THE HIGH COURT

5502S BANKRUPTCY

IN THE MATTER OF A BANKRUPTCY SUMMONS BY MARKETSPREADS LIMITED

AND

BRIAN O'NEILL

AND

THE HIGH COURT

5503S BANKRUPTCY

IN THE MATTER OF A BANKRUPTCY SUMMONS BY MARKETSPEADS LIMITED

AND

FERGUS RICE

Judgment of Ms. Justice Dunne delivered on J day of January 2014

The applicants herein ("Mr. O'Neill" and "Mr. Rice") seek to have the bankruptcy summonses served upon them set aside. The respondent to the applications is SFS Markets Limited, formerly known as Marketspreads Limited (and hereinafter referred to as "Marketspreads") and has petitioned for the bankruptcy of the applicants. The applications were listed and heard together as they arise out of related judgments.

Background
Marketspreads obtained judgments against Mr. O'Neill and Mr. Rice on the 28th March, 2012 in separate proceedings. The amount of the judgment in each case was €1,686,883.66 together with interest thereon pursuant to statute from the 12th April, 2012. The judgments were consent judgments and each judgment was subject to a stay on execution for two weeks.

The judgments remain extant and have not been appealed. Following the commencement of the bankruptcy proceedings, a plenary summons bearing the record number 2013 No. 3999P was issued on the 22nd April, 2013 on behalf of Mr. Rice and Mr. O'Neill against SFS Markets Limited. Before setting out the reliefs sought in those proceedings, I should add that it appears that the judgment debt of Mr. O'Neill and Mr. Rice was reduced by a sum of €400,000, being the consideration for the purchase of their shareholding in OR Spreadbetting Limited, the holding company of Marketspreads, on foot of a Share Purchase Agreement of the 17th April, 2012. As a result of the Share Purchase Agreement ("SPA") the balance of €1,286,883.66 on foot of the judgments together with interest thereon is the sum said to be due and owing by each of them in the bankruptcy summonses.

The plenary summons issued on behalf of Mr. Rice and Mr. O'Neill seeks, *inter alia*, the following relief:

> (1) rectification of the Share Purchase Agreement dated 17th April, 2012 as between the plaintiffs, Hanvon Limited and the defendant;
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> (2) if necessary, rescission of the said agreement;
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> (3) damages for breach of an agreement;
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> (4) a declaration that no sum is due by the plaintiffs to the defendant under the order of this Honourable Court dated 28th March, 2013 under the record number 2011 number 5207 ([2012 No. 20 COM]);
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> (5) an order marking the judgment entered on foot of the said order of this Honourable Court dated 28th March, 2013 as satisfied;
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> (6) in the alternative, an order setting aside the said order of this Honourable Court dated 28th March, 2013;
>
> (7) ….

One observation to be made in relation to the general endorsement of claim on the plenary summons is that it makes reference to one of the judgments obtained by Marketspreads, namely, that against Mr. Rice but it makes no reference to the proceedings bearing the record number 2011 No. 5206 ([2012 No. 19 COM]), the proc0eedings in which judgment was entered against Mr. O'Neill. No doubt that is an oversight.

It is somewhat surprising that an order is sought setting aside the judgment, presumably intended to be in respect of each of the plaintiffs in those proceedings, in circumstances where no appeal has been brought against the judgments and where there is no basis set out on the plenary summons that might give rise to an order setting aside the judgments. It is further surprising to see such relief being sought in circumstances where this Court was told at the hearing of the application to dismiss the bankruptcy summonses herein that Mr. O'Neill and Mr. Rice were not seeking to look behind the judgments. I will return to this issue later.

Marketspreads Limited changed its name subsequent to obtaining judgment against Mr. O'Neill and Mr. Rice from Marketspreads Limited to SFS Markets Limited but for ease of reference I will continue to refer to it as Marketspreads.

Exchange of affidavits
Mr. O'Neill and Mr. Rice swore affidavits grounding their application to have the bankruptcy summonses dismissed. Mr. O'Neill in his affidavit made the point that prior to the judgment being obtained, he discussed the situation with Mr. Ray Curran, described as the

then chairman of Marketspreads, (Mr. Curran disputed this description), and said that he was told that if he consented to the judgment and then sold his shareholding in OR Spreadbetting Limited, this would satisfy the judgment. Mr. O'Neill placed a value on his shares of just over €2m approximately as of the last transaction date in November 2010 and Mr. Rice valued his shares at approximately €1.8m at the same time. Mr. O'Neill stated that the amount of the judgment was excessive and he challenged the amount for which he and Mr. Rice were liable.

He then referred to the Share Purchase Agreement of the 17th April, 2012 which was executed subsequent to the judgment. Initially, the SPA was to be completed a few days after the judgment was entered into but there was a delay in having the SPA signed. In the meantime, Marketspreads had been suspended by the Central Bank on the 6th April, 2012.

Mr. O'Neill stated that he was told by Mr. Curran on 16th April, 2012 that the shares had to be sold immediately for a sum of €400,000 and that Mr. Curran told Mr. O'Neill and Mr. Rice that they would have to agree a consideration of €400,000 for the shares. This was on the basis that it was necessary to deal with the matter urgently in order to have the Central Bank suspension of Marketspreads lifted. As part of that arrangement it was stated that it was agreed "the balance would not be pursued". The alternative was that if the sale of the shares of Mr. O'Neill and Mr. Rice was not concluded, then Marketspreads would remain suspended permanently.

On the 17th April, 2012, Mr. Curran, Mr. O'Neill and Mr. Rice attended at PGL Accountants to sign the agreement. There was a complaint as to the lack of opportunity to obtain legal advice on the SPA but Mr. O'Neill and Mr. Rice were reassured that, despite the wording of the SPA, they would not be pursued for the outstanding balance of the judgements. A further complaint was made that Mr. O'Neill and Mr. Rice did not receive a copy of the SPA at that time. Mr. O'Neill and Mr. Rice have both contended that it was a condition of the Central Bank for lifting the suspension of Marketspreads that Mr. O'Neill and Mr. Rice be removed as shareholders.

