THE HIGH COURT
BANKRUPTCY

[2021] IEHC 709
[Petition No. 4905 P]

IN THE MATTER OF A PETITION FOR ADJUDICATION IN BANKRUPTCY

BETWEEN

EMMETT KILDUFF

PETITIONING CREDITOR

AND

K.J.

DEBTOR

JUDGMENT of Humphreys J. delivered on Tuesday the 23rd day of November, 2021

1. The debt in this case arises on foot of a tenancy relationship between the parties. In April 2018, the debtor fell into arrears of rent due to the landlord.

2. A PRTB determination in relation to rent arrears issued on 28th March, 2019 directing the debtor to pay €39,385 to the petitioning creditor.

3. Separately there was a PRTB decision regarding overholding, which is not directly relevant to the present application.

4. On foot of the PRTB determination, the Dublin District Court made an order dated 11th October, 2019 implementing the determination: *Kilduff v. K.J.* [2019/004454]. That was appealed to the Circuit Court, but the appeal was withdrawn.

5. The creditor brought a petition dated 19th August, 2020, filed on 1st September, 2020.

6. On 28th September, 2020, I made an order for substituted service on foot of an affidavit of Brian Comiskey, filed on 23rd September, 2020, and awarded costs to the petitioning creditor.

7. The matter was adjourned to 23rd November, 2020 but then adjourned further due to COVID-19 level 5 restrictions.

8. On the following mention date, 11th January, 2021, the matter was adjourned administratively to 1st March, 2021 because at that point only limited categories of cases were being dealt with remotely. (The entire list has since moved to a remote platform apart from where oral evidence is required or other exceptional cases.)

9. A further adjournment on the same basis occurred on the new date and the matter was listed for 10th May, 2021.

10. On the latter date the debtor sought an adjournment to file an affidavit, instruct a solicitor and put forward proposals. I allowed until 14th June, 2021 for that process.

11. When the matter came back to court, the debtor hadn't obtained a solicitor, and sought a further lengthy adjournment. He said that he was anticipating funds which were being held up in the legal costs adjudication process, that he was attempting to set up a company and

was engaging with a personal insolvency practitioner as well as putting money aside for the debt. I directed the debtor to file an affidavit exhibiting a statement of affairs and an affidavit sworn by his personal insolvency practitioner within four weeks.

12. A statement of affairs was sent on 16th July, 2021 and the matter was listed again on 19th July, 2021 when the debtor sought a further adjournment because of separate proceedings relating to the overholding determination. The petitioning creditor submitted that that was a separate matter and also noted that the personal insolvency practitioner had not provided a written opinion from a personal insolvency practitioner.

13. I adjourned the matter for a week to 26th July, 2021 for any further material from the personal insolvency practitioner, but on the new date the debtor said that his advice was that he could avail of a debt settlement arrangement, but would need 12 weeks to get the application ready.

14. I then listed the petition for hearing on 18th October, 2021. Insofar as the hearing touched on reference to previous separate *in camera* proceedings as part of what was an essentially *ad misericordiam* submission by the debtor in that regard, I imposed a reporting restriction.

Whether the matter should be further adjourned

15. On the hearing date, the debtor applied for yet a further adjournment, essentially on the grounds that he was confident he would be in funds, that the personal insolvency practitioner suggested that he should get all monies in and that he was seeking to make offers, which had been rejected. He also relied on having a counterclaim.

16. Having heard the parties, I did not consider that there was a pressing case for an adjournment, particularly in view of the fact that many of these matters had previously been canvassed, that the petitioning creditor was a private law actor and that under those circumstances it would be unfair to the creditor to adjourn the matter yet again, and because a reasonable opportunity to deal with any issues had already been afforded. It's worth making the point that the petition was already 14 months old at that point. It's also worth making the general point that bringing down the shutters at any stage can be presented as arbitrary, but that's inherent in any deadline. One can always make the case for a one-off further adjournment. But any suggestion that the court has to accede to such a plea merely because a case could be made for one further adjournment in itself can't be a correct analysis because on that basis no matter could ever be decided. A court is entitled to proceed to hear and determine an application if a reasonable time to deal with it has already been afforded.

