THE HIGH COURT

BANKRUPTCY

[3729]

IN THE MATTER OF A PETITION IN BANKRUPTCY PRESENTED BY DANSKE BANK A.S. TRADING AS DANSKE BANK

IN THE MATTER OF PAUL O'SHEA A BANKRUPT

BETWEEN

DANSKE BANK A/S TRADING AS DANSKE BANK

PETITIONER

AND

PAUL O'SHEA

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 19th day of December, 2016

1. On 4th July, 2016, the debtor was adjudicated a bankrupt on foot of the petition presented by the petitioner. The bankrupt says that the order of adjudication was served on him on 13th October, 2016. On 18th October, 2016, he brought an application pursuant to s.16 of the Bankruptcy Act, 1988 seeking to show cause.

2. The order of adjudication was pronounced on 4th July, 2016. The bankrupt accepts that the order of adjudication was served on him on 13th October, 2016. His application to show cause was made on 18th October, 2016. Strictly speaking, therefore, his application was made out of time. No application was made to extend the time pursuant to s.16(1) of the Act of 1988. At the time, the bankrupt did not have the benefit of legal representation and he may have believed that his application was within time. The Court has a discretion to extend the time up to 14 days. In the circumstances I am prepared to extend the time and to accept that it has been brought within the time allowed by the Court which is less than 14 days from the date of service of the order of adjudication.

3. Section 16 of the Act of 1988, as amended, provides as follows: --

> *"16.—(1) The bankrupt may, within three days or such extended time not exceeding fourteen days as the Court thinks fit from the service of the copy of the order of adjudication on him, show cause to the Court against the validity of the adjudication.*
>
> *(2) On an application to show cause under subsection (1) the Court shall, if within such time the bankrupt shows to its satisfaction that any of the requirements of section 11 (1) have not been complied with, annul the adjudication and may, in any other case, dismiss the application or adjourn it on such conditions as the Court thinks fit, having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him."*

4. In *Harrahill v. Kennedy* [2013] IEHC 539 Dunne J., considered the nature of an application to show cause against the validity of the adjudication under s.16. At para 21 it is stated:—

> *"Showing cause is, in my view, something other than raising an issue which has to be litigated elsewhere. In "Bankruptcy Law and Practice" (2nd Ed.), Sanfey and Holohan expressed the view at para. 2.102 that "the court has to be satisfied that it is just and equitable to annul the adjudication." That seems to me to be a helpful approach to adopt in cases where the application to show cause against the validity of the adjudication arises in circumstances other than a failure to comply with the criteria set out in section 11(1)…*
>
> *The test under s. 16(2) is, as I have said, slightly different [to that in s. 8(6)(b)] and I am satisfied that apart from a failure to comply with the criteria set out in s.11(1) the court can annul the adjudication if satisfied that it is just and equitable having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him. Raising an issue that could be tried elsewhere does not seem to me to be the correct basis upon which to consider an application under section 16(2).*

5. Thus if the bankrupt establishes that there was a failure to satisfy the requirements of s.11(1) of the Act of 1988, then the court shall annul the adjudication. If not, then the court must consider whether it would be just and equitable so to do having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him.

6. Section 11(1) of the Act provides as follows:—

> *"11.—(1) A creditor shall be entitled to present a petition for adjudication against a debtor if—*
>
> *(a) the debt owing by the debtor to the petitioning creditor (or, if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to more than €20,000,*
>
> *(b) the debt is a liquidated sum,*
>
> *(c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition, and*
>
> *(d) the debtor (whether a citizen or not) is domiciled in the State or, within 3 years before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in the State or has carried on business in the State personally or by means of an agent or manager, or is*

or within the said period has been a member of a partnership which has carried on business in the State by means of a partner, agent or manager"

7. The petition was presented by Danske Bank A.S. trading as Danske Bank on 12th January, 2016. The petition was signed by its duly authorised officers pursuant to a power of attorney, Mr. Peter Hughes and Mr. Grellan Dunne in the presence of Ms. Rachel Keane, a solicitor of the Legal Department of Danske Bank A.S. The petition was based upon a judgment of the High Court of 4th March, 2013, in the matter entitled "The High Court, No.2012/2388S between Danske Bank A/S (trading as National Irish Bank), plaintiff and Paul O'Shea, defendant". The combined total of the amount outstanding inclusive of interest calculated to 5th January, 2015, was €1,487,016.15.

