THE HIGH COURT

BANKRUPTCY

[No. 4262 P.]

[No. 4263 P.]

IN THE MATTER OF A PETITION FOR ADJUDICATION OF BANKRUPTCY BY CHELDON PROPERTY FINANCE DAC

JOHN HALE AND MARY HALE

Applicants

JUDGMENT of Ms. Justice Pilkington delivered on the 10th day of July, 2019

1. The applicants, John Hale and his spouse Mary Hale, have both issued identical motions within the proceedings brought against them seeking their adjudication as bankrupts. In respect of these proceedings (the action brought against John Hale is record no. [4262 P.] and that against Mary Hale is [4263 P.]). The notices of motion are in identical terms and seek the following;

> "an order pursuant to O. 124 of the Rules of the Superior Courts setting aside the Petition and proceedings herein by reason of irregularity, non-compliance with the Rules of the Superior Courts and/or statute."

2. RSC Order 124 states; -

> "1. Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.
>
> 2. No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.
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> 3. Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion."

3. In respect of RSC Order 124 (3) the requirement that objections shall be stated on the notice of motion has not been complied with in respect of either motion. Nor are there any grounding affidavits to their respective notices of motion. Rather both parties have chosen to rely upon the affidavits sworn by them on foot of the motions issued against them seeking their adjudication as bankrupts.

4. I should point out and I will revert to this point subsequently that RSC O. 124 deals solely with 'non-compliance with the Rules'; self-evidently the Rules of the Superior Courts. Accordingly, it follows (and the case law where this section is invoked confirms this) that one of those rules of court must be relied upon to invoke it. These plaintiffs trespass significantly beyond the confines of the terms of their own motions in the grounds they advance.

5. In my view within these bankruptcy proceedings this motion cannot be 'adopted' to deal with the bankruptcy summonses where no application was made to set them aside or seek their dismissal in respect of either or both summonses. Nor in my view can they be utilised as an alternative means to deal with the petition proceedings, which proceedings await the allocation of a hearing date and in respect of which all of the affidavits within the petition proceedings ground this application. The terms of the notices of motion seek to set aside the petition 'and proceedings herein'. I do not construe that as seeking the dismissal of the bankruptcy summonses and to the extent that these plaintiffs seek to do so then in my view it is not open to them pursuant to the terms of these motions.

Background

6. By order of McGovern J. on 4 July, 2017, bearing record number "the High Court, Commercial [2017 No. 123 S.] and [2017 No. 26 COM]" between "Cheldon Property Finance Designated Activity Company, plaintiff and John Hale and Mary Hale, defendants", the learned judge ordered: -

> "That the plaintiff doth recover against the defendants, jointly and severally, the sum of €1,903,548.20 and the costs of these proceedings to include the costs of the transfer of these proceedings into the Commercial List such costs to be taxed in default of agreement.
>
> And on the application of counsel for the defendants for a stay in the event of an appeal.
>
> And on hearing said counsel for the defendants and counsel for the plaintiff in that regard.
>
> And the court granting a stay on the order for costs.
>
> IT IS ORDERED that execution and registration on foot of the aforesaid Order be stayed for a period of 21 days from the date hereof.
>
> And the court doth direct that in the event of an appeal, the defendants can apply to the Court of Appeal for a further stay."

7. It was confirmed that the parties (who were legally represented before McGovern J.) have appealed his judgment and order but there has been no application, by either of the parties, for a stay before the Court of Appeal. Nor has any of the debt been discharged.

8. Thereafter bankruptcy summonses issued on 18 June 2018 against John and Mary Hale respectively. As set out above there has been no application utilising the proper procedure to set aside or dismiss those summonses by either party.

9. The petition of bankruptcy in respect of John Hale and Mary Hale is dated 6 September 2018. Two affidavits of debt and verifying

affidavits in respect of both applications bear the same date – the deponent of each affidavit is Donal O'Sullivan.

10. The notices of motion seeking the adjudication of bankruptcy both issued on 10 September 2018, both made returnable before the bankruptcy court on 15 October 2015.

11. John Hale swore his affidavit on 27 November 2018 and one in near identical terms was sworn by Mary Hale on 26 November 2018 and vice versa.

