THE HIGH COURT

BANKRUPTCY

[2022] IEHC 694

[Record No. 4864P]

IN THE MATTER OF A PETITION FOR ADJUDICATON OF BANKRUPTCY BY JOSEPH HOWLEY AGAINST CORMAC LOHAN

BETWEEN

JOSEPH HOWLEY

APPLICANT

AND

CORMAC LOHAN

RESPONDENT

JUDGMENT of Mr Justice Mark Sanfey delivered on the 12th day of December 2022

Introduction

1. This judgment concerns an important issue which arises regularly in bankruptcy matters: should a petitioner, who withdraws his petition against a debtor due to the debtor having discharged the debt prior to the hearing of the petition, be awarded his costs of presenting and prosecuting the petition against that debtor?

2. The issue proved to be surprisingly complex, warranting lengthy and detailed written submissions by both the petitioner and the debtor, as well as oral submissions. I reserved judgment with a view to providing some guidance as to how the issue should be addressed in the future, as well as addressing the circumstances of the present case.

Background

3. The petitioner in the matter is Joseph Howley ('the petitioner'), who is and was at all material times the Collector General of the Revenue Commissioners. The debtor ('the debtor' or 'Mr Lohan') is a solicitor who resides in Athlone, County Westmeath.

4. A bankruptcy summons issued in favour of the petitioner on 21st October, 2019 containing particulars of demand reciting judgments obtained by the petitioner against the debtor on 11th July, 2016 and 30th November, 2017. The particulars specify that, as of the date of the summons, sums of €196,679.47 and €64,088.17 respectively remained outstanding. A petition was presented on 16th April, 2020 by the petitioner; the act of bankruptcy was committed when the debtor "failed to pay, secure or compound the sum claimed in the Bankruptcy Summons within fourteen days of the date of service thereof". The petition listed the debt owing to the petitioner as €260,767.64 ('the petition debt'). The matter was listed for hearing on 18th May, 2020, although hearings were at that time cancelled due to the Covid-19 pandemic.

5. The matter came before the court on 21st December, 2020. There was a subsequent exchange of affidavits between the parties. In his affidavit filed on 22nd January, 2021, the debtor alleged that there were certain technical defects in the petition papers which warranted dismissal of the petition. The debtor went on to allege that he received a letter on 18th December, 2012 from the Revenue

Commissioners stating that they "were to carry out an audit on my practice, three or four days after we completed an appeal in the Supreme Court on behalf of clients against the Revenue Commissioners. I say that it was more than a coincidence that same occurred contemporaneously" [para. 8]. The debtor goes on in the affidavit to allege that he was "subjected to harassment" by the official conducting the audit in a number of ways. He alleges that the actions of the petitioner were "motivated by an ulterior purpose", namely "to punish your deponent for acting as a lawyer against it in other matters for clients of your deponent's practice" [para. 11]. The debtor requested that the court dismiss the petition, or in the alternative: -

> "(a) Adjourn the proceedings for a reasonable period, with suitable directions to the extent that the parties engage on an appointed date, prior to the return of the matter to the list; or
>
> (b) Direct that an assessment as to the suitability of the respondent for a personal insolvency arrangement – PIA, be undertaken in the usual manner…".

6. By affidavit of 8th March, 2021, the petitioner responded to the debtor's affidavit. The suggestion that the petition papers were defective was refuted. The allegations about the motivation for the audit of the debtor's affairs were roundly rejected in strenuous terms. It was pointed out that the petitioner's predecessor had obtained judgment against the debtor which was not appealed, and that in fact the official who had conducted the audit had taken proceedings against the debtor for determination of a penalty pursuant to s.1077(3) of the Taxes Consolidation Act 1997 in respect of underpayment of VAT. The High Court had determined that the debtor was liable to a penalty of €144,788.50; that decision was appealed to the Court of Appeal, which affirmed the decision of the High Court: see *Dorr v Lohan* [2019]

