Neutral Citation: [2015] IEHC 718

THE HIGH COURT

BANKRUPTCY

[1229P BANKRUPTCY]

IN THE MATTER OF

A BANKRUPTCY PETITION BY

MICHAEL GLADNEY,

COLLECTOR GENERAL OF THE REVENUE COMMISSIONERS, SARSFIELD HOUSE,

FRANCIS STREET,

LIMERICK.

THE COLLECTOR GENERAL ON BEHALF OF THE MINISTER FOR FINANCE, FOR THE BENEFIT OF THE CENTRAL FUND.

PETITIONER

AND

P. O'M.

DEBTOR

JUDGMENT of Ms. Justice Costello delivered on 20th day of November, 2015.

Facts

1. This case involves a lengthy history between the Collector General and P. O'M. ("the debtor") going back to 1988. The debtor tax payer fell into arrears in respect of taxes and ultimately the Collector General (whom I shall refer to as "the petitioner" which expression includes his predecessors in title) instituted proceedings and obtained judgment against the debtor as follows:-

Record No.	Date of Judgment	Judgment Sum
1999/293R	04/07/2001	€292,018.02
2001/391R	14/03/2002	€147,450.68
2002/572	11/10/2002	€20,246.58
Total		€459,715.28

2. The petitioner caused bankruptcy proceedings to issue against the debtor under record number 2003/401P claiming the total amount due as of the date of the Petition was €496,555.58.

3. The petitioner and the debtor settled the bankruptcy proceedings by terms reduced to writing on 5th February, 2004, and which are referred to in these proceedings as the 2003 Agreement. The Agreement provided as follows:-

> *"[w]e hereby confirm that the following terms of settlement of the above matter have been agreed between the Petitioner and the Debtor:*
>
> *1. €150,000 payable by bank draft by the Debtor to Matheson Ormsby Prentice, solicitors for the Petitioner, ("MOP"), on or before 28 October 2003;*
>
> *2. Monthly payments of €5000 by the Debtor to MOP as and from 28 November 2003, each cheque to be payable on 28th of the month thereafter, until the balance of the tax liability (€150,587.35) has been discharged in full, at which time the interest payable will be reviewed;*
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> *3. Legal costs of €8,500 to be paid by the debtor to MOP on or before 28 October 2003;*
>
> *4. There will be no moratorium placed on the interest due from the date of the judgment, and once the balance of the tax liability in the sum of €150,587.35 has been discharged in full, the Petitioner will review the interest due;*
>
> *5. Provided the Debtor makes payment as per the terms of paragraph 2 above, the Petitioner will waive all interest due from the date of settlement (being 31 October 2003). However, should the Debtor breach the terms of paragraph 2 above, all interest will become immediately due and payable including interest due from the date of settlement, subject to such credits as will be allowable in respect of payments already made.*
>
> *6. The bankruptcy petition will be struck out of the bankruptcy list with liberty to re-enter immediately should the Debtor fail to make payment on time of any of the instalments referred to in paragraph 2 above." (Emphasis added)*

4. It is common case that the debtor discharged the sum of €309,087.35 pursuant to the 2003 Agreement. There were some occasions when the payments of €5,000.00 were delayed and the sum of €2,198.76 was applied as a credit rather than as a payment.

5. The debtor fell into arrears in respect of current tax liabilities and the petitioner issued two further sets of High Court proceedings under record numbers 2006/427R and 2006/559R respectively.

