THE HIGH COURT

BANKRUPTCY

[No. 580P/579P]

IN THE MATTER OF PETITIONS OF BANKRUPTCY BY THE MINISTER FOR COMMUNICATIONS ENERGY AND NATURAL RESOURCES AND MICHAEL O'CONNELL

PETITIONERS

AND

MICHAEL WYMES AND RICHARD WOOD

RESPONDENTS

JUDGMENT of Mr. Justice Meenan delivered on the 20th day of March, 2018.

Introduction:

1. The bankruptcy proceedings herein originate from the decision in *Bula Ltd (In Receivership) and Others v. Tara Mines Ltd and Others*. On 24th February, 1997 Lynch J. made an order for costs against the above named respondents, Mr. Michael Wymes and Mr. Richard Wood. The issue of costs was itself the subject of protracted litigation.

2. On 31st July, 2003 a certificate of taxed costs was issued for the amount of €3,297,493.33, which together with interest amounted to a total sum of €4,881,735.59. The petitioners then set about recovering this amount from the respondents. This was the subject of further protracted litigation. Subsequnetly, bankruptcy summonses were served on both respondents on 1st March, 2010.

3. Further proceedings were commenced challenging the validity of these bankruptcy summonses and the first named respondent, Mr. Wymes, brought an application to dismiss the summons. This application was dismissed by McGovern J. in the High Court on 29th April, 2010 and the matter was subsequently appealed to the Supreme Court.

4. The Supreme Court delivered judgment on the appeal on 9th March, 2017 (*Minister for Communications, Energy & Natural Resources v. Wood & anor.* [2017] IESC 16), and a further judgment followed on 26th July, 2017 (*Minister for Communications, Energy & Natural Resources v. Wood & anor*. [2017] IESC 58). The appeal was dismissed and the validity of the bankruptcy summons was upheld. The petition herein was issued on 10th June, 2010. The hearing of the petition was adjourned on a number of occasions to await the outcome of Mr. Wymes's application to dismiss the bankruptcy summons.

5. The hearing of the petitions to have the respondents adjudicated bankrupt came before this Court on 23rd January, 2018. Mr. Wymes appeared in person and filed several affidavits in opposition to the petition. The second named respondent, Mr. Wood, was represented by counsel who adopted the position that he was not consenting to the orders being sought. Mr. Wood did not file any affidavits in relation to the proceedings.

6. In spite of the fact that litigation has been on-going for nearly fifteen years (from the date of the certificate of taxation on 31st July, 2003) involving numerous issues, it is important not to lose sight of the basic statutory requirements necessary to adjudicate a person bankrupt and the requisite proofs that are clearly set out. Even where the requisite proofs have been established, the court retains an inherent jurisdiction to stay bankruptcy proceedings. In the proceedings herein, it will be necessary to determine if any such circumstances exist to invoke this jurisdiction.

Statutory Provisions

7. The relevant legislation is the Bankruptcy Act 1988 (as amended) ("the Act of 1988"). The following are the relevant provisions:-

Section 7:-

> "7(1) An individual (in this Act called a "debtor") commits an act of bankruptcy in each of the following cases—
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) …
>
> (f) …
>
> (g) If the creditor presenting a petition has served upon the debtor in the prescribed manner a bankruptcy summons, and he does not within fourteen days after service of the summons pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor."

Section 11(1):-

> "(1) A creditor shall be entitled to present a petition for adjudication against a debtor if—
>
> (a) the debt owing by the debtor to the petitioning creditor (or, if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to more than €20,000,
>
> (b) the debt is a liquidated sum,
>
> (c) the act of bankruptcy on which the petition is founded has occurred within three months before the

presentation of the petition, and

(d) …"

Section 14:-

"(1) Subject to *subsection* (2), where the petition is presented by a creditor, the Court shall, if satisfied that the requirements of *section 11*(1) have been complied with, by order adjudicate the debtor bankrupt.

