

THE HIGH COURT

BANKRUPTCY

[NO. 2478]

IN THE MATTER OF S.D.

BANKRUPT - 2478

JUDGMENT of Ms. Justice Pilkington delivered on the 1st day of May, 2019.

1. By notice of motion dated 10 March 2019 the Official Assignee in bankruptcy ("the applicant") seeks the following reliefs: -

(i) An order granting leave for the use of documentation from proceedings entitled *J.D. v S.D.* [1997] 58 M, insofar as it relates to the bankrupt's estate, in proceedings entitled *Richard Coan v. S.D. et al* 3: 15-cv- 0050 - (JAM)/Ad Proc 15 5019; (name redacted)

(ii) If necessary directions in relation to the use of the said documentation;

(iii) An order pursuant to s. 134 of the Bankruptcy Act 1988 that the within application be heard in camera; and

(iv) Further or other order and costs.

2. Section 134 of the Bankruptcy Act 1988 ('the 1988 Act') provides that: -

"The Court may direct that the whole or any part of any sitting of the Court or proceeding in any matter under this Act shall be in private."

3. Two notice parties to the motion, namely S.D. and G.K, appeared and at the outset sought that the application be heard in camera. This was also one of the reliefs sought by the applicant within its motion. I note the reference to the documentation as originating within family law proceedings, which also involved J.D. who was not before this court. Accordingly, an order was made pursuant to s. 134 of the 1988 Act that this application shall be in private.

4. With regard to the notice party J.C. (J.D.) by letter dated 20 March 2019 her solicitors wrote stating that she had no objection to the reliefs sought within the motion but noted that their client "...is however anxious to maintain confidentiality around the documentation and consents to the use of the documentation for the purposes of the trial in the United States in the proceedings referred to at paragraph 1 of the motion on the understanding that the said documentation will not come into the public domain."

5. On 8 April 2019 this application was allocated a hearing on the final two days of the Hilary Term. I understand that the trial referred to within this application (and in respect of which the documentation is sought) begins with jury selection on 2 May 2019. That date had been fixed for some time. In advance of this application affidavits were filed by the applicant, on behalf of the U.S. Trustee in Bankruptcy and the notice parties S.D. and G.K.. Additional affidavits were filed after this application commenced (with leave of the Court).

6. S.D. filed for bankruptcy under Chapter VII of the United States Bankruptcy Code on 29 March 2013. He was adjudicated a bankrupt in this jurisdiction by Dunne J. on 29 July 2013 and an application to show cause on foot of that adjudication was rejected by the High and Supreme Courts [2015] IESC 42. He remains a bankrupt.

7. Whilst this application is a discreet one, there has been significant litigation attendant upon the bankruptcy of S.D. and other related matters.

8. In general terms, the applicant had secured previous orders (in particular of McGovern J. on 19 November 2014) to furnish certain documentation in respect of the bankrupt's estate to the U.S. Trustee in Bankruptcy, Mr Richard Coan. As the documentation was disclosed within family law proceedings *J.D. v. S.D.* [1997] 58 M ['the family law proceedings'] the initial order for the lifting of the in camera rule within those proceedings was made by Abbott J. on 14 February 2014.

9. In order to deal with the present application, it is necessary to consider its background.

10. The initial application seeking to lift the in camera rule within the family law proceedings was brought by NALM an entity within NAMA (on its own behalf and on behalf of the U.S. Trustee in Bankruptcy), where reliefs were sought for the disclosure of certain documents within those proceedings.

11. Pursuant to that application Abbott J. delivered judgment on 6 December 2013 and an order consequent upon that judgment and certain other matters issued on 14 February 2014.

12. The order of 14 February 2014 recites on its face;

(a) that J.D. and S.D. were heard in respect of that application, there was no attendance by or on behalf of G.K. as the notice party to those proceedings.

(b) that when the matter came before the court on 31 January 2014, a draft order and protocol had been prepared and orders made with regard to the manner in which any documentation was to be dealt with (and various other matters set out within the schedules to that order).

(c) S.D. was granted a stay for a period of 21 days in the event of an appeal. Counsel for S.D. within this application was unable to confirm that any appeal took place and I am informed that there is no record of it.

