[2019] IEHC 574

THE HIGH COURT

BANKRUPTCY

[2018 No. 5993]

BETWEEN

LAUNCESTON PROPERTY FINANCE DAC

PLAINTIFF

AND

DAVID WRIGHT

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 18th day of October 2018

1. Launceston Property Finance DAC ("the creditor") issued a bankruptcy summons against Mr. David Wright ("the debtor") in the sum of €1,742,842.27 on the 23rd April, 2018. The debtor brought an application to dismiss the bankruptcy summons dated 3rd May, 2018 pursuant to s. 8 (6) of the Bankruptcy Act, 1988 as amended. This is my decision in respect of the application.

The legal provisions

2. Section 8 (5) and (6) of the Bankruptcy Act, 1988 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.*
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> *(6) The Court—*
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> > *(a) may dismiss the summons with or without costs, and*
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> > *(b) shall dismiss the summons if satisfied that an issue would arise for trial."*

3. The Supreme Court recently considered the relevant test in *Minister for Communications, Energy and Natural Resources v. Wood and Wymes* [2017] IESC 16. At pp. 3 and 4 of the judgment of the court delivered by Dunne J. she held:

> *"It is mandatory on the Court to dismiss the summons having regard to the provisions of s. 8(6)(b) if an issue arises on the summons. There is no choice in this matter. The summons must be dismissed. That begs the question as to what is an issue that could give rise to the dismissal of a bankruptcy summons. In Minister for Communications v. M.W. McGovern J. described the test to be applied in deciding whether an issue would arise for trial as follows: '…this is a real and substantial issue and which is, at least, arguable and which has some prospect of success.' (at para. 24). In two subsequent decisions of the High Court, I accepted that this was the appropriate approach to be taken in considering whether an issue would arise for trial. (See Allied Irish Banks plc v Yates [2012] I.E.H.C. 360 at p. 29 and Marketspreads Ltd. v O'Neill and Rice [2014] I.E.H.C. 14 at p. 32 .)*
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> *Thus, in order for an application to dismiss a bankruptcy summons to succeed, the issue raised by an applicant must be a real and substantial issue. It should not be fanciful or unreal. It may be an issue of fact or law. If the issue raised is an issue of fact it must have some credibility. If, for example, the applicant for an order pursuant to s. 8(6)(b) of the Act of 1988 denies that he owes the money sought in a bankruptcy summons but has already suffered judgment in that amount, then the conclusion that he or she did not owe the money would simply not be credible…"*
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> The judgment continues:
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> *"**a mere assertion** that an issue arises would be insufficient to succeed in an application to dismiss a bankruptcy summons but **any evidence of fact** which would, if true, arguably give rise to an issue that requires to be litigated outside the bankruptcy proceedings would be sufficient to establish that the bankruptcy summons should be dismissed."* (emphasis added)

4. The test set out by the Supreme Court is of course binding upon this court and I have applied it in a number of previous applications to dismiss bankruptcy summonses.

The debt

The creditor sued the debtor for summary judgment in the Commercial list of the High Court for a sum in excess of €2 million as the assignee of loans granted by Anglo Irish Bank Corporation plc to the debtor. The debtor disputed the claim on a number of grounds, some of which related to the credits due in respect of the facilities arising from the receivership of secured properties. He said that he was entitled to credit for the rent received in relation to one secured property and he disputed the deductions from the gross proceeds of sale of two secured properties which resulted in a net sum being credited to the debt which he said was less than the

credit due to him. During the hearing he was asked by the trial judge if he was taking an issue in relation to the calculation of the interest and he did not advance any such case in evidence or in submissions. Also during the hearing, the creditor said that it had accounted for the rent of €16,400 and it agreed to deduct the gross rather than the net proceeds of sale from the sum in which it sought judgment. On 5th October, 2017 Mr Justice Kelly entered judgment in favour of the creditor in that sum €1,742,842.27. There is no stay on the order of the High Court.

5. The debtor subsequently applied to the High Court for a stay on the judgment and was refused. He appealed the judgment to the Court of Appeal and the Appeal is listed for hearing on the 30th July, 2019. He applied for a stay on the judgment of the High Court. This was refused on the undertaking of the creditor not to seek the adjudication of the debtor until after the determination of the appeal. The net effect is that the judgment of the High Court is enforceable and the creditor has agreed not to pursue its petition to adjudicate the debtor a bankrupt until after the determination of the appeal against the judgment of the High Court.

6. The notice of appeal was filed on the 23rd October, 2017 and sets out four grounds of appeal. None of the grounds of appeal relates to the quantum of the judgment.

The bankruptcy summons
The summons is based upon the judgment of 5th October, 2017 and calls upon the debtor to pay to the creditor the sum due on foot of the judgment. It is not based upon the underlying loan facilities. The debtor was duly served with the bankruptcy summons and he in turn issued an application to dismiss the bankruptcy summons.

Are there grounds for dismissal of the summons?
7. The debtor asserted that he was not indebted to the creditor in any sum amounting to more than €20,000. Initially he also relied upon technical criticisms of the date of endorsement of service of the bankruptcy summons and the authority of the deponent to swear the affidavit on behalf of the creditor but these points were not maintained at the hearing of the application.

8. Much of his case was directed towards challenging two versions of the mortgage he granted to his original lender, Anglo Irish Bank Corporation Ltd and the appointment of a receiver on foot of the mortgage to the secured properties. He argued that the receiver could not have been properly appointed over the secured properties by reason of the discrepancy between the two versions of the mortgage which he exhibited to the court.

