Neutral Citation [2012] IEHC 587

THE HIGH COURT

BANKRUPTCY

[2011 No. 5281]

IN THE MATTER OF AN APPLICATION TO DISMISS A BANKRUPTCY SUMMONS

BETWEEN

JIM MCCONNON

APPLICANT

AND

ZURICH BANK

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered the 31st day of 2012

The respondent herein obtained judgment against the applicant in the sum of €32,266,470 by order dated the 4th March, 2011, perfected on the 9th March, 2011.

Particulars of demand and notice requiring payment were sent to the applicant on or about the 5th September, 2011. The sum due on foot of the particulars of demand and notice requiring payment was not paid by the applicant. A bankruptcy summons was applied for by the applicant and was issued on the 7th November, 2011, and was served on the applicant on the 11th November, 2011.

A notice of application to dismiss the bankruptcy summons dated the 24th November, 2011 was issued by the applicant returnable for the 16th January, 2012. Following an exchange of affidavits between the applicant and the respondent the matter came on for hearing before me on the 6th June, 2012.

The Issues

A number of issues have emerged arising from the exchange of affidavits between the parties herein. In addition, an issue was brought to the attention of the parties by the Court and their assistance was sought in relation to the issue raised. In general terms the issues raised by the applicant can be set out as follows. First, the applicant has indicated that he appealed the judgment and order of the High Court in which judgment was obtained against him. Given that there is an appeal extant, the applicant contends that the bankruptcy summons should be dismissed. The second issue related to proceedings brought by the applicant challenging the constitutionality of the Bankruptcy Act 1988. The contention is that in the light of those proceedings the bankruptcy summons should be dismissed or at least stayed. A further point has been raised as to the authority of the deponent of the respondent's affidavit seeking the issue of a bankruptcy summons to swear the affidavit. The final issue raised by the applicant related to the fact that no reference was made in the grounding affidavit seeking the issue of a bankruptcy summons to the fact that a receiver had been appointed by the respondent. It is a fact that a receiver was appointed pursuant to a deed of mortgage and charge dated the 21st December, 2007, by a deed of appointment dated the 28th October, 2010. The applicant has described the receiver so appointed as a receiver by way of equitable execution but the applicant is a lay litigant and is clearly confused as to the correct term to be used to describe the receiver. Overall the applicant has contended that the application for a bankruptcy summons is an abuse of process and he has challenged the bona fides of the respondent in seeking the issue of a bankruptcy summons. The final issue relates to the timing of the presentation of the bankruptcy petition having regard to the provisions of s. 11 of the Bankruptcy Act 1988.

The applicant herein had sought legal aid in respect of these and other proceedings but had not obtained such assistance by the time of this hearing. Notwithstanding that, I felt it was inappropriate to adjourn the proceedings further to await the outcome of his application in that regard.

The constitutional proceedings

A number of the issues raised the applicant can be dealt with briefly. One of the issues relates to a challenge brought by the applicant to the constitutionality of the Bankruptcy Act 1988. Those proceedings were commenced by the applicant as plaintiff against the President of Ireland, An Taoiseach, Minister for Justice, Equality and Law Reform, Ireland, Attorney General, Commissioner of An Garda Síochána and the respondent herein. An application was brought by the respondent herein to dismiss the claim in those proceedings. That application came on for hearing before the High Court (Kelly J.) and those proceedings were dismissed by order of the Court on the 23rd May, 2012.

Kelly J. in his judgment set out the background to those proceedings which is common to these proceedings and the basis of the application to dismiss and the reasons for the dismissal for those proceedings. Reference was made to the fact that the applicant had appealed the decision of Birmingham J. and it was pointed out that a stay on execution of the judgment of Birmingham J. pending the determination of his appeal was sought by the applicant from the Supreme Court. That application for a stay of execution was refused on the 8th July, 2011. In the light of the fact that the proceedings commenced by the applicant seeking to challenge the constitutionality of the Bankruptcy Act 1988, have been dismissed, there is no basis for the dismissal of the bankruptcy summons by reason of any challenge to the constitutionality of the Bankruptcy Act 1988

