

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION (BANKRUPTCY)**

BETWEEN

THE OFFICIAL RECEIVER

Applicant

and

ANTHONY THOMPSON

Respondent

WEATHERUP J

[1] On 16 November 2001 a Bankruptcy Order was made in respect of the respondent upon a creditors' petition. The respondent had unsecured debts of £1.3 million and the Official Receiver was appointed trustee in bankruptcy. On 8 January 2002 a meeting of creditors approved the respondent's proposals for an Individual Voluntary Arrangement whereby an injection of third party funds would produce a payment to creditors of 13 pence in the pound.

[2] There are four applications before the Court. First, an application by the Official Receiver under Article 236 of the Insolvency (NI) Order 1989 challenging the decision of the creditors' meeting on the ground that there was material irregularity at or in relation to the creditors' meeting. Second, an application by the Official Receiver under Article 263 of the 1989 Order for public examination of the respondent. Third, an application by the respondent for a stay of advertising. Fourth, an application by the respondent to annul the Bankruptcy Order.

[3] The Official Receiver was dissatisfied with the disclosure made in the respondent's proposal to the creditors meeting and with the status of some of the creditors at the meeting and applied to set aside the creditors' decision. The respondent then prepared a draft modified proposal which he now seeks to present to a reconvened creditors' meeting. The Official Receiver contends

that there is no power to reconvene the creditors' meeting to modify the proposal and that the decision of the creditors' meeting must be set aside and the respondent subjected to public examination.

The respondent's approach to the present circumstances is to contend that the Individual Voluntary Arrangement involves a contract between the creditors and the debtor agreed at the creditors' meeting and the Official Receiver and the Court should leave matters to the debtor and the creditors. The Official Receiver's approach is to emphasise the need for the debtor to have made full disclosure of information to the creditors and that there should be an investigation of the shortcomings in the disclosure actually made to the creditors.

[4] Voluntary arrangements are dealt with in Articles 226-237 of the 1989 Order. Bankruptcy petitions are dealt with in Articles 238-256 of the 1989 Order. The Insolvency Rules (Northern Ireland) 1991 apply. The individual voluntary arrangement scheme is as follows:

- (a) The High Court may make an Interim Order whereby no proceedings will commence or continue against an insolvent debtor (Article 226). The application may be made where the debtor intends to make a proposal to his creditors for a voluntary arrangement, and if the debtor is an undischarged bankrupt notice of the proposal must be given to the Official Receiver (Article 227). The Interim Order is made if the High Court considers that it would be appropriate to do so for the purpose of facilitating the consideration and implementation of the debtor's proposal (Article 229).
- (b) The proposal must provide for a nominee to supervise the voluntary arrangement and where an Interim Order is made the nominee reports to the High Court on the debtor's proposal. By Rule 5.13 the nominee sends to the Official Receiver a copy of the debtor's proposal and the nominee's report. If the High Court is satisfied that a creditors' meeting should be summoned to consider the proposal it directs accordingly (Article 230).
- (c) The nominee arranges the creditors' meeting (Article 231) which decides whether to approve the proposed voluntary arrangement. The meeting may approve the proposed voluntary arrangement with modifications provided the debtor consents to each modification (Article 232). The Official Receiver does not play a part in the creditors' meeting.
- (d) The creditors' decision is reported to the High Court. If the creditors reject the proposal the High Court may discharge the Interim Order (Article 233). If the creditors approve the

proposal the voluntary arrangement binds creditors with notice of the meeting. The Interim Order ceases to have effect 28 days from the day on which the report of the creditors' meeting is made to the High Court (Article 234). In the case of an undischarged bankrupt the High Court may annul the Bankruptcy Order or give directions as to the conduct of the bankruptcy to facilitate the implementation of the approved voluntary arrangement (after 28 days from the report of the creditors' meeting to the court and provided there has been no challenge to the creditors' meeting) (Article 235).

- (e) An application may be made to the High Court challenging the decision of the creditors' meeting and the Official Receiver has made such an application (Article 236).
- (f) After approval of the voluntary arrangement the nominee becomes the supervisor of the voluntary arrangement during its implementation. Any person dissatisfied by a decision of the supervisor may apply to the Court, as may the supervisor in relation to any matter arising under the arrangement. (Article 237)

[5] In the case of bankruptcy proceedings Articles 257-264 provide for the protection of the bankrupt's estate and the investigation of his affairs. It is the duty of the Official Receiver to investigate the conduct and affairs of the bankrupt and report to the High Court (Article 262). Where a Bankruptcy Order has been made the Official Receiver may apply to the High Court for the public examination of the bankrupt (Article 263) and the Official Receiver has made such application. Where a Bankruptcy Order has been made the bankrupt is under a duty to deliver possession of his estate to the Official Receiver together with all records relating to his estate and affairs (Article 264).

