Neutral Citation No: [2018] NIMaster 7

Ref:	2018NIMASTER7

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered:	22/06/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

_____

16/090769 & 16/090482

BETWEEN:

ULSTER BANK LIMITED

Applicant

-and-

MICHAEL ADRIAN TAGGART & JOHN DESMOND TAGGART

Respondents

MASTER KELLY

Introduction

[1] By Ordinary Applications filed on 28th April 2017, the applicant seeks the following relief:

> "(i) A declaration that the erroneous ruling of the Chairman of a Creditor's meeting that the debt purportedly owed to Messrs Lampolski, Sauer and McCann would be admitted for voting purposes constitutes a material irregularity in the meeting of creditors held on Thursday 9 March 2017.
>
> (ii) An Order giving a direction of the Chairman of the Creditor's meeting for the summoning of a further meeting of the creditors to reconsider the proposal made at the meeting on Thursday 9 March 2017.

(iii) An order giving a direction that the Chairman should rule that the debts of Messrs Lampolski, Sauer, and McCann should be excluded for voting purposes.

(iv) All necessary and consequential directions.

(v) Costs."

[2] Rule 5.20 ("the rule") of the Insolvency Rules (Northern Ireland) 1991 ("the rules") governs voting rights at creditors' meetings. The rule also provides a right of appeal from decisions made about voting by the chairman of the meeting. The rule provides:

> " (1) subject to paragraphs (3) to (8), every creditor who was given notice of the creditors' meeting is entitled to vote at the meeting or any adjournment of it.
>
> (2) In Case 1, votes are calculated according to the amount of the creditor's debt as at the date of the bankruptcy order, and in Case 2 according to the amount of the debt as at the date of the meeting.
>
> (3) A creditor shall not vote in respect of a debt for an unliquidated amount, or any debt whose value is not ascertained, except where the chairman agrees to put upon the debt an estimated minimum value for the purpose of entitlement to vote.
>
> (4) The chairman has power to admit or reject a creditor's claim for the purpose of his entitlement to vote, and the power is exercisable with respect to the whole or any part of the claim.
>
> (5) The chairman's decision on entitlement to vote is subject to appeal to the court by any creditor, or by the debtor.
>
> (6) If the chairman is in doubt whether a claim should be admitted or rejected, he shall mark it as objected to and allow the creditor to vote, subject to his vote being subsequently declared invalid if the objection to the claim is sustained.
>
> (7) Subject to paragraph (8), if on an appeal the chairman's decision is reversed or varied, or a creditor's vote is declared invalid, the court may

> order another meeting to be summoned, or make such other order as it thinks just.
>
> (8) The court's power to make an order under paragraph (7) is exercisable only if it considers that the matter is such as to give rise to unfair prejudice or a material irregularity.
>
> (9) An application to the court by way of appeal under this Rule against the chairman's decision shall not be made after the end of the period of 28 days beginning with the day on which the chairman's report to the court is made under Article 233.
>
> (10) The chairman is not personally liable for any costs incurred by any person in respect of an appeal under this Rule.

[3] The applications are appeals under the rule. They were heard on 29th May 2018. Mr Hopkins appeared for the applicant and Mr McCausland for the respondents. I am grateful to counsel for their helpful oral and written submissions. As the appeals are identical this judgment applies to both, and should be read and interpreted accordingly.

Background

[4] On 27th September 2016, the applicant presented bankruptcy petitions against each of the respondents. The amount due on foot of the petitions is £6,416,438.36 and arises from judgment entered against the respondents by Mr Justice Burgess on 4th July 2016.

[5] Upon service of the petitions, the respondents consulted a licensed insolvency practitioner with a view to proposing an IVA with all of their creditors. According to their statements of affairs, they are indebted to some fifteen creditors in the total sum of £213,551,001.08.

[6] On 27th January 2017, interim orders were granted to facilitate a meeting of the respondents' creditors for the purposes of voting on the respondents' IVA proposals. The proposed dividend payable to creditors in the IVAs is £0.03p in the £ as opposed to no anticipated dividend in the event of bankruptcy.

[7] The creditors' meeting took place on 9th March 2017. The voting was contentious and controversial. Of the fifteen creditors disclosed in the respondents' statements of affairs, a total of eleven voted on the respondents' proposals. Those eleven claims total £155,925,984.22 in value. They include the three claimants who are the subject of these appeals. All three claimants voted in respect of debts allegedly due on foot of personal guarantees given to them by the respondents. At the meeting, the applicant objected to each of them being admitted for voting. Simply put, the

applicant alleges that the debts asserted by the three claimants ("the disputed claims") are specious and/or statute-barred.

[8] On the basis of the materials and representations before him, the chairman decided to admit all three contentious claims to vote on the proposals but marked the claims as disputed. The three claimants voted in favour of the IVAs and the applicant voted against them.

[9] The respondents' IVA proposals did not achieve the requisite statutory majority of creditors approving the proposed IVAs and consequently they were rejected.

[10] Although the present appeals were filed out of time, delay was minimal and no obvious prejudice caused so time was duly extended.

What is the scope of the appeal?

[11] The parties' respective skeleton arguments show that while they agree that the applicant has the burden of proof in these appeals, they fundamentally disagree on the nature of the case which the applicant is required to make and the appropriate standard of proof. The respondents argue that the applicant is required to prove that the debts are plainly bad. The applicant argues that the court should closely analyse the three disputed claims and (it is implied) rule on their legitimacy on the balance of probabilities. Clearly, these are two very different positions.