13. Accordingly, I note in respect of the application before Abbott J. that G.K. was on notice of the proceedings but did not advance submissions and S.D. made submissions to the court but did not appeal the order of Abbott J.

14. It is to be noted that the order and attached schedules of Abbott J. in February 2014 directed that protocols be put in place with regard to the documentation and the manner of its disclosure: -

(a) The first schedule to that order sets out the materials to be disclosed and the second and third schedules, under the sub-heading 'Agreed Protocol' set out a suggested protocol in relation to the redaction process which is detailed and comprehensive.

(b) With regard to the disclosure by NALM/NAMA to the U.S. Trustee, the order directs that this can only be done within the following constraints: (a) that it be used for investigative purposes within the U.S. bankruptcy only; (b) that it will not be disclosed to any third party, other than the legal advisers of the Trustee; and (c) that in the event that the Trustee wishes to examine S.D. in relation to the material disclosed, such examination will take place in private and the transcript of the examination will be sealed.

15. Thereafter;

(a) Abbott J., by order dated 7 March 2014, records that pursuant to a motion by the applicant herein it was ordered that the Official Assignee in bankruptcy was joined as a respondent to the family law proceedings (S.D. having been adjudicated a bankrupt).

(b) On 2 May 2014, Abbott J. makes, *inter alia*, orders regarding the furnishing of certain documentation pursuant to his order of 14 February 2014 to the applicant.

(c) On 16 May 2014 Abbott J. orders that the remaining motions be adjourned for hearing before McGovern J. on a *de novo* basis (save for the order of 7 May 2014 joining the Official Assignee as a party to the family law proceedings).

16. On 15 July 2014 Judge Schiff of the United States Bankruptcy Court, District of Connecticut, Bridgeport Division in case no. 13 – 50484 (AHUWS) in *Re: S.D. a Debtor* (name redacted) makes certain orders regarding the confidentiality of the documentation in the family law proceedings within that jurisdiction which states: -

"ORDERED, that, unless otherwise ordered by this Court, Richard M. Coan may receive, review, and use of the family law documents, subject to the following restrictions: -

(a) The family law documents will only be used for investigative purposes in connection with the trustee's administration of the above captioned bankruptcy case;

(b) The family law documents will not be disclosed to any third party, other than the trustee's counsel; and

(c) Any examination of the debtor in relation to the family law documents will take place in private and the transcripts of any such transcripts of any such examination will remain confidential,

And it is further ORDERED, that, unless otherwise ordered by this Court, nothing in this order prevents or prohibits the trustee from providing any of the family law documents to this Court, provided however that any delivery of the family law documents to this Court shall be made under seal and said documents shall remain under seal unless and until the court orders otherwise."

17. Thus it can be seen that the order of Judge Schiff in July 2014 mirrors the constraints in the use of the redacted documentation as set out within the order of Abbott J. in February 2014 as set out above.

18. On 13 August 2014 McGovern J. ordered, *inter alia*, that the Official Assignee (applicant) is entitled to examine all documentation in relation to the family law proceedings, with other matters adjourned to the next term. On 15 October 2014 McGovern J. deals with the question of costs in respect of previous applications.

19. On 19 November 2014 McGovern J. orders (having directed that the motions be heard otherwise than in public): -

"That the Official Assignee in bankruptcy do have liberty to furnish documentation in proceedings entitled *J.D. v. S.D.* [1997] 58 M and in proceedings entitled *S.D. v. J.D.* [2001/168M] to US trustee Richard Coan in accordance with the order of the US Bankruptcy Court (Schiff J.) dated the 15th of July 2014

AND IT IS ORDERED that the Official Assignee in bankruptcy do send to the solicitors for J.D. a list of the documents to be furnished to the said US trustee with details of how each such document has been redacted."

20. In respect of the orders of McGovern J. of 19 November 2014, the bankrupt S.D. was on notice of the application but did not attend, submissions were advanced on behalf of the Official Assignee and J.D. (also J.C.) who sought unsuccessfully to resist the application.

