Neutral Citation: [2010] IEHC 546

THE HIGH COURT

BANKRUPTCY

IN THE MATTER OF DAVID K DRUMM, A BANKRUPT

KATHLEEN P. DWYER, TRUSTEE IN BANKRUPTCY IN THE UNITED STATES OF AMERICA

APPLICANT

JUDGMENT of Ms. Justice Dunne delivered the 13th day of December, 2010

This was an application made ex parte on behalf of Kathleen P. Dwyer, the trustee in bankruptcy of David K. Drumm, a bankrupt. Although the application is an ex parte application, Mr. Hennessey S.C. appeared in this matter on behalf of Anglo Irish Bank Plc having been notified of the making of the application in advance.

Ms. Dwyer (hereinafter referred to as the "trustee") swore an affidavit grounding this application on the 1st November, 2010. In that affidavit she set out the background to this matter. On or about the 14th October, 2010, David K. Drumm (hereinafter referred to as the "bankrupt") filed a voluntary bankruptcy petition under Chapter 7 of the United States Bankruptcy Code, before the United States Court for the District of Massachusetts. She stated that the effect of filing the voluntary bankruptcy petition was immediately to render him a bankrupt according to the law of the United States of America. On the voluntary bankruptcy petition it stated that the bankrupt had resided in the Commonwealth of Massachusetts for the 180 days immediately preceding the filing of his bankruptcy petition. On that basis the United States Bankruptcy Court for the District of Massachusetts has exclusive jurisdiction over his bankruptcy proceedings pursuant to the provisions of 28 USC-1408 and the bankrupt has submitted to that exclusive jurisdiction. She was appointed trustee on the 15th October, 2010 of the bankrupt. She stated in the affidavit that by virtue of the bankrupt's adjudication and her appointment, all the assets both (real and personal) of the bankrupt were vested in her as trustee in bankruptcy. She then went on to describe her functions as the trustee in bankruptcy.

The trustee goes on to refer to a property known as 20 Abington, Malahide, situate in the townland of Auburn and the Barony of Coolock which is comprised in Folio 151858F (hereinafter described as the "Malahide property") which was registered in the joint names of the bankrupt and his spouse until the 13th May, 2009. At that time the Malahide property was conveyed into the sole name of the bankrupt's spouse. The trustee then sets out the fact that that property is not encumbered and has a value of approximately €2.1million. She stated that there were proceedings before the commercial division of this Honourable Court involving the bankrupt's spouse and Anglo Irish Bank Corporation Limited wherein it was asserted that the transfer by the bankrupt to his spouse of his interest in the Malahide property amounted to a fraudulent conveyance. She outlined the fact that the Malahide property was at the time of swearing registered in the name of the bankrupt's spouse and that the spouse had indicated a willingness to voluntarily set aside that conveyance and had provided an unconditional and irrevocable undertaking to that effect. Once that step has been taken the bankrupt's interest in the Malahide property will once again form part of the legal estate of the bankrupt and she is anxious to realise that asset for the benefit of all of the creditors of the bankrupt. It is in that context that she seeks an order in the following terms:-

> "(a) That the High Court in the Republic of Ireland and the officers of such Court do act in aid and be auxiliary to the United States Federal Bankruptcy Court for the district of the Massachusetts in the United States of America and in particular to assist and act in aid of the said court in the following matters:
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> > (i) Declaring that all property, both real and personal, of the bankrupt in the Republic of Ireland, including the lands compromised (sic) in All That and Those a plot of ground known as 20 Abington, Malahide, situate in the townland of Auburn and the Barony of Coolock and in the property registry authority in the Republic of Ireland, and unregistered land in the Republic of Ireland, vested in the trustee in bankruptcy in the United States of America on the 15th day of October, 2010.
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> > (ii) Providing that a certificate of vesting be registered in the Property Registration Authority or Registry of Deeds as the case may be insofar as the bankrupt has any title or interest in any lands within the jurisdiction of the Honourable Court and in particular in the above mentioned premises and lands.
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> > (iii) Assisting in the determination and realisation of the interest of the bankrupt in the said lands or any other lands, property or assets of the bankrupt situated in the Republic of Ireland.
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> > (iv) Assisting in examining the said bankrupt in relation to all matters relating to his estate."

