THE HIGH COURT

IN THE MATTER OF A PETITION FOR ADJUDICATION OF BANKRUPTCY BY MICHAEL GLADNEY AGAINST PMcG

JUDGMENT of Ms. Justice Pilkington delivered on the 2nd day of March, 2020

1. This application is by way of petition pursuant to the Bankruptcy Act, 1988 (as amended) ("the 1988 Act") seeking the adjudication of the respondent debtor PMcG ('the debtor') as bankrupt.

2. In the presentation of any petition, the court must initially be satisfied that the criteria of s. 11(1) of the 1988 Act has been complied with. Counsel for the petitioner and the debtor are *ad idem* that all have been satisfied; namely, that the debt owed is in excess of €20,000, is a liquidated sum, that the act of bankruptcy (being fourteen days from the service of the bankruptcy summons on the debtor on 19th December, 2016) had occurred within three months prior to the presentation of the petition and that the debtor is domiciled within the State.

3. Accordingly, this case deals exclusively with the additional criteria that the court must thereafter consider in respect of any petition, as set out in s. 14 of the 1988 Act, particularly s. 14(2). It is as follows:-

> "14 (1) Subject to subsection (2), 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.
>
> (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,
>
> 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".

4. For reasons set out below this matter is not amenable to a Debt Settlement Arrangement ('DSA'), so the only issue before this Court is the consideration of a Personal Insolvency Arrangement ('PIA').

5. This matter arises in respect of ten court judgments from 3rd February, 2011 to the 26th day of March, 2016 seeking a total of €347,467.74. In the final affidavit sworn by Joseph Howley on the 5th December, 2019, he avers that the total indebtedness (subtracting the sum of €99,247.86 paid by the debtor to date) is now the sum of €248,219.88.

6. This matter had previously been adjourned in excess of 24 occasions. The affidavits filed, in essence, set out and deal with the efforts by the debtor and those who advise him (a chartered accountant Mr. Brendan Roddy, of Roddy Szalska & Associates and thereafter Mr. Francis Brophy of Francis Brophy & Co), to seek an accommodation with his only creditor, the Revenue Commissioners. Mr. Brophy has also filed affidavits in this matter in addition to the significant number of affidavits filed by the debtor and the petitioning creditor.

7. In summary, the debtor is a solicitor, his profession is relevant as, in essence, any proposal for repayment that he has advanced, in seeking to repay his indebtedness, has been to discharge it from practice income. In other words, it does not come from any salary or other income but from the income derived from and projected to be derived from his practice.

8. At no point did counsel for the debtor seek to deny, or resile from, this debtor's indebtedness, but rather took issue with the failure of the petitioning creditor to adequately afford this debtor the opportunity and, indeed, proper consideration of his proposals for discharging it.

9. Counsel for the debtor has set out in some detail how consideration for the discharge of the indebtedness should properly be afforded him, within the parameters of s. 14(2) of the 1988 Act. He has also pointed out that the only possible asset of the debtor available in any bankruptcy comprises a 50% share within an unencumbered family home, any other (potential) asset is heavily encumbered. He was therefore at pains to contrast the possible recovery should his client be adjudicated bankrupt to a scenario whereby the entirety of the outstanding debt could potentially be discharged. Aside from his salary and practice receipts, the debtor's only available asset is his financial interest in the principal private residence (he has a spouse and children) valued in the order of €400,000.00

10. Accordingly, the various proposals (or variations on a proposal) that have been put forward for consideration by the petitioning creditor very much revolve around the nature of the debtor's business and the extrapolation by him and his financial advisors of his present and prospective fee income.

11. The petitioning creditor has suggested that, in respect of any proposed repayment schedule, on the evidence of past proposals, the timetable for repayment of any present proposal is unrealistic and cannot be achieved on the figures and proposal(s) presented.

