

## THE HIGH COURT

## BANKRUPTCY

1084P BANKRUPTCY

## BETWEEN

M. G.

PETITIONER

AND

K. M.

DEBTOR

**JUDGMENT of Ms. Justice Costello delivered the 15th day of January 2015**

1. The petitioner presented a petition dated 22nd May, 2014, seeking that the debtor, Mr. K. M., be adjudicated a bankrupt. The act of bankruptcy relied upon is that a bankruptcy summons was issued by the High Court on 24th March, 2014, and the bankruptcy summons was served on the debtor personally on 15th April, 2014, and since that date the debtor has failed to pay any of the said sum and the debt has not been secured or compounded. It is alleged that the creditor is indebted to the petitioner in sum of €425,689.21 plus continuing interest. The details are set out as follows:-

Judgment obtained 4th September, 2012, HC Rec. No. 2011/929R

Judgement amount €333,348.80

Costs €1,750.00

Paid/Credit on account (€15,600.05)

Court interest at 8% per annum (406 days) €28,431.01

**Total: €347,929.76**

Judgment obtained 30th August, 2013, HC Rec. No. 2013/504R

Judgment amount €76,599.66

Costs €383.63

Paid/Credit on account €0.00

Courts Interest at 8% per annum (46 days) €776.16

**Total: €77,759.45**

**Total Due at 15th October, 2013: €425,689.21**

2. These sums calculated as set out in the petition were demanded of the debtor in a statutory demand dated 22nd October, 2013, which was sent to the debtor on 24th October, 2013. The interest was calculated up to the 15th October, 2013. The debtor did not pay the said sum demanded and a bankruptcy summons issued on 24th March, 2014, in respect of the sums claimed as set out in the notice sent on 24th October, 2013. The summons was personally served on the debtor on 15th April, 2014. As no monies were received pursuant to the bankruptcy summons, the petition herein issued on 22nd May, 2014, relying upon the failure to pay the sum demanded in the bankruptcy summons as the act of bankruptcy grounding the petition.

3. The debtor swore a replying affidavit on 23rd July, 2014, but he did not dispute the sums demanded either in the statutory demand or the bankruptcy summons. However, at the hearing of the petition it was argued on his behalf that the amount sought on petition was in excess of the sum actually due and owing by the debtor to the petitioner and on that basis the petition ought to be dismissed.

4. It was submitted on behalf of the debtor that the sum claimed included interest on the costs in respect of the two judgments in circumstances where such interest was not chargeable. Therefore, it followed that a sum in excess of the amount due was claimed and that accordingly the petition ought to be dismissed.

5. The Debtors (Ireland) Act 1840 provides as follows:-

*"26. Every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment... until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment.*

*27. All decrees and orders of the Court of Chancery, and all rules of the any of the superior courts of common law.... whereby any sum of money, or any costs, charges, or expences, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies or costs, charges, or*

*expences shall be payable shall be deemed judgment creditors within the meaning of this Act.... and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges, or expences are by such orders or rules respectively directed to be paid;...."*

6. In *O'Sullivan v. Dwyer* [1973] I.R. 81 Walsh J. construed these two sections and at p. 85 stated:-

*"Thus interest on a judgment of the High Court or the Supreme Court may be claimed from the date of the pronouncement of the judgment and the costs awarded. Order 42, r. 15, of the Rules of the Superior Court provides that every execution order shall be endorsed with a direction to the sheriff to levy the money sought to be recovered under the judgment and also to levy the interest thereon at the rate of 4% per annum from the time of the judgment or order was entered or made unless the judgment otherwise directs."*

7. The debtor submitted that *O'Sullivan v. Dwyer* was thus authority for the proposition that by virtue of the operation of s. 27 of the Act of 1840 an execution order such as an order of *fieri facias* will attract interest on the judgment amount and on the costs awarded from the date of the pronouncement of the judgment.

8. The central tenet of the debtor's argument was that s. 30 of the Courts and Courts Officers Act 2002, as amended by s. 41 of the Civil Liability and Courts Act 2004, amended s. 27 and provided the only basis upon which interest on the amount of cost awarded could be charged. It did not include the circumstances that occurred in the two judgments obtained against the debtor and therefore there was no jurisdiction to charge interest. If there was no lawful basis for charging interest then the petition should be dismissed as it claimed interest on costs on its face when there was no legal basis for same.