IECA 230. In relation to the general trend of discharge of tax liabilities on the part of the debtor, Mr Howley averred as follows: -

> "25. I say and believe that the Respondent has made no payment against any of his tax liabilities since August 2018. I say that numerous payment proposals have been made by the Respondent to deal with his tax arrears but in each instance in which Revenue agreed to such proposals the Respondent reneged on them and failed to adhere to the agreed terms. There is also a history of the respondent sending cheque payments to Revenue which he then asks not to be presented or which he countermands. I say that the last occasion that this occurred was in December 2020 when a cheque in the sum of €50,000 was furnished by the Respondent and then stopped by him. In view of these facts, I have no reason to believe that there is a reasonable prospect that the Respondent can discharge the sums due by him".

7. By a notice of motion issued on 14th April, 2021, the debtor sought the following reliefs: -

> "(a) An order that the Petition issued in favour of the applicant dated 20 March, 2020 and received by the Examiner's Office dated 16 April, 2020 be dismissed or be struck out.
>
> (b) Alternatively, an order staying the proceedings herein.
>
> (c) Alternatively, an order pursuant to O.56AIII [sic] of the Superior Court Rules staying the proceedings to facilitate alternative dispute resolution.
>
> (d) Such further or other orders.
>
> (e) Costs."

8. The application was based on a grounding affidavit of Mr Lohan of 14th April, 2021. Mr Howley swore a replying affidavit on 6th May, 2021. Prior to that, a notice

to cross-examine Mr Howley on his affidavit of 8th March, 2021 was issued by Mr Lohan. There was a further exchange of affidavits between the parties in November of 2021. The debtor also issued a motion seeking to compel the petitioner to reply to a request for discovery by way of letter dated 14th April, 2021.

9. Humphreys J listed all of these various applications for hearing on 14th December, 2021. It appears by that stage that the debtor had made progress in reducing the petitioner's debt, and was able to inform the court on 14th December, 2021 that a payment of €95,000 had been made that morning. Accordingly, the debtor said that he would consent to an order striking out his notice of motion seeking discovery and his notice to cross-examine Mr Howley. The petitioner in turn agreed to strike out a motion which he had issued seeking to set aside the debtor's notice to cross-examine. The debtor's motion for discovery was also struck out. Humphreys J adjourned the hearing of the petition, and also adjourned the question of the costs of the ancillary matters with liberty to apply in relation to those costs in the petition proceedings. The debtor was also directed to file an affidavit exhibiting a statement of affairs and a letter of advice regarding his position from a personal insolvency practitioner by the adjourned date of 31st January, 2022.

10. The matter was adjourned on a number of occasions in the first six months of 2022, during the course of which the petition debt was fully discharged by a number of payments. The petitioner applied for his costs of the petition and the other ancillary applications. This application was opposed by the debtor, who applied for an order striking out the petition. The debtor also confirmed that his notice of motion seeking an order dismissing the petition and/or staying the proceedings to facilitate alternative dispute resolution could be struck out.

11. I directed that there should be a hearing of the petitioner's application for costs, and the various issues arising therefrom, on 24th October, 2022. I brought to the attention of the parties a view held by certain judges presiding over the bankruptcy list in the past that, as a petitioning creditor seeking adjudication of a debtor as a bankrupt effectively brought the application on behalf of all of the creditors, and would be entitled on adjudication to an order in respect of costs pursuant to s.12(1) of the Act, such a petitioner should not be entitled to his costs of the petition in circumstances where the petition was withdrawn prior to a hearing, as the nature of the proceedings was not an *inter partes* matter in which one litigant had sued another successfully, giving rise to an "event" which costs should follow. I indicated that I would like the parties to address this issue in their written submissions. The parties agreed to do so.