8. The act of bankruptcy relied upon was the failure to pay the sum referred to in a bankruptcy summons dated 9th March, 2015. The bankruptcy summons was served upon the bankrupt in accordance with an order of substituted service which I made on 12th October, 2015. I ordered that the time for service of the bankruptcy summons be extended for 28 days from 12th October, 2015. I also ordered that:—

> *"...service of the bankruptcy summons by delivering a copy thereof and annexed particulars of demand together with a copy of this Order and a copy of the Affidavit for Bankruptcy Summons to the Governor or Deputy Governor of Shelton Abbey Prison and showing the said Governor or Deputy Governor the original of the said Bankruptcy Summons be good and sufficient service of the said summons on Paul O'Shea provided that at the time of such service the said Paul O'Shea is detained in the said prison..."*

9. The first argument in relation to the application to show cause concerned service of the bankruptcy summons and whether the debtor had committed an act of bankruptcy. It is not disputed that the bankrupt was detained in prison on 22nd October, 2015, when Mr. Michael Lynchehaun served the Governor of Shelton Abbey Prison in accordance with the terms of the order of 12th October, 2015. The Governor confirmed that the bankrupt was detained in Shelton Abbey Prison at that time.

10. At the hearing of the petition to adjudicate him bankrupt, the debtor raised the issue that he was not served with the summons and, that even if he had been served with the summons, given the fact that he was in prison at the time and so could do nothing about it, this was fundamentally unfair and therefore he should not be considered to have committed an act of bankruptcy.

11. On that occasion, I noted that the debtor averred that he had not been served with the summons and he gave no explanation as to why he did not move to have the summons set aside following his release. I accepted that there had been compliance with the terms of the order. Thus he was deemed to have been duly served with the bankruptcy summons. This matter has been ruled upon previously by me.

12. In relation to the question of his inability to pay the sum demanded on the summons within the 14 days allowed, I held that this is a matter set out in the legislation and not a matter for the discretion of the court. It is a matter for the legislature to amend the legislation if it sees fit. I ruled that an act of bankruptcy had occurred in accordance with the Bankruptcy Act, 1988, as amended.

13. In the hearing before me on the application to show cause, counsel for the bankrupt accepted that it is usual for orders for substituted service upon individuals detained in prisons to be made in the terms of the order of 12th October, 2015. It is not usual to further direct the Governor or deputy Governor in turn to serve the papers upon the person detained. I am therefore satisfied that the order was a lawful order and the bankruptcy summons was served in accordance with the order. This means that the service of the summons was good and sufficient upon the bankrupt.

14. An application to show cause is not an appeal against matters previously ruled upon on the occasion of the adjudication. It follows that the debtor cannot rely upon the same argument that was already advanced and rejected at the hearing resulting in his adjudication as a bankrupt.

15. The second argument advanced relates to the legal identity of the petitioner and whether it is a creditor of the bankrupt. The bankrupt argues that the petitioner was not a creditor and therefore the petition ought to be dismissed. He does so on the basis that bank statements post dating the judgment of March, 2013, which he had previously exhibited, did not show that he was indebted in the sum of €1.2 million and when the business of National Irish Bank was transferred to Dankse Bank A/S by Central Bank Act, 1971, (Approval of Scheme of National Irish Bank Limited and Danske Bank A/S) Order 2007 (S.I. No.29 of 2007), he argues that there was nothing to show that his loans were either included or excluded from the transfer and on that basis the proof that the petitioner was a creditor was incomplete.

16. The petitioning creditor moves upon a judgment of the High Court of 2013. There is no stay on that judgment, though the debtor appealed the judgment on 20th March, 2013, but has taken no further steps in relation to the appeal. Unless, and until the order is stayed or overturned on appeal, I am bound to recognise it as a valid judgment in favour of the plaintiff in the proceedings: Dankse Bank A/S (trading as National Irish Bank). Therefore if there is any doubt whether the debtor's debts were transferred to Danske A/S pursuant to Central Bank Act, 1971, (Approval of Scheme of National Irish Bank Limited and Danske Bank A/S) Order 2007, this must be considered to have been resolved by the High Court prior to granting judgment in 2013. If there is any error it is clearly a matter for appeal.

17. Likewise, any issue in relation to the statements of account in respect of which judgment was obtained in 2013 are not relevant to the issues to be considered by this Court. Once there is a final judgment, it should be respected and another court should not seek to go behind the order and consider the proofs which necessarily led to the granting of the order. That is solely a matter for an appellate court.

18. It follows that I must acknowledge that Danske Bank A/S. trading as National Irish Bank is a creditor of the debtor. The legal entity is Danske Bank A/S The fact that it now described itself as trading as Dankse Bank as opposed to trading as National Irish Bank does not alter this fact. In his affidavit of debt at para. 6 Mr. Leonard averred that:—

> *"The petitioner had previously traded as National Irish Bank and NIB and now trades as Danske Bank."*

19. I am satisfied that Danske Bank A/S is, and was, a creditor of the debtor regardless as to whether at the time the judgment was obtained it was trading as National Irish Bank and the time the petition was presented it was trading as Danske Bank. Therefore, I reject the argument that the petitioner was not a creditor of the debtor. It was entitled to present the petition in this case.

