THE HIGH COURT

BANKRUPTCY

Bankruptcy No. 5212P

[2023] IEHC 435

IN THE MATTER OF A BANKRUPTCY SUMMONS BY LEADING EDGE PROJECT MANAGEMENT LIMITED (IN VOLUNTARY LIQUIDATION) AGAINST LIAM CAMPION OF CARROWREAGH, BORRIS-IN-OSSORY, COUNTY LAOIS, AND BEARING DATE OF 7TH MARCH, 2023

JUDGMENT of Mr Justice Mark Sanfey delivered on the 20th day of July 2023.

Introduction

1. This judgment concerns an important procedural issue which arises frequently in bankruptcy matters: whether the court has jurisdiction to extend the time within which an application may be made pursuant to s. 8 (5) of the Bankruptcy Acts, 1988 to 2015 (collectively referred to as "**the Act**"). If the court decides that it has such jurisdiction, the issue arises as to how the jurisdiction should be exercised generally, and in the circumstances of the present case.

2. The application of Liam Campion ("**the debtor**") to dismiss a bankruptcy summons against him issued on 19 February, 2023. Affidavits between the debtor and the alleged creditor were exchanged, and both sides proffered detailed written submissions in advance of the application before this court, which was heard on 10 July, 2023.

The facts

3. The facts leading to the present application may be summarised as follows:

- Leading Edge Project Management Ltd ("**the creditor**" or "**the company**") obtained a decree from the Circuit Court (Dublin Circuit Court) against the debtor on 1 December, 2008 in the sum of €30,500;
- The creditor ultimately was placed in voluntary liquidation, and was represented in the present application by the liquidator, John Healy;
- On 7 March, 2022, an order was made by this court (O'Moore J.) granting the company leave to issue a bankruptcy summons, which duly issued on that date;
- The time for a service of the bankruptcy summons was extended by the court on 16 May, 2022, and a summons was served on 18 May, 2022;
- The debtor did not within fourteen days after service pay the sum referred to in the summons, or secure or compound for it to the satisfaction of the creditor;
- The creditor presented a petition in bankruptcy against the debtor on 29 August, 2022, which was listed for hearing before the court on 17 October, 2022;
- The debtor served a "notice of application to dismiss bankruptcy summons" in accordance with O.76 r.15 of the Rules of the Superior Courts ("**the Rules**") on 10 February, 2023, together with an affidavit by the debtor of that date, which stated as follows:

  "

  1. I am not indebted to the said Leading Edge Project Management Ltd (in Voluntary Liquidation) (hereinafter "**the Petitioner**") in any sum amounting to more than €20,000.

2. While I am conscious of the need to avoid legal submission on affidavit, with regard to the Judgment on 1 December, 2008 in proceedings bearing title and record number The Circuit Court (Dublin Circuit) Record Number 2007/07488 between Leading Edge Project Management Limited, plaintiff and Liam Campion, defendant, whereupon the Petitioner asserts your Deponent is presently indebted to it in the sum of €30,5000 [sic] and on foot of which claimed sum the bankruptcy summons herein was issued, I say and am advised that the Bankruptcy Summons issued herein should be dismissed pursuant to s. 8(6) of the Bankruptcy Act, 1988 on the basis that the said judgment is more than 12 years old and the issuing of the summons herein is in contravention of s. 11(6)(a) of the Statute of Limitations Act, 1957."

- There followed an exchange of affidavits between the debtor and Mr. Healy in relation to certain issues arising from communications between them in relation to the judgment and the debt allegedly owed.

4. The petition and the present application were listed together in the regular Monday Bankruptcy List. Ultimately, it was agreed that the present application should be heard, and both sides filed written submissions in advance of the hearing.

The statutory background

5. Provision is made in the Act for an act of bankruptcy based on a failure to respond to a bankruptcy summons in s. 7 of the Act as follows:

> **"**7.— (1) An individual (in this Act called a "debtor") commits an act of bankruptcy in each of the following cases—

…

(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."

6. Section 8 of the Act deals, *inter alia,* with the circumstances in which a debtor may apply to the court to dismiss a summons:

"8. - (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.

7. The rules governing bankruptcy procedure are set out at O.76 of the Rules of the Superior Courts. They include the following provisions which are of relevance to the present application:

"13 (2) 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 has secured or compounded the debt to the satisfaction of the creditor.