Submissions of the petitioner

12. Comprehensive written submissions were delivered on behalf of the petitioner by Mr Paul Brady BL, who made oral submissions at the hearing in support of the petitioner's position. Counsel made the point that, while s.12(1) of the Bankruptcy Act 1988 as amended ('the Act') provides that the court "shall, at or after the hearing of the creditor's petition under section 14, make an order for payment of such costs out of the estate of the bankrupt in course of priority to be settled by rules of court", there was no provision in the Act dealing with the costs of a petition withdrawn due to payment by a debtor of the debt on which the petition was based. This was in contrast to the position which applied prior to the enactment of the 1988 Act; s.375 of the Irish Bankrupt and Insolvent Act 1857 ('the 1857 Act') provided that: -

> "The court may in all matters before it order such costs as to such court shall seem fit and just to be paid by any of the parties, and may order that a sum certain shall be paid as the full amount of the costs, without taxation".

13. Counsel submitted that, notwithstanding the removal of this express statutory discretion in the 1988 Act, s.12 did not oust the court's inherent power to award costs against any party in bankruptcy, and that "such jurisdiction and/or power may be exercised by reference to existing principles and the overriding requirement to do justice" [written submissions para. 13].

14. Counsel referred to the decision in a companies winding-up matter of Laffoy J in *Re MCR Personnel Limited* [2011] 3 IR 341. In that case, the company owed the petitioner monies on foot of a judgment. The petitioner made a demand for the monies under s.214 of the Companies Act 1963 which the company failed to satisfy. Accordingly, the petitioner presented a petition for the winding up of the company. The petition was served on the company, which discharged the debt six days later. The petition had not been advertised at that point, and was withdrawn on consent on the return date. The petitioner applied for the costs of the petition. The company resisted this application on the basis that the petition had not been advertised.

15. Laffoy J commented that "…[w]hether the court is exercising statutory jurisdiction under s.216 of the Companies Act 1963 or its inherent jurisdiction in the circumstances which arise in this application, in my view, the primary consideration is the proper application of O 99 of the Rules of the Superior Courts 1986, which provides, *inter alia*, that the costs of and incidental to every proceeding are at the discretion of the court and the normal rule is that costs follow the event" [para. 12].

16. Laffoy J went on to say as follows: -

> "[13] I do not think it would be appropriate for the court to lay down a strict rule that a petitioner whose debt has been satisfied before the petition comes before the court, where the petition has not been advertised, should not be entitled to the costs of presenting the petition…the court should be astute in

> ensuring that creditors do not use the winding up process as a debt collection process, nonetheless, there are other factors to which the court should have regard in considering an application by a petitioner for his costs. One is that, if the debtor company is not at risk of having to discharge the costs of the petition where it discharges the debt after the petition is presented but before it is advertised, there will be little incentive for the debtor company to comply with the demand pursuant to s. 214 of the Companies Act 1963 prior to the presentation of a petition. Another factor is that, if the petitioner has to bear the costs of the presentation of the petition to recover a debt to which he is clearly entitled, the defaulting debtor company gets off 'scot-free', whereas the wronged petitioning creditor is penalised in costs. Further, in my view, it is contrary to common sense that there should be a practice whereby the petitioning creditor whose debt is discharged after presentation of the petition but before it is advertised will only have an entitlement to costs of presenting the petition in circumstances where the overall costs are unnecessarily ratcheted up by requiring him to advertise for no other reason than to comply with the Rules of the Superior Courts 1986".

17. The petitioner makes the point that the court's decision in this regard was made notwithstanding that the Rules of the Superior Courts provided that it was possible for another creditor to step in and be substituted as petitioner. This remains the position under current legislation: see s.572(5) of the Companies Act 2014, and O.74, r.18 of the Rules of the Superior Courts. Neither S.572(5) Nor O.74 4.18 require that the petition be advertised before a creditor may be permitted to step in and take over the petition. It would appear therefore to be the case that a petitioner who withdraws his petition due to the petition debt being discharged by the debtor prior to

advertisement of the petition by the petitioner will be awarded his costs, notwithstanding that his petition may be taken up by another creditor and prosecuted by that creditor. The 1988 Act does not provide for any such substitution of one petitioning creditor for another; counsel for the petitioner in the present case submits that, if a petitioner under the Companies Acts will, pursuant to the decision in *Re MCR Personnel*, be awarded its costs on discharge of the petition debt notwithstanding the possibility that another creditor might take over the petition, a petitioning creditor in a bankruptcy should by analogy be awarded its costs in a similar situation, particularly given that its withdrawal of the petition would bring the matter to an end, the petitioning creditor having been paid his debt.