20. The bankrupt argues that the petition did not comply with the Rules of the Superior Courts 1986 because it was not sealed by the

company and signed by either two directors or a director and company secretary. Danske Bank A/S is a company incorporated under the laws of Denmark. It was established in the case of *Danske Bank v. McFadden* [2014] 2 IR 417 in a judgment of Dunne J. :—

> *"[T]he Bank is a Company organised and existing under the laws of Denmark. It has a Board of Directors and an Executive Board all of whom are based outside Ireland. It does not have a company secretary. … [T]he Bank operates through an Irish branch in this jurisdiction. For that purpose, the Danish Board of Directors delegated power to Andrew Healy and Kevin Gallen by a Power of Attorney dated the 21st March, 2007, including, inter alia, the power to appoint additional authorised attorneys. The power to grant Powers of Attorney in this manner is provided for at Article 20.2 of the Articles of Association of the Bank. On the 30th May, 2011, Messrs Healy and Gallen appointed Michael Leonard and any branch solicitor as lawful Attorneys of the Bank for the sole purpose of executing the bankruptcy petition and all ancillary documentation..."*

21. At p.15 it is stated by Dunne J.,:—

> *"The petition in this case has not been sealed with the seal of the Company and signed by two directors or by one director and the secretary. I accept that in a case involving a company incorporated in Denmark, there is no requirement for a seal and in such circumstances the failure to seal the document could not be a bar to the Bank pursuing a debtor in this jurisdiction. Nonetheless, no explanation has been given (sic) for the fact that the petition in this case has not been signed in the manner specified in the RSC. There is no evidence before the court to indicate that two directors of the Bank could not have signed the petition. To that extent therefore, I am satisfied that the Bank has not complied with the Rules of the Superior Courts. Nevertheless, it does seem to me that this is an appropriate case in which to have regard to the provisions of O.124 of the Rules of the Superior Courts. As in the case of the decision in Lloyds v. Loughran to which reference has been made I accept that as a general proposition there ought to be compliance with the Rules of the Superior Courts. Having said that, 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 0.124 to allow the Bank to proceed with its petition to have the debtor adjudicated notwithstanding the irregularity.*

22. In light of the judgment in *Danske Bank v. McFadden*, the courts have accepted petitions presented on behalf of Dankse Bank A/S which have not been sealed and which have been signed pursuant to the powers of attorneys as described in the *McFadden* case rather than by directors of the Bank from Denmark. As in the case of *McFadden*, the debtor in this case has not asserted any prejudice resulting from the manner in which the petition has been presented. I am satisfied from the evidence adduced on behalf of the petitioner that it was signed in accordance with Danish law and the articles of association of the bank. The only conceivable difference between this case and the *McFadden* case is the fact that the debtor in this case does not accept that he is indebted to Danske Bank A/S.

23. I have already set out the fact that there is a judgment of the High Court of the 4th March, 2013, establishing the fact that Dankse Bank A/S is entitled to judgment in the sum of in excess of €1.2 million against the debtor. While a notice of appeal has been lodged, it has not been pursued to date and no stay on the judgment was sought from either the High Court or the Court of Appeal. The bankrupt has not set out any basis for a defence to the judgment sum claimed by the petitioner. In the circumstances, the fact that he has made a bald assertion to the effect that he does not accept that the petitioner is a creditor of his does not suffice to justify departing from the decision in *McFadden* and is certainly not sufficient basis upon which to hold that he has shown cause against his adjudication in accordance with the requirements of s.16 of the Act of 1988.

24. He also argues that the petition was bad because there was no averment that the sum claimed to be due and owing remained unpaid. The affidavit of debt in this case was sworn by Michael Leonard. At para.1 he states that the debtor was at 5th January, 2015, indebted to the petitioner in the sum of €1,487,016.15. At para. 2 he stated, in relation to the debt:—

> *"...I say that no manner of satisfaction or security whatsoever hath been to my knowledge or belief had or received by the Petitioner, save as set forth in the said schedules."*

25. At para. 6 he averred:—

> *"It is within my own knowledge that the aforesaid debt was incurred, and such debt, to the best of my knowledge and belief, still remains unpaid and unsatisfied."*

At para.7 of his affidavit it is stated that:—

> *"The Debtor has failed to pay any of the sum claimed in the Bankruptcy Summons dated 9th March, 2015."*

In addition, the petition states that the debtor is indebted to it in the sum of €1,487,016.15 and that the debtor failed to pay any of the sum referred to in a bankruptcy summons dated 9th March, 2015. I am therefore satisfied that there has been compliance with the requirements of O.76, r.19(1)(a) of the Rules of the Superior Courts 1986, as the petition contains a statement showing the nature and amount of the debt and showing that the debt has not been paid, secured or compounded.

