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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

BRIAN F WALKER, TRUSTEE IN BANKRUPTCY OF MICHAEL GERALD McKAY AND GERARD JOSEPH DALRYMPLE

Applicant;

and

THE FIRST TRUST BANK

Respondent.

DEENY J

[1] This is a matter which comes before the court on the application of Brian Walker, trustee in bankruptcy of Michael Gerald McKay and Gerard Joseph Dalrymple. It came before the court by way of a summons of 11 November 2010 seeking directions in regard to his rights and obligations as trustee in bankruptcy in respect of certain lands on which the First Trust Bank, as it is described in one title but I think more correctly Allied Irish Bank plc, have a mortgage. There were certain areas in the original summons which Mr Mark McEwen, who subsequently was instructed in the matter, at the commencement of his attractive argument on behalf of the trustee, asked the court to amend and I have allowed that today without objection from Mr Richard Smith who appears for AIB Group (UK) Plc. I am obliged to both counsel for their helpful written and oral arguments. As Mr McEwen expresses it in his amended summons, directions are being sought pursuant to Article 276(2) of the Insolvency (Northern Ireland) Order 1989 on certain consequential matters.

[2] Mr Walker was appointed trustee in bankruptcy herein on 24 April 2009. He invited creditors to submit proofs of debt. The Bank, as I shall refer to it, did submit such a proof of debt. It is undated on the face of it. It appears to be on or about 21 May 2009 which can be seen to be quite promptly after Mr Walker's appointment and following his letter of 13 May 2009 to the First Trust Bank in Coleraine informing them of his appointment.

[3] The crux of the matter is as follows. The Bank was in the position that it had advanced a substantial sum of money to these two men who were builders. At the time of the affidavit of Mr Patrick Keown, solicitor for the Bank, a sum of money owing on the principal account was £212,158, that's at 24 January 2011, and can be seen to include a measure of interest. The Bank had secured this principal loan by way of a first legal charge over four sites and work in progress at Church Road, Rasharkin, which I believe is in County Antrim. It is right to say that they also had a much smaller debt owing on a Visa account and an even smaller debt owing on a current account. The Bank could have ignored these two smaller amounts as is clear on the authorities and simply held to their secured position. In doing so, of course, especially at this early stage of the bankruptcy, they would not be in a position of recovering any money if it transpired that the value of the security was less than their debt, but there was otherwise a dividend payable in the bankruptcy. The authorities are clear that it is quite permissible for a creditor in that position to put in a proof of debt, see for example Whitehead v Household Mortgage Corporation Plc [2003] BPIR 1482, a decision of the Court of Appeal in England and in particular the remarks of Lord Justice Chadwick at paragraphs 24 and 25.

[4] The crux of the matter here is the proof of debt which they did submit. At paragraph 10 they were required to submit:

> "Particulars of any security held, the value of the security and the date it was given."

and they answered:

> "Legal charge over four sites to the rear of 11 Church Road, Rasharkin comprised in Folio AN161768 County Antrim, registered in the names of Michael Gerald McKay and Gerard Joseph Dalrymple. The charge executed on 14 December 2007. The current value that of a plot of land due to utilities issue."

[5] There was subsequent correspondence to show that this related to a sewerage discharge difficulty affecting the site. It can be seen that the loan was made or certainly the charge was executed probably just after the height of the property market here and in subsequent events these two builders became bankrupt. Their

interest in their homes is the subject of separate litigation before the Chancery Division of the High Court, but is not relevant to this application before me.

[6] Now, what the applicant, Mr Walker, is putting before the court is the proposition that by filling in the proof of debt form in this way the Bank has forfeited the benefit of its security over these four sites at Rasharkin and they have done so because they have not complied with the requirement set out in the form, that is the proof of debt form, required under the Insolvency Rules 1991, as amended, to state the value of the security, and in his submission it is not only that he invites the court's direction to rule on this point that they are, therefore, in breach of that Rule but that the consequences of that Rule is that they have surrendered the security.