The authority of Mr Murrav

The second point made by the applicant relates to the authority of Richard Murray to swear an affidavit on behalf of the respondent. The applicant stated "this bankruptcy summons is invalid based on the fact that it is a requirement on behalf of the petitioning creditor that a statement be included by an officer of the company authorising a named person to swear the grounding affidavit on behalf of the company. In this case no such statement from any officer of Zurich Bank has been lodged with the court verifying that Richard Murray has any authority to swear the bankruptcy affidavit or indeed any affidavit on its behalf'. There is no such

requirement. The provisions of the Rules of the Superior Courts provide that:-

> "A bankruptcy summons may be granted to a company or other body corporate upon the affidavit of the secretary, director, or other person duly authorised in that behalf."

The affidavit grounding the application for the issue of a bankruptcy summons was sworn by Richard Murray who averred as follows:-

> "I am portfolio asset management solicitors to the plaintiff and I make this affidavit on the plaintiff's behalf and with its authority from facts within my own knowledge, save or as appears and where so appearing I believe the same to be true."

There is no basis whatsoever for the assertion made by the applicant herein and accordingly I am satisfied that this does not provide any ground to have the bankruptcy summons dismissed.

The appointment of a Receiver
Complaint is made by the applicant to the effect that the grounding affidavit should have referred to the fact that a receiver was appointed by the respondent over his property. The applicant first raised this as an issue in his affidavit sworn herein on the 24th November, 2011. He expanded on this issue in a subsequent affidavit sworn herein on the 16th January, 2012, in which he complained that the creditor had not revealed all relevant facts in that it was stated in the affidavit seeking the issue of the bankruptcy summons that no form of execution had issued in respect of the debt and it was asserted that this was completely untrue as a receiver had been appointed. An applicant for the issue of a bankruptcy summons is obliged under the provisions of O. 76, r. 11(1) of the Rules of the Superior Courts to swear, *inter alia*, "that no form of execution has issued in respect of such debt and claims to be proceeded upon ..." Appointment of a receiver pursuant to a power contained in a deed of mortgage and charge is not a form of execution in respect of the debt. It is to be noted that the appointment was made prior to the date upon which judgment was obtained by the respondent against the applicant. There is, having regard to the affidavits sworn by the applicant herein, some confusion in his mind as to the distinction between a receiver by way of equitable execution and a receiver appointed under a deed of mortgage and charge. A receiver by way of equitable execution could only be appointed following a judgment obtained by a creditor and it seems to me to be clear from the affidavit sworn by the applicant herein that he has misunderstood the distinction between a receiver appointed under a deed of mortgage and charge and a receiver by way of equitable execution. The applicant in his affidavit referred to a decision of the Supreme Court, *Ryley v. Taaffe* [1932] I.R. 194, in which a debtor summons was dismissed on the grounds that the affidavit leading to its issue was irregular in omitting to set out the fact that a receiver by way of equitable execution had been appointed on behalf of the creditor over the debtor's property. That is not the position in this case. Therefore, I am satisfied that the applicant is not entitled to the dismissal of the bankruptcy summons in this case on the basis that the affidavit grounding the application to issue the summons did not refer to the fact that a receiver had been appointed. Such a receiver is not appointed as a form of execution on foot of a judgment.

Appeal to the Supreme Court
The provisions of s. 8(6)(b) of the Bankruptcy Act 1988, have been considered in a number of judgments, notably in the decision in the case of *Minister for Communications v. M W* [2010] 3 I.R. 1. McGovern J. at p. 4 of his judgment in that case stated:-