[6] Individual Voluntary Arrangements offer a statutory alternative to bankruptcy proceedings, including cases where a Bankruptcy Order has already been made. Voluntary arrangements by undischarged bankrupts involve certain modifications of the procedures and include an ongoing role for the Official Receiver. For example notice of the debtor's proposal and the name and address of the nominee should be given to the Official Receiver (Rule 5.05(5)); notice of an application to the court for an Interim Order must be given to the Official Receiver (Rule 5.06(4)); a copy of the debtor's proposal and the nominee's report and the statement of affairs must be sent to the Official Receiver (Rule 5.13(6)); notice of the result of the creditors' meeting must be given to the Official Receiver (Rule 5.24(4)); the Official Receiver may apply to the court to challenge the decision of the creditors' meeting under Article 236 as has occurred in the present case.

[7] At the heart of the present applications lies Article 236 which provides as follows:

“(1) Subject to the following provisions of this Article, an application to the High Court may be made, by any of the persons specified in paragraph (2) on one or both of the following grounds, namely -

- (a) that a voluntary arrangement approved by a creditors’ meeting summoned under Article 231 unfairly prejudices the interests of a creditor of the debtor;
- (b) that there has been some material irregularity at or in relation to such a meeting.

(2) The persons who may apply under this Article are -

- (a) the debtor;
- (b) a person entitled, in accordance with the rules, to vote at the creditors’ meeting;
- (c) the nominee (or his replacement under Article 230(3)(a) or 232(3); and
- (d) if the debtor is an undischarged bankrupt, the trustee of his estate or the official receiver.

(3) An application under this Article shall not be made after the expiration of 28 days from the day on which the report of the creditors’ meeting was made to the High Court under Article 233.

(4) Where on an application under this Article the High Court is satisfied as to either of the grounds mentioned in paragraph (1), it may do one or both of the following, namely -

- (a) revoke or suspend any approval given by the meeting;
- (b) give a direction to any person for the summoning of a further meeting of the debtor’s creditors to consider any revised proposal the debtor may make or, in a case falling

within paragraph (1)(b), to reconsider the original proposal.

- (5) Where at any time after giving a direction under paragraph (4)(b) for the summoning of a meeting to consider a revised proposal the High Court is satisfied that the debtor does not intend to submit such a proposal, the Court shall revoke the direction and revoke or suspend any approval given at the previous meeting.
- (6) Where the High Court gives a direction under paragraph (4)(b), it may also give a direction continuing or, as the case may require, renewing, for such period as may be specified in the direction, the effect in relation to the debtor of any interim order.
- (7) In any case where the High Court, on an application made under this Article with respect to a creditors' meeting, gives a direction under paragraph (4)(b) or revokes or suspends an approval under paragraph (4)(a) or (5), the Court may give such supplemental directions as it thinks fit and, in particular, directions with respect to-
 - (a) things done since the meeting under any voluntary arrangements approved by the meeting, and
 - (b) such things done since the meeting as could not have been done if an interim order had been in force in relation to the debtor when they were done.
- (8) Except in pursuance of the preceding provision of this Article, an approval given at a creditors' meeting summoned under Article 231 is not invalidated by any irregularity at or in relation to the meeting.

[8] Within the structure outlined above the position in the circumstances of the present case is as follows:-

- (a) The approved voluntary arrangement bound the creditors who had notice of the meeting. In Re Hussein (1996) BPIR 160 Blackburne J. described the approved voluntary arrangement as a "statutory contract".

- (b) The Official Receiver applied after 28 days to challenge the decision of the creditors' meeting and the court extended time for the application to be made.
- (c) The Official Receiver's challenge to the decision of the creditors' meeting requires one of the specified grounds to be established namely unfair prejudice or material irregularity. In that event the court may revoke or suspend the approval and may give directions for a further creditors' meeting to consider any revised proposal.
- (d) If a debtor wishes to modify a proposal approved by a creditors' meeting and the supervisor refuses to convene a meeting, the debtor may apply to the Court, or the supervisor may apply for directions (Article 237). As approval of the debtor's proposal is a matter in the province of the creditors it is likely that the Court would direct a creditors' meeting rather than seek to approve the modification.

In the present case the proposed modification falls to be considered after the application to set aside the decision of the creditors' meeting and I proceed to determine whether there are grounds to make an Order under Article 236.

[9] Accordingly it is necessary to determine whether the voluntary arrangement approved at the creditors' meeting either unfairly prejudices the interests of a creditor or there has been material irregularity at or in relation to the meeting. The Official Receiver challenges the decision of the creditors' meeting under Article 236(1)(b) on the basis that there has been material irregularity at or in relation to the meeting in two respects, the first relating to the creditors voting at the meeting and the second relating to the disclosure of information to the creditors at the meeting.

