THE HIGH COURT
BANKRUPTCY

[2021] IEHC 427
[Bankruptcy No. 4549]

IN THE MATTER OF SECTION 85A OF THE BANKRUPTCY ACT 1988 (AS AMENDED)

BETWEEN

CHRISTOPHER D. LEHANE IN HIS CAPACITY AS THE OFFICIAL ASSIGNEE IN BANKUPTCY

APPLICANT

AND

MICHAEL WYMES (A BANKRUPT)

RESPONDENT

JUDGMENT of Humphreys J. delivered on Friday the 2nd day of July, 2021

1. Among the real-life inspirations for the fictional case of *Jarndyce v. Jarndyce* in Charles Dickens' *Bleak House* (London, Bradbury & Evans, 1852-53), is said to be *In re Jennens,* which involved a series of cases regarding the estate of Willian Jennens, who died in 1798. Thus the matter had been ongoing for 54 years by the date of the novel's publication (see Patrick Polden, "Stranger than Fiction? The Jennens inheritance in fact and fiction" (2003) 32(3) & 32 (4) *Common Law World Review* 211 & 338). Admittedly, formal litigation only broke out in 1810 (Polden, p. 225), although in the end, the cases kept coming until 1933 (Polden, p. 247). The legal travails of the bankrupt here, and before that, of the company with which he was associated, Bula Ltd., have now been ongoing for over 50 years. So assuming that things maintain their current trajectory, we should be passing the *Bleak House* threshold by the middle of this decade.

2. Over that half-century, there are just too many *Bula* and *Wymes* cases and judgments to list. For example, the High Court Search website shows Mr. Wymes as a party in 45 sets of proceedings, plaintiff in 22 actions and defendant in 23. (This well out-classes the *Jennens* proceedings which involved a mere 17 cases: Polden p. 338.) So I will limit the procedural history to the highlights.

1971 – Bula's debut in litigation

3. Bula Ltd. was formed over 50 ago in March 1971 for the purpose of land acquisition in relation to mineral exploitation. It was a company that was cradled in litigation because the first of the innumerable pieces of Bula-related litigation was initiated before the end of the year of its formation: see *Roche v. Minister for Industry and Commerce* [1973] 4 JIC 1302 (Unreported, High Court, 13th April, 1973).

1986 – Substantive proceedings

4. Bula Ltd. together with Mr. Richard Wood and Mr. Wymes began the substantive proceedings that have led directly to the present applications in 1986: *Bula Ltd. v. Tara Mines Ltd*. [1986 No. 10898 P]. Those proceedings were eventually dismissed by Lynch J. (*Bula Ltd. v. Tara Mines Ltd.* [1997] IEHC 202, [1997] 2 JIC 0602 (Unreported, High Court, 6th February, 1997)).

5. Lynch J. said at para. 1 of the judgment: "This case arises out of circumstances which commenced more than a quarter of a century ago. It has its origin in business dealings undertaken in the hopes of arriving at a very large crock of gold, which in the end of the

day turned into a bottomless pit of debt and misery for those who most avidly sought the crock of gold. It is from that bottomless pit that the remaining Plaintiffs in this action hope by this litigation to escape."

6. The version of the judgment on bailli.org includes a number of appendices which are not included in the justis.com version. Unless I am misreading the witness schedule set out in the bailli version of the judgment, the case lasted at least 276 days with Mr. Wymes spending 155 days in the witness box, 28 of those under cross-examination.

1997 – Costs order

7. Following the dismissal of the substantive proceedings, Lynch J. made an order on 25th February, 1997 in favour of the relevant Minister of the Government who was a defendant in the substantive proceedings.

1998 – Appeal to the Supreme Court

8. The decision of Lynch J. was then appealed to the Supreme Court [Supreme Court Record No. 1998 No. 7 SC].

2003 – Certificate of taxed costs

9. On 31st July, 2003, a certificate of taxed costs was issued in the amount of €3,297,493.33 together with interest of €1,584,242.26, making a total sum of €4,881,735.59 in favour of the relevant Minister.

2009 – First bankruptcy summons

10. A bankruptcy summons issued on 9th February, 2009. McGovern J. dismissed that summons in *Minister for Communications, Energy and Natural Resources v. M.W.* [2009] IEHC 413, [2010] 3 I.R. 1.

