THE HIGH COURT
BANKRUPTCY

[2021] IEHC 92

[Bankruptcy No. 5041]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 16 OF THE BANKRUPTCY ACT 1988

BETWEEN

MICHAEL GRIMES (A BANKRUPT)

APPLICANT

AND

DANSKE BANK A/S TRADING AS DANSKE BANK

RESPONDENT

AND

THE HIGH COURT
BANKRUPTCY

[Bankruptcy No. 5042]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 16 OF THE BANKRUPTCY ACT 1988

BETWEEN

CARMEL GRIMES (A BANKRUPT)

APPLICANT

AND

DANSKE BANK A/S TRADING AS DANSKE BANK

RESPONDENT

Judgment of Mr. Justice Richard Humphreys delivered on Thursday the 25th day February, 2021

1. On 13th April, 1988, a mortgage over a dwelling at Kells, County Kerry, was granted by the bankrupts to Northern Bank (Ireland) Ltd. Thirty-three years later, the bankrupts haven't discharged their liabilities to that bank's successor in title, although so far they seem unwilling to accept the legal consequences of that situation.

The summary proceedings

2. On 18th January, 2001, National Irish Bank (NIB), the successor in title to Northern Bank, issued a loan facility letter to the bankrupts, which was accepted on 19th January, 2001 (twenty years to the day before the date of the current hearing). The loan was in due course transferred from NIB to Danske Bank.

3. The bankrupts unfortunately failed to meet the repayments due. The balance was demanded on 26th August, 2013 and 3rd October, 2013. A summary summons was issued on 10th October, 2013 [2013 No. 3290S].

4. On 8th May, 2014, a notice of motion for summary judgment was issued under O. 37, r. 1 RSC. The grounding affidavit averred that the defendants had no defence and that appearances had been entered solely for the purposes of delay.

5. On 8th June, 2015, Michael Grimes ("the first applicant", for convenience) swore an affidavit stating that he was challenging the bank's actions by way of separate proceedings [*Grimes v. Danske Bank* 2014 No. 5545P], although it is not clear that those proceedings were ever prosecuted to a conclusion.

6. After nine separate adjournments the motion came to be listed before the Master on 2nd February, 2016. On that date, the first applicant stated in writing that he was seeking a declaration that "the mortgage was totally null and void *ab initio*", but he did not physically attend court on that date and judgment was granted in his absence. He then brought an application to the court to set aside that order under O. 63, r. 9 RSC. On 14th March, 2016 he said in a further affidavit that he did not attend the Master's Court because he was on bail on a "tax case" in Cork and at para. 8 said that it was "clearly contrary to natural justice that I was not given the opportunity to attend and present my case". History seems to repeat itself as we shall see.

7. It has been averred to on behalf of the bank that on 30th May, 2016 a letter was sent on behalf of the first applicant stating that he had had a stroke and could not attend court. On 13th June, 2016 he did attend court, but said that he needed further time to deal with the matter, relying on the alleged stroke.

8. After four adjournments the matter was listed before the High Court on a fifth occasion on 25th July, 2016 (the fifteenth occasion overall that the summary proceedings were listed if one also includes the nine adjourned dates before the Master and the tenth date on which the Master granted the order). On that fifteenth occasion, the court (Binchy J.) granted judgment, noting in the order that there was no attendance on behalf of the defendants and noting that the court had previously directed that a medical certificate be produced if the defendants were unwell, and that no such certificate had been produced.

9. The first applicant appealed to the Court of Appeal [2016 No. 414], but that appeal was struck out with costs to the bank on 23rd January, 2017.

The bankruptcy proceedings

10. On 13th March, 2017, the High Court (Costello J.) granted the bank's application for the issue of a bankruptcy summons. The debtors failed to pay, so petitions issued on 10th April, 2017 [2017 No. 3696P, relating to the first applicant, and No. 3697P, relating to Carmel Grimes ("the second applicant" for convenience)]. The first applicant swore an affidavit on 17th June, 2017 stating that he was in the process of buying out the freehold with a view to selling the property and said he "confidently expect[s] the property sold by the end of July [2017]" (para. 26).

