

THE HIGH COURT

BANKRUPTCY

[2017 1638 S.]

BETWEEN

MARTIN O'BRIEN

APPLICANT

AND

JAMES FARRELL

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 30th day of July, 2018.

1. By a notice dated the 18th May, 2018 the respondent applied to dismiss a bankruptcy summons obtained by the applicant dated 5th February, 2018. The issue for consideration is whether the bankruptcy summons should be dismissed pursuant to s. 8 (6) of the Bankruptcy Act, 1988 or the inherent jurisdiction of the court in the circumstances set out below.

Background

2. On the 13th February, 2017 Mr. Cian Ferriter S.C. made an award in arbitration proceedings between the applicant and John Gillespie on the one hand and the respondent and Grainne Farrell on the other hand. He awarded the applicant damages in lieu of specific performance in the amount of €315,000 against the respondent and Grainne Farrell jointly and severally. He also awarded damages in lieu of specific performance to John Gillespie in the sum of €286,000 against the respondent and Grainne Farrell jointly and severally.

3. The award was not appealed and was converted into an order of the High Court (McGovern J.) on the 27th June, 2017. The order was served on the respondent by certified post on the 23rd August, 2017. Particulars of demand and notice requiring payment prior to the issue of a bankruptcy summons dated the 3rd October, 2017 was served on both the respondent and Grainne Farrell on the 4th October, 2017. Applications to issue a bankruptcy summons against the respondent and Grainne Farrell were filed in the office of the Examiner of the High Court grounded upon an affidavit of the applicant sworn on the 22nd November, 2017.

4. On the 24th November, 2017 a protective certificate issued from Trim Circuit Court (Judge O'Malley Costello) pursuant to s. 95 of the Personal Insolvency Act, 2012 (as amended). By email dated 30th November, 2017 the respondent's personal insolvency practitioner, Mr. John O'Callaghan, notified the applicant's solicitors of the issue of the protective certificate on the 24th November, 2017. By letter dated 1st December, 2017 the applicant's solicitors noted the fact and advised Mr. O'Callaghan that the applicant had lodged an application for bankruptcy summonses to issue in respect of the respondent and Grainne Farrell. By separate letters dated the 1st December, 2017 the applicant's solicitors served copies of the bankruptcy summons application upon the respondent and Ms. Farrell returnable for the 11th December, 2017.

5. By email dated 5th December, 2017 Mr. O'Callaghan replied:

"I acknowledge the bankruptcy summons received and served on our client. This action cannot proceed as it is in contravention of s. 96 of the Personal Insolvency Act.

I attach the protective certificate which issued on the 24th November from Trim Circuit Court. This prevents any creditor related pursuit of debt, legal action, etc. during the duration of the protective certificate.

Can you please confirm that this action will be at least adjourned for the duration of the protective certificate and any extension of the protective certificate and pending the outcome of the PIA into which [the respondent] has entered.

I look forward to receiving this confirmation in short term." (Emphasis added)

6. The applicant's solicitors replied stating that they would be adjourning the application until Monday 5th February, 2018 "*which is the first Monday after the expiration of the 70 day protection period.*" They also informed the respondent that the application would be adjourned to 5th February, 2018.

7. The protective certificate was due to expire on the 2nd February, 2018. On the 29th January, 2018 the protective certificate was extended by Judge O'Malley Costello in Trim Circuit Court for a further 40 days. It expired on the 12th March, 2018.

8. It would appear that there was no contact between the solicitors for the applicant and either Mr. O'Callaghan or the respondent. On the 5th February, 2018 solicitors for the applicant applied for and obtained a bankruptcy summons against the respondent at a time when the protective certificate was in force. No one attended court on the 5th February, 2018 on behalf of the respondent. The respondent was unaware of the fact that a bankruptcy summons was obtained on the 5th February, 2018. The Personal Insolvency Practitioner, Mr. O'Callaghan emailed the applicant's solicitor on the 6th February, 2018 stating:

"As I was ill in January and unable to progress this file, I had to seek an extension. Please find attached the extension approval. I am formulating a proposal and shall be able to issue in just over a week or so."

9. The respondent says that in the circumstances the bankruptcy summons issued at a time that a protective certificate was in force. The applicant was not entitled to apply for and obtain a bankruptcy summons by reason of the provisions of s. 96 of the Act of 2012 and therefore the bankruptcy summons should be dismissed.

Was the application to dismiss the bankruptcy summons brought within time?

