THE HIGH COURT

BANKRUPTCY

[2021] IEHC 658

[Bankruptcy No. 4630]

IN THE MATTER OF SECTION 79 OF THE BANKRUPTCY ACT 1988 AND IN THE MATTER OF HENRY DIXON (A BANKRUPT)

BETWEEN

HENRY DIXON (A BANKRUPT)

APPLICANT

AND

CHRISTOPHER LEHANE (OFFICIAL ASSIGNEE IN BANKRUPTCY OF THE ESTATE OF HENRY DIXON)

AND

MICHAEL GLADNEY

RESPONDENTS

JUDGMENT of Humphreys J. delivered on Thursday the 21st day of October, 2021

1. The bankrupt's tax difficulties here have now been ongoing in one shape or form for the past 26 years. The draft civil bill in the Circuit Court proceedings underlying the first judgment against the bankrupt identifies VAT liabilities from 1st September, 1995 to 31st August, 1986 of €7,137.10. In addition, PAYE/PRSI for the period of 6th April, 2000 to 5th September, 2001 was sought totalling €19,437.16 as well as interest of €6,372.85 making a grand total of €32,947.11.

2. The first judgment was obtained on 18th April, 2002 in the Circuit Court, Western Circuit: *Irwin v. Dixon* [262/2002].

3. A further judgment was obtained on 24th October, 2002 in the High Court: *Irwin v. Dixon* [2002/530/R] in the amount of €632,914.68 plus costs of €240.63.

4. The two judgments obtained in 2002 were registered as judgment mortgages on 7th March, 2005 and 6th September, 2005.

5. A third judgment was obtained on 10th February, 2009 in the High Court in the amount of €55,650.80 plus €309.63 costs and interest of €26,861.01 making a total of €82,821.44: *Harrahill v. Dixon* [2008/813/R].

6. A judgment mortgage was registered on 28th April, 2009 against Folio 44622F, County Mayo, in respect of that judgment.

7. Judgment mortgages were also registered in respect of Folio 11401, County Mayo, but on 3rd October, 2003 the debtor had transferred his interest in that property to Hill View Farms Ltd. of which he is the sole shareholder.

8. On 31st May, 2013, the Collector-General's application for a well-charging order in respect of Folio 11401 was refused, presumably for that reason.

9. On 7th June, 2013, a consent well-charging order was made in respect of Folio 44622F and repayment of the judgments was charged over the debtor's shareholding in the company.

10. The Collector-General then petitioned for the debtor's adjudication in bankruptcy based on the 2009 judgment and on surrender of the judgment mortgage registered on 28th April, 2009.

11. The Collector-General indicated that it was intended to retain the securities arising from the 2005 judgment mortgages in respect of the 2002 judgments. The petition was in the amount of €82,821.44 which is the amount of the 2009 judgment alone.

12. The debtor was adjudicated bankrupt on 11th June, 2018.

13. On 17th May, 2019, a motion was issued by the Official Assignee seeking an extension of bankruptcy under s. 85A of the 1988 Act alleging non-cooperation and failure to disclose assets.

14. On 27th May, 2019, an order was made extending the bankruptcy on an interim basis. That interim extension continues and the question of a final order has been adjourned generally pending the determination of the present matter.

15. On 10th September, 2019, the Collector-General purportedly filed a proof of debt form. The standard wording of the form says on its face "Please submit your proof of debt within 21 days of adjudication", and that wording appears on the form in this case. The form appears to have incorrect interest calculations and also does not expressly state whether the Collector-General elected to release the security or to retain it outside of the bankrupt's estate. The form alleges unsecured debt of €469,119.54 and secured debt of €315,382.06, making a total debt of €784,501.60. As appears from para. 4 of the affidavit of Denis Ryan filed on 23rd October, 2020 this form was accepted by the Official Assignee.

16. On 22nd June, 2020, an order was granted by consent against the bankrupt and the company that a portion of the farm at Roosky, Claremorris, County Mayo within Folio MM44622F be possessed with liberty to sell or dispose of it, although the Official Assignee appears to have agreed to stay execution for a period of time.

17. The motion now before the court was filed on 18th December, 2020 seeking either an order pursuant to s. 79 of the 1988 Act disallowing the claim of the Collector-General insofar as it exceeds the sum of €82,821.44 or alternatively appealing the decision of the Official Assignee to admit the Collector-General as a creditor in the sum of €784,501.60.

18. In response to that motion, a draft amended proof of debt was exhibited dated 8th March, 2021 and a formal amended proof of debt was submitted on 22nd June, 2021 and accepted by the Official Assignee on 7th July, 2021.