Finally, both have indicated that they would not have agreed to redeem their entire shareholding for the sum of €400,000 three weeks after consenting to judgment if they were leaving themselves open to being pursued for a sum of €1.2m approximately.

Mr. Ray Curran in his affidavit of the 18th April, 2013 disagreed with the averments of Mr. O'Neill and in a second affidavit of the same date disagreed with Mr. Rice's averments in his application to have the bankruptcy summons dismissed. He noted that they both consented to the judgments on the 28th March, 2012 in an agreed sum although there had been some prior discussion as to the amount for which judgment would be entered.

He pointed out that contrary to the averments by Mr. O'Neill and Mr. Rice he was never chairman of OR Spreadbetting Limited or Marketspreads. He never agreed to accept the shares of Mr. O'Neill and Mr. Rice in OR in full settlement of the amounts due by them to Marketspreads. He further stated that he was not "empowered to agree" any such agreement. The basis of the agreement was as set out in the SPA.

Mr. Curran pointed out that the case being made now by Mr. O'Neill and Mr. Rice as to the effect of the sale of the shares is at odds with the express terms of the SPA. He added that correspondence subsequent to entering into the SPA undermined the contention of Mr. O'Neill and Mr. Rice to the effect that they believed that the sale of the shares for the sum of €400,000 set aside the entire debt.

Mr. Curran stated that on the 17th April, 2012, Mr. O'Neill and Mr. Rice reviewed the agreement and signed it. There was no request by them on that date for an opportunity to obtain legal advice. There was some discussion as to the requirements of the Central Bank for lifting the suspension of Marketspreads and Mr. Curran indicated that he understood that the removal of Mr. O'Neill and Mr. Rice from the share register was a prerequisite for the lifting of the suspension of the company.

Mr. Curran took issue with an assertion of Mr. O'Neill and Mr. Rice that they were not given copies of the agreement at the time.

A further affidavit was sworn on behalf of Marketspreads by John McNicholl, a director of Marketspreads. He dealt with a number of issues in relation to the background of the company, Marketspreads, and its relationship with OR Spreadbetting Limited, the holding company of Marketspreads Limited. He explained that OR Spreadbetting Limited, the holding company of Marketspreads, was a special purpose vehicle formed specifically to acquire a company known as Worldspreads Ireland Limited. The acquisition of that company was the result of a deal brought to the attention of a number of investors by Mr. O'Neill and Mr. Rice who were director and senior executive of Worldspreads Ireland Limited prior to the 21st December, 2009. OR Spreadbetting Limited acquired the entire issued share capital of Worldspreads Ireland Limited on the 21st December, 2009 for in excess of €10.5m. The consideration was later reduced to €9.2m approximately following the making of warranty claims. After its acquisition, Worldspreads Ireland Limited changed its name to Marketspreads Limited and as previously indicated it subsequently changed its name to SFS Markets Limited.

Mr. McNicholl then set out a number of matters in relation to the diversion of company funds involving the said Mr. O'Neill and Mr. Rice who were at that time the management team of Marketspreads. It was stated by Mr. McNicholl that these issues became apparent to the respondent's board in late 2010/early 2011. Another company known as Sports Spread Betting (Ireland) Limited was indebted to Marketspreads. Mr. Rice was a director and majority shareholder in that company and Mr. O'Neill also had an interest in it. Concerns had arisen in relation to figures that were provided from Marketspreads to Sports Spread Betting (Ireland) Limited and, as a result of ongoing investigations, it became apparent at a board meeting on the 3rd June, 2011 that the balance owing by Sports Spread Betting (Ireland) Limited to the respondent was a figure in excess of €1.4m. Mr. O'Neill and Mr. Rice accepted responsibility for advances wrongly made to Sports Spread Betting (Ireland) Limited and tendered their resignations to Marketspreads. Mr. McNicholl exhibited letters of the 11th July, 2011 and the 18th July, 2011 in respect of Mr. O'Neill. The letter in respect of Mr. Rice was signed on the 24th June, 2011. In those letters, Mr. O'Neill and Mr. Rice each agreed to sell their shares in OR Spreadbetting Limited and to use the funds raised to repay the amount taken. Neither could find a buyer for their shares and the debt remained unsatisfied. It was noted by Mr. McNicholl that although the sums wrongfully drawn from Marketspreads were described as advances to Sports Spread Betting (Ireland) Limited, Marketspreads has been unable to establish that the funds were actually applied to the benefit of that company. Indeed, account statements suggest that a sum of €750,000 was paid into personal accounts of Mr. O'Neill and Mr. Rice, having been first paid over to Sports Spread Betting (Ireland) Limited.

Mr. McNicholl then went on to describe accounting irregularities at Marketspreads and noted that the Central Bank had become increasingly concerned that Mr. O'Neill and Mr. Rice, who were formerly involved with Marketspreads, remained on the share register of OR Spreadbetting Limited. The trading licence of Marketspreads was suspended in April2012 by the Central Bank.

Mr. McNicholl then described how the shares of Mr. O'Neill and Mr. Rice were acquired at a cost of €8.50 per share in respect of their shares, the same price as that which was later sought from existing shareholders in a rights issue. The proceeds of the sale were to be set against the indebtedness of Mr. O'Neill and Mr. Rice to Marketspreads. This was reflected in the Share Purchase Agreement referred to above. It was pointed out that Marketspreads reported losses of €1.5m between December 2009 and December 2012 and had remained in business only due to the financial support of its shareholders in general and Mr. Curran in particular. Without that

support it would have failed. It was against this backdrop that the proceedings to obtain judgment against Mr. O'Neill and Mr. Rice took place. It was pointed out that the judgment has not been appealed or challenged prior to the bringing of these bankruptcy proceedings and that no sums have been recovered on foot of the judgment save for the sum of €400,000 arising from the SPA.

