Neutral Citation: [2015] IEHC 42

THE HIGH COURT

BANKRUPTCY

2506 BANKRUPTCY

BETWEEN

SFS MARKETS LIMITED (FORMERLY MARKETSPREADS LIMITED)

PETITIONER

AND

FERGUS RICE

DEBTOR

JUDGMENT of Ms. Justice Costello delivered the 16th day of January 2015

1. This is an application to annul an adjudication of bankruptcy dated 22nd January, 2014, brought by the debtor pursuant to s. 85C of the Bankruptcy Act 1988, as inserted by s. 157 of the Personal Insolvency Act 2012, and/or the inherent jurisdiction of the court.

Background

2. A bankruptcy summons was issued by the judgment creditor, Marketspreads Ltd on the 4th February, 2013, in the sum of €1,351,861.65, being the balance, including interest, due in respect of a consent judgment dated 28th March, 2012, in proceedings entitled *Marketspreads Limited v. Fergus Rice* Rec. No. 2011/5207S. The bankruptcy summons was served on the debtor on 15th February, 2013. The debtor issued a notice of motion seeking to dismiss the bankruptcy summons. The motion was hotly contested and 11 detailed affidavits were filed including three by the debtor. The motion was heard by Dunne J. on 11th July, 2013. Written submissions were provided and the debtor was represented by solicitor and senior counsel. Dunne J. delivered a written judgment on 15th January, 2014. She reviewed the facts in detail and refused the application to dismiss the bankruptcy summons.

3. The creditor had issued a petition to adjudicate the debtor a bankrupt on 2nd May, 2013. The petition had been adjourned pending the determination of the motion to dismiss the bankruptcy summons. The petition was listed for hearing on 15th January, 2014, but was adjourned by the court for one week to the 22nd January, 2014. This was to allow the parties to consider the judgment and to allow the debtor to consider his options and to make any proposals he might wish to make to the petitioner to avoid the petition proceeding.

4. On 22nd January, 2014, senior counsel for the debtor applied for an adjournment of the petition pending an appeal of the judgment of Dunne J. in relation to the refusal of the application to dismiss the summons. In the alternative he applied for an adjournment of the petition to 17th February, 2014, to allow the debtor an opportunity to consider his options. The court refused the application to adjourn the petition pending the hearing of an appeal. The court refused an application for an adjournment to allow the debtor further time to consider the options open to him. The court noted that the petition had been before the court for some time. Dunne J. indicated that she was surprised to be told on the morning of 22nd January, 2014, that there was more information which the debtor wished to pursue. The court found the debtor's applications surprising and disturbing and noted that it seemed to involve pursuing points which could and should have been dealt with before. She stated that it appeared that the debtor was not actually engaging with the circumstances in which he found himself and the "other options" alluded to were unrealistic. If she thought something practical could be done with the benefit of an adjournment she would adjourn the matter. There was no reality, however, in what the debtor was talking about and there seemed to be little merit in adjourning the matter. The court and indeed senior counsel for the debtor, accepted that the petitioner's proofs were in order and so she adjudicated him a bankrupt.

5. The petition had been before the court since 2nd May, 2013. The debtor accepted in his affidavit of 28th November, 2014, at para. 21 that he "*had been advised by counsel in advance of 22nd January 2014 of the nature of a Personal Insolvency Arrangement ("P.I.A.") and of [his] eligibility for same*."

6. It was common case that counsel for the debtor did not refer to the provisions of s. 14(2) of the Act of 1988, as amended, at the hearing on 22nd January, 2014.