Record No	Date of Judgment	Judgment Debt

2006/427R	07/06/2007	€123,530.13
2006/559R	08/03/2007	€18,070.75
Total		€141,600.88

6. The petitioner elected not to seek any further interest on the judgment debts the subject of the 2003 Agreement after 31st October, 2003. However, he sought to recover the outstanding interest which was due on those debts up to 31st October, 2003, which came to a total of €136,190.99. By letter dated 27th February, 2007, the petitioner's solicitors wrote to the debtor's solicitors noting that the petitioner had reviewed all five cases in detail and that, according to the petitioner's records, there was still a substantial amount of interest outstanding in respect of the three older judgments. The letter set out that the interest up to 31st October, 2003, amounted to €136,190.99 and that the sums then due in respect of cases bearing record numbers 2006/427R and 2006/559R amounted to €125,545.13 and €20,085.75 respectively. The letter stated that the petitioner was prepared *"strictly without prejudice, to allow [the debtor] a period of 18 months in which to discharge this liability in full. [€281,821.87]"*

7. The letter concluded by stating:-

> *"[p]lease note that should these terms not be agreed and payments subsequently maintained strictly on time, we will be instructed to institute Bankruptcy Proceedings against [the debtor] in respect of the full balance outstanding at that time."*

8. The debtor's solicitors replied on 14th March, 2007, with a counter offer. The terms offered were not clearly set out. However, it appeared that the debtor was offering to pay €22,614.63 in respect of interest accrued on the older judgments and to pay in full over time the amount claimed in the proceedings brought in 2006. In other words he was refusing to pay the interest in the sum of €113,576.36 which related to the case bearing record number 1999/293R.

9. Unfortunately, in reply, the petitioner's solicitors wrote as follows:-

> *"Our client has confirmed that they are prepared, strictly without prejudice, to accept your client's proposal to discharge the outstanding liability as set out in our letter dated 27 February 2007…"*

In fact it would appear that the debtor never proposed to discharge the liability set out in the petitioner's solicitors' letter of 27th February, 2007, and has always disputed the liability sought of €113,576.36. It would appear that neither firm of solicitors appreciated the fact that the parties were not *ad idem* because they each proceeded on the basis that their offer had been accepted. In these proceedings each party referred to this exchange of correspondence as the 2007 Agreement, though in fact there was no agreement between the parties.

10. It is not disputed that the debtor made a number of payments from June, 2007 until June, 2010. In his replying affidavit of 3rd December, 2014, the debtor exhibits 26 receipts (dated from 13th June, 2007, to 16th August, 2010) from the petitioner in respect of these payments which total €135,689.00. Each of these receipts shows clearly how the payment was treated by the petitioner. Every single one of them was credited towards interest and the receipts clearly show the periods in respect of which the interest was credited. It is absolutely clear from documents furnished by the debtor that the petitioner set these receipts off against interest claimed against liabilities from as far back as May, 1987. Specifically, the payments were credited against the interest liabilities he had not agreed to repay in his solicitors' counter offer of 14th March, 2007. At no stage did the petitioner claim that the amounts were being misapplied or that an agreement had been reached whereby the petitioner had waived his right to recover the interest sought as set out in the letter dated 27th February, 2007.

11. The petitioner stated that the debtor had agreed to pay the full sum claimed in the letter of 27th February, 2007, but that he had failed to comply with the terms of the Agreement in that certain of the promised payments were dishonoured and certain other payments were not made within the timeframe agreed and that he ceased payments in respect of the balance of his outstanding liabilities on or about 21st July, 2010. This left a shortfall according to the petitioner in the sum of €144,107.24. In essence therefore the petitioner maintained that the debtor failed to adhere to either the 2003 Agreement or the so called 2007 Agreement.

12. The petitioner served Particulars of Demand and Notice Requiring Payment upon the debtor on 18th February, 2014, calculating the sum then alleged to be due and owing by the debtor to the petitioner as of 13th February, 2014, in the sum €550,614.14. It was accepted that this represented an over statement of €899.35 due to an error in the calculation of the interest due in respect of proceedings bearing record number 1997/293R which had been part of the 2003 Agreement.

13. A bankruptcy summons issued on 19th May, 2014, claiming the sum of €550,614.14. The sum was again calculated as of 13th February, 2014, and reproduced the figures set out in the Notice of Demand.

