entitlements of any creditors to realise their judgment and potential steps taken by any debtor to assist in that realisation.

46. As also pointed out by the trial judge and this court, Ms. Hynes was adjudicated bankrupt on 16 October 2022 and should, in the normal course, emerge from that process 12 months later⁷ However, in the interim, giving that pursuant to s.44(1) of the 1988 Act all property in the possession of any bankrupt at the date of his/her adjudication vests in the OA (with certain limited exceptions not relevant to this case) then a number of the areas in which Ms. Hynes seeks an early resolution will likely require the involvement of the OA, as also noted by Sanfey J. within his judgment.

47. This of course is an appeal from the Order of the High Court and counsel for the respondents has correctly pointed out that the appellant has adduced certain matters on appeal that were not before the High Court. The difficulties Ms Hynes states she has encountered within the Seamus Maguire & Co litigation were raised in the High Court and she styled that aspect of her application as updating the court. The reference to her one-third interest in a property is new. It was submitted in an attempt to persuade this court that she was potentially in a position to discharge her indebtedness and as this is a bankruptcy proceeding I have considered it for this reason. However the position of the OA has yet to be determined and if the sale is to proceed then adjudication is not, in and of itself an impediment to that process.

⁷ Since s.10 of the Bankruptcy (Amendment) Act 2015 there is now an automatic discharge from bankruptcy one year after adjudication, subject to any Order that the Court may make.

48. I am unsure as to the relevance of her third criterion and her potential complaint to the DPC. I have noted it because it does appear to confirm that the progress of the Seamus Maguire & Co litigation remains potentially problematic and I cannot discern that the many complexities raised within this litigation may be definitively resolved in the near future.

49. All of these matters raise the more fundamental difficulty in that the length of any possible stay of these proceedings depends totally upon the resolution of other litigation, in existence since 2013, and the possible sale of another interest. This is in circumstances where the criteria for adjudication as a bankrupt have been satisfied.

50. I also note the significant period of time which has now elapsed since the entry of initial judgment in 2009 and the entitlement of the respondents to seek to recover pursuant to its terms, notwithstanding the significant period of time that has also passed from the entry of that judgment to the issue of the bankruptcy summons.

Conclusion

51. In my view, Sanfey J. delivered a considered judgment on 10 October 2022. I can see nothing that has been advanced to overturn his conclusions as to the respondents' compliance with the procedural requirements of the 1988 Act, which were not appealed in any event.

52. Of central importance is his finding that the respondents have satisfied s. 11 and s.14(1) of the 1988 Act. I agree with his conclusion. These comprise the essential proofs that must be satisfied for any adjudication in bankruptcy and there is no appeal in respect of these findings so the adjudication of Ms Hynes must stand.

53. S14(2) does not arise for consideration on the facts of this case. It therefore follows that the trial judge was correct to adjudicate Ms Hynes bankrupt.

54. The trial judge categorised the case before him as essentially an enquiry as to whether an opportunity might be afforded Ms Hynes to retrieve the position in circumstances where she states that money is likely to become available, which would enable them to pay off the respondents' debt.

55. In considering those circumstances and in adjudicating Ms Hynes bankrupt Sanfey J. also pointed out that this did not mean that the areas Ms Hynes had raised as potentially ensuring receipt of monies to enable her to discharge her indebtedness were at an end. The OA is in a position to pursue any litigation or other matter he sees fit to pursue in order to yield assets for her estate in bankruptcy.

56. Ms Hynes seeks a stay or some form of adjournment of indefinite duration pending resolution of other proceedings commenced in 2013. In my view this appeal cannot await the outcome of other proceedings commenced some ten years ago. The further application for a stay, following the refusal before the High Court and this court in January, has not raised any new grounds and failed to advance any exceptional circumstance which would necessitate the making of an Order in these terms. Ms Hynes' adjudication as a bankrupt is upheld and her application for a stay or any form of adjournment is refused.

57. For the reasons set out above, the appeal of Ms Hynes is dismissed.

Outcome of this Appeal

This appeal is dismissed.

Costs

As the respondents have been entirely successful, my provisional view is that the respondents should be entitled to the costs of the appeal. If the appellant wishes to contend for an alternative order, she will have liberty to file a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the respondents will have a similar period to respond likewise. In default of such submissions being filed, the proposed order will be made.

As this judgment is being delivered electronically, Noonan and Butler JJ. have indicated their agreement with it and the orders I have proposed.