21. Accordingly, the documentation has been furnished pursuant to the order of McGovern J.

22. On 15 February 2019, Judge Meyer upon the application of the U.S. Trustee in Bankruptcy granted leave to use that documentation at the forthcoming trial in the U.S. and this is dealt with in more detail below.

23. The affidavit sworn by Timothy Miltenberger on 8 April 2019, as representing the Chapter 7 Trustee, avers at paragraph 4 of that affidavit that the applicant was requested to make this application (i) in the interests of comity (ii) 'to put J.C. on notice of any perceived variation of the earlier order, because she is not a party to the U.S. litigation' and (iii) 'to advise the Irish Courts so it will not perceive that the Chapter 7 Trustee is acting without regard to the *in camera* rule or without consideration for the rulings of the High Court.'

24. In respect of these matters the Courts have delivered two judgments; McGovern J. on 13 August 2014, and Abbott J. on 6 December 2013.

25. The judgment of McGovern J. on 13 August in so far as it dealt with matters that relate to the issues before this Court stated: -

"Against the background circumstances of this bankruptcy, the actions taken by the Official Assignee are neither arbitrary nor disproportionate and are necessary to enable him to carry out his function expressed under s. 61(2) of the Act, to get in and realise property.... To some extent, this seems to be accepted by the bank whose written submissions state that the Official Assignee's right to access the bankrupt's Family Law documentation is strictly limited to the right to review documents relevant to his economic estate. It seems to me that this is precisely what the Official Assignee seeks to do. Insofar as there is an inference in the right of the bankrupt to privacy, it seems to me that that does not go beyond what is justified and permissible, having regard to the necessity of the Official Assignee to investigate the financial affairs of the bankrupt. Furthermore, as the Official Assignee is a party to the family law proceedings, he is governed by the in camera rule."

26. It is noteworthy that McGovern J. also stated: -

"It is clear that the Official Assignee does not seek inspection of the Family Law documents other than for the purpose of ascertaining relevant information which will enable him to carry out his duties under the Act."

27. The judgment of Abbott J. of 6 December 2013 considers in detail the role of the in camera proceedings in light of a third party application to seek certain documentation within those proceedings. The court initially records that whilst J.D. and S.D. are divorced from one another the matrimonial proceedings still proceed before the court and are by virtue of the nature of those proceedings protected by the in camera rule.

28. The court records that one of the effects of the filing for bankruptcy was the imposition of an automatic stay on all proceedings (worldwide) involving S.D. and in that regard that NAMA was obliged to make application to the U.S. Bankruptcy Court to lift that stay for the purposes of maintaining this motion. An order was obtained to that effect on 18 September 2013 permitting NAMA to pursue the application before Abbott J.

29. In considering the in camera rule Abbott J. considered it from both the perspective of statute as set out above, but also that the case law cited within the judgment admitted of the possibility that there was indeed a common law power vested in the courts to lift the in camera rule, notwithstanding any statutory provisions.

30. Within that judgment, following an analysis of the case of *X.Y. v. Y.X.* [2010] IEHC 440 the court held: -

"There is, therefore, a very substantial common interest in law between this family court and the bankruptcy court in Ireland. Also, given the strong statutory nexus between NAMA and the U.S. Bankruptcy Court, I consider that the same relationship arises between this Court and the U.S. Bankruptcy Court."

31. After then considering the public interest statutory basis for the statutory framework for the creation of NAMA, and the strong public interest that the court found arises through the nexus between NAMA and the U.S. Bankruptcy Court through its participation in the U.S. Bankruptcy proceedings (and contended by the applicants on the facts of this case by extension and for the same reasons with the Official Assignee in bankruptcy in this jurisdiction) the court noted: -

"I find as a fact that the first applicant has been guilty of several intentional or unintentional concealment of assets, either through simple denial in the examination process of s. 341 in the U.S. bankruptcy, or by inappropriate invocation of the in camera rule in this and this and in another non-E.U. jurisdiction and by failing to properly define the status of wife no. 2 and her relationship to the various assets and transactions queried in the interrogation process. I am satisfied that without full disclosure in accordance with the motion herein, the position of the U.S. Court in establishing the assets and liabilities of the first applicant for the purposes of bankruptcy proceedings in the U.S., would be well-nigh impossible. The forensic effect of committal proceedings against the first named applicant for contempt in the U.S. bankruptcy proceedings would not necessarily have the desired result in ensuring that availability of proper information for the U.S. bankruptcy proceedings."

