Neutral Citation Number: [2011] IEHC 541

THE HIGH COURT

BANKRUPTCY

[NO. 2378]

IN THE MATTER OF A BANKRUPT, PATRICK MURPHY, OF 18, FALCON HILL, LOVERS WALK, TIVOLI, CORK

APPLICANT

BANK OF IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 12th day of April, 2011

1. This is an application by an applicant to show cause against the validity of his adjudication as a Bankrupt, made on 24th January, 2011. The application is brought pursuant to s. 16 of the Bankruptcy Act 1988 ("the Act"). The relevant parts of the section are as follows:

> *"16.-(1) The applicant may, within three days or such extended time not exceeding fourteen days as the Court thinks fit from the service of the copy of the order of adjudication on him, show cause to the Court against the validity of the adjudication.*
>
> *(2) On an application to show cause under subsection (1) the Court shall, if within such time the applicant shows to its satisfaction that any of the requirements of section 11 (1) have not been complied with, annul the adjudication and may, in any other case, dismiss the application or adjourn it on such conditions as the Court thinks fit, having regard to the interests of the applicant, his creditors and any persons who might advance further credit to him ..."*

2. On 7th May, 2010, Bank of Ireland ("the Bank") obtained a judgment in the sum of €9,025,720.70 against the applicant. Between 17th May, 2010, and 31st October, 2010, payments amounting to €2,665.00 were paid by the applicant to the Bank and these sums were credited to his account.

3. On 21st October, 2010, the Bank served on the applicant a notice of demand prior to the issue of a Bankruptcy Summons. The sum specified in the demand was €9,025,880.70. This comprised the judgment sum of €9,025,720.70 and a sum of €160 for six-day costs. Although the notice said that the total amount specified in the notice remained outstanding, the actual indebtedness of the applicant to the Bank was greater because Courts Act interest had continued to run on the judgment sum.

4. On 19th November, 2010, a further €1,000 was paid by the applicant to the Bank and credited to his account.

5. A Bankruptcy Summons issued on 29th November, 2010. The applicant was adjudicated a Bankrupt on 24th January, 2011. Section 16 of the Act requires an application to show cause against adjudication to be made within three days or such extended time not exceeding fourteen days as the court thinks fit from the service of the copy of the Order of Adjudication on the applicant. The application was not made within time, but an affidavit was sworn by the applicant on 28th January, 2011, in support of the application before the court which is based on a notice of motion dated 1st February, 2011. In his grounding affidavit, the applicant sets out reasons why the court should extend the time for the bringing of the application.

6. While there is some dispute between the Bank and the applicant as to the information contained in the affidavit, it does appear that within a short time after the adjudication, the applicant intended to bring this application, and since bankruptcy is an onerous state for the debtor, it seems appropriate that I should extend the time for bringing the application, and I do so.

7. The grounds upon which this application are made are as follows:

> The applicant claims that the following requirements of s. 11(1) of the Bankruptcy Act 1988 have not been complied with:
>
> > *"1. The sums claimed in the demand and in the Bankruptcy Summons were inaccurate, and accordingly, the failure to pay all or part of the sums so demanded could not, and did not, amount to an act of bankruptcy.*
> >
> > *2. Accordingly, there was no act of bankruptcy on which to ground a valid order of adjudication of bankruptcy.*
> >
> > *3. In particular, no act of bankruptcy had occurred within three months before the presentation of the Petition.*
> >
> > *4. The debt was not a liquidated sum by reason of the failure to properly account for partial repayments of same.*
> >
> > *5. The Bankruptcy Summons, if granted prior to the swearing of a valid verifying affidavit (and it appearing that the affidavit was sworn some two days after the issue of the Bankruptcy Summons) could not be valid Bankruptcy Summons."*

8. At the hearing of the application, the applicant did not pursue ground number five. It appears that the matter was not pursued because an affidavit was sworn by Ms. Janet Seacy, which clearly established that the verifying affidavit had been sworn on 2nd November, 2010, and not on 2nd December, 2010, as originally thought by the applicant. Even though the indebtedness of the applicant to the Bank changed from time to time, depending on Courts Act interest which was added and credits given in respect of payments, the Bank's claim against the applicant was at all times for a liquidated sum.