7. The debtor had exhibited a statement of affairs dated 20th July, 2012, in his affidavit before the court on the motion to dismiss the bankruptcy summons. He did not avail of the opportunity to exhibit a more up to date or a more complete statement of affairs despite the refusal of the application to dismiss the bankruptcy summons and the adjournment of the hearing of the petition for one week. He did not consult a personal insolvency practitioner in relation to the possible alternatives open to him other than bankruptcy notwithstanding the fact that the petition had been served on him some seven months earlier and that he had been expressly advised of the nature of a personal insolvency arrangement and of his eligibility for such an arrangement. Even though the debtor failed to adduce additional evidence in relation to his assets and liabilities, there was evidence before the court regarding these matters when the court came to adjudicate upon these matters. The court was also entitled to have regard to the fact that, for whatever reason, he had chosen not to file a further affidavit updating his statement of affairs, nor did he inform the court of any proposals he wished to make to deal with his situation as an alternative to bankruptcy.

8. The debtor does not make the case that he could not have consulted a personal insolvency practitioner or prepared a draft personal insolvency arrangement proposal before the 22nd January, 2014. He only sought to do so after 22nd January, 2014, for the first time.

9. The debtor appealed the order of Dunne J. of 22nd January, 2014, by a notice of appeal dated 11th February, 2014. In para. 39 of his affidavit grounding the present application the debtor accepts that the same issue as he raises in this application arises in his appeal. On 21st July, 2014, the debtor issued this motion seeking to annul the adjudication of bankruptcy pursuant to s. 85C of the Bankruptcy Act 1988 and/or the inherent jurisdiction of the court. He also sought various orders staying the realisation of his estate pending the appeal and/or pending the determination of this motion. These were withdrawn and were not pursued at the hearing before this court.

10. The jurisdiction to annul an adjudication of bankruptcy

Section 85C(1) of the Bankruptcy Act 1988, as amended, provides as follows:-

"85C.-(1) A person shall be entitled to an annulment of his adjudication-

(a) where he has shown cause pursuant to section 16, or

(b) in any other case where, in the opinion of the Court, he ought not to have been adjudicated bankrupt."

Section 85C(1) reproduces s. 85(5) of the Act of 1988 prior to its amendment. Section 85C(1) (and s. 85(5) before that) is intended to give statutory effect to the previously existing jurisdiction of the High Court to annul a bankruptcy on equitable grounds or under its inherent jurisdiction. In *O'Maoileoin (A Bankrupt) v. Official Assignee* [1999] IEHC 75 Laffoy J. confirmed that the court had an equitable jurisdiction to annul a bankruptcy which had existed for over a century before the coming into effect of the Bankruptcy Act 1988. It is important to note that it is a discretionary jurisdiction in that the court may annul adjudication where in the opinion of the court a person ought not to have been adjudicated bankrupt. In *Re Gorham* [1924] 2 I.R. 46 Pim J. identified three circumstances where it would be proper to exercise the inherent jurisdiction of the court to annual a bankruptcy. These were where there was a doubt as to whether the bankrupt was alive at the time of the adjudication, where the bankruptcy had been obtained by fraud or where the bankruptcy was an abuse of the process of the court. In *Gill v. Philip O'Reilly & Co. Ltd* [2003] 1 I.R. 434 at p. 441 Fennelly J. held:-

"The machinery of bankruptcy… cannot be undone without extremely compelling reasons."

11. Thus, in considering the debtor's application the court is exercising a discretionary equitable jurisdiction such as is normally used in the case of a fraud or abuse of the process of the court and it should not exercise the jurisdiction without extremely compelling reasons.

Debtor's Case

12. The debtor's case is that Dunne J. allegedly failed to comply with the requirements of s. 14(2) of the Bankruptcy Act 1988, as amended, and which came into effect on 3rd December, 2013. Section 14 provides 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."