> "There are a number of legal authorities dealing with applications to dismiss a bankruptcy summons and the principles which apply where an applicant shows cause as to why he should not have been adjudicated a bankrupt.
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> In the matter of a bankruptcy summons by *St. Kevin's Company against a Debtor*, (extempore, Supreme Court, 2ih January, 1995) the Supreme Court expressed the view that the correct interpretation of s. 8(6)(b) of the Act of 1988 was that the High Court should not undertake an investigation into the merits of the case once it was satisfied that an issue arose on the summons. In those circumstances, the Supreme Court stated that it was mandatory for the court to dismiss the summons if it was satisfied that an issue arose between the parties, and the issue would have to be litigated separately outside the bankruptcy process."
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> He went on to note at p. 8 of the judgment:-
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> "The respondents say that the applicants cannot say with certainty that the debt is due to them where the issue of whether the order for costs is enforceable by the applicants has yet to be finally determined by the Supreme Court. I reject this submission. The High Court has adjudicated on this issue and no stay has been granted on that order. The costs sought from the applicants are costs in the High Court and Supreme Court which have been taxed and are no longer amenable to review. In the absence of a stay on the High Court order directing that the order for costs is enforceable, it seems to me that I should consider whether or not there is a reasonable prospect of success in the appeal against that order. In my view, there is not, and I do not think that the appeal gives rise to an "issue" which would arise for trial within the meaning of s. 8(6)(b) of the Bankruptcy Act 1988."

A number of points arise from the passages cited above. The first point to note is that the fact that there is an appeal to the Supreme Court on the judgment or order of the High Court does not of itself give rise to an "issue". When an order is made and no stay of e ecution has been granted in respect of that order, the order is enforceable. That includes the issue of a bankruptcy summons. The second point to note is that the High Court should not undertake an investigation into the merits of the case once it was satisfied that an issue arose on the summons. The third point to note is that in considering whether an issue has arisen it is appropriate to consider whether or not there is a reasonable prospect of success in the appeal against the order.

On reading the affidavits of the applicant herein, it seems to me that the principal argument being made by him as to the success or otherwise of his appeal relates to allegations of fraud, misrepresentation and illegality which were not made in the hearing before Birmingham J. and in respect of which the applicant wishes to adduce new evidence in the course of his appeal. The applicant has not identified the new evidence in any detail and has not explained why it was not possible to refer to this evidence in the hearing before Birmingham J. The question of new evidence and the reliance on issues that could have been relied on before Birmingham J. was raised in the constitutional proceedings brought by the applicant and considered by Kelly J. in the judgment referred to above. Kelly J. considered the fact that issues now sought to be raised by the applicant could have been raised by him by way of defence to the summary proceedings and in the course of his judgment, Kelly J. considered in detail the rule in *Henderson v. Henderson* [1843] 3 Hare 100. He also dealt with the question of new evidence. Having set out a number of averments from Mr. Murray on behalf of the respondent and from the applicant, he went on to conclude that the material said to comprise the new evidence was before the court when Birmingham J. heard the application for summary judgment. He added:-

> "In these circumstances, I am of the view that this executive summary, which he now wishes to ventilate, is not new evidence for the purposes of this application. It was available to his counsel and the court when the Bank's application for

summary judgment was heard."

He then concluded it was not necessary to consider further the question of new evidence. The same position pertains before me. Given the matters relied on by the applicant herein and having considered the affidavits sworn by the applicant and on behalf of the respondent and in particular, having considered the matters now raised by the applicant, I could not conclude that there is evidence before me to establish that there is a reasonable prospect of success in the appeal against the order of Birmingham J. Accordingly, there is not an "issue" which would arise for trial within the meaning of s. 8(6) (b) of the Bankruptcy Act 1988, insofar as the matters relied on by the applicant herein are concerned.

That leaves one issue to be concerned and that relates to the time limits in relation to the presentation of a bankruptcy petition. I now propose to consider that issue.

Section 11 of the Bankruptcy act 1988.
The final issue to be considered relates to the provisions of s. 11 of the Bankruptcy Act 1988, which provides:-

> "1. A creditor shall be entitled to present a petition for adjudication against a debtor if-
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> (c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition ..."