12. On more than one occasion, counsel for the debtor has invoked a passage from an affidavit sworn by Francis Brophy on the 3rd December, 2019 where he avers (in respect of a report prepared by him) as follows:-

> "I confirm the veracity of the content of my said report. Given:
>
> (i) The demonstrable sustainability of Mr. McG's proposal
> (ii) The fact that payments totalling €133,000 have been made already

(iii) The financial effect of bankruptcy on the returns to the Revenue

I believe the refusal by the Revenue Commissioners to accept the proposal as failing to maximise the returns to the State, as lacking any coherent financial logic and has been fundamentally unfair to a taxpayer bona fide attempting to address historical, as well as ongoing, tax liabilities. I am of the view that a case for review of this position should be submitted by the client's accountant whether by PPA application or directly to tax appeals commissioners as such an application or appeal would appear to be well grounded in light of the above analysis".

13. There had been some small dispute as to whether the amounts repaid by the debtor total €133,000 or the figure set out above of €99,247.86. There is a disagreement to the effect that the debtor claims that two cheques in favour of the creditor in the respective sums of €10,048.09 have been discharged, whereas the petitioner states that they have not. That does not totally explain the discrepancy in the figures but, in considering the matter, I am prepared to afford the debtor the benefit of the doubt, not in the sense that such a figure can be accepted within any matters that may bind any party subsequently, but for the purposes of argument within these proceedings, that a sum of some €130,000 has been discharged by him. In other words, I am proposing, for the purposes of this application, to take his financial figure at its height.

14. I also accept, in considering these matters, that the debtor is now tax compliant in respect of his other present taxation obligations but that, what I might describe as the potential bankruptcy debt, remains outstanding.

Background

15. The essential chronology would appear to be as follows:-

(a) On the 19th December, 2016, a bankruptcy summons was served on the debtor the act of bankruptcy was committed 14 days thereafter.

(b) On 29th March, 2017 this petition is presented in the Examiner's Office and served on the 28th April, 2017.

(c) On 14th December, 2017, a protective certificate issued to allow the presentation of a debt settlement arrangement on 17th January, 2018. In respect of this petitioning creditor, as it has judgement mortgages registered against the debtor's property, which constitute secured debt which cannot be included, it opted out of the debt settlement agreement. The 70-day period of the protective certificate expired on 22nd February, 2018.

(d) On 24th April, 2018, a further protective certificate issued to allow the presentation of a personal insolvency arrangement, the Revenue opted out of the arrangement and the protective certificate expired on the 3rd July, 2018.

(e) On 5th October, 2018, the debtor lodged an appeal with the Tax Appeals Commissioners; on 25th October, 2018, the Tax Appeals Commission refused the appeal as "not a valid appeal".

16. On various dates between 2017 and 2019, a number of proposals were made by the debtor; the upshot is that the proposals were rejected and the petitioning creditor sought to proceed with the petition.

17. What is clear is that the debtor, in conjunction with successive personal insolvency practitioners, has put forward various proposals by way of repayment proposals akin to a PIA, for consideration by the petitioning creditor (there is no other). Equally, in my view, there has been a careful assessment of the various proposals by the petitioning creditor. In such circumstances, there has been an exchange of correspondence whereby various proposals constituting a PIA have been submitted. All have been rejected after, in my view, due consideration.

18. Issue has also been raised, particularly in an affidavit of Mr. Roddy sworn on the 15th January, 2020 and quoted above, that the debtor has not been afforded a proper opportunity to avail of a PPA (phased payment application). Specifically, Mr. Roddy avers that the debtor was denied an entitlement to appeal the Revenue Commissioners decision to reject a PPA lodged on the 11th October, 2018, because no formal notification of the rejection was ever received. Mr. Roddy avers that there was never any proper rejection of the PPA and, accordingly, the respondent debtor thereafter denied an opportunity to appeal the rejection either by way of internal Revenue review and/or the Tax Appeals Commission.