19. It seems to be accepted that the bankrupt was not given a copy of the amended proof of debt or notice of it in the period between its submission and its acceptance. The net effect of the amended proof of debt seems to be an attempt to surrender the Collector-General's security in full and prove for the entirety of the judgment debts plus interest. The intention to so proceed is contested by the bankrupt on a number of grounds

including that the Collector-General does not have a legal entitlement to revisit the previous approach.

The law

20. It would be helpful at this juncture to highlight a number of aspects of the law of particular relevance to the present motion. By way of context, Sanfey and Holohan, *Bankruptcy Law and Practice*, 2nd ed. (Dublin, Round Hall, 2010), para. 13-03, p. 432, say that "[t]he claim of the petitioning creditor is deemed to have been proven by virtue of the order of adjudication". However, that does not mean that the petitioning creditor is stuck with the amount in the petition. He or she can prove for a different amount in principle, but doesn't have to.

21. Section 79 of the Bankruptcy Act provides: "The Court may, on the application of the Official Assignee or any creditor or the bankrupt or arranging debtor, disallow, in whole or in part, any debt already proved or admitted." This is the provision under which the present motion is primarily brought.

22. Section 82(1) of the 1988 Act provides that: "As soon as convenient after the receipt by him of sufficient funds to meet expenses, fees, costs and preferential payments and to pay a dividend to creditors in any bankrupt's estate the Official Assignee shall place on the Court file a list of creditors admitted by him or by the Court, a copy of the relevant account of the bankrupt in his books, particulars of expenses, fees, costs, preferential payments and dividend payable to creditors and his report on the realisation of the estate." This is of relevance to an argument which we will come to regarding the necessity for a time limit for submission of proofs of debt.

23. The requirement to prove a debt is set out in the first schedule of the 1988 Act, para. 1: "Every creditor shall prove his debt and a creditor who does not do so is not entitled to share in any distribution that may be made." Paragraph 3 provides that: "The Official Assignee may fix a time within which proofs of debt shall be sent to him. A proof submitted thereafter shall not be allowed except by order of the Court."

24. Provision for amendment of the proof of debt is made in para. 9 which provides: "Subject to paragraph 24 (5), a creditor may, with the consent of the Official Assignee, amend his proof of debt."

25. Of particular note is para. 23 of the first schedule which provides as follows:

"23. The Official Assignee shall deal in the following manner with claims:

(a) He shall prepare a list certified by him of the claims.

(b) This list shall record—

(i) the claims allowed by him, which shall be deemed to be admitted, and
(ii) the claims either disallowed by him or which he considers should not be admitted without reference to the Court.

(c) He shall refer disputed debts to the Court for adjudication.

(d) The decision of the Official Assignee in regard to a claim shall be confirmed in writing to the creditor.

(e) Any person aggrieved by the decision of the Official Assignee may appeal to the Court.

(f) The Official Assignee shall place a copy of the list on the Court file.

(g) The list shall be open to public inspection on payment of a prescribed fee but no fee shall be charged to creditors inspecting the list."

26. The time limit is referenced again in para. 24(3) which provides as follows: "A secured creditor shall not be entitled to surrender his security after the time fixed by the Official Assignee for receipt of proofs of debt, except by order of the Court."

27. Amendment of the value of a security is addressed in para. 24(5) which provides: "Where a creditor has valued his security he may at any time amend the valuation and proof on showing to the satisfaction of the Official Assignee, or the Court, that the valuation and proof were made bona fide on a mistaken estimate, but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the Official Assignee allows the amendment without application to the Court."

28. The requirements for advertisement of the fixing of a time for sending a proof of debt are set out in O. 76, r. 65(1) and (2) RSC:

"65. (1) The Official Assignee or a trustee may give notice, by advertisement in Iris Oifigiúil and otherwise as he shall think fit, of the fixing of a time within which proofs of debt shall be sent to him. Such advertisement shall be in the Form No 21.

(2) In addition to advertisement, such notice shall be given by the Official Assignee or trustee to all the creditors entered in the bankrupt's statement of affairs or any other creditor of whom the Official Assignee or trustee is aware, who shall not already have lodged proofs or claims with him."

29. This is reinforced by the form of advertisement set out in appendix O, form No. 21 RSC which provides as follows:

"No. 21.

NOTICE TO CREDITORS TO PROVE DEBTS

THE HIGH COURT

BANKRUPTCY

No.

In the matter of ... a Bankrupt.