10. A bankruptcy summons is issued pursuant to s. 8 of the Bankruptcy Act, 1988. Subsection 5 provides that a debtor served with a bankruptcy summons may apply to the court within the prescribed time to dismiss the summons. The prescribed time is fourteen days from the date of the service of the summons. The summons in this case was served on the 23rd April, 2018. In the ordinary way, the time for applying to dismiss the summons would have expired on the 6th May, 2018. That was a Sunday of a bank holiday weekend. The next date the offices of the Examiner of the High Court were open was Tuesday the 8th May, 2018. The affidavit grounding the application was sworn by the respondent on the 4th May, 2018 and is stamped received on the 4th May, 2018. The notice of motion is dated 8th May, 2018, but there is a line through the date of the 8th and it is amended to read the 14th and the notice of motion is stamp dated 14th May, 2018. There is a second affidavit sworn by the respondent grounding the application to dismiss the bankruptcy summons dated the 8th May, 2018 and stamp dated received in the office of the Examiner 14th May, 2018. There is then a further notice of an application to dismiss the bankruptcy summons dated the 18th May, 2018.

11. In light of this confusion, Mr. Farrell swore a further affidavit dated the 8th May, 2018 where he avers that he lodged an affidavit with the Examiner's office on the 4th May seeking to set aside the bankruptcy summons and he confirms that the bankruptcy summons was served upon him in the 23rd April, 2018. In a further affidavit sworn on the 2nd July, 2018 he confirms that a supplemental affidavit in addition to the papers pertaining to the application were delivered to the Examiner's office on 8th May, 2018, being the fourteenth day since the receipt of the bankruptcy summons at the 23rd April, 2018 (making allowances for the bank holiday weekend). The papers were not processed and returned by the Examiner's office to his solicitors until six days later on the 14th May, 2018. This was confirmed by the Examiner's office by email dated 14th May, 2018 stating:

"It has been noted that the original application was first filed on 4/15/2018 and subsequently queries dealt with by 8/5/2018 (within the fourteen days of summons being served on the debtor)."

12. In all the circumstances I am satisfied that the application has been brought within the time limited by the Act and if it were not, then the court ought to extend the time for the bringing of the application pursuant to O. 122 r. 7.

The Personal Insolvency Act, 2012

13. The Personal Insolvency Act, 2012 was enacted inter alia to enable insolvent debtors to resolve their indebtedness in an orderly and rational manner without recourse to bankruptcy and to thereby facilitate the active participation of such persons in economic activity in the State. A key component of the legislative architecture created by the Act of 2012 is the establishment of a period of protection of debtors from creditor action to enable a debtor to prepare a personal insolvency arrangement. This is achieved by means of a protective certificate which may be obtained either from specialist circuit court judges or the High Court. The provisions of the Act relevant to this application are ss. 95 and 96. They provide:

"95. -

(2) Where the appropriate court receives the application for a protective certificate and accompanying documentation pursuant to subsection (1)(a), it shall consider the application and documentation and, subject to subsection (3)—

(a) if satisfied that the eligibility criteria specified in section 91 have been satisfied and the other relevant requirements relating to an application for the issue of a protective certificate have been met, shall issue a protective certificate, and

(b) if not so satisfied, shall refuse to issue a protective certificate.

(5) Subject to subsections (6) and (7) and section 113 (2), a protective certificate shall be in force for a period of 70 days from the date of its issue.

(6) Where a protective certificate has been issued pursuant to subsection (2)(a), the appropriate court may, on application to that court by the personal insolvency practitioner, extend the period of the protective certificate by an additional period not exceeding 40 days where—

(a) the debtor and the personal insolvency practitioner satisfy the court that they have acted in good faith and with reasonable expedition, and

(b) the court is satisfied that it is likely that a proposal for a Personal Insolvency Arrangement which is likely—

(i) to be accepted by the creditors, and

(ii) to be successfully completed by the debtor,

will be made if the extension is granted.

(7) Where a protective certificate has been issued pursuant to subsection (2)(a) or extended under subsection (6), the appropriate court may on application to that court extend the period of the protective certificate by a further additional period not exceeding 40 days where—

(a) the personal insolvency practitioner has been appointed in accordance with section 49 (9), and

(b) the court is satisfied that the extension is necessary to enable the personal insolvency practitioner so appointed to perform his or her functions under this Chapter.

(10) The registrar of the appropriate court shall notify the Insolvency Service and the personal insolvency practitioner concerned where the court—

(a) issues or extends a protective certificate under this section,

(b) refuses to issue or extend a protective certificate under this section,

or

(c) decides to hold a hearing referred to in subsection (3).

