THE HIGH COURT

BANKRUPTCY

[2015 No. 1587 P]

IN THE MATTER OF THE PETITION FOR ADJUDICATION OF BANKRUPTCY BY ACC LOAN MANAGEMENT LIMITED AGAINST P.

JUDGMENT of Ms. Justice Baker delivered on the 19th day of January, 2016.

1. ACC Bank (hereinafter "the Bank") presented a petition for adjudication of bankruptcy against P. on 17th April, 2015, in which it is claimed that Mr. P. is indebted to the Bank in the sum of €3,647,281.92, on foot of a judgment obtained in the High Court against him on 30th July, 2014. The Bank holds security for the debt in real property estimated as having a value in October 2013, of €895,000.

2. The Petition was adjourned from time to time and came before me for determination following the exchange of affidavits and the filing by the respondent of a statement of affairs.

3. At the hearing of the Petition, counsel appeared for the Bank and for Mr. P.

4. Counsel for Mr. P. argued that the Petition ought to be dismissed as having been brought for a collateral purpose, and makes the alternative argument that the Petition ought to be adjourned pending the determination of proceedings he has commenced against the Bank and against receivers appointed by the Bank over the secured property and for the reasons more fully recited below. I will deal first with the application to dismiss the Petition.

Collateral or improper purpose?

5. Counsel relies primarily on the judgment of Budd J. in *McGinn v. Beagan* [1962] I.R. 364, where Budd J. stayed proceedings on the debtor's bankruptcy summons on the grounds that it had been issued for an ulterior or collateral purpose. The circumstances were unusual and the court found a collateral and ulterior purpose in the context of a long history of personal ill-will on the part of the petitioner against the respondent, and considered that the real purpose for which the petitioner had purchased the debt and then petitioned for bankruptcy was to render the debtor ineligible to be a member of the Urban District Council as an undischarged bankrupt. In the final paragraph of the judgment, Budd J. said as follows:-

> *"The proper purpose of bankruptcy proceedings is to make assets available to creditors. The debtor in this case has very big debts, and I am quite satisfied that he has no assets to meet them. Judgments remain unsatisfied and creditors have failed to obtain instalment orders. In my view McGinn brought this debtor's summons for improper reasons, and I am satisfied that proceedings were not taken to get payment, but to make Mr. Beagan a bankrupt and unseat him. Hence, the purchase of the debt and the issue of the summons were to enable Mr. McGinn to commence proceedings for a collateral purpose. It seems to me that I should not allow the Court's processes to be used for an ulterior and collateral purpose, and I will therefore stay all further proceedings on the debtor's summons."*

6. Counsel for the respondent argues that the case is directly on point and that the Bank has issued the Petition solely for the purpose of avoiding the conclusion to judgement of litigation already commenced by the respondent against the Bank and receivers appointed by the Bank.

7. I consider that there is an inherent jurisdiction to stay proceedings including bankruptcy proceedings that are, or have become, oppressive or an abuse of process, and that in the case of a petition for adjudication in bankruptcy, the principles identified in *McGinn v. Beagan*, are engaged, and the court may inquire whether the petition was presented, and is genuinely being prosecuted, for the purposes of recovering the debt. Dunne J. considered and applied the decision of Budd J. in *McGinn v. Beagan* in *D. v. D.* [2008] IEHC 435, where she rejected the argument made on behalf of the debtor.

8. In that case, the High Court in family law proceedings had made certain orders for the payment of money by the debtor to the petitioner, including lump sum payment orders. The orders were not performed, and no satisfactory explanation was put forward by the debtor to explain the default. Dunne J. took the view that:-

> *"an adjudication will have the effect of assisting the applicant in the recovery of the debt due to her… think it is an inference too far to suggest that the petitioner is aware that an adjudication will not assist in the recovery of the debt. On the contrary, an adjudication will have the effect of assisting the applicant in the recovery of the debt due to her. Obviously an adjudication of bankruptcy would have an effect on the position of the debtor as the director of the companies within the group. However, there is nothing in the evidence before me to suggest that that was the purpose of the petitioner in bringing these proceedings."*

9. Dunne J. found also that no "ill will or spite" towards the debtor in pursuing the proceedings had been shown, and concluded that the petitioner had been *"driven to take these steps in order to secure the payments of the money provided for in the order of the court".*