Mr. McNicholl made the point that any suggestion to the effect that the judgment figures was incorrect was moot in circumstances where judgment had been entered into by consent between the parties. Accordingly, he disagreed with the suggestion that there was an overstatement of the judgment sum.

Mr. McNicholl also took issue with the suggestion that it was agreed at the time of the consent to the judgment that the shares of Mr. O'Neill and Mr. Rice would be surrendered in full settlement of the debt. He pointed out that this was "totally contrary" to what was provided for in the SPA signed by Mr. O'Neill and Mr. Rice. It was also contradicted by a series of communications in e-mails that took place following the signing of the Share Purchase Agreement. Mr. McNicholl referred to thee-mails exhibited in the affidavit of Mr. Curran which contained proposals for the paying of a regular sum to reduce the indebtedness and also provided for the furnishing of statements of affairs to Mr. Curran from Mr. O'Neill and Mr. Rice. That, in fact, was done. Accordingly, Mr. McNicholl made the point that it was very clear following the entry into the Share Purchase Agreement that there were further monies due by them on foot of the judgment and their contentions to the contrary were at odds with their communications following the execution of the SPA.

A further affidavit was sworn by Mr. Rice on the 19th April, 2013. To a large extent this affidavit was a reiteration of points previously made by Mr. Rice in respect of matters leading up to the entry of the judgment. He referred to various discussions which he said took place in relation to the proposed Share Purchase Agreement; he stated that having signed the Share Purchase Agreement and having attended on the following day to re-sign certain stock transfer forms on the basis that he had signed them the previous day in the wrong place, he duly signed the additional stock transfer forms and that as far as he was concerned that brought an end to the matter in that he had settled the case by transferring his shares in full and final settlement of the judgment in accordance with the settlement he had agreed prior to consenting to judgment. He added that it was absurd to suggest that he would have agreed to consent to judgment in the full amount of the plaintiffs' claim without any set-off in respect of amounts owed by Marketspreads to Sport Spreads Betting (Ireland) Limited unless the transfer of his shares was to discharge the claim in full. He then referred to proceedings which had been issued by way of plenary summons seeking to have the Share Purchase Agreement rectified.

A replying affidavit was furnished by Mr. Curran in respect of that affidavit in which Mr. Curran contrasted the approach of Mr. O'Neill and Mr. Rice as to the discussions leading up to the conclusion of the Share Purchase Agreement. Mr. Curran reiterated that he never represented to Mr. O'Neill or Mr. Rice that they would not be pursued any further if they executed the SPA. Mr. Curran dealt with a number of other issues that had been dealt with previously, such as the issue in relation to whether or not the question of legal advice on the part of Mr. Rice and Mr. O'Neill was canvassed. He reiterated that no opportunity to obtain legal advice was sought by Mr. O'Neill or Mr. Rice. He never suggested that the agreement "had to be signed in the absence of legal advice". Further, he made the point that to the best of his recollection, copies of the agreement were provided to Mr. O'Neill and Mr. Rice at the meeting.

Mr. Curran then dealt with an issue that had been raised by Mr. Rice as to whether or not he held all of the shares in OR Spreadbetting Limited or whether some of those shares were transferred by him to members of his family. It was noted by Mr. Curran that the articles of association of the company do not list transfers to family members as "permitted transactions" and noted that a transfer of shares could only occur "with the prior written consent of the holders of all the issued equity share capital". He pointed out that any attempted transfer was necessarily invalid in circumstances where the requirements of the articles of association were not complied with. Mr. Curran then went on to deal with the fact that subsequent to the execution of the SPA, that there was an engagement by Mr. O'Neill and Mr. Rice which culminated in the furnishing of a statement of affairs by both of them to Mr. Curran. Mr. Curran pointed out that it is not clear why such a statement of affairs would have been furnished if it was really the view of Mr. O'Neill and Mr. Rice that a full settlement had been reached.

Mr. McNicholl also furnished a further affidavit on the 11th June, 2013. In that affidavit he set out details of funds transferred from Sports Spread Betting (Ireland) Limited into a personal account of Mr. O'Neill on the 22nd March, 2010, which funds originally carne from Marketspreads. This was part of a larger sum of €750,000 which was diverted away from Marketspreads by Mr. O'Neill and Mr. Rice and which ultimately was part of the sums sought to be recovered in the proceedings which led to the judgment.

Mr. O'Neill swore a further affidavit on the 28th June, 2013 which was supported by a further affidavit of Mr. Rice sworn on the same day. In his affidavit, Mr. O'Neill referred to the terms upon which the judgment at issue was obtained by consent. He relied on information obtained by him on foot of a data protection request to the Central Bank. He exhibited two e-mails created by someone, presumably in the Central Bank,- those e-mails are heavily redacted and it is not possible to identify the sender or the recipient - in which the following appeared:

> "
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> In that regard, he said that there had been a settlement discussion with Brian O'Neill this afternoon in advance of the court case tomorrow and that he was willing to surrender his shareholding in OR Spreadbetting Limited to settle the debt. However, this could only be agreed if he accepted summary judgment in court tomorrow."

A further e-mail of the 28th March sent at approximately 2.30prn referred to the court case this morning and stated:

> "Here's in the file note documenting my understanding of the events in court today."

Mr. O'Neill in his affidavit did not refer to another part of that e-mail exchange. It appears on the same sheet of paper exhibited by him in his affidavit which was sent at approximately one minute to six pm and referred again to "court case this morning" and stated:

> "For information
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> A settlement was reached with(.....) Fergus Rice in advance of the court hearing this morning for the amount of €... .. . . I understand that if the settlement is not finalised within two weeks ..... can return to court and seek to have the judgment registered against them. . ...
>
> We also had a telephone conversation with ..... about addressing .....
>
> The practical implications of today's settlement with(.....) Rice.
>
> Regards."

Mr. O'Neill in that affidavit went on to complain about the extent of the redaction of the documents concerned. Mr. O'Neill then said that the matters set out in this affidavit indicated that there was a clear dispute as to whether he owed Marketspreads the amount sought in the bankruptcy summons herein.