12. The final replying affidavits were sworn by Albert Prendiville on 4 December 2018 in respect of both applications.

13. Thereafter the plaintiffs issued these notices of motion on 15 December 2018

14. No correspondence was opened to me which intimated that this application would be brought. Indeed all indications to the contrary; the matter was listed within the bankruptcy list and adjourned from time to time to permit the filing of affidavits. Thereafter this motion issued when it appeared that these petitions with their accompanying notices of motion were in a position to be allocated a hearing date before the court.

15. One of the matters to which I must have regard is that the plaintiffs within this application appear, in respect of the arguments they advance, to simply re-iterate the matters advanced within their affidavits in respect of the petition proceedings. No effort has been made to distil the specific reliefs relied upon in respect of this motion.

16. It therefore appears that these plaintiffs consider they can essentially have two attempts to deal with these petition proceedings; to put up all of the issues of which they complain within this present application. If the court accepts that their various grounds (or one or some of them) succeed then the court may proceed to strike out the respective petitions. If they do not succeed in having the petitions struck out then they have a further opportunity to air them when the petitions proceedings are heard.

17. No case law has been opened to me where an application has been advanced pursuant to RSC O. 124, as opposed to the court invoking its terms in the exercise of its discretion.

18. I understand that at some times within this litigation process John Hale and Mary Hale may have been acting on their own behalf; in any event both were represented by senior and junior counsel in the proceedings before McGovern J. and in these proceedings both are represented by the same counsel (Mr. Neuman BL) instructed by Herbert Kilcline solicitors, who issued these motions.

19. The petition for the adjudication of the applicants as bankrupts is ready for hearing. The affidavits have been filed within that adjudicative process. Within that process these notices of motion have been issued seeking to set aside the petition. In my view therefore, given the specific and unusual facts of this application, it must be strictly construed.

20. Counsel on behalf of John and Mary Hale make a number of submissions as to the validity of the respective petitions.

21. In summary, their contentions may be summarised as follows: -

> (i) the date on both petitions is incorrect in that the year appears as 2016 and should be properly 2017; no rule of court pursuant to RSC O. 124 is advanced.
>
> (ii) Cheldon Property Finance DAC failed to mention and advert to the fact that in addition to the security that it discloses it holds over John Hale and Mary Hale that in fact it holds additional security. Section 11(1)(c) of the Bankruptcy Act 1988 was called in aid of the argument advanced but no rule of court pursuant to RSC O. 124 is advanced. The affidavits of Albert Prendiville within both proceedings sets out the position re security, paragraph 8 in the John Hale proceedings and the petitioner's entitlement to rely upon it in paragraph 9 of the Mary Hale proceedings. I accept those averments.
>
> (iii) that the dates within the affidavits of service of Pat Keegan in respect of the service of the respective demands are incorrect. This is conceded within Mr. Prendiville who points to the fact that both demands were personally served and that is not in dispute; and
>
> (iv) that in respect of Mary Hale's application only, that the date of demand is within the affidavit of Joe Kelly is incorrect. Again Mr. Prendiville deals with this omission/error at paragraph 6(c) of this affidavit within the Mary Hale proceedings. In any event as this relates to matters in respect of the bankruptcy summons which is not impugned within her notice of motion I do not understand the relevance of this submission. Again no rule of court pursuant to RSC O. 124 is advanced.
>
> (v) It was also claimed that there should never have been an application for bankruptcy as the criteria had not been satisfied on the facts of this case. The relevance of this to the present application is difficult to discern. As was pointed out by counsel for Cheldon Property Finance DAC ('Cheldon') pursuant to the judgment and order of McGovern J. no monies whatsoever had been discharged by either John or Mary Hale in respect of their outstanding indebtedness. Again no rule of court pursuant to RSC O. 124 is advanced.

22. It was emphasised at some length and repeatedly by counsel on behalf of John and Mary Hale that there must be strict observance with the statutory rules set out by the Bankruptcy Act 1988 and that failure to adhere to them had significant consequences for a creditor such as Cheldon. Whilst undoubtedly a sound proposition in law in my view this is a matter to be properly dealt with within the petition proceedings and not within motions where the sole issue is whether there has been compliance with the rules and what if anything flows from this.

