Neutral Citation: [2016] IEHC 307

THE HIGH COURT

[HH: IS: HC: 2015: 000027]

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015

IN THE MATTER OF JAMES NUGENT OF MAPLE 6, HAZELDENE ANGLESEA ROAD, DUBLIN 4

("THE DEBTOR")

AND

IN THE MATTER OF A PROTECTIVE CERTIFICATE (PERSONAL INSOLVENCY ARRANGMENT) ISSUED BY THE COURT ON THE 3RD DECEMBER 2015 ("THE PROTECTIVE CERTIFICATE")

AND

IN THE MATTER OF AN EXTENSION TO THE PERIOD OF THE PROTECTIVE CERTIFICATE ISSUED BY THE COURT ON 10TH FEBRUARY 2016

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO S.97 OF THE PERSONAL INSOLVENCY ACTS 2012 – 2015 AND THE INHERENT JURISDICTION OF THIS HONOURABLE COURT

JUDGMENT of Ms. Justice Baker delivered on the 8th day of June, 2016.

1. On the 10th March, 2016, I delivered judgment in the substantive application of Danske Bank for an order setting aside an extension of a protective certificate granted ex parte to James Nugent, a debtor, on the 10th February, 2016. For the reasons set out in that judgment I made an order setting aside the extension of the protective certificate. See Nugent & Personal Insolvency Acts [2016] IEHC 127.

2. This judgment is given in the application by Danske Bank for an order that the costs of that application be borne by the personal insolvency practitioner, Tom Murray, who acted on behalf of the debtor for all purposes related to the personal insolvency application, and the application for the extension of the protective certificate.

3. An order for costs in respect of the application against the debtor, Mr. Nugent, was made by me without any real opposition from Mr. Nugent. Mr. Nugent was adjudicated bankrupt by order of Costello J. on the 4th April, 2016 in which she awarded costs against him in favour of Danske Bank, the petitioning creditor, and that order was not opposed.

4. Danske Bank argues that as the personal insolvency practitioner ("PIP") is deemed for the purposes of the personal insolvency legislation to be the party making the application, and because of the central role that the PIP plays in the statutory process, that the PIP ought to bear responsibility for the costs incurred by Danske in the successful application to set aside the extension of the certificate. The Bank relies in particular on para. 31 of my judgment where I stated as follows:-

> *"31. A Personal Insolvency Practitioner is in a unique role, not equivalent to the role of an examiner or a liquidator appointed by the court under the Companies Acts, although some similarities can be noted. The PIP is required to be interposed between the Insolvency Service of Ireland and the debtor. A debtor may not engage with the process envisaged by the Act, whether to seek a personal insolvency arrangement, or a debt settlement arrangement without employing a PIP. The PIP takes a role between the administrative functions of the Insolvency Service of Ireland and the creditors. The PIP is required for example to consider whether a debtor may avail of the options available under the personal insolvency legislation as an alternative to bankruptcy. The PIP is required to undergo an examination and to apply for registration as a PIP before he or she can operate within the State. Further, by S. 14 of the Bankruptcy Act 1988, a court shall, before making an order of adjudication, consider whether the debtor's inability to meet his engagement could be more appropriately dealt with by a personal insolvency arrangement or a debt settlement arrangement, and the court hearing a petition in bankruptcy must be satisfied that this option has been explored by a PIP who has considered the alternatives and whose professional view is a factor taken into account by the bankruptcy court. All interactions that the debtor has with the Insolvency Service of Ireland, on the one hand, and the court, on the other hand are through the PIP, and this puts the PIP in a unique position of responsibility to the Insolvency Service of Ireland, the court, the creditors and of course to the debtor. That this imports a duty of frankness and full disclosure seems to me to be unequivocal, and while the PIP is not an officer of the court in a true sense, he is a professional engaged with a process in respect of which the court expects a full, professional and objective approach. The PIP may, but does not always engage a solicitor, but the obligation of frankness must be one which the PIP bears personally by virtue of his unique role at the centre of the process, and as the person uniquely with standing to bring application to the court."*

5. It is argued in particular that because of the central and unique role played by the PIP in the personal insolvency process, and because it is the PIP who makes the application, and is responsible for the preparation and presentation of the paperwork, that he ought to be held accountable in respect of the costs of the application. The "event" for the purposes of costs is said to be the granting by me of the order setting aside the extension of the protective certificate on the grounds, inter alia, that the debtor had failed to make full and frank disclosure to the court in making the application for extension.

6. The argument of the Bank is essentially that as I held that the PIP bore personally an obligation of frankness, and arising from his unique role at the centre of the process, he uniquely has standing to bring application under the statutory scheme to the court, his failure to comply with his duty of disclosure to the court means he personally should bear the costs. Had the PIP made full disclosure to the court, it is argued the protective certificate would not have been extended.

