THE HIGH COURT

BANKRUPTCY

[No. 2329 AD]

IN THE MATTER OF A PETITION FOR ARRANGEMENT FOR SIOBHAN MULLEE OF NEWTON, BALLINDINE, COUNTY MAYO

JUDGMENT of Mr. Justice Gilligan delivered the 3rd day of February, 2012

1. The same situation applies in respect of a petition for arrangement by Dominic Mullee, the petitioner's husband, in proceedings bearing Record No. 2330 AD.

2. Three issues arise for determination before the court following upon the earlier judgment as delivered herein on the 14th December, 2011. The first issue relates to the amount of the debt due pursuant to the guarantees as referred to in the earlier judgment, and in particular the amount of interest which the bank is entitled to on the basis that the arranging debtor contends that no interest is due on the debt after the date of the order of protection, which in this instance is the 22nd March, 2010, as under the Bankruptcy Rules such is interest is only calculable up to the date of the granting of protection. The arranging debtor relies on a passage from Forde & Simms: "*Bankruptcy Law*" Round Hall 2009 at p. 137, paras. 8- 11 wherein in it is stated:-

> "Interest cannot be recovered in respect of the period following adjudication which causes some injustice in periods of very high interest rates and where the administration of insolvent estate takes a long time. As Costello J. said in a company liquidation case:-
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> > 'It has long been established that in the case of an insolvent company which is being wound up, creditors whose debts carry interest are entitled to dividends only upon what was due for principal and interest at the commencement of the winding up and interest ceases to run from that date.'
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> This is rule is confirmed by the 1988 Act and is extended to any other financial "consideration in lieu of interest"."

3. Mr. Jennings on behalf of the arranging debtor relies on s. 75(2) of the Bankruptcy Act 1988, in support of this proposition. In particular, making reference to the fact that the issue has been clarified by s. 75(2) which has recently been substituted by a new s. 75(2) by s. 30(f) of the Civil Law (Miscellaneous Provisions) Act 2011 (No. 23 of 2011) with effect from the 2nd August, 2011, in providing:-

> "(2) Where interest or any pecuniary consideration in lieu of interest is reserved or agreed for on a debt which is overdue at the date of adjudication or order for protection the creditor shall be entitled to prove or be admitted as a creditor for such interest or consideration up to the date of adjudication or order for protection."

4. Mr. Jennings contends that the bank is claiming almost eight months of additional interest to which it is not entitled. While no exact figure is available the arranging debtor estimates that the overcharging of interest by the bank runs to a sum in the region of €130,000.00.

5. The second issue that arises is in respect of the fact that the bank has altered its position from the content of the grounding affidavit of debt of November, 2010 and that in effect the bank has subsequently obtained further valuation reports in April, June and September, 2011 and exhibited these in affidavits wherein it sought to amend its claim to reflect the falling value of its security and accordingly, amend its valuation and proof.

6. Mr. Jennings contends that the bankruptcy rules make specific provision for amending valuations and proofs and the bank has failed to follow this procedure. Section 24(5) of the first schedule of the Bankruptcy Act 1988, sets out the circumstances in which a creditor may amend its valuation and proof in stating as follows:-

> "Where a creditor has valued his security he may at any time amend the valuation and proof on showing to the satisfaction of the official assignee, or the court, that the valuation and proof were made *bona fide* on a mistaken estimate, but every such amendment shall be made at the cost of the creditor and upon such terms as the court shall order, unless the official assignee allows the amendment without application to the court."

7. In essence Mr. Jennings contends that amended valuations were put in moving down the line which reflected the falling values of the company's profit assets and no order of the court was sought or granted to reflect the fluctuations of the property market generally.

8. Reliance is placed on the decision of Budd J. in *In Re Michael Clenaghan* a *Bankrupt* [1961], 95 ILTR at p. 89. Mr Jennings contends that the valuations of November, 2010 are the correct valuations to be used for the purpose of assessing the amount due and owing to the bank, and that the bank simply cannot moving down the line keep putting in further valuations reflecting a fall in property prices.