The issue that has arisen for consideration relates to the requirement that the act of bankruptcy should have occurred within three months before the presentation of the petition. What happens if, as in this case, there is an application to dismiss the summons? At the beginning of this judgment I set out some of the relevant dates. Thus, the bankruptcy summons was issued on the 11th November, 2011, and was served on the applicant on the 11th November, 2011. The notice of application to dismiss the bankruptcy summons was dated the 24th November, 2011 and was returnable for the 16th January, 2012, and subsequently the application to dismiss the bankruptcy summons came on for hearing before me on the 6th June, 2012.

The question therefore arises as to when a petition may be presented by a creditor. That gives rise to a consideration of the phrase "act of bankruptcy" and when it can be said that an act of bankruptcy has occurred. For that purpose it is necessary to consider the provisions of s. 7 of the 1988 Act which provides:

> "7(1) An individual (in this Act called a debtor") commits an act of bankruptcy in each of the following cases-
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> (a) if in the State or elsewhere he makes a conveyance or assignment of all or substantially-all of his property to a trustee or trustees for the benefit of his creditors generally;
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> (b) if in the State or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof;
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> (c) if in the State or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudicated bankrupt;
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> (d) if with intent to defeat or delay his creditors he leaves the State or being out of the State remains out of the State or departs from his dwelling-house or otherwise absents himself or evades his creditors;
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> (e) if he files in the Court a declaration of insolvency;
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> (f) if execution against him has been levied by the seizure of his goods under an order of any court or if a return of no goods has been made by the sheriff or county registrar whether by endorsement on the order or otherwise;
>
> (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."

It will be seen that the act of bankruptcy at issue in this case is that contained ins. 7(1)(g), namely, the failure of the debtor within fourteen days after service of the bankruptcy summons to pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor. It should also be noted that an application by a debtor under the provisions of s. 8(5) of the Act should be made within fourteen days from the date of service of the bankruptcy summons. The applicant in this case has complied with that time limit.

In the circumstances the question that has to be considered is whether the three month period referred to ins. 11 of the Act continues to run where an application to dismiss the bankruptcy summons is before the court or as contended for on behalf of the respondent, whether the three month period does not commence unless and until the debtor's application pursuant to s. 8(5) is determined by refusing to dismiss the summons.

Very helpful written submissions were furnished to the court on behalf of the respondent in this regard and reference was made in the course of those submissions to Robb on the Law and Practice of Bankruptcy and Arrangements in Ireland. In a commentary related to s. 115 of the Bankruptcy and Insolvency (Ireland) Act 1857 which provided that: "no person shall be liable to be declared a bankrupt by reason of any act of bankruptcy committed more than six months prior to the filing of the petition of the bankruptcy" it was stated as follows:-

> "Should a debtor served with a debtor summons not comply with the requirements thereof within the time limited, or if, having applied to dismiss the summons, he fails in his application, then he will have committed an act of bankruptcy, which is complete upon the expiration of the limited time, or from the date of the order dismissing his application, but any petition for adjudication founded on such act of bankruptcy can only be presented by the creditor suing out the summons, and must be presented within six months of that date."

Hunter, writing in *Northern Ireland Bankruptcy Law and Practice* (1984) about the provisions of law applicable in Northern Ireland, in 1984, since changed, at para. 5.50, stated:

> "The hearing of the application to dismiss the summons will invariably take place after the date for compliance with the summons. The court has no power to extend the time limited by the summons for compliance with its requirements. It seems clear, however, that if the summons is dismissed by the court no act of bankruptcy will have been committed. If the summons was not dismissed, there is some doubt as to whether the date of the act of bankruptcy is at the expiration often days after the service when the debtor has failed to comply with it or at the later date when his application to dismiss is rejected. Under the corresponding statutory provisions in the 1869 Act (Eng.), but relying on a rule of court which has no counterpart in Northern Ireland, the Court of Chancery Appeals in *ex parte Wier* declared that where a person who is really indebted to another in the required sum is served with the debtors summons and does not comply with it within the prescribed time after service, the act of bankruptcy is complete on that date, notwithstanding a pending application to dismiss the summons. However it is doubtful if this decision would be followed in Northern Ireland. It conflicts with a dictum of Millar J. in *Re. Drumgoole* and the wording of s. 78 of the 1872 Act is inconsistent with that construction."