9. The thrust of the applicant's claim is that neither the Notice of Demand nor the Bankruptcy Summons have given credit to the applicant for payment of any sums after the date of judgment. It seems to be agreed between the parties that between 31st May, 2010, and 19th November, 2010, a total of €4,025.00 was paid into the applicant's Loan Account No. 72939674. This includes a sum of €1,000 paid on 19th November, 2010.

10. The applicant claims that these credits should have been made against the principal sum and not the interest. He refers to paragraph five of the affidavit sworn by Ms. Janet Seacy of the Bank on 29th January, 2011, which he says shows that the credits were made against the principal sum due on foot of the judgment of 17th May, 2010.

11. While that is the way it may have been calculated in the affidavit, it is also clear from that affidavit that interest at Courts Act rate ran on the judgment from 17th May, 2010, and was added to the applicant's indebtedness to the Bank up until the date of adjudication on 24th January, 2011.

12. The applicant claims that since the sums paid by the debtor were credited against the amount of the judgment and not the interest, that the sum claimed in the Bankruptcy Summons was inaccurate and exceeded the amount of the debt.

13. He asserts it is a requirement of the Act that the sum being demanded be a liquidated sum, that is to say, a sum which has been ascertained. He further argues that it is not sufficient to say that the sum of interest could have been liquidated and included in the particulars and demand where this has not, in fact, been done, and in circumstances where the Bank limited its claim to payment of the sum in the judgment and costs. He maintains that the interest was waived by the Notice of Demand and that the Bankruptcy Summons issued on 29th November, 2010, did not give credit for a sum of €1,000 which was lodged on 19th November, 2010. It is argued that the Notice of Demand and Bankruptcy Summons are therefore defective.

14. The applicant relies on *In Re Sherlock, A Bankrupt* [1995] 2 ILRM 493. In that case, an adjudication of Bankruptcy was set aside, as a credit, to which the applicant was entitled, had not been allowed against the principal sum due to the petitioning creditor. The sum specified in the Bankruptcy Summons was, therefore, inaccurate, and Murphy J. declared the adjudication void. In granting the relief sought, he held that:-

> *"(1) A certain degree of precision is required in the documentation grounding an application for bankruptcy as the bankruptcy code is penal in nature and the requirements of the statutes must be complied with strictly.*
>
> *(2) Where the amount said to be due on foot of the notice requiring payment and on the Bankruptcy Summons is in excess of the amount actually owed, this constitutes a substantial defect rendering the notice and the summons defective."*

15. Accordingly, he held that the failure to respond to the Summons could not constitute an act of Bankruptcy, and even though he had no doubt that the failure to give credit for the sum of approximately IR£1,000 in that case was due to an oversight, he felt bound to dismiss the petition because the computation was defective.

16. The Bank, in its submissions, accepts that a sum of €4,025.00 was received on behalf of the applicant between the date of judgment and the issue of the Bankruptcy Summons and that a further sum was received on 30th November, 2010.

17. Since Courts Act interest accrues on the judgment debt from 19th May, 2010, the amount owed by the applicant to the Bank continued to grow up to the date of adjudication because the credits were less than the accumulating interest. The applicant has not disputed the fact that Courts Act interest applies to the judgment, although he appears to contend that this was waived by the Bank in view of the figures stated in the Notice of Demand and Bankruptcy Summons. I do not accept that argument. The applicant has adduced no evidence in support of that claim and it is clear, from the evidence in the affidavit of Ms. Janet Seacy, sworn on 29th January, 2011, that this was not the position of the Bank.

18. Furthermore, the applicant does not challenge the computation of interest that arises in this case. So, there is no claim of a *mistake* in the figures.