18. The petitioner submits that the petition is clearly governed by ss.168 and 169 of the Legal Services Regulation Act 2015 ('LSRA') and the reconstituted O.99; the court has a general power under s.168 "on application by a party to civil proceedings" to "order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings…". It was submitted that the court therefore has, in civil proceedings, "…a general jurisdiction and discretion to award costs at any time during the proceedings…" [written submissions para. 32]. It was submitted that proceedings initiated by bankruptcy petition clearly came within the definition of "civil proceedings".

19. It was submitted that the matters set out in s.169 of the LSRA and the general principles summarised by the Court of Appeal (Murray J) in *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183 should guide the court in the exercise of its discretion, and that the "event" identified by Laffoy J in *Re MCR Personnel* as "…the successful recovery by the petitioner of the debt due to him, rather than the winding up of the company which he sought, which had ceased to be

necessary…[para 15]" was equivalent to the "event" in the present case which must be regarded as having been resolved in the petitioner's favour. The petitioner set out in his submissions at paras. 40 to 51 the facts upon which he contended that he was entitled to the costs of the petition and ancillary applications.

Submissions of the debtor

20. The debtor himself also made extensive written and oral submissions, and concluded the written submissions by summarising his position as follows: -

- "The petition is/was invalid;
- there is no legislative provision in place to seek costs in the circumstances before the Court despite previous legislative provisions ostensibly providing for the contemplation of same;
- even if there was or the court is of the view that there is or might be, the petitioner is not entitled to same due to its own conduct both before and after the issue of the summons and petition, its refusal to engage in ADR and ultimately the presence of [mala] fides."

21. These points are developed at length in the written submissions. The debtor lays heavy emphasis on his contention that "…the actual application grounding the petition is defective and said motion, it is submitted would not have been successful in any event…" [para. 1]. The debtor sets out the circumstances in which he offered to withdraw the discovery motion and the notice to cross-examine, emphasising that, by the time those applications came before Humphreys J in December 2021, "…sizeable sums had been discharged…if the parties had come to an arrangement…the motions were somewhat moot"… [para. 2]. The debtor acknowledges that "…the main aspect of the discovery request was the request to show how the respondent was chosen for an audit a week before Christmas and 2 working days after the aforementioned

Supreme Court case concluded" [para. 2]. The debtor stresses the contention that the petition was defective, stating that "…there was no evidence before the Court as there were no exhibits evidencing any debt and the Motion was not heard or decided on and it is therefore submitted that the Petitioner cannot rely on the argument that a valid Petition was before the court…" [para. 4].

22. In relation to the fact that the express power on the part of the court to deal with the costs relating to a petition in s.375 of the 1857 Act had not been included in the 1988 Act, the debtor stated as follows: -

> "It is submitted that, in the context of where there was a legislative basis in the 1857 Act, which was one of the provisions omitted from the 1988 Act, the legislature intended to omit the legal right to recover costs where the money demanded was discharged prior to any successful adjudication order or decision. We do not know the reason why this was omitted in the 1988 Act but perhaps it is because the legislature intended to encourage engagement or alternative dispute resolution as provided for in the Court Rules or simple engagement between the parties before a moving party incur whatever costs to initiate such proceedings" [para. 7].

23. The debtor submitted that the only relevant "event" contemplated by the proceedings was the petitioner obtaining its order for adjudication, an "event" which did not occur. The debtor emphasised the principle to which Laffoy J referred in *Re MCR Personnel* that winding up proceedings should not be used as a debt collection device, and contended that awarding costs by defining the relevant "event" as the payment of money as demanded was contrary to that policy. The debtor pointed out that the petitioner had already obtained costs orders for the judgments against him

"…including excessive interest and penalties borne from a tax audit which was targeted and whose purpose was …replete with [mala] fides"… [para 10].