An affidavit of Harold B. Murphy, Attorney at Law of the firm of Hanify and King, P.C. was also filed in which he set out and exhibited a legal opinion concerning the principle consequences and effects of an adjudication in bankruptcy of a qualified resident of the United States of America in circumstances where the bankrupt filed a voluntary bankruptcy petition under Chapter 7 of the United States Bankruptcy Code. It is not necessary to refer to that affidavit in detail at this point. Suffice to say that it sets out the consequences and effects of an adjudication in bankruptcy in the United States. It describes the function of the trustee and a number of other matters pertaining to bankruptcy proceedings in the United States of America. It would be fair to say that there is a measure of similarity between the bankruptcy code applicable in the United States of America and the bankruptcy code in this jurisdiction albeit that there are obviously some practical and procedural differences. That affidavit was relied on to establish the fact that there was a degree of equivalence of jurisdiction in relation to bankruptcy proceedings in this jurisdiction and in the United States of America.

Counsel on behalf of the applicant accepted that it was not possible for the trustee in this case to rely on the provisions of s. 142 of the Bankruptcy Act 1988, as amended. It provides that:-

> "(1) The Court and its officers may act in aid of any court in the Isle of Man or the Channel Islands, and its officers respectively, at the request of such court, in any bankruptcy matter before such court, and the Court and its officers so acting shall have the like jurisdiction and authority as in the case of a bankruptcy originating under an order of the Court.
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> (2)(a) The Government may by order apply subsection (1) in relation to any other jurisdiction where the Government are satisfied that reciprocal facilities to that effect will be afforded by that jurisdiction."

The Government in this jurisdiction has not made any order applying subsection (1) to the United States of America. Accordingly the provisions of the Act cannot be relied on in support of the application in this case.

Mr. Dunleavy on behalf of the applicant submitted that this was a matter for the discretion of the court and a matter of the inherent jurisdiction of the court in circumstances where having regard to the principles of the comity of nations that such an order should be made particularly having regard to the fact that it is undesirable to have a multiplicity of proceedings in different jurisdictions. He referred to the decision in the case of In *Re. Bolton* [1920] 2 I.R. 324, in which Dodd J. considered the equivalence of the procedures in South Africa and in this jurisdiction. He relied on the "opinion of the eminent counsel who has presented the law to me from South Africa". He also had the South African legislation before him and he considered that as well. He commented at p. 328 as follows:-

> "Included in the debtors property, of which he was deprived on insolvency, were such assets as were situated in a foreign jurisdiction. I have no hesitation, therefore, in holding that 'bankruptcy matters' in s. 71 includes 'insolvency matters' in the South African code. That this is not a strange meaning appears from the definition in the Trustee Act, 1893, (56 and 57 Vict. C. 53), s. 50: 'In this Act, unless the context otherwise requires, the expression 'bankrupt' includes in Ireland insolvent.'"

He continued:-

> "There lies at the root of the whole matter the old well known principle of comity of nations and comity of independent jurisdictions within the same nation. A judgment pronounced by this Court could not formerly have been levied in Britain, but by the Judgment Extension Act and the comity which exists between England and Ireland a judgment of the court in England can be made a judgment of our court for the benefit of the English creditor, and in the same way a judgment of our court can be realised in England or Scotland. This is merely carrying into effect the comity which binds together all the members of the great British Commonwealth of Nations."

Mr. Dunleavy relied on that decision and the affidavit of Harold Murphy to demonstrate that there was an equivalence between the bankruptcy code in the United States of America and in this jurisdiction. I accept that there is such an equivalence. It is interesting to note in passing that although the decision in *Re. Bolton* was in respect of a South African bankruptcy, the provisions of s. 71 of the Bankruptcy Amendment (Ireland) Act, 1872, were applicable and it provided:-

> "The court and the courts having jurisdiction in England and Scotland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency . . ."

It appears that jurisdiction under s. 71 in that case was assumed on the basis that the courts of South Africa fell into the description of "other British courts elsewhere having jurisdiction in bankruptcy or insolvency".