17. The upshot was that the matter was then heard and judgment was reserved, but that wasn't the end of things.

Developments post-hearing

18. After the hearing, on 28th October, 2021, the debtor instituted plenary proceedings as a personal litigant against the landlord (*K.J. v. Kilduff* [2021 No. 6053 P]) claiming damages for negligence. The debtor told me that these proceedings would be seeking €2.5 million and that he had had an informal conversation with senior counsel to that effect.

19. Had the debtor been adjudicated at the end of the hearing, this wouldn't have arisen in such a way because it would have been a matter for the Official Assignee to institute any counter-proceedings. It wasn't really made clear at the hearing that affording time would be used for the purposes of instituting new proceedings – the debtor referred to a "counterclaim" which implied (incorrectly) a claim made within proceedings brought by the landlord.

20. I was also informed that on 12th November, 2021 the District Court made an order against the debtor for payment of an additional sum of around €65,000 due for additional rent and an order for possession of the property concerned with a stay of 6 weeks. The debtor says he intends to appeal.

21. The matter was listed again for mention at the debtor's request on 15th November, 2021 at which point the debtor took the opportunity to raise a number of matters that are of limited relevance at this stage such as an alleged infirmity in the underlying PRTB determination. The problem with that submission is that if unchallenged decisions are made, then the process moves on, and the taking of consequential action is not a basis for challenging historic decisions or seeking an extension of time to do so. That which is unchallenged has to be treated as valid in such a process, otherwise one would be forever going back to square one. The same applies to any other administrative or judicial process – one can challenge any particular operative decision when it is made, but if not, the process begins for any consequential decision and it would lead to procedural anarchy to suggest that this gives an entitlement to rewind the clock. Separately, the debtor also expressed hopes of making repayment, but those are only hopes, and were qualified by reference to payment on account; and in any event such expressions of anticipated intention to pay are becoming a little thin at this stage.

Whether entitlement to an order of adjudication has been made out on a *prima facie* basis

22. Section 11(1) of the 1988 Act provides as follows:

> "A creditor shall be entitled to present a petition for adjudication against a debtor if—
>
> (a) the debt owing by the debtor to the petitioning creditor (or, if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to more than € 20,000,
>
> (b) the debt is a liquidated sum,
>
> (c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition, and
>
> (d) the debtor (whether a citizen or not) is domiciled in the State or, within 3 years before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in the State or has carried on business in the State personally or by means of an agent or manager, or is or within the said period

has been a member of a partnership which has carried on business in the State by means of a partner, agent or manager."

23. I consider that on the evidence those criteria are satisfied here on a *prima facie* basis in each case, particularly having regard to the judgment of the District Court.

24. Section 14 of the 1988 Act provides as follows:

> "14.— (1) Subject to subsection (2), where the petition is presented by a creditor, the Court shall, if satisfied that the requirements of section 11(1) have been complied with, by order adjudicate the debtor bankrupt.
>
> (2) Before making an order under subsection (1), the Court shall consider the nature and value of the assets available to the debtor, the extent of his liabilities, and whether the debtor's inability to meet his engagements could, having regard to those matters and the contents of any statement of affairs of the debtor filed with the Court, be more appropriately dealt with by means of—
>
> (a) a Debt Settlement Arrangement, or
> (b) a Personal Insolvency Arrangement, and where the Court forms such an opinion the Court may adjourn the hearing of the petition to allow the debtor an opportunity to enter into such of those arrangements as is specified by the Court in adjourning the hearing.
>
> (3) A copy of the order shall be served on the debtor, either personally or by leaving it at his residence or place of business in the State.
>
> (4) For the purposes of subsection (2), the Court may order the bankrupt to attend and make full disclosure of his assets and liabilities to the Court by way of a statement of affairs filed with the Court."

25. I have considered the matters to which regard has to be had under s. 14 and in particular to the question of alternatives to bankruptcy pursuant sub-s. (2). I consider that alternatives to bankruptcy are not suitable here, especially seeing as time has already been allowed for exploration of that. I previously directed a statement of affairs as contemplated by sub-s. (4) on 14th June, 2021, but I might add that a court is no obligation to make such a direction before adjudicating a debtor bankrupt, at least in the absence of a likelihood otherwise being established to the effect that there might be a realistic alternative to adjudication.

