Neutral Citation No: [2018] NICh 25	***Ref:*** **McB10803**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	***Delivered:*** **19/12/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

BETWEEN:

THE DEPARTMENT OF FINANCE

Petitioning Creditor/Respondents;

-and-

BARRY McGILLION

Debtor/Appellant.

_____

McBRIDE J

Applications

[1] There are two applications before the court namely:

(1) An appeal by Barry McGillion lodged on 13 June 2018 against the order of Master Kelly dated 6 June 2018 when she ordered that he be adjudicated bankrupt and

(2) An appeal against the decision of Master Kelly dated 27 July 2018 when she dismissed Mr McGillion's application for the bankruptcy order to be annulled.

[2] The Department of Finance and Land and Property Services (Rating) ("the Department") was represented by Mr Dunford of counsel. Mr McGillion, the appellant, appeared as a litigant in person.

Evidence before the court

[3] Both appeals were supported by affidavits sworn by Mr McGillion on 13 June 2018 and 25 June 2018. The affidavits are identical in their content. His affidavit sworn on 13 June 2018 stated as follows:

> "2. I have made a mistake by not attending court to defend this claim … I ask this right honourable court to afford me the opportunity to correct my mistake.
>
> 3. I now formally make an offer to make payment in full in respect of this bill.
>
> 4. I make an application for the bankruptcy order to be annulled on receipt of my payment."

[4] Ms Maureen Gray, solicitor in the Office of the Crown Solicitor for Northern Ireland swore an affidavit on 8 November 2018 setting out the chronology of proceeding. She averred that despite Mr McGillion's sworn admissions that the petition debt was due the debt and associated costs remain unpaid.

Factual background

[5]

(a) The Department obtained decrees in Strabane Magistrates' Court against Mr McGillion for unpaid rates on 10 July 2014, 8 October 2015 and 10 November 2016 in respect of property at 139 Glenelly Road, Plumbridge, County Tyrone.

(b) Mr McGillion did not appeal the said decrees.

(c) The Department served a statutory demand on Mr McGillion demanding payment of the amount due on foot of the decrees plus costs totalling £5,612.31.

(d) Mr McGillion failed to comply with the statutory demand and at no stage made any application to have the statutory demand set aside.

(e) The Department issued a bankruptcy petition based on Mr McGillion's failure to meet or set aside the statutory demand. The petition was issued on 20 December 2017 and was initially fixed for hearing on 25 April 2018. As a result of a typographical error in the spelling of Mr McGillion's address the Department sought and was granted leave to amend the petition and re-serve it. The petition was then fixed for hearing on 6 June 2018. On that date the Master granted the bankruptcy order.

(f) On 13 June 2018 Mr McGillion lodged a Notice of Appeal against the bankruptcy order on the grounds of "mistake" and "offer to pay". This was supported by his affidavit sworn on 13 June 2018.

(g) The appeal was listed before the Chancery Court on 21 June 2018 and adjourned to allow Mr McGillion an opportunity to obtain legal advice and representation.

(h) On 25 June 2018 Mr McGillion applied to the Master for rescission of the bankruptcy order. This application was grounded on an affidavit dated 25 June 2018 which was in exactly the same terms as his earlier affidavit. This case was listed and adjourned to 22 July 2018 to enable Mr McGillion to seek legal advice and representation.

(i) When the matter was relisted Mr McGillion attended court with Mr Scullion who acted as his McKenzie Friend. According to the affidavit of Ms Gray, solicitor, Mr McGillion on that date tried to pass an unopened envelope to the Master. The Master refused to look at the contents because Mr McGillion refused to allow Ms Gray to view the contents in the envelope. Thereafter Mr McGillion indicated that he would not discuss any matter except in "a private court". When asked to state the grounds of the application he said that he had discharged the debt by way of "an equitable asset". Ms Gray informed the Master that the debt had not been discharged or satisfied in any way and the Master then dismissed Mr McGillion's application.

(j) On 31 July 2018 Mr McGillion lodged a Notice of Appeal against the Master's order dismissing his application to rescind the bankruptcy order.

(k) The two appeals were listed before the Chancery Court on 13 September 2018. On that date as a result of discussions between the parties Mr McGillion requested that the court make a validation order to enable him to pay the petition debt and costs from one of his bank accounts. A validation order was necessary as his bank accounts had been frozen due to the making of the bankruptcy order. The court granted a validation order in principle but asked Mr McGillion to provide details of his bank account to enable the order to be perfected.