23. Objection was also taken in the manner in which Cheldon has conducted this process in that initially the affidavits grounding this application has been sworn by a Donal O'Sullivan and that thereafter, the affidavit dealing with certain errors should have been deposed to by the same deponent and not the second deponent a Mr. Prendiville. Both are fellow directors of Cheldon.

24. As I understand it Keane J. within the bankruptcy list had imposed a tight timetable for the service of affidavits and as Mr. O'Sullivan was on holiday at the operative time (this is averred to by Mr. Prendiville within his replying affidavits) had sworn the affidavit. I accept this.

25. The proposition was advanced that one co-director cannot correct sworn testimony of another co-director as their interests 'might not be aligned'. This is a serious proposition advanced without any attempt to substantiate it. For the avoidance of doubt this ground is not a basis to set aside these petitions.

26. Reliance was placed by counsel for the applicants upon the *ex tempore* decision of Irvine J. in *Ulster Bank Ireland Ltd. v. Grimes* [2015] IECA 346 where it was contended that the court confirmed that it is inappropriate by affidavit to correct an earlier affidavit. I do not construe the *ex tempore* judgment of Irvine J. to that effect. It was the nature of the correction with which the court took issue not the fact that an additional affidavit had been filed to deal with matters that had been addressed in previous affidavits.

27. RSC O. 40, r. 4, was opened. It sets out that deponents must swear affidavits within their own knowledge or means of knowledge. I am satisfied that the affidavits filed by Cheldon in this case satisfy the criteria within this rule.

28. Within the petition proceedings the petitioning creditor (Cheldon) must, pursuant to section 11 (and 14) of the 1988 Act, satisfy a court that it has discharged all of the criteria for any debtor to be adjudicated bankrupt. Section 11 is central to any adjudication of bankruptcy. I do not therefore see how any intervening motion, within the petition proceedings and relying solely upon affidavits filed within that process can permit any debor to seek to argue compliance with s. 11 in advance of that bankruptcy adjudication. It cannot be permitted to be the vehicle by which the de facto adjudication of bankruptcy is heard or a 'trial run' of the issues contemplated. In my view given that the petition proceedings are ready to be heard then the issues and matters that require adjudication within that process should proceed within it and not outside of it.

29. Counsel for John and Mary Hale referred to a number of authorities, and opened sections 11, 19 (b), 21 and 25 of the Bankruptcy Act 1988 ('the 1988 Act').

30. In respect of the legal submissions advanced by counsel for John and Mary Hale, they initially referred to the judgment of *AIB Plc v. Yates* [2012] IEHC 360. Within that judgment, the well-known decision in *O'Maoileoin v. Official Assignee* [1989] IR 647 was also quoted as was the case of *Re Sherlock* [1995] 2 ILRM 493. All three cases refer to a bankruptcy summons not a petition. It is now well established that the criteria for distinguishing whether there has been compliance in respect of a bankruptcy summons and a petition has been distinguished by the courts.

31. The next cases cited relate to petitions in bankruptcy. The first was that of the *Society of Lloyds v. Loughran* – a decision of Finlay Geoghegan J. on 2nd February, 2004 ('*Loughran*'). The court, in considering the presentation of a petition, dealt with the argument that the petition had not itself been properly sealed in accordance with the provisions of RSC O. 76, r. 20 (2) and ought for that reason be set aside.

The difficulty is set out by Finlay Geoghegan J. as follows: -

> "It is accepted that the Society of Lloyds is a body corporate. The petition has been sealed with its seal and no issue is taken in relation to this. It has, however, only been signed by one person who is described as 'authorised signatory'. The sealing and one signature have been witnessed. The objection made is that it ought to have been signed by two directors or a director and secretary."

Within that case, the court considered the judgment of *O'Maoileoin* and the decision of Cave J. in the case of In *Re Collier*, [1891] 64 L.T. 742. The court continued: -

> "Whilst, I note the distinction between the approach to a bankruptcy summons and petition made by Cave J. above, in general I accept that there ought to be compliance with the rules of court even on a petition but conclude that there is nothing on the authorities which appears to absolutely preclude the Court from exercising its discretion in a proper case under O. 124 of the Superior Court Rules where there is a failure to comply with the rules on a petition."

