Neutral Citation Number [2008] IEHC 250

**THE HIGH COURT**
**BANKRUPTCY**

**6545 S**

**BETWEEN**

**GERARD HARRAHILL**

**PLAINTIFF**

**E. C.**

**DEFENDANT**

**Judgment delivered by Ms. Justice Dunne on the 21st day of July 2008**

1. The applicant herein is the Collector General and this is his application for liberty to issue and serve a bankruptcy summons. It appears that a number of judgments were obtained by the plaintiff's predecessor in the office of Collector General, Liam J. Irwin, against the defendant herein. In all, the Collector General obtained six judgments against the defendant between the 4th April, 1996 and the 30th November, 1998. The judgments amounted in total to a sum of €88,180.06. Particulars of demand were served on the defendant on the 29th January, 2008.

2. No execution order in respect of the judgments has been filed and accordingly there is no return of *nulla bona*. An application for a bankruptcy summons was previously made by the plaintiffs predecessor and was refused by this Court on the 9th May, 2005. On that application, the requirement for a *nulla bona* was challenged by the plaintiff in those proceedings and legal argument was heard. Following legal argument, judgment was delivered refusing the application for a summons. The decision was appealed to the Supreme Court, but was struck out on the 17th December, 2007, on the application of the plaintiff. It appears that the matter was struck out before the Supreme Court, because the plaintiff in those proceedings, Liam Irwin, had ceased to be the Collector General prior to the hearing of the matter in this Court. Subsequently, the new Collector General issued these proceedings. In that way, the matter has now come back before the court whereby the present Collector General seeks leave to issue and serve a Bankruptcy Summons. Unfortunately, given the nature of the application, there was no *legitimus contradictor* to oppose the arguments of the plaintiff herein.

3. Insofar as this application involved the same arguments as were previously relied on by the plaintiff herein, namely that it was not necessary to have a return of *nulla bona* before the issue of a bankruptcy summons, my view remains the same and I do not propose to set out the arguments on that point or to repeat what was stated by me in the judgment delivered in the earlier proceedings. Suffice to say that the same arguments were referred to and so far as the points made in respect of that matter were concerned, my decision remains the same.

4. The question at the heart of this application is whether the plaintiff should have to comply with the practice of the High Court to the effect that a plaintiff will not be allowed to issue a bankruptcy summons unless a judgment has been obtained and unless there is evidence to show that the plaintiff has sought to execute the judgment and has been unsuccessful as demonstrated by a return of a *nulla bona* by the Sheriff. The issue of a bankruptcy summons is provided for in s. 8(I) of the Bankruptcy Act 1988, ("the Act") which states as follows:-

> "A summons (in this Act referred to as a 'bankruptcy summons') may be granted by the Court to a person (in this section referred to as 'the creditor') who proves that:
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> (a) a debt of £1,500 or more is due to him by the person against whom the summons is sought,
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> (b) the debt is a liquidated sum, and
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> (c) a notice in the prescribed form, requiring payment of the debt, has been served on the debtor."

5. The practice of this Court has been that a return of *nulla bona* has to be produced to the court on the *ex parte* application for the issue of the bankruptcy summons in order to demonstrate that the creditor has attempted execution against the goods of the debtor. As I pointed out in the course of the ruling previously made by me herein:-

> "Obviously there may be cases in which a return may not be available and there may be good reason notwithstanding the practice note for the court to grant a summons. No such reason has been put forward in the present case."

6. These proceedings have been commenced by the new Collector General on foot of an affidavit of bankruptcy of Gerard Harahill sworn herein on the 21st February, 2008. In that affidavit, no reason was given as to the failure to obtain a return of *nulla bona* and to explain why in the absence of a return of *nulla bona*, the bankruptcy summons should issue. The approach of the plaintiff herein has been to assert that the statutory requirement under s. 8(1) of the Act has been complied as have the Rules of the Superior Courts and that in those circumstances the court has no discretion as to the issue of the summons.

7. The submission on the part of the plaintiff herein is that the use of permissive language such as "may" in a legislative provision means that the statute confers an enabling power rather than a mandatory duty. Reference was made to Hogan and Morgan on *Administrative Law in Ireland*, (3rd Ed. 1998), pp. 438 to 439 in which the authors state:-

> "There exists an important exception to this general rule in cases where a statutory body is given a discretionary power coupled with the duty to exercise this power in a particular way in prescribed circumstances. In other words, there are cases in which, when applied to action of an administrative character, 'may' means, in effect, 'must' . . ."