February, 2010 – Second bankruptcy summons

11. A second bankruptcy summons was issued on 15th February, 2010 by order of Dunne J. That was served on 1st March, 2010.

March, 2010 – Application to dismiss bankruptcy summons

12. Mr. Wymes brought an application to dismiss the bankruptcy summons on 15th March, 2010. That application was dismissed by McGovern J. in an *ex tempore* judgment on 29th April, 2010 followed by an order dated 6th May, 2010. Mr. Wymes then appealed to the Supreme Court on 28th May, 2010.

June 2010 – Filing of petition

13. On 11th June, 2010, the petition of the Minister for Communications, Energy and Natural Resources was filed. As noted later in the Supreme Court's determination in this matter, the petition issued after the appeal of the application to dismiss the summons had been lodged in the Supreme Court, but before judgment on that appeal had been delivered.

14. On 9th July, 2010, an affidavit was filed by Mr. Wymes seeking the dismissal of the petition or alternatively a stay or an adjournment. By an *ex tempore* ruling of Dunne J., the petition was adjourned in light of the fact that the question of the dismissal of the summons was under appeal.

2014 - Supreme Court decision on substantive proceedings

15. On 6th November, 2014 the Supreme Court made a final order striking out the appeal in the substantive underlying proceedings.

2017 - Supreme Court decision on application to dismiss bankruptcy summons

16. In *Minister for Communications, Energy and Natural Resources v. Wood* [2017] IESC 16, [2017] 3 JIC 0901 (Unreported, Supreme Court, Dunne J. (Denham C.J. and Charleton J. concurring), 9th March, 2017), the Supreme Court dismissed the appeal in respect of the High Court's refusal to dismiss the bankruptcy summons.

17. In *Minister for Communications, Energy and Natural Resources v. Wood* [2017] IESC 58, [2017] 7 JIC 2607 (Unreported, Supreme Court, Dunne J. (Denham C.J. and Charleton J. concurring), 26th July, 2017), the Supreme Court dealt with a further issue regarding interest that remained outstanding from the first judgment.

March, 2018 – Adjudication in bankruptcy

18. On foot of the Minister's petition, Meenan J. adjudicated Mr. Wymes bankrupt in *Minister for Communications, Energy and Natural Resources v. Wymes* [2018] IEHC 213, [2018] 3 JIC 2006 (Unreported, High Court, 20th March, 2018).

May, 2018 – Application to show cause

19. Following that order, the bankrupt filed a notice to show cause against the validity of the adjudication pursuant to s. 16 of the Bankruptcy Act 1988 on 31st May, 2018. One of the major grounds was the allegation that no act of bankruptcy had occurred in the three months preceding the petition, reliance being placed on the fact that the validity of the bankruptcy summons was under appeal at that time.

20. The show-cause application was rejected by Pilkington J. in *Minister for Communications, Energy and Natural Resources v. Wymes* [2019] IEHC 245, [2019] 4 JIC 0503 (Unreported, High Court, 5th April, 2019). The bankrupt then appealed to the Court of Appeal.

2019 – Motion to extend bankruptcy

21. The Official Assignee then brought a motion under s. 85A(3) and (4) of the 1988 Act seeking an order extending the term of bankruptcy of the bankrupt, as well as an order directing the bankrupt to file a statement of affairs and a statement of personal information. That is one of the motions now before the court.

July, 2020 – Retirement of Official Assignee

22. On 24th July, 2020, Mr. Christopher Lehane retired as Official Assignee. As of 27th July, 2020 Mr. Denis Ryan was designated Deputy Official Assignee. Mr. Michael Ian Larkin was appointed as Official Assignee under s. 60C of the 1988 Act on 16th November, 2020.

October, 2020 – Court of Appeal decision on show cause application

23. In *Minister for Communications, Energy and Natural Resources v. Wymes* [2020] IECA 182, [2020] 7 JIC 0704 (Unreported, Court of Appeal, Faherty J., (Kennedy and Ní Raifeartaigh JJ. concurring), 7th July, 2020), the Court of Appeal rejected the appeal against the dismissal of the show-cause application.

24. There was then a separate judgment as to costs (*Minister for Communications, Energy and Natural Resources v. Wymes* [2020] IECA 274, [2020] 10 JIC 0601 (Unreported, Court of Appeal, Faherty J., (Kennedy and Ní Raifeartaigh JJ. concurring), 6th October, 2020)).