Costs against non-parties

7. Under the scheme of the personal insolvency legislation the PIP bears responsibility for processing the application and dealing with

the paperwork, but in my view the PIP is still properly characterised as a non-party for the purposes of considering whether costs should be awarded against him. The PIP has a central role in the procedures under the legislation, but he has no personal interest in the result and any order that is made under the legislation is made for the benefit of, or affects, the debtor in his personal capacity, and not the PIP. Thus, the role of the PIP is to some extent analogous to the role of an examiner, or a solicitor or another professional acting in a role, albeit that application for a protective certificate and for the court's approval of a DSA or a PIA may not be made other than with the assistance of a PIP.

8. The leading judgment on the jurisdiction of the court to make an order for costs against a non-party, and the criteria that are engaged, is the judgment of Clarke J. in *Mooreview Developments Ltd. v. First Active Plc.* [2011] IEHC 117; [2011] 3 I.R. 615. In a reasoned, analytical judgment he considered that the jurisdiction to award costs against a non-party who had not been joined to the proceedings, even for the mere purposes of making an order for costs against such party, derived from s. 53 of the Supreme Court of Judicature (Ireland) Act, 1877, which vested in the court a clear jurisdiction in its discretion to award costs against any person, including a person not a party to the litigation. Clarke J. considered inter alia that this broad approach to the jurisdiction of the court "*accords with the view that the court should have full control over proceedings before it*" (at para. 3.28)

9. The judgment of Clarke J. in *Mooreview Developments v. First Active Plc*. dealt with an application for costs against the director of a company in long-running and complex litigation where he was satisfied that the main beneficiaries of the litigation, had it been successful, was that director and his wife. It was clear also in that case that an order for costs against the company, and the other companies in the group of which it was a part, was unlikely to be met. Clarke J. considered that certain factors should guide the court in the exercise of its jurisdiction to award costs against a non-party and he approved a passage from the judgment of Tompkins J. in *Carborundum Abrasives Limited v. Bank of New Zealand* (No. 2) [1992] 3 NZLR 757, and from which the following principles emerge:

> a. It is not necessary to establish impropriety fraud or bad faith on the part of a non-party.
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> b. If it is the case that that non-party had a "*direct personal financial interest*" in the result, the court would take into account the fact that a non-party initiated or controlled the litigation, and might derive a financial interest, the court should take into account that he or she should not always be permitted to do so with no risk of costs.
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> c. Consideration should be given to the fact that if the party to the proceedings is an insolvent company, the reason that party, and not an individual plaintiff or defendant, is in the proceedings ought to have some influence on the court if the non-party may hope to have some financial benefit or gain from the fruits of the litigation, whether by the preservation of assets or otherwise.
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> d. The court should also take into account the likelihood of costs being met by a corporate entity.
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> e. The reasonableness of the course adopted by the non-party is also a factor, as is whether the proceedings were pursued in a "*reasonable fashion"* (per Clarke J. at para. 4.9)

10. Clarke J. helpfully identified the policy reason behind the exercise of this jurisdiction was *"to prevent parties having a 'free ride' as to how they would conduct litigation, designed for their benefit, without there being any risk of a meaningful cost order being made against them."* That policy reason must in my view be a key to understanding how the court will approach an application for costs against a non-party who is a professional person and who has no direct or indirect interest in the result of the litigation. In the Mooreview Developments litigation Clarke J. was satisfied that it was reasonable to conclude that Mr. Cunningham did have a personal financial interest in the result of the litigation and did make an order that he be personally liable for the costs of the various proceedings.

11. Some assistance can also be found in the judgment of Costello J. in *re Wogan's (Drogheda) Ltd.* [1993] WJSC-HC 2783 (delivered on the 9th February, 1993) where he considered the question of whether costs in an examinership, where he had held that the petition seeking protection under the then relevant legislation contained false information which must have been known by the directors of the company, could be awarded against the examiner. The application for those costs was made by the Revenue Commissioners and a creditor who had appeared on the initial application for protection and on the confirmation application. Costello J. held that there was no power under s. 29 of the Companies (Amendment) Act, 1990 to make an order that the examiner should pay costs to any party to proceedings but he did consider that such a power arose under the provisions of O. 99, r. 1 of the Rules of the Superior Courts. Costello J., however, considered that while he did have jurisdiction to award costs against the examiner:

> *"I do not think that the interests of justice require me to make an order that the examiner should pay the creditor's costs. I think that such an order might be made in very exceptional circumstances but whilst the circumstances in this case were such as to justify the refusal of an order in the examiner's favour under s. 29, I do not think they can justify an order against him under Order 99. I must therefore refuse this application." (at p. 2813)*

12. The Supreme Court delivered a judgment on the question of costs which I also find persuasive, in the case of *Dunne v. Minister for Environment & Ors.* [2007] IESC 60 where Murray J., having outlined the first principle of law, that costs normally follow the event, pointed to the fact that this rule "has an obvious equitable basis", and must engage the court in considerations of "the interests of justice".

