THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 158

[2020 No. 178]

The President
Edwards J
Kennedy J

IN THE MATTER OF THE BANKRUPTCY ACT AND IN THE MATTER OF

JOHN HOEY (A BANKRUPT)

BETWEEN

CHRISTOPHER D LEHANE (AS OFFICIAL ASSIGNEE IN BANKRUPCY IN THE ESTATE OF JOHN HOEY, A BANKRUPT)

RESPONDENT

AND

JOHN HOEY

APPELLANT

JUDGMENT of Mr. Justice Birmingham, President of the Court of Appeal, delivered (via electronic delivery) on the 26th day of May 2021

1. This is an appeal against a judgment of the High Court (Pilkington J.) of 8th April 2020 postponing the discharge of the appellant from bankruptcy.

2. The background to this application was that the appellant was adjudicated bankrupt on 29th February 2016. In the ordinary way, there would have been an expectation that he would have been discharged from bankruptcy on 28th February 2017. However, the respondent brought a motion before the High Court, dated 13th February 2017, seeking to extend the bankruptcy period by ten years pursuant to s. 85A(1) of the Bankruptcy Act 1988 (as amended), or such other period as the Court regarded as appropriate, on the basis that the Bankrupt has:

   (a) failed to cooperate with the Official Assignee in the realisation of the assets of the Bankrupt; or

   (b) hidden from or failed to disclose to the Official Assignee income or assets which could be realised for the benefit of the creditors of the Bankrupt.

3. Of note is that prior to the hearing of the motion, the solicitors for the Official Assignee wrote to the solicitors for the Bankrupt on 27th February 2020. The pertinent portion of that letter, as quoted by the trial judge, was as follows:

> "… the primary remaining issue to be dealt with in our client's administration of this estate is the sale of Anna Croft. This application to extend Mr. Hoey's bankruptcy proceeds in part because of his conduct to date but also in part because the estate remains to be concluded and regulated.
>
> If your client confirms that he will cooperate in the sale of Anna Croft and its surrounding lands and will so undertake to the court on Tuesday [when the matter was listed for hearing], then our client is prepared to seek no further extension of his bankruptcy."

It appears there was no response to that letter.

4. The significance of this is that the High Court judge concluded her reserved judgment by saying that whilst, in her view:

> "…there are grounds under both criteria set out within s. 85A(1)(a) and (b) of the Bankruptcy Act 1988 for extending the period of Mr. Hoey's bankruptcy, I would be happy to consider, having heard the parties, whether this matter should be adjourned for a short period of time to see if any further cooperation might arise, in which case this could well determine the extent of any bankruptcy extension concerning Mr. Hoey."

This is particularly in light of the contents of the Official Assignee's solicitor's letter of 27th February 2020 referred to above.

5. The grace period was not availed of, and instead, the trial judge extended the period of bankruptcy, directing that the bankruptcy would stand discharged on 28th February 2024.

6. That date has been referred to in the course of the proceedings as being an eight-year extension. In fact, while 28th February 2024 will be the eighth anniversary of the bankruptcy adjudication, the extended period is actually seven years.

7. In the written submissions at paragraph 6, which appears at page 48 of the Core Book, it is stated:

> "The [a]ppellant accepts the trial judge in her reserved judgment in April 2020 was entitled to make the findings of fact which she did. In that sense, apart from developments in May 2020, which touch upon the last 4th ground (no S.O.A. [statement of affairs] "…suggests little short of obstinacy'), this appeal, by light analogy with the criminal jurisdiction or procedure is not against conviction; – but against severity only."

8. In light of that acknowledgement, it is unnecessary to rehearse the factual background to this matter in any great detail. Suffice it to say that the application generated what might be described as a volley of affidavits: a grounding affidavit, and later, a supplemental affidavit from the Official Assignee and three affidavits from the appellant. Those affidavits have been described, without exaggeration, as "replete with conflicts". In those circumstances, the trial judge proceeded on the basis that she could not resolve the issues of conflict, and to the extent that there was conflict, she took the view more favourable to the Bankrupt but based her decision on matters that were not in controversy. The approach taken by the trial judge was consistent with what emerges as the correct approach from cases such as Thomas McFeely, A Bankrupt [2016] IEHC 299, and the Supreme Court decision in Killally v. The Official Assignee [2014] IESC 76.

9. At paragraph 15 of the judgment, the trial judge recorded that counsel for the Official Assignee was explicit in identifying four specific grounds (and only four) upon which the application for the extension of time of the bankruptcy was sought, those being:

> "(a) That a substantial amount of our machinery [farm machinery and vehicles] was moved from the family farm into storage (hidden) within the grounds of a local hotel.
>
> (b) The discovery of €12,000 in cash on the debtor's premises.
>
> (c) The hiding of Kepak money.
>
> (d) The failure by Mr. Hoey throughout the entirety of the bankruptcy process to furnish a proper statement of affairs, to meet the O.A.'s [Official Assignee] requirement and those of s. 19 of the 1988 Act."

