Neutral Citation [2015] IEHC 596

THE HIGH COURT

BANKRUPTCY

[2015 No. 5748 BANKRUPTCY]

BETWEEN

IN THE MATTER OF A PETITION FOR ADJUDICATION

FOR BANKRUPTCY BY

DES HENNESSY BUILDING CONTRACTORS LIMITED

PETITIONER

AND

MICHAEL O'BEIRNE

RESPONDENT

[2015 No. 5749 BANKRUPTCY]

IN THE MATTER OF A PETITION FOR ADJUDICATION

FOR BANKRUPTCY BY

DES HENNESSY BUILDING CONTRACTORS LIMITED

PETITIONER

AND

ANNE O'BEIRNE

REPONDENT

JUDGMENT of Ms. Justice Costello delivered on 6th day of October, 2015.

Introduction

1. Michael O'Beirne and Anne O'Beirne ("the respondents") were served with bankruptcy summonses dated 30th April, 2015, by Des Hennessy Building Contractors Limited ("the petitioner") in respect of the sum of €75,567.22. The respondents seek to have the summonses dismissed pursuant to s. 8 of the Bankruptcy Act 1988, as amended.

2. Section 8 of the Bankruptcy Act 1988, as amended, 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. The test to be applied when hearing an application to dismiss a bankruptcy summons was recently considered in *Marketspreads Limited v. O'Neill & Rice* [2014] IEHC 14 by Dunne J. and by this Court in *ACC Loan Management Limited v. C.M*. [2015] IEHC 96. I do not propose to rehearse the law set out in those two judgments. The respondents and the petitioner agreed that the test to be applied is whether there is a real and substantial issue and one which is, at least, arguable and has some prospect of success.

The facts

4. The respondents and Des Hennessy Limited entered into a building agreement on 17th July, 2009. The Building Agreement included an arbitration clause which provided that either party could request the President of the Royal Institute of the Architects of Ireland ("RIAI") to appoint an arbitrator after consultation with the President of the Construction Industry Federation ("CIF"). The parties could not agree to the appointment of an arbitrator and solicitors acting for Des Hennessy Limited requested the President of the RIAI to nominate an arbitrator. By letter dated 20th March, 2013, she notified the parties that she nominated Mr. James O'Donoghue to act as Arbitrator. On the 10th April, 2013, solicitors acting for the respondents wrote to Mr. John Graby, a director of the RIAI, pointing out that under the arbitration clause the President of the RIAI is supposed to consult with the President of the CIF prior to the nomination of an arbitrator. They asked that Mr. Graby would let them know whether or not this was done. On 17th May, 2013, they raised the issue again with Mr. Graby. Mr. Graby replied on 20th May, 2013, simple stating that the President had made her appointment on foot of the application and was now *functus officio* in the matter and that she and the RIAI would not engage in any further correspondence with either party on the matter.

5. The following month, on 12th June, 2013, the respondents' solicitors wrote to Mr. Matt Gallagher, the President of the CIF asking him to clarify whether or not he was consulted by the President of the RIAI in relation to her nomination of Mr. O'Donoghue as arbitrator in respect of the Building Agreement of 17th July, 2009, between Des Hennessey Limited and the respondents. They sent a reminder letter on 17th June, 2013, and again on 19th June, 2013. On 20th June, 2013, Mr. Martin Lang replied on behalf of the President of the CIF stating that the inquiry should properly be referred to the appointing body, the RIAI. The respondents made no further queries until July, 2014.

6. Following an initial letter from the Arbitrator to the parties' solicitors dated 22nd March, 2013, to arrange a tele conference, the respondents' solicitors wrote on 9th April, 2013, headed "*without prejudice to jurisdiction*" raising, *inter alia*, the issue as to whether or not the Arbitrator had been properly nominated by the President of the RIAI. The Arbitrator dealt with this by way of a preliminary application. There were written submissions prepared by the parties and oral submissions and then further written submissions. The respondents were represented by senior counsel. The Arbitrator gave his ruling on 23rd July, 2013. He held that no evidence was presented by the respondents of any lack of compliance with the provisions of the arbitration clause on the part of the President of the RIAI and that he was duly appointed. He formally ruled that he had jurisdiction to act as Arbitrator in the reference. In addition, he noted that the correct name of the claimant should be Des Henessy Building Contractors Limited and amended the name of the claimant in the arbitration. The respondents did not appeal this ruling.