13. The debtor argues that compliance with the requirements of s. 14(2) is mandatory and that the requirements are substantive and not merely procedural. He argues that Dunne J. failed to comply with these requirements when she adjudicated him a bankrupt on 22nd January, 2014, and that accordingly the adjudication should be annulled. He relies on the decision of *FCR Media Ltd v. Farrell* [2014] IEHC 252. In that case the petition was heard on 9th December, 2013, in the absence of the debtor. McGovern J. was satisfied that the requirements of s. 11 of the Bankruptcy Act 1988 had been complied with and adjudicated the debtor a bankrupt. On 9th December, 2013, he was unaware of the fact that s. 14, as amended, had come into force on 3rd December, 2013. At para. 7 of his judgment he stated:-

"At a subsequent hearing, the debtor drew my attention to the fact that s. 14 of the 1988 Act had been amended in a way which now requires me to consider, before making any adjudication, whether she comes within the ambit of one of the other arrangements set out in s. 14(2). Accordingly, I set aside my order of adjudication and adjourned the hearing of the petition to enable the debtor to show to the court whether she comes within the scope of one of the other arrangements specified above. I directed that she file an affidavit with a statement of affairs and exhibit a letter from a registered Personal Insolvency Practitioner, stating whether or not she would come within the scope of one of the other arrangements. I declined to annul the bankruptcy because I was otherwise satisfied, when making the order of 9th December, 2013, that the requirements of the Act had been met. Instead, I felt that the appropriate course was to adjourn the petition so it could be reheard in the light of the amendments to s. 14 of the Act."

He stated at para. 13 of his judgment:-

"It seems to follow, from the amendments to s. 14, that the debtor should be given an opportunity to show to the court whether she comes within the scope of one of the schemes of arrangement provided for in the legislation."

At para. 19 he concluded:-

"The debtor has failed to produce any satisfactory evidence to show that she comes within the scope of s. 14(2) of the 1988 Act (as amended), and has failed to deal with this issue in any meaningful way. In those circumstances, the court cannot form the view that her inability to meet her liabilities could be more appropriately dealt with under either a debt settlement arrangement or a personal insolvency arrangement."

He then adjudicated her a bankrupt.

14. The debtor herein argued that this case was authority for the proposition that a failure to comply with the requirements of s. 14(2) would entitle a debtor to an annulment of an adjudication made in circumstances where, as a matter of fact, the court had not complied with the section. It was argued that as a matter of fact Dunne J. had failed to comply with requirements of s. 14(2) and therefore this court ought to follow the authority of *FCR Media Ltd v. Farrell* and exercise its discretion to annul the adjudication of the debtor as a bankrupt dated 22nd January, 2014.

Discussion

15. The petitioner resisted the application on a number of grounds. Firstly, it was argued that the case advanced by the debtor was more properly a matter of an appeal as it related to an alleged error in law on the part of the trial judge. It seems to me that as a matter of principle this is correct. A High Court judge cannot act as a court of appeal in respect of a judgment of another High Court judge. Furthermore, a consideration of paras. (a) and (b) of s. 85C(1) shows that the statutory jurisdiction to annul an adjudication of bankruptcy is an exceptional and limited jurisdiction. It is concerned first and foremost with a failure to satisfy the technical requirements as set out in s. 11. Normally this would constitute grounds of appeal. However, a debtor is entitled to show cause to set aside an order of adjudication within a very tight time limit (of no more than 14 days from the date of adjudication). This is clearly to deal with the situation where an error may have been made and it is imperative that the draconian effects of an adjudication be reversed as expeditiously as possible in appropriate cases. The second statutory ground upon which an adjudication may be annulled clearly relates to the equitable jurisdiction of the High Court and is directed primarily towards reversing abuses of process and fraud. It is not a general alternative to an appeal on a point of law such as arises in the normal way in respect of any decision of the High Court. This is confirmed by the statement of Fennelly J. in *Gill v. Philip O'Reilly & Co. Ltd.* that an adjudication of bankruptcy cannot be annulled without extremely compelling reasons.

