THE HIGH COURT

BANKRUPTCY

[5920]

BETWEEN

ENNIS PROPERTY FINANCE DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

DOMINIC CARNEY

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 16th day of July, 2018

1. The issue for decision in this judgment is whether the bankruptcy summons issued in this case on the 22nd May, 2017 should be dismissed pursuant to s. 8 (6) of the Bankruptcy Act, 1988.

The relevant law

2. Section 8 (5) and (6) of the Bankruptcy Act, 1988 ("the Act") 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.*
>
> *(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 Supreme Court recently considered the law in this area in *The Minister for Communications, Energy and Natural Resources v. Wood* [2017] IESC 16. Dunne J. gave the decision of the court and she held as follows:

> *"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. …*
>
> *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. If the issue raised was an issue of law which was well established and as to which there was no doubt and could not avail the applicant, raising such an issue could not give rise to the dismissal of the bankruptcy summons.*
>
> *…*
>
> *If the issue is an issue of law which is clearly established and not open to doubt such that, as McKechnie J. in the course of his judgment in Harrisrange [Ltd v. Duncan [2003] 4 I.R. 1] identified, is it clear "that fuller argument and greater thought is evidently not required for a better determination of such issues" then the bankruptcy summons should not be dismissed.*
>
> *In looking at the situation overall one must of course consider whether what is deposed to on affidavit by the applicant is credible.*
>
> *…*
>
> *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."*

4. From these passages the following points emerge:

> (i) Once an issue for trial arises on the summons, the summons must be dismissed.
>
> (ii) The issue raised must be real and substantial.
>
> (iii) The issue raised may be an issue of fact or of law.
>
> (iv) If it is an issue of fact, it must have some credibility.
>
> (v) Mere assertion that an issue arises is insufficient.
>
> (vi) An assertion must be supported by evidence of fact which would, if true, arguably give rise to an issue that requires to be litigated outside the bankruptcy proceedings.
>
> (vii) If the issue raised is an issue of law which was well established and as to which there was no doubt the

summons should not be dismissed.

The facts
5. On or about the 3rd June, 2005 the defendant entered into a guarantee with the Bank of Scotland (Ireland) Ltd in respect of the debts of Philisview Properties Ltd to the bank in the sum of €100,000. In October 2010 Bank of Scotland (Ireland) Ltd merged with Bank of Scotland Plc. Subsequently by purchase deed dated 29 November, 2014 (as novated by deed of novation dated 12th November, 2014) and a deed of assignment dated 20th April, 2015 Ennis Property Finance Ltd acquired the facilities the subject matter of these proceedings from Bank of Scotland Plc.

6. Ennis Property Finance Ltd issued a summary summons on the 10th May, 2016 against Philisview Properties Ltd (in receivership), the defendant and Mrs. Niamh Carney. Ennis Property Finance Ltd changed its name to Ennis Property Finance DAC and on 14th November, 2016 the title to the proceedings was amended and they continued in the name of Ennis Property Finance DAC. The plaintiff issued a motion seeking liberty to enter final judgment against the defendant in the sum of €100,000 together with all interest costs and expenses referred to at Clause 2.6 of the guarantee and indemnity dated 3rd June, 2005. The notice of motion was grounded on the affidavit of Jonathan Hanley sworn on the 17th November, 2016 and was returnable to the 16th December, 2016. Mr. Hanley exhibited a copy of the guarantee and indemnity dated 3rd June, 2005 at exhibit B of his affidavit.

7. The matter was adjourned for hearing to the 27th February, 2017. The defendant delivered a replying affidavit sworn on the 27th February, 2017 where he raised a number of grounds of defence. One such ground, to which I shall return, was the argument that he had discharged the debt due to Bank of Scotland Plc by posting a promissory note to pay "the bearer" the sum of €2,638,936.70. He said that Bank of Scotland Plc accepted the promissory note in acceptance of the debt due by Philisview Properties Ltd and therefore there was no basis to sue on foot of a guarantee of the debts of that company.

8. In his affidavit he did not raise any issue in relation to the validity of the guarantee or deny that he entered into the guarantee with Bank of Scotland (Ireland) Ltd.

9. On the morning of 27th February, 2017 the defendant applied for but was refused an adjournment as he wished to query the guarantee. Twomey J. granted the plaintiff summary judgment against the defendant in "*the sum of €100,000 together with all interest, cost and expenses referred to at Clause 2.6 of the guarantee and indemnity dated the 3rd day of June, 2005 and the costs of the proceedings when taxed and ascertained.*"

10. On the 19th April, 2017 the plaintiff sent the defendant particulars of demand and notice requiring payment prior to the issue of a bankruptcy summons. The amount claimed was €100,000 and it was based on the judgment of the 27th February, 2017. As the sum was not paid, the plaintiff applied for and was granted a bankruptcy summons which was issued on the 22nd May, 2017. The bankruptcy summons was grounded upon the particulars of demand which was in turn based upon the judgment of the 27th February, 2017.