[7] For completeness I observe that for some reason that is not before the court, and Mr McEwen is unable to help with, an assistant solicitor in Mr Walker's office wrote on 6 August 2009 sending a copy of proof of debt for completion and return to their office and the Bank then did respond and their response was terser than the first proof. It seems to me the documents they sent in then are of no legal effect. It was not appropriate to ask them for these further proofs. They already had submitted a proof and these documents seem to me otiose and I don't propose to address them further.

[8] The applicant draws to the court's attention certain Rules under the Insolvency Rules which relate to the proof of debts in a bankruptcy. Those Rules themselves are made on foot of the Insolvency Order 1989 (Northern Ireland (as amended) and in particular Article 295 thereof which says that a proof of debt in a bankruptcy shall be in accordance with the Rules. It's worthwhile noting that that is the route of the concern here raised by the applicant and that there is no express Article in the Insolvency Order saying that a secured creditor will lose its security if it fails to comply with the Rules made under the Order.

[9] Then turning to the Rules helpfully opened by Mr McEwen the first relevant Rule is to be found at the second Chapter 8 in these rather complex Rules under the rubric Proof of Bankruptcy Debts, Section A - Procedure for Proving; Meaning of "Prove". 6.094, so far as relevant, reads as follows:

> "(1) A person claiming to be a creditor of the bankrupt and wishing to recover his debt in whole or in part must (subject to any Order the court under Rule 6.090(2)) submit his claim in writing to the Official Receiver, where acting as receiver or manager, or to the trustee.
>
> (2) The creditor as referred to as 'proving' for his debt; and the document by which he seeks to establish his claim is his 'proof'.

> (3) Subject to paragraphs (4), (5) and (6), the proof must be in the form known as 'proof of debt' (whether the form prescribed by the Rules, or a substantially similar form), which shall be made out by or under the directions of the creditor and signed by him or a person authorised in that behalf."

[10] It is not necessary for me to continue that quotation over paragraphs (4), (5) and (6) of Rule 6.094. Mr McEwen draws attention to the word "must" in the first paragraph there and in the third paragraph, "the proof must be in the form known as 'proof of debt'" i.e. Form 6.40 or a substantially similar form. The Bank in fact didn't expressly use Form 6.40 but counsel sensibly accepts that it was substantially similar and no point turns on that.

[11] We then turn to Rule 6.096 headed "Contents of Proof". I observe that that Rule has been amended since the original enactment of these Rules so that the provision relied on by counsel is no longer 6.096(1)(g), but 6.096(1)(e) and that Rule provides:

> "Subject to Rule 6.094(4), the following matters shall be stated in a creditor's proof of debt and that includes -
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> (a) the creditor's name and address …;
>
> (b) the total amount of his claim ….;
>
> (c) whether it includes interest …;
>
> (d) particulars of how and when the debt was incurred; and
>
> (e) particulars of any security held, the date when it was given and the value which the creditor puts upon it;"

[12] Now, the point here is a simple one as Mr McEwen says, that the Bank as creditor did not put the value of its security in its proof of debt. It was in breach of this Rule. Now, it might be argued that it was giving a sort of valuation i.e. that the land is worth what the land is worth subject to or due to this utilities issue, but it seems to me that Mr McEwen has made out his case that that is not an acceptable fulfilment of the obligation of value. He submits that some monetary value must be placed on the security which is held. This is important for the proper conduct of the bankruptcy. The trustee is trying to establish what the debts of the bankrupt are and

what assets are available to meet that bankruptcy. He is entitled, according to the Rules, to know whether the debt owing on foot of the charged property accedes that charge or is less than that charge. If, for example, as is stated in the original proof that there was £196,430 owing on the secured debt but that the value of the lands were twice that that would point to him being able to pay a dividend to other unsecured creditors in due course. So it is important for the proper conduct of the bankruptcy that a valuation is put in. Equally well if the creditor now finds that for some reason its security is virtually worthless it's as well that the trustee knows that early on so that further sums are not expended on what might then be a bankruptcy in which no dividend will ever be paid.

