

THE HIGH COURT

BANKRUPTCY

[2024] IEHC 53

[Bankruptcy No. 5041]

IN THE MATTER OF MICHAEL GRIMES (A BANKRUPT)

JUDGMENT of Mr Justice Kennedy delivered on the 7th day of February, 2024

1. By Notice of Motion dated 16 October 2023, Dr Michael Grimes (“the Applicant”) seeks his discharge from bankruptcy and orders annulling: (a) his adjudication as a bankrupt pursuant to the order of the High Court (Pilkington J.) dated 5 November 2019; and (b) the appointment of a Receiver in respect of a property at Kells, County Kerry (“the Property”), and ancillary reliefs. Before considering the issues raised by the application, it is appropriate to note two preliminary matters. Firstly, as appears from paragraphs 1 – 34 of the judgment of Humphreys J. dated 25 February 2021), previous proceedings involving the Applicant have been marked by significant delays and repeated adjournments at his request. A similar pattern occurred in respect of this application, with the Applicant repeatedly seeking adjournments on medical grounds but without producing the evidence which, in view of past experience, the Court had determined was necessary to justify any such requests. In the event, the Court did not deem it appropriate to accede to his most recent adjournment application and duly proceeded with the hearing.

2. The second preliminary issue is that the Applicant purported to issue an identical application in the name of his wife, who was also adjudicated bankrupt but has significant health problems. It transpired that the motion was issued without her knowledge and consent

in circumstances in which capacity issues would clearly have arisen. The Applicant also sought permission to make submissions on his wife's behalf without drawing the Court's attention to the fact that Pilkington and Humphreys JJ. had previously rejected an identical application on his behalf. I had no hesitation in striking out the application which had been made in the name of the Applicant's wife (awarding costs against the Applicant) because it was clear that the motion had issued without his wife's knowledge and consent. The Applicant acknowledged that that order was the appropriate course, which begged the question as to why he had issued the application in the first place. Even if there were a basis for the application to proceed, the Applicant would not have been permitted to make submissions on his wife's behalf and I am surprised that he should have sought to do so in the light of the High Court's previous rulings on his similar applications in the past.

Background

3. The Applicant and his wife ("the Borrowers") borrowed from National Irish Bank but defaulted on their repayment obligations to its successor in title, Danske Bank A/S ("Danske").

The following key events occurred thereafter:

25 July 2016	The High Court gave summary judgment against the borrowers for €158,991.75
23 January 2017	The Court of Appeal dismissed the Borrowers' appeal from the 25 July 2016 ruling.
3 July 2017	Danske presented a bankruptcy petition in respect of the Applicant.
5 November 2019	The High Court (Pilkington J.): (a) granted leave to amend the petition; (b) refused the Applicant's motion to dismiss the petition; and (c) adjudicated the Applicant as bankrupt.

18 November 2019	The Applicant issued an application pursuant to s. 16(1) of the Bankruptcy Act 1988 (“the Bankruptcy Act”) to show cause against his adjudication as a bankrupt.
12 June 2020	The Court of Appeal struck out the Applicant’s appeals against the 5 November 2019 rulings.
19 January 2021	The High Court dismissed the s. 16(1) application.
25 February 2021	The High Court extended the applicant’s bankruptcy period to 5 November 2025.
16 October 2023	The current application issued.

Challenge to Order Adjudicating the Applicant as a Bankrupt

4. The Applicant challenged the 5 November 2019 order for adjudication, contending that the process was flawed because the original bankruptcy petition omitted to confirm the estimated value of the security. That issue was identified and leave was sought and granted to amend the petition accordingly. The Applicant takes issue with the decision of Pilkington J. to grant such leave and then to proceed with the hearing of the petition.

5. I see no basis for the Applicant to seek to resurrect an issue explicitly raised and conclusively determined on 5 November 2019, particularly when his appeal was struck out and he has already sought to rehash the issue in his section 16(1) application. The point was fully litigated (at least twice). Pilkington J. granted leave to amend the petition, dealing with the issue. He was then adjudicated bankrupt. The Applicant’s appeal from all aspects of the order of 5 November 2019 was struck out. His attempt to relitigate the same issue in his section 16 application was unsuccessful. Humphreys J. concluded that Pilkington J. had jurisdiction to

allow the amendment of the petition on 5 November 2019, which Humphreys J. described as a “*modest amendment*”.

