THE HIGH COURT
BANKRUPTCY

[2021] IEHC 767

[Bankruptcy Record No. 5389]

IN THE MATTER OF A PETITION IN BANKRUPTCY

BETWEEN

BEACON CAPITAL LIMITED AND ROBERT BAKER

PETITIONING CREDITORS

AND

GERARD CAREW

DEBTOR

JUDGMENT of Humphreys J. delivered on Friday the 10th day of December, 2021

1. On 25th April, 2017, the debtor entered into a personal guarantee with the petitioning creditors to repay any monies to be advanced to Oakwood Foods (Ireland) Ltd.

2. The sum of €70,000 was advanced to that company on 28th April, 2017.

3. On 22nd July, 2019 Barniville J. made an order in proceedings entitled *Beacon Capital Ltd. and Robert Baker v. Oakwood Foods (Ireland) Ltd. v. Gerard Carew* [2018 No. 226 S], giving judgment for the sum of €90,000 in favour of the petitioning creditors.

4. Separate proceedings [2018 No. 433 SP] were taken to register the security against the debtor's interest in Folio TY34921.

5. A bankruptcy summons was issued on 19th October, 2020 by order of O'Connor J. and was served on 2nd November, 2020.

6. The debtor failed to make any payment on foot of the summons, or indeed at all, and an affidavit of debt was sworn by Michael Bolger, a director of the first petitioning creditor, on 10th February, 2021.

7. On 16th February, 2021, the petition in bankruptcy was filed together with an affidavit of service of the bankruptcy summons and a notice of motion seeking the debtor's adjudication.

8. The petition and motion were served on 26th March, 2021 and an affidavit of service was filed on 1st April, 2021.

9. The matter was listed for the first time on 12th April, 2021 when I was informed on behalf of the debtor that he had been unable to log into the hearing. I granted an adjournment to 14th June, 2021 – the first of a number of indulgences to the debtor as shall be seen.

10. On 10th June, 2021, four days before the adjourned date, the debtor prepared a prescribed financial statement for an application for a protective certificate in which he acknowledged a debt of €130,784 to the petitioning creditors consisting of a judgment for €90,000 and interest of €40,784.

11. That application was formally made to the Circuit Court, South Eastern Circuit, County Tipperary on 11th June, 2021.

12. The matter came back before me on 14th June, 2021 when I was told on behalf of the debtor that he had been in ill-health and that the protective certificate application would be listed before the Circuit Court shortly. Various objections were made on behalf of the petitioning creditors in particular that the solicitor who had appeared was not on record and that the debtor had had a different solicitor on the previous occasion on which the petition had been before the court. It was noted that there had been roughly 8 sittings of the Circuit Court for personal insolvency in the South Eastern Circuit since the matter had first arisen, and it was alleged that the debtor lacked *bona fides,* was abusing the process of the court and was not insolvent in that he had unencumbered assets. It was also pointed out that in the prescribed financial statement grounding the application for the protective certificate the debtor had acknowledged the debt.

13. Notwithstanding those submissions I granted an adjournment to 28th June, 2021 but I made that peremptory as against the debtor.

14. On 18th June, 2021, Her Honour Judge Mary Enright granted the protective certificate sought which included a list of debts, notably the sum of €130,784 owing to the petitioning creditors.

15. When the matter came back before me on 28th June, 2021, I was informed on behalf of the debtor that the protective certificate had been obtained. The petitioning creditors objected that the notice of the protective certificate had not been properly served on both of the petitioners, but, in what might be regarded as yet a further indulgence to the debtor, I indicated that I was not going to regard that as an obstacle to a further adjournment, so I adjourned the petition again to 19th July, 2021.

16. On the latter date, the petition was adjourned by consent to 11th October, 2021, the consent presumably deriving from the existence of the protective certificate.

17. When the matter then returned to the court on 11th October, 2021, it was submitted on behalf of the petitioning creditors that the certificate had expired and that no proposal had been made. The petitioning creditors sought to proceed with the petition and again stressed that the debtor had admitted the debt as part of the application for the protective certificate. What was sought on behalf of the debtor was an adjournment of three weeks in order to put a proposal and it is said that that was the extent of the instructions furnished by the debtor. In a further indulgence to the debtor, I granted yet another adjournment to 1st November, 2021, but again peremptorily as against the debtor, and gave the debtor a week to file any affidavit with a week for any reply by the petitioners.

18. When the matter then ultimately came on for hearing on 1st November, 2021 it had benefited from five adjournments sought by the debtor, two of them peremptory against him and only one of which was on consent.

19. Before the court on the hearing date was a notice of motion filed on 16th February, 2021 seeking adjudication, the petition itself, the affidavit of debt of Michael Bolger, an affidavit of service, the bankruptcy summons, the prescribed financial statement and the protective certificate. In addition, I was given an affidavit of Gerard Carew of 21st October, 2021 and exhibits. It can be noted immediately that this was filed outside of the period of one week allowed on 11th October, 2021 so to that extent the debtor's complaints about a late reply to that affidavit have to be contextualised. No leave to file such a late affidavit was sought or granted. Furthermore, the affidavit of 21st October, 2021 came a matter of days before the hearing of the petition, but seven months after it was served, which again I think contextualises the debtor's subsequent complaints about fair procedures. That affidavit told a roundabout tale of being misled by a "financier" who was only named as "PM" in the affidavit and an associate who is only named as "JE" in the body of the affidavit, although strangely full names are used in an exhibit. The affidavit states at para. 21 that if adjudicated, "I will no longer be in a position to make payments to the Plaintiffs", which unfortunately is not a defence. It also states that terms had been agreed with another creditor, which is a situation that the petitioning creditors characterise as possibly constituting a preference for such creditor.