8. For example, in *Bakht v. Medical Council*, Griffen J. rejected the submission that s. 27(2) of the Medical Practitioners Act, 1978, conferred a discretion and held that the subsection imposed a statutory duty on the Council to make such rules. The subsection provided for the registration of certain categories of doctors who have passed such examinations "as are specified in rules made by the Council". Likewise in *R. (Local Government Board) v. Guardians of the Letterkenny Union*, it was held that the provisions of s. 10 of the Vaccination (Amendment) Ireland Act, 1879 were mandatory. This section provided that the guardians of any union "may direct proceedings" to be instituted for the "purpose of enforcing obedience" to the Vaccination Acts. The Letterkenny Union, apparently deferring to local opinion, had taken no action against some 290 defaulting parents, claiming that in doing so they were exercising bona fide a discretion conferred by the Act. Cherry L.C.J. said:-

> "It is settled law that provisions in a statute merely of a permissive character may impose a duty [and] it has been held

that where a statute directs anything to be done which is for the public good, words of permission may be construed as mandatory in their operation. The background to the Act, coupled with the provisions of the expense of the proceedings to be paid out the rates, indicated that the legislature intended that a duty should be imposed 'upon the guardians of enforcing the provisions of the Act in all proper cases'".

9. It was further submitted that the principle "may" sometimes mean "shall" applies not just to statutory bodies but also to courts. Counsel relied on the case of in *Re. Thomas J. Dunne, Applicant* [1968] I.R. 105 in support of this proposition. In that case the applicant held a licence for the sale of intoxicating liquor in his hotel. He wished to install a public bar. Section 19(2) of the Intoxicating Liquor Act 1960, stated that it shall be lawful to have a public bar in a hotel if the District Court has made an order pursuant to subs. (1) of that section. Subsection (1) provided that the District Court "may order" the extinguishment of an appropriate seven day licence if an applicant shows to the satisfaction of the court that he has procured the consent of the holder thereof to its extinguishment. Having complied with that requirement he duly applied to the District Court for an order but his application was refused because a similar application by the applicant in respect of the same seven day licence had already been refused by the High Court in other proceedings on the ground that there was no evidence of a demand by the public for a public bar in the hotel. He appealed that refusal to the Circuit Court and a case was stated by the Circuit Court judge for determination by the Supreme Court. It was held by the Supreme Court that:-

> "Where a statute employs the words 'may order' to confer on a court jurisdiction, subject to the fulfilment by a defined applicant of certain statutory conditions precedent, to make an order which would result in the applicant acquiring a right or benefit by the provisions of the statute, the said words should be construed as imposing on the court an obligation to make such order once the court is satisfied that those conditions have been fulfilled by the applicant."

10. At p. 114 of the judgment Walsh J. stated:-

> "It is to be noted that, in the case of persons availing themselves of the provisions of subs. 1 of s. 19 of the Act of 1960, the application is made to the District Court and there is no provision for the giving of notice to any person or persons. It would appear from the provisions of the section that the application is made ex parte and may be made at any sitting of the District Court for the court area in which the hotel is situated. Both of these matters, namely, the absence of the obligation to give notice to any person and the fact that the application may be made at any sitting, rather than at annual licensing sessions, are in sharp contrast to applications made for new licences or for the renewal of existing licences. A person availing of the machinery provided by subs. 3 of s. 19 would, in the first instance, make his application to the Circuit Court for the simple reason that it is the court of first instance for the making of applications for certificates entitling the holder to receive a hotel licence. But again no provision is made in the Act of 1960 for the giving of notice to any person. What is required to be shown by the applicant in either the District Court or the Circuit Court, as the case may be, is that either he is the holder of the seven day licence in question or that he has procured the consent of the holder to the extinguishment thereof. When the court in question is so satisfied then, in the words of the statute, it 'may order that the ordinary seven day licence be extinguished'. The immediate question is whether the use of the word 'may' here imports any discretion or whether it should be construed as being mandatory."