[12] In order to consider the scope of the appeal, it is important to look carefully at the application of the rule. In Re a debtor (No 222 of 1990), ex parte the Bank of Ireland and others [1992] BCLC 137 (cited with approval by Weatherup J in Official Receiver –v-Thompson [2002] NICh 10) Harman J considered the scope of the English equivalent of the rule. He said at 145:

> "In my judgment the scheme of the meeting rules….is quite plainly a simple one. As one would expect the meeting is not the place to go into lengthy debates as to the exact status of a debt, nor is it the time to consider such matters as this court, sitting as the Companies Court, frequently has to consider as such whether a debt is bona fide disputed upon substantial grounds, an issue which leads to a great deal of litigation and frequently takes a day or so to decide. None of that could possibly be a suitable process to be embarked upon at a creditors' meeting.
>
> The scheme is quite clear. The chairman has the power to admit or reject; his decision is subject to appeal; and if in doubt he shall mark the vote as objected to and allow the creditor to vote. That is easily carried out upon the basis advanced by Mr Moss QC, Mr Mann and Mr Trace. It provides a simple clear rule for the chairman, not a lawyer,

> faced at a large meeting with speedy decisions necessary to be made to enable the meeting to reach a decision. On that basis the chairman must look at the claim**;** if it is plain or obvious that it is good he admits it, if it is plain or obvious that it is bad he rejects it, if there is a question, a doubt, he shall admit it but mark it as objected."

He continued at 146:

> "…that the provisions of the rule and that the provisions elsewhere show that voting at the meeting is a matter for the rules a departure from which is truly an irregularity".

[13] Thus, a creditor is not to be deprived of his right to vote unless his claim is plainly or obviously bad. This is the only basis upon which a claim may be rejected and excluded from voting under the rule. Consequently, unless the chairman of the meeting of 9th March 2017 considered the claims to be plainly or obviously bad, the only decision he was empowered to make in view of the applicant's dispute was to admit them to vote and mark them objected to. As this is the decision under appeal, the applicant's case can only be that the disputed claims should have been rejected as plainly bad and thus excluded from voting.

[14] It follows then that in order for the applicant to obtain the relief sought it must prove (i) that the disputed debts are plainly and obviously bad and (ii) that the chairman's decision to admit them for voting gave rise to a material irregularity or unfair prejudice in the matter. In my judgment, that means that the standard of proof with which the applicant is faced cannot be on the balance of probabilities. The words "plainly" and "obviously" denote a much higher standard of proof and one which leaves the court with no room for doubt. If the applicant cannot discharge that burden of proof then the court's power to grant the relief sought is not exercisable under the rule. That is the scope of this appeal.

[15] Thus the question for the court to decide is whether the applicant has discharged its burden of proof.

Consideration

[16] In considering the answer to that question, I have taken into account all the available evidence submitted in the case. That evidence includes affidavits from the applicant, the respondent, and the chairman of the meeting. The chairman's affidavit also exhibits the materials before him at the relevant time including documentation and emails provided by or on behalf of the three claimants, as well as correspondence from the applicant's solicitors outlining the nature of their disputes. I have also considered the first respondent's oral evidence. While I do not consider that that oral evidence was necessary, it did provide the applicant with an

opportunity to cross examine him and to do so robustly. However, I found that the short cross–examination which took place elicited no evidence that proved the disputed debts to be plainly bad. Taking all that evidence into consideration together with the written and oral submissions of counsel, I have concluded that the answer to that question is no. In reaching that conclusion, I also consider that there were in any case a number of impediments to the applicant succeeding in these appeals.

[17] The first impediment is that the court is no more empowered under the rule to investigate, analyse or adjudicate upon disputed claims than the chairman of the meeting. Nor is it empowered to do so elsewhere under the rules. The relevant case law is clear that in the case of a disputed insolvency debt the court's power under the rules is limited to considering whether the subject debt is disputed on substantial grounds. The same authorities are also clear that in those circumstances, the substance of the dispute should be tried out by action (see: Moore v Commissioners of Inland Revenue [2002] NI 26; Allen –v- Burke Construction Ltd [2010] NICh9, [2011] NIJB 62; Sheridan Millennium Ltd –v- Odyssey Property Company [2003] NICh7) – the question of the applicant's locus standi in any such action notwithstanding.

[18] The second impediment is that the applicant is a stranger to the three claims it disputes and whose votes it objects to. It has little or no factual knowledge about them so its case is founded on suspicion.

[19] The third impediment is that the applicant did not believe that it was required to prove that the disputed claims are plainly bad and so never set out to make that case.

[20] The fourth impediment relates to the applicant's claim that some or all of the three disputed debts may be statute–barred. That particular issue is immaterial. An IVA is a voluntary process. It is also a statutory process. That statutory process obligates the debtor to make full disclosure, on oath, of all creditors to whom he is indebted (see: Official Receiver–v-Thompson [2002] NICh 10). A debt which is statute-barred is still a debt. The creditor's rights of legal redress may be compromised in those circumstances but the debt itself is not expunged.

[21] The final impediment is that the applicant accepts that the rejection of the three disputed votes would not have affected the outcome of the meeting on 9th March 2017. Therefore, even if an irregularity had occurred in the chairman's decision to admit them to vote, the irregularity would not have been material.

Conclusion

[22] For the reasons given, I find that the applicant has not proved that the three disputed debts are plainly and obviously bad. Accordingly, the relief sought by the applicant is hereby refused. I will now hear counsel on the question of the bankruptcy petitions and any other applications arising.