Neutral Citation: [2016] IEHC 527

THE HIGH COURT

BANKRUPTCY

[2012 No. 2479 BANKRUPTCY]

[2012 No. 2480 BANKRUPTCY]

IN THE MATTER OF

AN APPLICATION UNDER SECTIONS 61(7) AND 71 OF THE BANKRUPTCY ACT 1988

AND

IN THE MATTER OF

BRIAN O'DONNELL (A BANKRUPT)

AND MARY PATRICIA O'DONNELL (A BANKRUPT)

BETWEEN

LITIGATION FINANCE LIMITED

APPLICANT

AND

CHRISTOPHER LEHANE

OFFICIAL ASSIGNEE

JUDGMENT of Ms. Justice Costello delivered on 3rd day of October, 2016

Introduction

1. The relief sought in the notice of motion dated 31st May, 2016, by the applicant is for:-

> *"…an Order:*
>
> *1) Pursuant to Section 61(7) and/or 71 of the Bankruptcy Act 1988 that the Official Assignee shall transfer the chose in action to the Applicant on the terms of the offer made by the Applicant".*

2. Section 61 of the Bankruptcy Act 1988 sets out the functions and powers of the Official Assignee. It includes the power to sell property of the bankrupt. Property includes *choses in action* (s. 3 of the Act of 1988). Section 61(7) provides:-

> *"The exercise by the Official Assignee of the powers conferred by this section shall be subject to the control of the Court, and any creditor or other person who in the opinion of the Court has an interest may apply to the Court in relation to the exercise or proposed exercise of those powers."*

3. Section 71 of the Act provides:-

> *"The Court may make to the bankrupt out of his estate such allowances as the Court thinks proper in the special circumstances of the case."*

4. The applicant is a company incorporated under the laws of England and Wales in 2012 whose sole purpose is to purchase claims relating to the estates of Mr. Brian O'Donnell and Dr. Mary Patricia O'Donnell ("the Bankrupts"). It is not a creditor of either of the estates. The company was incorporated by the four children of the Bankrupts, the directors of the applicant are sons of the Bankrupts and the solicitor representing the applicant is a son of the Bankrupts.

5. In view of the fact that the Bankrupts are not parties to this application and the applicant is not a bankrupt, s. 71 does not apply to this application.

6. The notice of motion does not identify the *chose in action* which the applicant asks should be transferred to it. The grounding affidavit of Mr. Blake O'Donnell sworn on 28th June, 2016, clarifies that the applicant is seeking an order:-

> *"…to compel the Official Assignee to assign any and all claims that the bankrupts possess against Hibernia (2005) Limited and Gort Limited to the Applicant."*

7. On 17th June, 2015, the applicant offered €3,500.00 for an assignment of any and all claims of Mr. Brian O'Donnell and Dr. Mary Patricia O'Donnell against Hibernia (2005) Ltd. and Gort Ltd. After an exchange of e-mails, on 20th July, 2015, Mr. O'Donnell, on behalf of the applicant, stated that it wished to purchase the claims of the Bankrupts against the two companies so that the applicant could:-

> *"…participate as a creditor in voting for the appointment of an insolvency practitioner in relation to the court ordered winding up of Hibernia (2005) Limited and Gort Limited.*
>
> *Other than the voting rights at the creditors meeting there is currently no value in the claims."*

8. The e-mail did not elaborate on the claims of the Bankrupts against the two companies being wound up by the courts of England and Wales. On the other hand the e-mail elaborated on the purpose in seeking to become creditors of the two insolvent companies. It stated:-

> *"Mr. O'Donnell and Mrs. O'Donnell have previously indicated to your office in correspondence that they believe Morgan Stanley Mortgage Servicing Ltd illegitimately levied an interest rate swap liability against Hibernia (2005) Limited and Gort Limited which they were not legally entitled to do. Morgan Stanley Mortgage Servicing Ltd subsequently appointed Ernst & Young as administrators over Hibernia (2005) Limited and Gort Limited and sold 15 Westferry Circus to Canary Wharf Group for the balance of the outstanding debt (as calculated by Morgan Stanley Mortgage Servicing Ltd) plus £1."*

9. The Official Assignee's solicitors wrote to Mr. O'Donnell on 24th July, 2015, pointing out that the information available to the Official Assignee was insufficient for him to assess the applicant's offer. The letter set out certain matters which the Official Assignee would require before he could evaluate the offer, including detailed documentary records substantiating and outlining the allegations which it was proposed would be made and it sought a Senior Counsel or Queen's Counsel's opinion outlining the reasoning for the actions, the prospect of success or failure, the estimated costs of any such action, how any fees are to be discharged and what is the fee arrangement in relation to any such action. The letter concluded:-

> *"Having ascertained all of the foregoing information the Official Assignee will then be in a position to consider:*
>
> - *Whether he should embark on the litigation;*
> - *Whether he should assign the litigation;*
> - *What benefit falls to the Estate of the Bankrupt;*
> - *The exact terms of the litigation;*
> - *Whether the litigation is or could be considered vexatious".*