11. The plaintiff was unable to effect service of the bankruptcy summons upon the defendant so on the 19th June, 2017 the plaintiff applied *ex parte* for an order pursuant to O. 76 r. 14 (1) of the Rules of the Superior Courts that the time for the service of the bankruptcy summons be extended and for an order for substituted service of the bankruptcy summons by ordinary prepaid post at the defendant's home address. An order was made extending the time for service of the bankruptcy summons for 28 days from the 19th June, 2017 along with an order which provides that the bankruptcy summons together with annexed particulars of demand, a copy of the order and a copy of the affidavit of the bankruptcy summons may be served by ordinary prepaid post at the defendant's home address. The order was perfected on the 23rd June, 2017. On the 27th day of June, 2017 of the bankruptcy summons was served in accordance with the terms of the order.

12. On the 24th July, 2017 the defendant issued a notice to dismiss the bankruptcy summons pursuant to s. 8 of the Act of 1988.

13. On the 31st May, 2017 the defendant brought an application to the Court of Appeal seeking an order extending the time to appeal the order of the 27th February, 2017. The application was refused on the 6th November, 2017 on the basis that the court was not satisfied that the defendant had raised an arguable ground of appeal.

Issues raised by the defendant
14. The defendant raised a number of issues which he says will arise for trial and therefore the bankruptcy summons must be dismissed. They are:

(1) *That the judgment is under appeal*. This argument was advanced before the decision of the Court of Appeal of November, 2017 and therefore no longer applies.

(2) *There is no original guarantee dated 3rd June, 2005 or there was never any guarantee granted by the defendant to Bank of Scotland (Ireland) Ltd of that date*. The defendant at all times was aware that the plaintiff was suing on foot of the guarantee dated 3rd June, 2005. Any arguments he wished to make in relation to the validity or enforceability of the guarantee either were advanced, or he had the opportunity to advance them, in the High Court or the Court of Appeal. His arguments were rejected in the High Court and the Court of Appeal refused leave to extend the time for bringing an appeal on the basis that he had disclosed no grounds of defence. This court cannot go behind the judgments and orders of the High Court and the Court of Appeal. It follows that all of the issues raised by the defendant relating to the existence or otherwise of an original guarantee of 3rd June, 2005 and the mere fact that, following a complaint by the defendant there is a garda investigation into any alleged forgery or fraud in relation to the guarantee, cannot be relied upon by the defendant on this motion. Ms Justice Dunne has made clear that where the defendant has already suffered judgment no issue within the meaning of s. 8 (6) of the Act of 1988 would arise for trial on any point decided expressly or by necessary implication by that prior judgment.

(3) *The defendant says that he has discharged the debt of Philisview Properties Ltd to Bank of Scotland Plc by way of a promissory note sent on the 10th April, 2015.* This point was raised as a defence in his affidavit of the 27th February, 2017. It was rejected by both the High Court and the Court of Appeal. It cannot now be relied upon to dismiss the bankruptcy summons on the basis that an issue would arise for trial.

(4) *He says that the plaintiff is seeking to mislead the High Court on the basis of allegations of fraudulent representation*. These claims were made before the Court of Appeal and were also rejected by the Court of Appeal. The matter cannot be re-litigated in the High Court and therefore this ground for dismissing the bankruptcy summons also must be rejected.

(5) *He says that the summons has been brought for an ulterior motive or improper purpose and on the basis of McGinn v. Beagan [1962] I.R. 364 the summons ought to be dismissed.* There is no evidence that the plaintiff has issued a bankruptcy summons for an improper purpose. The plaintiff is seeking to recover a debt due to it on foot of a court order of 27th February, 2017. The court was invited to infer that because the defendant has engaged in multiple proceedings against the plaintiff and the receiver appointed to Philisview Properties Ltd that it seeks to have him adjudicated a bankrupt in order to bring to an end the litigation he has launched. There is no reason for the court to draw such an inference. Furthermore, as was pointed out by counsel for the plaintiff, the plaintiff had commenced the steps leading to a petition for the bankruptcy of the defendant by the service of particulars of demand on the 19th April, 2017 and the bankruptcy summons had been issued and served and the petition had been issued before the defendant instituted proceedings against the plaintiff in November 2017. He has served a plenary summons but no statement of claim. In the circumstances, it cannot be said that the bankruptcy proceedings were a covert attack on his ability to bring his plenary proceedings. Insofar as there is a dispute with the receiver, this is largely over and the Court of Appeal has ruled that he may sue the receiver in relation to certain chattels which he claims are his property and are worth about €80,000 and are in the possession of the receiver. The receiver has agreed to sell the secured property of Philisview Properties Ltd for €1.5m and therefore if the defendant were to be adjudicated a bankrupt in the future, it is likely to have minimal impact upon the litigation between the defendant and the receiver.