[13] I have some sympathy with the Bank. I wish to make it clear that I do not think that a creditor is obliged to provide a professional valuation of any security which it chooses to prove in these circumstances nor, in fairness, did Mr McEwen suggest that they are. What they are obliged to do by the Rule is to put the value "which the creditor puts upon it". It is nothing more than that and is to give some rough estimate. I don't think any trustee could object if the valuation was prefaced by circa or approximately or perhaps even put in a range of values to the best of the creditor's ability. But I find that some valuation, more than was stated here, ought to have been submitted and the Rules themselves, I think, support that because there is provision later in the Rules for a creditor to amend the value that it has put on the security and that would appear, to my mind, to support the view that there is an original valuation put on the lands.

[14] So what follows, therefore, from this error on the part of the Bank in completing the proof of debt? The applicant invites the court to consider that the error which he was apprehensive of and which, therefore, he had to bring before the court may lead to the consequence that the Bank has thereby surrendered its security and there is a passage in *Fletcher on The Law of Insolvency*, *Third Edition*, at paragraph 9057 which gives support for that, but we must look at what the Rule actually says and what the Rule says is as follows. Paragraph (1) as I've just mentioned says that "a secured creditor may at any time alter the value which he has put upon a security". Paragraph (2) is not applicable. Rule 6.113(1) reads as follows:

> "If a secured creditor omits to disclose his security in his proof of debt he shall surrender his security for the general benefit of creditors, unless, the court, on application by him, relieves him from the effect of this Rule on the ground that the omission was inadvertent or the result of honest mistake."

[15] And at this point I have to say I part company with the applicant. The words of that Rule seem to me quite clear. If he omits to disclose his security he shall be deemed to surrender it. As has been said the mischief that is sought to be avoided by these provisions in the Rules is of a secured creditor who seeks to prove in the

bankruptcy as an unsecured creditor in the hope of receiving a dividend without disclosing that he himself has a security over some part of the lands disclosed in the bankruptcy or conceivably some other part, some other lands of the bankrupt not disclosed by him. But it is disclosure that is sought and the words are quite clear it seems to me that the secured creditor who "omits to disclose his security" shall indeed surrender the security, but the words of the Rule do not say "If a secured creditor omits to disclose his security or the value of the same" he shall surrender his security. Nor does the Rule provide that: "If a secured creditor omits to properly and fully disclose his security he shall surrender ..". He has to disclose his security, but the failure to specify a value for the security does not in my view lead to the surrender of the security. It would be remarkable if it were otherwise. As Mr Smith says it's a draconian remedy to inflict on a creditor and it would be most surprising if it was the intention of the legislature or those making the Insolvency Rules that a mere clerical error on the part of a Bank official in completing the proof of debt could lead to the Bank losing its security. I find that it does not do so.

[16] That being the case it seems right just to mention some other matters. Support is given for the first view which I expressed about the need to express value in *Stroud's Judicial Dictionary of Words and Phrases, Seventh Edition, Volume 3* at page 293(5). Mr Smith quotes one sentence in the text book *Fletcher* saying in effect that the sanction for failing to disclose the value of your securities is that of being wholly or partly excluded from participation in the dividend. Mr McEwen points out that the learned author goes on to say as follows:

> "This sanction may be imposed by the court upon the application of the trustee in bankruptcy and it, therefore, behoves a secured creditor to pay special attention to the detailed provisions of the Insolvency Rules and to observe them meticulously."