26. The entitlement to an order for adjudication having been established on a *prima facie* basis, I then turn to the question of any defences advanced.

Whether a defence has been made out

27. While I have every sympathy for the debtor in terms of the distress and misfortune that he has encountered across a number of matters to which he referred that it is not necessary to go into here, he is unfortunately not entitled to retain assets at the expense of creditors in a situation where he is unable to meet his debts at the moment.

28. Unfortunately I did not consider that any of the matters raised by the debtor amounted to establishing a defence. Without needing to go through them individually, distress and hardship as a consequence of adjudication, or arising from life events overall, even when severe, doesn't in itself amount to a basis to reject a petition. It might be different if the injury is being improperly caused by wrongful acts of the petitioning creditor, as opposed to any inherent distress of the adjudication process in itself, but that wasn't the centre of gravity of the debtor's submission. Insofar as he made complaints about the creditor, those either hadn't been established evidentially or were not of such a nature as to preclude adjudication, even if correct. Not accepting offers or not affording more time for money to come in is not in itself wrongful conduct by a creditor because there is no general obligation to accept offers or afford more time. It might be different if there was some special obligation on the particular facts such as an agreement to allow time, but that doesn't arise here. The objectivity of the process and the need for fairness to a creditor generally precludes the court from being unduly swayed by hardship as such (see *Danske Bank v. Mullaney* [2021] IEHC 669 (Unreported, High Court, 27th October, 2021)). I would note that insofar as the debtor feared that adjudication might be seen as a negative judgement or a stain on his escutcheon in terms of his conduct in some way, that is not the case and certainly not the case nowadays. People get into debt for all sorts of reasons, and adjudication in bankruptcy is just a civil consequence of that, not a form of punishment or admonishment. Only a minority of adjudications arise from complete disregard of the legal process. Many adjudications arise from economic hardship outside of the debtor's control, such as marriage breakdown, ill health, or the loss of employment, perhaps as a result of broader trends, or are just the inevitable attrition rate of a degree of financial risk-assumption and entrepreneurship, which is celebrated by society when it goes well so logically to some degree it must be accepted when it doesn't. So I don't think that bankruptcy should in itself carry a stigma these days. Indeed, if one co-operates with the process, as I am sure the debtor will, it is relatively painless compared to how it used to be. Not only that, in the long run it's probably better for a debtor who can't currently meet their debts to embrace the process and reap its advantages in order to allow a fresh start to be made, which is the course I would encourage generally and in particular for the debtor here. The flip side of bankruptcy not being a punishment is that it should not unduly focus on impact on the debtor, and in particular it is not a procedure where a "plea in mitigation" type defence is really appropriate. The primary consideration is to address the civil consequences of the need to apply the debtor's assets for the benefit of creditors. This requires an objective and unemotional standard.

Whether an order of adjudication should be immediately effective

29. I turn finally to whether it is on balance appropriate for any adjudication to be other than immediate.

30. The parties and of the Official Assignee engaged with the court about a number of different possibilities for perhaps giving the debtor a final opportunity to address matters. Options considered were as follows:

(i). Adjourning the matter *simpliciter* - however, that had the disadvantage of potentially leading to a circular situation where the whole discussion had to happen again from scratch, which is inappropriate where adequate time had already been afforded and doubly so where a full hearing of the petition has already taken place.

(ii). Making an order with a stay - however, stays in bankruptcy matters should be particularly rare given that adjudication affects personal status and given the procedural mayhem thereby potentially caused: *In re Tobin* [2021] IEHC 466 (Unreported, High Court, 13th July, 2021) para. 16, *O'Rourke v. O'Rourke* [2021] IEHC 591, [2021] 9 JIC 3001 (Unreported, High Court, 30th September, 2021) para. 12.

(iii). Directing that the order not be perfected for a period of time - however, this has the same practical difficulty as a stay, which is the creation of a limbo period because the legal consequences of adjudication flow from adjudication rather than from the perfection of the order.

31. In all the circumstances I think it is very difficult to fashion an *ad hoc* alternative to a simple, immediately effective order of adjudication and accordingly that is the order I propose here. The fact that judgment was reserved will in itself have given the debtor a breathing space, but that is about all a court can normally do in such a situation.

Order

32. Accordingly, the order will be that the debtor be adjudicated bankrupt.