Neutral Citation: [2015] IEHC 96

THE HIGH COURT

BANKRUPTCY

5673S BANKRUPTCY

IN THE MATTER OF A BANKRUPTCY SUMMONS BY ACC LOAN MANAGEMENT LTD

AND

C. M.

JUDGMENT of Ms. Justice Costello delivered the 14th day of January 2015

1. This is an application to dismiss a bankruptcy summons issued on the 23rd June, 2014, following the making of a statutory demand dated 4th April, 2014, by the creditor against the debtor Mr. C. M. The application is brought pursuant to s.8 of the Bankruptcy Act 1988, as amended, which provides as follows:-

> *"(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."*

2. The application is also brought pursuant to the inherent jurisdiction of the court.

The Law

3. There have been a number of cases where the principles governing an application to dismiss a bankruptcy summons pursuant to s.8 has been discussed. The most recent authoritative judgment was that of Dunne J. in *Marketspreads Ltd v. O'Neill & Rice* [2014] IEHC 14. She considered the test as established by the Supreme Court in *St. Kevin's Company against a Debtor* (Ex tempore, Supreme Court, 27th January, 1995) as interpreted by McGovern J. in the *Minister for Communications v. M.W.* [2010] 3 I.R. 1. McGovern J. noted at p.4 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."*

4. In the *Minister for Communications v. M.W.* McGovern J. stated that the test was is there a real and substantial issue and one which is at least arguable and has some prospects of success. Dunne J. held as follows:-

> *"…the obligation of the Court is to be satisfied that there is an issue between the parties and, if so, then one must dismiss the bankruptcy summons. It seems to me that in considering the approach of the Court in deciding whether or not there is an issue, one has to have regard, of course, to whether or not the issue is, to use the words of McGovern J., "a real and substantial issue and one which is, at least, arguable and which has some prospect of success". To put it another way, if one was to re-phrase the test, could it be said that the summons should be dismissed if the Court was merely satisfied that there was an issue, that it was unreal and illusory, that it was not arguable and had no prospect of success, could it be said in those circumstance, the Court is nonetheless obliged to dismiss the bankruptcy summons? Although there is no written judgment of the Supreme Court in the St. Kevin's case, it is clear that the Court was of the view that there should not be an investigation into the merits of the case once it was clear that an issue arose. Equally, the Court indicated that that such an issue was one which would have to be litigated separately outside the bankruptcy process. The court therefore has to consider the arguments that are put forward in any given case to satisfy itself that there is, in fact, an issue. An unreal or illusory issue raised by a party will not give rise to the dismissal of a bankruptcy summons…*
>
> *In the course of the arguments, reference was made to the approach of the Courts in applications for summary judgment as to whether a defence has been raised requiring the matter to be adjourned to plenary hearing. I think that the test in such cases is of assistance in considering the test identified by McGovern J. Therefore, it seems to me that, in considering if the party seeking the dismissal of the bankruptcy summons has raised an issue such that the summons should be dismissed, the Court could derive some assistance from the approach to be found in cases such as Harrisrange Limited. v. Duncan [2003] 4 I.R. 1 and to the well known principles set out in the judgment of McKechnie J."*

5. Dunne J. also referred to the decision of Clarke J. in *McGrath v. O'Driscoll* [2006] IEHC 195 where he held:-

> *"…that a mere assertion of a defence is insufficient but any evidence of fact, which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved"*

6. I accept that these are the principles which should be applied in determining whether or not the bankruptcy summons herein should be dismissed.