(l) As a result of Mr McGillion's failure to provide bank details the case was listed for review on 14 November 2018. Mr McGillion attended with Mr Scullion. Mr McGillion asked that Mr Scullion act as his McKenzie Friend. The court reminded him that a McKenzie Friend had to be appointed by the court and that there was no automatic right to have one. The court further advised that an application for a McKenzie Friend to be appointed could be refused if the court considered that it was not in the interests of justice to appoint the named person as a McKenzie Friend. The court advised Mr McGillion that he should therefore make some enquiries in respect of Mr Scullion

and in particular should enquire whether he had been a party in similar court proceedings. At that point Mr McGillion did not pursue his application to have Mr Scullion appointed as a McKenzie Friend. Mr McGillion continued to refuse to provide details of his bank account and stated that he had "tendered payment" by way of sending "cash" by special delivery to the presiding judge. Upon further questioning it transpires that when he stated he had tendered payment by way of sending cash to the judge by special delivery he was referring to two draft validation orders upon which he had marked as follows:- "ACCEPTED FOR VALUE AND RETURNED FOR VALUE FOR SETTLEMENT AND CLOSURE EXEMPTION # JA330123D DATED: 22 October 2018 by- barry vincent (signed) Barry McGillion". On the second draft copy of the validation order he marked at the top of the draft order, "VOUCHER/COUPON/MONEY ORDER PAY TO THE ORDER OF …" and at the bottom of this document he had written "Signed by Drawer: barry vincent signed Barry McGillion AR".

Hearing on 5 December 2018

Submissions by the parties

[6] Mr McGillion attended court with Mr Scullion. He made no formal application for Mr Scullion to act as his McKenzie Friend and accordingly he appeared as a litigant in person without the assistance of a McKenzie Friend although Mr Scullion sat directly behind him in the court. Mr McGillion made the following submissions to the court:

> "(a) I am settler, Barry Vincent, doing business as Barry McGillion, or any derivative of commercial title of 139 Glenelly Road, Plumbridge, County Tyrone.
>
> (b) I rebut and disclaim the affidavit of Maureen Gray dated 8 November 2018 and the Department's submissions dated 22 November 2018.
>
> (c) I have tendered payment way of promissory note as defined by Bills of Exchange Act 1882 Section 83(1), (2) and (3)."

Mr McGillion then referred the court to a passage in Chitty on Contracts at paragraph 30.036 and stated:

> "The judge is the holder in due course. My note has been dishonoured therefore the plaintiff has lost course to recourse."

[7] Mr Dunford on behalf of the Department relied on his written submissions dated 19 November 2018. In these Mr Dunford submitted that Mr McGillion's submission that the draft orders marked by him constituted "cash" or "payment of the debt" was simply "the peddling of illegal nonsense". He submitted that Mr McGillion had failed to pay the petition debt and costs and accordingly there were no grounds upon which the bankruptcy order should be set aside or annulled and consequently he submitted that the appeals should be dismissed as they were without merit.

Consideration

[8] The power of the High Court to make a bankruptcy order is governed by Article 245 of the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order"). It provides as follows:

> "(1) The High Court shall not make a bankruptcy order on a creditor's petition unless it is satisfied that the debt, or one of the debts, in respect of which the petition was presented is either—
>
> (a) A debt which, having been payable at the date of the petition or having since become payable, has been neither paid nor secured or compounded for, or
>
> (b) A debt which the debtor has no reasonable prospect of being able to pay when it falls due.
>
> …
>
> (3) The High Court may dismiss the petition if it is satisfied that the debtor is able to pay all his debts or is satisfied—
>
> (a) That the debtor has made an offer to secure or compound for a debt in respect of which the petition is presented,
>
> (b) That the acceptance of that offer would have required the dismissal of the petition, and
>
> (c) That the offer has been unreasonably refused;

> and, in determining for the purposes of this paragraph whether the debtor is able to pay all his debts, the Court shall take into account his contingent and prospective liabilities.
>
> (4) In determining for the purposes of this Article what constitutes a reasonable prospect that a debtor will be able to pay a debt when it falls due, it is to be assumed that the prospect given by the facts and other matters known to the creditor at the time he entered into the transaction resulting in the debt was a reasonable prospect."