14. The face of the Summons stated:-

> *"[y]ou are especially to note:-*
>
> *That the consequences, which will follow any neglect to comply with the requisitions contained in the summons, are that you may be adjudged a bankrupt on a petition of bankruptcy being presented against you by the said Michael Gladney.*
>
> *If, however, you are not indebted to the said Michael Gladney in any sum, or you are only indebted to Michael Gladney in a sum of €20,000.00 or less, you must apply to the Court to dismiss this summons within fourteen days after service of this summons on you, by filing in the Examiner's Office, Four Courts, Dublin 7, an Affidavit in the prescribed form (Form 6, Appendix O of the Rules of the Superior Court), stating that*
>
> *(a) you are not so indebted, or only so indebted to an amount of €20,000.00 or less or*
>
> *(b) before service of this summons upon you, you had obtained the protection of the Court or had compounded or secured for the debt to the satisfaction of the said Michael Gladney and on your applying to dismiss the summons a date will be fixed for the hearing of your application."*

The Bankruptcy Summons was personally served upon the debtor on 29th May, 2014, and no payment was made in respect of the sums claimed.

15. In due course, the petitioner issued the Petition herein on 17th July, 2014, returnable for 10th November, 2014. The Petition and the Affidavit of Debt were served upon the debtor on 23rd September, 2014.

16. On 10th November, 2014, the Petition was adjourned and on 3rd December, 2014, the debtor swore an affidavit seeking an order extending the time in which to apply to dismiss the Bankruptcy Summons and an order dismissing the Bankruptcy Summons. In the alternative, he also sought to resist the Petition to adjudicate him a bankrupt.

17. When the matter came on for hearing before me, I had to determine whether or not time should be extended in which to seek to dismiss the Bankruptcy Summons; if time was extended, whether the Bankruptcy Summons should be dismissed; and if the Bankruptcy Summons was not dismissed, whether or not the debtor should be adjudicated a bankrupt on foot of the Petition.

Application to extend time

18. Counsel on behalf of the debtor submitted that the Court had jurisdiction to extend the time fixed by the Rules in which to bring an application to dismiss a bankruptcy summons. This was not contested by counsel for the petitioner. It was submitted that by analogy the Court should apply the principles as enunciated in *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] I.R.170 and the variation of the principles as set out by the Supreme Court in *Goode Concrete v. CRH plc & Ors* [2013] IESC 39 in the judgment of Clarke J.

19. It seems to me that the analogy between an appeal from a judgment or order and an application to dismiss a bankruptcy summons is misconceived. A judgment or order is binding upon the parties and may be acted upon (on the assumption that there is no stay). A bankruptcy summons, on the other hand, is a procedural step which is taken by a creditor with a view to establishing an act of bankruptcy on the part of the debtor. It is a prelude to the presentation of a petition for the adjudication of bankruptcy of a debtor. It does not amount to a judgment (thought it is frequently is based upon previously obtained judgments). Crucially, a debtor is entitled to raise arguments in relation to the validity of a bankruptcy summons at the hearing of a petition by way of defence to a petition. In that sense, a debtor who is served with a bankruptcy petition and who fails to apply to dismiss it within the 14 days allowed under the Rules of court for such application is not precluded from raising those points at a later stage in the proceedings ie at the hearing of the petition. This is fundamentally different, in my opinion, to an appeal against any existing order or judgment. If no appeal is brought, there will be no further opportunity afforded to the would-be appellant to raise the issues which he may seek to raise by way of appeal.

20. Furthermore, because a bankruptcy summons is part of a procedure designed to lead to a hearing on foot of a petition in bankruptcy, the question of the efficient utilisation of court time is relevant to deciding whether or not to extend the time in which to allow a hearing to take place on the dismissal of a bankruptcy summons when the same arguments can be advanced in relation to the petition to adjudicate the debtor a bankrupt.

