Neutral Citation Number: [2009] IEHC 413

THE HIGH COURT

BANKRUPTCY

5042 and 5043

IN THE MATTER OF A BANKRUPTCY SUMMONS BY THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES AND M. O'C.

RESPONDENTS

AGAINST

M.W. and R. W.

APPLICANTS

JUDGMENT of Mr. Justice Brian McGovern delivered on the 12th day of May, 2009

1. This is an application brought by Mr. M.W. and Mr. R.W. ("the applicants") for an order dismissing the bankruptcy summons herein on the grounds of the invalidity of the summons and for such further or other order as to the court may seem appropriate. The application is brought under the inherent jurisdiction of the court and also pursuant to the statutory jurisdiction of the court provided for in s. 8 of the Bankruptcy Act 1988.

2. Section 8 of the Bankruptcy Act 1988, states, *inter alia*:

> *"(1) A summons (in this Act referred to a 'bankruptcy summons') may be granted by the Court to a person (in this section referred to as 'the creditor') who proves that-*
>
> *(a) a debt of £1,500 or more is due to him by the person against whom the summons is sought,*
>
> *(b) the debt is a liquidated sum, and*
>
> *(c) a notice in the prescribed form requiring payment of the debt has been served on the debtor*
>
> *. . .*
>
> *(3) The notice requiring payment of the debt shall set out the particulars of the debt due and shall require payment within four days after service thereof on the debtor.*
>
> *(4) The bankruptcy summons shall be in the prescribed form.*
>
> *(5) A debtor served with a bankruptcy summons may apply to the court in the prescribed manner and within the prescribed time to dismiss the summons.*
>
> *(6) The court -*
>
> *(a) may dismiss the summons with or without costs, and*
>
> *(b) shall dismiss the summons if satisfied that an issue would arise for trial."*

3. The Minister for Communications, Energy and Natural Resources and M.O'C. ("the respondents") claim that M.W. and R.W. are indebted to them in the sum of €5,893,749.83 inclusive of interest on foot of a Certificate of Taxed Costs issued pursuant to an Order for Costs made by the High Court on 24th February, 1997. The respondents were granted leave of the High Court to issue the bankruptcy summons herein on foot of that amount on 9th February, 2009, and the summons was served on the first-named applicant on 13th February, 2009 and on the second-named applicant on the 12th February 2009.

Relevant legal authorities

4. 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.

5. In the matter of a bankruptcy summons by *St. Kevin's Company against a Debtor*, the Supreme Court, in an Unreported *extempore* judgment delivered on 27th January, 1995, delivered by Hamilton C.J., expressed the view that the correct interpretation of s. 8(6)(b) of the Bankruptcy Act, 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.

6. In *Re Sherlock, a Bankrupt* [1995] 2 ILRM 493, the applicant sought to show why he should not have been adjudicated bankrupt on the grounds that the sums in the notice requiring payment and the bankruptcy summons were inaccurate. He claimed that he should have received a credit for approximately £1,000 against the sum owed of approximately £180,000. In his judgment, Murphy J. stated at p. 494:

> *"On behalf of the bankrupt, it was argued that if it could be shown that the sums claimed in the demand and in the bankruptcy summons were inaccurate, then failure to pay the sums so demanded could not and did not amount to an act of bankruptcy and, accordingly, that there was no such act on which to ground a valid order of*

adjudication. In my view, that argument is correct in principle."

In the course of that case, a number of decisions were referred to. In *Re Collier* [1891] 64 L.T. 742, Cave J. said at p. 743:

". . . On more than one occasion, the members of the Court of Appeal expressed the opinion that, since the commission of an act of bankruptcy was a serious matter, and involved consequences of what has been called a penal nature, it was important to see that the necessary preliminaries were complied with."

In the case of O Maoileoin v. Official Assignee [1989] I.R. 647, Hamilton P. quoted at some length from the decision of Cozens-Hardy M.R. in the case of In Re a Debtor [1908] 2 K.B. 684, at 686-687, as follows:

"This appeal, though it relates only to a small amount, undoubtedly raises a point of importance. The petitioning creditors obtained a final judgment against the debtor. Certain sums were either paid or allowed by way of set-off so that the amount of the judgment debt was reduced. A bankruptcy notice was served on the debtor, and in the margin of that notice there was inserted certain figures which bring out the result that a sum of £984.7s.1p is the balance of the amount due on the final judgment. The bankruptcy notice proceeds in the usual form requiring payment, and stating that a non-compliance with the bankruptcy notice will involve the consequences, which to some extent are penal consequences, of bankruptcy. The amount claimed in the bankruptcy notice was not due. There was a mistake in the calculation of interest. For the present purpose, I care not what the precise amount of the mistake was. It was, I believe, between £1 and £2, but putting aside the question of amount, this was a bankruptcy notice which said 'if you do not pay a judgment debt which is due and also a further sum which is not due, you are liable to be made a bankrupt'. It is said that it is a formal defect which can be set right under s. 143(1) of the Bankruptcy Act 1883, and that we ought to disregard it or treat it as formal and amend the bankruptcy notice and allow the bankruptcy proceedings to go on. On principle, I am not prepared to accede to that argument. I cannot regard it as a mere formal defect that you claim payment from a man of that which was never due to him. It is not necessary to say that there was any attempt on the part of the petitioning creditors wilfully to exact payment of that which they knew was not due. My judgment does not depend upon that. It seems to me that a defect of this kind is substantial, that it is not formal, and does not fall within the language of s. 143 so much in point of principle."

7. At 654 of the same judgment, Cozens-Hardy M.R. said:

"These cases clearly establish that the bankruptcy code, having regard to the consequences which flow from an adjudication of bankruptcy, is penal in nature and that the requirements of the statutes must be complied with strictly; that the debtor's summons to be served within the provisions of s. 21 of the Bankruptcy Ireland (Amendment) Act 1872, must be served in the prescribed manner and the amount due in accordance with the judgment, when a judgment is relied upon, must be accurate and that a claim for an amount in excess of the amount due in accordance with such judgment would render the notice defective and a subsequent adjudication void."

8. It seems to me that both before the 1988 Act, and since then, the courts have regarded it as necessary to strictly comply with the provisions of the Rules and statutory provisions in order to trigger the bankruptcy process because it has such serious consequences for a debtor.

Bankruptcy Rules
9. Order 76 of the Rules of the Superior Courts provides for the procedural formalities relating to bankruptcy. Order 76, rule 10(1) provides that a bankruptcy summons must:

"(a) require the debtor, within fourteen days after the service of the summons upon him, to pay the debt to the creditor or to secure the payment of the debt to the satisfaction of the creditor or to compound the debt to the satisfaction of the creditor, and,

(b) state that in the event of the debtor failing to pay the sum specified in the summons or to secure or compound for it to the satisfaction of the creditor, such default shall be an act of bankruptcy."

10. Order 76, rule 13(2) provides that the debtor must be informed 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 either (a) that he is not so indebted or only so indebted to a less amount than £1,500, 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. An act of bankruptcy is committed if the debtor has been served with a bankruptcy summons and has not within fourteen days after service paid the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor.

11. Order 76, rule 12 provides:

"(4) 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 . . ."

12. Rule 13(2) provides that if the debtor 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 a less amount than £1,500 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."

13. In this case, the debtors have a judgment for costs against them. The costs awarded have been taxed at €3,297,493.33. Interest is claimed at the rate of 8% per annum from 25th March, 1998 (being the date on which costs were first ascertained), to 9th April, 2002, at the rate of 2% per annum from 10th April, 2002, to 31st July, 2003, and at the rate of 8% per annum from 1st August, 2003, until payment. This interest, as of 20th January, 2009, amounted to €2,596,256.50, making, in all, a total due by the applicants of €5,893,749.83.

14. The sum of €5,893,749.83 ("the sum claimed") is the sum stated as due and owing in the affidavit sworn for the purpose of obtaining the bankruptcy summons and also in the summons itself which issued on 9th February, 2009, by order of the court.

Issues

15. The applicants raise the following arguments in support of their claim to have the bankruptcy summons dismissed:-

(a) They say that the respondents cannot say with certainty that the debt is due to them where the issue of whether the order for costs is enforceable by the respondents has yet to be finally determined by the Supreme Court. The High Court has determined that the order for costs is enforceable.

(b) Since s. 11(6)(b) of the Statute of Limitations 1957, provides that "no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which interest became due", the claim for interest made in this case is not correct and that the amount of the debt claimed is overstated and inaccurate.

(c) Payment of the sum claimed was not required of the applicants on more than one occasion.

(d) A form of execution has issued in respect of the claimed debt and remains to be proceeded upon by the respondents in that they have registered judgment mortgages against the applicants' property but have not proceeded upon them. The applicants claim that the registration of judgment mortgages is a form of execution.

16. I propose dealing with items (c) and (d) above, first, as they seem to be subsidiary to the other issues which I have to decide.

17. (c) If there is a necessity to make more than one demand, it arises out of Form No. 5 of Appendix O of the Rules of the Superior Courts. This is the form of affidavit for a bankruptcy summons and which requires the deponent to state that an account in writing of the particulars of demand, and notice requiring payment has been given to the debtor and that *". . . payment of the same has been on more than one occasion required of him."*

18. Section 8(1) of the Act provides that a bankruptcy summons may be granted to a creditor who proves that a debt of £1,500 or more is due to him by the debtor, that the debt is a liquidated sum and that a notice in the prescribed form requiring payment of the debt has been served on the debtor. The notice in the required form is No. 4. of Appendix O which does not mention more than one demand.