Name of the Petitioner

7. If the debtor is to succeed in his application to dismiss the bankruptcy summons he must satisfy the court that an issue would arise for trial. The debtor relied upon a number of arguments which he said amounted to such an issue. Two technical points were

taken by the debtor in relation to the bankruptcy summons. The first related to the fact that the statutory demand and statutory summons were brought in the name of ACC Bank Plc but the petition was brought in the name of ACC Loan Management Ltd. Mr. Michael Leogue, team leader in specialised asset management of ACC Loan Management Ltd. swore an affidavit on 15th August, 2014, herein on behalf of the creditor and explained the situation as follows. He said that on 27th June, 2014, ACC Bank Plc re-registered as a private limited company known as ACC Bank Ltd and, on the same day, a certificate of incorporation on change of name was issued by the Registrar of Companies certifying that ACC Bank Ltd had changed its name and was now incorporated under the name ACC Loan Management Ltd. The name was entered on the register accordingly. He exhibited the certificate of incorporation on re-registration as a private company and a certificate of incorporation on change of name both dated the 27th June, 2014. He states that it was therefore correct to issue the bankruptcy summons on 23rd June, 2014, in the name of ACC Bank Plc and the petition of bankruptcy on 16th September, 2014, in the name of ACC Loan Management Ltd.

8. The debtor complained that there was a change of name between the date of the issuing of the bankruptcy summons (23rd June, 2014) and the date of the service of the summons upon him (3rd July, 2014) and that there was also a change in the status of the creditor company from a public limited company to a private limited company. He also pointed to the fact that the creditor did not renew its banking licence by the time the petition was presented. He thus challenged the entitlement of the petitioner, ACC Loan Management Ltd, to bring the proceedings in the circumstances. The precise objection he raised was not clarified other than to say that the articles of association might have been changed so that the petitioner might not have been entitled to collect debts which had been due to ACC Bank Plc.

9. In my opinion this submission is ill founded and cannot affect the ability of the petitioner to bring a petition pursuant to the bankruptcy summons in this case. Section 23(4) of the Companies Act 1963 provides as follows:-

> *"A change of name by a company under this section shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it by its former name may be continued or commenced against it by its new name"*

10. This governs the change of name from ACC Bank Plc to ACC Loan Management Ltd. The change of status from a plc to a limited liability company can have no bearing whatsoever on the capacity of the creditor to collect debts due to it. Likewise whether or not the company holds a banking licence is irrelevant to the collecting of debts. There has been no evidence advanced to establish that the articles of association of the creditor were amended, much less that it has lost the right to recover judgment debts due to ACC Bank Plc. Insofar as the debtor seeks to have the bankruptcy summons dismissed on this ground, I reject this claim.

Form of the bankruptcy summons

11. The second technical objection advanced by the debtor is based on the wording of O.76, r. 13 (2) of the Rules of the Superior Courts. This provides:-

> *"There shall be endorsed on the summons in addition to an intimation of the consequences of neglect to comply with the requisition of the summons, a notice to the debtor that if he disputes the debt and desires to obtain the dismissal of the summons he must file an affidavit within fourteen days after service of the summons stating (a) that he is not so indebted or only so indebted to an amount of €20,000 or less or (b) that before the service of the summons he had obtained the protection of the Court or (c) that he secured or compounded the debt to the satisfaction of the creditor"*

The bankruptcy summons issued on the 23rd June, 2014, and was in precisely the form prescribed by S.I. 461/2013 amending Appendix O of the Rules of the Superior Courts. The summons on its face stated that:-

> *"unless you shall have within the time aforesaid applied to the Court to dismiss this summons,* ***on the ground that you are not indebted to the said ACC BANK PLC in any sum*** *or that you are only indebted to ACC BANK PLC in a sum of €20,000 or less". (emphasis added)*

It went on to provide on the second page:-

> *"If, however, you are not indebted to the said ACC BANK PLC in any sum, or you are only indebted to ACC BANK PLC in a sum of €20,000 or less, you must apply to the Court to dismiss this summons within fourteen days after service of this summons on you, by filing in the Examiner's Office, Four Courts, Dublin, an affidavit in the prescribed form… stating that:*
>
> > *(a) you are not so indebted, or you are only so indebted to an amount of €20,000 or less, or*
> >
> > *(b) before service of this summons upon you, you had obtained the protection of the Court, or had compounded or secured for the debt to the satisfaction of the said ACC BANK PLC".*

12. It was submitted by the debtor that the summons did not set out what he must do if he disputed the debt and wished, on that ground, to dismiss the summons and therefore ought to be dismissed. I do not accept that completing a bankruptcy summons as provided for in Appendix O of the Rules of the Superior Courts can amount to a breach of the requirement of O.76, r.13(2) as contended by the debtor. If I am wrong in that regard, I am of the opinion that it is an error such as would not justify the dismissal of the summons as more fully set out below.