Discussion

24. It is certainly the case that, as with winding-up petitions, the courts have frowned on the use of petitions in bankruptcy as a means of debt collection. While the provisions of s.14(1) of the Act, which provides that "…the court shall, if satisfied that the requirements of s.11(1) have been complied with, by order adjudicate the debtor bankrupt…" are cast in mandatory terms, the court will generally require the debtor to seek advice from a personal insolvency practitioner as to whether he might be entitled to avail of the mechanisms under the Personal Insolvency Acts, and will often adjourn making a determination on the petition if it appears that there is a chance that the debtor may be able to discharge the petitioning creditor's debt if afforded some time to do so.

25. However, it must be borne in mind that, in the majority of cases – as occurred in the present case – the petitioning creditor will have obtained judgment against the debtor and possibly have attempted to execute the judgment against the debtor's property. If proceeding by way of bankruptcy summons – once again, the route most often used to petition in bankruptcy – the petitioning creditor will have served particulars of demand, and if no payment is received, applied to court for a bankruptcy summons, and served this on the debtor. If the debtor does not within fourteen days after service of the summons pay the sum referred to in the summons, or secure or compound for it to the satisfaction of the creditor, the petitioning creditor can issue a petition to have the debtor adjudicated bankrupt providing he complies with the requirements of the Act and s.11(1) in particular.

26. A creditor's petition in bankruptcy is therefore based squarely on the debtor's inability or refusal to pay the debt which he owes to the petitioning creditor. While there is no longer a requirement that the petitioning creditor have attempted execution before applying for a bankruptcy summons – in this regard, see the decision of the Supreme Court in *Harrahill v Cuddy* [2009] IESC 022001 – the creditor is required to take numerous steps towards recovering its debt prior to invoking the petition procedure. Accordingly, the procedure by which a creditor petitions the court to adjudicate the debtor bankrupt and thereby vest his property in the Official Assignee for realisation and rateable distribution among his creditors is effectively the "last resort" for the creditor, of which he avails when all efforts to collect the debt have failed.

27. While it is true that the object of a petition in bankruptcy is to satisfy the court that an order of adjudication should be made, the true purpose of the petitioning creditor is to recover its debt, or part thereof. If the only way that this can be achieved is through bankruptcy, the petitioning creditor will try to obtain his order of adjudication, and hope to retrieve as much of his debt as possible through the best efforts of the Official Assignee. However, it may be, as in the present case, that the debt is paid by the debtor over a period prior to the hearing of the petition, so that it is neither necessary nor possible to proceed with the petition.

28. In the winding-up of a company, the petition must be advertised in advance of the hearing of the application for winding-up: see O.74, r.10 of the Rules of the Superior Courts in this regard. This gives creditors notice of the application, and the opportunity, if they satisfy the statutory criteria, to take over the petition if the petitioning creditor declines to prosecute it. In this way, the creditors as a body are engaged in the process from the moment the petition is advertised, and the petition

may be regarded as being, at least potentially, for the benefit of creditors other than the petitioning creditor.

29. By contrast, in bankruptcy there is no advertisement of the petition in advance of the hearing. The names of the debtors in the Legal Diary are usually anonymised by the use of initials. It may be that this is so as to facilitate the debtors who wish to stave off bankruptcy by marshalling their resources to pay off the petitioning creditor, however belatedly; it may also be that a less tolerant view is taken in relation to companies, where incorporation is a privilege afforded to shareholders who wish to restrict their liability in respect of the debts of the company.

30. In any event, no creditor other than the petitioning creditor is involved in a bankruptcy petition; it is a matter solely between the petitioning creditor and the debtor. Of course, once an adjudication takes place, the debtor's estate vests in the Official Assignee, and pursuant to s.136 of the Act, a creditor ceases to have any remedy against the property or person of the bankrupt in respect of his debt apart from his rights under the Act, and cannot commence proceedings in respect of that debt save with the leave of the court, and on such terms as the court may impose.