10. Mr. O'Donnell replied by letter dated 11th September, 2015. He did not provide any statement of the claim by the Bankrupts against Hibernia (2005) Ltd. and Gort Ltd. Neither did he set out the detail of the possible claim by Hibernia (2005) Ltd. or Gort Ltd. against Morgan Stanley Mortgage Servicing Ltd. He asked the solicitors to define what they meant by a " *detailed documentary record*". By implication he declined to provide an opinion analysing the merits of the case and said that it was a matter for the Official Assignee. He stated:-

> *"We do not have any obligation to commission one in order to make a bid for the assets.*
>
> *We remind you that the Official Assignee has an obligation to realize all assets for the estate and an obligation to accept bids which would generate funds for the estate. Failure to do so will result in a challenge to the High Court."*

The letter requested an immediate response. The Official Assignee did not reply. Then the notice of motion herein issued on 24th May, 2016. On 14th June, 2016, after the motion had issued, Mr. O'Donnell sent an e-mail stating that the applicant had responded comprehensively to all of the queries on 11th September, 2015, and received no follow up response. He said that the Official Assignee was thus in breach of his obligations as Official Assignee.

11. Mr. O'Donnell swore two subsequent affidavits in relation to this application. Only the second dealt with the merits of the application. It was sworn on 14th July, 2016, in response to the affidavit of the Official Assignee sworn on 7th July, 2016. Among other arguments advanced by the Official Assignee, he stated that he did not have any particulars of the claims or the value of the claims or any explanation why an assignment of the claims was necessary. Mr O'Donnell's replying affidavit gives no further detail of the alleged claims of the Bankrupts against either Hibernia (2005) Ltd. or Gort Ltd. It gives no information in relation to those companies other than the fact that they are in the course of being wound up and that the sole asset of Hibernia (2005) Ltd. has been sold. No further information relating to the possible causes of action by either Hibernia (2005) Ltd. and/or Gort Ltd. against Morgan Stanley Mortgage Servicing Ltd. is put before the Court.

12. Mr. O'Donnell exhibits the joint administrators' reports dated 27th June, 2013, and 20th December, 2013, in respect of the two companies. From these it appears that an asset is listed in the directors' statement of affairs as "*litigation claim against Morgan Stanley for misselling (sic) swap for £131.6m ending 2016*". It is valued at £500, though the total in the summary of assets suggests this is an error and it should read £5,000. However, there is no evidence in relation to the claim or its value so this is an assumption on my part. The statement of affairs indicates that the directors of the companies, the Bankrupts, claim to be creditors in the sum of £5,149,602. There is no explanation of this claim in the statement of affairs. The report states that the unsecured creditors of the companies primarily comprise the companies' directors' loan and ground rent due in respect of the property that was sold. It is to be inferred, though again there is no evidence in this regard, that the Bankrupts' claim against the two companies is a directors' loan.

13. Tellingly, the joint administrators state at p. 3 of their report of 20th December, 2013, that:-

> *"Having reviewed the SoA, the Joint Administrators would comment that the primary asset of the Companies has now been sold and the Joint Administrators believe there to be no remaining assets to realise. You will note from Appendix 5 that the Companies' directors have included uncharged assets in the SoA. The Joint Administrators have sought legal advice on the validity of these purported assets and believe there to be no value in them[.]*
>
> *The Joint Administrators would also comment that the realisations from the sale of the Property were sufficient to repay the secured lenders in part only. Therefore, the possibility of a dividend to unsecured creditors did not exist and an independent review or statutory audit of the unsecured liabilities detailed at the SoA was not therefore required."*

Standing

14. The first matter which must be determined is whether or not the applicant has standing to bring an application pursuant to s. 61(7) of the Act of 1988. Usually, assignments of claims in bankruptcies are sought by the bankrupt in the interests of justice so that the bankrupt may pursue the claim when the Official Assignee has decided for various reasons not to pursue the claim. It is noteworthy that neither of the Bankrupts have sought the assignment of these claims in this case. A company, in which they appear to have no interest, seeks the assignment of their asserted *chose in action*.

15. A creditor of the bankrupt automatically has standing to apply to court pursuant to s. 61(7). The Bankrupts have accepted that their four children are creditors of their estates. However, they have not chosen to bring the application themselves. It is brought by

a company they incorporated with the sole purpose of acquiring claims of the Bankrupts against third parties. Thus the interest of the applicant is not that of a creditor in the estate of either of the Bankrupts. In law, it is the interest of an unconnected third party who seeks to buy claims of the Bankrupts.

16. Section 61(7) provides that "*any… other person who in the opinion of the Court has an interest may apply to the Court*". The question of the standing of a party, other than a creditor, is a matter for assessment by the court. The court must be satisfied on evidence adduced by the applicant that they have an interest in relation to the exercise or proposed exercise by the Official Assignee of the powers conferred on him by s. 61.

17. At present the applicant has no interest in the causes of action. It seeks to acquire an interest by purchasing the *chose in action* from the Official Assignee. It says that its offer to purchase the *chose in action* is sufficient to meet the requirement established by s. 61(7) and that it has standing to bring the application based upon the offer to purchase the property of the Bankrupts without anything more.