19. In closing submissions, counsel for the debtor contended that it was within the court's discretion, to give consideration to directing that the petitioning creditor, the Revenue Commissioners, independently review and indeed reconsider an application by way of PPA in respect of this debtor. That appeared to relate potentially to the earlier refusal but also, it was argued, there could be an independent discretion exercised by this Court to direct that it now be instituted afresh and considered by the Revenue Commissioners on that basis.

20. It is clear that whilst repayments have been made by the debtor in respect of his outstanding indebtedness, that these repayments have not always been in accordance with the timetable proposed for the discharge of his liabilities. Indeed, had the proposals been complied within the initial timetable envisaged, the entire indebtedness would now be discharged.

The Authorities

21. *McGinn v. Beagan* [1962] I.R. 364 is authority for the proposition and has been accepted by both parties, that any petition for an adjudication of bankruptcy should not be allowed to be used for an ulterior or collateral purpose.

22. In *BD v. JD* [2008] IEHC 435, Dunne J. had to consider an argument as to whether the petition was used for an ulterior and collateral purpose, in the context of family law proceedings. It was contended, within those proceedings, that the petitioner had issued them for a collateral purpose and not for recovering the debt due. There was affidavit evidence of considerable ill will between the parties. The court in examining *McGinn v. Beagan* and other related authorities stated:-

> "It is clear from the examination of the authorities referred to that if someone commences bankruptcy proceedings not for the purpose of recovering the debt due, but to inflict damage on the debtor, e.g. for the purpose of ousting someone as a trustee, or having someone disqualified from a position such as that of a local councillor, then the proceedings are an abuse of process and liable to be dismissed. This is well illustrated by the facts of the case of *McGinn v. Beagan…."*.

23. In considering the position of the debtor and his argument that it had worsened financially from the date of the court order, the court stated:-

> "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".

24. The court found, on its assessment of the evidence, that the petitioner was not motivated by ill will in pursuing these proceedings, was satisfied that the petitioner was not engaged in any abuse of process and made an adjudication of bankruptcy on the facts of the case.

25. *In the Matter of Eric O'Callaghan* [2015] IEHC 185, a petition for adjudication in bankruptcy, the petitioner had set out a statement of affairs and sought to obtain a protective certificate in respect of a personal insolvency arrangement. Ulster Bank, as the dominant secured creditor had voted against the PIA and the petitioner strongly argued that the return for Ulster Bank would be better than any outcome were he to be adjudicated bankrupt.

26. One of the matters before Costello J. was the issue as to whether the debtor's inability to meet his engagements could be more appropriately dealt with on the facts of that case by means of a PIA. In considering the language of s. 15 of the 2008 Act in circumstances where debtor's inability to make his engagements "could" be more appropriately dealt with by means of a debt settlement arrangement or a personal insolvency arrangement the court stated:-

> "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".

27. In considering the sections of the Personal Insolvency Act, 2012 concerning PIAs, the court held as follows:-

> "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".

The court continued:-

> "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".

28. These cases were in turn considered in the judgment by Baker J. entitled *In the Matter of the Petition for Adjudication of Bankruptcy by ACC Loan Management Limited against P* [2016] IEHC 117. On the facts of this case, the judgement debtor sought an order for dismissal or stay of his order of adjudication in bankruptcy, on the basis that he was entitled for an award of damages arising from proceedings seeking to challenge the appointment of the receiver and that the bank had filed the present petition for the collateral purpose of avoiding the outcome of the decision of the Court of Appeal in these other proceedings. The debtor, in making the argument, relied upon *McGinn v. Beagan*. In considering the court's jurisdiction pursuant to s. 14 of the 1990 Act, the court stated as follows:-

"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."

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".

29. The fact that the debt was secured, informed the court that any debt settlement would not be appropriate in the circumstances. On the facts of this case, the court was satisfied that there was no reasonable or practical reality in any PIA being available to Mr. P having regard to the attitude of the bank which is a secured creditor.