9. The third issue that arises is in respect of the estimated legal costs involved in litigation as taken by the bank as against the solicitors who acted on behalf of the company Mullee Properties Limited in respect of various property transactions. Mr. Jennings quite candidly does not dispute the amount of the estimated legal costs, but takes the view that they may be "a bit on the high side" and relies on the discretion of the court to reduce these somewhat.

10. Ms. Kelly Smith on behalf of the bank contends that s. 75(1) of the Bankruptcy Act 1988, makes clear that the nature and extent of the debts capable of being proved is extremely wide so as to encompass contractual interest. In this case she contends that the right to contractual interest has accrued and that s. 75(2) of the Bankruptcy Act 1988, is quite clear in providing for the banks entitlement to the appropriate interest as due on all outstanding sums and the section was only substituted by s. 30(f) of the Civil Law (Miscellaneous Provisions) Act 2011 (No. 23 of 2011) with effect from the 2nd August, 2011, and the reference therein contained to the order for protection is the only issue that arises and quite clearly in the particular circumstances that pertain the substitution

is not retrospective and cannot apply. In the circumstances that pertain a letter of demand was served on the 15th September, 2009, a receiver was appointed to the company on the 17th September, 2009, and on the 26th October, 2010, demands were served on the guarantors. All events occurring prior to the 2nd August, 2011, so that, in effect, the right to contractual interest had accrued. Furthermore, it is contended that in the particular circumstances the bank was not put on notice of the events taking place and the bank was not initially listed as a creditor.

11. Reliance is placed on ss. 26 and 27 of the Interpretation Act 2005, in dealing with the position of the repeal and substitution of a legislative provision and, in particular, s. 26(1) which provides that:-

> "Wherein enactment repeals another enactment and substitutes other provisions for the enactment so repealed the enactment so repealed continues in force until the substituted provisions come into operation. Following from s. 27(1)(e) the repeal does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment and does not prejudice or affect any legal proceedings civil or criminal pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention."

12. Further reliance is placed on s. 27(2) which provides that where an enactment is repealed the proceedings in being may be carried out as if the enactment had not been repealed.

13. In the present case it is contended that s. 75(2) continues to apply as a result of s. 27 of the Interpretation Act 2005. It is clear that the substituted s. 75(2) cannot apply in the particular circumstances of this case, and that in particular not only were the arranging debtors petitions issued prior to the commencement of the 2011 Act, but the bank had also sought to prove its debt prior to the commencement of the 2011 Act. On this basis it is respectfully submitted that the bank's right to prove for interest had accrued prior to the introduction of the substituted s. 75(2).

14. Reliance is also placed on the decision of Dunne J. in *Start Mortgages Ltd v. Gunne* [2011] 1 EHC at p. 275 wherein Dunne J. confirmed that proceedings in respect of a right acquired or accrued may be continued as if the enactment had not been repealed.

15. As regards the question of valuations as submitted by the bank originally, it is accepted on the bank's behalf that the original valuations only referred to finished and unfinished houses and did not include a substantial number of fully serviced sites.

16. Ms. Smith refers to s. 24 of the Bankruptcy Act 1988, with reference to secured creditors and in particular s. 24(5)(6) and (7), and contends that effectively subs (5), (6) and (7) clarify the situation.

17. The relevant sections provide as follows:-

> "(5) Where a creditor has valued his security he may at any time amend the valuation and proof on showing to the satisfaction of the Official Assignee, or the Court, that the valuation and proof were made *bona fide* on a mistaken estimate, but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the Official Assignee allows the amendment without the application to the Court.
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> (6) Where a valuation has been amended in accordance with *subparagraph (5)*, the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the amended valuation or, as the case may be, shall be entitled to be paid, out of any money for the time being available for dividend, any dividend or share of dividend which he has not received by reason of the inaccuracy of the original valuation before that money is made applicable to the payment of any future dividend but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.
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> (7) If a creditor having valued his security subsequently realises it, or if it is realised under the provisions of *subparagraph (4)*, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor."