10. I adopt the reasoning of Dunne J. in my approach in the present case.

The litigation between the Bank and the debtor

11. In proceedings entitled *ACC v. P.* 2014 No. 5970 P., and related proceedings between *P. v. ACC Loan Management Limited & Ors* [2014 No. 5264 P., Cregan J. gave judgment on 31st July, 2014, [2015] IEHC 591. In the first proceedings, the plaintiff as receiver appointed by the Bank sought possession over certain properties of the defendant, and in the second set of proceedings, Mr. P. sought a declaration that neither the current receiver, nor a receiver previously appointed, were validly appointed. Cregan J. concluded that the Bank had not validly appointed either receiver, and as a consequence Mr. P. was entitled to damages for trespass to his property. Cregan J. held over any issue of whether Mr. P. was entitled to damages because the injunction by which the receivers had obtained possession had been wrongly granted.

12. The Bank and the receivers have appealed the decision of Cregan J. to the Court of Appeal, and I am advised that the matter is at directions stage in that Court. Cregan J. has deferred the assessment of damages until the Court of Appeal has delivered its judgment. Counsel agree that the likely timeframe for the conclusion of the High Court damages claim, if such arises, is 18 months or

thereabouts.

13. Counsel for Mr. P. argues that the Bank seeks the adjudication in bankruptcy in order to prevent him from prosecuting the appeal or the claim for damages against the receivers or the Bank in those proceedings. For the purpose of the argument before me, it was accepted by both counsel that, while the receiver and the Bank have somewhat different roles in the proceedings, damages that might be assessed against either the Bank or the receiver could ultimately become the subject of a set off as between the debtor and the Bank. It seems to me, and I will return to this point later, that any damages recovered by Mr. P. against the receivers and/or the Bank might fall into the general fund available for creditors should the bankruptcy proceed. That point may have some significance in the overall determination of the application before me.

14. Counsel for the Bank argues there is no collateral purpose and he correctly points to the general proposition of law that a creditor is entitled to seek to enforce judgment by any means available to him and does not, in the normal course of recovery, require to forego security or choose between methods of execution. Thus, I accept the general proposition that the Bank was not precluded from presenting the Bankruptcy Petition merely on account of the fact that it had security for the judgment debt, nor because it had now taken further steps to appoint a receiver in respect of whose appointment no procedural objection has been raised.

15. Counsel for the respondent makes the point that the Petition was served on him on 9th July, 2015, in the course of the hearing of the proceedings before Cregan J. and that this fact points to a motive on the part of the Bank to prevent him continuing with those proceedings, and *ipso facto* pursuing his claim for damages arising out of his successful argument that the receivers were not validly appointed. Counsel for the Bank points to the fact that demand was made on 11th September, 2014, and an act of bankruptcy for the purpose of the Petition occurred in December 2014, before the proceedings came on for hearing before Cregan J., albeit after Mr. P. himself instituted plenary proceedings on 11th August, 2014. I turn now to examine the claims in those proceedings.

The P. plenary proceedings
16. I accept what is argued by counsel for the Bank that, while there is a plea at para. 9 in the general endorsement of claim to the plenary summons that Mr. P. "disputed the validity" of the appointment of the receiver, it was only in the course of the litigation before Cregan J. that the precise issue on which he determined in favour of Mr. P. evolved and crystallised, namely whether the seal of the Bank had been affixed in accordance with the requirements of the mortgage.

17. Thus, I conclude on those facts that it cannot be said that the Bank presented the Petition merely on account of improper or collateral purpose, namely to prevent the ongoing prosecution by Mr. P. of the litigation by which he sought damages for negligence and trespass against the Bank and receivers. Those proceedings relate to the means by which the Bank sought to enforce its security, and I do not consider that the Bank, or even Mr. P. himself, anticipated the course of those proceedings, especially as the particular infirmity with regard to the sealing of the deed of appointment was not expressly flagged in the pleadings.

Discussion: purpose of presenting and prosecuting the petition
18. It is clear, from the documentation that I have, that the property over which the receivers were appointed did not then, nor does it now, have a value which comes close to the amount of the debt, and that in those circumstances, at the time the Petition was presented there was no *mala fides* on the part of the Bank in seeking to enforce its debt by the presentation of the Petition, as it could have sought enforcement by any number of means at its disposal.

19. The course of the proceedings before Cregan J. was not anticipated at the time the Petition was served on the debtor.

