THE HIGH COURT

BANKRUPTCY

[No. 5942]

IN THE MATTER OF PETITION FOR ADJUDICATION OF BANKRUPTCY BY PROMONTORIA (ARROW) AGAINST RICHARD DINEEN

PROMONTORIA (ARROW) LTD

BETWEEN

PROMONTORIA (ARROW) LTD

PETITIONER

AND

RICHARD DINEEN

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 16th day of July, 2018

1. The issue for decision in this judgment is whether the bankruptcy summons issued by the petitioner on the 23rd October, 2017 should be dismissed pursuant to s. 8 (6) of the Bankruptcy Act, 1988 as amended.

The relevant law

2. Section 8 (5) and (6) of the Bankruptcy Act, 1988 ("the Act") provides:

> *"(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."*

3. In a judgment delivered on the 16th July, 2018 in *Ennis Property Finance DAC v. Dominic Carney* I summarised the relevant legal principles as follows:

> *"4. From these passages the following points emerge:*
>
> *(i) Once an issue for trial arises on the summons, the summons must be dismissed.*
>
> *(ii) The issue raised must be real and substantial.*
>
> *(iii) The issue raised may be an issue of fact or of law.*
>
> *(iv) If it is an issue of fact, it must have some credibility.*
>
> *(v) Mere assertion that an issue arises is insufficient.*
>
> *(vi) An assertion must be supported by evidence of fact which would, if true, arguably give rise to an issue that requires to be litigated outside the bankruptcy proceedings.*
>
> *(vii) If the issue raised is an issue of law which was well established and as to which there was no doubt the summons should not be dismissed."*

The facts

4. Anglo Irish Bank Corporation Plc offered the respondent certain facilities by letters of loan offer dated 2nd May, 2007 and 30th April, 2008 which were duly accepted by the respondent. By letter of loan offer dated 22nd December, 2009 Anglo Irish Bank Corporation Ltd granted the respondent a further facility("the Loans") .

5. The petitioner says that the loans and associated security were acquired by National Assets Loan Management Ltd ("NALM"). By global deed of transfer dated 11th December, 2015 the Loans a nd associated security were transferred from NALM to the petitioner. Clause 2 of the deed of transfer contained a certificate pursuant to s. 108 of the National Asset Management Act, 2009 in the following terms.

> *"Pursuant to s. 108 of the NAMA Act, the Assignor (a NAMA group entity under the NAMA Act) hereby certifies that the bank assets listed in the Schedule(s) hereto have been transferred to it in accordance with part 6 of the NAMA Act and that those assets are held by the assignor as at the date hereof."*

6. By deed of confirmation in relation to loan balances dated 11th December, 2015 between NALM and the petitioner, NALM confirmed to the petitioner that each of the loan balances was not less than the corresponding amounts set out in the column headed "total outstanding debt balance (ccy)" in schedule 1 as of the cut-off date and that the loan balances represent the amounts outstanding under the facilities as of the cut out date. The balances in respect of the respondent's indebtedness were set out in p. 49 of the schedule.

7. The petitioner served a particulars of demand and notice requiring payment prior to the issue of a bankruptcy summons on the respondent which was dated the 4th May, 2017 and claimed payment in the sum of €20,025,705.17. The respondent did not pay the sum or any part thereof and the petitioner applied for and was given leave to issue a bankruptcy summons against the respondent on the 23rd October, 2017. The petitioner was unable to effect personal service of the bankruptcy summons upon the respondent. It issued an ex parte docket dated 21st November, 2017 seeking an order pursuant to O. 76 r. 14 (1) of the Rules of the Superior Courts for the time for the service of the bankruptcy summons to be extended for a further 28 days and an order for substituted service of the bankruptcy summons upon the respondent by ordinary prepaid post at his residential address. An order in those terms was made on the 27th November, 2017.

8. The petitioner served the bankruptcy summons on the respondent in accordance with the terms of the order. By notice of application to dismiss the bankruptcy summons issued in the examiner's office on the 18th December, 2017 the respondent applied to have the bankruptcy summons dismissed.

9. After an exchange of affidavits between the parties, the application was advanced by the respondent upon two grounds.

The first issue
10. Order 76 r. 14 (1) of the Rules of the Superior Courts provides as follows:

> *"14. (1) A bankruptcy summons shall be personally served within twenty-eight days from the date of the summons …If personal service within the time limit cannot be effected, the Court may grant extension of the time for such service. If the Court is satisfied by affidavit that the debtor is evading service or that from any other cause prompt personal service cannot be effected, it may order service to be effected in the manner permitted by Order 9, rule 2 as if the debtor were a defendant, or make such order for substituted or other service, or for the substitution for service of notice by letter, public … or otherwise, as may be just."*

In relation to the first issue the respondent says that the bankruptcy summons issued on the 23rd October, 2017, The period of 28 days expired on the 20th November, 2017. No application was made to extend the time to serve the bankruptcy summons within the 28 days for service of the bankruptcy summons. The application was brought after this period had elapsed. Therefore, there was an issue for trial in relation to the validity of the order extending the time for serving the bankruptcy summons and whether the bankruptcy summons was spent.

11. This does not give rise to an issue for trial. First, the order for substituted service was not appealed and stands. Secondly, O. 76 r. 14 (1) fixes a time for service of a bankruptcy summons. It does not fix the time to apply for the extension of time in which to serve the bankruptcy summons. Thirdly O. 122 r. 7 states:

> *"The Court shall have power to enlarge … the time appointed by these Rules, …, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."*

There is nothing in the provisions of O. 76 r. 14 to suggest that it is not subject to the provisions of O. 122 r. 7. No authority for this proposition was advanced. I reject this argument.