Was the statutory demand inaccurate?

Order 76, rule 12(4) of the Rules of the Superior Courts provides:-

> *"Detailed particulars of demand shall be endorsed upon or annexed to the bankruptcy summons. No objection shall be allowed to the particulars unless the Court considers that the debtor has been misled by them."*

13. The main thrust of the debtor's argument that the bankruptcy summons should be dismissed related to the credits which were afforded to him in respect of a consent judgment in the sum of €1.9 million dated 30th November, 2010, in proceedings entitled *ACC BANK Plc v. C. M.* Rec. No. 2009/1167S. The statutory demand was dated 4th April, 2014, and stated as follows:-

> *"Take notice that ACC BANK PLC, the said Creditor, hereby requires immediate payment of the said sum of €1,381,024 within fourteen days of service of this Notice upon you at the address given below and failing payment within that period, ACC BANK PLC will apply to the High Court for the issue of a bankruptcy summons against you in accordance with section 8 of the Bankruptcy Act, 1988.*

Particulars of the demand:

1. A consent judgment in the sum of €1,900,000 was entered by the High Court (Feeney J) against the Debtor in favour of the Creditor on 30 November 2010, which said sum has been reduced by €818,976 by virtue of sums recovered by the Creditor through its security as detailed on the attached spreadsheet, leaving a balance due on foot of the said judgment by the Debtor to the Creditor, before interest of, €1,081,024;

2. Interest on the said judgment, as reduced by the sums recovered by the Creditor through it security and calculated, as illustrated on the attached spreadsheet, at the rate of 8% per annum from 30 November 2010 to 9 December 2013 amounting to €359,822.67. Notwithstanding its entitlement to interest in the said sum, the Creditor has agreed to limit its interest claim against the debtor to €300,000.

TOTAL SUM CLAIMED: €1,381,024".

14. The attached spreadsheet was presented in a tabular form as follows:-

A	B	C	D	E	F	G	H
	Date	Interest Rate	Transaction Value	Balance o/s (Column D less next payment on list)	Daily Interest Charge (Column E x 8%/365)	# Days Interest	Interest Charge (Column F x Column G)
Judgment	30/11/2010	8%	€1,900,000.00	€1,900,000.00			
Less Rent of Main Street	30/11/2010		- €56,527.00	€1,843,473.00	€404.05	240	€96,171.73
Less Hennessy Settlement	28/07/2011		- €110,000.00	€1,733,473.00	379.94	36	€13,677.81
Less Sale of Parkgarriff	02/09/2011		- €260,000.00	€1,473,473.00	€322.95	177	€57,162.68
Less Contents of Rossmore	26/02/2012		- €2,449.00	€1,471,024.00	€322.42	239	€77,057.48
Less Credit re contents of Rossmore	22/10/2012		- €20,000.00	€1,451,024.00	€318.03	39	€12,403.27
Less Sale of Rossmore	20/11/2012		- €200,000.00	€1,251,024.00	€274.20	374	€120,549.69
Less Sale of Main Street	09/12/2013		- €170,000.00	€1,081,024.00	N/A	N/A	N/A
Final Balances				€1,081,024.00			€395,822.67