A further affidavit was sworn by Mr. Rice on the 5th July, 2013 which was supported by an affidavit from Mr. O'Neill sworn on the same date. In the affidavit of Mr. Rice he reiterated a number of points in relation to the circumstances in which the consent to judgment was entered into. He made the point he and Mr. O'Neill consented to the judgment with a stay to allow for the execution of various documents necessary to give effect to the settlement. The terms of the settlement were that there was an express agreement with Marketspreads to the effect that Mr. O'Neill and Mr. Rice would transfer their shares in OR Spreadbetting Limited in full and final settlement of the claim. If the necessary instruments were not executed by Mr. O'Neill and Mr. Rice to fulfil their obligations, the debt would remain and Marketspreads would be in a position to register the judgment and enforce it. He reiterated that it was represented to Mr. O'Neill and Mr. Rice that the judgment would never be enforced because of the settlement and that no debt would remain owing after the settlement was put into effect. He stated that, although there is no appeal in relation to the judgment, separate proceedings have been issued in which it is sought to have rectification of the Share Purchase Agreement and, if necessary, rescission of the same together with a declaration that no sum is due to Marketspreads under the judgment. It is not disputed by Mr. Rice that the Share Purchase Agreement was signed by Mr. O'Neill and himself but it is contended that this was done on the basis that the Share Purchase Agreement reflected the nature of the agreement to settle the proceedings and that, following the execution of the Share Purchase Agreement, no debt would remain owing by Mr. O'Neill or Mr. Rice to Marketspreads and that the judgment would not be enforced provided that they signed the Share Purchase Agreement. Mr. Rice goes into other issues such as the value of the shares at the time of entering into the Share Purchase Agreement and again reiterates the point that he did not have a chance to read it or have his lawyers review it prior to signing. He reiterated that neither he nor Mr. O'Neill were give copies of the Share Purchase Agreement. On that basis he argued that there was a clear dispute as to whether he owed Marketspreads the amount sought in the bankruptcy summons herein.

A short affidavit was sworn by Mr. Joe Kenny in relation to a meeting that occurred sometime around late April/early May, which was a shareholders' meeting of Marketspreads. He stated that a settlement had been concluded between Marketspreads and Mr. O'Neill and Mr. Rice and that the company would not be pursuing them any further. He stated that indicated was given openly to all shareholders at that meeting. Mr. Enrique Curran, a company director and shareholder of Marketspreads, swore an affidavit in response to the affidavit of Mr. Kenny. He pointed out that Mr. Kenny is a director of Sports Spread Betting (Ireland) Limited, the company of Mr. O'Neill and Mr. Rice. He disagreed with Mr. Kenny's description of the shareholders' meeting referred to. The essence of his affidavit is that Mr. Kenny's account of what occurred at the meeting was inaccurate. He said that he had listened to a recording of the meeting prior to swearing the affidavit. At the meeting he said that a prepared statement was read to the meeting and in response to queries from shareholders, it was indicated by Mr. Lernihan, a director of Marketspreads and by Mr. Curran, that Marketspreads had secured judgment against Mr. O'Neill and Mr. Rice and were in discussions with them as to how that debt would be settled.

I should say at this stage that I do not propose to attach any weight to the affidavit of Mr. Kenny on this particular aspect of the matter as it appears to me that his recollection is, at best, sketchy and that the meeting to which he refers appears to have taken place in advance of the Share Purchase Agreement having been executed by the parties.

A replying affidavit was sworn by John McNicholl on 9th July, 2013 and, apart from dealing with certain issues in relation to the valuation of the shares of Mr. O'Neill and Mr. Rice, Mr. McNicholl referred again to thee-mails that passed between the parties subsequent to the inclusion of the SPA. He referred again to an e mail of the 28th May 2012 which he sent to Mr. O'Neill and to the response from Mr. O'Neill. It would be helpful to quote from the affidavit of Mr. McNichol!. He stated:

> "20. As appears from my e-mail of the 28th May, 2012, I noted that Sportspread had not come up with a proposal to discharge their liability to the respondent and indicated that the applicants would be pursued in their personal capacities.
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> 21. I say and believe that the e-mail sent by Mr. O'Neill in response is, to my mind, extremely damaging to the case which the applicants seek to make. The e-mail does not suggest the existence of an agreement whereby the applicants' shares would be accepted in full and final settlement. Instead Mr. O'Neill states:
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> > 'We also assume that you are referring to the proposal from our initial agreement with Ray for Sportspread to pay a monthly fee of €2.5k. This was a proposal from our first meeting that Sportspread would pay €2.5k per month until such time as our shares in OR Spreadbetting had been sold and there was some clarity on the actual amount of the inter company. It was not a firm condition of the actual agreement from our second meeting but we do accept that Ray could have an expectation that this would still be paid.
> >
> > We will agree to pay €2.5k per month until we can get all elements of the agreement fulfilled. Please forward the appropriate account details and we will have the €2.5k paid on the first of each month'."

From that exchange of correspondence Mr. McNicholl concludes that it was clear that Mr. O'Neill and Mr. Rice knew that further sums remained to be paid after the sale of the shares.

The final affidavit was an affidavit of Thomas Scully sworn herein on the 9th July, 2013. Mr. Scully is a shareholder in Marketspreads and is also an employee of Sports Spread Betting (Ireland) Limited. He attended the meeting of Marketspreads on the 16th April, 2012 to discuss the implications of the suspension of Marketspreads by the Central Bank. His recollection of the meeting was that it was indicated by Mr. Curran that Messrs. O'Neill and Rice had surrendered their shares in OR Spreadbetting Limited. He invested further funds in Marketspreads after that meeting and stated that he would not have done so if it had been indicated that Marketspreads intended to pursue Mr. O'Neill and Mr. Rice, the majority shareholders in the business that employed him. It would not have been in his interest to do so if the pursuit of litigation could have the consequence of ultimately making him redundant. He left the meeting with the understanding that the issues between Marketspreads and Mr. O'Neill and Mr. Rice had been resolved.