11. Walsh J. continued at p. 116:-

> "It is a well-recognised canon of construction, as Lord Cairns said in *Julius v. Lord Bishop of Oxford* 5 App. Cases, 214, 225, that:
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> > 'where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.'

12. At p. 244 of the report Lord Blackburn said:

> 'The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right.'"

13. He went on at p. 117 to state:-

> "In my view this canon of construction is applicable to the present case. Section. 19 quite clearly exists for the benefit of persons holding hotel licences. If such holders comply with the requirements of the section they can obtain the right to have a public bar. The section provides the matters upon which the court must be satisfied before such right can arise. The section does not make any provision for the consideration of any other matters by the court in question upon such an application, or for the consideration of the views of any other person or persons upon the application. The requirements of the section also produce the result that in any such case the number of licensed premises in the State is reduced by one. It has been the consistent policy of the Licensing Acts since the year 1902 to limit, and in many cases to effectively reduce, the number of licensed premises in the State. Apart from s. 19 of the Act of 1960, the same result in reducing the number of premises is also achieved by the provisions of s. 13 of that Act. Having regard to the general policy of the Acts and the requirements of obtaining new licences, it is remarkable that in this section the Oireachtas has made no provision whatever for the giving of notice to the hearing of objections. This, in my view, is a very strong indication that the extinguishment of the licence in applications under s. 19 of the Act of 1960, was not intended to be a matter of discretion. This was also emphasised by the fact that such an application could be made at any sitting of the District Court.
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> . . .
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> In my view, when one has regard to the context in which the use of the word `may' appears in s. 19, and when one has regard to the object of the section and to the fact that the persons to benefit from the section are clearly identified, to the absence of requirement as to notice, to the absence of any reference to objections and to the informality of the procedure, one cannot but conclude that the correct construction of the section is that, upon the giving of the proofs required by the section in the particular case, there is no discretion in the court to decline to make the order sought, namely, that the ordinary seven day licence in question be extinguished. I am, therefore, of opinion that in the High Court Mr. Justice Henchy did not have the discretion which he purported to exercise and could not refuse the order sought upon the grounds which he gave. It follows, therefore, that this refusal cannot be a bar to an application on the part of the applicant under subs. 1 of s. 19 of the Act of 1960, and cannot be raised as a bar to his present application. . . ."

14. According to the submission of the plaintiff, there is a striking similarity between the facts of the Dunne case and the facts of the present case. Counsel set out the matters that must be complied with in accordance with the Act and the Rules of the Superior Courts on an ex parte application for leave to issue a bankruptcy summons namely, there must be:-

> (1) A debt of IR£1,500 or more due to the creditor by the person against whom the summons is sought;
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> (2) The debt is a liquidated sum;
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> (3) A notice in the prescribed form requiring payment of the debt must be served on the debtor;
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> (4) Such notice must set out particulars of the debt due and require payment within four days after service thereof on the debtor;
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> (5) The bankruptcy summons must be in the form prescribed in the Rule;
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> (6) The bankruptcy summons must
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> > (a) require the debtor within fourteen days after the service of the summons upon him, to pay the debt to the creditor or to secure the payment of the debt to the satisfaction of the creditor or to compound the debt to the satisfaction of the creditor and (b) state that in the event of the debtor failing to pay the sums specified in the summons or to secure or compound for to the satisfaction of the creditor, such default should be an act of bankruptcy;
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> (7) The creditor must, not earlier than four clear days after he has served a notice requiring payment file in the proper office a copy of the notice, together with an affidavit of the truth of his debt made by himself or by any other person who can swear positively to the facts verifying the truth of his debt, and that no form of execution has issued in respect of such debt and remains to be proceeded upon, and shall lodge with the proper officer any bills, notes, guarantees, contracts, judgments or orders referred to in his affidavit together with the summons which it is proposed to issue;
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> (8) Where the debt or any part thereof is for money lent by a money lender or interest or charges in connection with it, the affidavit must contain a statement of the date on which a copy or note or memorandum in writing of the contract made pursuant to s. 11 of the Moneylenders Act 1933, was delivered or sent to the borrower and a statement showing in detail the particulars mentioned in s. 16(2) of the Moneylenders Act 1993 and a copy of the note or memorandum shall be filed with and verified by the said affidavit.