32. In finding that the in camera rule should be lifted in the terms of the notice of motion (as subsequently amended) the court indicated that it had regard to a number of interests, the balance of interest between the applicants to the family law proceedings, the substantial interest of the Irish taxpayer in recovering the assets provided by NAMA, the public interest in ensuring the comity between Irish courts and cooperation with the U.S. bankruptcy court, the court held: -

"I find that the in camera rule should be lifted in terms of the notice of motion herein (as extended and amended), but subject to redaction to protect the private and sensitive non - commercial aspects of the case from being disclosed, and on the basis that the material is only used for investigative purposes within the U.S. bankruptcy and not for public dissemination in the s. 341 process. The information should, therefore, not be disclosed by reason of this Court lifting the in camera rule unless the trustee and official assignee in the U.S. bankruptcy proceedings are authorised by the U.S. court to use the information and documentation within that constraint. In this regard, I have taken some comfort from the fact that counsel for NAMA indicated that this course would be taken by the trustee in the U.S. bankruptcy proceedings."

33. In summary, the applicant argues or contends that the orders sought by it within this motion is simply a refinement of the existing orders and the comity between the courts whereby the consolidated U.S. proceedings now proceeds to trial and simply seeks confirmation that it may continue to use the documentation as it has heretofore. It also follows it is argued from the orders of Abbott J. and McGovern J. in this jurisdiction and in the U.S. Courts of Judges Schiff and Meyer.

34. Counsel for S.D. contends that the differentiation between the use of documentation within the investigative process and within this imminent trial means that the court has to consider anew the rights and entitlements of the respective parties (and potentially other third parties who may be named within the documentation) in the proper preservation of their constitutional and other rights. Counsel for S.D. and G.K. further contend that any lack of formal complaint within the U.S. process (particularly with regard to the order of Judge Meyer) is not relevant as the proper forum for such complaint, in respect of both persons who are Irish citizens, is before the Irish courts and not the U.S. courts. Both claim breaches of their respective rights pursuant to the Irish constitution and the European Convention on Human Rights.

35. Counsel for S.D. and G.K. have sought to argue that this present application must be considered as wholly distinct from any use to which the documentation has been put in any prior investigative process.

36. Both also contend that only the family law courts within this jurisdiction can deal with any application regarding the lifting of the

in camera rule dealing with the family law proceedings. It is also argued that this application should be made within this jurisdiction by the U.S. Trustee in Bankruptcy who must be made amenable to the jurisdiction of the Irish Courts should the necessity for any contempt proceedings arise.

37. Counsel for G.K. argued that the only entities that could properly consider the documentation and any proper redaction were the legal parties advising the notice parties to this application. Complaint was also made as to the manner of the redaction of the documentation utilised before the U.S. courts.

38. Whilst the documents in question were initially part of those family law proceedings, there are no proceedings currently before the family courts. It is also noteworthy that Abbott J. transferred the entirety of any extant matters to the bankruptcy court. S.D. had been adjudicated a bankrupt and his estate thereafter became a matter for the Official Assignee (this applicant). No direction was given by Abbott J. that any further or consequential orders concerning the family law proceedings (if any) were to be made by him or a judge dealing with family law matters. Nor was any case law advanced to this Court as to any issue of jurisdiction that precludes this Court from considering these matters.

39. When the outstanding matters concerning the bankrupt's estate were transferred to McGovern J., he thereafter dealt with all matters relating to this bankrupt's estate. That included his order of 19 November 2014 granting the Official Assignee liberty to furnish documentation within the family law proceedings. There was no separate exercise in examination or redaction of documentation as that process had been carried out pursuant to the detailed schedules to the order of Abbott J. on 14 February 2014. Moreover the order of McGovern J. records that the party who sought to resist the application was J.C. (J.D.). As set out above there was no appeal from the order of Abbott J. and whilst G.K. was made a notice party to those proceedings the primary protection in respect of the applicability of the in camera rule was in respect of the parties to those proceedings; J.C.(J.D) and S.D. who remains a bankrupt and therefore his estate continues to be administered by the Official Assignee, the applicant to these proceedings.