In the decision in *Ex parte Weir* (1871) L.R 6 Ch. App. 875, an individual had been adjudicated bankrupt and an issue was raised as to whether the adjudication bad where the act of bankruptcy occurred more than six months before the presentation of the petition for adjudication? In that case an application had been made to dismiss the summons. There was a provision for the giving of security pending which the summons would be stayed until the court dealing with the matter had reached a decision. On the last day for giving security the appellant by consent obtained a further order postponing the time for perfecting the security. The security never was given and thereafter a petition for adjudication was filed. One of the issues that arose was that under the rules then existing, the effect of given security was to act as a stay on the proceedings and the argument related to whether or not time could run during the stay of proceedings. Mellish L.J. at the outset identified the question before the court in the following terms:-

> "The question is, was the petition presented within six months of the completion of the act of bankruptcy? If the act of bankruptcy was complete on the expiration of three weeks from the service of the summons, the petition for adjudication was too late; but if the act of bankruptcy was not complete until the debtor made default in giving security in compliance with the order of the registrar, the petition for adjudication was in time."
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> The court set out the provisions of s. 6(6) of the Act of 1869 which is in similar terms to s. 7 of the Bankruptcy Act 1988, and then referred to other provisions similar to the provisions of s. 8(5) of the Bankruptcy Act 1988.
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> Mellish L.J. then continued at p. 878 as follows:-
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> "This section unquestionably enables the debtor, if in compliance with the rule he makes an affidavit denying the debt, to obtain the decision of the registrar, and if the registrar decides against him, and he gives security if required, the decision also of a competent court, as to the existence of the debt; and although the section does not in terms say how or when the proceedings in bankruptcy are to be stopped, it is certainly absurd to suppose that the proceedings in bankruptcy are to go on until the question whether there is or there is not a debt has been determined. Now this object may be obtained either by holding that where an application is made to the court within the 21 days to dismiss the summons, the completion of the act of bankruptcy s postponed until that application has been disposed of, or by holding that though an act of bankruptcy had been committed, if there is a real debt to the prescribed amount, no petition for an adjudication can be presented, or by holding that though an act of bankruptcy ahs been committed and though a petition for adjudication may be presented, yet that no order of adjudication can be made. We do not think that any other section of the Act throws any material light upon the proper construction of this section and if the question had depended upon the Act alone, we should have had great doubt what the proper construction was; but we are of opinion that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act, that it is our duty to adopt and follow that construction."

Mellish L.J. subsequently referred to the bankruptcy rules and noted the provision to the effect that: "a debtor shall not be adjudged bankrupt on a petition ... where such debtor shall have applied for the dismissal of such summons ..." accordingly it was held by the court that the act of bankruptcy was complete on the expiration of the period specified in the summons and that the timing for presentation commenced on that date. The reasoning for taking that view was expressed as follows:-

> "... because if no act of bankruptcy could have been committed, or no valid petition for adjudication presented, it was wholly unnecessary to provide that the debtor should not be adjudicated bankrupt."

Hunter, in the work referred to above, commented that he doubted that a similar approach would be adopted in Northern Ireland and it was submitted to me that the position would be the same in this jurisdiction as there is no similar provision contained in O. 76 of the Rules of the Superior Courts. Further, it was submitted that the approach taken in *Wier* was one which should not be followed given the criticism of that decision by the House of Lords in the case of Jackson v. Hall [1980] 1 W.L.R. 118. That was a case which considered the construction of a statute and in the course of the judgment in that case the dictum of Mellish L.J. in *Re. Weir* was doubted. Lord Fraser of Tullybelton at p. 129 stated:-

> "It was made by the Lord Chancellor under s. 73(3) of the Agriculture Act 1947, as amended, and was also subject of a negative resolution by either house: see s. 108(1). It does not, therefore have the express approval of parliament. The fact that it was made by the Lord Chancellor does not invest it with the authority that it would have if it had been approved by the holder of that office in his judicial capacity. The Order has, in my opinion, no greater weight than if it had been made by any other Minister acting under statutory authority and it merely gives effect to the views of the Minister, or of his department, as to the effect of the Act. It ought not, in my opinion, to be treated by the courts as an aid to construction of the Act. A view to the opposite affect was expressed by Mellish L. J. in In *Re. Wier*, ex parte Wier (1871) L.R. 6 Ch. App. 875, who said at p. 879:-
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> "... where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act, ... it is our duty to adopt and follow that construction."
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> In my opinion that statement is erroneous, at least in relation to rules like those of 1976, which have not been affirmatively approved by Parliament, and it should not be treated as authoritative in relation to such rules."