The question to be determined is whether or not the spreadsheet is inaccurate. In the replying affidavit sworn by Michael Leogue on 15th August, 2014, on behalf of the creditor, it is averred that the total amount of rent paid to the Receiver from the appointment of the Receivers on the 19th January, 2009, until the sale of the premises on the 19th July, 2012, was €56,527.00 and a schedule of rent is exhibited. This shows that the rents collected run from 25th January, 2010, to 26th June, 2012. The date on the spreadsheet in the statutory demand is explained as the creditor affording the debtor a credit against the judgment debt in the full amount of the rent gathered in by the Receiver. It is stated that the full amount of rent collected has been credited to the debtor's account and that by crediting it in full as of the date of the judgment this reduces the total interest that would have been payable on foot of the judgment due to the creditor by the debtor and thus is in ease of the debtor. After the exchange of affidavits which took place in relation to this motion, the debtor now accepts that in fact the rent actually recovered has all been credited against his liabilities. Therefore, it cannot be said that the statutory demand and therefore the bankruptcy summons based upon it are inaccurate in relation to this figure. There was no other challenge to the calculation of the other credits set out in the spreadsheet and therefore any case which the debtor wished to advance on the basis that the bankruptcy summons was inaccurate on the basis of the figures set out in the spreadsheet must fail.

Was the debtor misled by the summons?

15. The debtor complained that he was misled or confused by the second entry on the spreadsheet which was described as "Less Rent of Main Street" and was dated 30/11/2010. He said he understood that this meant he was being credited with rent recovered in respect of the premises at Main Street up to 30th November, 2010. He says that he was aware that the property had been let after that date and that accordingly there should have been a credit due to him over and above this credit in respect of these additional rents. At para. 5 of his affidavit grounding the application to dismiss the bankruptcy summons sworn on 8th July, 2014, he stated as follows:-

"The spreadsheet suggests that no rent was received after 30th November 2010. This is not so. I know that the restaurant and the apartments were occupied by tenants for approximately two years after 30th November 2010. I know that they paid rent. I am entitled to know how much rent they paid and when and where this rent was lodged for my benefit. This rent should have been lodged when collected against the total due and this would of course also have an impact on the daily interest accruing as well as on the capital sum.

6. I do not have exact figures but I believe that the top floor apartment was rented out for most of the duration of the receivership being from the time the Receiver was first appointed until the property was sent for auction at the end of 2012. I believe that the restaurant and first floor apartment were rented out from about June 2009 until the end of 2012. A rough analysis of the figures on the spreadsheet would indicate that the rent for the whole building was approximately €3,140.00 per month up until the 30th November 2010. This would indicate that the rent for the following two years would be in the region of €75,000.00. Also the rent should be lodged periodically and as well as the lump sum reduction there should be a further reduction in respect of the rent being lodged when collected as the principal would be less and the daily interest charged would be less."

16. The statutory demand is clearly dated 4th April, 2014, and claims sums due as of that date. It gives a credit for "Rent of Main Street" and it gives the date when the credit is allowed. It does not state the date when the rent was recovered. Quite clearly all of the rent was not collected on one date, 30th November, 2010. Therefore, it seems to me, that objectively construing the spreadsheet attached to the statutory demand, the date can only be referable to the date that credit for the rent was afforded to

the debtor. It cannot reflect the date the rent was either due or recovered. This is clear from the manner in which interest on the judgment sum is calculated. At no point was Courts Act interest claimed in respect of the entire judgment sum. Immediately the full credit for the rent of Main Street was deducted from the entire judgment sum and Courts Act interest was only applied to the reduced sum.

17. In the debtor's affidavit sworn on 2nd September, 2014, at paras. 13 and 14 he averred as follows:-

> *"At the time I received the Particulars of Demand and Notice Requiring Payment Prior to the Issue of a Bankruptcy Summons I believed that the Creditor had shown rent only up until the 30th November 2010 and my reaction was to a certain respect informed by this belief. I believed that more deductions should have been made from the amount on the Consent Judgment and that in the event of a move to bankruptcy I would have a full defence based on the (sic) that belief.*
>
> *I received the Bankruptcy Summons on the 3rd July 2014. I was still of the belief that the deductions from the Consent Judgement were not correct and my position and calculations were set out in my Affidavit of the 8th July 2014. It had the same spreadsheet attached as that attached to the Particulars of Demand and Notice Requiring Payment Prior to the Issue of a Bankruptcy Summons. I still presumed that the rent of Main Street, Kenmare was up until the 30th November 2010 and that there was a large amount of rent unaccounted for. I set out in my Affidavit a calculation of the amount of rent that could have been missing and if anything this was on the low side."*

This averment suggests that the debtor was not confused or misled by the statutory demand and the summons, but rather, that he was of the belief that they were inaccurate. He did not reply to the demand by stating this belief, which is all the more striking as he had been in correspondence with the creditor prior to the delivery of the statutory demand in relation to this issue.