18. As regards the decision of Budd J. in *Michael Clenaghan a Bankrupt*, Ms. Kelly contends that this case was decided on old 1905 rules representing a very different situation to the provisions of the 1988 Bankruptcy Act and that, in essence, in the *Clenaghan* case no amendment was permitted, but that is not the situation that pertains in the Bankruptcy Act 1988.

19. Ms. Smith was not required by the court to comment on the aspect of the litigation costs.

20. Paragraphs 15 and 16 of the first schedule of the Bankruptcy Act 1988, set out as follows:-

> "(15) In respect of debts due after the adjudication or order for protection the liability for which exists at the date of such adjudication or order for protection a creditor may prove her value of the debt at that date.
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> (16) Where a person who is liable to make any periodical payment (including rent) is adjudicated bankrupt or is granted an order for protection on a day other than the day on which such payment becomes due the person entitled to the payment may prove for a proportionate part of the payment for the period from the date when the last payment became due to the date of the adjudication or order for protection as if the payment accrued due from day to day."

21. The reality of the situation is that pursuant to the Bankruptcy Rules interest is only calculable up to the date of the order granting protection. While some doubt may arise in respect of the appropriate interpretation of s. 52(2) of the Bankruptcy Act 1988, that situation has now been clarified by the substitution of a new s. 75(2) by s. 30(f) of the Civil Law (Miscellaneous Provisions) Act 2011 (No. 23 of 2011) with effect for the 2nd August, 2011. However, no authority in support of the Bank's proposition to the effect that s. 75(2) of the Bankruptcy Act 1988, was considered and found to differ from the bankruptcy rules, has been submitted to the court and thus, no authority for the proposition that interest continues to run from the date of protection. By analogy the passage from Forde & Simms *"Bankruptcy Law"* Round Hall 2009 at para. 137, appears to follow the line of the bankruptcy rules in respect of the winding up of an insolvent company in that creditors whose debts carry interest are entitled to dividends only upon what was due for principal and interest at the commencement of the winding up and interest ceases to run from that date and, in my view, the date of the commencement of the winding up in respect of a company can be safely equated to the date of the protection order. Accordingly, in my view on this aspect I prefer the submissions as made out on behalf of the arranging debtor and interest accordingly ceases to run from the date of the protection order. As has been previously stated herein, the situation has been further clarified with effect from the 2nd August, 2011, by the substitution of s. 30(f) of the Civil Law (Miscellaneous Provisions) Act 2011.

22. The bank accordingly is not entitled to prove interest in the bankruptcy proceedings as and from the date of the protection order.

23. As regards the issue of valuations, the court is satisfied that pursuant to s. 24 of the Bankruptcy Act 1988, where a creditor has valued his security he may at any time amend the valuation but only on the basis that the valuation of proof was made bona fide on a mistaken estimate and then only upon such terms as the court shall order unless the official assignee allows the amendment without application to the court.

24. In the court's views. 24(6) and (7) only clarify events that are to take place following an amendment of a valuation which has arisen *bona fide* on a mistaken estimate.

25. The court is satisfied that no case has been made out in general terms in respect of the 2010 valuation to the effect that the content thereof was *bona fide* set out on a mistaken estimate and thus, also bearing in mind that no application has been made to the court to allow an amended valuation, and it not being the case that the official assignee has allowed any amendment without application to the court, the Bank is obliged at this point in time to rely on the November, 2010 valuation insofar as it provided a value at that time in respect of the finished and unfinished houses.

26. However, the matter does not end there because it does appear that there was a *bona fide* mistake in that a significant number of serviced sites were not included in the November, 2010 valuation but were included in the September 2011 valuation, and in these circumstances on the basis that it does appear there was a *bona fide* mistake made the court is satisfied in the exercise of its discretion that it is appropriate accordingly that, in this one regard, the fully serviced sites are to be valued as per the appropriate November, 2010 valuation. The court is of the opinion that the view as expressed adequately deals with the situation that has arisen in the round.

27. As regards the costs of litigation the court does not propose to interfere in any way with the figure as claimed.

28. It is most unfortunate that this matter has taken up so much time and clearly it is now incumbent on the parties to reach agreement as per the court's directions and findings so as to move this matter to a conclusion.