[10] The following propositions are relevant-

- (a) Suspicions about the debts owed to creditors voting at the meeting do not constitute unfair prejudice under Article 236(1)(a). Such unfair prejudice is concerned with unfairness arising from the terms of the voluntary arrangement. Debtor (No 259 of 1990) [1992] 1 All ER 641.

The complaint was that the statement of creditors in the debtor's statement of affairs was a fabrication and Hoffman J stated that if there were grounds for closer investigation of the debtor then an application to challenge the decision of the creditors' meeting was not the appropriate remedy and that a creditor who was bound by a voluntary arrangement could petition for

bankruptcy if information furnished was false or misleading in any material particular or contained material omissions.

- (b) An erroneous ruling by the chairman of a creditors meeting rejecting the votes of creditors will be a material irregularity for the purposes of Article 236(1)(b). Debtor (No 222 of 1990) [1992] BCLC 137.

Harmon J stated that the creditors meeting was not the place to go into lengthy debates as to the exact status of a debt and the chairman of the meeting should look at the claim and either admit the debt or reject it and if there was a doubt he should admit the debt but mark it as objected to (an identical approach is provided by Rule 5.17 in Northern Ireland). The chairman's decision can then be appealed to the court.

- (c) An irregularity will not be material if it would not have affected the outcome. Debtor (No 259 of 1990).

A challenge was made on the ground of material irregularity by reason of the failure to notify a creditor who was the debtor's ex-wife. However this was not a material irregularity because as an ex-wife she was an associate of the debtor and not entitled to vote against the proposal.

- (d) Inadequacies or omissions relating to the proposal may amount to material irregularities under Article 236(1)(b). Debtor (No 287 of 1993) [1996] BPIR 64.

Rimer J stated that the information supplied to the creditor was crucial to his assessment of the proposed arrangement and the information should be complete and accurate. The debtor had failed to disclose assets and liabilities and the approval of the voluntary arrangement at the creditors' meeting was revoked.

[11] The Official Receiver's first ground of material irregularity concerns the creditors. The respondent's total debts are £1.3 million and there were seven creditors present or represented and voting at the creditors' meeting of whom five voted to accept the proposal. Three of the accepting creditors were Terence Gorman (£700,000), Grant Thornton (£54,000) and Barbara Hollywood (£316,000). The Gorman debt arose out of the purchase by the respondent of shares held in trust for Gorman in Hollyshaw Investments Limited a company now in liquidation. The purchase price of the 13 shares in the company held in trust for Gorman indicated a company valuation of £4.2 billion whereas the liquidator indicated that the company was never worth more than £50 million. The Thornton debt arose from guarantees provided by the respondent although proof of the guarantees was not provided. Barbara Hollywood is the wife of the respondent and is an

“associate” of the respondent under Article 4 of the 1989 Order and under Rule 5.21 the votes of associates should be excluded.

[12] The status of a creditor is a matter for the chairman of the creditor’s meeting (Rule 5.20(4)) and the chairman’s decision is subject to appeal to the court by any creditor or by the debtor (Rule 5.20(5)). If the chairman is in doubt about the creditor he should allow the creditor to vote and mark the vote as objected to (Rule 5.26). If on appeal the creditor’s vote is declared invalid the court may order another meeting if there has been unfair prejudice or a material irregularity (Rule 5.20(7) and (8)). There was no appeal by any creditor or the debtor in the present case.

[13] In Debtor (No 259 of 1990) reference was made to the creditors remedy by way of a petition for bankruptcy. A creditor bound by a voluntary arrangement may petition for a Bankruptcy Order under Article 238(1)(c) of the 1989 Order and an Order will be made if the Court is satisfied that information was false or misleading in any material particular or contained material omissions (Article 2(51)). In the present case the debtor is an undischarged bankrupt and the Bankruptcy Order has not been annulled.

[14] Any irregularity in the vote of Barbara Hollywood was not material as it would not affect the outcome, as was the position in Debtor (No 259 of 1990).

[15] Accordingly the status of the specified creditors does not amount to material irregularity for the purposes of Article 236(1)(b).