21. I do not accept that it is appropriate to apply the principles in relation to extending time to appeal a decision of a court as enunciated in *Eire Continental* and *Goode Concrete* to an application to extend the time to dismiss a bankruptcy summons. In my opinion, the Court has a general discretion and the differences between an appeal and an application to dismiss a bankruptcy summons are relevant to the exercise of that discretion.

22. In this case I am not persuaded that the debtor has advanced good grounds upon which I should exercise my discretion to extend the time permitted by the Rules to bring an application to dismiss the Bankruptcy Summons. The onus rests on him to do so. While I accept that the debtor was experiencing ill health, he had quite clearly been experiencing this for some considerable time and it had not prevented him from practising his profession during that time. Furthermore, the Bankruptcy Summons clearly states on its face that the application to dismiss the Bankruptcy Summons must be brought within 14 days from the date of the service of the Summons upon the debtor. This was not the first time the debtor had been served with a bankruptcy summons. The debtor is in practice as an accountant. No real explanation was afforded as to why he delayed from 28th May, 2014, to 3rd December, 2014, in applying to dismiss the Bankruptcy Summons. In view of the fact that he will be allowed to raise by way of defence to the Petition to adjudicate him bankrupt those arguments which he wishes to present in support of his application to dismiss the Bankruptcy Summons, I cannot see that he would be in any way prejudiced by my refusal to extend the time in which to allow him to bring this application. Accordingly, I dismiss the application to extend the time to seek to dismiss the Bankruptcy Summons.

Defence to the Petition

23. The debtor argues that the Bankruptcy Petition should be dismissed. He submits that the petitioner had failed to take into account the terms of the 2003 Agreement and the so called 2007 Agreement. He says that the amount claimed in the Bankruptcy Summons and in the Petition is grossly overstated. He says that the sum of €128,075.00 was incorrectly applied towards interest and that the balance due in respect of the five judgments the subject of the Petition is €101,545.48. He therefore says that he did not commit an act of bankruptcy by failing to pay the sum of €550,614.14 as claimed in the Bankruptcy Summons. He submits that the two Agreements were enforceable and that he complied substantially with the terms of each of the Agreements. Insofar as there was a failure to comply with the Agreements, he acknowledges that there were some slight delays in the payments but says no objection was taken at the time and the full amount that he agreed to pay was paid by him. He therefore says that the sums now claimed are not due and owing or in the alternative that the petitioner is estopped from alleging that the sums are due and owing. In addition, it was argued that there was an error in the calculation of the amount due in the Notice of Demand of 18th February, 2015, whereby the petitioner overstated the claim by the sum of €899.35. The debtor urges that it is well settled law that an act of bankruptcy is not committed when a debtor fails to pay the sum claimed in a bankruptcy summons if the sum claimed is greater than the amount actually due and owing by the debtor to the creditor.

Decision

24. Despite the fact that both the petitioner and the debtor believed that there was an agreement in 2007, I am of the opinion that in fact that there was no agreement. It seems to me that the correspondence shows that the solicitors for the petitioner and debtor each asserted that their respective offers had been accepted. This was clearly not the case. Crucially, in my opinion, in respect of each payment made by the debtor from 2007 onwards the petitioner issued receipts. Each of these receipts clearly indicates that the monies were being credited against interest which, on the debtor's case, it had been agreed would not be sought by the petitioner. There has been no explanation at all as to why this matter was not immediately raised by the debtor at the time. At the very least it made clear that the petitioner had not agreed to waive the interest in respect of the three older judgments the subject of the Bankruptcy Summons and Petition and which he claimed in the letters of 27th February, 2007.