(2) Before making an order under *subsection* (1), the Court shall consider the nature and value of the assets available to the debtor, the extent of his liabilities, and whether the debtor's inability to meet his engagements could, having regard to those matters and the contents of any statement of affairs of the debtor filed with the Court, be more appropriately dealt with by means of -

(a) a Debt Settlement Arrangement, or

(b) a Personal Insolvency Arrangement,

and where the Court forms such an opinion the Court may adjourn the hearing of the petition to allow the debtor an opportunity to enter into such of those arrangements as is specified by the Court in adjourning the hearing.

(3) …

(4) …"

Application of Statutory Provisions:
8. The first issue to be determined is whether the respondents (the debtors) have committed an "act of bankruptcy". A bankruptcy summons was served on each of the debtors. In the case of Mr. Wymes, an application was brought in the High Court to dismiss the summons. As detailed above, this application was rejected by the High Court, a decision that was subsequently affirmed by the Supreme Court. Therefore, there is no issue concerning the validity of either of the debtors' summonses.

9. The debt was not paid within fourteen days after the service of the bankruptcy summons. It follows therefore that an "act of bankruptcy" has taken place, as per s. 7(1)(g) of the Act of 1988. In reaching this conclusion, I have considered the argument put forward by Mr. Wymes that there was no obligation on him to pay the debt on foot of the bankruptcy summons in circumstances where he has made an application to dismiss the summons within the fourteen days. I will return to this argument later in the judgment.

10. As an "act of bankruptcy" has occurred, the petitioners under s. 11(1)(c) of the Act of 1988 were entitled to present a petition for adjudication against the debtors. The "act of bankruptcy" on which the petition was founded occurred within three months before its presentation, as required by s. 11(1)(c).

11. The wording of s. 14(1) is unambiguous. If the court is satisfied that s. 11(1) has been complied with, then the court shall adjudicate the debtors bankrupt. However, the court retains an inherent jurisdiction to stay the bankruptcy proceedings. I will consider this issue in the context of the various defences raised by Mr. Wymes.

Defences:
12. The provisions of s. 14(1) were considered by Baker J. in *ACC Loan Management Limited v. P* [2016] IEHC 117. Baker J. states:-

"Inherent jurisdiction

46. Counsel for the debtor also argues, and this is not denied by the Bank, that I have an inherent jurisdiction to stay the bankruptcy proceedings. I accept that I have such jurisdiction, but consider that a number of matters must guide me in the exercise of that discretion. The newly available personal insolvency options, which offer an insolvent debtor a possibly more benevolent means of dealing with his creditors, must guide my approach. However, I cannot fail to have regard to the provisions of s. 14 (1) of the Act of 1988 as follows:

"14(1) Where the petition is presented by a creditor, the court shall, if satisfied that the requirements of section 11(1) have been complied with, by order adjudicate the debtor bankrupt."

47. This creates, in my view, a prima facie entitlement on the part of a petitioning creditor that the adjudication order be made, and s. 14(2) must be seen as an exception…"

13. In his unsuccessful application to dismiss the bankruptcy summons before the High Court, Mr. Wymes relied on a number of grounds. It is clear that a number of the grounds that were relied on in that application are now being raised as defences to the petition. This Court, when considering the defences raised by Mr. Wymes, cannot allow him to either re-litigate issues that have already been decided or to raise issues that ought to have been raised in previous proceedings, as this would be contrary to the rule in *Henderson v. Henderson* [1843] 3 Hare 100. Against this background, I will look at the various defences raised.