The judge commented that the first three grounds were advanced pursuant to the criteria within s. 85A(1)(a) with the fourth ground being pursuant to s. 85A(1)(b).

10. The trial judge then considered each of the issues that had been raised in turn. So far as the machinery issue was concerned, she felt that it was noteworthy and not disavowed that the items were procured subsequent to a search warrant, were moved to the property of a third party. She felt that subsequent averments of Mr. Hoey did not provide any evidence to the Court that they were not properly estate assets that should have properly been vested in the Official Assignee from the outset.

11. In relation to the €12,000, the judge explained how the sum in question came to be located in the course of a search under warrant – it was located behind a radiator following the intervention of a sniffer dog.

12. In relation to the Kepak money issue, the judge referred to the matter that Kepak confirmed in correspondence that a number of cheques were paid over from the period of 16th February 2016 to 8th March 2016, with the cheque on 16th February 2016 in the sum of €57,539.85 (bankruptcy date being 29th February 2016). She referred to the fact that also exhibited were five subsequent cheques by Kepak to Mr. Hoey, all marked "A/C

Payee Only", all of which were then endorsed to different third party organisations resulting in applications for Mareva injunctions to prevent the relevant banks disposing of the amounts held in the account of those third party entities.

13. In dealing with the absence of a statement of affairs, the judge referred to the contention by Mr. Hoey that he furnished documentation to the Examiner's Office on 2nd November 2015, and that he had also made full disclosure of his assets in the context of family law proceedings. Elsewhere, the judge referred to the ongoing difficulty that the Official Assignee had in relation to the bankruptcy by reason of the absence of the filing of a proper statement of affairs.

14. At paragraphs 61 and 62 of her judgment, the judge summarised her view of the facts in the following terms:

> "61. In my view, I am satisfied, on the balance of probabilities, that Mr. Hoey had significant cash assets hidden on his property which were not disclosed to the O.A., and in respect of which he failed to furnish any credible or proper explanation, other than it was needed for living expenses. It is not the amount of the cash but its non-disclosure that is the issue. I have also had regard to his conduct with regard to the Kepak monies, the distribution of some of the proceeds by cheques made out in favour of various third parties, in turn necessitating applications for Mareva injunctions. I also note the moving of certain assets formerly on the Anna Croft property. In my view, considering all of the affidavits, the evidence arising from the cross examination of the O.A. and the legal submissions advanced, these matters constitute a sufficient basis for the finding of a failure by Mr. Hoey to cooperate with the Official Assignee in the realisation of his assets as required by s. 85A(1)(a) of the 1988 Act.
>
> 62. In my view, the most troublesome feature of this case remains the failure of Mr. Hoey to cooperate with the O.A. in the filing of a statement of affairs. The requirement to file a statement of affairs is well known. The O.A. gave evidence that its absence constitutes an ongoing difficulty within this bankruptcy. There was never any suggestion or offer by Mr. Hoey that this defect would now be rectified. His position is that the information gleaned by the O.A. should be sufficient in all the circumstances. I do not understand the reluctance to co-operate with the O.A. in this regard, but the view of Mr. Hoey that he has submitted the information regarding his estate and that is an end of the matter and should be sufficient, suggests little short of obstinacy. The requirement of s. 19 of the 1988 Act is clear and applies to all without exception. His blatant failure to fully disclose to the O.A. his income and/or assets, which of course are to be realised for the benefit of creditors, remains unexplained."

15. In the course of the hearing in the High Court, counsel for the Official Assignee suggested that the extension should be within the range of six to ten years, being not at the most egregious end of the scale, but sufficiently serious to warrant a significant extension of the bankruptcy. Counsel on behalf of the Bankrupt, on the other hand, pointed out that

by the time of the hearing in the High Court, the bankruptcy had, in practice, already been significantly extended beyond the one year envisaged, and that no further extension beyond that was required.

16. It appears the identification of a range of six to ten years was influenced by a decision of Kelly J. in the case of The Director of Corporate Enforcement v. D'Arcy [2005] IEHC 333, dealing with what was suggested as the analogous situation of the appropriate period of a director's disqualification. There, Kelly J. derived assistance from the decision of the English Court of Appeal in the case of In Re Seven Oaks Stationers (Retail) Ltd [1991] Ch. 164, which envisaged dividing a potential 15-year disqualification into three periods as follows:

> "(i) The top bracket of disqualification for periods over ten years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again.
>
> (ii) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious.
>
> (iii) The middle bracket of disqualification for from six to ten years should apply for serious cases which do not merit the top bracket."