18. I am reinforced in this view by the debtor's written submissions where he stated as follows:-

> *"By the 30/11/2010 the Receiver had been in occupation of the Main Street property for twenty months. The Debtor believed that the restaurant was rented out for about €2,500 per month and that the top floor apartment was rented out about (sic) €260 per month. This meant that a quick calculation would indicate that the amount that should have been received for the 20 months was €60,720. The amount of rent indicated on the spreadsheet was €56,527 and therefore the Debtor assumed that the rent indicated was up until 30/11/2010. The Debtor knew that the premises was rented out or should have been rented out up until for(sic) a further two years at least and so believed that a further figure of €60,000-€70,000 should have been credited the account. The Debtor therefore believed on foot of the figures that the amount claimed on the spreadsheet attached to Particulars of Demand was in excess of what was actually due. He also believed that the amount claimed on the Bankruptcy Summons was in excess of what was actually due and he felt that in those circumstances there was no obligation to pay the amount claimed on foot of the Summons and the failure to pay on foot of that Summons could not constitute an act of Bankruptcy. The Debtor submits that he has not committed an act of Bankruptcy. In the Particulars of Demand the Creditor reduced its interest claim by €59,822.67 but the Debtor believed that the amount of what he believed to be undeclared or understated rent was in excess of this."*

It seems clear from this submission that in truth the debtor was not misled within the meaning of the rules in relation to the particulars of demand but rather believed that the particulars of demand were inaccurate.

19. In the case of *Murphy v. Bank of Ireland* [2014] IESC 37 Dunne J. stated:-

> *"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."*

It is clear that Dunne J. is giving an objective interpretation of the test of whether or not a debtor has been misled by the particulars of demand.

In my opinion, construed objectively, the statutory demand and bankruptcy summons were not misleading. They gave a true, complete summary statement and demanded what was due as of 4th April, 2014. Applying the test objectively, therefore, there are no grounds for dismissing the summons on the basis that the debtor was misled. Further, if the test is not an objective test, I do not consider, for the reasons outlined above, that the debtor has been misled within the meaning of O.72, r. 12(4) and therefore the summons ought not to be dismissed on this ground.

Other issues advanced

20. The debtor advanced further grounds in support of his argument that the bankruptcy summons should be dismissed. It is important to bear in mind that in doing so he must satisfy the court that there is a real and substantial issue between the parties which has some prospect of success. The mere assertion of a defence is insufficient. The debtor claimed that the creditor refused for a period of months commencing June, 2013 to discuss a settlement of his debt and that as a result he lost an opportunity to compromise his debts with all of his creditors. It seems to me that this must be fundamentally misconceived. It cannot give rise to a cause of action in favour of the debtor against the judgment creditor. Insofar as this is relied upon as a basis to dismiss the bankruptcy summons it must fail.

21. If I am incorrect in this conclusion, I note that no evidence was submitted to the court that the debtor ever had the money or was in a position to make an offer of settlement that could have been acceptable to the creditor. It is notable that the judgment sum the subject matter of the bankruptcy summons was a consent judgment dated 30th November, 2010, and that no payment has ever been made by the debtor. Therefore it seems to me that even if, as a matter of principle, a refusal to discuss settlement of a judgment debt could give rise to a course of action, in this case there is no more than a bald assertion of a possible defence. There is no supporting evidence and therefore this cannot be accepted as the basis to dismiss the bankruptcy summons.