20. The replying affidavit of Michael Bolger was lodged in the Examiner's Office on Wednesday 27th October, 2021, only six days after the debtor's affidavit, although the debtor claims that he only received this affidavit on 29th October, 2021. The reason that this final affidavit was effectively irrelevant to the hearing is that there is very little evidential content, if any, in the replying affidavit. It is in essence comment on material which was already before the court that could just as easily have been made by way of submission. So consequently the debtor did not need an opportunity to reply to it and, in any event, had brought about the last-minute nature of the exchange of affidavits by not providing his own affidavit until very shortly beforehand and outside of timelines directed by the court.

21. When the matter was called, it was submitted on behalf of the petitioning creditors that the exchange of affidavits had not changed anything. Again attention was drawn to the admission of debt in the prescribed financial statement. The debtor applied for a one-week adjournment to reply to the latest affidavit and to take instructions and to update the court. These were all extremely generic grounds for an adjournment. It was also submitted that there was an open offer which had been refused by the petitioning creditors. But there is no obligation on petitioning creditors to accept offers, open or otherwise.

22. It was submitted on behalf of the petitioning creditors that the debt had been admitted and consequently no offer short of the full amount of the debt as so admitted would be acceptable. When it was stated in reply that the debtor had offered the full amount of the judgment, that is €90,000, it was stated that the debt was now over €130,000 and consequently an offer of €90,000 was not acceptable. I pointed out that there had been two peremptory adjournments to date and asked counsel for the debtor what defence the debtor had to the petition, and also how it would help the debtor if I disregarded the petitioning creditors' replying affidavit entirely. The reply to that was that counsel had no instructions.

23. In the circumstances I didn't see any compelling basis for an adjournment and I adjudicated the debtor bankrupt. That decision was not in reality based on the affidavit furnished the previous week to which the debtor objected. I was satisfied that s. 11 of the Bankruptcy Act 1988 had been complied with and I had regard to the matters stated in s. 14 of the 1988 Act. In particular, there was no appropriate alternative to bankruptcy given that the debtor had already been through the personal insolvency process.

24. Having made that order orally, I am now taking the opportunity to set out the reasons in writing in order to assist the parties. Apart from the points already made above there are probably three matters particularly worth emphasising at this stage:

(i). It merits repeating that there was no unfairness in not allowing a further adjournment after two peremptory adjournments, because the order was not based on the final affidavit, and anyway that affidavit was in essence comment rather than of evidential value, so the debtor did not need to reply evidentially. It had no material influence on my decision which was based squarely on the primary problem the debtor had to begin with, namely the unsatisfied liability to the petitioning creditors. I indicated clearly to the debtor that I could disregard that affidavit entirely and asked how that would make any difference. And in any event the last-minute nature of the exchange of affidavits was down to the debtor not engaging by way of affidavit before then, and in delivering an affidavit outside time lines directed by the court, without leave to do so. Plus, the claim of unfairness needs to be put in the context of the curtain eventually having to come down at some point after quite a string of indulgences towards the debtor prior to the hearing date, and in the context that seven months on from service of the petition, no instructions as to any actual legally viable defence had been furnished to counsel.

(ii). Insofar as the debtor now claims that the petitioning creditors were seeking interest which had previously not been included in the petition, a creditor is not confined to the amount in the petition if a greater debt can be proved (consistent with *Murphy v. Bank of Ireland* [2014] IESC 37, [2014] 1 I.R. 642), and reliance had been placed by the petitioning creditors on the debtor's own admission of the sum due by way of interest which are exhibited in the debtor's affidavit in these proceedings. But even if that is somehow wrong, as of 1st November, 2021 we were still at the stage of offers and intentions. That isn't enough. On the date of hearing of a petition, a creditor is entitled to require jam today rather than jam tomorrow. Thus, unless a debt has actually been paid by the moment the petition is called on for hearing, a creditor is entitled to proceed. (For present purposes one can leave aside the hypothetical question of payment which, while not in full, reduces the debt to below the sum of €20,000 referred to in s. 11(1)(a) of the 1988 Act. My own view subject to any further argument is that that is not a valid step to automatically avoid an adjudication because the way s. 11 is phrased is that the requirement of a sum of €20,000 must exist as of the date of presentation of the petition rather than necessarily on the date of adjudication. But one can leave a final determination of that point to a case where it arises.)

(iii). Following adjudication, the debtor never applied to the High Court to show cause against adjudication under s. 16(1) of the 1988 Act. Whether it is appropriate, not having done so, to simply appeal the adjudication to the Court of Appeal (as the debtor has done here [Court of Appeal Record No. 2021 No. 295]) is something that can be left to that court to clarify if needs be. Order 86, r. 7 RSC (which provides that an application that can be made either at trial level or on appeal should first be made to the trial judge) may have relevance to the principle, but more generally it would be a matter for consideration as to whether it really assists the Court of Appeal to add to its workload to question an adjudication when the trial court can revisit that itself, if necessary with any additional evidence, under the show-cause procedure, with an appeal on all matters then arising from that decision if unsuccessful (see *In re Lennon* [2021] IEHC 594, [2021] 9 JIC 3003 (Unreported, High Court, 30th September, 2021) paras. 18 and 19).

Order

25. For the reasons stated above, the order made on 1st November, 2021 was that the debtor be adjudicated bankrupt.