I was referred to the decision in *Re. Drumgoole* (1887) 21 I.L.T.R. 32. Millar J. in that case at p. 33 made the following observation:-

"I scarcely thought that it would have been necessary at this period of time to promulgate from the bench, as a matter of practice, that upon a motion to dismiss a debtor's summons the person who served such notice was the proper person to move that motion and state his case, or that I should assign any reason for that practice, but so it is, although it admits of a very plain statement and very adequate reason in support of that statement as follows: all that the Act of Parliament itself, as distinguished from the General Orders, required the summoning creditor to do was 'to serve in the prescribed manner a debtors summons requiring the debtor to pay a sum due of not less than £20' and when the proper evidence of the service of the summons in the prescribed manner should have been filed, the case of the summoning creditor would have been complete for affecting in due course an act of bankruptcy by the creditor if no step had been taken on the part of the debtor to prevent or interfere with that course, such as by a notice of motion grounded on the necessary affidavit, as in the present case, to dismiss that debtor's summons;

and the 19th General Order in express terms provides that 'when a debtor [as in the present case] files the above mentioned affidavit, the time shall be fixed by the officer at which the application for the dismissal of the summons shall be heard by the court, a notice thereof in the prescribed form shall be given by the debtor, three days before the day so fixed [in manner as therein], and in default of the debtor giving such notice, or in default of his appearing before the court at the time fixed, his application for the dismissal of the summons shall be dismissed."

Miller L.J. went on to observe as follows:-

"It is only necessary, therefore, to state generally that it lies upon the debtor upon whom the debtor summons has been served and who has served the notice for dismissal as directed by the 191h General Order, which is by way of appeal from the acts of the various officers of this Court, in the same manner as in every other case in which a notice of motion is served, to open his case in order that the court may be enabled to deal with the motion as directed by the 80th section of the Bankruptcy (Ireland) Amendment Act 1872, upon the necessary assumption that, if that notice and the documents relied upon in support of such notice should not prove sufficient to displace a debtor's summons as served, an act of bankruptcy by the debtor will in due course, necessarily be established against him, and after this declaration it shall not be said in this Court, especially by a regular practitioner in it, that the established practice has been that the summoning creditor should begin and restate what is already upon the files of this court"

Relying upon those passages, counsel on behalf of the respondent argued that they support the proposition that no act of bankruptcy is committed unless and until an application to dismiss a bankruptcy summons has been resolved in favour of the creditor. It was argued that the approach derived from Robb and Hunter represents a sensible interpretation of s. 11(1)(c) of the 1988 Act. In other words it was urged on the court that an act of bankruptcy occurs only when the debtor has failed to comply with a valid bankruptcy summons. If the validity of the summons has been impugned by way of a motion, it cannot be said that there has been a failure to comply with the summons until such time as its validity has been confirmed by order of the court. Accordingly it was urged on the court that the bringing of an application by a debtor seeking to dismiss the bankruptcy summons effectively stops time running for the purposes of s. 11 (l)(c) of the 1988 Act until such time as the court has determined the application. It was submitted that the alternative to the interpretation was to oblige a debtor who has filed an affidavit in time seeking to dismiss the bankruptcy summons to pay the sum claimed on the summons in order to avoid committing an act of bankruptcy. If that were so an act of bankruptcy would occur on the expiration of fourteen days from the service of the summons irrespective of the challenge to the validity of the summons and ultimately the effect of a successful application to court to dismiss the summons would result in that act of bankruptcy being deemed not to have occurred. It was suggested that this interpretation of the respective provisions of the Act was one which would lead to an absurd situation.