25. Furthermore, even if there had been an arrangement entered into for the staged payment of the sums due, the Agreement itself is not enforceable. The debtor offered no consideration in exchange for the waiving of the interest to which the petitioner was entitled. The recent decision of the Court of Appeal in *Harrahill v. Swaine* [2015] IECA 36 is on point and is binding upon me. In that case the Collector General sought summary judgment against the tax payer in respect of arrears of income tax, PAYE, PRSI, VAT, CGT and CT

together with interest in respect of the period from 2004 to 2012. In defence, the tax payer said that he had entered into a binding repayment agreement in 2011 whereby the Revenue Commissioners had agreed to forebear in issuing proceedings against him in respect of his then outstanding liabilities on terms which included a requirement that he would arrange his tax affairs such that his liability would cease to increase. He asserted that he had compiled with the terms of the Agreement. The trial judge concluded that the defendant on his own evidence had not acted in compliance with that Agreement but he referred the matter to plenary hearing in respect of an undertaking which he considered could be argued to be separate from the repayment agreement.

26. The Court of Appeal held that nothing was promised by the tax payer beyond the payment at a later date of a liability which he already admitted was outstanding. The Court accepted the submissions of counsel for the Collector General based upon the decisions of *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd*.[1996] 1 I.R. 12, *Re Selectmove Ltd.* [1995] 2 All E.R. 531 and *The Barge Inn Ltd. v. Quinn Hospitality Ireland Operations 3 Ltd.* [2013] IEHC 387 that a promise to pay a sum or part of a sum which the debtor is already bound by law to pay to the promisee cannot afford the consideration necessary to render enforceable an agreement regarding the payment of that debt. The Court considered the judgment of the English Court of Appeal in *Re Selectmove Ltd* and it noted at para. 51 that:-

> *"…the Court of Appeal concluded that the company's promise to pay its existing liabilities by instalments and its future debts as they fell due could not constitute consideration for the agreement advanced by the company, notwithstanding what the company submitted was the practical advantage to the Inland Revenue of such an agreement, given that it was likely to recover more from the company by adopting this approach than by putting the company into liquidation. Accordingly, even if the company's offer had been accepted, the agreement was unenforceable for what of consideration."*

27. In *Truck and Machinery Sales Ltd. v. Marubeni Komatsu Ltd.*, Keane J. stated at p. 28:-

> *"[i]t has been settled law since the decision of the House of Lords in Foakes v. Beer (1884) 9 App. Cas. 605 that a promise to pay part of a debt is not good consideration in law. Its applicability in circumstances such as the present was considered by the English Court of Appeal in Re Selectmove Ltd. [1995] 2 All E.R. 533, where a company claimed that it had come to an arrangement with the Revenue as to the payment of arrears. The Court of Appeal unanimously held that it was bound by the decision in Foakes v. Beer to reject the argument that a promise to pay a sum which the debtor was already bound by law to pay to the promisee could afford any consideration to support the contract."*

28. Finally, the Court of Appeal cited the decision of Laffoy J. in The *Barge Inn Ltd. v. Quinn Hospitality Ireland Operations 3 Ltd.* as follows:-

> *"58. Lefroy C.J. in his judgment delivered in 1858 outlined the common law principle as follows (at p.110):*
>
> *'… the principle of the Common Law, which is, that payment merely of a less sum, when it is what we may call a parol payment or payment in fact, and not a payment in pursuant of a contract by deed, cannot, by the Common Law, be deemed to be any satisfaction whatsoever of a greater liquidated sum; but the law will allow the payment of a smaller sum to be a satisfaction of a greater liquidated sum, if there be, along with the payment of the smaller sum, any collateral advantage, however small, attending the transaction.'…*
>
> *62. It is beyond question that the rule in Pinnel's Case still represents the law in Ireland and this Court is bound by it, although the introduction of a new element into the relationship of the debtor and creditor, such as the collateral advantage to the creditor, may remove the relationship from the scope of the rule."*

29. These cases are binding upon me and the law has been settled for a very considerable length of time. It is apparent that no collateral advantage whatsoever was offered by the debtor to the petitioner. The arrangements therefore were not legally enforceable. There was no consideration. In his defence, the debtor has not asserted that any collateral advantage was offered or accepted. It follows that the debtor has not established that the sums claimed in the Bankruptcy Summons were not due and owing. Therefore the failure to pay on foot of the Bankruptcy Summons amounts to an act of bankruptcy and the petitioner was entitled to petition for the debtor's bankruptcy.