14. Mr. Wymes argues that there was no "act of bankruptcy" and consequently no basis upon which the petition against him could be presented in circumstances where he had applied to have the bankruptcy summons dismissed within fourteen days provided for under the Act of 1988. I see no basis for this argument. The decision of the Supreme Court to dismiss the summons had the effect that it was as if the application had not been made. As such, the obligation to pay the debt within fourteen days remained and a failure to do so would constitute an "act of bankruptcy". Such a view is supported by the decision in *McConnon v. Zurich Bank* [2012] 4 IR 737. In that case, the respondent obtained judgment against the applicant and a bankruptcy summons was subsequently issued by the respondent which the applicant sought to dismiss on a number of grounds. During the course of the proceedings, a question was

raised as to whether a creditor who had served a bankruptcy summons on a debtor was required by s. 11 of the Act of 1988 to present a petition for adjudication within three months of an "act of bankruptcy", pursuant to s. 7(1)(g), notwithstanding the fact that the debtor had taken proceedings to challenge the validity of the bankruptcy summons. In giving judgment Dunne J. stated:-

> "[35] … It seems to me that looking at the provisions of s. 8(5) and s. 11(1)(c) of the Act of 1988 together there is some ambiguity in the legislation. On a literal interpretation of s. 11(1)(c) of the Act of 1988, I think that one would have to say that the creditor in this case would have to begin the process all over again leading to the issue of a further bankruptcy summons, leading, no doubt, to a similar application to dismiss. However, I do not think that s. 11(1)(c) of the Act of 1988 can be looked at in isolation from s. 8(5) of the Act of 1988. Counsel for the respondent pointed out in his submissions that if there was not, in effect, a stay on the three month period pending the determination by the court of the validity of the bankruptcy summons, then the applicant would have to pay the debt due notwithstanding the challenge to the validity of the bankruptcy summons in order to avoid committing an act of bankruptcy. As I have said, it seems to me that when one looks at the Act as a whole and at the purpose of the legislation, it would be illogical to interpret those sections as giving what amounts to a stay to a debtor pending the determination as to whether or not an act of bankruptcy has occurred while not affording the creditor what amounts to the same facility in respect of the determination of the time when the act of bankruptcy could be said to have occurred. Accordingly, I am satisfied that an act of bankruptcy has been committed by the applicant."

15. The issue of delay was raised as a defence by Mr. Wymes. It is common case that there has been a delay in bringing these proceedings on for trial. However, much of the responsibility for this delay rests with Mr. Wymes himself who has engaged in protracted, and ultimately, unsuccessful, litigation. This issue was dealt with in the application to dismiss the bankruptcy summons before McGovern J. in the High Court and again by Dunne J. in the Supreme Court. I refer to the following passage from the judgment of Dunne J. in the Supreme Court, delivered 9th March, 2017:-

> "Having considered the submissions of Mr. Wymes on the subject of delay it seems to me that one thing can be said clearly. Delay in the execution of an order for costs or taking proceedings such as bankruptcy proceedings in order to recover a debt which has been conclusively found to be due by the courts as in this case on foot of an order for costs does not render the order for costs enforceable. In other words, it does not seem to me that delay in executing an order for costs or in applying for a bankruptcy summons by itself could give rise to an issue requiring a bankruptcy summons to be dismissed. It is not without significance that considerable latitude is given to the process of execution under the Rules of the Superior Courts which provides for a very lengthy period of time within which to execute judgments, albeit after a period of six years, leave of the Court may be required before pursuing the matter further, as occurred in the *Bula* case referred to above. That latitude is very much in contrast to the time limits applicable to the commencement of proceedings to be founds in the Statute of Limitations. Thus, if delay is an issue which could have a bearing on whether or not the bankruptcy summons should be dismissed, it seems to me that the delay in question must give rise to prejudice of some kind. The question then arises as to whether or not prejudice asserted by Mr. Wymes in this case can feed into that consideration."