I now want to turn to the question as to whether or not there is an inherent jurisdiction in the court to make the order sought herein. The first authority referred to in this regard by Mr. Dunleavy was the decision in the case of *Banque Indosuez S.A. v Ferromet Resources Inc.* [1993] B.C.L.C. 112 at p. 118 in which Hoffman J. stated as follows:-

> "This Court is not of course bound by the stay under United States law but will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of Inc in Texas under Chapter 11. This Court has jurisdiction to make interlocutory orders for the preservation of Inc's property in this country by way of assistance to the United States Bankruptcy Court but no such assistance has been requested here. So far as the evidence shows, these proceedings are the individual act of the single creditor and, if successful, would enable that creditor to secure some of Inc's assets outside the United States Bankruptcy Process. Mr. Neville-Clarke said that these proceedings had been taken with the consent of the other banks, but a private sharing arrangement of that kind is not substitute for administration in accordance with the law of the jurisdiction seized of the bankruptcy.
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> In exercising the discretion as to whether to grant or refuse injunctive relief, I therefore think that I should take into account the fact that the proceedings have not been authorised by the United States Court. I think that this is particularly significant in a case in which the United States proceedings have been initiated by, among others the bank itself. In my view the only justification for maintaining the injunctions in these circumstances would be, first, if I was satisfied that any assets recovered in the proceedings would be made subject to the Chapter 11 administration and secondly, if action without the authority of the United States Court was necessary to prevent some dissipation of assets which would be to the prejudice of the bank's rights under the United States Bankruptcy law. If these conditions were satisfied, it would then be necessary to examine the balance of convenience in accordance with the Cyanamid guidelines (see *American Cyanamid Company v. Ethicon Limited* [1975] 1 All E.R. 50R, 1975 A.C. 396)."

That particular decision related to insolvency proceedings in respect of a company. It was submitted by Mr. Dunleavy that whilst it was not a case involving an application for an order in aid it was of significance and relevance in relation to the approach to be taken to bankruptcy or indeed, insolvency proceedings, in another jurisdiction.

Mr. Dunleavy then referred to the decision in the case of *Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings Plc and Ors* [2006] 3 W.L.R. 689, a decision of the Privy Council. The background to that case is that European investors in a shipping business borrowed $300m on the New York bond market for the purchase of five gas transport vessels and commenced trading. The investors of the business became insolvent and petitioned for relief in New York under Chapter 11 of the United States Bankruptcy Code which allowed insolvent companies to negotiate a plan of reorganisation with their creditors. The Federal Bankruptcy Court confirmed a plan providing for the assets to be taken over by the creditors and ordered that it be carried into effect. The ships, registered in Liberia, were owned and managed by a group of Manx companies, each ship owned by a separate subsidiary of a management company and all the shares in the management company held by a holding company, N, which was in turn held through a web of companies incorporated in other off shore jurisdictions, including the appellant, a Cayman registered company which owned 70% of the issued share capital of N. The Federal Bankruptcy Court sent a letter of request to the High Court of Justice of the Isle of Man asking for assistance in giving effect to the plan. The respondents petitioned the Manx High Court for an order vesting the shares in their representatives. The appellant cross petitioned, asking the Manx High Court not to recognise or enforce the terms of the plan, on the basis that it was a separate legal entity registered in the Cayman Islands which had never submitted to the jurisdiction of the Federal Bankruptcy Court and that no order of that court could effect its right of property in the Isle of Man. The Isle of Man court held that clause 22, as confirmed by the Federal Bankruptcy Court's order was a judgment *in rem* purporting to change the title to property outside the jurisdiction and could not be recognised. On appeal by the respondents the decision of the Court in the Isle of Man was reversed holding that the bankruptcy's court order was not a judgment *in rem* but a judgment *in personam* in proceedings in which N, by its voluntary petition, had submitted to its jurisdiction. The matter

was then appealed to the judicial committee of the Privy Council which ruled on the matter in a judgment of Lord Hoffman. At p. 695 of the judgment Lord Hoffman stated:-

