THE HIGH COURT
BANKRUPTCY

[2021] IEHC 296
[Bankruptcy No. 5266]

IN THE MATTER OF A PETITION FOR THE ADJUDICATION IN BANKRUPTCY OF ROSEANN MCLAUGHLIN (A BANKRUPT)

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PETITIONER

AND

ROSEANN MCLAUGHLIN (A BANKRUPT)

RESPONDENT

JUDGMENT of Humphreys J. delivered on Wednesday the 5th day of May, 2021

1. On 30th September, 2013 the High Court (Birmingham J.) granted judgment against the bankrupt and her husband in the amount of €4,022,734.92 (*Kavanagh v. McLaughlin* [2013] IEHC 453 (Unreported, High Court, 30th September, 2013).

2. The Supreme Court dismissed an appeal from that order (*Kavanagh v. McLaughlin* [2015] IESC 27, [2015] 3 I.R. 555).

3. The bankrupt and her husband then brought counter-proceedings against the transferee of the loan facilities (*McLaughlin v. Ennis Property Finance Ltd*. [2016 No. 9951 P]).

4. Bankruptcy proceedings issued against the respondent, in the course of which she made a personal insolvency application acknowledging the debt due under the Supreme Court judgment. She also undertook through solicitors to discontinue the 2016 counter-proceedings.

5. The respondent was adjudicated bankrupt on 11th February, 2021 (*Kavanagh v. McLaughlin* [2021] IEHC 122, [2021] 3 JIC 0502 (Unreported, High Court, 5th March, 2021).

6. An undated notice to show cause against the validity of the adjudication was issued and given a return date of 22nd March, 2021. The application was heard on 26th April, 2021. The respondent contends that the adjudication should be annulled due to non-compliance with s. 11(1) of the Bankruptcy Act 1988 and on equitable grounds. An issue is also taken on a preliminary point raised by the petitioning creditor. The various grounds of challenge resolve into essentially six distinct points which I will deal with in sequence as follows.

Alleged lack of liquidated sum due

7. It is denied that there was a liquidated sum due, primarily on the basis that a receiver had been appointed, but had not completed the work of the receivership. It is submitted that therefore "[t]he sums due to the Petitioner, if any, have not yet been determined." Unfortunately, that submission confuses enforcement with liability. The liability was settled as of the date of the Supreme Court judgment and comes well within the concept of a calculable debt as referred to in *Motor Insurers Bureau of Ireland v. Hanley* [2006] IEHC 405, [2007] 2 I.R. 591.

Alleged claim of treating acknowledgment of debt as an act of bankruptcy

8. The submission is made that when the bankrupt referred to the liability under the Supreme Court judgment in her application for a protective certificate, that did not amount to an act of bankruptcy. My decision in *Kavanagh v. McLaughlin* was characterised by the respondent as erroneous on that ground. However, that is a misunderstanding of what I stated. The liability of the bankrupt arises from the Supreme Court's order. For good measure, it is acknowledged in the application for the protective certificate, and on either of those grounds, but certainly on both in combination, it is not something that can be revisited at this stage. That outcome doesn't depend on any alleged theory that an acknowledgement of the debt in a protective certificate application is in itself an act of bankruptcy.

Alleged existence of an issue for trial

9. It is claimed that the 2016 proceedings have yet to be determined and that, therefore, this raises an issue for the trial. There are two fundamental problems with that. First of all, as already held in *Kavanagh v. McLaughlin*, the bankrupt is not entitled to rely on the 2016 proceedings, having undertaken to withdraw them. To continue to prosecute them, or to otherwise rely on them, is an abuse of process. I haven't been given any persuasive reason to reconsider that finding at this stage. A second problem is as also stated at para. 24 of my judgment in *Kavanagh v. McLaughlin* that no valid issue for trial has in fact been identified. Again I don't see any persuasive reason to reconsider that finding.