16. In this case the debtor has in fact appealed the decision of Dunne J. by notice of appeal dated 11th February, 2014. As was conceded in his affidavit herein, he does so on precisely the same grounds as he now invites this court to annul the adjudication. In those circumstances I accept the submissions of the petitioner that it is not open to the debtor to proceed in this manner and that to permit him to do so would itself constitute an abuse of process. Having invoked the appellate jurisdiction of the courts by serving a notice of appeal (which has not been discontinued) he has elected to pursue this remedy. He cannot seek an alternative remedy at the same time on the very self same grounds. He is, therefore, estopt from seeking to annul the adjudication of bankruptcy on those self same grounds. I find it most significant that the debtor was not able to cite any case where an adjudication of bankruptcy was annulled in a situation where an appeal against the order of adjudication was pending. In the circumstances I decline to exercise my discretion to annul the adjudication on this ground alone.

17. Even if I am incorrect in my exercise of my discretion on this basis, I would nevertheless refuse the application. It is abundantly clear that the debtor had ample opportunity to consult with a personal insolvency practitioner and to prepare a personal insolvency arrangement in advance of the adjudication on 22nd January, 2014. He accepts that he had received advice from senior counsel in relation to the matter and in particular in relation to his eligibility for a personal insolvency arrangement prior to 22nd January, 2014. No explanation has been advanced as to why the debtor did not raise this point at the hearing on 22nd January, 2014, or why he did not consult a personal insolvency practitioner prior to that date. He cannot rely upon his own default as the basis for an annulment of the adjudication.

18. The debtor argued that the court did not have any, or any sufficient, information to satisfy itself as to the matter set out in s. 14(2) and therefore could not have complied with the provisions of that section. It is argued that therefore it must follow that the adjudication was improperly arrived at. I disagree. The debtor is seeking to rely upon his own failure both to adduce evidence as to his assets and liabilities and his possible eligibility for a personal insolvency arrangement as well as his own failure expressly to request an adjournment in order to advance such evidence pursuant to s. 14(2). In *FCR Media Ltd. v. Farrell*, McGovern J. adjourned the matter to allow the debtor to exhibit a statement of affairs and a letter from a personal insolvency practitioner stating whether or not she was eligible for a personal insolvency arrangement or debt settlement arrangement. She failed to do so. In those circumstances, McGovern J. held that she had failed to produce any satisfactory evidence to show that she came within the scope of the section. He clearly was of the view that the onus was on the debtor to adduce such evidence as the debtor saw fit so as to establish, if possible, why the debtor should not be adjudicated bankrupt. The fact that the court could not form a view that her inability to meet her liabilities could be more appropriately dealt with under either a debt settlement arrangement or a personal insolvency arrangement did not deprive the court of a jurisdiction to adjudicate her a bankrupt where the papers were otherwise in order. In other words, the absence of information did not deprive the court of jurisdiction. It seems to me that this is correct as a matter of principle. The absence of full information regarding a debtor's assets and liabilities cannot deprive the court of jurisdiction to adjudicate on a petition for bankruptcy where the papers are otherwise in order: this would be to allow a debtor to obstruct the court in the exercise of its proper jurisdiction by his non co-operation or indeed non participation in the proceedings.

19. In this case the debtor had exhibited a statement of affairs dated 20th July, 2012, and Dunne J. therefore was in a position to consider his assets and liabilities. Insofar as the information furnished was either incomplete or out of date, that was a matter for the debtor to rectify if he saw fit. The inadequacy of the information presented by the debtor to the court could not, in my opinion, deprive the court of jurisdiction to adjudicate on the matter. It is important to note that the provisions of s. 14(1) are mandatory in their effect. If the court is satisfied that the provisions of s. 11(1) have been complied with, then the court must adjudicate the debtor a bankrupt. The effect of subs. 2 is to allow the court to adjourn the petition, if it sees fit, to allow the debtor in the appropriate case to pursue either a debt settlement arrangement or a personal insolvency arrangement. If it cannot assess whether either of these possibilities is appropriate in the particular case this cannot deprive it of the jurisdiction and, indeed, the obligation, as set out in s. 14(1).