25. On 3rd November, 2020 the applicant applied to the Supreme Court for leave to appeal.

December, 2020 – Motion to substitute applicant

26. On 7th December, 2020, Mr. Lehane, as the original applicant, applied under O. 17, r. 4 to substitute Mr. Larkin (although the grammar of the first part of the motion is somewhat loose and is capable of being construed the other way around, but it's clear what was intended) and for an order directing that the proceedings be carried on as between Mr. Larkin and the bankrupt. That motion is the primary matter now before the court.

2021 - Supreme Court determination regarding the show-cause issue

27. In *Minister for Communications, Energy and Natural Resources v. Wymes* [2021] IESCDET 8, [2021] 1 JIC 2503 (Unreported, Supreme Court, MacMenamin, O'Malley and Baker JJ., 25th January, 2021), the Supreme Court granted Mr. Wymes leave to appeal. The only parties to that determination were Mr. Wymes and the Minister as petitioning creditor. The Official Assignee was not made aware of the leave to appeal application until very late in the day and current procedures do not seem to require the Official Assignee to be put on notice of appeals involving a bankrupt unless the Official Assignee was a party originally.

Procedural history of the motions

28. Returning now to the two motions before the court, it may be of assistance to outline their procedural history. On 11th March, 2019, the motion to extend the bankruptcy was first listed. Pilkington J. granted an interim extension pending determination of the motion and adjourned the matter to 8th April, 2019.

29. On 8th April, 2019, the matter was listed for hearing on 29th July, 2019. However, when the matter was listed again on 29th July, 2019 Pilkington J. said she was minded to adjourn the motion to 4th November, 2019 for mention only, having regard to the fact that the show-cause issue was under appeal.

30. On 4th November, 2019, the matter was adjourned to 3rd February, 2020 on the same basis, and likewise on the latter date Pilkington J. adjourned the matter to 27th April, 2020.

31. The April sitting, however, was cancelled due to the Covid-19 pandemic and the matter was listed again on 6th July, 2020 when Pilkington J. put the matter in for mention on 2nd November, 2020. That listing was also cancelled due to the pandemic and the matter was relisted on 7th December, 2020. On that listing the bankrupt did not appear and I fixed 12th January, 2021 as a hearing date with liberty to the applicant to issue a motion to substitute the new Official Assignee.

32. On 12th January, 2021, Covid issues intervened again and the matter was adjourned for mention to 1st March, 2021. The March date did not proceed due to the pandemic and the matter was listed on 10th May, 2021 at which point I gave directions about exchange of affidavits and submissions and listed the matter for hearing on 16th June, 2021. On that date, following the hearing, I announced the order being made and I now take the opportunity to give reasons.

Application to substitute the applicant

33. The application to substitute the name of the current Official Assignee as applicant is best considered under three headings:

    (i). the status of the Official Assignee,

    (ii). the standard of proof, and

    (iii). the bankrupt's specific objections.

Status of the Official Assignee

34. The Official Assignee is not a corporation sole and proceeds in his or her own name. Hence, when she or he leaves office, a necessity arises for a successor to be substituted to allow any litigation to continue. O. 17, r. 4 RSC is designed for that purpose and is more than wide enough to cover the replacement of one individual office-holder with their successor.

35. The rules allow the application to be made *ex parte,* although here it is made on notice at the bankrupt's request and in order to obviate the need for dealing subsequently with an application by the bankrupt to set aside any *ex parte* order.

36. This is a classic context where O. 17, r. 4 is the sensible way to proceed. Any other approach would be anarchic and would mean that on the death, retirement or incapacity of an officer-holder who is a litigant, the system would come to a juddering halt. I will explain further below why the bankrupt's objections do not amount to a reason to take a different view.

Standard of proof for a substitution application is *prima facie* entitlement

37. As set out by Kelly J. in *Irish Bank Resolution Corporation v. Comer* [2014] IEHC 671, [2014] 7 JIC 3009 (Unreported, High Court, 30th July, 2014), an application to substitute one plaintiff for another is not intended to be a "sort of mini-trial of the action" (para. 44). As Kelly J. said at paras. 38 to 43 in particular, the fact that the application can be made *ex parte* means that the standard of proof is *prima facie* evidence that would justify the court in making the order sought. That respectfully seems to me to be a very practical approach to such applications, the reason being that the substitution of the plaintiff or moving party is a *sine qua non* for the matter to proceed at all. Therefore, substituting such a party cannot be intended to completely determine for all time all issues or defences that might be raised, but is best rather viewed as something to be done on a *prima facie* basis to allow the orderly prosecution of the matter. Any complaints made

about the factual or legal premises of the substitution can be revisited once the proceedings are reconstituted in such a way that they can be determined at all.