15. It was pointed out the requirement of the practice directing that a return of *nulla bona* is required was described as an extra layer not provided for in the Act or the rules. Accordingly it was submitted that the intention of the legislature was to confer a right to a creditor who complied with the detailed requirements set out in the Act and the Rules to issue and serve a bankruptcy summons and that the legislature through the Act and rules had defined "the conditions upon which they are entitled to call for its exercise .. .". On that basis it was submitted that no further criteria should be considered by the court on an *ex parte* application for leave to issue and serve a bankruptcy summons.

16. In the course of submissions reference was also made to the case of *Dolan v. Neligan* [1967] I.R. 247. That case considered the words "hereby authorise" as used in the provisions of s. 25 of the Customs Consolidation Act 1876. Walsh J. in the judgment of the Supreme Court stated at p. 274:-

> "The words in s. 25 of the Act of 1876 'hereby authorised to return any money which shall have been overpaid as duties of customs' are the relevant words so far as the section is concerned. The question is whether these words are obligatory or merely permissive. If they are permissive only then the words import a discretion. *Prima facie*, the words 'hereby authorised' import a discretion. However, the general context must be examined to see if there is anything in the subject matter to indicate that these words are intended to be imperative.
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> . . .
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> In my view the statute is not to be construed as merely conferring a discretion to return the overpayments when those other conditions have been satisfied. The correct construction of the provision in question is that, upon the fulfilment of the conditions laid down by the section, the customs authorities are not lawfully authorised to do otherwise than to return the overpayments. Provided the claim was made and established within the period of six years, as it was in this case, the overpayments must be returned."

17. Whilst I have no difficulty with the interpretation of the word "may" when contrasted with the word "shall" as explained in the *Dunne* case referred to above, I have some doubt as to whether such an approach can be taken in relation to the interpretation of s. 8 of the Bankruptcy Act. I think it would be helpful to look again at the basis of the decision of the Supreme Court in the Dunne case where it was held *inter alia*:-

> "Where a statute employs the words 'may order' to confer on a court jurisdiction, subject to the fulfilment by a defined applicant of certain statutory conditions precedent, to make an order which would result in the applicant acquiring a right or benefit by the provisions of the statute, the said word should be construed as imposing on the court an obligation to make such order once the court is satisfied that those conditions have been fulfilled by the applicant."

18. I have already referred to a number of passages from the judgment of Walsh J. in that case, but I wish to refer back to one of those passages. Walsh J. commented at p. 117:-

> "Having regard to the general policy of the Acts and the requirements of obtaining new licences, it is remarkable that in this section the Oireachtas has made no provision whatever for the giving of notice of the hearing of objections. This, in my view, is a very strong indication that the extinguishment of the licence in applications under s. 19 of the Act of 1960, was not intended to be a matter of discretion. This was also emphasised by the fact that such an application could be made at any sitting of the District Court.

19. In the paragraph following that passage, he went on to describe similar provisions found in s. 27 of the Act of 1960, which

enabled the owner of a six day licence to turn it into a seven day licence by applying at any sitting of the District Court and satisfying that court as to a number of requirements. He noted:-

> "Again this procedure is made without notice to any party, no provision whatever is made with regard to the making of objections and the net result is the reduction of the total number of licensed premises by one."

20. He then went on to make the comment I have referred above:-

> "In my view, when one has regard to the context in which the use of the word 'may' appears in s. 19, and when one has regard to the object of the section and to the fact that the persons to benefit from the section are clearly identified, to the absence of requirement as to notice, to the absence of any reference to objections and to the informality of the procedure, one cannot but conclude that the correct construction of the section is that, upon the giving of the proofs required by the section in the particular case, there is no discretion in the court to decline to make the order sought, namely, that the ordinary seven day licence in question be extinguished."