16. The Supreme Court found that there was no such prejudice.

17. Mr. Wymes submitted that "a form of execution had issued and remained to be proceeded upon." Such was put forward as a ground for refusing the order sought by the petitioners. However, this issue has already been determined by the High Court in *Minister for Communications, Energy and Natural Resources and M. O'C v. M.W. and R.W* [2010] 3 IR 1, where McGovern J. stated:-

> "[20] (d) I do not accept the respondents' contention that a form of execution has issued in respect of the claimed debt insofar as the applicants have registered judgment mortgages against property belonging to the respondents but have not proceeded upon them. A registration of a judgment mortgage is not a process of execution: see *In re Lambe's Estate* [1869] I.R. 286 and *Barnett v. Bradley* (1890) 26 L.R. Ir. 209. Where a party registers a judgment mortgage, it can then proceed to obtain a well charging order and an order for sale. But the mere registration of a judgment mortgage is not, without more, execution…"

18. Mr. Wymes claims that the debt due by him is statute barred. Section 11(6)(a) of the Statue of Limitations Act, 1957 (as amended) provides:-

> "(6) (a) An action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable.
>
> (b)No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due."

Again, this issue has been determined by the Supreme Court judgment of 26th July, 2017, where Dunne J. stated:-

> "As has previously been explained, the creditor in this case, the Minister for Communications, Energy and Natural Resources ("the Minister") obtained an order in February, 1997 for costs in the High Court against the debtors, Mr. Wood and Mr. Wymes. The order for costs provided that in default of agreement the costs would be taxed and ascertained. The process of taxation was long and drawn out and ultimately a final certificate of taxation in respect of the High Court order issued on 31st July, 2003. Until that time the amount of costs due by Mr. Wood and Mr. Wymes was unascertained. It goes without saying that until such time as the final amount due for costs was ascertained by the issue of the final certificate of taxation, the Minister was unable to recover same."

It follows, that this is not a ground upon which Mr. Wymes can resist the application before this Court.

19. Mr. Wymes submits that he ought not to be adjudicated bankrupt as the litigation that gave rise to the order for costs was in the public interest. The standard rule with regards cost orders is that "costs follow the event", as per O. 99 r. 1(4) of the Rules of the Superior Courts. However, the court has discretion to depart from this rule where the litigation involves matters in the public interest, for example, constitutional issues. If a court is being requested to exercise this discretion then the appropriate time to make such a request is when the issue of costs is being determined by the trial judge. It would appear that no such application was made to the trial judge in 1997 or, if it was, it was refused. This Court cannot revisit an issue of costs which was determined in 1997.

20. In his submissions, Mr. Wymes referred the court to the fact that there appears to have been a complete breakdown in relations between himself and the other debtor, Mr. Wood. The circumstances and consequences of this breakdown were set out in detail in

the course of several affidavits filed by Mr. Wymes. Reference was made to negotiations and an alleged settlement involving Mr. Woods. These matters were also raised and dealt with in the course of the application to dismiss the bankruptcy summons. I refer again to the judgment of the Supreme Court of 9th March, 2017, where Dunne J. states:-

> "It appears that there are serious disputes between Mr. Wood and Mr. Wymes in relation to the settlement of obligations between themselves, apparently the subject of other proceedings. It seems to me that regardless of the fact that discussions may have taken place between Mr. Nagle and Mr. O'Hagan some years ago in relation to a resolution of the indebtedness of Mr. Wood to the State in respect of the costs at issue in these proceedings, it is difficult to see any factual basis beyond speculation and suspicion on the part of Mr. Wymes for suggesting that there was a collateral or ulterior motive on the part of the State in pursuing these bankruptcy proceedings. That there were discussions to settle the outstanding liabilities of Mr. Wood is not enough. It is clear from the conduct of the Minister in relation to this matter that the purpose of these proceedings is to recover the amount due from Mr. Wood and Mr. Wymes through the bankruptcy process. There was nothing to stop Mr. O'Hagan on behalf of the Minister from entering into negotiations to attempt to resolve the issue with Mr. Wood. The fact that those negotiations were not successful is neither here nor there. There is no basis for concluding that the issue raised in this regard by Mr. Wymes is anymore than an assertion unsupported by any cogent evidence and as such is not one that could succeed and accordingly I reject his submissions on this issue."