9. The issue of the validity of the security he agreed to grant to his lender when he borrowed the monies the subject of the summary judgment is not an issue which can arise in relation to the validity of the bankruptcy summons. In this judgment I am solely concerned with the issue as to whether or not the bankruptcy summons should be dismissed pursuant to s. 8 (6) (b) of the Act of 1988. I make no observations whatsoever as regards the validity of the mortgages or of the appointment of Mr. Tyrell as receiver over the secured properties.

10. For the first time the debtor argued that there were errors in the computation of the interest charged on the loans originally taken out with Anglo Irish Bank Corporation Plc. The debtor referred to other cases where overcharging by Anglo Irish Bank Corporation plc was proved and the sums due by the borrower to the successor to Anglo Irish Bank Corporation plc were reduced accordingly. Unfortunately, from his perspective, he does no more than simply assert that he too was over charged. He did not raise this point when he had the opportunity to do so in defence of the application for summary judgment. He has not shown that the interest actually charged was other than the rate the bank was contractually entitled to charge. He has not even attempted to estimate the amount he says he has been overcharged.

11. As noted above, the debtor had the opportunity to challenge the interest calculations if he saw fit. He was expressly asked by the trial judge whether he was taking any issue on this point and he did not allege that the interest was improperly calculated. This is significant in view of the fact that the decision in *IBRC v Morrissey* [2014] IEHC 527 had been decided some three years prior to the date of the hearing of the summary application before Kelly J. All litigants are required to bring forward all of their arguments and evidence at the trial of the action. Litigation is not to be conducted in a piecemeal fashion. This is a fundamental requirement of orderly litigation and fairness of procedures to other litigants. The debtor failed to adduce this evidence or advance these arguments in the appropriate court at the appropriate time. He cannot now seek to evade that obligation at this point in the litigation between the parties.

12. In relation to the claim that he had not been afforded credit for rent collected by the receiver, the creditor notified the debtor of the fact that it was crediting him with rent paid by a tenant of one of the secured properties in the sum of €16,400. If that had not been properly credited, it was open to the debtor to dispute the figures relied upon by the creditor and to make this point to the trial judge. It is quite clear that he did not do so.

13. Thirdly, when an issue arose as to the level of expenses attributable to the receivership and the realisation of the secured properties, the creditor afforded the debtor credit in respect of the gross rather than the net proceeds of sale, so there could be no question of failing to afford him the full credit to which he was entitled.

14. Finally, he argued that the creditor had produced inconsistent versions of the statement of account and that therefore, by inference, the judgment must be unenforceable as obtained in error or by fraud. This point was raised at the eleventh hour in an affidavit filed in court one hour before the application was due to be heard. Consequently, the creditor had no opportunity to respond to the allegations. However, it is not necessary for it to do so. On the debtor's own case, the difference between the two versions of the statement of account, even if unexplained, amounted to know more than €300.00. It was held by the Supreme Court in *Murphy v Bank of Ireland* [2014] 1 IR 642 that a bankruptcy summons was valid provided it did not claim a sum greater than that actually owing to the creditor. In that case the summoning creditor failed to afford the debtor credit for €4,425 which was set off against the judgment debt but at all times the sums actually due and owing were well in excess of the sums claimed. At para. 99 and 100 of the judgment Dunne J concluded:-

> *"99. I consider the approach of McGovern J. to be correct. The sum demanded was not in excess of that actually due and there was nothing in the Bankruptcy Summons which could have confused or misled the Appellant as to what he was required to do in order to avoid committing an act of bankruptcy. Had the appellant paid the sum sought on the Bankruptcy Summons, he would not have committed an act of bankruptcy.*
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> *100. Thus, in circumstances where the sum actually due is significantly in excess of that sought on the Bankruptcy Summons, it is difficult to see how the appellant can contend that the amount claimed in the Bankruptcy Summons was excessive by failing to give credit for the sum of €4,425 as against the sum of €495,938.87 which had accrued due for interest as set out above.*

The same logic applies in this case. Courts Act interest on the judgment sum clearly amounts to a sum greater than €300. It follows that this argument also must fail.

15. As a judge of the High Court I am bound to enforce orders of the High Court which are not stayed, even if they are the subject of an appeal. I cannot go behind the decision of the judge who gave the judgment. In particular, I cannot look at the evidence which either was or was not led in the hearing before the High Court. It follows that no issue could arise for trial in respect of the bankruptcy summons based upon the judgment of the 5th October, 2017 such as to satisfy the test set out by the Supreme Court in *Minister for Communications v. Woods and Wymes*. Either the credit has already been afforded to the debtor or he had ample opportunity to raise the point and adduce his own evidence prior to the trial in the High Court but elected not to do so.

16. The situation is that there is a valid extant order of the High Court which is not the subject of a stay. It is therefore not only enforceable but clearly no issue can arise in this court within the meaning of s. 8 (6) (b) of the Act of 1988 as explained by the Supreme Court in *Minister for Communications v. Wood and Wymes*. The fact that there is an appeal pending before the Court of Appeal does not alter this. It follows that the bald

17. assertion by the debtor that he is not indebted to the creditor in any sum amounting to more than €20,000 cannot be accepted.

18. The debtor argued that pursuing bankruptcy proceedings when he is insolvent violated his constitutional rights or his rights under Article 6 of the European Convention on Human Rights. In circumstances where he has been afforded an opportunity to present his case at trial and has been afforded an opportunity to appeal the decision, these rights have been vindicated and upheld by the High Court and the Court of Appeal. There is no basis to dismiss the summons on this ground.

19. For these reasons I refuse the application to dismiss the bankruptcy summons. The petition should be adjourned to be heard at a date after the appeal against the judgment of 5th October, 2017 has been determined in accordance with the undertaking of the creditor to the Court of Appeal.