21. If one subjects s. 8 to the sort of analysis carried out by Walsh J. in the *Dunne* case, the issue as to whether or not discretion is conferred by s. 8 hopefully will become clear. The first point to note about s. 8 is that it provides for the issue of a bankruptcy summons. That is in itself unusual. There are very few circumstances in which an individual or party wishing to issue proceedings against another must first apply to court for leave to issue those proceedings. Accordingly, unlike the vast range of legal proceedings, such proceedings cannot be issued without leave of the court. There are other circumstances in which proceedings cannot be issued without leave of the court, but these are far and few between. In considering the nature and effect of an adjudication in bankruptcy, it may be helpful to refer to a definition of bankruptcy in *Bankruptcy Law and Practice in Ireland*, Sanfey and Holohan at p. 1 as follows:-

> "While the law and system of bankruptcy seek to provide a means whereby creditors can recover rateably among themselves, they also grant a measure of protection for the bankrupt, and ensure that he cannot be proceeded against to the benefit of one creditor and to the detriment of another. Bankruptcy may be defined in different ways. One may define it terms of its purpose, that is, a system whereby the assets of a debtor are distributed equably among his creditors.
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> . . .
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> On a person being adjudicated bankrupt, that person's property vests by operation of law in an assignee to be realised for the benefit of his creditors, the bankrupt losing the capacity to deal with that property and becoming subject to various legal disabilities, and the creditors losing the right of independent remedy to recover their debts."

22. The second point to note in relation to the application under s. 8 is that it simply enables the applicant to issue and serve a bankruptcy summons. No other right or benefit is conferred on the applicant. To that extent it seems to me to be somewhat different to the situation that obtained in the Dunne case referred to above. It was noted in that case that the provisions of the Act of 1960, did not give any opportunity for grounds of objection which could be put forward on an application to extinguish a licence and more pertinently it was noted that the statute did not make any provision for any objectors in relation to an application pursuant to s. 19(1). On such an application as in respect of an application for leave to issue and serve the summons under s. 8, the application is made *ex parte*. However, there is one significant difference between the two applications and namely, that following the issue of a bankruptcy summons, s. 8(5) provides:-

> "A debtor served with a bankruptcy summons may apply to the Court in the prescribed manner and within the prescribed time to dismiss the summons.
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> (6) The Court
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> (a) may dismiss the summons with or without costs, and
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> (b) shall dismiss the summons if satisfied that an issue would arise for trial.

23. It is not necessary or appropriate to set out the circumstances in which the bankruptcy summons may be dismissed, but it is significant to note that such an application can be made. In the *Dunne* case the end result of the extinguishment of the licence was the entitlement of the applicant to receive a full licence in respect of the relevant premises. In the *Dolan v. Neligan* case, in which the words "hereby authorised" were considered, the plaintiff was found to be entitled to the repayment of overpayments that had been made "in error" when the conditions in the relevant statutory provision had been satisfied. It was held in that case that the effect of the statutory provision was that once the relevant conditions were satisfied, the Revenue Commissioners were not lawfully authorised to do otherwise than to return the overpayments.

24. I find it difficult to equate the statutory provisions contained in s. 8 of the Act, with the statutory provisions contained in the relevant statutory provisions at issue in the *Dunne* case and in the *Dolan v. Neligan* case. In those cases, there were no further steps or conditions to be fulfilled by the applicant/plaintiff in order to obtain the right which was at issue in the proceedings. In the present case, the issue of a bankruptcy summons on proof of the matters set out in the statute is but the first step in what may be a lengthy process. It is a process that can be stopped in its tracks immediately upon service of the bankruptcy summons by an application to dismiss the summons. In that sense it seems to me that the legislature intended by the words used in s. 8 to confer discretion on the court. One has to bear in mind the serious consequences of bankruptcy for a debtor and the restrictions placed on an individual who has been adjudicated bankrupt. Commencing the process to have someone adjudicated bankrupt is not something which should be lightly done. I am sure it is for that reason that a bankruptcy summons cannot be issued without leave of the court. Among the adverse affects of adjudication from the point of view of a bankrupt are the vesting of all his/her property in the official assignee for the benefit of the creditors; restrictions on the ability of the bankrupt to act as a director of a company, the restriction on a bankrupt holding public office. These are all serious restrictions. It is not surprising then that the legislature have ensured that the process of having someone adjudicated bankrupt involve a number of different procedural steps.

25. Finally, I think it is important to point out as mentioned before, that the practice of requiring a return of *nulla bona* is not an absolute prerequisite for the issue of a bankruptcy summons. If the applicant demonstrates a good reason for the absence for the return of *nulla bona*, then there is nothing to stop the court in an appropriate case from issuing the bankruptcy summons, notwithstanding the absence of a return of *nulla bona*.

26. For the reasons I have outlined above, I do not think it is appropriate to issue the bankruptcy summons in this case in the absence of a return of *nulla bona*.