6. The Applicant disagrees with the 5 November 2019 ruling and he would have preferred a different outcome. If leave to amend the petition had been refused, it may not have changed the ultimate outcome but might have forced the petitioner to start from scratch. However, the Court clearly had jurisdiction to allow the amendment and it is difficult to see any basis on which leave would have been refused in the circumstances. In any event, the issue has been conclusively determined (again, at least twice).

7. The legal principles have been outlined in *O’Donnell v Lehane* [2015] IEHC 228, a judgment of Costello J. dated 16 April 2015, at paragraphs 14 - 17:

“14. ... *an adjudication of bankruptcy cannot be undone without extremely compelling reasons. The onus is on the moving party, the bankrupt, to satisfy the Court that the bankrupt ought not to have been adjudicated bankrupt. In Re Sean Dunne (a bankrupt) [2013] IEHC 583 McGovern J. was dealing with an application to annul an adjudication on the basis of alleged defects in service. At para. 11 of the judgement he held:-*

“24. *Having regard to the contents of s.85(5)(b) it seems to me that a challenge to the adjudication on the basis of service in this case would be permissible only if there was some new evidence that had not been available before the judge who made the adjudication.*”

15. *This is authority for the proposition that the bankrupt must adduce new evidence which had not been available before the judge who made the adjudication in bankruptcy if the Court is to annul [sic] the adjudication. In this case it is striking that the debtors do not point to evidence in relation to the identity of the creditor which was not available to the Court (or to the debtors) at the hearing of the petitions to adjudicate them bankrupt. ...*

16. *In addition it is argued the debtors’ application clearly breaches the rule in Henderson v. Henderson (1843) 3 Hare 100. In Johnson v. Gore Wood & Co. [2002] 2 A.C. 1 Bingham L.J. at p. 31 stated as follows:*

“... *Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those*

elements are present the later proceedings would be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.”

17. This passage has been cited and approved by the Supreme Court in *Carroll v. Ryan* [2003] 1 I.R. 309, *A.A. v. Medical Council* [2003] 4 I.R. 302 and in *Re Vantive Holdings* [2010] 2 I.R. 118. In that latter case Murray C.J. quoted at pp. 124-125 from the judgment of the trial judge as follows:

“The rule in Henderson v. Henderson is to the effect that a party to litigation must make its whole case when the matter is before the court for adjudication and will not afterwards be permitted to reopen the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case. In its more recent application this rule is somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate.”

Murray C.J. then stated at p.125 as follows:

“[22] Viewing it through the prism of estoppel and res judicata the rule in Henderson v. Henderson (1843) 3 Hare 100 strictly speaking applies to proceedings between parties where those proceedings determine the rights or obligations between those parties. It is intended, inter alia, to promote finality in proceedings and to protect a party from being harassed by successive actions by another party when the issues between them either were or could have been determined with finality in the first proceedings....

[25] Underlying the rule in Henderson v. Henderson (1843) 3 Hare 100 is the policy of the need to protect the due and proper administration of justice from an abuse of process and uphold the principle of finality in legal proceedings.”

8. As appears from the foregoing, compelling reasons are required to justify an application to annul. No such reasons appear from the Applicant’s affidavits. All matters raised were or should have been raised at the hearing of the petition (and on appeal) and/or on the application pursuant to s. 16 of the Bankruptcy Act. He has not put any material evidence before the Court that was not raised or which couldn’t have been raised in those applications. I am satisfied that, insofar as the application purports to challenge the adjudication, it clearly constitutes an abuse

of process, it is *res judicata* and it offends against the rule in *Henderson v Henderson*. It is only in exceptional circumstances that a court will reopen an issue which has been conclusively determined by a court of competent jurisdiction. No such circumstances exist here. The application is flawed and an abuse of process. Having failed in his attempt to appeal the 5 November 2019 order and in his attempt to relitigate the same issue in his the section 16 application, the Applicant is not entitled to mount a collateral attack on that order, on the Court of Appeal's June 2020 order dismissing his appeal, or on the judgment of Humphreys J. on his section 16(1) application. The issues which the Applicant sought to raise in this application in respect of the adjudication are *res judicata* (and, if that was not the case then he would still be debarred from raising such issues as a result of the rule in *Henderson v Henderson*). His attempt to relitigate such issues is an abuse of process.