32. It should be noted that within the facts of this case RSC O. 76, r. 20 was at issue and that the court thereafter exercised its discretion pursuant to RSC O. 124.

33. This is reiterated subsequently by Dunne J. in *Danske Bank v. McFadden* [2014] 2 I.R. 417, ('*McFadden*') where the learned judge was satisfied that O. 76, r. 20 (2) of the Rules of 1986 did apply to the petitioner and the petitioner was required to complete the petition in the manner specified therein. However, the failure to affix a seal to a petition brought by a company incorporated in a country where there was no requirement for a company to have a seal could not act as a bar to presenting a petition. The court continued; -

> "O. 124 confers upon the court a discretion. In this case, as in the decision in the case of *Lloyds v. Loughran*, there is no prejudice asserted on behalf of the debtor by reason of the irregularity complained of. It is also accepted that the petition has been signed in accordance with Danish law and the Articles of Association of the Bank. Further there is no dispute as to the fact that the debt is owed by the debtor. In those circumstances, it seems to me that I should exercise my discretion under O. 124 to allow the Bank to proceed with its petition to have the debtor adjudicated notwithstanding the irregularity."

34. In both *Loughran* and *McFadden* above specific rules of court were advanced as grounds for the dismissal of the petition in bankruptcy. In each RSC O. 124 is invoked (a) within the petition proceedings (b) to argue a defect on the face of the petition itself (c) is invoked to determine whether the court might exercise its discretion pursuant to the terms of that rule. In no case opened before me has it been invoked as a basis to set aside a petition on an interlocutory application within existing petition proceedings which are awaiting a hearing but rather whether the court might exercise its discretion to strike out a petition based upon an argument as to whether any rule of court has been impugned.

35. Counsel for John and Mary Hale then referred me to the headnote in the case for the *Minister for Communication, Energy and Natural Resources & anor. v. M.W. & anor*. which reiterated the assertion that as bankruptcy was penal in nature there should be strict compliance. This is a well-known proposition and accepted.

36. In the decision of *Noone v. RTB* [2017] IEHC 556, the court was considering whether it had jurisdiction to enlarge the time for bringing an appeal to the court for his determination order made by the RTB. Other than the confirmation by the court, on the facts of that case, that the time limit stipulated is absolute and that the court does not enjoy any jurisdiction to extend it, it is difficult to understand the relevance of that case to the facts at issue.

37. The judgment of Laffoy J. in *EBS Limited v. Gillespie* [2012] IEHC 243, was also opened. However, in my view, it simply confirms the rule of court as to the content of any affidavit required in an action for the recovery of land and that there must be compliance with it.

38. Next the judgment of Baker J. in *Harrington v. Gulland Property Finance Limited & anor*. [2018] IEHC 445 was opened. In that case, objection was taken to a receiver who had in circumstances where the court accepted that he did not know that the deed of charge which supported his appointment was receiver was wholly redacted and not as he had understood partially redacted. The court stated: -

> "I am guided in the correct approach to counsel's argument by the judgment of O'Malley J. in *Allied Irish Banks Plc. v. Honohan* [2015] IEHC 247, at para. 155, where she identified an essential element of the crime of perjury as involving 'a sworn statement that the maker knows to be false'."

The court continued: -

> "I am satisfied on the evidence that Mr. Tennant did not know that his averment that he was properly appointed receiver over the Harrington lands was false at the time he swore his affidavits in this matter. I accept his explanation that it was the heavily redacted nature of the deeds which had been furnished to him, and on which the deed of appointment was grounded, not been scrutinised by him, and it appears it had not been scrutinised by any of the other persons in the chain of professionals who examined the matter.
>
> I am also influenced by the approach that O'Malley J. took to the question in that she identified the fact that no personal gain was likely to result from the incorrect statements of fact sworn by the officers of the bank in that case and that this suggested that there was 'nothing to indicate a deliberate intention to swear to a falsehood'. She identified what had occurred as 'sloppiness', a description which may appropriately be implied to the present circumstances.
>
> I am satisfied that Mr. Tennant did immediately make application to court and swore a corrective affidavit when he became aware of the error in his earlier evidence. I am also satisfied, notwithstanding the argument of counsel for the Harringtons, that he had nothing to gain personally from a false averment, albeit that he did, of course, stand to gain his professional fees on account of being appointed receiver."

