

**THE HIGH COURT
BANKRUPTCY**

[2021] IEHC 337

[Bankruptcy Petition No. 4911]

IN THE MATTER OF A PETITION IN BANKRUPTCY

BETWEEN

SILE O'BEIRNE

PETITIONING CREDITOR

AND

PAT LYNCH

DEBTOR

JUDGMENT of Humphreys J. delivered on Tuesday the 25th day of May, 2021

1. The debtor is an executive employee of a fast food company. Separate to his main employment, he ran a takeaway premises in the restaurant and kitchen of the petitioning creditor's public house, the Merriman Tavern, Main Street, Scarriff, County Clare.
2. The petitioning creditor obtained two District Court judgments on 20th March, 2019 and a Circuit Court judgment on 9th December, 2019 to recover possession of the premises.
3. The total of the amount of the judgment plus costs and interest was €29,929.66.
4. Particulars of demand issued on 2nd March, 2020. That set out a demand for payment, failing which a bankruptcy summons would issue.
5. An affidavit of service was produced proving service of particulars of demand by post on 2nd March, 2020 at the debtor's work address.
6. An affidavit was sworn for an application for a bankruptcy summons on 5th June, 2020 and the summons issued on 6th July, 2020 by order of Pilkington J.
7. An affidavit of service proved personal service of the summons on 17th July, 2020 by hand at the debtor's employer's address.
8. The petition issued on 15th September, 2020 and again an affidavit of service was produced proving service of the petition and affidavit of debt by hand on 12th October, 2020.
9. A notice of motion seeking adjudication in bankruptcy was filed on 29th September, 2020 returnable for 19th October, 2020.
10. The debtor has paid 18 instalments of €200 amounting to €3,600 and in addition a deposit of €4,809 has been allowed for by the petitioning creditor, leaving a total now due, according to the petitioning creditor, which I accept on the evidence, of €21,520.66. I made an order in the matter on 10th May, 2021, and now give reasons for that order.

Criteria

11. The statutory criteria are set out in s. 11(1) of the Bankruptcy Act 1988 and I am satisfied on a *prima facie* basis that all of those criteria are satisfied here. I turn now to the defences offered.

Alleged agreement regarding underlying debt

12. The solicitors for the petitioning creditor wrote to the debtor on 15th December, 2020 saying "we request that you start payments to us immediately in respect of the debt at a rate of €200 per week as an interim measure pending receipt of a statement of affairs from you." That is not a settlement or an agreement not to prosecute the petition, and nor is it a bar to doing so. The debtor claims that because he has agreed to pay €200 per week or at least because he has been doing so as a matter of fact, that precludes the creditor progressing the petition. That is incorrect.

Lack of service of demand

13. This objection seems to be a misunderstanding. A demand clearly was served and there is an affidavit of service to back that up.

Alleged incorrect address for service

14. The debtor complains that he was served at his work address rather than his home address and that this was "not appropriate" given the "penal" nature of bankruptcy. However, the address of service does not particularly matter once service actually happened. Nor is this a basis for refusing the petition in circumstances where the debtor clearly was served and has appeared.

Allegation that the sum demanded is not above the statutory threshold of €20,000

15. The debtor claims at paras. 16 to 23 of his affidavit that the sum demanded is below €20,000. His explanation for this is somewhat convoluted, strained and legalistic and does not provide any satisfactory basis to disagree with the petitioning creditor's figures, which I accept and which in fact are highly generous to the debtor in that:
- (i). they allow for a deposit which was not something they were strictly obliged to do by virtue of the judgments of the District Court and Circuit Court; and
 - (ii). they do not factor in the anticipated liability for costs of the petition itself.
16. The latter point might be a factor in another case. Sure, the amount of the debt at the time of the petition must be a liquidated sum in excess of €20,000, but a subsequent payment does not deprive the court of jurisdiction. If on a discretionary basis one is to refrain from adjudication on the basis of a subsequent payment, that should be on the premise that it is apparent to the court that the as yet unliquidated costs are not likely to surpass the difference between the ultimate net debt and the sum of €20,000. One can envisage an example where a debtor owes €21,000 to the petitioning creditor, a petition is then brought and the debtor pays €2,000 reducing the liability to €19,000 and claiming that the petition should be refused on that basis. However, if the petitioning creditor has incurred estimated costs of €3,000 in progressing the matter to that point it could be unfair to dismiss the petition in circumstances where the petitioning creditor would then have to go back to square one. However, exploration of that issue is perhaps best left for a case in which it would make a difference.

Claim that personal insolvency would be more suitable

17. The claim that a personal insolvency approach to the debtor's problems would be more suitable has not been made out. His assets significantly exceed his liabilities and he seems to be in a position to continue to purchase stock and so forth. One is left with the impression that he has been endeavouring to single out this creditor and only meet his liabilities to her in a limited and drip-feed manner. While he claims that the process to apply for a protective certificate is underway, I do not accept in the circumstances that that process is in fact more suitable.
18. The debtor clearly has had ample opportunities already to address his liability to the petitioning creditor and also to pursue personal insolvency if that had been appropriate.

Order

19. In all the circumstances, the order I made on 10th May, 2021 was that the debtor be adjudicated bankrupt with costs to the petitioning creditor.
20. Subsequent to the order of adjudication, the debtor applied for a stay. While I granted the usual stay on the order for costs, I do not consider a stay on an adjudication in bankruptcy to be appropriate (absent truly exceptional circumstances), and certainly not here, for quite a number of reasons:
 - (i). an adjudication in bankruptcy is an order affecting personal status, like for example a divorce or decree of nullity; it is not something that could properly be stayed except perhaps in extremely limited circumstances - one is either bankrupt or not, married or not, and so on, rather than in some kind of artificial limbo;
 - (ii). to grant a stay would nullify my decision that the personal insolvency process was not a better alternative because it would allow the debtor to make such an application and then successfully oppose the lifting of the stay in due course on the basis that the personal insolvency process had been invoked;
 - (iii). in the case of bankruptcy, staying the order of adjudication means that the assets would not vest in the Official Assignee and thus would create a situation whereby the bankrupt was free to dispose of those assets in a way that would prejudice creditors and frustrate the ultimate purpose of the bankruptcy; and finally
 - (iv). it is clear from experience in the Bankruptcy List that in such very limited cases as where stays have been granted, enormous potential for procedural complication has broken out. While I appreciate that in other areas of the law stays might well be the default position, if not virtually automatic, there are very solid reasons for that not to be the case in bankruptcy or indeed in the case of other orders or decrees of personal status.