13. The jurisdiction of the court therefore is one which it exercises in its discretion and in the interests of justice, although the discretion is to be exercised on a reasoned basis and the court is not at large. This principle is well established.

14. The Supreme Court recently delivered a judgment in *Miley & Ors. v. Employment Appeals Tribunal & Ors.* [2016] IESC 20, on appeal from the High Court which had awarded costs against the EAT following the making of an order of certiorari quashing a determination of that body. The court held that the EAT was entitle prima facie to impunity from costs, it being a statutory tribunal, and because it was not a *legitimus contradictor* in the litigation and did not take part in the proceedings.

15. Denham J. giving the judgment of the Court went on to consider whether the EAT might have lost its immunity by reason of *mala fides* or impropriety and was persuaded by the jurisprudence relating to the award of costs against members of the judiciary which while they have been held to have a prima facie immunity, do not have absolute immunity. She held that errors of law or fact are matters of appeal and not matters of impropriety, but that the standard of the hearing was "*wanting*" and not one that anybody with adjudicative function would *"aspire to in this day and age nor was it conduct which participants in proceedings should be required to accept*". It was not however in her view impropriety. The court refused to award costs against the EAT because it was not satisfied that it had acted with *mala fides* or impropriety.

16. The Supreme Court quoted with approval the judgment of Dunne J. in *KCB Private Security v. Appeals Board & Anor*. [2009] IEHC 549 that *"a complete immunity might be unjust", but refused to award costs because the Appeals Board was a quasi-judicial body "in a similar and analogous position to that of a judge".*

17. I consider that the closest analogy to the role adopted by a PIP in the procedures under the personal insolvency legislation is that of an examiner, and I have already noted this in the substantive judgment. The PIP does not act in a quasi- judicial manner, but does have a unique and burdensome obligation to the court in the manner in which an application is presented for protection, and a high degree of frankness and trust is required for the process to function in the manner envisaged. In those circumstances there is, it seems to me, no reason in principle why costs could not be awarded against a PIP in a suitable case, although I consider, as did Costello J. in *Wogan*, that such jurisdiction would be exercised sparingly and in exceptional circumstances.

18. The guiding principle is the interests of justice and certain factors bear on the interests of justice in the present case and to which I have regard. The relevant factors are as follows:

19. The substantive judgment was the first judgment of a superior court on the role of the PIP in the scheme of the personal insolvency legislation, and counsel has informed me that since it was delivered by me only two months ago it has been opened before every specialist judge of the Circuit Court. The interests of clarifying the law therefore were served by the litigation and that public interest is one that benefits the operation of the legislation and the practice and procedure of PIPs operating within the scheme and of the specialist judges of the Circuit Court. That factor is one that must bear on my consideration, as does the fact that the PIP in this case was operating in a new legislative scheme where no guidance was available from the superior courts as to the extent and nature of the role of the court.

20. I also consider that some of the criteria and factors outlined by Clarke J. in *Mooreview* must bear on my decision. In particular, I consider that it is relevant that the PIP has no personal benefit to gain from the application, nor indeed from the personal insolvency process, and it is fair to say that the scale of fees charged by a PIP in these matters is modest.

21. Further, the PIP is required to be engaged by a debtor, and a debtor may not process an application under the legislation other than through the agency of a PIP. This has the effect that while an individual PIP may of course refuse to act for a debtor, or may cease to act for such debtor, it is almost inevitable that once a PIP commences the process on behalf of a debtor he or she will remain with the process until it reaches a conclusion, whether as a result of a creditors' meeting and the approval of a court of a DSA or a PIA, or because the process is discontinued or fails.

22. A PIP does have to exercise a high degree of scrutiny, but I am not satisfied in this case that the PIP was fully informed by the debtor with regard to some of the matters which led to my decision, and in particular, while the PIP did know, or must have known, of the various adjournments of the bankruptcy petition and the extent to which they were contested, I consider that the failure of the PIP to deal adequately with the investments and projected income and capital from the investments of the debtor, that this arose more because, in my view, the PIP did not sufficiently engage with the detail of those investments, rather than from any *mala fides* on his part, or because he failed to address the issues in regard to those investments at all. I consider that the PIP who is an experienced accountant and insolvency practitioner did fail to engage with many of the assumptions made by Ernst & Young, whose report was at the time of the application for the extension of the certificate, two years old and was based on projections and contingencies which had not yet been realised. His approach to the financial circumstances and projections was cursory and did not sufficiently and coherently engage with those factors. This did not arise in my view as a result of *mala fides* and the primary blame must in my view lie with the debtor who himself was an experienced businessman.

23. For these reasons, it seems to me that I ought not award the costs of the application to set aside the extension of the protective certificate against the PIP, as to do so would not be in the interests of justice, would fail to have regard to the fact that this legislation is new and still relatively untested, that the PIP did not act *mala fides*, but rather perhaps carelessly or without sufficient and detailed engagement with the facts, and because he had no personal benefit to gain from the application.