31. The petitioner in the present case therefore argues that, if a petitioner in a company's winding-up case is entitled to its costs where the debtor discharges the debt prior to advertisement of the petition, as was the outcome in *MCR Personnel*, that principle should apply equally in a bankruptcy matter, and that, if anything, the petitioner in a bankruptcy matter is in a stronger position to get his costs as there is no possibility that another creditor may take over the petition; the costs which he has incurred in prosecuting the petition have resulted in recovery of the debt, and it would be unjust to deny him an order for his costs in such circumstances.

32. The debtor disputes that the court has jurisdiction to award the costs of a petition which has been withdrawn, and relies on the fact that the court's jurisdiction under s.375 of the 1857 Act was not incorporated in the 1988 Act. In fact, there is no mystery as to the reason for this omission. The 1988 Act has its origins in the Bankruptcy Law Committee Report, issued in 1962 under the chairmanship of Mr Justice Budd. The Committee pointed out at para 45.12.1 of the report that the "Court of Bankruptcy and Insolvency in Ireland", which was established by 1857 Act, "… was by Section 3 of the Supreme Court of Judicature (Ireland) (No.2) Act 1897 united and consolidated with the Supreme Court and all jurisdiction and powers of the Court of Bankruptcy vested in and was exercised by the High Court." The draft bill appended to the report, which formed the basis for the drafting of the 1988 Act, accordingly did not incorporate s.375 of the 1857 Act; as the committee stated at para. 45.12.3:

> "…As the [bankruptcy] Court is now part of the High Court and as such has inherent powers to award costs in any matter the re-enactment of section 375 of the 1857 Act enabling the Court in all cases to award costs is unnecessary".

33. In my view, a bankruptcy petition undoubtedly falls under the heading of "civil proceedings" to which reference is made in s.168 of the LSRA. As such, the principles in ss. 168 and 169 and the reconstituted O.99 of the Rules of the Superior Courts govern the issue of the costs of the petition and the ancillary applications. Section 169(1) incorporates the principle that "costs follow the event" unless the court orders otherwise, and sets out a non-exclusive list of matters to be taken into account by the court, of which the following are particularly relevant: -

> "(a) Conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases…"

34. The debtor raised two matters in particular which he contends are relevant to the issue of costs: his assertion that the petition papers were defective, and his allegation that the audit which led to the judgments against him was initiated in bad faith and for an improper purpose. As I have noted above, both of these contentions were strongly rejected by the petitioner.

35. As events transpired, it was not necessary for the court to consider, much less determine, the foregoing issues. The contention that the petition documents were defective is set out at para. 3 of the debtor's affidavit of 19th January, 2021; it is refuted, in my view effectively, at para. 5 of Mr Howley's affidavit of 8th March, 2021. I do not see how the allegation in relation to the initiation of an audit in 2012 has any relevance to the present proceedings. The petitioner obtained judgments against Mr Lohan, and these were not appealed. The suggestion that the audit was initiated *mala fide* seems to me to be a collateral attack on those judgments. I do not consider that this Court can disturb or overlook those judgments, particularly where the debtor has not seen fit to appeal them.

36. The debtor makes complaint that the petitioner refused to engage in alternative dispute resolution. There is no obligation on a petitioning creditor to embrace an ADR process which by its nature is consensual. Section 169(1) does however list the following as a factor that the court may take into account in its deliberation on costs: -

"(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) or the court considers that one or more than one of the

parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation."

37. It is notable that this criterion relates to an instance where the parties are "invited by the court to settle the claim (whether by mediation or otherwise) …". There was no such "invitation" by the court, whether pursuant to its powers under O.56A(3) or otherwise; in any event, it must be doubtful whether there could ever be an invitation by a court to a petitioner who has obtained judgment against a debtor to compromise a petition in bankruptcy by settlement or mediation. The "claim" of the petitioner has already been determined by the court; what is at issue is whether an adjudication should be ordered, and as I have noted above, the wording of s.14(1) of the Act suggests that a petitioning creditor who has complied with the requirements of s.11(1) may well be entitled as of right to an adjudication order.