Again, it seems to me, bearing in mind that the actual agreement was executed on the 1ih April, 2012 between Marketspreads and Mr. O'Neill and Mr. Rice, the views of Mr. Scully as to what the position was as of the 16th April, 2012 are not of any practical assistance as to the position of the parties subsequent to the execution of the SPA.

The relevant law

The starting point for consideration of an application to dismiss a bankruptcy summons is s. 8 of the Bankruptcy Act 1988, ("the Act"). It provides as follows:

"Section 8

(5) 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.

(6) The Court -

(a) may dismiss the summons with or without costs, and

(b) shall dismiss the summons if satisfied that an issue would arise for trial."

The crucial part of s. 8 is that contained ins. 8(6) to the effect that the Court shall dismiss the summons if satisfied that an issue would arise for trial. It has long been understood to be the case that the wording ins. 8(6)(b) is mandatory. In other words, if the Court is satisfied that an issue would arise for trial, the Court has no discretion in relation to the matter and must dismiss the summons.

The interpretation of s. 8(6)(b) of the 1988 Act.
The consideration in relation to this area of law must commence with the decision in *In the matter of a bankruptcy summons by St. Kevin's Company against a Debtor* (*Ex tempore*, Supreme Court, 27th January, 1995). That case gave rise to an ex tempore judgment and thus, unfortunately, no written report of the decision is available. A helpful account of the decision is to be found in an article entitled *"Challenging a Bankruptcy Summons- A New Way out for Debtors"* by Micheal P. O'Higgins (1995 2(7) CLP 173). In the course of that article, the decision in the Supreme Court in that case was described as follows:

"The matter was then appealed to the Supreme Court. At the outset of the hearing, the Chief Justice Hamilton queried whether, on a proper reading of s. 8(6)(b), the High Court had jurisdiction to determine the issue between the parties. The Court took the view that on a correct interpretation of s. 8(6)(b) an investigation into the merits of the case should not be undertaken once an issue arose on the summons. The Chief Justice stated that s. 8(6) dealt with the question of how the High Court should deal with the bankruptcy summons where there was an issue arising on the summons. In the view of the Court it was mandatory for the High Court Judge to dismiss the summons if he was satisfied that an issue arose between the parties. Referring to the agreed note of the High Court hearing, the Chief Justice stated that it was manifest that the learned High Court Judge was satisfied that there was an issue between the parties and that accordingly, under the terms of s. 8(6), the Judge was obliged to dismiss the bankruptcy summons. The issue between the parties would have to be litigated separately 'outside the bankruptcy process'. Accordingly, although the Court was mindful of the difficulties which this decision posed for the creditor, the Court had no alternative but to allow the appeal and dismiss the summons."

A number of decisions of the High Court have considered the application of s. 8(6)(b) and the law in this area was reviewed extensively by the High Court in the case of *The Minister for Communications v. M.W.* [2010] 3 I.R. 1 by McGovern J. He stated at page 4 of the judgment as follows:

"4. There are a number of legal authorities dealing with applications to dismiss a bankruptcy summons and the principles which apply where an applicant shows cause as to why he should not have been adjudicated a bankrupt.

5. In *In the matter of a bankruptcy summons by St. Kevin's Company against a Debtor* (*Ex tempore*, Supreme Court, 27th January, 1995) the Supreme Court expressed the view that the correct interpretation of s. 8(6)(b) of the Act of 1988 was that the High Court should not undertake an investigation into the merits of the case once it was satisfied that an issue arose on the summons. In those circumstances, the Supreme Court stated that it was mandatory for the court to dismiss the summons if it was satisfied that an issue arose between the parties and the issue would have to be litigated separately outside the bankruptcy process.

6. In *In re Sherlock* [1995] 2 I.L.R.M. 493, the applicant sought to show why he should not have been adjudicated bankrupt on the grounds that the sums in the notice requiring payment and the bankruptcy summons were inaccurate. He claimed that he should have received a credit for approximately £1,000 against the sum owed of approximately £180,000. In his judgment, Murphy J. stated at p. 494:-

'on behalf of the bankrupt, it was argued that if it could be shown that the sums claimed in the demand and in the bankruptcy summons were inaccurate then the failure to pay the sums so demanded could not and did not amount to an act of bankruptcy and accordingly that there was no such act on which to ground a valid order of adjudication. In my view that argument is correct in principle.'

In the course of that case, a number of decisions were referred to. In *In re Collier* (1891) 64 L.T. 742, Cave J. said at p. 743:-

, ... On more than one occasion, the Court of Appeal have expressed the opinion that, since the commission of an act of bankruptcy was a serious matter, and involved consequences of what has been called a penal nature, it was important to see that the necessary preliminaries have been complied with.'

In the case of *O'Maoileoin v. Official Assignee* [1989] I.R. 647, Hamilton P. at p. 652 quoted at some length from the decision of Cozens-Hardy M.R. in the case of *In Re A Debtor* [1908] 2 K.B. 684, at pp. 686 to 687, as follows:-

'This appeal, though it relates only to a small amount, undoubtedly raises a point of importance. The petitioning creditors obtained a final judgment against the debtor. Certain sums were either paid or allowed by way of set-off so that the amount of the judgment debt was reduced. A bankruptcy notice was served on the debtor, and in the margin of that notice there are inserted certain figures which bring out the result that a sum of 9841.7s.1d is the balance of the amount due on the final judgment. The bankruptcy notice proceeds in the usual form requiring payment and stating that a non-compliance with the bankruptcy notice will involve the consequences, which to some extent are penal consequences, of bankruptcy. The amount claimed in the bankruptcy notice was not due. There was a mistake in the calculation of interest. For the present purpose I care not what the precise amount of