The second issue
12. The respondent accepts that there is no issue with the transfer of the Loans and security from NALM to the petitioner. The respondent argues that there was no evidence of a valid assignment of the Loans to either NAMA or NALM. The respondent argues that the petitioner had not exhibited any notices of assignment in respect of the transfer or transfers which occurred prior to the transfer by NALM to the petitioner in December 2015. He argues that the validity of that assignment was predicated on the initial transfer(s) being valid and it was submitted that there was considerable uncertainty in respect of this chain of title. Accordingly, an issue arose in respect of the petitioner's standing and/or entitlement to institute and prosecute the proceedings which must be determined outside the bankruptcy process.

13. The respondent referred to s. 84 of the NAMA Act which permits NAMA to acquire an eligible bank asset of a participating institution. It was accepted that Anglo Irish Bank Corporation Plc and Anglo Irish Bank Corporation Ltd were participating institutions and that the Loans and the associated security of the respondent were eligible bank assets. The respondent emphasised the significance of s. 87 of the Act. Subsections 1 and 2 provide:

> *"(1) When NAMA has identified an eligible bank asset of a participating institution that NAMA proposes to acquire, and has determined the acquisition value of that asset, NAMA shall serve on the institution a schedule (referred to in this Act as an "acquisition schedule").*
>
> *(2) NAMA may nominate a NAMA group entity as the entity that is to acquire a bank asset identified for acquisition."*

The respondent argued that it is not clear whether NAMA acquired the Loans and associated security of the respondent directly from the Anglo companies and then itself transferred the Loans and associated security to NALM or whether it nominated NALM directly to acquire the assets. This meant that it could not be certain that the assets have been transferred to NALM under the provisions of the Act of 2009. It meant therefore that an issue arose for trial as to whether assets may have been properly transferred by NAMA to NALM.

14. Section 96 of the Act of 2009 requires participating institutions to make reasonable efforts to notify each debtor of the acquisition of the bank asset by NAMA or the relevant NAMA group entity. Subsection 2 (c) states that no objection may be raised by any debtor to NAMA's or the relevant NAMA group entity's, acquisition of the bank asset concerned based upon any failure or delay on the part of a participating institution to notify the person in accordance with s. 96 (1).

15. Notwithstanding the provisions of s. 96, the respondent said that nonetheless there was a requirement to comply with s. 28 (6) of the Judicature Act of 1877 based on the provisions of s. 106 of the Act of 2009. This states:

> *"Nothing in this Act relieves NAMA or a NAMA group entity of any obligation, at law or in equity, except to any extent to which this Act specifically provides otherwise."*

The respondent argues that s. 106 did not relieve either NAMA or NALM of the obligation to comply with requirements of s. 28 (6) and that an issue arose for trial as to whether NAMA had complied with the requirements of the Judicature Act, s. 28 (6). This meant that

until this was determined there was an issue as to the title that NALM transferred to the petitioner by the deed of transfer of the 11th December, 2015.

16. The petitioner relied upon the provisions of s. 108 of the Act of 2009. This provides:

> *"108.— (1) NAMA or a NAMA group entity may certify under its seal or common seal, as the case requires, that NAMA or the NAMA group entity holds a bank asset specified in the certificate.*
>
> *(2) A document purporting to be a certificate issued in accordance with subsection (1)—*
>
> > *(a) shall be taken to be such a certificate, and to have been certified under the seal of NAMA or the NAMA group entity, as the case may be, unless the contrary is proved, and*
> >
> > *(b) is conclusive as to the matters set out in it"*

17. The certificate issued by NALM in clause 2 of the deed of transfer of the 11th December, 2015 is a certificate pursuant to s. 108 of the Act and is therefore conclusive as to the matters set out in the certificate. It states that:

> *"The bank assets listed in the schedule(s) hereto have been transferred to it in accordance with part 6 of the NAMA Act and that those assets are held by the assignor as of the date" of the deed."*

The certificate is conclusive evidence of the transfer of the respondent's Loans and associated security to NALM in accordance with part 6 of the NAMA Act. The court cannot go behind this certificate. The respondent has not alleged any basis upon which it could do so. In those circumstances it is not open to the court to go behind the certificate.

18. This was the conclusion reached by Twomey J. in *Promontoria (Gem) DAC v. Redmond & Ors* [2018] IEHC 231. In an application for summary judgment the defendant challenged the plaintiff's title to bring the proceedings. At para. 15 of the judgment Twomey J. stated:

> *"As regards NALM's entitlement to assign the Facility Letter, Clause 2 of the Global Deed of Transfer contains a certificate by NALM that the Scheduled Documents, which includes the Facility Letter, had been transferred to it in accordance with Part 6 of the National Asset Management Agency Act 2009. In this regard, it is relevant that under s. 108 of that Act, NALM is entitled to certify under seal that it holds a specific "bank asset" (which includes a credit facility, such as the Facility Letter) and this certificate is conclusive as to the matters set out therein. On this basis, this Court concludes that this argument regarding the evidence of Promontoria's title does not offer the defendants a credible defence."*

19. I agree with the analysis of Twomey J. The threshold that the respondent must meet in this application is equivalent to the threshold required to defend an application for summary judgment and refer a matter to a plenary hearing. This argument was insufficient for the latter purpose; it cannot be sufficient for the purposes of an order under s. 8 (6) of the Act.

20. It follows that no issue arises for trial in relation to the second issue.

Conclusion

21. Having analysed each of the two issues raised by the respondent in support of an application to dismiss the bankruptcy summons pursuant to s. 8 (6), I have concluded that no issue would arise for trial and accordingly I refuse the application to dismiss the bankruptcy summons.