30. The question of the adjudication or stay of a petition seeking bankruptcy then arose in the case of *Governor and Company of the Bank of Ireland against Alison Smyth (otherwise Alison Laydier)* [2017] IEHC 5.

31. On the facts of that case, the debtor had engaged the services of a personal insolvency practitioner to consider a debt settlement arrangement in the context of having obtained a protective certificate pursuant to s. 61 of the Personal Insolvency Act, 2012. The documentation prepared for the DSA disclosed that the debtor was not employed, had no assets and no secured debts and was living with dependent children as a caretaker in her current residence. In essence, her proposal was an offer by a grandparent to pay a sum towards the resolution of her debts with her only other income being from the Department of Social Welfare. The court stated that the DSA contrasted the expected outcome in the events of bankruptcy if the DSA were approved, then the amount of recovery would be in the order of 1.74% of the total debts versus a zero recovery in the event of bankruptcy. The petitioning creditor voted against the DSA and, as it held a locking percentage of the votes, the DSA was rejected. In seeking an adjudication in bankruptcy, the debtor argued that the defeated proposal for the DSA be resubmitted either in its existing or in improved form and the court heard the debtor in respect of those matters.

32. In essence, the argument was that any adjudication of bankruptcy would result in no recovery for the creditors whatsoever but that the proposed DSA would yield a recovery (albeit a very modest one). In considering the criteria of debt settlement arrangements as set out in the Personal Insolvency Act, 2012, the court stated:-

> "In those circumstances, is it then open to the Court to infer that the continuance of bankruptcy proceedings after the rejection of a DSA amounts to an abuse of process? In my opinion, put in those terms, without more, it is not. If I were to hold otherwise, it would amount to an indirect compulsion on a petitioning creditor to agree to a DSA. Indeed, it could leave a petitioning creditor in a worse off situation. The DSA may have been rejected and yet the petitioning creditor would not be permitted to continue with the bankruptcy petition. In fairness to the debtor in these proceedings, this is not her intention and she is prepared to represent the DSA for the acceptance of the petitioner".

33. The court pointed out that s. 14(1) of the 1980 Act merely requires that the requirement of s. 11(a) of the same Act had been complied with and that there was no requirement that it be shown that assets be recoverable or that the debtor has monies from which the creditors might be paid. It continued:-

> "Given the mandatory nature of s. 14(1), this militates against the inference which the debtor invites the Court to draw in the circumstances. It is a powerful argument against the Court granting the relief sought unless it can be shown that the proceedings otherwise amount to an abuse of the process of the Court. No other grounds have been advanced to support the suggestion that the petition is being pursued for an improper purpose".

The court continued:-

> "For these reasons, I am of the opinion that the continued maintenance of a petition to bankrupt a debtor by a creditor who has voted to reject a proposed DSA does not amount to an abuse of process, notwithstanding the fact that there may be no assets to be realised in the bankruptcy process nor moneys for the payment of debts of creditors".

Conclusion

34. In this case, there is a single creditor, the Revenue Commissioners. For reasons set out above, the possibility of a debt settlement arrangement cannot be entertained. In respect of a personal insolvency arrangement, the proposals have been presented, considered, and rejected by the petitioning creditor. I accept that both parties have conscientiously and diligently dealt with this matter.

35. Counsel for the debtor urged upon this Court the exercise of its discretion so as to ensure that this matter was reviewed by the Revenue Commissioners within its PPA procedure to permit a review or an opportunity for this debtor to avail of the phased payment application process. It might thereafter permit an appeal within the internal revenue

structures; an application to the Tax Appeal Commissioners was adverted to. In short that what was described as the internal procedures with the Revenue should initially be exhausted prior to a possible consideration by this Court of s. 14(2).