[17] I am encouraged in the view which I had formed on reading the papers and which has been further elucidated by the hearing this morning which has allowed me to give judgment immediately, but I am encouraged by the decision of Mr Justice David Clarke in C&W Berry Limited v Armstrong-Moakes & Anor [2007] EWHC 2101 Queen's Bench 2007 BPIR 1199. In that case, the facts of which I think I need not go into in detail, the creditor had a charge or order dating from 1992 which the widow of the debtor wanted to discharge and she took amongst other points that they had failed to provide a valuation of their security in the original proof of debt form. Now, despite that and despite the fact, as appears from the learned judge's judgment that they made no subsequent reference to it either in the course of the bankruptcy proceedings, he found on Rules very similar to ours that the creditor could not be taken to have surrendered or waived its security on foot of that. More was required. That case is in favour of the creditor here.

[18] I think it's also my duty to say, because it's relevant to a decision I'll have to make in a moment, that I have to express some surprise about the applicant's approach here. It is true to say that it is perhaps worth elucidating the point that value should be a monetary value for the purposes of the Insolvency Rule in question, but it's really hard to see how the applicant could argue or even invite the court to think that the court could properly hold that the creditor here had surrendered his security. Partly that is because he must always have known that, as I've already read out, 6.113 allows the court to grant relief from the effect of the Rule relating to the omission to disclose security "on the ground that the omission was inadvertent or the result of honest mistake", as is manifestly the case that the omission here to provide valuation was, indeed, inadvertent or the result of an honest mistake i.e. that they thought it was proper to express it in the way that they did and the court would inevitably have granted that relief in my view and for the avoidance of doubt I state that.

[19] But furthermore in the very full affidavit of Mr Keown, on behalf of the Bank, attention is drawn to the subsequent dealings between the Bank and Mr Walker. He was sent the Title Documents in question on 10 July 2009 following correspondence from Mr Walker and the Bank carefully stated in their letter with the documents: "These Title Documents are being sent to you on the basis that you will hold same on behalf/to our order". That was the basis on which Mr Walker received them. I find it a surprising contention that he would then be at liberty to argue as a trustee in bankruptcy on behalf of the unsecured creditors that in fact the Bank had surrendered its security.

[20] There is some question about the redemption figure which Mr Smith relied on, but I accept the submission that the letter about that is not inconsistent with simply asking for an up-to-date state of the debts. But there was further correspondence between the parties relating to house sales and house sales were being discussed and certainly there is nothing in that from Mr Walker to suggest that he believed that the Bank had surrendered their security or might have been construed as having done so. On the contrary, on 7 July 2010 the Bank wrote saying:

> "We are agreeable to properties being sold on the basis that as first charge holders we are cleared in full or receive full net sale proceeds before any other distributions or costs."

[21] They had also paid the insurance premium on the properties in question. They apparently partly completed some of the properties. And when the applicant wrote on 19 October saying: "You have decided to prove in the bankruptcy as an unsecured creditor and, therefore, I will have to seek the court's direction" the Bank replied saying that: "At no time have we advised that we wished to prove in the bankruptcy as an unsecured creditor". So for this and the other reasons set out in the affidavit of Mr Keown I do have to express some surprise that the applicant felt it necessary to bring this application for directions before the court.

[22] Now, to return to the amended summons at paragraph (a)(1) of the amended summons I am asked:

> "(1) Whether the proof of debt submitted on behalf of the respondent have (sic) the effect of a surrender of any security which the respondent might hold over certain of the assets of the bankrupts.

I rule it does not have the effect of surrender of any security.

> (2) Whether the proof of debt submitted on behalf of the respondent complies with the requirements contained in Rule 6.096 and if the proof does not so comply in respect of the valuation of the security whether the respondent can rely on its security.

I rule that the proof does not comply with Rule 6.096, but nevertheless the respondent can rely on its security both on a proper interpretation of Rule 6.113 and because any error was inadvertent.

> (3) In the premises whether the applicant is to treat the respondent as a secured or an unsecured creditor for the purposes of any distribution

The applicant is to treat the respondent as a secured creditor in respect of its secured debt and an unsecured creditor in respect of its unsecured debts.

> (b) Such further or other order subject to counsel."

[No order as to costs was made].