39. As to the potential insolvency or otherwise are John and Mary Hale, the decision of Clarke J. in *Danske Bank v. McFadden* [2010] IEHC 119, was called in aid in respect of the following paragraph: -

> "First, I am of the view that NIB should give an undertaking not to seek to have Mr. McFadden made bankrupt. With such an undertaking in place, then Mr. McFadden will be protected from the most severe form of enforcement. While it is entirely possible that NIB may, in the intervening period, be able to enforce the judgment to some extent either in the form of actually recovering funds, or in securing priority in respect of any such funds or assets over competing potential creditors, and while any such action is undoubtedly likely to act to Mr. McFadden's detriment, same would not, in my view, be a permanent detriment. NIB is clearly a mark to repay any funds obtained."

40. The facts of the case quoted above are clearly significantly at variance with the facts of the present application.

41. As has been quoted above the judgment of McGovern J. remains outstanding, there is no stay upon it and no challenge to the bankruptcy summons. Accordingly, the case cited above is not relevant to the facts of this case. For the avoidance of doubt any suggestion that an undertaking will be sought from Cheldon of the type sought in that case is rejected.

42. As set out above, a significant number of authorities were advanced by counsel on behalf of John and Mary Hale. In my view, some of the cases opened to the court are of, at best, limited relevance to the matters upon which the court's adjudication is sought in the present proceedings.

43. Counsel for Cheldon divided his response into dealing with the (a) technical and (b) substantive objections raised on behalf of John and Mary Hayes.

44. With regard to the incorrect date on the petition it is submitted that this was subsequently clarified within the affidavit of Albert Prendiville. It was pointed out that the correct date had been inserted in the proceedings before McGovern J. where John and Mary Hale had been represented by senior and junior counsel. The matter had been fully contested and judgment in excess of €1.9 million awarded against them. Clearly it is a clerical error. To suggest this as a basis for the dismissal of the petition is in my view a novel proposition and I reject it. At best it is a trivial objection. Of course, a petition should bear the correct year within its record number and therefore to the extent that may be necessary I therefore exercise the court's discretion pursuant to RSC O. 124 in respect of that error.

45. The affidavits of service have been dealt with above. Counsel for Cheldon accepts that there were errors but states that they have been fully explained within the affidavits of Mr. Prendiville. It was submitted that there was a clear act of bankruptcy pursuant to s. 7 (1) (g) of the 1988 Act and that the petition for adjudication pursuant to s. 11 (1) was entirely in order. The errors with the affidavits are regrettable, in the circumstances of this matter I accept the explanation furnished. Within the terms of the motions I can see no basis for the setting aside of the petition pursuant to this criteria – no ground within O. 124 has been invoked by the applicants.

46. Reliance is placed upon the decision of Charleton J. In *The Matter of a Petition for Adjudication of Bankruptcy by the Governor and Company of the Bank of Ireland v. Brian and Mary Patricia O'Donnell* [2013] IEHC 395.

47. Within that case the court listed a number of issues it was called upon to adjudicate – one of them being described as point number 5 within the judgment as follows: "are there defects in the bankruptcy petition." After setting out s. 11 (1) and (2) of the Bankruptcy Act 1988, the court stated as follows: -

> "While it is argued by the debtors that defects in the petition cannot be overlooked, because these arise by virtue of statute, nonetheless, as in the *Lancefort* case, the Bank of Ireland claims that any such defects can be overlooked on a *de minimis* basis. Such a submission certainly has force in other branches of statutory regulation, following the line of authority referable to planning decisions."

The court continued:

> "A court should always look to what is material to any case and how any factor of substance to the proceedings, if so adjudged, may have adversely affected those who claim their legal rights are undermined. It seems to me that the *Lancefort* case is authority which enables the application of Order 124 of the Rules of the Superior Courts, since compliance with statute and the breach thereof was the foundation for the analysis which led to the conclusion that the substance and effect of any process must be central to a decision."