20. It is clear that Dunne J. considered the papers in detail including the statement of affairs when she prepared her written judgment of 15th January, 2014. The adjudication on 22nd January, 2014, followed on from that and clearly she had in mind the facts she had considered the previous week in her written judgment. The decision of 22nd January, 2014, must be read in conjunction with the written judgment of 15th January, 2014. It was accepted, by senior counsel for the debtor, that the filing of a statement of affairs was not a mandatory requirement of s. 14(2) so the case was not advanced on the basis that a statement of affairs had not been exhibited. However, it was submitted that there must be evidence of the nature and value of the assets available to the debtor and the extent of his liabilities that the court should consider and it was said there was no such evidence. I do not accept this. In this case, there is no evidence upon which I can conclude that the evidence advanced by the debtor in respect of his assets and liabilities which was before Dunne J. was not considered by her. That being so, I cannot conclude that as a matter of fact there was a failure to comply with s. 14(2) even though she was not directly referred to the requirements of the section by counsel. In those circumstances, it seems to me that the failure if any to comply with the requirements of s. 14(2) of the Act of 1988, as amended, by Dunne J. was not such as amounted to extremely compelling reasons as is required in *Gill v. Philip O'Reilly & Co. Ltd.* Therefore it is not a basis upon which this court ought to exercise its discretion to annul the adjudication.

21. It is important to consider what is actually required by s. 14(2) of the Act of 1988, as amended. Before making an order of adjudication the court is to consider certain matters and where the court forms the opinion that the debtor's inability to meet his engagements could be more appropriately dealt with by means of a personal insolvency arrangement (or a debt settlement arrangement) the court may adjourn the hearing of the petition to allow the debtor an opportunity to enter into a personal insolvency arrangement (or a debt settlement arrangement). In other words, the court had the discretion whether or not to adjourn the hearing of the petition. It is not mandatory that the court do so even if it forms the opinion that the debtor's inability to meet his engagements could be more appropriately dealt with by a personal insolvency arrangement (or a debt settlement arrangement).

22. In fact what occurred here was that, having refused the application to dismiss the bankruptcy summons, Dunne J. adjourned the hearing of the petition to adjudicate the debtor a bankrupt for one further week to allow the debtor to consider the options open to him and to put any proposals he wished to the petitioner. Thus, in effect, he had the benefit of an adjournment such as could have been granted pursuant to s. 14(2). In the event, the debtor did not seek to put any further information concerning his assets and liabilities before the court or to argue that a personal insolvency arrangement was a more appropriate way of dealing with his inability to meet his liabilities. The learned trial judge refused the application for a further adjournment to enable the debtor to consider further his options. She did so as she could see no merit in an adjournment. She stated that if she thought something practical could be done she would adjourn the matter. The refusal to adjourn the hearing of the petition again was clearly a decision she was entitled to make in the exercise of her discretion. The fact that she appears not to have considered the express terms of s. 14(2) in exercising her discretion or in reaching her conclusions in the circumstances do not amount to compelling reasons to annul the adjudication of 22nd January, 2014.

23. For the sake of completeness, I should point out that *FCR Media Ltd. v. Farrell* is not in fact authority for the proposition that an adjudication of bankruptcy should be annulled where there has been a failure to comply with the requirements of s. 14(2) of the Act of 1988, as amended. On the contrary, McGovern J. expressly declined to annul the adjudication; he had set aside his own order and adjourned the petition so that it could be reheard. Furthermore, the case can be distinguished from the instant case on two very significant grounds. McGovern J. was dealing with an application to annul his own order of adjudication. In addition, the adjudication had not been the subject of an appeal. In this case I have been asked to annul an order of another High Court judge on the basis that she erred in law in failing to comply with the provisions of s. 14(2) of the Act of 1988, as amended, and the order has been appealed on the self same grounds as it is now sought to annul it. For the reasons set out above, I refuse the application to annul the adjudication.

24. The petitioner argued that s. 14 was not retrospective in effect and that as the petition had been presented on 2nd May, 2013, before the section was commenced on 3rd December, 2013, s. 14 ought not to be applied to the hearing of this petition. I have not found it necessary to decide this issue in order to deal with this application and therefore I make no ruling on this argument.