19. In my mind, there is some uncertainty as to whether it is necessary to make a demand more than once. But I am quite satisfied that in this case, a claim for the costs in some form has been made of the applicants on more than one occasion. The applicants say that the Certificate of Taxation and letter of demand of 10th September, 2004, does not make any demand for interest and cannot, therefore, constitute a demand for the sum claimed in the bankruptcy summons which is a sum that includes interest. The taxation of costs took place at a hearing over a number of days in December 1997, and separate but concurrent taxations took place in respect of the costs due by Bula and those due by the applicants. Bills of Costs were presented to the applicants and hearings took place before the Taxing Master. The applicants took part in the taxation process. It is also clear that in the bankruptcy proceedings, a demand was made on the applicants.

20. (d) I do not accept the applicants' contention that a form of execution has issued in respect of the claimed debt insofar as the respondents have registered judgment mortgages against property belonging to the applicants but have not proceeded upon them. A registration of a judgment mortgage is not a process of execution. See In *Re Lambe's Estate* I.R. 3 Eq. 286 and *Barnett v. Bradley* [1890] 26 L.R. Ir. 209. Where a party registers a judgment mortgage, it can then proceed to obtain a well charging order and an order for sale. But the mere registration of a judgment mortgage is not, without more, execution.

21. That leaves the principal issues in dispute in this motion, namely, whether or not the debt claimed by the respondents is due and owing either because of uncertainty over the issue of the enforceability of the order for costs, or because of the calculation of interest and the applicants' contention that no arrears of interest in respect of the judgment debt shall be recoverable after the expiration of six years from the date on which the interest became due.

22. (a) The applicants say that the respondents cannot say with certainty that the debt is due to them where the issue of whether the order for costs is enforceable by the respondents 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. It is clear that the delay in execution was due to the repeated attempts by the applicants to frustrate various orders of the courts over many years.

23. (b) The only matter which then arises for consideration is the applicants' assertion that the claim for interest made in this case is not correct, and that the amount of the debt claimed is overstated and inaccurate since no arrears of interest in respect of the judgments given against Bula Limited and the applicants shall be recovered after the expiration

of six years from the date on which interest became due by virtue of s. 11 (6)(b) of the Statute of Limitations 1957. In this case, the costs have been taxed at €3,297,493.33. Interest is claimed from 25th March, 1998 (being the date on which costs were first ascertained). It is now over ten years since 25th March, 1998.

24. Have the applicants raised an issue which would arise for trial? The respondents say that the Statute of Limitations only bars the remedy of recovery of all the interest but does not extinguish the entitlement of the creditors to claim interest for a period in excess of six years. They also rely on O. 76, r. 12 (4) which provides that:

> *"No objection shall be allowed to the particulars unless the court considers that the debtor has been misled by them."*

It seems to me that the applicants can hardly have been misled by the manner in which the interest was stated as the rates of interest and the periods for which they are claimed are fully set out in the particulars of demand. On the other hand, there does seem to be an issue as to whether or not interest beyond the period of six years can be claimed and, if not, whether a correct liquidated sum has been claimed. In my view, this is a real and substantial issue and one which is, at least, arguable and which has some prospect of success.

25. That being the case, it seems to me that I have to dismiss the summons by virtue of s. 8(6)(b) of the Bankruptcy Act 1988, and following the decision of the Supreme Court in *St. Kevin's Company against a Debtor*. It is with some disquiet and misgivings that I reach this conclusion because there can be no doubt but that the applicants are very significantly indebted to the respondents on foot of the orders for costs which have been made against them and properly taxed and ascertained. I am also aware of the numerous court actions or appeals in which the applicants have sought to frustrate the effect of judgments given against them, whether for costs or otherwise. In the case of *In re Sherlock [*1995] 2 ILRM 493 at 495, Murphy J. said of a bankrupt:

> *"… he is and was entitled to a credit of something in excess of £1000 against the amount of the principal sum. I have no doubt whatever that the failure to give credit for this sum was due to an oversight. Furthermore, there can be no doubt that, on any computation, the amount due by the bankrupt far exceeds the minimum sum required to found an order for adjudication. Nevertheless, the question remains, whether this error invalidates the bankruptcy summons and in turn the order for adjudication based on it."*

In the circumstances of that case, the learned High Court Judge directed that the adjudication should be set aside. That decision is in line with the other authorities which I have set out above. Therefore, as I am satisfied that an issue arises for trial on the question of the interest recoverable the applicants are entitled to the order which they seek.