…

15. The affidavit mentioned in sub-rule (2) of rule 13 shall be in the Form No.

6. Where a debtor files such affidavit, the time shall be fixed by the proper officer at which the application for the dismissal of the summons will be heard by the Court. Notice thereof in the Form No 7 shall be given and the affidavit served by the debtor, not less than four days before the date so fixed, by service of the notice and the affidavit on the solicitor for the summoning creditor at his registered place of business or, if no solicitor is employed, by service on the summoning creditor at his address for service. In default of the debtor giving notice or in default of his appearance before the Court at the time fixed his application shall be dismissed."

The debtor's position

8. It is clear from the foregoing provisions that the debtor issued his application to dismiss the summons out of time. Having been served on 18 May, 2022, the application pursuant to s. 8(5) should have been filed "within fourteen days after service of the summons", i.e. in the first week of June 2022. In the event, the application was not filed until February 2023.

9. The debtor seeks an extension of time in respect of the default in complying with this time limit. He does so pursuant to O.122(7) of the Rules, which is as follows:

"Subject to sub-rule (2) and to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement

> may be ordered although the application for same is not made until after the expiration of the time appointed or allowed."

10. Counsel for the debtor submits that this sub-rule gives the court "very wide powers to enlarge the time for doing any act", and cites the decisions of the Supreme Court in *Kavanagh v. Healy* [2015] IESC 37 and of the Court of Appeal in *Crowe v. Kitara* [2016] IECA 62 in this regard. Counsel made the point that an issue going to the validity of the bankruptcy summons can be raised by a debtor in defence to the petition in bankruptcy, and even subsequent to an adjudication in the context of an application by the bankrupt under s. 16 of the Act, i.e. a "show cause" application. In such circumstances, it was submitted that the court should exercise its discretion under O.122, r.7 to enlarge the time so that an issue which could be tried at a later stage in the process in any event could be tried at the earliest stage of the process.

The creditor's position

11. The creditor submitted that the fourteen day period cannot be extended at all. The essence of the creditor's case in this regard is expressed as follows in its written submissions:

> "8. It is submitted that the 14 day time period for applications to dismiss is one which operates in tandem with the time allowed for an act of bankruptcy to be committed under section 7(1)(g) of the Act. The time period is designed to ensure that if a debtor disputes the debt he has a means to challenge the summons but must do so quickly in order to avoid an act of bankruptcy occurring which would automatically happen by operation of law if the summons is [sic] not complied with.
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> 9. However, if (as in this case) a debtor fails to bring … an application to dismiss within the time allowed and an act of bankruptcy is deemed to have

been committed, that process cannot be reversed. The position is even more stark when matters have proceeded to the point where a petition is presented. In that event, the court is bound by the mandatory positions of section 14 of the Act which require it to adjudicate a debtor bankrupt unless there is evidence that the provisions of section 11(1) of the Act have not been complied with.

10. In view of this, it is submitted that there is no basis or jurisdiction upon which a court can extend time to apply to dismiss a bankruptcy summons. To do so would be entirely inconsistent with the provisions of the Act, and the clear intent of the Oireachtas and the drafters of the RSC. If such applications were allowed, it would have the effect of allowing a debtor to sit on his hands until faced with a petition for bankruptcy before taking steps to (i) dismiss the summons and (ii) undo the act of bankruptcy which he is deemed by law to have committed. Such a situation would set these statutory provisions to nought."

Discussion

12. The purpose of the service of a bankruptcy summons is to create an act of bankruptcy. This occurs where, within fourteen days after service of the summons, the debtor does not pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor. At the end of the fourteen days, such a debtor has committed an act of bankruptcy. For a perceptive and helpful analysis of the role of the bankruptcy summons in bankruptcy procedure generally, see the dicta of the Supreme Court (Baker J) in *re Wymes*, *a bankrupt* [2021] 1 IR 803 at paras. 34 to 49 of that judgement.

13. S. 8(5) states that the application to court to dismiss the summons must be made "within the prescribed time". S. 3 of the Act provides that "prescribed", except in relation to court fees, "…means prescribed by rules of court". As we have seen, O.76 r.13(2) provides that the person seeking dismissal of the summons "must file an affidavit within fourteen days after service of the summons …".

14. In my view, it is significant that the periods after which the act of bankruptcy will be deemed to have occurred pursuant to s.7(1)(g), and within which the debtor may apply to dismiss the summons, are co-extensive. The creditor seeks to bring about an act of bankruptcy as a precursor to initiating a bankruptcy process by service of a petition in bankruptcy. The alleged debtor can attempt to prevent the act of bankruptcy occurring by applying to dismiss the summons before the act of bankruptcy is complete. In doing so, the debtor is given the opportunity to apply to court to persuade it that the invocation of the bankruptcy regime in aid of the creditor is inappropriate because the court will be "satisfied that an issue would arise for trial"; until that issue is resolved, the court cannot proceed by way of bankruptcy summons and ultimately a petition for adjudication.