7. The Arbitrator issued directions in relation to the hearing of the arbitration and the arbitration commenced on 20th November, 2013. On 21st November, 2013, counsel for the parties informed the Arbitrator that the parties had reached a settlement of the matters in dispute between them and requested that the Arbitrator publish a final award by consent setting out the terms of that settlement.

8. The Arbitrator published his final award on 17th December, 2013, in the following terms:-

> *"In accordance with the terms of the settlement reached between the Parties, I now Award and Determine by consent as follows:-*
>
> *1. The Respondents shall pay to the Claimant the sum of €100,000.00 (One hundred thousand euro) in full and final settlement of all matters referred to me in this Arbitration, and*
>
> *2. The Respondents shall pay to the Claimant the Claimant's Costs of the Reference on this Arbitration, such costs to be taxed in default of agreement and*
>
> *And I now Award and Determine as follows;- the Respondents are liable for the Cost of the Award (the cost of the services of the Arbitrator to date) which I have taxed and settled in my determination as set out in my letter to the parties (c/o their respective Solicitors) dated the 13th December 2013 with attached Statement of Account."*

9. The respondents did not move to set aside the arbitration award. The respondents paid the award of €100,000.00 to the petitioner. The respondents and the petitioner did not reach agreement in respect of the costs so the costs were taxed at a hearing before the Taxing Master on 30th June, 2014. A certificate in respect of the taxed costs issued on 20th January, 2015 in sum of €75,567.22.

10. After the conclusion of the hearing of 30th June, 2014, but before the Taxing Master granted the Certificate of costs, the respondents' solicitors wrote on 8th July, 2014, to both the President of the RIAI and the President of the CIF making an access request under s. 4 of the Data Protection Acts 1988 and 2003 for a copy of any information they respectively kept about the respondents in relation to the matter of the arbitration between Des Hennessey Limited, claimant, and Michael O'Beirne and Anne O'Beirne, respondents, and in particular, any information kept in relation to any consultation between the RIAI and the CIF in respect of the nomination of an arbitrator in the matter. There was no explanation as to why this request was made some 15 months after the respondents had first sought information in relation to this point. Mr. Granby replied on behalf of the RIAI on 22nd July, 2014. Ms. Alison Irving replied on behalf of the CIF on 31st July, 2014, enclosing the correspondence referred to above. She stated:-

> *"Please note that no consultation took place between the Royal Institute of Architects of Ireland and the Construction Industry Federation in respect of the nomination of any particular arbitrator in this matter."*

11. The respondents failed to pay the sum as certified in the Certificate of Taxation and the petitioner served a notice requiring payment of the sum prior to the issue of a bankruptcy summons upon each of the respondents dated 4th February, 2015. Bankruptcy summonses were issued on 13th April, 2015, on behalf of the petitioner against each respondent. By Notice dated 11th May, 2015, the respondents applied to dismiss the Bankruptcy Summonses.

Arbitration Act 2010

12. The Arbitration Act 2010 repealed the Arbitration Acts 1954-1998. Section 6 provided that the UNCITRIL Model Law on International Commercial Arbitration has the force of the law in the State and applies to arbitrations which commenced after the coming into force of the Act on 8th June, 2010. As a result, certain changes were effected to the law of arbitration in the State. In particular, Article 16 of the Model Law conferred competence on an arbitral tribunal to rule on its own jurisdiction. The Article provides:-

> *"(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement…*
>
> *(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.*
>
> *(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 [the High Court] to decide the matter, which decision shall be the subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."*

13. Article 34 governs applications for setting aside an arbitral award. It provides as follows:-

> *"Article 34. Application for setting aside as exclusive recourse against arbitral award*
>
> *(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.*
>
> *(2) An arbitral award may be set aside by the court specified in article 6 only if:*
>
> > *(a) the party making the application furnishes proof that:… (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;…*
>
> *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal."*

14. Article 36 sets out the sole grounds upon which recognition or enforcement of an arbitral award maybe refused. However, s. 23(4) of the Act provides that Article 36 does not apply in respect of an award in arbitral proceedings which took place in the State. Therefore this Article does apply to the arbitration subject, the matter of these applications.