18. The purpose of the applicant acquiring the claims is not elaborated or disclosed to the Court. It is therefore left to the Court to assume that it seeks to acquire the claims for the purpose of pursuing them. If this end is to be legitimate, it must be with a view to obtaining a return.

19. Public policy is relevant in this context. The courts will not assist in the proliferation of unmeritorious litigation, either by disappointed bankrupts or by third parties, by ordering the Official Assignee to assign unmeritorious causes of action pursuant to s. 61(7) to persons who wish to acquire the cause of action. They must be alert to possible trading in litigation which could give rise to issues of maintenance or champerty, though the sale of the interest of a bankrupt in litigation by the Official Assignee is authorised by statute and therefore does not offend the rules against maintenance and champerty. The court must consider the proposed proceedings in order to satisfy itself that the assignment of the cause of action could be accepted to be legitimate or in the interests of justice. It must assess, at least in a general way, the prospects of success of the proceedings. At a minimum, the court ought not to order the Official Assignee to assign a claim that is bound to fail as being frivolous or vexatious.

20. The powers of the Official Assignee that are subject to the control of the court are set out in s. 61(3)(a)-(k). The interest of the applicant to the court must relate to the exercise of, or failure to exercise, the powers. These are:-

> *(a) to sell the property by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in lots and for the purpose of selling land to carry out such sale by lease, sub-lease or otherwise and to sell any reversion expectant upon the determination of any such lease,*
>
> *(b) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim present or future, certain or contingent, ascertained or sounding only in damages whereby the bankrupt or arranging debtor may be rendered liable,*
>
> *(c) to compromise all debts and liabilities capable of resulting in debts and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the bankrupt or arranging debtor and any debtor and all questions in any way relating to or affecting the assets or the proceedings on such terms as may be agreed and take any security for the discharge of any debt, liability or claim, and give a complete discharge in respect thereof,*
>
> *(d) to institute, continue or defend any proceedings relating to the property,*
>
> *(e) to refer any dispute concerning the property to arbitration under the terms of section 11 of the Arbitration Act, 1954 ,*
>
> *(f) to mortgage or pledge any property to raise any money requisite,*
>
> *(g) to take out in his official name without being required to give security, letters of administration to any estate on the administration of which the bankrupt or arranging debtor would benefit,*
>
> *(h) to agree a sum for costs where the Court so directs or where he considers that the amount which would be allowed on taxation would not exceed €12,000,*
>
> *(i) to agree the charges of accountants, auctioneers, brokers and other persons,*
>
> *(j) to ascertain and certify to the Court the amount due in respect of a mortgage debt and the due priority thereof with power to the Court to vary such certificate,*
>
> *(k) to draw out of the account referred to in section 84 (1) any sum not exceeding €130 by way of indemnity in respect of costs incurred by him."*

21. Examples of a person who would not be a creditor of the bankrupt but who may have an interest in the exercise by the Official Assignee of those powers, other than the bankrupt him- or herself, could include a neighbour to property of the bankrupt, a party to proceedings instituted by, or against, the bankrupt prior to his adjudication, a person concerned in an estate falling within sub-para. (g). In each case, the applicant must adduce evidence to the court so that the court may form the opinion that the applicant has the requisite interest to make the application. If the applicant is not a creditor of the bankrupt, he or she will not automatically have *locus standi* to bring the application. In the absence of standing, the application cannot be moved.

22. The court cannot form the requisite opinion if an applicant simply makes an offer to purchase an asset from the bankrupt's estate without giving the court any further information. To hold otherwise could lead to a host of unmeritorious applications pursuant to s. 61(7) and would do violence to the language of the statute. A judge cannot form an opinion without evidence, save that he or she has insufficient evidence to form an opinion.

23. For all of the reasons set out above, it was incumbent on the applicant to set out particulars of the claims of the Bankrupts which it wished to purchase and the value of the claims. It did not do so, despite the correspondence from the solicitors for the Official Assignee and the affidavit sworn by the Official Assignee in reply to the motion. At the very least there should have been sufficient information for the Court to assess:

- Whether the applicant had an interest within the meaning of s. 61(7);
- The nature of the claim(s);
- That the proposed claim(s) is not bound to fail, nor is it frivolous or vexatious;
- Some approximate assessment of the value of the claim; and
- Any other relevant information.

In the absence of this information the Court cannot form an opinion that the applicant has an interest within the meaning of s. 61(7). On this ground, I refuse the application. If the applicant wishes to renew its offer to take an assignment of the claims and sets out the information I have outlined in this judgment or at least some of the information requested by the Official Assignee it may renew the application if necessary and if it sees fit.

24. In view of the fact that I have held that the applicant has not established that it has *locus standi* to bring the application, I shall not decide whether or not the Court should make an order directing the Official Assignee to assign to the applicant the *chose in action* of the Bankrupts against Hibernia (2005) Ltd. and Gort Ltd. as this is not necessary for the purpose of my decision on this application.