(11) Where a protective certificate is issued under this section, the Insolvency Service shall—

(a) enter details of the name and address of the debtor and the date of issue of the protective certificate, and

(b) where applicable, the extension under this section of the protective certificate, together with such other details as may be prescribed under section 133 (3)(b), in the Register of Protective Certificates.

(12) On receipt of a notification under subsection (10) of a decision of the court referred to in that subsection, the personal insolvency practitioner shall notify each of the creditors specified in the schedule of creditors of that decision and, in the case of a decision to issue a protective certificate, the notification by the personal insolvency practitioner shall contain a statement—

(a) that the debtor intends to make a proposal for a Personal Insolvency Arrangement,

(b) of the effect of the protective certificate under section 96, and

(c) of the right of the creditor under section 97 to appeal the issue of the protective certificate.

96.— (1) Subject to subsections (3), (4) and (5), a creditor to whom notice of the issue of a protective certificate has been given shall not, whilst the protective certificate remains in force, in relation to a specified debt:

(a) initiate any legal proceedings;

(b) take any step to prosecute legal proceedings already initiated;

(c) take any step to secure or recover payment;

(d) execute or enforce a judgment or order of a court or tribunal against the debtor;

(e) take any step to enforce security held by the creditor in connection with the specified debt;

(f) take any step to recover goods in the possession or custody of the debtor (whether or not title to the goods is vested in the creditor or the creditor has security over the goods);

(g) contact the debtor regarding payment of the specified debt, otherwise than at the request of the debtor;

(h) in relation to an agreement with the debtor, including a security agreement, by reason only that the debtor is insolvent or that the protective certificate has been issued—

(i) terminate or amend that agreement, or

(ii) claim an accelerated payment under that agreement.

(2) Whilst a protective certificate remains in force, no bankruptcy petition relating to the debtor—

(a) may be presented by a creditor to whom subsection (1) applies in respect of a specified debt,

(b) in a case where the petition has been presented by such a creditor in respect of a specified debt, may be proceeded with.

(3) Without prejudice to subsections (1) and (2), whilst a protective certificate remains in force, no other proceedings and no execution or other legal process in respect of a specified debt may be commenced or continued by a creditor to whom subsection (1) applies against the debtor or his or her property, except with the leave of the court and subject to any order the court may make to stay such proceedings, enforcement or execution for such period as the court deems appropriate pending the outcome of attempts to reach a Personal Insolvency Arrangement, but this subsection shall not operate to prohibit the commencement or continuation of any criminal proceedings against the debtor.

Discussion

14. Where a court issues a protective certificate the certificate shall be in force for a period of 70 days from the date of its issue. A personal insolvency practitioner may apply to court to extend the period of the protective certificate by an additional period not exceeding 40 days. The court may extend the period where it is satisfied as to the matters set out in subs. (6). It is to be noted that this is not a second protective certificate but rather an extension of the period of protection. The registrar of the court is required to notify the Insolvency Service of Ireland and the personal insolvency practitioner concerned when the court either issues or extends a protective certificate under s. 95.

15. On receipt of the notification from the registrar of the court, the personal insolvency practitioner shall notify each of the creditors specified in the schedule of creditors of the decision of the court. This includes a decision to extend or to refuse to extend the period a protective certificate shall remain in force. Subsection (12) specifies that in the case of a decision of the court to issue a

protective certificate the notification by the personal insolvency practitioner must state that the debtor intends to make a proposal for a personal insolvency arrangement, must explain the effect of the protective certificate under s. 96 and inform the creditor of the right under s.97 to appeal the issue of protective certificate. Such information is not required to be repeated when notifying creditors that the period of the protective certificate has been extended.

16. The effect of the issue of a protective certificate is set out in section 96 of the Act. The debtor is protected for the period the protective certificate remains in force from creditor action. It does this by prohibiting a creditor from proceeding against the debtor in the manner therein specified while the protective certificate remains in force. But it is not an absolute protection. The protection only extends to creditors to whom notice of the issue of the protective certificate has been given and it only extends to specified debts i.e. debts specified in the schedule of creditors submitted in the application for the protective certificate. So if a debtor does not include a creditor in his schedule of creditors or excludes a debt or the personal insolvency practitioner fails to notify a creditor of the fact that a protective certificate has issued, any creditor so omitted or who has not been notified will not be prevented by the provisions of s. 96 of the Act of 2012 from taking the steps set out in s. 96 against the debtor notwithstanding the fact that a protective certificate is in force.