[or as the case may be]

The above-named was on the ... day of ... 20 ... adjudged bankrupt.

All persons claiming to be creditors in this matter are to send their proofs of debt to me at the Four Courts, Dublin 7, on or before the ... day of ... 20 ....

Dated

(Signed)

Official Assignee,

Four Courts,

Dublin 7.

Solicitor for the Official Assignee.

[address]".

The issues

30. As the matter evolved in oral submissions, three threshold issues were raised by the bankrupt as to why the Collector-General's proofs of debt should be disallowed (there were further issues down the line if these were unsuccessful):

    (i). the Official Assignee should not have accepted the original proof of debt because it did not contain an election as to what was to be done with the security;

    (ii). the time limit referred to in the proof of debt form should be construed as the time limit for the purposes of the First Schedule to the 1988 Act, and consequently the Official Assignee should not have accepted either the original or the amended proof of debt without an order of the court because, on that interpretation, we were past time for the delivery of the proof of debt or for abandonment of a security; and

    (iii). the Official Assignee should not have accepted the revised proof of debt without telling the bankrupt about it first because to do so deprived the bankrupt of the opportunity to argue that the matter should be referred to the court prior to being accepted.

31. I will deal with these matters in turn although I will note at this juncture that as the submission evolved it essentially became tantamount to saying that the Official Assignee did not operate the statutory scheme correctly. The Official Assignee was aware of the motion but did not choose to participate; and while I probably would have welcomed his assistance, it is really up to interested parties in these kind of situations to decide

whether to get involved. So I was not really in a position to do anything about the Official Assignee's non-involvement in circumstances where he felt that he did not have a whole lot to contribute on this motion.

Lack of election in the original proof of debt

32. An election as to what is to be done with the security is mandatory both in the proof of debt form and in logic. So the original proof of debt should not have been accepted in the absence of such an election. The Collector-General argued in the present motion that the form was "at best a nullity" and in any event would be superseded if the amended proof of claim form was to be accepted. So ultimately no huge argument was put forward by the Collector-General to the effect that the first form was valid. I consider that it was not and should not have been admitted.

Whether a time limit was imposed by the Official Assignee on the facts

33. On balance I think that the request in the proof of debt form to "please" submit the proof of debt within 21 days of adjudication is not a legal invocation of the power to impose a statutory time limit. While the word "please" is somewhat more suggestive of a request than of a mandatory order, not a lot turns on that alone because sometimes such courtesies are merely the velvet glove over an iron fist, and don't necessarily imply that there's a whole lot of choice involved. More importantly, the formality and legal consequences flowing from the imposition of a statutory time limit do require more certainty and clarity as to whether the statutory power is being invoked in this sort of situation than the exhortation in the proof of debt form.

34. The rules also require an advertisement, although they are not an absolute model of clarity. The word "may" is used in O. 76, r. 65(1) RSC; but "may" in that context means "shall" when we look at r. 65(2) which says that the Official Assignee "shall" give notice to creditors "in addition to advertisement". By inference, the advertisement must, therefore, be a "shall" as well.

35. Essentially the position is that imposing a time limit is optional rather than mandatory, but if a time limit is imposed then some form of advertisement becomes mandatory. This is consistent with the logic of s. 82 of the 1988 Act which is to the effect that if there are sufficient assets to meet the cost of bankruptcy and pay preferential creditors, the Official Assignee moves on to consider a dividend. This requires a list of creditors and a report to a sitting of the court which will be the context in practice where the imposition of a deadline may be necessary. That may not be necessary if there is going to be no dividend; or in other words it is pointless to invite creditors generally to put in claims if in fact nobody is going to get paid except the preferential creditors. So in the absence of any evidence that formal time limit for the purposes of the First Schedule was imposed, I think the bankrupt's time limit points just do not arise because they are based on the mistaken premise that a time limit was in fact triggered.

Failure to inform the bankrupt of the amended proof of debt form

36. The Collector-General argues that the bankrupt would have had nothing to say in response to the amended proof of debt form, that the form concerns judgments of the court which were not appealed or made the subject of an application to set aside, and

that, if anything, the amount in the form was less than the amount in the original form. I do not accept that that is a complete answer to the problem that the form was accepted without notice to the bankrupt.

37. It is implicit in para. 23(b) that there are three possible outcomes for a claim – acceptance, rejection, or referral to the court. Hence where the First Schedule envisages referral to the court, that is to the exclusion of the other options, in the sense that what is involved is a referral rather than a decision whether positive or negative first.