In my view, this determines the matter insofar as it is contended that such is a defence to the application herein. The fact that these issues are ongoing does not alter the position.

21. It was contended that there are sufficient assets available, or potentially available, to cover the debt owed to the petitioners. This may have some relevance under the provisions of s. 14(2) of the Act of 1988, set out at para. 7 above. However, as the debtors' debts exceed €3,000,000 they are not amenable to enter into a Personal Insolvency Arrangement without the consent of the creditor and, in this instance, the petitioner is not consenting to such an arrangement.

22. Further, despite references to various assets being available that would be sufficient to discharge the debt, matters have failed to progress and the debt is still outstanding.

23. Possibly anticipating that the petitioners would rely upon the rule in *Henderson v. Henderson* and the doctrine of res judicata, Mr. Wymes relies on s. 135 of the Act of 1988, which provides:-

> "The Court may review, rescind or vary an order made by it in the course of a bankruptcy matter other than an order of discharge or annulment."

This issue was also addressed by Dunne J. in the Supreme Court judgment of 9th March, 2017 as follows:-

> "It is contended that by virtue of this provision the Court has a jurisdiction to revisit its previous decision. It does not seem to me that that provision can avail Mr. Wymes or that it amounts in some way to an exception to the *res judicata* doctrine. Section 135 is an unusual provision insofar as it does permit the Court to review an earlier order made in the then extant proceedings. While s. 135 maybe usual in allowing a court to review an order previously made in proceedings then before the Court, I cannot see how s. 135 can be relied on to allow an issue decided in other proceedings to be revisited in these proceedings. In those circumstances, I am satisfied that the approach of the learned trial judge was correct."

24. Finally, Mr. Wymes submits that the "petition is tainted by ulterior motives/collateral purpose/economic duress/improper conduct and wrongdoing towards collusive grossest of undervalues for the lands of Mr. Wood". This issue was dealt with by Dunne J. in the Supreme Court on the 9th March, 2017.

> "...It is contended that Mr. Nagle negotiated with Mr. Wymes in the period between March 2009 to November 2009 in relation to Mr. Wymes' prior security claim over the lands of Mr. Wood in relation to the indebtedness of Mr. Wood to Mr. Wymes. It is further contended that the negotiations that took place between Mr. Nagle and Mr. Wymes took place in circumstances where Mr. Wymes was unaware of any previous discussions between Mr. O'Hagan and Mr. Nagle. In these circumstances, it is contended by Mr. Wymes that "there are substantive grounds for believing that the threatened bankruptcies have an ulterior and collateral purpose for the exercise of pressure so as to facilitate and enable the securing of lands of Mr. Wood by the local authorities at a bargain undervalue, if not fire sale, price". Thus it is alleged that there was an abuse of process and a collateral and ulterior purpose in issuing bankruptcy proceedings."

I refer again to the passage from the judgment of Dunne J., set out at para. 20 above. This is a clear and unambiguous rejection of Mr. Wymes's submissions on this ground.

Conclusion on "defences"

25. In the foregoing paragraphs, I have set out the various defences put forward by Mr. Wymes. An analysis of these defences demonstrates that they are either of no substance or have already been dealt with in the course of other proceedings.

26. At para. 7 above, I have set out the wording of s. 14(1) of the Act of 1988, which, subject to the inherent jurisdiction of the court to stay proceedings, directs the court to adjudicate the debtors bankrupt if "satisfied that the requirements of s. 11(1) have been complied with..." I am satisfied that s.11(1) has been complied with.

27. In my view, having analysed the defences put forward, no grounds have been advanced to invoke the inherent jurisdiction of the court to stay the proceedings herein.

28. By reason of the foregoing, the petitioners are entitled to the reliefs sought and the debtors, Mr. Michael Wymes and Mr. Richard Wood, must each be adjudicated bankrupt.