The issues raised by the respondents
15. The respondents accept that they are out of time to appeal the ruling by the Arbitrator that he was properly appointed and had jurisdiction to conduct the arbitration pursuant to Article 16 of the Model Law and that they were out of time to move to have the final award of 19th December, 2013, set aside under Article 34 of the Model Law. They have identified two issues which they claim constitute issues for trial so that the summonses should be dismissed pursuant to s. 8(6)(b) of the Act of 1988, as amended:

> (1) That the Arbitrator was invalidly appointed with the result that he had no jurisdiction to determine the dispute before him and that his award accordingly is unenforceable; and
>
> (2) That the petitioner is not entitled to enforce the arbitral award through the bankruptcy summons procedure.

The appointment of the Arbitrator
16. The respondents accept that while the time in which to challenge the arbitral award under Article 34 has passed they nonetheless submit that the failure to appoint the Arbitrator in accordance with the terms of the arbitral agreement remains a matter that can be raised by them by way of opposition and/or defence in the event that any part of the arbitral award is sought to be enforced against the respondents. It is submitted that to succeed in an action upon the arbitral award the claimant must prove that the Arbitrator was duly appointed in accordance with the terms of the Arbitration Agreement. The respondents referred to *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer* [1954] 1 Q.B. 8 and *Kianta Osakeyhtio v. Britain & Overseas Trading Co. Ltd.* [1954] 1 Lloyd's Rep. 247.

17. In *Christopher Brown Ltd.*, Devlin J. set out the matters which a plaintiff has to prove in order to succeed in an action to enforce an arbitration award. This includes that an arbitrator was appointed in accordance with the clause which contains the submission to arbitration. However, this was not an issue in the case and the point is not elaborated upon in the judgment. In *Kianta Osakeyhtio*, the Court concluded that the Arbitrator lacked jurisdiction on the basis that an agreement referred to as the compensation agreement contained no arbitration clause. This agreement was an accord and satisfaction substituting wholly new rights and obligations for those which existed under the original agreement which did include an arbitration clause. However, as the dispute the subject of the arbitration and of the arbitration award related to matters arising under the compensation agreement, the Arbitrator lacked jurisdiction and accordingly the action to enforce the award failed. The case was not concerned with the requirement to prove that the Arbitrator was properly appointed. 18. The critical difference between each of these cases and the present one with which this Court is concerned is that fact that the arbitration between the petitioner and the respondents was conducted under the Model Law. Under the provisions of the Model Law, an arbitrator is given express power to determine his jurisdiction under Article 19. There is then a specific time limit during which an aggrieved party may seek to appeal that ruling. The clear intent is that if an arbitrator has made a ruling, the ruling on that point shall be conclusive as between the parties unless it is overturned on an appeal brought in accordance with Article 16. Otherwise the time limit for appealing the ruling could be rendered ineffective if it can easily be circumvented. It is clear from international case law decided under the Model Law that the prescribed time limits set out should be strictly complied with. See Mansfield, *Arbitration Act 2010 and Model Law: A Commentary* (Dublin: Clarus Press, 2012) at p. 141. In dealing with Article 16 Mansfield notes that the *travaux preparatoires* suggest that:-

> *"'a party who failed to raise the plea as required under article 16 (2) [that the tribunal lacks jurisdiction] should be precluded from raising such objections not only during the later stages of the arbitral proceedings but also in other contexts, in particular, in setting aside proceedings or enforcement proceedings, subject to certain limits such as public policy, including those relating arbitralbility.' Similarly, international case-law decided under the Model Law has held that a failure to raise objection before the arbitral tribunal prevents a party from making objection in subsequent enforcement proceedings. International case-law has also held that courts should adopt a limited and deferential role to the jurisdiction of an arbitral tribunal."*

Clearly in this case the respondents did raise the point and it was decided against them. It seems to me that the logic in relation to the failure to raise a challenge to jurisdiction applies a *fortiori* where a challenge is raised and rejected. Unless the ruling is overturned on appeal, that is the end of the matter. It cannot be revived to ground an application to set aside the award. If that be the case, then likewise it ought not be permitted to be raised as a defence to proceedings seeking to enforce the award.