38. In any event, the debtor could have insisted on standing his ground and fighting the petition on these grounds. He did not do so; between the filing of the petition on 16th April, 2020 and July 2022, the debtor, to his credit, managed to pay to the petitioner the entire debt. The issue is whether this discharge of the debt represented an "event" which the costs must follow.

39. On the one hand, the petitioner has received the benefit of recovering the petition debt over a period of two years, something that might have been less likely had the debtor been adjudicated bankrupt, and which is a benefit exclusive to the petitioner, whereas an adjudication order would result in a process whereby all creditors are equal, and the petitioner's debt would be treated the same as any other debt, if there were such.

40. As against that, the petitioner had to incur the cost of prosecuting the petition. He was obliged, pursuant to s.12(1) of the Act, "…at his own cost [to] present his

petition and prosecute it…", although if an adjudication had resulted, the court, subject to the matters set out at s.12(2), would have made an order for the payment of those costs out of the estate of the bankrupt. The effectiveness of such an order would depend on whether there were assets to meet the costs.

41. If it is the case that a debtor does not have to meet the costs of a petitioner who, on discharge of the petition debt by that debtor, withdraws the petition, it seems to me that there is no sanction for a debtor who delays matters and defends the petition in such a way which causes the petitioner to incur significant costs. If the debtor manages to pay off the debt, he avoids bankruptcy; if the debtor is unsuccessful in this regard and is adjudicated, all things being equal he is in no worse position than when the petition was first presented. The petitioner on the other hand, who after perhaps considerable delay has established his entitlement to an adjudication order, has been put to what may be considerable extra expense; even if the debt is paid in full, he has had to incur extra cost by virtue of the way the matter was defended.

42. It seems to me that, whatever the situation in relation to petitions for winding-up under the Companies Acts, the petition proceedings in bankruptcy must properly be regarded as an *inter partes* proceeding until the making of an adjudication order. If the court had been required to determine the validity of the petition in the present case, and held that the debtor was correct in his contention that the petition were invalid, the debtor would undoubtedly have been entitled to his costs of defending the petition. It seems to me that it would be unjust if the converse were not the case, *i.e.* that a petitioner is not entitled to his costs even though his position is well-founded, or has been settled by virtue of discharge of the full petition debt.

43. That being so, it seems to me that the decision of Laffoy J in *MCR Personnel* that the withdrawal of a petition for winding-up by the petitioner consequent upon

discharge by the debtor of the petition debt is an "event" which costs must follow is directly analogous to the situation in the present case. The petition was not prosecuted because the petitioner had achieved his purpose of payment of the petition debt. By any objective standard, he had "won the day" and should be entitled to his costs accordingly. The fact that the matter did not proceed to adjudication is neither here nor there. The debtor chose to pay off the debt over a period of time rather than refuse to pay and contest the petition on the grounds he had advanced, with the concomitant risk that if he lost, he would be adjudicated bankrupt. In my view, the petitioner's costs of presenting and prosecuting the petition are the price the debtor has to pay for buying time which enabled him to pay off his debt to the petitioner.

General principles governing payment of debt prior to hearing

44. It seems to me that the appropriate approach by the court in a case such as the present may be summarised as follows: -

(1) The overriding principle which the court must apply is that the award of the costs of a petition in bankruptcy is a matter for the court's discretion, which must be exercised by reference to the general principles governing the award of costs, and the requirement to do justice in the particular circumstances of the case;

(2) where a bankruptcy petition is dismissed by consent in circumstances where the debtor has discharged the petition debt prior to the hearing of the petition, the court will usually regard the discharge of the petition debt as the "event" which costs must follow, so that the court's discretion will usually be exercised so as to order the debtor to pay the petitioning creditor's costs of presenting and prosecuting the petition;