17. Further, a creditor who has been notified of the issue of a protective certificate and whose debt is a specified debt may apply to court for leave to commence or continue proceedings, execution or other legal process in respect of a specified debt pursuant to subs. (3) during the period the protective certificate remains in force. The court may thus grant relief against the prohibition on a creditor's action against the debtor as it deems appropriate pending the outcome of attempts to reach a personal insolvency arrangement. The court may permit creditor action which would otherwise be prohibited.

18. Notifying creditors of the decision of a court to issue a protective certificate or extend the period of a protective certificate is critical to the effect of a protective certificate pursuant to s. 96 of the Act. Three steps are envisaged. The court will make a decision. The registrar of the court will notify the Insolvency Service and the personal insolvency practitioner concerned. The personal insolvency practitioner in turn will notify the creditors of the debtor and the Insolvency Service will enter the information in the register of protective certificates maintained pursuant to s.95 (11). No time is fixed for the notification of creditors. Clearly it is in the interests of a debtor that these steps are taken expeditiously. Unless and until a creditor is notified that a protective certificate has issued the creditor is not debarred from taking creditor action against the debtor, which somewhat defeats the purpose of obtaining a protective certificate. The Oireachtas has specified that a creditor is not bound by the existence of a protective certificate until the creditor receives notification that the certificate issued. But the section does not specify what is to occur where there is a delay in notifying a creditor of the extension of the period of protection, as opposed to the issuing of a protective certificate. If there is a delay notifying the creditor of the extension of the period of protection did the Oireachtas intend that the creditor should be entitled to pursue the debtor notwithstanding the fact that the court has extended the period of protection and there has been no hiatus in the period of protection?

19. In approaching this issue it is important to have regard to the purpose of providing protection to a debtor in the first place and then extending that protection. It is to afford the debtor the opportunity to engage in a personal insolvency arrangement. The Oireachtas has recognised that it may not be possible to complete the necessary steps within the 70 days provided by subs. (5). The intention is that if this cannot be completed within the 70 days provided by subs. (5) the period should be extended to afford the personal insolvency practitioner additional time, where there is a prospect of reaching a personal insolvency arrangement. There should be no hiatus in the protection afforded the debtor by decision to issue a protective certificate. This end would be defeated if a delay by the registrar in notifying inter alia the personal insolvency practitioner or by the personal insolvency practitioner in notifying the creditor of the court's decision to extend the period of protection could result in lapse in protection which would permit a creditor to pursue the debtor notwithstanding the fact that the period of protection had been extended. To construe s. 96 (1) in conjunction with ss. 95 subs. 10 and 12 to the effect that there is no protection from creditor action during the extension period until creditors are notified of the extension of the period is not consistent with the legislative intent that a protective certificate is to enable a debtor to prepare a personal insolvency arrangement while protected for a limited period from creditor action, save such action in respect of which the creditor obtains leave of the court.

20. Any prejudice resulting to creditors by reason of the decision to issue or extend a protective certificate is met by the provisions of s. 96 (3) or s. 97 which entitles a creditor to appeal the decision to issue a protective certificate.

21. Furthermore, the Insolvency Service maintains a register of protective certificates which records the name and address of the debtor and the date of the issue of the protective certificate and where applicable the extension of the protective certificate and the date on which the protective certificate ceases to be in force. To my mind this remedies any disadvantage which might accrue to a creditor where there is a delay in notifying the creditor of the extension of the period of protection pursuant to s. 95 (6). It is open to the creditor to check the register to ascertain whether or not the period of protection has been extended and to ascertain the date on which the protective certificate ceases to be in force.

Conclusion

22. In this case the protective certificate was in force on the date the applicant applied for and obtained the bankruptcy summons on the 5th February, 2018. It had received notice of the issue of a protective certificate but not of the renewal of the protective certificate. To my mind the fact that it had not yet received notice of the renewal (but did so the following day) does not alter the fact that the protective certificate was in force on the 5th February, 2018 and he was a creditor to whom s. 96 subs. (1) applied. It might have been possible for him to have applied to the court pursuant to s. 96 (3), but that is not what occurred in this case. I am satisfied that the creditor was debarred in the circumstances from applying for the bankruptcy summons pursuant to sub. para. b, c and d of subs. (1). For this reason, the bankruptcy summons should be dismissed pursuant to the provisions of s. 8 subs. 6 of the Bankruptcy Act, 1988 and I so order.