20. While Article 36 of the Model Law specifically provides that:-

> *"(1) Recognition or enforcement of an arbitral award… may be refused only:*
>
> *(a) at the request of the party against who it is invoked, if that party furnishes to the competent court where*

recognition or enforcement is sought proof that:…

> *(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties…"*

It is important to note that s. 23(4) of the Act of 2010 provides that this Article does not apply in respect of an award in arbitral proceedings which took place in the State. The arbitral proceedings between the petitioner and the respondents took place within the State and therefore Article 36 of the Model Law does not apply to this award. Therefore Article 36 does not provide a basis whereby a court could refuse to enforce the award on the grounds that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

21. The question then is, is there an alternative basis whereby the Court could refuse to enforce the award on this basis notwithstanding the express exclusion of Article 36 from arbitrations which take place within the State? The respondents provided no authority to support the proposition that a court would be entitled to refuse to enforce an arbitral award on the basis of a challenge to the composition of the arbitral tribunal which was not based upon Article 36 of the Model Law where the Arbitrator has previously determined that he had jurisdiction pursuant to Article 16 of the Model Law. This is not surprising. One of the objectives of the Model Law is to promote the finality of arbitral awards and to limit the grounds of challenge to arbitral decisions. It does not facilitate revisiting issues which have been determined in the course of the arbitral process.

22. Article 16 of the Model Law grants arbitrators the power to determine their jurisdiction. The respondents challenged the jurisdiction of the Arbitrator precisely on the grounds that are now raising in these proceedings and the Arbitrator ruled upon the matter and held that he had jurisdiction. The Model Law affords a party a month in which to appeal this decision and no such appeal was brought. On the contrary, the respondents submitted to the jurisdiction of the Arbitrator and proceeded to engage in the arbitration process.

23. They had a further opportunity under the Model Law to move to have the arbitration award set aside and again they failed to do so within the strict time limits prescribed by the Model Law.

24. If the respondents are to satisfy the Court that the bankruptcy summonses issued in these circumstances ought to be dismissed it is necessary to consider what is required for the granting of a bankruptcy summons pursuant to s. 8 of the Act of 1988. Section 8 states:-

> *"(1) a summons (in this Act referred to a 'bankruptcy summons' may be granted by the court to a person (in this section referred to as 'the creditor' who proves that -*
>
> > *(a) a debt of more than €20,000.00 is due to the creditor concerned by the person against whom the summons is sought,*
> >
> > *(b) the debt is a liquidated sum, and*
> >
> > *(c) the creditor concerned has given not less than 14 days' notice in the prescribed form to the debtor of the creditors' intention to apply for a bankruptcy summons and debt remains unpaid…*
>
> *(3) The notice requiring payment of the debt shall set out the particulars of the debt due and shall require payment within 14 days after service thereof on the debtor"*

Thus the petitioner is simply required to prove that a debt of more than €20,000.00 was due to it by the respondents and the debt is a liquidated sum.

25. The petitioner's case is that the debt arises from the compromise of a claim whereby the respondents agreed to pay to the petitioner the sum of €100,000.00 plus costs. In default of agreement, the costs were to be measured by the taxation process. This was an agreement reached between the parties. It then became part of the award at the express request of the parties. The Arbitrator did not determine either the €100,000.00 payable by the respondents to the petitioner or the amount of the costs. The respondents participated in the taxation process and have not sought to appeal the amount fixed by the Taxing Master.