2013 proceedings

22. The debtor in fact instituted proceedings in 2013 in the High Court between *C. M. v. Kieran Wallace, Barry Donohue, ACC Bank Plc, Maurice Cohalan, Malcolm Tyrrell, Brian Olden and Brendan Kelly* Rec. No.2013/14040P. The proceedings are predominately concerned with a series of complaints the plaintiff/debtor raises against the Receivers appointed by the judgment creditor. Much of the argument before the court was concerned with whether or not the Receiver had properly conducted sales of the properties subject to security in favour of the judgment creditor or whether the Receivers had failed to rent the properties. Those are

undoubtedly claims which the debtor is entitled to pursue if he sees fit against the Receivers. This court is solely concerned with whether or not there is any substantial issue for trial between the debtor and the judgment creditor arising from those proceedings. Furthermore, it must be an issue which could give rise to an award of damages which in turn could be set off against the judgment debt the subject of the bankruptcy summons.

23. The reliefs sought by the plaintiff in the 2013 proceedings are as follows:-

> *"(a) an Order removing or, in the alternative, requiring the Bank to remove the Receivers as Receivers appointed under the mortgage*
>
> *(b) an Order setting aside the Contract for Sale and Conveyance of the Restaurant property*
>
> *(c) further or in the alternative to (b), an Order for damages in respect of the sale of the Restaurant arising out of the failure to obtain planning permission prior to the sale and the failure to interact with any parties interested in purchasing the restaurant property and the failure to interact with the Plaintiff when he was in a position to recover the restaurant property as part of his overall debt to the First Named Defendant*
>
> *(d) Further or in the alternative to (b) above, an Order for damages in respect of the sale of the restaurant to the Seventh Named Defendant at an undervalue as part of a "job lot" of other properties being sold by the Fourth, Fifth and Sixth Named Defendants.*
>
> *(e) Further or in the alternative to (b) above an Order for damages in respect of the diminution of the value of the Restaurant property arising out of the attempted auction*
>
> *(f) Further or in the alternative to (a) above a full and final account from the Second and Third Named Defendants*
>
> *(g) Damages to the Plaintiff in respect of the loss of rent of the restaurant property*
>
> *(h) Damages to the Plaintiff in respect of the payment of a figure of compensation to the tenant of the top floor apartment in the restaurant property*
>
> *(i) Damages for negligence and breach of duty including exemplary and/aggravated damages*
>
> *(j) Such further or other reliefs as to this Honourable Court should seem fit or appropriate; and*
>
> *(k) Costs.*

24. Reliefs (b), (c), (d), (e), (g) and (h) are all solely referable to the conduct of the receivership by the Receivers. I shall deal with the issue as to whether or not the judgment creditor could be liable in damages to the debtor for the acts or omissions of the Receivers as pleaded in the 2013 proceedings below. Reliefs (a), (f) and (i) relate to the third named defendant, the judgment creditor. Even if the plaintiff were to succeed in the 2013 proceedings and obtain orders under reliefs (a) and (f) they could not result in an award of damages against the judgment creditor, the third named defendant therein. This leaves the claim for damages for negligence and breach of duty. At paras. 24 to 26 of the statement of claim the debtor raises a complaint that the judgment creditor would not meet and furnish him with a statement of the amount of his indebtedness at that time. At para. 26 it is pleaded:-

> *"While the Plaintiff will pursue the re-entered proceedings to prevent the Third Named Defendants from recovering any monies allegedly due, it is part of his claim in the within proceedings that failings of the First, Second and Third Named Defendants to interact with him in relation to the monies due frustrated his attempt to retain ownership of the restaurant property."*

In fact, prior to the motion to dismiss the bankruptcy summons, the plaintiff had made an application to the President of the High Court to re-enter the summary proceedings as pleaded in para. 26 of the statement of claim and the President of the High Court refused the application. Thus, this plea was spent at the time the motion came for hearing before this court.

