THE HIGH COURT

BANKRUPTCY

[No. 1450 P.]

IN THE MATTER OF ERIC O'CALLAGHAN OF 31 HIGHER O'CONNELL STREET, KINSALE, CO. CORK A PETITIONING DEBTOR

JUDGMENT of Ms. Justice Costello delivered on the 27th day of March, 2015

1. The petitioner presented a petition for his adjudication in bankruptcy pursuant to s.15 of the Bankruptcy Act 1988, as amended, by a petition dated 16th December, 2014. He confirmed that he was unable to meet his engagements with his creditors. In his verifying affidavit he stated as follows:-

> *"2. I have, prior to presenting the petition, made reasonable efforts to reach an appropriate arrangement with my creditors relating to my debts by making a proposal for an informal arrangement.*
>
> *3. On the 29th day of November, 2013 I met with a Personal Insolvency Practitioner (PIP) Mitchell O'Brien… for a face to face interview at his offices…. I provided details of my financial circumstances and other relevant information. On the 26th day August 2014 a Protective Certificate with respect of a Personal Insolvency Arrangement (PIA) was issued by Cork Circuit Court… and a creditors' meeting was held on the 3rd day of November 2014 to consider the PIA proposal developed by my PIP. Ulster Bank as my dominant secured creditor voted against my PIA proposal despite it showing a return for Ulster Bank that was 113% better for them than will be the outcome in Bankruptcy."*

2. The petitioner's Statement of Affairs shows that he had a monthly income of €2,529.19 and his reasonable living expenses in accordance with the Insolvency Service of Ireland's guidelines is €2,746.73 This sum includes mortgage repayments due to Ulster Bank Ireland Ltd. ("Ulster Bank") in the sum of €1,590.94. The total secured debt due to Ulster Bank is €367,165.33. His total unsecured debts are €27,786.95. The net deficit in his estate is €266,692.28. The estimated value of his home is €120,000.00 and the estimated net realisable on sale of the home is €108,000.00.

3. The PIA proposed by the petitioner's PIP involved restructuring the mortgage debt so as to ensure that there was a sustainable monthly repayment due in respect of secured debt and in effect writing off the excess of that sum as an unsecured debt. It was proposed to pay a nominal sum of €100.00 to all of the unsecure creditors which would include Ulster Bank in respect of the sum that was to be converted into an unsecured debt. According to the PIA proposal subsequently furnished by the PIP to the creditors, the debt due by the petitioner to Ulster Bank comprised 93% of the petitioner's total debt, 100% of his secured debt and 83.2% of his unsecured debt. It was estimated that the petitioner could afford to pay a monthly mortgage repayment of €1,358.58. This entailed reducing the mortgage balance to €230,000.00 i.e. a write down of €137,165.33. This was because the term of the mortgage was to be reduced from aged 75 to aged 68/69.

4. The PIP calculated that the return for the secured creditor in the event of the debtor being adjudicated a bankrupt was €108,000.00. It is argued that if Ulster Bank had accepted the proposed PIA it would recover €230,000.00 and that this was a 129% better return than in bankruptcy. Of course this is based upon the petitioner meeting all of his revised mortgage repayments over a period of 16 years.

5. While it was not on affidavit before the Court, it was accepted by both the petitioner and Ulster Bank that the petitioner had made three payments in 2014 of €350.00 and one payment of €700.00. It was explained that the petitioner's inability to make the repayments was due to his difficulties in employment. He was a self-employed tiler until 2008. Thereafter, between autumn 2008 and June, 2013 his sole source of income was his Jobseeker's Allowance from the Department of Social Protection. He fell into arrears as a result of his unemployment. It was said that he would now be able to make the repayments proposed in the PIA as he had, as of October, 2014, obtained employment as a PAYE worker with a construction company working for Eli Lilly in Dunderrow, Kinsale, Co. Cork.