26. The issue for the Court is whether or not there is an issue for trial as to whether or not the respondents are indebted to the petitioner in sum of €75,567.22 on the basis that there was a defect in the appointment of the Arbitrator and that the debt alleged to be due and owning is on foot of a taxation of an order for costs made by that Arbitrator. The issue raised must be a real and substantial issue and one which is arguable and has some prospects of success. I do not accept that the issue raised has any real prospect of success or is real or substantial. The debt sued upon arises out of a compromised agreement reached between the parties. The precise figure was arrived at by agreement that the costs should be taxed. There is no challenge to the taxation of the costs. Section 8 of the Act of 1988, as amended, merely requires that there be a debt due and owing and that the debt be a liquidated sum. It is therefore not necessary that the agreement between the parties form part of an arbitration award, though obviously this occurred in this case. Secondly, insofar as the debt is based upon the actual award, the issue which the respondents now seek to raise was raised and dealt with in the arbitration and it is not now open to the respondents to raise that as an issue for trial within a meaning of s. 8. In those circumstances I do not accept that there is an issue which would arise for trial regarding appointment of the Arbitrator. The issue raised has no prospect of success.

Bankruptcy summons procedure

27. The respondents' second argument is based upon s. 23 of the Arbitration Act 2010. This provides:-

> *"(1) An award (other than an award within the meaning of section 25) made by an arbitral tribunal under an arbitration agreement shall be enforceable in the State either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect and where leave is given, judgment may be entered in terms of the award."*

The respondents argue that the effect of s. 23 is that an arbitral award may be enforced by only one of two methods: a direct action on the award itself or by way of application to the High Court seeking leave to enforce the award in the same manner as a judgment or order of the High Court. It is common case that the petitioner has not sought leave of the High Court to enforce the arbitral award.

The respondents argue that it follows that the only method of enforcement open to the petitioner is direct action upon the award itself. They submit that bankruptcy proceedings do not constitute such a direct action and therefore it cannot be enforced by way of bankruptcy summonses. They rely upon the decision in In Re *Debtor's Summons against Moore* [1907] 2 I.R. 151. Fitzgibbon L.J. said at p. 157 that:-

> *"the procedure by debtor's summons in its essence, is not a process for the recovery of a debt, but is a procedure to bring about an act of bankruptcy, which effects the status of the debtor, and the rights of his creditors."*

The respondent says this means that the award cannot be enforced by means of a bankruptcy summons.

26. The petitioner submits that it is not enforcing an award pursuant to s. 23 of the Act of 2010. It argues that it is bringing proceedings pursuant to the Bankruptcy Act 1988, as amended. The legislation allows a creditor, such as the petitioner, to bring bankruptcy proceedings against a debtor, such as the respondents. It argues that it is a creditor in the amount set out in the certificate of taxation and the respondents are its debtors. It submits that the fact that the debt or liability arose on foot of an arbitration is not relevant. All that is required is that there is a debt due by the person sought to be summoned greater than €20,000.00 and the amount is liquidated sum. It is not necessary for the creditor to obtain a judgment in respect of a debt in order for him to institute bankruptcy proceedings on foot of that debt. As was stated in *Moore*, the procedure is not the recovery of the debt as such. It is a procedure to bring about an act of bankruptcy.

27. I agree with the submissions of the petitioner. The real issue is whether s. 23 of the Arbitration Act 2010 prohibits a party who has obtained an award in arbitration proceedings from seeking, not to enforce the award, but to bring about an act of bankruptcy. Section 23 simply establishes that an arbitration award may be enforced. Obviously this is permissive. There is no obligation on a person who obtains an award to enforce it. There is no qualification in s. 8 of the Act of 1988, as amended, of the nature of the debt which must be owed by a debtor to a creditor other than that it be a liquidated sum of more than €20,000.00. Therefore, it seems to be that the respondents' argument that an arbitration award cannot be relied upon as a debt for the purposes of obtaining a bankruptcy summons because it is not being enforced as permitted under s. 23 has no merit. It is not a real and substantial issue.

28. Accordingly, I reject the respondents' application to dismiss the bankruptcy summons herein.