20. Therefore, I conclude that the presentation of the Petition was not done for an ulterior motive, and turn now out to consider whether the continued prosecution of the Petition, having regard, in particular, to the fact that Mr. P. has not yet been in a position to prosecute his claim in damages, as the appeal to the Court of Appeal is not yet determined.

The continued prosecution of the Petition
21. Certain factors influence me in my conclusion. The debtor has not denied the debt nor appealed the judgment granted in the summary proceedings. The statement of affairs filed by him shows a very significant level of insolvency, and two other financial institutions hold secured debts. He has a large portfolio of residential and commercial property, and has identified most of these as being in so called "negative equity". Secured creditors as of the date of the statement of affairs sworn on 3rd November, 2015, amounted to €4,289,400. Any interest that might have accrued on the Bank's judgment and/or the costs of the summary proceedings are not quantified, but counsel for the Bank asserts that the amount now owed to ACC, including costs and interest, is approximately €3.9m. In those circumstances, it seems likely that the amount of debt is higher than the amount identified, although I make no criticism of the debtor in regard to his contents of his statement of affairs. The assets identified in the statement of affairs approximate to €1.4m.

22. In those circumstances, and having regard to what, even on the debtor's estimate is likely to be a very considerable shortfall on the amount owed to the Bank on foot of the summary judgment, I am satisfied that the Bank was entitled to present and continue to prosecution, the Petition in bankruptcy and that adjudication will have the effect of assisting the Bank in recovering its debt, albeit does not appear that it will be likely to recover the entire debt.

23. I accept on that basis that the bankruptcy petition is not being prosecuted by the Bank for an improper purpose, as the debtor has shown some, albeit small, unencumbered assets. In the circumstances, the Bank has a legitimate interest as a substantial creditor, which it may pursue by the method of execution of its choice.

24. Accordingly, I do not find as a fact that the Bank has a collateral purpose in continuing the bankruptcy petition,

25. I turn now to consider the other arguments of the debtor namely that the bankruptcy petition should be stayed pending the determination of the appeal and his claim for damages.

Adjourn proceedings pending determination of damages claim?
26. The debtor asserts a substantial claim for damages against the receivers and/or the Bank arising from the finding of Cregan J. that the receivers were not properly appointed. It is argued that there has been a loss of rent estimated at about €200,000.00 per annum, and that future rent was lost as the receivers failed to take steps to secure an alternative tenant after the tenant in possession did not seek a renewal of his lease or letting agreement. The Bank says that the receiver collected the sum of €31,031.00 rent to date, and taking the argument of the debtor at its height, and noting that the claim of the debtor for loss might be said to have crystallised in that the Bank did execute a further deed of appointment of a receiver by deed of 31st July, 2015, the effect of which is that some, at least, of the debtor's claim against the Bank and/or the receivers has become limited in time, the claim for lost rent is approximately €170,000.00, subject of course to proof that an alternative tenant at the asserted rent level was likely to be available.

27. In addition the debtor alleges that the petrol station, part of the asset over which the receivers were appointed, has become "significantly dilapidated" and has lain vacant for almost a year and a half without being secured. The debtor suggests a loss of capital value of approximately €135,000.00 in respect of these premises, and notes also that on the Bank's valuation the capital value of the premises increased by over €100,000.00 between October 2013 and April 2015.

28. As noted above at paragraph 13, it is not necessarily the case as a matter of law that any damages that might be recovered by Mr. P. against the receivers and/or the Bank arising from the alleged trespass and/or loss of value of his property or properties would be the subject matter of a set off in respect of the Bank's claim. Those damages, at least arguably, would fall to the benefit of the creditors as a whole. While I accept that counsel for both parties had conceded that it is artificial for the purposes of the argument before me to separate the claim or liability of the Bank and the receivers in respect of the alleged trespass and/or loss of value of the premises, the Official assignee would be obliged by virtue of his obligation to the creditors as a whole to pursue the clam for damages, and for that purpose to engage with the appeal of the judgement of Cregan J. Thus I do not accept that the Bank can gain any advantage in the damages claim or the appeal merely on account of the fact that the debtor is bankrupt

29. The argument of the debtor fails to recognize the wide powers available to the Official Assignee in Bankruptcy, to pursue claims on behalf of the estate of a bankrupt and the imperative on him to pursue with vigour any claims that might benefit the general body of creditors and that might enhance the value of the estate of the debtor.