40. In my view this Court must be circumspect in ensuring that this application is not treated as a quasi-appeal or re-hearing from the judgments and orders of Abbott J. and McGovern J. within those proceedings. Neither in my view can this Court trespass upon the process adopted by the U.S. Trustee in Bankruptcy within that jurisdiction. As set out above this application is a discrete one and I propose to consider it as such.

41. The United States Trustee in Bankruptcy already has the documentation in question; the issue therefore is his seeking the consent of this Court that it might now be used within the forthcoming trial pursuant to the order of Judge Meyer. The order of Abbott J. refers to its use within the 'investigative process' (mirrored within the order of Judge Schiff) and leave is sought, to ensure that the U.S. courts, in utilising the documentation, does so with regard to the in camera rule and the orders consequent upon that determination within this jurisdiction and the U.S.

42. In my view it must also be noted that the time of the orders of Abbott J. and Schiff J., whilst S.D. has been adjudicated bankrupt within both jurisdictions both this applicant and the U.S. Trustee in Bankruptcy were conducting their respective investigations into the bankrupt's estate. The proper administration of any process of bankruptcy may well involve litigation consequent upon that investigative process with the aim of seeking the proper recovery of the bankrupt's estate for its creditors. At the time initial orders were made in this case the proceedings had not been consolidated with the U.S. and a trial was not imminent.

43. It has been argued by Counsel for the applicant that it is illogical for documentation to be utilised within the investigative process and for this Court to then determine that that same documentation could not be utilised in a trial consequent upon that investigative process. I agree. In my view the ongoing utilisation of these documents is not within a different or separate process but rather an ongoing continuum of the steps that the U.S. Trustee in Bankruptcy has deemed appropriate to maintain in respect of this bankrupt's estate and other third parties against whom allegations are made as to the manner in which that estate has been dealt with throughout the totality of this bankruptcy process.

44. In affidavits filed during the course of this application by the solicitors instructed by G.K. and S.D. much was made, particularly on behalf of G.K., that certain documentation in issue was put to her in her depositions in the U.S. were in an improperly redacted or wholly unredacted form. The exhibits of that documentation did not support these averments – the documentation is clearly redacted. However, in my view that is not an issue for this Court, rather for the US Court.

45. One feature of this application is the fact that G.K, a notice party to the family law proceedings made no submissions regarding the lifting of the in camera rule or any protocols arising from such an adjudication. There was no appeal by her or any party to the family law proceedings from the order of Abbott J. of February 2014. No submissions were advanced to McGovern J. by S.D. or G.K. (Only J.C. (J.D.) prior to his order of 19 November 2014. At some point regard must be had to what is often referred to as the rule in *Henderson v. Henderson* [1843] 3 Hare 100 as to why these matters were not argued previously and in particular before McGovern J. prior to his order in November 2014.

46. This is not a separate or self-contained application; it forms part of a continuum of matters that require to be addressed concerning the ongoing administration of the bankruptcy estate of S.D.

47. The lifting of the in camera rule and the protocol for the redaction of documents was executed pursuant to the order of Abbott J. The order of McGovern J. (consequent upon the bankruptcy of S.D. and the joinder of the Official Assignee to proceedings) directed the furnishing of the documentation to the U.S. Trustee in Bankruptcy.

48. The documents are held by the U.S. Trustee in Bankruptcy and they now propose, pursuant to and consequent upon the orders of Judges Schiff and Meyer to use those documents at trial in the manner set out below.

49. The documentation has been furnished to the U.S. Trustee in Bankruptcy. It has been used within the investigative process (which is deemed to include within the taking of any depositions). Arising from that investigative process Judge Meyer will shortly adjudicate in proceedings *Richard Coan v. S.D. et al* 3: 15-cv- 0050 – (JAM)/Ad Proc 15 5019; (name redacted).