15. Once the fourteen day period under s. 7(1)(g) elapses, the debtor has, according to the Act, committed an act of bankruptcy. The creditor now has a basis for proceeding to petition for the debtor's bankruptcy, and is entitled to invoke the jurisdiction of the court: in this regard, see particularly the dicta of Baker J. in *re Wymes* at para. 94 of that judgement. The debtor is still entitled to raise any infirmity in the bankruptcy summons at the hearing of the petition, or even after his adjudication pursuant to s. 16 of the Act. However, the creditor's position changes fundamentally when the fourteen day period expires without the debtor paying, securing or compounding the debt in the manner envisaged by s. 7(1)(g).

16. Notwithstanding that this is so, is the jurisdiction in O.122, r.7 so wide as to permit the time for an application to dismiss the summons to be enlarged even where the service of that summons has led to an act of bankruptcy? That sub-rule gives the court power "to enlarge or abridge the time appointed by these rules…". There is no doubt that an extensive power is given to the court to enlarge time where that time period is set down by the rules. There is however no power to invoke O.122, r.7 as a means of extending a mandatory statutory time-limit: in this regard, see the decision of the Supreme Court (McCracken J.) in *Proctor and Gamble v. Controller of Patents* [2003] 2 IR 580.

17. In the present case, s. 8(5) provides for an application to dismiss the summons "within the prescribed time". The section therefore envisages that there be a time-limit within which the application must be brought; the task of deciding what that time period should be is left to the Rules Committee, which, in the case of bankruptcy, provides in O.76 a cohesive code of bankruptcy procedure closely aligned to the aims and objectives of the Act.

18. It can be persuasively argued that the fourteen-day limit is in fact a statutory time-limit, in that s. 8(5) makes clear that there must be a time-limit, and simply leaves the rules to determine how long it should be. If that is so, it would seem that O.122, r.7 should not be invoked to enlarge a time-period which, although the duration of it is in fact supplied by the rules, is in fact a time-period mandated by the parent statute.

19. Also, although s. 8(5) uses the word "may" ("… may apply… within the prescribed time…"), it appears to me that this is one of those occasions when "may" means "shall"; the debtor can of course decide whether or not to apply to dismiss the summons, but if he opts to make the application, he must do it within the prescribed

time. This interpretation is supported by the wording of O.76 r.13(2): "…he *must* file an affidavit within fourteen days after service of the summons …" [Emphasis supplied].

Conclusion

20. In my view, the fourteen day period within which the application to dismiss must be brought is in fact a time-limit mandated by s. 8(5), albeit finding expression in O.76 r.13(2). I do not consider that O.122, r.7 can be used to side-step this period, within which the sub-rule provides that the debtor "must file an affidavit…". Even if the fourteen-day period is not properly regarded as a mandatory statutory time-limit, it seems to me that the period is deliberately co-extensive with the period of fourteen days referred to in s. 7(1)(g), and permits the debtor to apply to dismiss the summons on the basis that the bankruptcy jurisdiction has been inappropriately invoked in circumstances where "an issue would arise for trial". It is notable that s. 8(6) does not require the court to decide the issue; it is effectively asked to conduct an exercise the object of which is to determine whether the process of creating an act of bankruptcy should be permitted at all in circumstances where there may be an issue which would arise for trial between the parties. If satisfied that there is such an issue, the court has no option but to dismiss the summons. However, if the debtor does not apply within the fourteen days, an act of bankruptcy occurs by operation of law, and it is in my view too late for a debtor to seek to persuade the court that the creditor cannot proceed to petition for his bankruptcy.

21. Even if there were such a jurisdiction to enlarge the time limit in respect of a s. 8(5) application, I consider that such an enlargement should only be granted in very compelling circumstances, and where the delay is small to the point of being *de minimis* – days rather than weeks. In the present case, given that that the application

was brought over eight months after the fourteen-day period expired, and six months after the creditor's petition in bankruptcy was filed, there are no circumstances in which an enlargement of time can be granted, even if the court has such a jurisdiction. The fact that some of that time may have been spent between the parties in attempting to negotiate settlement is irrelevant.

22. There were further issues raised by the parties as to whether or not there was an "issue for trial" in relation to whether or not the judgment could be regarded as statute-barred. In view of my finding that the time cannot be enlarged to permit the present application, it is not necessary to decide this issue. The debtor's application to dismiss the summons must be dismissed, and any other issue must be considered in the context of the petition, which can now proceed to hearing.