25. The final basis upon which the debtor could argue that he has a claim in damages against the judgment creditor arises from the final plea in his statement of claim which is to the effect that the Receivers have been *de facto* agents for the bank and as such the bank is liable for their conduct.

Liability for the conduct of the Receivers

26. In the course of argument the debtor was asked to advance authority for the proposition that the judgment creditor could be liable for the allegedly wrongful acts and omissions of the Receivers on the basis that the Receivers were the agents of the judgment creditor. In reply the debtor argued that the consent judgment of the 30th November, 2010, amounted to the bank accepting liability for the wrongful acts of the Receivers as they had compromised their claim largely, as he said, on the basis of the wrongful acts of the Receivers. I reject this submission. A consent judgment entered on foot of a compromise entered into between the parties cannot be authority for the proposition that a receiver is the agent of the mortgagee as opposed the agent of the mortgagor.

27. Secondly the debtor argued that the decision of Feeney J. on 22nd October, 2012, to award the debtor damages against the bank for the wrongful conversion by the receivers of goods of the debtor which were sold by the receivers as part of the process of selling the secured property constituted authority for his argument that the Receivers were agents of the bank. In reply, counsel for the judgment creditor pointed out that the judgment of Feeney J. reflected damages for conversion. The Receivers had wrongfully converted goods of the debtor in the conduct of the sale of the secured property and the bank had received the proceeds of the conversion of the goods along with the proceeds of the sale of the property. Clearly the bank was not entitled to receive the proceeds of sale of conversion and accordingly the order of Feeney J., it was submitted, did not constitute authority for the proposition that the bank was liable for the wrongful acts of the Receiver on the basis that the Receiver was the agent of the bank. I agree with this submission.

28. Counsel for the judgment creditor referred to the well known judgment of Denham J. in *Bula Ltd v. Crowley* [2003] IESC 10 in relation to the question of agency of receivers. She quoted from the judgment of Fox L.J. in *Gomba Holdings v. Minories Finance* [1989] BCLC 115 at p. 117 as follows:-

> *"The agency of a receiver is not an ordinary agency. It is primarily a device to protect the mortgagee or debenture*

holder. Thus, the receiver acts as agent for the mortgagor in that he has power to affect the mortgagor's position by acts which, though done for the benefit the debenture holder, are treated as if they were acts of the mortgagor. The relationship set up by the debenture, and the appointment of the receiver, however, is not simply between the mortgagor and the receiver. It is tripartite and involves the mortgagor, the receiver and the debenture holder. The receiver is appointed by the debenture holder, on the happening of specified events, and becomes the mortgagor's agent whether the mortgagor likes it or not. And, as a matter of contract between the mortgagor and debenture holder, the mortgagor would have to pay the receiver's fees. Further, the mortgagor cannot dismiss the receiver, since that power is reserved to the debenture holder as another of the contractual terms of the loan. It is to be noted also that the mortgagor cannot instruct the receiver how to act in the conduct of the receivership. All this is far removed from the ordinary principal and agent situation so far as the mortgagor and the receiver are concerned. Whilst the receiver is the agent of the mortgagor he is the appointee of the debenture holder and, in practical terms, has a close association with him. Moreover he owes fiduciary duties to the debenture holder, who has a right, as against the receiver, to be put in possession of all the information concerning the receivership available to the receiver: see Re Magadi Soda Co. Ltd (1925) 41 TLR 297.

The result is that the receiver, in the recourse of the receivership, performs duties on behalf of the debenture holder as well as the mortgagor. And these duties may relate closely to the affairs of the entity which is the subject of the receivership."

29. Denham J. also approved the case of *Rottenberg & Ors v. Monjack & Anor* [1993] BCLC 374 where it was stated at pp. 377-8:-

"It is quite clear, both from these powers and the purpose for which receivers are appointed and the job they are called on to do, that their duty must be to the secured creditor. They cannot be put in the position, negligence and dishonesty apart, of having to weigh discretions between the secured creditor and the debtor. If they behave efficiently and honestly, the secured creditor must come first."