9. Section 30 provides as follows:-

*"30 (1) Subject to section 23 of the Act of 1981, interest on the amount of costs, charges or expenses awarded to a party in proceedings in a court, to which section 27 of the Debtors (Ireland) Act 1840 applies, pursuant to a judgment, order or decree of the court, shall –*

*(a) Not be payable until-*

*(i) if the amount aforesaid is agreed by the parties to the proceedings, the date of such agreement, or*

*(ii) in default of agreement –*

*(I) the date on which a certificate of taxation (which expression includes an interim certificate of taxation) in respect of the amount aforesaid is issued by a taxing master of the High Court or by a county registrar exercising the powers of such a taxing master as may be appropriate, or*

*(II) if appropriate, in the case of proceedings in the Circuit Court, the date on which a county registrar measures the amount aforesaid in accordance with the rules of the court,*

*and*

*(b) be payable at the rate for the time being standing specified in section 26 of the Debtors (Ireland) Act 1840, from the appropriate date aforesaid until that amount is paid."*

It was submitted on behalf of the debtor that by virtue of the operation of s. 30 interest could only be levied on costs, charges or expenses to which s. 27 of the Act of 1840 applied where those costs have either been agreed between those parties or, in the absence of agreement, where the costs have been taxed. There was no other power to charge interest on costs and therefore if costs had not been agreed or taxed or measured by a county registrar the judgment creditor was not entitled to interest on the costs.

10. The petitioner rejected the arguments advanced on behalf of the debtor. As a preliminary point it was submitted that the debtor's replying affidavit did not dispute his indebtedness to the petitioner and in particular did not establish any facts upon which it could be concluded the sum claimed in the petition was in excess of the sum due and owing by the debtor to the petitioner. While this is undoubtedly the case, in my opinion this does not preclude the debtor from raising the legal argument advanced on his behalf. It is clear from the statutory demand, the bankruptcy summons and the petition that the sums demanded therein reflect a calculation of interest on costs and therefore it is open to him to advance submissions in respect of that fact.

11. It was pointed out on behalf of the petitioner that at no stage did the petitioner demand a sum in excess of the amount actually due and owing by the debtor to the petitioner pursuant to the two judgments. It was pointed out that the debtor did not dispute the judgment amounts, the interest calculated on the judgments or the amount of the costs. The sole matter of dispute was the interest claimed in respect of the two orders of costs. These were calculated up to the 15th October, 2013, and came to €159.60. The petitioner argued that the particulars of demand dated 24th October, 2013, set out a figure for interest on the judgment sum up to the 15th October, 2013. If the interest had been brought up to the 24th October, 2013, an additional sum of €777.90 was due and owing as of 24th October, 2013. Thus, it was submitted, even if it had been incorrect to include the sum of €159.60 in respect of interest on costs, the fact that a further €777.90 was in fact due in respect of interest on the judgment sums by the 24th October, 2013, meant that the statutory demand did not claim a sum greater than was actually due and owing by the debtor to the petitioner on that date.

12. When the second statutory demand was served on the 5th March, 2014, in the same sum as that calculated up to 15th October, 2013, the amount actually due and owing by the debtor to the petitioner in respect of the judgment sums plus interest was commensurately greater. It was submitted that as a matter of fact the petitioner had never demanded payment of a sum greater than that which was in fact due and owing by the debtor to the petitioner.

13. The debtor relied upon the well known case of *In re A Debtor* [1908] 2 K.B. 684 where at pp. 686-687 Cozens-Hardy M.R. held as follows:-

*"This appeal, though it relates only to a small amount undoubtedly raises a point of importance.... 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, sub-s.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...."*

At p. 689 of the judgment, Crozens- Hardy M.R. continued:-

*"Both on principle and on authority it seems to me that when you find a notice including in the claim for payment a sum which is not due from the debtor at all, that is not a mere formal defect within s. 143, sub-s. 1. The appeal must therefore be allowed."*

14. The debtor also cited *O'Maoileoin v. Official Assignee* [1989] I.R. 647 where Hamilton P. considered the above cases and stated at p. 654:-

*"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... 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."*

15. Murphy J. considered the consequences of making a demand for payment of an amount in excess of the sum due and owing *In Re Sherlock* [1995] 2 I.L.R.M. 493 and stated at p. 497:-

*"It seems to me that applying those principles to the present case where I have accepted that the sum demanded of the debtor exceeded the amount due by more than £1,000, it follows that the cause shown must be allowed and the adjudication set aside."*

16. In each of these cases the error resulted in a sum in excess of the amount due and owing being demanded and it was on that basis that the petition was either dismissed or the adjudication annulled. That is very different from a case such as this where the amount demanded was always less than the amount lawfully due and owing.

17. In *Murphy v. Bank of Ireland* [2014] IESC 37 the Supreme Court considered an application to show cause to the Court against an adjudication in bankruptcy where there had been a failure to give credit for the sum of €4,425 as against the sum of €495,938.87 in the bankruptcy summons. In the circumstances of the case, the sum due was significantly in excess of that sought on the bankruptcy summons. The Supreme Court rejected the appeal of the decision of McGovern J. in the High Court. Dunne J. held:-

*"I consider the approach of McGovern J. to be correct. The sum demanded was not in excess of that actually due and there was nothing in the Bankruptcy Summons which could have confused or misled the Appellant as to what he was required to do in order to avoid committing an act of bankruptcy. Had the appellant paid the sum sought on the Bankruptcy Summons, he would not have committed an act of bankruptcy."*

Therefore these cases do not assist the debtor in his argument that the petition herein be dismissed. *Murphy v. Bank of Ireland* is clear authority for the proposition that if the sum claimed is in fact less than what is lawfully due and owing, an error in the calculation of that sum (whether it be a failure to give a credit or an overstatement of the amount of interest due) does not invalidate the statutory demand, the bankruptcy summons or the subsequent adjudication of bankruptcy pursuant to a petition. Thus, even if the debtor is correct in his submissions regarding the charging of interest on costs, his application to dismiss the petition must fail.