50. This application is sought by this applicant at the request of the U.S. Trustee in Bankruptcy (i) in the interests of comity (ii) to put J.C. on notice, because she is not a party to the U.S. litigation and (iii) 'to advise the Irish Courts so it will not perceive that the Chapter 7 Trustee is acting without regard to the in camera rule or without consideration for the rulings of the High Court.'

51. The interests of comity are noted. J.C. (J.D.) is properly on notice of this application as a notice party but has not taken any part in it and in any correspondence has not sought to preserve her position in that regard. Accordingly no submissions have been advanced on her behalf, only on behalf of the other notice parties S.D. and G.K. The advices to the Irish Courts that the U.S. Trustee

in Bankruptcy is acting having due regard to its in camera rule within this jurisdiction is also noted.

52. It follows of course that the U.S. Trustee abides by the procedure and laws of the U.S. I note that the order of Judge Meyer has already been made regarding the furnishing of documentation originating within the family law proceedings at the forthcoming trial of this matter. I further note the averment that the U.S. Trustee in Bankruptcy has not received in camera documents from the Official Assignee that includes redacted private and sensitive non-commercial aspects of the Irish family law proceedings.

53. Mr. Miltenberger in his affidavit sworn on 10 April 2019 avers that "both the Chapter 7 Trustee and his counsel seek guidance from the High Court that they act in accordance with the spirit and intent of the Irish in-camera rule."

54. As set out by the Official Assignee in his affidavit within these proceedings sworn on 15 March 2019 the family law documentation will be dealt with in a court to which the public will not have access for the relevant period, that the relevant exhibits and the transcripts in relation to portions which reference papers or matters from the family law proceedings will all be sealed, and that the use of this documentation will be available to the Court, the jury (who will be instructed as to the confidential nature of this documentation) and the parties (and any potential witnesses) to this hearing. I further note that at the trial that the U.S. Trustee will have no objection to the Court receiving this family law documentation under seal, the Court instructing the jury to maintain the confidentiality of these documents and that the Trustee will redact any sensitive information if so instructed by the Court. With regard to that latter point that will permit any parties involved within the U.S. proceedings to make an application to that Court with regard to the redaction of material. That does not apply to J.C. (J.D.) who is not a party to the U.S. proceedings (although a creditor within the U.S. bankruptcy) and I would therefore request that particular care is exercised to ensure that her privacy is protected in the use of the family law documentation within the trial process. It is my request therefore that the protections as envisaged for the retention of the in camera rule within the trial proceedings as set out above be utilised.

55. In my view this is an appropriate case for invoking s. 135 of the Bankruptcy Act 1998 in the events that have now happened. That section states that: -

"The Court may review, rescind or vary an order made by it in the course of a bankruptcy matter other than an order of discharge or annulment."

It has been suggested by the applicant that perhaps no order is necessary but in my view I should do so following the order of McGovern J. in November 2014.

56. Pursuant to s. 135 I have decided to review and vary that order to the following effect;

The order of McGovern J. dated 19th November 2014 ordered "That the Official Assignee in bankruptcy do have liberty to furnish documentation in proceedings entitled *J.D. v. S.D.* [1997] 58 M and in proceedings entitled *S.D. v. J.D.* [2001/168M] to US trustee Richard Coan in accordance with the order of the US Bankruptcy Court (Schiff J.) dated the 15th of July 2014."

In my view consequent upon that order, invoking section 135 of the Bankruptcy Act 1988 this court orders;

That in respect of the documentation furnished to the U.S. Trustee in Bankruptcy pursuant to the order of McGovern J. on 19 November 2014 that the U.S. Trustee has leave for the use of documentation from proceedings entitled *J.D. v S.D.* [1997] 58 M, insofar as it relates to the bankrupt's estate, in proceedings entitled *Richard Coan v. SD et al* 3: 15-cv-0050 – (JAM)/Ad Proc 15 5019 in accordance with the order of the U.S. Court (Judge Meyer) dated the 15th of February 2019.

57. I will hear the parties on the question of costs.