30. Denham J. then concluded at p. 1456 as follows:-

"The receiver receives the assets of the mortgagor for the benefit of the mortgagee. Thus in this case the Receiver received the assets of Bula for the benefit of the Banks. The principal task of the Receiver is to secure the assets of the company which have been mortgaged in favour of the debenture holder which appointed him. Thus in this case the Receiver secured the assets of Bula in favour of the banks. It is clear that a Receiver appointed under a mortgage is there as a consequence of an agreement being activated and his position and powers follow accordingly. The appointment of the Receiver was a device to protect the Banks. Thus while the Receiver acts as agent for Bula, which was a party to agreements pursuant to which he was appointed, his actions are for the benefit of the Banks. The Receiver took possession of the assets for the benefit of the Banks. It is an unusual and unique relationship. While the Receiver is the agent of Bula yet he has a special relationship with the Banks. It is a tripartite relationship. In this case the Receiver was appointed, on certain events happening, in accordance with the agreements, by the Banks, and, whilst the Receiver is the agent of Bula, that company cannot instruct the Receiver how to act in the receivership. Thus the Receiver has duties to both Bula and the Banks. However, the first duty of the Receiver is to the Banks. The object of his appointment was to realise the banks security, that is to sell the property of Bula in this case. The duty of the Receiver is to the Banks, to realise the security, to sell the assets. That, as Costello J. said, was the whole purpose of his appointment."

31. Clause 9.4 of the mortgage specifically makes it clear that a receiver appointed under the mortgage is to be the agent of the debtor who is "solely responsible for his acts". It is therefore abundantly clear there can be no question of *de facto* agency between the bank, the judgment creditor, and the Receivers. It follows therefore that for the purposes of an application pursuant to s.8 of the Bankruptcy Act 1988, a claim based on alleged *de facto* agency of the Receivers, is not a real and substantial issue which would arise for trial. The unreality of the debtor's argument in this regard is underscored by para. 24 of his affidavit of 2nd September, 2014, where he avers:-

"Even if I do not succeed in the 2013 proceedings [against the Receivers] I am still allowed contest the figures in these proceedings as I am saying that if the Receiver had done his job properly that I would have been credited with far greater sums in the spreadsheet"

The debtor is thus arguing that if he fails in his action against the Receivers to recover damages for the Receivers' alleged mismanagement of the secured properties and failure to obtain rents which he alleges ought to have been obtained or could have been obtained, nonetheless he would be entitled to seek a credit for these un-recovered rents as against the judgement creditor. This is a simply unsustainable argument. In my opinion it cannot amount an issue to be tried within the meaning of s.8 of the Act of 1988.

Other Matters

32. The debtor also sought to rely upon claims by the Receiver against tenants of the secured properties and claims that the debtor might have had against the auctioneers who conducted the sales of the properties. It is abundantly clear that whatever the outcome of these claims they could not amount to an issue to be tried as between the judgment creditor and debtor and therefore fall outside the scope of s.8 of the Act of 1988.

33. Credit was given to the debtor against the judgment sum for monies received by the judgment creditor in respect of the settlement of a claim the judgment creditor brought against solicitors (the Hennessy settlement). The debtor claims that he ought to be given information about this settlement and he ought to be permitted to argue that the bank had settled for too low a figure. On that basis, it is argued, that the judgment sum should be reduced and therefore the sum claimed in the bankruptcy summons is too great. He advances this as another ground for seeking to set aside the bankruptcy summons. It has only to be stated in those terms to be shown how this cannot be the case. He has received the benefit of a credit being the payment made by a third party to the bank; a credit to which he had no entitlement. Whether the credit could or should have been larger is clearly neither here not there. He has received the benefit of the credit and it cannot be said that when the particulars of demand and subsequently the bankruptcy summons was served upon him that they were any way inaccurate because of the amount of the Hennessy Settlement.

Conclusion

34. The debtor has failed to establish any basis upon which the bankruptcy summons herein should be dismissed. Accordingly, I refuse this application.