Alleged failure to notify the bankrupt of the last return date

10. It is clear that Ms. McLaughlin was served with the petition and did not appear in answer to it. It is also clear that she received a letter from solicitors for the petitioning creditor dated 19th January, 2021 advising of the listing date of 1st February, 2021 with a view to fixing a date (exhibit SWC1 to the affidavit of Seán Canniffe). That letter states expressly that "a new hearing date will have to be assigned." Solicitors for the petitioning creditor emailed Mr. McLaughlin on 7th January, 2021 stating that the matter would be adjourned on 1st February, 2021 and seeking consent to an adjournment on behalf of both the respondent and her husband. That email does not say there is no need to attend. Given that the respondent neither attended on 1st February, 2021 (not very difficult as it only involves clicking a link) nor asked any follow up questions to anybody (even her husband it would seem), and given that she was also directly personally informed that the matter would be adjourned on 1st February, 2021, there is no injustice created by the fact that no direct personal notice was given to her of the adjourned date. Given that she never showed up at any point, it doesn't seem immediately likely that she would have attended even if she had such notice (assuming she was entitled to it, which she wasn't, not having attended originally). In fairness to her she doesn't make any particularly strenuous case that she was anxious to engage diligently with the proceedings and personally attend at all times, but was wholly thwarted in that firm intention by an inexplicable lack of notice. This is just a technicality from her point of view.

11. Even assuming *arguendo* that one were to accept the McLaughlins' sworn testimony that they did not discuss the adjourned date between themselves, leaving the respondent in blissful ignorance of it, that is not an answer. One cannot opt out of proceedings and

then complain when matters are decided in one's absence. As noted above, the context here is that Ms. McLaughlin never in fact appeared in these proceedings until after her adjudication in bankruptcy. The affidavit she swore in this application seems to be based on an assumption that one can decide not to show up and then must be spoon-fed as to the progress of the case thereafter. Her complaint of being "deprived of the opportunity in accordance with fair procedures to challenge the debt in fact or in law" is misconceived. She has already had the opportunity to challenge the debt in fact and in law right up to the Supreme Court where she wholly failed, so it is hard to see what that point is about. But more fundamentally, a party can waive the right to participate by inaction, and that is what happened here. *V*igilantibus *non dormientibus jura subveniunt*. Otherwise the court and the other party would be put in procedural handcuffs by a party who refuses to engage with the court and its proceedings. There is absolutely no analogy with a case where there is a clear intention to defend and a track record of appearing, but where a party misses a date by accident and then seeks promptly to rectify the matter when it discovers the error.

12. But even if I'm wrong about all that, lack of notice as such isn't a sufficient basis for a show-cause application. There must be some actual defence to the petition, and unfortunately for the respondent, that element is lacking here.

Alleged failure to deliver papers

13. Complaint is made that, at the hearing, the petition creditor relied on a booklet of papers that was not furnished to the bankrupt, and it is said that this is a breach of Practice Directions HC54 and HC100. But since she didn't appear, she cannot really complain about that. In any event, on the facts, the booklet consisted of her own papers, so she had them anyway. This heading does not raise any legitimate fair procedures point.

Alleged collateral purpose

14. It is claimed in submissions that the petition is brought for the collateral purpose of nullifying the bankrupt's 2016 proceedings. That complaint is not evidentially based. Further, as noted above, I made the point in *Kavanagh v. McLaughlin* that the debtor cannot rely on the 2016 proceedings, having undertaken to discontinue them. That principle applies here, and I see no reason to revisit that conclusion, so she cannot rely on those proceedings to ground this argument. In any event, the whole point is based on a misinterpretation. A creditor is entitled to enforce their rights and it is only in relatively unusual circumstances that a bankruptcy petition could be held to have been brought for a collateral purpose. *McGinn v. Beagan* [1962] I.R. 364 was such a relatively unusual case where the purpose of the petition was to disqualify an elected public representative. There is no analogy with the present case.

Order

15. Accordingly, the application to show cause against the adjudication in bankruptcy is dismissed.