> the mistake was. It was, I believe, between one and two pounds. But putting aside the question of amount, this was a bankruptcy notice which said 'if you do not pay a judgment debt which is due and also a further sum which is not due you are liable to be made bankrupt.' It is said that is a formal defect which can be set right under s. 143(1) of the Bankruptcy Act, 1883, and that we ought to disregard it or treat it as formal and amend the bankruptcy notice and allow the bankruptcy proceedings to go on. On principle I am not prepared to accede to that argument. I cannot regard it as a mere formal defect that you claim payment from a man of that which never was due from him. It is not necessary to say that there was any attempt on the part of the petitioning creditors wilfully to exact payment of that which they knew was not due. My judgment does not depend upon that. It seems to me that a defect of this kind is substantial, that it is not formal, and does not fall within the language of s. 143. So much in point of principle.'
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> 7. At p. 654 of the same judgment, Hamilton P. said:-
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> > 'These cases clearly establish that the bankruptcy code, having regard to the consequences which flow from an adjudication of bankruptcy, is penal in nature and that the requirements of the statutes must be complied with strictly; that the debtor's summons to be served within the provisions of s. 21 of the Bankruptcy Ireland (Amendment) Act 1872, must be served in the prescribed manner and the amount due in accordance with a judgment, when a judgment is relied upon, must be accurate and that a claim for an amount in excess of the amount due in accordance with such judgment would render the notice defective and a subsequent adjudication void.'
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> 8. It seems to me that both before the Act of 1988 and since then, the courts have regarded it as necessary to strictly comply with the provisions of the Rules of the Superior Courts 1986 and statutory provisions in order to trigger the bankruptcy process because it has such serious consequences for a debtor."

The decision in the *Minister for Communications v. M.W.* was relied on by me in a case entitled *Allied Irish Banks plc v. Ivan Yates* [2012] IEHC 360 where I stated (at p. 29) as follows:

> "In this case, I am satisfied that having regard to the decision of McGovern J. to which I have referred, who in turn relied on the well known *ex tempore* decision of the Supreme Court in the case of *St. Kevin's Company against a Debtor* (unreported, Supreme Court 27th January, 1995) that so far as the amount due by the debtor to the applicant is concerned, the debtor has raised issues which have to be litigated separately outside the bankruptcy process. The issues raised are real and substantial and have some prospect of success.
>
> For that reason, I would indicate at this stage that I will dismiss the bankruptcy summons."

Submissions and discussion

During the course of the hearing there was some discussion as to whether or not the decision in the case of *Minister for Communications v. M.W.* did in fact follow the approach of the Supreme Court in *St. Kevin's Company against a Debtor*. The argument was made on behalf of Mr. O'Neill and Mr. Rice that the test posed by Mr. Justice McGovern, namely, is there a real and substantial issue and one which is at least arguable and has some prospect of success, involved the Court in overstating the principle to be found in the decision of the Supreme Court in the case of *St. Kevin's Company against a Debtor*. I have to say that I have some difficulty with the contention of Mr. Trainor, S.C. in this respect. From what one can ascertain of that decision, the obligation of the Court is to be satisfied that there is an issue between the parties and, if so, then one must dismiss the bankruptcy summons. It seems to me that in considering the approach of the Court in deciding whether or not there is an issue, one has to have regard, of course, to whether or not the issue is, to use the words of McGovern J., "a real and substantial issue and one which is, at least, arguable and which has some prospect of success". To put it another way, if one was to re-phrase the test, could it be said that the summons should be dismissed if the Court was merely satisfied that there was an issue, that it was unreal and illusory, that it was not arguable and had no prospect of success, could it be said that in those circumstances, the Court is nonetheless obliged to dismiss the bankruptcy summons? Although there is no written judgment of the Supreme Court in the *St. Kevin's* case, it is clear that the Court was of the view that there should not be an investigation into the merits of the case once it was clear that an issue arose. Equally, the Court indicated that such an issue was one which would have to be litigated separately outside the bankruptcy process. The Court therefore has to consider the arguments that are put forward in any given case to satisfy itself that there is, in fact, an issue. An unreal or illusory issue raised by a party will not give rise to the dismissal of a bankruptcy summons.

I have previously approached the question of when the Court should dismiss a bankruptcy summons on the basis of the test identified by McGovern J. in *Minister for Communications v. M.W.* In my view, the test as outlined by McGovern J. does not impose any further requirement beyond that identified in the decision in St. Kevin's. It simply clarifies the question as to when it can be said that an issue arises which will result in a bankruptcy summons being dismissed. I propose to consider this matter on that basis.

In the course of the arguments, reference was made to the approach of the Courts in applications for summary judgment as to whether a defence has been raised requiring the matter to be adjourned to plenary hearing. I think that the test in such cases is of assistance in considering the test identified by McGovern J. Therefore, it seems to me that, in considering if the party seeking the dismissal of the bankruptcy summons has raised an issue such that the summons should be dismissed, the Court could derive some assistance from the approach to be found in cases such as *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1 and to the well known principles set out in the judgment of McKechnie J.

I was referred to a passage from Delany and McGrath on *Civil Procedures in the Superior Courts* (3rd. Ed.) summarising the law in relation to the procedure where summary judgment is sought, at para. 26- 52 to a decision of Clarke J. as follows:

> "In *McGrath v. O'Driscoll* [2006] IEHC 195, [[2007] 1 ILRM 203] Clarke J. referred to the decision in *Aer Rianta* and summarised the approach to be adopted in relation to factual issues as follows:
>
> > 'So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved.'"

The authors go on in the course of their commentary to refer to a further passage from that decision at para. 26 - 54, where it is observed:

"In *McGrath v. O'Driscoll*, Clarke J. also commented on the approach that should be adopted in relation to legal issues:

> 'So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment.'"