[9] In *Fulton v AIB Group (UK) Plc* (unreported) the court held as follows at paragraphs [29] and [30]:

> "[29]…it is now well established that the Bankruptcy scheme set out in the 1989 Order, provides that questions as to the existence of the debt at the date of the presentation of the petition, and any cross-claim, are intended to be dealt with on an application to set aside the statutory demand — that is to say, before the petition is presented. It is therefore incumbent on the debtor, at the statutory demand stage, to raise any defences or cross claims he may have. It is therefore, I find, contrary to the intention of Parliament, having put this bankruptcy scheme in place in the 1989 Order, for the court to consider disputes as to the existence of the debt and any cross claim at the bankruptcy petition stage, save in exceptional circumstances.
> ….
>
> [30] Consequently, failure to apply to set aside a statutory demand or an unsuccessful attempt to do so, conclusively determines the liability of the debtor to pay the debt demanded by the creditor. …"

[10] On the basis of the evidence of Maureen Gray, solicitor and the admissions made by Mr McGillion in both his affidavits and before the court I am satisfied that Mr McGillion is liable to pay the debt on which the bankruptcy petition is based. The debt has not been paid, or secured or compounded for. Accordingly, I dismiss the appeal and affirm the bankruptcy order made by the Master.

[11] In the second appeal Mr McGillion seeks to have the bankruptcy order annulled. The power of the High Court to annul a bankruptcy order is governed by Article 256 of the 1989 Order. It provides as follows:

> "(1) The High Court may annul a bankruptcy order if it at any time appears to the Court—
>
> (a) That, on any grounds existing at the time the order was made, the order ought not to have been made, or
>
> (b) That, to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the Court.
>
> (2) The High Court may annul a bankruptcy order whether or not the bankrupt has been discharged from the bankruptcy."

[12] Mr McGillion was offered the opportunity to pay the petition debt and associated costs and to that end the court agreed to make a validation order to allow payment from one of his bank accounts for this purpose. Unfortunately, Mr McGillion failed to provide bank details and therefore this order could not be perfected and accordingly no payment was made from his bank account to satisfy the debt.

[13] I am further satisfied that Mr McGillion has not otherwise paid the bankruptcy debt and expenses. His submissions to this court that his markings on the draft validation orders, as set out at paragraph 5 (l) above, amounted to cash payment or otherwise payment of the debt, is, I find, "a legal nonsense". I accept Ms Gray's evidence that the petition debt and costs have not been paid or satisfied in any way to date. Accordingly, I am satisfied that the grounds for annulment set out in Article 256 have not been met and I therefore dismiss the appeal to annul the bankruptcy order.

[14] Under Article 371 of the 1989 Order the court also has a general power to review, vary or rescind any order it makes. Whilst this is a wide power, Chadwick LJ in *Re RS and M Engineering Company Limited* [1999] 2 BCLC 485 at 492 noted as follows:

> "… The exercise of the power should be confined as a matter of discretion to cases in which there has been some change in circumstances (which may perhaps include the consideration of material of which was

> not previously before the court) since the original order was made – see the observations of Millet J in *Re A Debtor* [1993] 2 All ER 991 at 995."

[15] I am satisfied that there has been no change of circumstances since the making of the original order. No additional materials have been brought to this court's attention. I am satisfied that there are no other grounds upon which I should exercise my discretion to vary, rescind or review the original bankruptcy order and accordingly I refuse to vary, rescind or review the original bankruptcy order.

Conclusion

[16] This is a case in which the court offered Mr McGillion several opportunities to deal with this matter in a sensible and pragmatic manner and in accordance with the legal framework set out in the 1989 Order. The court sought to facilitate him in paying the debt by agreeing in principle to make a validation order. Unfortunately, Mr McGillion, instead of availing of the opportunities afforded to him, chose instead to take the advice of Mr Scullion, who is well-known to these courts as a sovereign man. As a consequence Mr McGillion proceeded to pedal legal nonsense before this court. This is most regrettable as Mr McGillion now finds himself declared bankrupt, with all the consequences which flow from that as a result of his failure to pay what is a modest debt and one which it appears he would have been in a position to discharge.

[17] I will hear the parties in respect of costs.