19. In *In Re Sherlock,* Murphy J. made reference to the decision of Cozens-Hardy M.R. in *In Re A Debtor* [1908] 2 K.B. 684, where, at p. 687, the learned Master of the Rolls stated:

> *"The amount claimed in the bankruptcy notice was not due. There was a mistake in the calculation of interest. For the present purpose, I care not what the precise amount of the mistake was. It was, I believe, between one and two pounds. But putting aside the question of amount, this was a bankruptcy notice which said 'If you do not pay a judgment debt which is due and also a further sum which is not due you are liable to be made a bankrupt.' It is said that is a formal defect which can be set right under s. 143, sub-s. 1, of the Bankruptcy Act, 1883, and that we ought to disregard it or treat it as formal and amend the bankruptcy notice and allow the bankruptcy proceedings to go on. On principle, I am not prepared to accede to that argument. I cannot regard it as a mere formal defect that you claim payment from a man of that which never was due from him."*

20. In *In Re Sherlock*, at p. 497, Murphy J. quoted with approval the conclusions of Hamilton P. in *O'Maoileoin v. Official Assignee* [1989] I.R. 654, where he said:

> *"These cases clearly establish that the bankruptcy code, having regard to the consequences which flow from an adjudication of bankruptcy, is penal in nature and that the requirements of the statutes must be complied with strictly; that the debtor's summons to be served within the provisions of s. 21 of the Bankruptcy Ireland (Amendment) Act, 1872, must be served in the prescribed manner and the amount due in accordance with a judgment, when a judgment is relied upon, must be accurate and that a claim for an amount in excess of the amount due in accordance with such judgment would render the notice defective and a subsequent adjudication void."*

21. The Bank argues that the reasoning behind the strict view taken by the court in *In Re Sherlock* and the other cases referred to therein is that because of the severity of the Bankruptcy regime and the consequences for a debtor, the law insists that he must actually owe the sum claimed of him, and that if the sum sought is in excess of the sum owed (however marginal), the demand must be bad because the debtor cannot be expected or compelled to pay a sum which is more than he owes.

22. I accept the submission of the Bank on this point.

23. In the case of *In Re Sherlock*, the sum sought was IR£1,000 in excess of the sum actually owed. In the case before 'me, the sum demanded of the applicant was considerably less than he actually owed at that time, when interest was taken into account, notwithstanding any credits given.

24. In effect, the Notice of Demand and the Bankruptcy Summons understates the actual amount owed by the applicant. It does not do so because of any mistake in the calculations, but simply on the basis that the Bank has confined its claim in the application for the Bankruptcy Summons to the amount of the judgment of 17th May, 2010, and the costs awarded at that time.

25. Whether the Bank would be entitled to prove a sum in excess of that figure in the Bankruptcy is a matter that can be argued by

the parties in due course. But what is clear, beyond any doubt, is that the actual sum owed by the applicant to the Bank is considerably in excess of the sum demanded of him in the Notice of Demand and referred to in the Bankruptcy Summons which issued.

26. In the course of the hearing, counsel were unable to cite any case which dealt specifically with this point, namely, whether an understatement of the amount actually due brought a debtor within the ambit of *In Re Sherlock* and the cases referred to therein.

27. I am satisfied that the jurisprudence established by *In Re Sherlock* developed in order to protect debtors from the rigours of Bankruptcy following a demand for payment which was excessive, even if the excess was minimal, and arose due to an oversight or innocent mistake.

28. That judgment is not authority for the proposition that a claim for a liquidated sum, which is less than the sum actually due, gives rise to a "cause shown" against the validity of an adjudication of Bankruptcy under s. 16 of the Act, and where no mistake or carelessness has been shown in the computation of the figures set out in the Notice of Demand or the Bankruptcy Summons.

29. The applicant has not suggested that the interest figures calculated by the Bank and shown in paragraph five of the affidavit of Ms. Janet Seacy are inaccurate. It is quite clear, on the basis of those figures, that even allowing for the credits due to the applicant, his debt to the Bank considerably exceeds the sum demanded of him, both at the date of the demand and the date of the Bankruptcy Summons.

30. In the circumstances, the applicant has failed to show cause against the validity of the adjudication and I refuse the application.