[16] The Official Receiver’s second ground of material irregularity concerns false and misleading particulars and omissions from the information furnished to the creditors by the respondent. This includes the following irregularities alleged by the Official Receiver-

- (a) Undisclosed bank accounts. The respondent’s draft modified proposal discloses six additional creditors with claims totalling £82,000. The Official Receiver has identified additional accounts with Lloyds Bank, Barclays Bank, HSBC, Bank of Ireland and the Ulster Bank in Dublin.
- (b) Undisclosed personal possessions with a suggested value of £3 million. The possessions referred to (with the respondent’s reply in brackets) are as follows:-
 - a private house valued at £400,000 (owned by the respondent’s wife);
 - a yacht at £85,000 (owned by a company);
 - 100 acres of land at Newry at £250,000 (denied);

- a house and 56 acres at £185,000 (mortgaged to the Bank of Ireland);
- two cars at £120,000 (the first subject to finance, the second sold to the respondent's wife);
- house contents of £460,000 (insured by the respondent's wife);
- a holding in Innova Precision Writing Points Limited £1.3million(a company that never traded).

The respondent described the list of assets as a "mere puff" that did not represent his financial position. No adequate explanation was forthcoming in relation to these assets.

- (c) The absence of particulars concerning payments to the DAT 1990/1 Trust, that may affect the ability of the trust to provide the funds for the arrangement. The proposal at the creditors' meeting was for a voluntary contribution of £150,000 (which it is now proposed to increase to £235,000) to fund the arrangement. The respondent was the settlor of the trust and a trustee who resigned in October 2001 and the Official Receiver has questioned the basis on which funds are to be made available for the benefit of the respondent. The trust received funds from Hollyshaw Investments Limited in 1997 by way of repayment of debt and that company is now in liquidation and in the absence of proof of the loan the Official Receiver states that the liquidator and creditors of the company would have a prior call on the funds from the DAT 1990/1 Trust which may impact on the provision of funds for the voluntary arrangement.
- (d) The omission of particulars concerning debts and credits relating to other companies. The shares in Fibrepoints Limited are owned by the respondent and the company is in liquidation. The respondent claims to be a creditor of the company to the extent of £235,000 (which was not disclosed in the proposal). The assets of Fibrepoints were sold to Emchem Limited and the respondent has been advised that as director of Fibrepoints he would be liable to account for a debt Emchem Limited may be unable to pay (although the respondent may not have been aware of his potential liability).
- (e) The respondent has not disclosed his interest in Allfibres Plc and Du Pont Group Holding Limited.

[17] I am satisfied that by reason of the non-disclosure of information to the creditors as set out above there were material omissions from the

respondent's proposal which amounted to material irregularity in relation to the creditors' meeting. Accordingly the approval given at the meeting may be revoked or suspended under Article 236(4)(a) of the 1989 Order. The respondent proposes to modify the proposal to creditors and as that course of action will be facilitated the suspension of the creditors' decision is not appropriate. Accordingly revocation is ordered of the approval given at the creditors' meeting of 8 January 2002.

Further it is necessary to give directions to the nominee/supervisor for the summoning of a further meeting of creditors to consider the modified proposal from the respondent.

[18] The Official Receiver submits that in advance of any further meeting of creditors the respondent should be subjected to a public examination to ascertain the full extent of his assets and liabilities and that the results of the public examination should be submitted to the creditors' meeting. Public examination is a feature of bankruptcy proceedings and it is not appropriate to transplant that procedure into the investigation of voluntary arrangements. There are separate schemes for bankruptcy and arrangements and the latter involves a moratorium on other proceedings. The Official Receiver provides a valuable service in his ongoing involvement in voluntary arrangements and that includes the exercise of his powers of investigation of the debtor's proposal. With the Court having control over the voluntary arrangement and the bankruptcy the need for further investigation of the debtor in the present circumstances is a matter that the creditors ought to decide. However in order to make that decision the creditors must have the necessary information. The Court may give directions designed to inform the creditors of the position before they make a decision on the modified proposal. Accordingly I do not accede to the application for a public examination.

[19] It is necessary to give supplemental directions as to the mechanism whereby full information will be provided to the creditors so that they might make an informed decision as to any proposed voluntary arrangement.

- The respondent to prepare a modified proposal, to include all the matters required by Rule 5.04.
- A copy of the modified proposal to be served on the supervisor and the Official Receiver within 7 days of the Order herein.
- A copy of the supervisors comments to be served on the respondent and the Official Receiver 7 days after receipt of the modified proposal.
- A copy report of the Official Receiver to be served on the respondent and the supervisor 7 days after receipt of the supervisors comments. The report should contain such details relevant to the modified proposal and the supervisors comments as the Official Receiver may determine.
- The supervisor to serve notice of creditors meeting at least 14 days in advance together with copies of the respondent's modified proposal, the supervisors comments and the Official Receiver's report.

- The rules for the holding of creditors meetings to apply.

[20] It is ordered that the decision of the creditors' meeting of 8 January 2002 be revoked and directions are given for the holding of a further creditors' meeting as set out above. Further, the application for public examination of the respondent is refused, the application to annul the Bankruptcy Order is refused and the application for a stay of advertising is granted.