11. On 19th June, 2017, notices of motion issued seeking adjudications in bankruptcy. On 29th June, 2019 the first applicant swore a further fairly argumentative affidavit relying *inter alia* on he and his wife being octogenarians (at para. 55) and asking for an adjournment (at para. 64).

12. On 9th August, 2019, the bank issued a notice of motion seeking a modest amendment of the petition under O. 28, r. 1 RSC quantifying the value of their security for the purposes of complying with s. 11(2) of the Bankruptcy Act 1988. The grounding affidavit noted that the first applicant had failed to obtain the fee simple despite the opportunity to do so.

13. On 30th October, 2019, the first applicant made a purported *ex parte* application seeking a determination that the petitions in his case and his wife's case "are null, void and of no effect *ab initio*".

14. On 5th November, 2019, the High Court (Pilkington J.) allowed the amendment of the petition, refused the motion to dismiss the petitions and adjudicated the debtors bankrupt.

15. On 18th November, 2019, appeals to the Court of Appeal were lodged against the adjudication order [2019 No. 480 relating to the second applicant and 2019 No. 481 relating to the first applicant].

16. On 13th January, 2020, Pilkington J. made an order under O. 122, r. 7 RSC extending the time for the formal making of the amendment of the petition and in doing so refused an application made by the first applicant for an adjournment of that matter.

17. On 20th January, 2020, the applicants appealed the order of 13th January, 2020 to the Court of Appeal [Court of Appeal Record Nos. 2020 No. 41 relating to the first applicant and 2020 No. 42 relating to the second applicant].

18. On 12th June, 2020, all four appeals to the Court of Appeal were struck out automatically on foot of an unless order, because the applicants failed to deliver submissions.

The motions to show cause

19. The bankrupts issued the present applications to show cause against their adjudication on 18th November, 2019 [2019 No. 5041 relating to the first applicant and 2019 No. 5042 relating to the second applicant]. The matters were listed on 9th December, 2019, at which point the first applicant claimed by email that he would not be in a position to attend for medical reasons. The matter was adjourned with a direction to permit the filing of affidavits.

20. When the matter was listed again on 3rd February, 2020, the first applicant sent a further email claiming that he was unable to attend due to illness and sought a further adjournment beyond the date on which it was anticipated that the Court of Appeal would deal with his existing appeals. Pilkington J. directed that if the first applicant was still unwell by the adjourned date, a medical certificate should be furnished.

21. On 24th February, 2020 the matter was listed again and the first applicant applied for a further adjournment. Pilkington J. refused the application to adjourn the show cause motions until after the appeal against the adjudication orders. She also emphasised that the first applicant would not be permitted to represent the second applicant and also that medical evidence would need to be furnished as to her condition if it was being contended that she could not attend due to illness. The first applicant said that he wanted to formally object to the refusal of his application for an adjournment and asked for a formal order refusing the adjournment so that he could appeal it.

22. The matter was due to be listed again on 1st May, 2020, but due to the Covid-19 emergency that was adjourned administratively to 2nd November, 2020. That listing coincided with the second Covid-19 lockdown, so the listing was administratively adjourned again to 7th December, 2020. On that latter date, the first applicant sent an email requesting a further adjournment. I did not decide anything substantive on that date but listed the matter for remote hearing on 19th January, 2021.

23. On 11th January, 2021, the first applicant sent an email seeking a further adjournment and I adjourned that adjournment application to the hearing date. He enquired about a perfected order in that regard which might be thought to be suggestive of a wish to appeal that decision, but so far as I know he has not in fact appealed it as yet.

24. On the Sunday evening before the hearing, 17th January, 2021, the first applicant sought yet a further adjournment of the hearing by email. That application was listed at short notice in the bankruptcy list on Monday 18th January, 2021, at which point the bank appeared, but not the applicants. Following the mention of that matter, I adjourned that adjournment application to the substantive hearing date of 19th January, 2021. The Official Assignee in the meantime has issued a motion to extend the bankruptcy which was returnable for 25th January, 2021.