30. Separately, the debtor argued that the sum claimed in the Notice of Demand of 18th February, 2014, was overstated by €899.35. He alleged that it was also overstated in the Bankruptcy Summons. He argued that he was not obliged to pay a sum claimed in a bankruptcy summons if it claimed more than was due and owing to the creditor. The petitioner submitted that as of the date of the issue of the Bankruptcy Summons the debtor was undoubtedly indebted to the petitioner for a sum well in excess of the sum demanded, €550,614.14, as the petitioner had obtained further judgments against the debtor and which sums were not claimed as part of either the particulars of demand or in the bankruptcy summons.

31. On 24th February, 2014, the petitioner obtained judgment against the debtor in the sum of €118,240.41. On 19th March, 2014, he obtained a judgment against the debtor in the sum of €14,333.93. Subsequent to the issue of the Bankruptcy Summons the petitioner obtained judgment against the debtor on 9th June, 2014, in the sum €22,795.29 in respect of VAT liabilities from 1st July, 2013, to 31st December, 2013, together with interest thereon, calculated up to 19th February, 2014. Finally, on 11th August, 2014, the petitioner obtained judgment against the debtor in the sum of €26,181.22 in respect of Income Tax from 2012 and PAYE and PRSI from 2013.

32. It is thus clear that as of 19th May, 2014, the date of the issue of the Bankruptcy Summons, the sum due by the debtor to the petitioner was considerably more than the sum claimed €550,614.14. Following the Supreme Court decision in *Murphy v. Bank of Ireland* [2014] IESC 37 and the decision of this Court in M.G. v. K.M. [2015] IEHC 43, it is clear that the Bankruptcy Summons is therefore valid and the debtor has committed an act of bankruptcy in failing to pay on foot of the Bankruptcy Summons within the time allowed.

33. Finally, the debtor argued that the petitioner was estopped from contending that the interest on the arrears in respect of the three older judgments would not be sought on the basis of the alleged 2007 Agreement. I am satisfied that the debtor has not advanced any grounds which could give rise to an equitable estoppal in this case. On the contrary, he has exhibited receipts from 2007 to 2010 which clearly indicate that he either knew or ought to have known that the petitioner had not waived the interest. He either knew or ought to have known that the petitioner was crediting the payments he was making against that interest. In those circumstances he did not challenge the petitioner's entitlement to deal with the payments in the way they were treated. The first occasion when he sought to challenge the right of the petitioner to seek to recover this interest was when he delivered his affidavit of 3rd December, 2014. I reject this defence to the Petition to adjudicate him a bankrupt.

Conclusion
34. I am in a position to determine these matters of law in these proceedings. This case does not raise an issue which is required to be resolved elsewhere such as occurred in the case of *The Minister for Communications, Energy and Natural Resources v. M.W.* [2010] 3 I.R. 1.

35. I refuse the application to extend the time in which to apply to dismiss the Bankruptcy Summons herein and I dismiss the application to dismiss the Bankruptcy Summons on the basis that it was brought very considerably later than the time allowed for the bringing of such an application under the Rules. I reject the debtor's arguments that the Petition should be dismissed. There was no agreement whereby the petitioner waived his right to collect the interest due on foot of the outstanding judgments the subject matter of this Petition. If I am in error in that regard, the Agreement is unenforceable for want of consideration. The petitioner is not estopped from pursuing the interest claimed in the Petition. The sum claimed in the Petition was not greater then the debtor's indebtness at the time of either the Notice of Demand, the Bankruptcy Summons or the Petition.

36. I will adjourn the petition to allow the debtor time to submit a statement of affairs and a letter from a Personal Insolvency Practitioner setting out whether any of the alternatives to bankruptcy as set out in s. 14(2) of the Bankruptcy Act 1988, as amended, are applicable.