Mr. Trainor on behalf of Mr. O'Neill and Mr. Rice also relied on the decision of Clarke J. in the case of *GE Capital Woodchester Ltd. v. Aktiv Kapital Asset Investment Ltd.* [2009] IEHC 512, in which it was noted that a defendant will not necessarily be in a position to produce all of the evidence on affidavit at the summary judgment stage. Delany and McGrath commented on that observation at para. 26- 53 where they noted as follows:

> "Subsequently, in *GE Capital Woodchester Ltd. v. Aktiv Kapital Asset Investment Limited*, he elaborated on the extent of the obligation placed on a defendant to adduce factual evidence to support an alleged defence at the stage of the application for summary judgment, stating that a defendant will not necessarily be in a position to put or have to put affidavit evidence before the Court to establish the factual basis for that defence. He noted that the factual basis for the defence may not derive from facts within the defendant's own knowledge. However, he might be able to persuade the Court that there was a credible basis for the contention that facts to grounds the defence put forward exist. Clarke J. gave the example of where a defendant establishes a credible basis for suggesting that there are witnesses who are unwilling to swear affidavits but could be compelled to appear at trial by subpoena who will depose to facts which might arguably give rise to a defence. He went on to observe:
>
> > 'Likewise, there will always be cases where the true nature of a defendant's defence will rest in evidence (whether documentary or otherwise) which will only become available through procedural devices such as discovery, interrogatories or the like. That is not to say that it is open to a defendant, on a summary judgment application, to make a vague and generalised contention which would amount to nothing more than an assertion that something useful to his case might turn up on discovery or the like. However, it seems to me that where a defendant satisfies the court that there is a credible basis for asserting that a particular state of facts might exist which state of facts, if same were in truth to exist, could be established by appropriate discovery and/or interrogatories, then such defendant should be entitled to liberty to defend. It should, again, be emphasised that mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of the motion for summary judgment, possible to put before the court direct evidence of the assertion concerned.'"

In referring to that particular passage from Delany and McGrath and, indeed, to the judgment of Clarke J., Mr. Trainor referred to the material that had been exhibited from the Central Bank in relation to the terms of the settlement between the parties. He argued that the file note was consistent with an agreement in the terms contended for by Mr. O'Neill and Mr. Rice.

Conclusions

This is a case in which there is a valid and binding judgment obtained by consent between the parties in circumstances where Marketspreads and Mr. O'Neill and Mr. Rice were represented. The circumstances in which a valid and binding judgment of that Court can be set aside are few and far between. It is not necessary in the context of these proceedings to review the law in that respect. Suffice it to say that there is such a judgment and it is not suggested that there is any basis upon which the Court can go behind that judgment despite the fact that one of the reliefs sought in separate proceedings is an order setting aside the judgment of the 28th March, 2011. Certainly, no evidence of any facts which could give rise to such relief has been put before the court. As can be seen from the summary of the material before the Court on foot of the affidavits sworn herein, much of the information put before the Court relates to an element of dispute as to the correctness of the judgment and the figures contained therein. However, once there is a valid and binding judgment which has not been the subject of an appeal and in respect of which there are no grounds advanced to show any basis upon which that judgment could be set aside, it would not be appropriate for this Court to look behind the judgment in any way.

That being so, the next question that requires to be considered by the Court is whether Mr. O'Neill and Mr. Rice have succeeded in raising an issue as to whether or not there was an agreement to accept the shareholding in OR Spreadbetting Limited in full and final settlement of their respective liability on foot of the judgments.

At this point it is necessary to consider the Share Purchase Agreement which was signed by Mr. O'Neill and Mr. Rice on the 17th April, 2012. The agreement was prepared by William Fry, Solicitors, on behalf of Marketspreads. The agreement involved a sale of the shares of Mr. O'Neill and Mr. Rice in OR Spreadbetting Limited to a company, Hanvon Limited, therein referred to as "the Buyer". The Share Purchase Agreement was a carefully drafted document. In the course of the interpretation clause, reference was made to the agreements of the 24th June, 2011, the 11th July, 2011 and the 18th July, 2011 entered into by Mr. O'Neill when he first proposed to sell the shares in OR Spreadbetting Limited and to the agreement dated the 24th June, 2011 entered into by Fergus Rice for the same purpose. The consideration for the shares was stated to be €400,000 and "debt" was defined as "the sum of €1,686,883.66 being the amount owing to Marketspreads by the sellers". The outstanding debt amount was defined as €1,286,883.66. Reference was also made to the proceedings, being the proceedings bearing Record No. 2011/5206S and 2011/52087 respectively. Clause 3.3 of the Share Purchase Agreement was headed

> "Acknowledgment of Debt" and provided as follows:
>
> "Each of the sellers hereby acknowledge that, prior to the novation of the relevant debt amount as contemplated by this agreement, the debt is owed by them (jointly and severally) and thereafter the outstanding debt amount will be owed by them to Marketspreads subject to the terms and conditions of the BON agreements and the FR agreement. The relevant debt amount shall be owed by Buyer to Marketspreads subject to the terms and conditions set out in the schedule. Each of the sellers further acknowledges the terms of this agreement and the rights and remedies of Marketspreads hereunder."

Clause 5.5 was headed "Entire Agreement" and provided:

> "This agreement and all matters referred to therein (including without limitation the proceedings and related court order dated 28th March, 2012) contains the entire agreements between the parties relating to the transactions provided for in this agreement and supercedes all previous representations, arrangements, undertakings and agreements (if any) between the parties in respect of such matters. Each of the sellers acknowledges that in agreeing to enter into this agreement it has not relied on any representation, warranty, undertaking, covenant, pre-contractual statement or understanding other than those contained in this agreement."

A further term of importance was contained at Clause 5.7 headed "Independent Legal Advice". It provided as follows:

> "By entering into this agreement, each of the sellers shall be deemed to acknowledge that he does so on consent and with full knowledge of his rights and obligations hereunder and of the restrictions on him hereunder having first obtained (or been offered the opportunity to obtain) legal advice as to the effect of this agreement from a solicitor, and where any seller has not so obtained such advice, he hereby acknowledges that he is waiving the right to independent legal advice."