18. The petitioner argued that s. 30 of the Act of 2002, as amended, did not apply in the circumstances of this case. This argument was advanced on two grounds. Firstly, it was pointed out that the statutory demands were based on two orders of *fieri facias* dated 4th September, 2012, and 30th August, 2013, respectively. The second para. of the order of 4th September, 2012, provided:-

*"And that of the Goods and Chattels of said K.M. in your Bailiwick you further cause to be made the said sum of €1750.00 together with Interest thereon at the rate of 8 per centum per annum from the 4th day of September 2012..."*

The second para. of the order of 30th August, 2013, provided:-

*"And that of the Goods and Chattels of the said K.M. in your Bailiwick you further cause to be made the said sum of €383.63 together with Interest thereon at the rate of 8 per centum per annum from the 30th day of August 2013..."*

19. The petitioner submitted that by virtue of these two orders the petitioner was entitled to levy interest on the amount of costs awarded in respect of each judgement and that the petitioner was entitled to rely on the content of the said orders of *fieri facias*.

20. In the alternative, the petitioner argued that s. 30 of the Act of 2002 did not prescribe the sole circumstance upon which interest could be levied on costs, charges or expenses. In particular it was pointed out that the costs in respect of the first judgment had been measured by the Master of the High Court and were included in the order of the Master of the High Court giving liberty to enter final judgment. It was argued that in the circumstances there could be no requirement that the costs be taxed by the taxing master or, in the alternative, that the order was akin to a certificate of taxation.

21. It appears to me that this submission must be correct. The statute must be given a purposeful interpretation. It is clear that the intention was to fix a date from which interest on costs could run. Clearly interest on judgment sums commences on the date of the pronouncement of the judgment. However, the amount of costs is not always ascertained on that date. The purpose of s. 30 is to fix such a date where it is not the same as the date of the pronouncement of the judgment. Where the costs are measured, as occurred in the case of the first judgment, then clearly the date of the pronouncement of the judgment is the date from which interest commences to run. This interpretation is reinforced by the provisions of s. 30(1)(a)(ii)(II) which deals with a county registrar

measuring the amount of costs in accordance with the rules of court. It was necessary to insert a provision expressly recognising the power of county registrars to measure costs as, prior to that date, county registrars did not have this jurisdiction. Obviously judges and the Master of the High Court did have this jurisdiction prior to that point in time and therefore it was not necessary expressly to make reference to judges or the Master of the High Court in this regard. Their existing powers in respect of costs were not altered by s. 30.

22. In relation to the second judgment, this was granted in default of appearance in the Central Office of the High Court pursuant to O. 99, rr. 39-45. These are fixed sums calculated by reference to the judgment sum entered in the Central Office of the High Court. Specifically r. 39 provides:-

*"In all cases of judgment by default of appearance for a liquidated demand, where the plaintiff is entitled to costs, there should be added to the principal sum for which such judgment is marked the respective sums for costs set out in Appendix W, Part II."*

Thus it is clear that these costs in respect of this second judgment are in fact added to the principal sum for which judgment was marked and form part of the actual judgment sum rather than a separate award of costs. There is no question of either agreeing the costs or having them taxed or measured: they are prescribed by the Rules of the Superior Courts. It follows therefore that they become due and owing at the same date that the judgment is entered in the Central Office of the High Court. It seems to me therefore that the petitioner's submission that s. 30 of the Act of 2002, as amended, has no application to these costs is correct. Section 30 is concerned with ascertaining the date from which interest upon costs should be calculated. In this case it is clear that it is the same date that judgment was pronounced by the Master of the High Court in the case of the first judgment and, in the case of the second judgment, when judgment was entered in the Central Office of the High Court.

### **23. Conclusions**

I am of the opinion that the petitioner's submissions in this matter are correct. As a matter of fact the petitioner never demanded payment of a sum in excess of a sum actually lawfully due and owing by the debtor to the petitioner. Secondly, the petitioner was clearly entitled to rely upon the two orders of *fiery facias* in this case, each of which clearly on their face charged interest on the fixed sums for costs as set out on the respective orders. Thirdly, s. 30 of the Act of 2002, as amended, does not mean that the only circumstances in which interest on the amount of costs, charges or expenses is payable is where there is an agreement between the parties or a certificate of taxation of a taxing master of the High Court or a county registrar or the measurement of costs by a county registrar. Accordingly the debtor's application for the dismissal of the petition is refused.