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated. For example, in *Solomons v. Ross* (1764) 1 H.Bl 131n, a firm in Amsterdam was declared bankrupt and assignees were appointed. An English creditor brought garnishee proceedings in London to attach £1,200 owing to the Dutch firm but Bathurst J, sitting for the Lord Chancellor, decreed that the bankruptcy had vested all the firm's moveable assets, including debts owed by English debtors, in the Dutch assignees. The English creditor had to surrender the fruits of the garnishee proceedings and prove in the Dutch bankruptcy.
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> This doctrine may owe something to the fact that 18th and 19th century Britain was an imperial power, trading and financing development all over the world. It was often the case that the principal creditors were in Britain but many of the debtor's assets were in foreign jurisdictions. Universality of bankruptcy protected the position of British creditors. Not all countries took the same view. Countries less engaged in international commerce and finance did not always see it as being in their interest to allow foreign creditors to share equally with domestic creditors. But universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view.
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> As Professor Fletcher points out (*Insolvency in Private International Law* (1st Ed. 1999), p. 93) the common law on cross-border insolvency has for some time been 'in a state of arrested development', partly no doubt because in England a good deal of the ground has been occupied by statutory provisions such as s. 426 of the Insolvency Act 1986, the European Council Regulation (EC) No. 1346/2000 of 29th May, 2000, on insolvency proceedings . . . and the Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), giving effect to the UNCITRAL Model Law. In the present case, however, we are concerned solely with the common law.
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> The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out. For example, the rule that English moveables vest automatically in a foreign trustee or assignee has so far been limited to cases in which he was appointed by the court of the country in which the bankrupt was domiciled (in the English sense of that term), as in *Solomons v. Ross*, or in which he submitted to the jurisdiction: *Re Davidson's Settlement Trusts* (1873) L.R. 15 Equity 383. It may be that the criteria for recognition should be wider, but that question does not arise in this case. Submission to the jurisdiction is enough. In the case of immovable property belonging to a foreign bankrupt, there is no automatic vesting but the English court has a discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property."

Mr. Dunleavy places particular emphasis on the last of the paragraphs cited above. He pointed out that in the case of the bankrupt in these proceedings, the bankrupt by initiating the proceedings has clearly submitted to the jurisdiction of the court of the United States of America. There is no suggestion that the property at issue in these proceedings has automatically vested in the trustee in bankruptcy in the United States. However, it was submitted by Mr. Dunleavy that this is a case in which there is an equivalence of jurisdiction as described in the affidavit of Mr. Murphy.

The comments made by Lord Hoffman to the effect that the common law on cross border insolvency has been in a state of arrested development could be said to have some application in this jurisdiction also. An examination of the Irish authorities in the area of insolvency proceedings and private international law demonstrates the paucity of decisions in this area. Those decisions which have been cited to the court tended to be decisions which came under the provisions of s. 71 of the Bankruptcy (Ireland) Amendment Act 1872. There are no decisions which fall outside the ambit of that provision. The fact that the principle case referred to by Binchy in *Irish of Conflicts of Law* when he dealt with the issue of the effect in Ireland of a foreign adjudication is the case of *Neale v. Cottingham* I.R. Chy. Rep. 54 (1770) is an indication of the lack of decided cases in this area. The Government has not availed of the provisions of s. 142 (2)(a) of the Act to provide for the application of s. 142(1) of the Act to any other jurisdiction in circumstances where reciprocal facilities may be available. No doubt the existence of the EC Insolvency Regulation (no. 1346/2000) has provided some degree of comfort in the sense that those provisions now apply to the vast majority of States within the EU. Nonetheless as can be seen from the facts of this particular case, there is no formal provision in respect of other countries with which this jurisdiction has many links.

We do live in a world of increasing world trade and globalisation as mentioned by Lord Hoffman. Whether one is talking of companies trading internationally or of individuals who have establishments in more than one jurisdiction, the fact of the matter is that businesses and individuals are infinitely more mobile than was the case in 1770. I can see no reason of public policy for refusing to assist the trustee in bankruptcy in this case in the manner sought. On the contrary, it seems to me that it is to the benefit of the creditors of the bankrupt to facilitate the trustee in this case. One of the principal creditors of the bankrupt is Anglo Irish Bank Corporation Plc which is participating in the bankruptcy proceedings in the United States of America. There is no obvious disadvantage to the creditors in refusing to make an order in aid of the trustee in bankruptcy and on a practical basis, it would appear to be more appropriate to make such an order so that the property in this jurisdiction can be dealt with by the trustee in bankruptcy for the benefit of all of the creditors of the bankrupt. I am satisfied that the court has the inherent jurisdiction contended for by Mr. Dunleavy. In the circumstances I propose to make an order in the terms of the relief sought herein.