38. As noted above, the First Schedule to the 1988 Act, para. 23(c) says that the Official Assignee "shall refer disputed debts to the court for adjudication", rather than simply accept such debts by his own decision. It is agreed that that includes disputes as between debtor and creditor. Whether it includes disagreement between the Official Assignee and the creditor isn't an issue here but I don't think it does, a point I will come back to. The requirement to refer disputed debts to the court has the implication that the debtor has to know about the debt prior to the acceptance of the debt by the Official Assignee. Given the mandatory obligation to refer disputed debts to the court, it was not lawfully open to the Official Assignee to accept a proof of debt or an amended proof of debt without having given the bankrupt a prior reasonable opportunity to know about it and dispute it. The right of appeal isn't an answer either because the debt shouldn't have been accepted in the first place without notice, and to do so circumvents the statutory intention that disputed debts are referred to the court rather than being accepted.

39. This is consistent with para. 7 which provides that "An affidavit shall be required in any case where the debt is disputed or the Court or the Official Assignee thinks fit." That would be meaningless if a debt could be accepted without an affidavit and without an opportunity being afforded to find out if the debt is disputed. It implies, again, a process whereby we first find out if the debt is disputed, then get an affidavit, and then refer the matter to the court.

40. The bankrupt here has various legal arguments he wishes to make as to why the debt shouldn't be accepted and under those circumstances I don't think that the argument that the bankrupt would have had nothing of value to contribute can realistically be accepted as an objection *in limine*. The correct procedure is:

    (i). When a proof of debt or amended proof of debt is received by the Official Assignee, that needs to be notified to the bankrupt.

    (ii). The bankrupt has to be given a reasonable opportunity to either:

        (a). dispute the debt; or
        (b). argue that even though the amount itself is undisputed, the matter should for some other reason be referred to the court.

    (iii). If the debt is disputed, the Official Assignee cannot admit it, but must refer to the court as long as an affidavit is filed. I think if the debt is disputed but no affidavit is

filed, the proof can simply be rejected as improper in form rather than on the merits, as a way of reconciling paras. 7 and 23(c).

(iv). If the debt is not disputed as such, but some other argument is advanced as to why the matter should be referred to the court, the Official Assignee should consider that argument and make his own decision about whether to admit the debt or not or whether to refer it to the court.

41. This procedure wasn't followed here and on that basis I would set aside the acceptance of the amended proof of debt. I would accept that this may seem administratively inconvenient but that follows what the statute says, convenient or otherwise. Courts should factor in what is practical and purposive if and when the statute gives them a choice, but sometimes it doesn't. If the Official Assignee wants to get involved in some future application to argue differently he can do that but that can't affect the present application. Maybe there might be something to be said for legislative streamlining, by providing that the Official Assignee could simply make a decision subject to appeal to the court. But again I don't see that as something I can read into the statute given the mandatory terms of para. 23(c). The existing right of appeal under para. 23(e) has to be read as subject to that express provision and as covering in effect matters other than simply disputing a debt (appeal shouldn't arise there because the Official Assignee isn't supposed to make a decision in such a case). An example might be where a creditor's claim is rejected. An official authority that rejects a claim is not "in dispute" with an applicant – it has simply exercised an administrative or adjudicative function in a manner with which the applicant doesn't agree. Hence "appeal" is a much more appropriate concept here than trying to shoehorn such a situation under the heading of "dispute". Admittedly, a situation where one creditor objects to another creditor's proof of debt might be yet a further category – that could be a dispute but only if the Official Assignee knows about it, and an obligation to notify all creditors of any individual creditor's claim for such a possible purpose seems unduly onerous. Perhaps if another creditor finds out and objects after a claim is allowed, appeal is the more appropriate route there. Even bearing all that in mind, while I've attempted to clarify how the legislation can be made to work best within its terms as they stand at the moment, that's not to say that amending the legislation (to allow the Official Assignee to simply make a first instance decision in all cases and to expressly state who should be notified of any individual claim prior to doing so) wouldn't make the process work more smoothly – it probably would and might well be worth considering.

Order

42. There will, therefore, be an order under s. 79 of the 1988 Act:

(i). disallowing the Official Assignee's admittance of the original proof of debt because it did not specify the Collector-General's election regarding his security; and

(ii). disallowing the amended proof of debt because the Official Assignee did not give the bankrupt a reasonable opportunity to dispute it or argue that it should be referred to the court, prior to admitting the debt.

43. For the avoidance of doubt, the order is without prejudice to the entitlement of either party to raise any other issue in any future context in the event that the Collector-General was to submit or purportedly submit a further proof of debt.