30. Furthermore, I do not accept that the distance that might be created between and the Bank and Mr. P. by the interposition of the Official Assignee in Bankruptcy would give the proceedings less force, as Mr. P. could be, and would be required to be, fully engaged with those proceedings and to afford such assistance in these as may be required. He may in the alternative be permitted to pursue the claim in his own name.

31. Thus, I reject the suggestion that the Petition ought to be adjourned or stayed pending the conclusion of the appeal, and the claim for damages in the receivership proceedings, on the grounds that Mr. P. is best placed to pursue those damages outside the context of bankruptcy.

32. Counsel for Mr. P. also argues that the proceedings be stayed in the context of s.14 (2) of the Act as substituted by the Personal Insolvency Act, 2012, which requires the court to consider whether a personal insolvency arrangement might be more appropriate to the circumstances. I turn now to consider this argument.

The possibility of personal insolvency options
33. Section 14 of the Bankruptcy Act, 1988 was amended by the substitution of a new s.14 by the Personal Insolvency Act, 2012. Section 14(2) provides as follows:

> 14 (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 any statement of affairs of the debtor filed with the Court, be more appropriately dealt with by means of—
>
> (a) a Debt Settlement Arrangement, or
>
> (b) a Personal Insolvency Arrangement,
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> 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."

34. Counsel for the debtor argues that by virtue of s.14 (2) I must consider whether the debtor could more appropriately seek to deal with his admitted significant debts by means of a personal insolvency arrangement and that the Petition should be adjourned to permit him to attempt to enter into such an arrangement.

35. Counsel for the Bank asserts that there is no practical reality in the debtor's seeking to engage the personal insolvency legislation having regard to the quantum of his debts.

36. By virtue of s.91 of the Personal Insolvency Act, 2012 a debtor may seek to make a proposal for a personal insolvency arrangement only when the aggregate of his secured debts is less than €3 million, unless all of the secured creditors consent in writing to the limit not having application in his case. It is argued that for the debtor to come below the €3 million limit, and having regard to the fact that the bulk of his debts are secured, he would need to recover damages of a very high level in the receiver proceedings. Counsel for the Bank argues that the debtor's secured liabilities amount to approximately €4.9 million (being the amount of the judgment plus costs plus interest, and the other secured debts) and that it is an insurmountable hurdle for the debtor to recover the amount necessary to bring the amount of secured debts below €3 million. I do not consider that calculation to be necessarily correct, as counsel for the Bank has not shown me by evidence that the interest and/or costs on the Bank's debt are secured by its security or securities. I will take therefore the figure of €4.289, 400 as a more appropriate estimate of the secured debt, being the figure the debtor identified in his Statement of Affairs. In order for the debtor to come within the €3 million threshold he would have to achieve damages in excess of €1.2 million in the receiver proceedings.

37. I cannot assess the likely damages that might be recovered by the debtor in the receivership proceedings. However on the debtor's own figures the amount of the special damages, a quantifiable claim, is in the region of €350,000. Thus the balance of the damages to which he asserts he is entitled would be general damages for trespass and in the form of aggravated, exemplary or punitive damages. To recover damages at that level is onerous, although of course not impossible.

Discussion
38. The provisions of s.14 (2) are engaged and I am mandated by statute to consider whether the debtor may seek to avail of the personal insolvency regime afforded by the legislation. The Act of 2012 in its long title recites a desire on the part of the Oireachtas to introduce an "orderly and rational" means for the resolution of indebtedness in the interests of both debtor and creditor and in the common good. The long title also recites the perceived need that debtors resolve their indebtedness

> "without recourse to bankruptcy and to thereby facilitate the active participation of such persons in the economic activity of the State".

39. Thus the Oireachtas requires the court to consider whether the personal insolvency route would offer a more beneficial solution in

the light of the desire that the debtor be permitted to continue to participate in economic activity. If the personal insolvency solution is reasonably available to a debtor he should be given time to explore that option.

40. However I am also mandated by s. 14 (2) to consider the "nature and value of the assets available to the debtor", and in the present case I must have regard to any contingent interest that the debtor has in the damages claim and the extent of his liabilities.

Conclusion on this argument
41. I have no power to assess the likely damages that might be recovered by the debtor in the receivership proceedings. However on the debtor's own figures the amount of the special damages, a quantifiable claim, is in the region of €350,000. Thus the balance of the damages to which he asserts he is entitled would be general damages for trespass, and in the form of aggravated, exemplary or punitive damages. To recover damages at that level is onerous, although of course not impossible.