9. For completeness, I should note that the Applicant also sought an order of discharge pursuant to section 85(5)(b) of the Bankruptcy Act, asserting that only Danske had claimed in the bankruptcy and that they were "*clearly owed nothing at the time of this application*", which appears to be a reference to the ultimate assignment of the debt to Pepper Finance DAC ("Pepper"). This submission was not vigorously pursued in his submissions and appears to me to be entirely inconsistent with the judgments on the application for adjudication, the section 16(1) application and the application to extend the bankruptcy period. As Humphreys J. observed in the opening paragraph of his 25 February 2021 judgment:

"On 13 April, 1988, a mortgage over a dwelling at Kells, County Kerry, was granted by the bankrupts to Northern Bank (Ireland) Ltd. Thirty-three years later, the bankrupts haven't discharged their liabilities to the bank's successor in title, although so far they seem unwilling to accept the legal consequences of that situation."

Apart from the period now extending to 36 years, that remains an accurate summary of the situation. I am not satisfied that there is any basis to annul the order of adjudication. It appears to me that the current situation is very similar to that which was considered by the Court in *SFS Markets Ltd (formerly Marketspreads Ltd) v Fergus Rice* [2015] IEHC 42, a decision of

Costello J. dated 16 January 2015, and I would particularly rely on paragraphs 15, 16 & 18 of her decision. The circumstances of this case are more extreme than in that case and, if any question of the exercise of discretion arose, I would not be disposed to exercise it in the Applicant's favour for the reasons outlined not only in this judgment but also in the other, related, judgments in respect of the Applicant's bankruptcy.

The Property

10. The Applicant acquired the Property with the acquisition financed by a mortgage over the Property, which was dated 13 April 1988. The mortgage was ultimately assigned to Pepper. The Applicant described the property as a residential property or family home but the evidence before the Court confirms that the property was never his family home. On 11 September 2023, payments having fallen into arrears and the Applicant having been adjudicated bankrupt, Pepper appointed a Receiver in respect of the Property. The Applicant challenges the validity of the appointment in the current motion.

11. Pepper (and the Official Assignee) argue that, because the Applicant is an adjudicated bankrupt, any entitlement to challenge the appointment of a Receiver and/or to pursue any proceedings or enforce any rights in respect of the Property has vested in the Official Assignee in Bankruptcy, pursuant to s. 44(1) of the 1988 Act. An affidavit sworn on behalf of the Official Assignee confirmed that:

“My office has investigated the property in the context of the administration of the bankruptcy estate. I have formed the view that it is a matter for Pepper Finance Corporation (Ireland) DAC to enforce its security to the extent that it is legally entitled to do so. I note that a Receiver has been appointed in that regard. There is no value to the bankruptcy estate in interfering with that process and secured creditors are entitled to rely on their security and this is confirmed by section 136(2) of the Bankruptcy Act, 1988 (as amended) (‘the Act’).”

The Applicant did not submit any evidence or legal arguments to counter the evidence and submissions from the petitioner and the Official Assignee in respect of these points.

12. It is clear that the Applicant has no standing to challenge the appointment of the Receiver in the circumstances and that any rights which he formerly enjoyed in respect of the property automatically vested in the Official Assignee when he was adjudicated bankrupt. Accordingly, it is not necessary for me to consider another objection raised by the Applicant, that he is not satisfied that there was a valid assignment to Pepper. That point, if point there was, would be a matter for the Official Assignee to raise. However, it appears that he has considered the issue and he has not sought to take any point in that regard.

13. The Applicant also contended that Pepper's appointment of the Receiver and the sale of the asset were precluded by virtue of his having been adjudicated bankrupt. I agree with the Official Assignee's submission that, while unsecured creditors are restricted (by s. 136(1) of the Bankruptcy Act) from bringing enforcement proceedings (absent leave of the court) during the bankruptcy process, secured creditors may continue to rely on their security post adjudication pursuant to s. 136(2).

Conclusion

14. Accordingly, I will dismiss the application. Since it appears to me that the real objective of this application was to delay Pepper's ability to realise its security rather than to raise any new issue in relation to the administration of the bankruptcy, my provisional view is that I should direct the Applicant to pay the petitioner and the Official Assignee their costs in respect of the application. However, I will allow the parties 14 days to file short (less than 2,500 words) written submissions before reaching a determination in respect of the costs of the application, following which an order will be perfected to reflect the dismissal of the application as outlined above.