26. In a supplemental affidavit, the bankrupt stated that the petition was brought for an improper collateral purpose of frustrating his appeal in respect of the judgment of March, 2013, and in relation to other litigation with which he is concerned. I am satisfied that the creditor is *bona fide* trying to recover sums due to it pursuant to the judgment of the High Court of March, 2013. In reliance on its security, it has appointed a receiver to various properties. The history of the receivership has been fraught and opposed by the bankrupt on all fronts. The bankrupt has twice been committed to prison for contempt of court for failing to comply with orders obtained by the receiver. The petitioner has sought well charging relief and an order for sale in respect of lands and premises contained in Folio KE5445. It sought a conditional order of garnishee in respect of the bankrupt's farm premiums on 2nd September, 2013. However, the Department of Agriculture, Food and Marine subsequently informed the petitioner that the bankrupt had transferred his herd number to another source and the order of garnishee would have no effect. On 11th November, 2013, the petitioner obtained a conditional order under O.46, r. 1 of the Rules of the Superior Courts 1986, that the judgment stands charged on the bankrupt's shares in a company called Cannon Agri Limited. The order was made absolute on 2nd December, 2013. On 27th January, 2014 it was ordered that pursuant to O.46, r. 2 and s.133 of the Common Law Procedure Amendment Act (Ireland) 1853, that the bankrupt *inter alia* transfer all of his shares in Cannon Agri Limited to the County Registrar of the County of Kildare. By letter dated 2nd April, 2014, from the County Registrar, the County Registrar informed the petitioner that the bankrupt had transferred all

his shares in Cannon Agri Limited to Mr. Robert Kelly on 14th October, 2013, and that the bankrupt had no shares to transfer to the County Registrar.

27. I am satisfied that this clearly shows that the petitioner has been endeavouring to recover monies due and owing to it from the bankrupt. The bankruptcy petition was presented some three years after it obtained a substantial judgment but had so far been unable to recover any money on foot of the judgment, despite considerable efforts so to do. This is not a collateral or improper purpose within the meaning of *McGinn v. Beagan* [1962] 1 I.R.364 or *ACC Loan Management v. P. (a bankrupt)* [2016] IEHC 117. In *McGinn*, the petitioner procured the assignment to himself of the balance due on foot of a judgment against a debtor in circumstances where there had been a long history of ill will between the petitioner and the debtor. The debtor's summons was issued, not with a view to obtaining payment or to make money available to creditors, but solely to make the debtor a bankrupt to render him ineligible to hold a political office. I am satisfied that in this case the petition has been presented for the purposes of recovering the debt. It is therefore not brought for an improper purpose and I reject this argument also.

28. The petitioner valued the lands in Folio KE 976 over which it held a first legal charge at €830,000 and the lands comprised in Folio KE 5445 in respect of which it has a judgment mortgage at €370,000. The petitioner gave up its security registered on two other folios and therefore did not provide a value for these lands. It is open to a secured creditor to indicate whether or not it proposes to rely upon its security or whether it intends to surrender its security. In this case, the petitioner has indicated the security upon which it intends to rely and has valued it at €1.2 million. In view of the fact that the debt claimed is €1,487,016.15, it is not improper to proceed with the petition. It is not obliged as a precondition to instituting bankruptcy proceedings to release the judgment mortgages registered against the interest of the debtor in certain lands. Therefore, the failure so to do cannot be a basis for showing cause against the adjudication of the debtor in this case.

29. I am satisfied that there was compliance with the requirements of s.11(1)(a),(b) and (c) of the Act of 1988. The debt owing by the bankrupt to the petitioning creditor amounted to more than €20,000, it was a liquidated sum and the act of bankruptcy on which the petition was founded occurred within 3 months before the presentation of the petition; the failure to pay on foot of the bankruptcy summons served pursuant to the order for substituted service dated 12th October, 2015, which service was effected on 22nd October, 2015. I therefore have a discretion as to whether or not I should annul the adjudication pursuant to s. 16(2) of the Act of 1988. I am not satisfied that it would be just and equitable to annul the adjudication in the circumstances of this case. I am not persuaded that the adjudication has been either improperly sought or obtained or that, having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him, this is a case where the Court ought to exercise its discretion to annul the adjudication.

30. Finally, I should note that there was criticism of the conduct of the hearing of the petition on 4th July, 2016, and of the *ex tempore* judgment I delivered setting out my reasons for rejecting the arguments advanced on that occasion and for adjudicating the debtor a bankrupt. Insofar as the bankrupt makes complaint in relation to these matters, these are matters for appeal and not matters for an application to show cause. I have dealt with the substance of the arguments in this judgment.