The applicant in dealing with the arguments of the respondent simply relied on the provisions of section 11 (1)(c) of the 1988 Act. He argued that the position set out by the Act was clear. If a debtor does not comply with a bankruptcy summons there is an act of bankruptcy and the creditor must then issue the petition for adjudication against the debtor within the time prescribed in section 11.

Decision
There is no authority in this jurisdiction to assist the court in the interpretation of the provisions of s. 8(5) and s. 11(1)(c) of the 1988 Act and how one interplays with the other. If one was to adopt a literal interpretation of the provisions of s. 11(1) (c) of the 1988 Act, then it seems that the respondent in this case could not present a petition for adjudication of the debtor at this stage. A practical solution to the issue raised in this case would be for a creditor to present a petition notwithstanding that the debtor had sought to have a bankruptcy summons dismissed. If that were done, it would then be necessary for the petitioner to adjourn the petition for adjudication until such time as the debtor's application to dismiss pursuant to s. 8(5) had been determined. One of the difficulties presented by the facts of this case is that on the presentation of a petition, the petitioner must recite the act of bankruptcy on which the petition is founded (See O. 76, r. 19 of the Rules of the Superior Courts). Can it be said that an act of bankruptcy has occurred in circumstances where the debtor has made an application to dismiss the bankruptcy summons. Obviously, if the debtor is ultimately successful in the application to dismiss, no act of bankruptcy has occurred. On the other hand, if the debtor fails to have the bankruptcy dismissed, the act of bankruptcy must have occurred as a result of the failure to pay the sum due on foot of the bankruptcy summons within fourteen days from the date of service of the bankruptcy summons.

Section 11(1)(c) of the 1988 Act, on its face appears to be clear and unambiguous. It provides for the petition to be presented within three months of the occurrence of the act of bankruptcy. It makes no reference whatsoever to what should occur in the event that an issue is raised as to whether an act of bankruptcy occurred at all. Looking at the Act as a whole and bearing in mind the penal nature of an adjudication of bankruptcy could it be said that on an interpretation of the Act as a whole the provisions of s. 11(1) (c) of the 1988 Act are to be applied strictly without regard to the provisions of s. 8(5) of the Act? It is. inconceivable that a court would allow a debtor to be adjudicated a bankrupt if an application to dismiss a bankruptcy summons was extant. Is it therefore necessary or appropriate that a creditor must present a petition in circumstances where the petition on presentation must inevitably be adjourned to abide the outcome of the debtor's application to dismiss the summons?

The act of bankruptcy relied on in this case is the failure to pay the sum of €32,266,470 within fourteen days of the service of the summons on the debtor. The summons provided the necessary information that the debtor could be adjudicated on the presentation on the presentation of a petition unless he had applied within the prescribed time to dismiss the summons. The debtor did make such an application. The act of bankruptcy; assuming that the summons was not dismissed, would have occurred fourteen days after the service of the bankruptcy summons, that is, by the 25th November, 2011. A petition has not been presented within three months of that date. Given that it is inconceivable that a petition presented within the time limit provided for in s. 11(1) (c) of the 1988 Act would have been acted upon pending the conclusion of the application to dismiss the bankruptcy summons, even though there is no provision in the 1988 to provide for that contingency, should the. creditor be in a different position to the debtor? In other words, if the debtor's application to dismiss the summons fails, should the creditor be forced by virtue of the lapse of time to recommence the same procedure again by issuing a further Bankruptcy Summons? It seems to me that looking at the provisions of s. 8. (5) and s. 11

(1)(c) of the 1988 Act together there is some ambiguity in the legislation. On a literal interpretation of s. 11(1)(c) of the 1988 Act, 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 1988 Act can be looked at in isolation from s. 8 (5) of the 1988 Act. Counsel on behalf of 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 debtor 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 debtor. I am of the view that the creditor is now in a position to present a petition on foot of that act of bankruptcy.