36. I appreciate as Baker J. in *ACC v. P* stated that the court does have an inherent jurisdiction to stay proceedings. However, both she and Costello J. in *Alison Smyth (otherwise Ladlier*) restricted the exercise of such jurisdiction to deal with some perceived abuse of process. In this case the stay or adjournment is not sought in the context of s. 14(2) to consider as PIA. Here I am also being asked to exercise my inherent jurisdiction for something different; the further consideration by the Revenue Commissioners within the PPA procedure. This is a different exercise of the Court's discretion.

37. The caselaw in its examination of s. 14(1) makes it clear that it creates a prima facie entitlement for adjudication with s. 14(2) seen as an exception, or in my view possible exceptional circumstances.

38. Here the submission is that consideration of the debtor's repayment schedule or repayment would again be subject to review. I am satisfied that within this process there has been a proper review of the debtor's proposals and his repayment schedule based upon projected and future practice income. In short the petitioning creditor, notwithstanding that this debtor is now revenue compliant in all other areas, save for this process.

39. More importantly, in my view, is the fact that no new matters have come to light in the intervening period. In essence, the case put forward on behalf of the debtor remains fundamentally the same. Certain permutations have been put but based upon the same essential case that has been made from the outset. Accordingly, this is not a case where matters have come to light in the interim which should now be afforded consideration; this is more akin to an application that the matter be stayed so that it might again be revisited in a different forum. Just as the court in *Smyth* found that, in essence, the court was being asked to ensure that the matter was revisited; in my view, the only creditor in this matter has carefully considered and has refused the possibility of an arrangement (which it did in some detail). Accordingly, in my view, it would not be proper for this Court to again require the Revenue to, in essence, revisit the matter based upon the matters that have already been put before it. The petitioning creditor has formed its view that a personal insolvency arrangement in respect of this debtor, given the figures and timetable proposed, is simply unrealistic in light of the maters put before it. In my view, the exercise of this Court's discretion cannot be utilised in order that the same petitioning creditor is obliged to revisit these matters upon which it has already clearly adjudicated.

40. In my view, the position in *Smyth* was even more stark; the possibility was either a likely recovery of zero from a bankruptcy as opposed to a minor recovery within a suggested debt settlement arrangement. In this case, with an outstanding indebtedness (and I appreciate the final figure is disputed) but in the order of some €250,000, there is a possibility of some recovery within the bankruptcy and, at present, the amount of recovery (which is posited at 100%) cannot be guaranteed in respect of any possible

arrangement. With regard to the comments that this petitioning creditor will recover more by permitting some form of phased payments than through the bankruptcy process, in strict financial terms given the debtor's interest in his family home (and the size of the debt), this may not be as compelling an argument as in other cases.

41. Accordingly, I find, the criteria set out in s. 11(1) of 1988 Act have been satisfied. I accept the categorisation in *ACC Management Company Limited v. P* by Baker J. that the criteria in s. 14(1) of the 1988 Act had been satisfied subject to the consideration (in this case solely restricted to a personal insolvency arrangement) within s. 14(2) of that Act.

42. Here, the proposals with regard to a personal insolvency arrangement have been carefully crafted and equally carefully considered. However, the essential issues remain the same; that the repayment of these monies by the debtor can only be from present and future income from his practice, which in turn is predicated upon an increased yield to that practice in the foreseeable future. In my view, the petitioning creditor has properly considered these matters and has rejected the proposed arrangement, primarily on the basis that they consider it unlikely or unrealistic that this debtor will be able to adhere to the timetable for repayment. I can see no issues that remain outstanding.

43. On the basis that the criteria of s. 11(1) of the 1988 Act have been satisfied. I decline, for the reasons set out above, to exercise the court's discretion within s.14 of the Act to require any form of direction or otherwise that the Revenue Commissioners of some other body reconsider the debtor's proposals for repayment. On the facts of this case I do not consider it appropriate to do so. Furthermore, for the reasons set out above, I consider there is no basis that would cause this Court to adjourn this matter for the consideration of a personal insolvency arrangement, pursuant to s. 14(2) of the 1988 Act.

44. Accordingly, I adjudicate this debtor bankrupt.