(3) where the petition debt comprises a judgment or judgments in favour of the petitioner against the debtor which either have not been appealed or which have been unsuccessfully appealed by the debtor, the court will not normally entertain any submission on behalf of the debtor that the judgment(s) on which the petition debt is based is invalid or unenforceable by petition;

(4) where the petition debt is discharged by the debtor before the hearing of the petition, it will be presumed by the court that it is acknowledged by the debtor that the petition debt was validly due and owing;

(5) the onus is on the debtor in such a situation to adduce evidence and/or make submissions to rebut this presumption and which will satisfy the court that its discretion should not be exercised in the usual manner;

(6) while the court may adopt a pragmatic attitude to the admission of evidence adduced by the debtor in this regard, disputed averments or submissions unsupported by evidence will not be sufficient to displace the usual order which the petitioner may expect to be made in his favour;

(7) it is for the court in each case to decide whether the debtor has discharged the onus on it such that the usual order in favour of the petitioner should be displaced;

(8) where the court makes the usual order for costs in favour of the petitioner, those costs may include the costs of any application issued by either the petitioner or the debtor in connection with or ancillary to the prosecution or defence of the petition.

Conclusions and orders

45. Applying those principles to the present case, I am of the view that the discharge of the petition debt by the debtor is the "event" which costs must follow. The court was not required to consider whether or not the petition was valid, and there does not seem to me in any event to be any basis on which the contention that it was invalid could be maintained. The allegation of *mala fides* on the part of the staff of the Revenue Commissioners in initiating the audit which led to the judgments on which the petition is based is a collateral attack on the judgments themselves. If there were any issue in this regard, it should have been raised by way of defence and/or counterclaim in the proceedings in which the petitioner's predecessor ultimately obtained judgment. The debtor is not permitted to raise those issues here.

46. I do not consider that any of the matters raised by the debtor should displace what I regard as the usual order in favour of the petitioner for his costs of the presentation and prosecution of the petition. As regards the "ancillary" applications:

(1) The notice of motion issued by the debtor on 14th April, 2021 sought primarily to dismiss the petition, or stay the proceedings to facilitate alternative dispute resolution;

(2) the debtor issued a motion for discovery on 30th April, 2021, which was filed on 2nd November, 2021. This motion was based on a request for discovery in a letter of 14th April, 2021 from the debtor to the solicitors for the petitioner, relating to material regarding the decision of the Revenue Commissioners to initiate an audit of the debtor, and the appointment of a certain official to carry out that audit; it follows from the views I have expressed in the foregoing paragraph above that I consider that this motion for discovery was inappropriate in the circumstances;

(3) a notice of motion was issued by the petitioner on 12th May, 2021 grounded on the affidavit of Michael Commons, a solicitor acting for the petitioner, seeking primarily an order to set aside the notice of 30th April, 2021 to cross-examine the petitioner;

(4) by order of 14th December, 2021, Humphreys J ordered by consent that

(a) the discovery motion at (2) above be struck out;

(b) the notice to cross-examine the petitioner be set aside; and

(c) the costs of the motions for discovery and the application by the petitioner to set aside the notice to cross-examine be "adjourned with liberty to apply for same as costs of the petition herein".

47. Given my findings as set out above, I will make the following orders: -

(1) The petition will be struck out with an order in favour of the petitioner as against the debtor for his costs of presenting and prosecuting the petition;

(2) the debtor's motion issued on 14th April, 2021 seeking a dismissal of the petition or in the alternative a stay on the petition to facilitate alternative dispute resolution will be struck out with an order in favour of the petitioner for his costs of the motion;

(3) the petitioner is entitled to his costs of the discovery motion filed by the debtor on 2nd November, 2021, and the petitioner's motion issued on 12th May, 2021 seeking that the notice to cross-examine him be set aside;

(4) the costs of any of the foregoing applications are to be adjudicated in default of agreement.