25. I wish to record my gratitude to Mr. Dylan West B.L. for the petitioner, and to Mr. Rudi Neuman B.L. for the Official Assignee who attended as a courtesy to assist the court. The bankrupts were called, but did not appear. Having heard the matter on 19th January, 2021, I announced the order being made and indicated that reasons would be given later.

The second applicant's position

26. As noted above, at the adjudication hearing on 5th November, 2019, Pilkington J. did not permit the first applicant to advocate on behalf of the second applicant. In the Court of Appeal, Costello J. on 8th May, 2020 directed the creditor to notify the second applicant that the first applicant was not permitted to prosecute the appeal on her behalf and that if she wished to adopt his submissions she could do so, but would have to be present herself at the remote hearing to indicate that. Thus the position is clear that for present purposes the first applicant cannot act on behalf of the second applicant.

The adjournment application

27. Mr. West opposed the written application to adjourn the motions to show cause. As appears from the procedural history of the matter, a number of similar applications have been made by the first applicant on various previous occasions. The present application for an adjournment relying on ill-health is merely the latest one and, viewing the matter overall, is part of a pattern of delay in the proceedings as a whole. The procedure to show cause against adjudication under s. 16 of the Bankruptcy Act 1988 needs to be progressed rapidly. The notices to show cause were issued on 18th November, 2019 and it is highly undesirable that they would remain outstanding for a fourteen-month period. Certainly that militates against adjourning them any further. Furthermore, there is a lack of engagement with the need to actually hear those applications from the bankrupts and they have not put forward anything which shows a reasonable prospect that either

bankrupt would be willing or able to progress their applications within a reasonable time or indeed at all.

28. Admittedly the hearing of the present matter was the first time that a medical certificate of any kind has been produced, but I do not find it particularly impressive. It refers to "cardiac investigations" by the first applicant's GP (not by a specialist), and the urgency, if any, of this was not clarified. The actual investigation involved is also unspecified - it could be something as simple as taking bloods, who knows. It must also be noted that there is no basis in any medical certificate for an adjournment in relation to the second applicant. The time of the appointment is stated to be 9.30 a.m. on 19th January, 2021. I started dealing with the adjournment application around 11.30 a.m. on that date so there was plenty of time for the first applicant to attend his GP and then dial into the hearing after that visit.

29. The position was further complicated by the fact that in a later email the first applicant stated that the appointment was at 10 a.m. That discrepancy certainly does not bolster the validity of his alleged medical excuse. There was also quite a degree of disparity between the dramatic urgency of the medical allegations made in the first applicant's email and the very sparse content of the medical certificate, which does not reinforce or bear out the detail alleged by the first applicant. The certificate alleges that he is unfit to work, but he is not being asked to work. He is simply being asked to dial into a virtual hearing. He clearly has no problem sending a variety of emails requesting adjournments, so it is not too much to ask of him to click the link that has been furnished to him to allow him to address the court.

30. In all those circumstances, I refused the adjournment application. However, rather than proceed with the matter immediately, I gave the applicants a further indulgence and put it back to 2 p.m. with the applicants to be contacted in the meantime by phone and email and told that they should either dial into the hearing or they would see a situation where the matter would be dealt with in their absence.

Further adjournment application

31. When the matter resumed at 2 p.m. on 19th January, 2021, the first applicant made yet a further application for an adjournment. This arose in circumstances where following the refusal of his adjournment application, solicitors for the petitioner bank telephoned him and emailed him indicating that the matter would proceed at 2 p.m. I was informed that on the phone call he said he would think about the matter and then some fifteen minutes later he emailed complaining about his medical condition and seeking an adjournment.

32. What is clear is that the first applicant was at home on the day of the hearing at a computer and able to send a detailed email. His email was not backed up by any new medical certificate. It indicated a mutating set of medical conditions which over the previous number of days had ranged from pulmonary pneumonia to cardiac investigations and then to fluid on the lung. He claimed that his prescription of "[f]umeroside" had been doubled. Presumably, that was a misprint for "furosemide". In the absence of any medical certificate relating to such a drug, Mr. West had no objection to my checking the

NHS website (the online equivalent of a dictionary or encyclopaedia – not roving inquiry of the kind for which Posner J. earned sceptical comment arising from cases such as *Rowe v. Gibson*, 798 F.3d 622, 624 (7th Cir. 2015)), as clarification was appropriate in order to guard against any possible injustice to the first applicant, in case this medicine involved incapacitating side-effects. This authoritative source indicated that the drug in question is not a particularly disabling form of medication, stating "[t]he main side effect of furosemide is peeing more often than normal. Most people need to pee about 30 minutes after taking furosemide, and again within a few hours" (www.nhs.uk/medicines/furosemide).