6. Ulster Bank voted against the PIA as the proposal involved writing down a considerable portion of the mortgage debt. It was not prepared to engage in this form of arrangement. On the other hand, Ulster Bank had offered to accept reduced payments from the petitioner for a period of 5 years. It is said that the reduced payments was less than the sum allowed for as a mortgage repayment in the PIA. Ulster Bank emphasised that it was prepared to work with debtors, and the petitioner in particular, to achieve a solution where they could remain in their homes.

7. The petitioner's fundamental objection to the solution offered by Ulster Bank was that it would not ensure his return to solvency. At the end of 5 years, he would still be left with a very considerable debt which he simply would not have the ability to repay during the remainder of his working life. His priority was not so much to remain in his home as to return to solvency. In presenting the petition for his own bankruptcy he was motivated by his desire to return to solvency.

8. Section 15 of the Bankruptcy Act 1988, as amended, provides as follows:-

> *"(1) Subject to subsection (2), where the petition for adjudication is presented by the debtor the Court may, where it considers it appropriate to do so, and where it is satisfied that the debtor is unable to meet his engagements with his creditors and that the requirements of section 11(4) and (5) have been complied with, by order adjudicate the debtor a 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 the debtor's statement of affairs 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.¬"

9. The issue the petitioner submitted was for consideration by the Court is its jurisdiction in the event that a party petitioned for his own bankruptcy pursuant to s.15 following a failed PIA "in circumstances where the Honourable Court considers that a creditor's position in respect of the PIA was unreasonable". It was submitted that prior to adjudicating a debtor a bankrupt on his own petition, the Court must be satisfied that it is appropriate so to do. In deciding this matter the Court must consider whether the debtor's inability to meet his engagements could be more appropriately dealt with, in this case, by means of a PIA.

10. Under s.15 the first matter the Court has to consider is 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 the debtor's statement of affairs filed with the Court, be more appropriately dealt with by means of ... a debt settlement arrangement** (emphasis added). The Court is clearly in a position to consider the nature and value of the assets available to the debtor and the extent of his liabilities as they have been detailed in his Statement of Affairs and they are presented in the proposed PIA exhibited by the petitioner. The question to be decided is whether his inability to meet his engagements could be more appropriately dealt with by means of a PIA. This involves determining what is meant by "could" in the context of s.15(2) of the Act of 1988, as amended. Obviously, as a matter of mathematics, any debtor's inability to meet his engagements could be dealt with by a PIA if sufficient amount of the debts are written off. It would follow that if the Court is solely concerned with mathematics all indebtedness could be dealt with by PIAs.

11. Personal Insolvency Arrangements are dealt with in Chapter 4 of the Personal Insolvency Act 2012. Section 99 provides that the terms of a PIA shall be those which are agreed to by the debtor and subject to Chapter 4 approved by a majority of the debtor's creditors in accordance with Chapter 4. There are detailed provisions governing secured creditors and PIAs set out in ss. 102, 103 and 105 of the Act of 2012. Section 108(1) provides:-

> *"A vote held at a creditors' meeting to consider a proposal for a Personal Insolvency Arrangement shall be held in accordance with this section, section 110 and regulations made under section 111…*
>
> *(9) Where on the taking of a vote at a creditors' meeting held for the purpose of considering a proposal for a Personal Insolvency Arrangement the proposal is not approved in accordance with subsection (1), the Personal Insolvency Arrangement procedure shall terminate and a protective certificate issued under section 95 shall cease to have effect."*

12. Section 110 provides:-

> *"(1) Subject to subsection (2) a proposed Personal Insolvency Arrangement shall be considered as having been approved by a creditors' meeting held under this Chapter where—*
>
> *(a) a majority of creditors representing not less than 65 per cent of the total amount of the debtor's debts due to the creditors participating in the meeting and voting have voted in favour of the proposal,*
>
> *(b) creditors representing more than 50 per cent of the value of the secured debts due to creditors who are—*
>
> *(i) entitled to vote, and*
>
> *(ii) have voted,*
>
> *at the meeting as secured creditors have voted in favour of the proposal, and*
>
> *(c) creditors representing more than 50 per cent of the amount of the unsecured debts of creditors who—*
>
> *(i) are entitled to vote, and*
>
> *(ii) have voted,*
>
> *at the meeting as unsecured creditors have voted in favour of the proposal.*
>
> *(2) For the purposes of subsection (1)(b) the value of a secured debt shall be—*
>
> *(a) the market value of the security concerned determined in accordance with section 105 , or*
>
> *(b) the amount of the debt secured by the security on the day the protective certificate is issued,*
>
> *whichever is the lesser."*