Bankrupt's objections

38. The bankrupt made an initial complaint that the Official Assignee represented this as an *ex parte* application in principle. But that is correct, as the wording of the rules makes clear. Even if it had not been correct, the application was *actually* being made on notice so the complaint makes no difference. The bankrupt also made the point that he had not consented to the substitution. But consent is not necessary.

39. Essentially his key objections boil down to two points. The first was that, since the Official Assignee is not a corporation sole, there are "no succession rights". One can see the point that if a plaintiff is not a corporation sole, then in any given case succession is not absolutely automatic, but there is still almost always a need for succession. Such a need is best met by an application under O. 17, r. 4. That is what the rule is there for.

40. The second argument was that the bankrupt was not satisfied that s. 12 of the Personal Insolvency Act 2012 was the appropriate provision under which Mr. Larkin should have been appointed as Official Assignee, and was not satisfied that Mr. Larkin had been properly appointed. Section 12(1) of the 2012 Act says that "[t]he Minister may, after consultation with the Insolvency Service, appoint such number of persons to be members of the staff of the Insolvency Service as may be approved by the Minister for Public Expenditure and Reform." The "Minister" means the Minister for Justice (see s. 2(1) of the 2012 Act). Section 60(2) of the 1988 Act says that "[t]he Official Assignee shall be a member of the staff of the Insolvency Service." That, therefore, brings in s. 12 of the 2012 Act.

41. The bankrupt argued that there was no evidence that the Minister had appointed Mr. Larkin. But he is not entitled to demand such evidence for the purposes of an application of this kind, which is determined on a *prima facie* basis. In such a context, the averments of the moving party are generally sufficient.

42. However, while the Official Assignee submitted that a letter from the Insolvency Service of Ireland (ISI) stating that Mr. Larkin had been appointed was *prima facie* evidence, I do not think that s. 8(5) of the 2012 Act has the radical effect the Official Assignee contended for. Section 8(5) only makes documents of the ISI *prima facie* evidence. It does not mean their contents are presumed to be true. Thus, a sealed document constituting a performative act of the ISI is evidence of that act. For example, a sealed agreement would be evidence that the ISI had entered into that agreement. But a sealed document containing a factual representation is not *prima facie* evidence that the fact so stated is true.

43. Thus I do not believe that the document from the ISI stating that Mr. Larkin has been appointed (by the Minister) is actually evidence that he has been appointed for the purposes of s. 8(5) of the 2012 Act. As noted above, the appointment wasn't made by the ISI, so the document isn't performative, it is just a factual representation. A sealed

document which constates an appointment made *by the ISI itself* would indeed be evidence of the appointment. But what *is* evidence is Mr. Larkin's own affidavit, and that to my mind constitutes *prima facie* proof for present purposes. If the bankrupt thinks that Mr. Larkin was not appointed by the Minister for Justice in accordance with the correct procedure, no doubt he can look into that by way of correspondence or under the Freedom of Information Act 2014 or in some other manner in due course. (Although it can be surprising to discover that not all appointments are reduced to writing by way of a formal warrant signed by the appointing Minister (which I think would be best practice), but omitting to do so, while slightly unsatisfying, doesn't mean that an appointee wasn't appointed.) For present purposes, the bankrupt's beliefs about the appointment being procedurally questionable were not a reason not to make the order; doubly so since no plausible basis for those beliefs was apparent.

Order

44. Accordingly, the order made on 16th June, 2021 was:

(i). that there be an order under O. 17, r. 4 RSC substituting Michael Ian Larkin as the applicant in these proceedings; and

(ii). that, in the light of the fact that the Official Assignee already has the benefit of an interim extension of the bankruptcy pending determination of the motion for a substantive extension, and without objection from the Official Assignee, the application for the substantive order extending the bankruptcy be adjourned with liberty to apply either following the Supreme Court judgment on the show-cause appeal or for any other reason.