(6) *That the plaintiff should have pursued other means of recovery on foot of the judgment debt and sought the bankruptcy of the defendant only as a last resort.* A judgment creditor is free to pursue whichever remedies are available to it (or none) as it sees fit. Specifically, it is not required to exhaust a particular mode of execution before pursuing another method of recovery on foot of the judgment debt. Whether or not the debts of the debtor may be dealt with other than by way of bankruptcy is a matter which the court is required to consider pursuant to the provisions of s. 14 (2) of the Act of 1988 prior to adjudicating a debtor bankrupt. The fact that there exist alternative means of seeking to recover the debt which have not been pursued does not mean that the bankruptcy summons procedure has been improperly invoked or that the bankruptcy summons therefore should be dismissed. No issue on this point would arise for trial as this is well settled law.

(7) *The defendant says that if the receiver appointed to Philisview Properties Ltd waited for the value of the secured property to rise before selling the property this would erase the debt due to the plaintiff and therefore there would be no debt owing by the defendant on foot of the guarantee.* This submission ignores the fact that the plaintiff has already obtained judgment against the defendant. Furthermore, it is established law that a mortgagee realising property or a receiver realising property on behalf of a mortgagee is not required to postpone sale in the hope that a better price may be obtained in the future. No issue arises for trial on this point.

(8) *The application to extend the time for service of the bankruptcy summons was made out of time and is therefore invalid. Alternatively, the application ought not to have been made ex parte and the defendant is not bound by the order because he did not consent to the order*. The bankruptcy summons issued on the 22nd May, 2017. Order 76 r. 14 (1) provides that the bankruptcy summons shall be personally served within 28 days from the date of the summons. The plaintiff was unable to effect personal service upon the defendant. Order 122 r. 3 of the Rules provides:

"Where the time for doing any act or taking any proceeding expires on a Saturday, Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open."

28 days from the 22nd May, 2017 was Sunday the 18th June, 2017. It was therefore not possible for the plaintiff to apply for an order extending the time for service of the bankruptcy summons on that date (or indeed the day before). The application was made on Monday the 19th June, 2017, the day on which the court offices were next open. It was therefore in accordance with O. 122 r. 3. Further, O. 76 r. 14 (1) continues that if personal service within the time limit cannot be effected, the court may grant an extension of the time for such service. Thus the court may grant an extension of time for service of the summons and may also prescribe that service may be effected other than by way of personal service where the court is satisfied that prompt personal service cannot be effected. The defendant sought to rely upon the provisions of O. 74 r. 48 to argue that no order should be made without the consent of a person affected by the motion and, as he had not consented to the order of the 19th June, 2017, he was not bound by the order. This argument must be rejected. A court is empowered to make an order for substituted service of any document in the absence of the person sought to be served. It would be absurd and defeat the whole purpose of an order for substituted service to require the consent of the person to be served to the order or to hold that the order was not binding on the person because they had not consented to the making of the order. This is not what is required by O. 76 r. 14 (1).

(9) *The defendant says that if he is adjudicated a bankrupt he will be deprived of his constitutional right to property and his rights under the European Convention on Human Rights to Property as he will not be able to pursue the receiver for the return of his chattels*. The property right identified by the debtor is a chose in action i.e. his right to sue the receiver for the return of his chattels. That chose in action will form part of his estate if he is adjudicated a bankrupt and it will be for the Official Assignee to pursue that cause of action if he sees fit for the benefit of the bankruptcy estate. This is a normal consequence of adjudication and does not amount to a deprivation of constitutional or other rights to property. Therefore, no issue arises for decision outside of the bankruptcy process on this point either.

15. Finally, in his written submissions the defendant asked that a preliminary question be referred to the Court of Justice of the European Union or to the European Court of Human Rights to enable either of those courts to determine his right to pursue his claim to his chattels against the receiver. In the alternative the court is asked to state a case directly to the Supreme Court on these points as a matter of public importance.

16. No issue of European Law is engaged in these proceedings and therefore there is no question of any reference to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union. It is not for the High Court to make referrals to the European Court of Human Rights. Once a litigant has exhausted his or her rights of appeal in the national courts system then it is a matter for the litigant to apply his or herself to the European Court of Human Rights if they see fit. As the proceedings before me do not arise out of an appeal from the Circuit Court, but rather from original proceedings brought in the bankruptcy division of the High Court, there can be no consultative case stated to the Court of Appeal pursuant to either s. 37 or s. 38 of the Courts of Justice Act, 1936 as amended.

17. For these reasons I conclude that no issue would arise for trial between the plaintiff and the defendant and accordingly I refuse

the application to dismiss the bankruptcy summons.