After quoting Hamilton P. in *O'Maoileoin* the court continued: -

> "This case is different. It is based on an act of bankruptcy following upon a judgment for a debt which has been proven; in this case by an order made with the consent of the debtors. The procedure is therefore a petition in bankruptcy, the amounts in respect whereof can be disputed and debated before the court and where the strictures arising from the fear of the misuse of the procedure of the bankruptcy summons are misplaced. Secondly, even if there is a minor error in a petition that is not necessarily fatal to the process. Respect for the law is not upheld by the courts taking totemic points on issues which cause no prejudice to any party and which are divorced from the reality of any central issue in the adjudication. So, in a bankruptcy petition, it is not inevitably the case that an insubstantial point should lead to the petition being refused. It is certainly the case, as was argued by counsel for the debtors, that justice is at the heart of this process. Justice is not a concept, however, which exists divorced from truth."

The court continued:

> "In the context of bankruptcy proceedings, the claim that strictness of procedure always overrules the obligation of the court to analyse truth ceases to be valid as a modem proposition and as a proposition consistent with the obligation of the courts to seek to administer justice on the foundation of truth. A full analysis of the relevant case law was carried out by Finlay Geoghegan J. in *Lloyds v. Loughran* (unreported, High Court, 2 February 2004). She noted the distinction between a bankruptcy notice, which in this jurisdiction is now the bankruptcy summons procedure, and the bankruptcy petition procedure."

48. With regard to the matters alleged it is contended by counsel for Cheldon that the errors complained of are not errors with regard to any statutory proofs - all have been complied with.

49. With regard to the argument that John and Mary Hale should never have been made bankrupt because they are ready, willing and able to pay their debts if they fall due it was pointed out that it was open to John and Mary Hale to discharge the sums due and they had chosen not to do so. No amount whatsoever had been discharged in respect of the debt. In accordance with the statutory procedure John and Mary Hale have properly been adjudicated bankrupt.

50. At the outset of this judgment I set out my reservations with regard to this interlocutory application. The notices of motion seek to invoke RSC O. 124 but thereafter to attempt to effectively impugn the entirety of the bankruptcy summons and petition procedure, often without reference to any rule of court which they assert has been impugned. Of course the applicants are entitled to do so but within the proper procedural framework.

51. Bankruptcy summonses were issued again John and Mary Hale respectively. No proper applications, in accordance with the Bankruptcy Act 1988 have been brought to seek to set those summonses aside or set them aside. In my view an attempt to now invoke RSC O. 124 to seek to do so is improper and I also note the requirements of RSC O. 124 (2) in that regard.

52. With regard to the petition proceedings the matters raised by the applicants were all within the affidavits sworn in respect of the application for the adjudication of John and Mary Hale as bankrupts. The most unusual feature of this application in my view is that rather than deal with these matters within those proceedings this interlocutory application is advanced utilising precisely the same documentation as within the petition proceedings. In such circumstances, given that the petition proceedings remain extant this applicant cannot be used as a means of an 'alternative hearing' and therefore the grounds advanced must in my view be specifically delineated as to the circumstances in which it is necessary to invoke RSC O. 124.

53. Whilst I have dealt with the objections raised by the applicants within their interlocutory application, in my view they are not entitled to reliefs in respect of any matters outside of the strict parameters of their respective motions.

54. In invoking RSC O. 124 they have totally failed to comply with RSC O. 124 (3). The basis of the majority of the reliefs they seek do not invoke any rule of court to which RSC O. 124 might be subject at all.

55. As set out above this interlocutory application is not an alternative procedure to seek to set aside the bankruptcy summons or to argue both here and in any possible future application the grounds why John and Mary Hale should not be adjudicated bankrupt. With these motions the grounds are narrower – these applicants must with specificity and particularity show why they are reliant upon Order 124 and in my view they have failed to do so.

56. To the extent that any issues have been raised as to the efficacy of matters within the petition itself I exercise my discretion pursuant to RSC O. 124 not to set the petitions aside and permit their adjudication.

57. The applicants' notices of motion are refused.

58. I will hear the parties in respect of any further orders required.