42. Were I prepared for the purposes of the exercise in the present case to act on a working assumption that the debtor may, not that he will or probably will, recover damages that could theoretically bring him below the €3 million threshold, that exercise, does not avail the debtor for the following reason. The personal insolvency legislation gives a class of veto to secured creditors with regard to the approval of a personal insolvency arrangement. By virtue of s. 110 (1) (b) of the Act of the 2012 creditors representing more than 50 per cent of the value of the secured debt must vote in favour of any personal insolvency arrangement, and although the majority of creditors can bind the minority such that a debt can be restructured with the potential for some write-off, a secured creditor has a particular control over the process. There is no indication from the other secured creditors or from the Bank in these proceedings that it or they will consent, either to a personal insolvency arrangement or, more importantly for the purposes of the exercise engaged by me, to the waiver of the €3 million limit.

43. The exercise required by s. 14(2) requires me to consider the value of the assets and liabilities of the debtor, but also to consider whether his inability to meet his engagements could "more appropriately be dealt with means of either a personal insolvency arrangement or a debt settlement arrangement". Clearly as the bulk of the debts of the debtor are secured debts, a debt settlement arrangement is not appropriate. I am not satisfied having regard to the level of secured debt, and because no evidence has been tendered that the other secured creditors are prepared to waive the monetary limit, that the debtor may appropriately, or indeed at all, hope to engage a personal insolvency arrangement with his creditors, and in those circumstances I have formed an opinion that the debtor's inability to meet his financial commitments is not likely to be dealt with more appropriately under the insolvency regime.

44. I note in that regard that the evidence of the Mark Reilly the personal insolvency practitioner (PIP), while it does offer some argument in favour of the debtor, suggests that it is "premature" to go down the PIA route until the damages claim is concluded and that it would not "be prudent to commence" the insolvency process until "all matters are sorted".

45. Thus, notwithstanding the argument of counsel for the debtor, notwithstanding that he might in due course recover substantial damages from the receiver and/or the Bank in the receiver proceedings, I am not satisfied that I ought to exercise my jurisdiction under s. 14(2) and stay or adjourn these bankruptcy proceedings to enable a full engagement by the debtor with the Insolvency Service of Ireland. I accept that there might be what Mr. Reilly describes as a "real potential" for repayment from the as yet contingent damages claim, but I cannot see that my discretion ought to be exercised in favour of the debtor under s. 14(2) when I am not satisfied that the circumstances point to any reasonable or practical reality in a PIA being available to Mr. P. having regard to the attitude of the Bank which is a secured creditor, and having regard to the amount of his debts and the monetary limit on the availability of the personal insolvency route when the secured debts exceed €3 million.

Inherent jurisdiction
46. Counsel for the debtor also argues, and this is not denied by the Bank, that I have an inherent jurisdiction to stay the bankruptcy proceedings. I accept that I have such jurisdiction, but consider that a number of matters must guide me in the exercise of that discretion. The newly available personal insolvency options, which offer an insolvent debtor a possibly more benevolent means of dealing with his creditors, must guide my approach. However, I cannot fail to have regard to the provisions of s. 14 (1) of the Act of 1988 as follows:

> "14(1) Where the petition is presented by a creditor, the Court shall, if satisfied that the requirements of section 11 (1) have been complied with, by order adjudicate the debtor bankrupt."

47. This creates, in my view, a *prima facie* entitlement on the part of a petitioning creditor that the adjudication order be made, and s. 14(2) must be seen as an exception. I accept that prejudice is likely to be done to Mr. P. in his business affairs by an adjudication of bankruptcy, but unfortunately I can see no means by which I can adjourn the proceedings to permit him to avail of the more benevolent personal insolvency arrangement having regard to the quantum of his debt and the extent to which they are secured.

48. While I am satisfied that prejudice will be caused to him, that prejudice must be seen in the context of the mandatory obligation on the part of the court contained in s. 14 (1) to adjudicate once a petition is shown to be properly before the court and the proofs are in order. There being no argument that the requirements in s. 11 of the Act of 1988 have not been complied with, the argument being one which in my view is linked to the contingent damages claim, I consider that my discretion cannot go so far as to deny the Bank a statutory right.

49. The debtor will not be denied his constitutional right to litigate, albeit he must pursue the damages claim either through the Official Assignee or personally if the Official Assignee permits him so to do.

50. Accordingly I propose making the order for adjudication and refuse the order staying or dismissing the petition in bankruptcy.