One of the complaints made by Mr. O'Neill and Mr. Rice is that they there were not afforded the opportunity to obtain legal advice prior to signing the agreement. In the light of the express terms of the SPA set out above and signed by Mr. O'Neill and Mr. Rice it is difficult to see how Mr. O'Neill and Mr. Rice can now challenge the agreement on the basis that they did not have the opportunity to have the agreement reviewed by their lawyers and to obtain advice thereon. They have, by entering into the agreement, expressly waived their rights in that regard. Mr. O'Neill and Mr. Rice are clearly both experienced businessmen and I am not satisfied that any issue has been raised in relation to the question of legal advice which could require litigation outside the bankruptcy proceedings.

A further point raised on behalf of Mr. O'Neill and Mr. Rice in regard to the conclusion of the SPA was that on signing it they did not receive a copy of the agreement. There is a dispute between the parties on this particular issue but, in truth, it seems to me that whether or not they did receive a copy of the agreement having signed it, this is not a matter which gives rise to an issue that needs to be litigated separately. The validity of the agreement is not affected by a failure to obtain a copy of the agreement on the date of execution, if that was in fact the case.

At the heart of the contentions made by Mr. O'Neill and Mr. Rice is that they would never have accepted the valuation of their shares at €400,000 if they thought that there was any possibility that Marketspreads could pursue them for the balance of the judgment. Equally, they contended that they would not have entered into the SPA if it meant that there would be "further pursuit" of the balance of the judgment. They said that it was their understanding prior to the entry into the SPA and as a result of consenting to the judgment that if they disposed of their entire shareholding in OR Spreadbetting Limited that this would be in full and final settlement of the debt due to Marketspreads. The problem with that contention, it seems to me, is that the agreement makes it clear that after the transfer of shares took place there would still be an outstanding debt as provided for in the agreement in the sum of €1,286,883.66. That is provided for clearly and unambiguously in the agreement. Their contentions are contradicted by the signed agreement entered into by them. Accordingly, I cannot see how any issue arises given the express terms of the Share Purchase Agreement entered into by Mr. O'Neill and Mr. Rice.

The final point raised on behalf of Mr. O'Neill and Mr. Rice relates to the basis upon which the petition has been brought and indeed the bankruptcy summons. It is contended on their behalf that the judgments have been subsumed into the Share Purchase Agreement and that the bankruptcy summons and, by extension, the petition, should be based on the SPA as opposed to the judgments. Reference was made in this context in particular to the provisions of Clause 3.3 of the agreement headed "Acknowledgment of Debt". The debt is the amount that was owed to Marketspreads by Mr. O'Neill and Mr. Rice on foot of the judgment. There is a reference in Clause 3.3 to the novation of the "relevant debt amount" as contemplated by the agreement. Clause 3.4 in the agreement headed "Novation" makes it clear that the relevant debt amount is the sum of €400,000 for which Hanvon Limited undertook the obligations of Mr. O'Neill and Mr. Rice to Marketspreads and in that regard Clause 3.4.1 provided, *inter alia*, that Marketspreads would release the sellers from the obligations under or in connection with the relevant debt amount; Mr. O'Neill and Mr. Rice irrevocably agreed with Hanvon Limited that Hanvon would owe the entire of the obligations and liability which they owed to Marketspreads in respect of the relevant debt amount and Hanvon Limited agreed with the sellers and Marketspreads to assume the relevant debt amount.

> Clause 3.42 provided:
>
> "As and from the effective date any reference to the debt shall be construed as referring to the relevant debt amount as novated by this agreement and the outstanding debt amount."

Thus, the change effected by the agreement was that insofar as the sum of €400,000 was concerned, that sum (the relevant debt amount) was to become a liability on the part of Hanvon Limited. Mr. O'Neill and Mr. Rice were released from any obligation to Marketspreads in regard to that sum and what was left was the outstanding debt amount. The outstanding debt amount was defined in the agreement as the sum of €1,286,883.66. That sum was the balance due on foot of the judgments after the deduction of the sum of €400,000.

It is correct to say, as was pointed out on behalf of Mr. O'Neill and Mr. Rice, that Clause 3.3 of the SPA states that the outstanding debt amount "will be owed by them... subject to the terms and conditions of the BON Agreements and the FR agreement." Those agreements include a number of terms including the cessation of employment of Mr. O'Neill and Mr. Rice, payments due to them, acknowledgment of debts due by them to Marketspreads (not ascertained as of that time) amongst other things. Each of those agreements noted that "This letter is without prejudice to any other right or remedy or claim or counterclaim which the Company may have in respect of the matters provided for herein." I cannot see how the incorporation of the terms of those agreements into the SPA could in any way have removed or changed the obligations of Mr. O'Neill and Mr. Rice on foot of the judgments. It seems to me that, as was contended for on behalf of Marketspreads, the purpose of the agreement was to reduce the indebtedness of Mr. O'Neill and Mr. Rice by means of the surrender of their shareholding in OR Spreadbetting Limited. It must be borne in mind that this was occurring against the background of a situation in which Marketspreads had been suspended by the Central Bank and it was certainly considered and contemplated that one of the considerations for the lifting of that suspension was the removal of Mr. O'Neill and Mr. Rice from having any involvement whatsoever in connection with Marketspreads.

Given that there is a valid and binding judgment herein and that there is a Share Purchase Agreement duly signed by Mr. O'Neill and Mr. Rice in terms which flatly contradicts their contentions as to the agreement between them and Marketspreads, I am not satisfied that any point raised on behalf of Mr. O'Neill and Mr. Rice is such as to give rise to a real and substantial issue that is, at least, arguable and has some prospect of success. One might add that their contentions are not only contradicted by the terms of the SPA but are also contradicted by their own conduct subsequent to entering into that agreement. If there was any basis for their contentions, one wonders why they entered into email correspondence as described by Mr. McNicholl and why each of them provided Statements of Affairs to Mr. Curran in July 2012. In addition, there were proposals to repay the outstanding debt through their company, Sports Spread. Given the approach disclosed in the email correspondence, the contentions made in these proceedings are somewhat surprising, to say the least.

In all the circumstances, I am refusing the application to dismiss the bankruptcy summonses herein.