33. It seems to me that the first applicant has represented his medical issues in a somewhat disingenuous and exaggerated manner. For example, he stated that "I am now just back from the clinic and on my way to bed and drugged." The only sense of "drugged" that appears from his email is simply meaning that he has taken, or at least been prescribed, some medication recently. On such a wide definition, that would probably include a substantial portion of the population. Clearly being "drugged" in this sense has in no way inhibited him from making repeated applications for adjournments including sitting at a computer tapping out his complaints right at the time he should have been in virtual court. Even the sense of "on my way to bed" isn't specified – maybe it just means he intends to go to bed at some point in the evening. On that possible interpretation, everyone is on the way to bed, unless already there. Not only does his email offer no compelling reason to revisit the decision on the adjournment, if anything it reinforces the basis for refusing that application in that it gives the distinct impression that the court is being toyed with, if the court didn't have that impression already.

34. Insofar as, at the eleventh hour, mention is made of a request for legal aid, what is suggested is not the correct procedure. Legal aid has to be sought from the Legal Aid Board and not by bringing an application in any given proceedings against the other side. The first applicant made reference in the proceedings at a previous point to his 40 or 50 years of experience with litigation (experience which, one might say, is evident in his considerable success in delaying and postponing the determination of various matters against him up to now), so it seems unlikely that the question of legal aid and the procedure for obtaining it has only arisen in his mind for the first time on 19th January, 2021. But even if he is unaware of the procedure for applying for legal aid, that's not a basis for revisiting the adjournment application.

Whether the adjudication should be set aside

35. Having considered all matters submitted on behalf of the applicants, those matters don't disclose any basis to set aside the adjudication. In summary:

    (i). The debt is clearly a liquidated sum and the other prerequisites are satisfied. In any event, this complaint re-litigates the summary proceedings and the adjudication: see *Carney v. Ennis Property Finance DAC* [2020] IECA 281 (Unreported, Court of Appeal, Haughton J., (Whelan and Noonan JJ. concurring), 16th October, 2020);

(ii). The alleged lack of a lawful demand for the monies re-litigates the summary proceedings.

(iii). The bankrupts are not entitled to rely on the bank's initial noncompliance with s. 11(2) of the 1988 Act, given that that was cured by amendment. The appeals regarding the amendment were dismissed and raising the point amounts to re-litigating the adjudication.

(iv). The claimed lack of opportunity to review the petition incorporating the amendment prior to adjudication is not a compelling point because the bankrupts were fully aware of the precise terms of the amendment. The filing of the petition as amended was more in the nature of a formality for the record.

(v). It hasn't been demonstrated that equity favours setting aside the adjudication; quite the reverse. This point also re-litigates the adjudication.

(vi). The claim that the person named in the petition does not exist and that the adjudication order does not relate to the applicant is frivolous. It also revisits the appeal against the adjudication order.

(vii). The claim that the procedure is unconstitutional is not properly constituted. The procedure is set out in primary legislation, so it cannot be challenged independently of a challenge to that legislation, which has not been brought, either properly on notice to the Attorney General, or at all.

34. There is a separate problem regarding the second applicant in that she hasn't engaged with the procedure at all or herself appeared or communicated with the court on the current matter. So in the absence of any entitlement by the first applicant to represent her, that is a reinforcing reason to dismiss her application. For example, no valid adjournment application was ever made because she never engaged with the court to seek an adjournment, and nor did she appear to move her application.

Order

35. Accordingly, the order made on 19th January, 2021 was:

(i). the adjournment applications were refused; and

(ii). both applications seeking to show costs against the adjudication were dismissed with costs to the petitioner including reserved costs.