13. It is apparent from the above that creditors of a debtor are entitled to vote to accept or to reject a proposed PIA. An essential element of the scheme is that they are free to vote in favour or against as they interpret is in their best interests. It follows that the Court is not entitled to oblige them to vote in favour of a PIA. The question of the reasonableness or unreasonableness of a creditor in refusing to vote for a PIA is not a matter for consideration by the Court when considering the matters set out in s.15(2) of the Act of 1988, as amended. If I were to construe the legislation in the manner contended for by the petitioner, the effect would be to empower the Court to decide whether or not a PIA is acceptable or not. This is not for the Court to decide: it is expressly a matter for the creditors as is set out in the provisions of the Act of 2012 which I have cited above. This reflects the balance which has been struck by the Oireachtas when enacting the Personal Insolvency Act 2012 between the interests of debtors and the interests of creditors. It is important to bear in mind that a debtor is not obliged to present a petition once a proposal for a PIA is not approved in accordance with s.108 of the Act of 2012. The only result is that the procedure terminates and the protective certificate issued ceases to have effect.

14. It follows from my construction of s.15 of the Act of 1988, as amended, that the question of the reasonableness or otherwise of Ulster Bank in refusing to accept the proposed PIA is not a matter which I can consider. On the other hand, there is evidence before the Court of the fact that the petitioner has attempted to enter into a PIA and that the proposed arrangement has not been approved. As it is not open to the petitioner to present a second PIA at this stage it follows, as a matter of fact, that his inability to meet his engagements could not more appropriately be dealt with by means of a PIA. I have therefore formed the opinion that the petitioner' s inability to meet his engagements could not more appropriately be dealt with by means of a PIA and therefore the

question of adjourning the petition to allow the debtor an opportunity to enter into any such PIA does not arise.

15. The next argument advanced on behalf of the petitioner was based upon s.15(1). It was accepted that the requirements of s.11 (4) and (5) of the Act of 1988, as amended, have been complied with. It was argued that the Court might consider it inappropriate to adjudicate the debtor a bankrupt by reason of the alleged unreasonable stance of Ulster Bank in relation to the petitioner's proposed PIA. It is argued that if the Court is of the view that a debtor's inability to meet his engagements could be more appropriately dealt with by means of a PIA had the creditor not unreasonably refused the proposed PIA that therefore the Court must be of the view that an adjudication in bankruptcy is not appropriate in the circumstances. In view of the fact that I have rejected the argument that the Court can enter into an assessment as to the reasonableness or otherwise of a creditors decisions in relation to proposed PIAs, it follows that this argument also must be rejected. On the contrary, the Court is in a position to adjudicate the petitioner a bankrupt on his own petition as he has requested the Court so to do. To put it in the alternative, there is no reason for the Court to refuse the petition.

16. I wish to state that I have approached this case on the assumption that the petitioner is correct in his argument that Ulster Bank behaved unreasonably in rejecting the proposed PIA in the circumstances. I have made no such determination and I expressly decided the case as a matter of law. This judgment is not to be taken as in any way endorsing the criticisms advanced by the petitioner against Ulster Bank. Ulster Bank is entitled to have regard to its own legitimate commercial interests in its dealings with debtors.

17. Counsel for the petitioner has clearly indicated that the petitioner's first priority is to return to solvency rather than to remain in his home. He wishes to be adjudicated a bankrupt pursuant to his petition if the Court is satisfied that it is appropriate for the Court to make the Order pursuant to s.15 of the Act of 1988, as amended. In those circumstances, I am satisfied that it is appropriate to make the Order sought and I adjudicate the petitioner a bankrupt.