17. This approach of considering offending conduct in three bands – upper, middle, and least serious – is one that is very familiar to those called on to familiarise themselves with the jurisprudence of the criminal division of this Court.

18. It seems to me that in considering what was an appropriate period, the trial judge was required to have regard to the desirability of deterring misconduct and so maintaining the integrity of the bankruptcy system. In Killally, Clarke C.J. had commented:

> "The seriousness of that breach needs to be measured in the light of the correct view taken by the trial judge that the maintenance of the integrity of the bankruptcy process is of the utmost importance and requires to be encouraged by the imposition of sanctions for breach. In the light of those considerations, and notwithstanding the fact that Mr. Killally had already been sentenced by the criminal courts, I am of the view that it was within the range of sanctions open to the trial judge in all the circumstances of this case to impose, by way of additional civil sanction, an extension of one year on Mr. Killally's bankruptcy."

19. The reference to "a range of sanctions" also echoes the language of sentence appeals on the criminal side. There, we have often made the point that, generally speaking, it is not a question of one correct sentence, but rather of considering whether a particular sentence falls within an available range. Again, we have often made the point that merely because one member of the Court, or even all the members of the Court, might have been disposed to impose a different sentence than the one actually imposed, does not

provide a basis for intervention. Intervention should result only from a conclusion that the sentence imposed fell outside the available range.

20. In the course of the appeal hearing, exchanges were made between members of the Court and counsel on both sides. It was made clear to the Court that if, even at that stage, full cooperation, as in providing a complete and accurate statement of affairs, was forthcoming, that would (however belated) be very welcome from the perspective of the Official Assignee. Having canvassed the option with counsel, the Court decided to put the matter back to provide yet a further opportunity for that to occur. In doing so, the members of the Court were at pains to point out that the appellant could not expect to have the slate wiped clean by cooperating at that point. Nonetheless, if full cooperation was forthcoming, it was a matter to which the Court would have regard and which would, therefore, to some extent advantage the appellant.

21. In the aftermath of the initial appeal hearing, the appellant did prepare some additional documentation which appears, on its face, to be a contemporaneous account of the current liabilities and assets of the appellant, rather than a record of his liabilities and assets as at the date of his adjudication. By letter dated 20th April 2021, the solicitors for the Official Assignee drew attention to that. Moreover, the letter highlighted what its author saw as further deficiencies as follows:

> "1. The Statement of Affairs omits any reference to the monies hidden on your client's [the appellant] property or to the Kepak monies[,] both of which your client accepted had been hidden from the Official Assignee as at the date of his adjudication.
>
> 2. The Statement of Affairs omits any reference to the sum of €45,539.85 which remains missing from the Kepak monies since the date of his adjudication.
>
> 3. The Statement of Affairs omits any reference to the real property – Annacroft – which your client asserts was placed in trust on an as yet unspecified date. The omission of Annacroft from the Statement of Affairs cannot be explained by a bald assertion that the property does not belong to your client, since your client has now sworn that his cattle – which he similarly swore had been placed in the self-same trust – represent losses to his estate.
>
> 4. While not properly a matter for the Statement of Affairs – being something which arises post adjudication and ought to have been included in the Affidavit accompanying the Statement of Affairs – it is not acceptable for your client to decline to identify the sums received from 'friends and family' which he now swears been his only source of income (apart from donations from the St. Vincent de Paul Society) since 29 February, 2016 nor to identify the persons who provided these sums."

22. In my view, despite the Court of Appeal affording the appellant a still further opportunity to cooperate, and so to improve his position, matters have not really moved on since the

judgment of the High Court was delivered. The question that arises then is whether the order made by the High Court judge was one that was open to her, or whether it was an impermissible order as falling outside the available range. I accept that the extension ordered was a significant one and represented a severe sanction. However, in my view, a significant extension was called for in the circumstances of the case. In my view, the order made by the High Court was an appropriate one and certainly could not be said to fall outside the available range.

23. In the circumstances, I would dismiss the appeal.

24. As this judgment is being delivered electronically, it is the practice to offer a provisional view on the costs of the appeal, subject to any application on costs which may be brought. My provisional view is the costs of the appeal should be paid by the unsuccessful appellant. If either party wishes to contend otherwise, short written submissions should be forwarded to the Office of the Court of Appeal within 10 days. Alternatively, the party should contact the Office of the Court of Appeal to request a short oral hearing on the costs issue, though any party who requests such a hearing which results in an order in line with that indicated provisionally, may incur the further costs of such a hearing.

Edwards J

I have had the opportunity to read the judgment delivered by the President and I agree with the conclusions reached therein.

Kennedy J

I have also read the judgment of the President and I agree with the decision.