**THE COURT OF APPEAL**

Neutral Citation Number: [2019] IECA 71

**Record Number: 2018/346**

**Irvine J.**
**Edwards J.**
**Baker J.**

**BETWEEN/**

**ENNIS PROPERTY FINANCE DESIGNATED ACTIVITY COMPANY**

**PETITIONER/RESPONDENT**

**- AND -**

**DOMINIC CARNEY**

**RESPONDENT/APPELLANT**

**JUDGMENT of Ms. Justice Irvine delivered on the 20th day of February 2019**

1. This is an appeal brought by Mr. Dominic Carney against the judgment and order of the High Court (Costello J.) of the 16th July, 2018.

2. By her judgment and order, the High Court judge refused Mr. Carney's application to dismiss the bankruptcy summons issued against him on the 22nd May, 2017.

**The background facts**
3. By guarantee in writing dated the 3rd June, 2005, Mr. Carney guaranteed the debts of a company, Philisview Property Limited (Philisview") to the extent of €100,000. The beneficiary of that guarantee was Bank of Scotland (Ireland) Limited which had loaned considerable sums to Philisview.

4. In October 2010, Bank of Scotland (Ireland) Limited merged with Bank of Scotland plc and later, by purchase deed dated the 29th November, 2014 and deed of assignment dated the 20th April, 2015, Ennis Property Finance Limited acquired the aforementioned loan and the security provided by Mr. Carney.

5. On the 10th May, 2016, Ennis Property Finance Limited commenced summary summons proceedings against Philisview, Mr. Carney and Mrs. Niamh Carney. Later, Ennis Property Finance Limited changed its name to Ennis Property Finance Designated Activity Company ("Ennis"). The title to the proceedings was amended to reflect that change on the 14th November, 2016. On the 27th February, 2017, Ennis obtained judgment against Mr. Carney for the sum of €100,000 on foot of the aforementioned guarantee.

6. On the 22nd May, 2017, Ennis issued the within bankruptcy summons.

7. On the 31st May, 2017, Mr. Carney, having failed to appeal the judgment granted against him on the 27th February, 2017 within the time provided by the Rules of the Superior Courts ("RSC"), applied to the Court of Appeal to extend the time within which he might do so. He was unsuccessful in that application in circumstances where the Court concluded that he had not demonstrated any arguable ground of appeal.

8. On the 19th June, 2017, Ennis applied ex parte to the High Court seeking an extension of time for service of the bankruptcy summons and also for an order for substituted service. That application was supported by an affidavit sworn on the 16th June, 2017 by Ms. Jennifer Clarke, solicitor and partner with the firm of Messrs. L.K. Shields solicitors. In her affidavit she stated that a number of attempts had been made to serve Mr. Carney with the bankruptcy summons at his address at 23A, Dunlocha Cottages, Blackrock, Cork, but that these had proved unsuccessful. She further stated that she was satisfied that Mr. Carney was seeking to evade service to frustrate Ennis pursuing its outstanding debt. Ms. Clarke referred to the difficulties experienced in seeking to serve Mr. Carney with documents in other proceedings and she exhibited orders of the Court made in those proceedings and wherein substituted service had been granted by ordinary pre-paid post at the aforementioned address.

9. Accordingly, on Monday the 19th June, 2017, Costello J. granted the 28 day extension of time that had been sought and made an order permitting the bankruptcy summons to be served by ordinary pre-paid post.

10. In response, by application dated 19th July, 2017, Mr. Carney applied to have the petition dismissed. He did so based on his affidavit sworn on 19th July, 2017. The principal issues raised by Mr. Carney in that affidavit may be summarised as follows:-

> (i) he wanted to appeal the judgment obtained by Ennis on foot of the guarantee, and he protested that Ennis's solicitors had been aware of that fact when they issued the bankruptcy summons;
>
> (ii) he was entitled to notice of Ennis's application for substituted service, given that he had not consented to the order proposed;
>
> (iii) Ennis was not the beneficiary of the guarantee;
>
> (iv) Ennis had appointed a receiver, Mr. Gearoid Costelloe, over the assets of Philisview and he had failed to realise their

value;

(v) he had discharged the guarantee by providing a promissory note to Bank of Scotland Ireland;

(vi) Ennis had not acted with clean hands. It had pursued the bankruptcy proceedings in breach of his constitutional rights in circumstances where it was not the holder in due course of any loan note/agreement or guarantee.

11. It should be stated that what was set out in Mr. Carney's grounding affidavit was expanded upon in written submissions which he filed with the Court in advance of the hearing of his application by Costello J.

**Judgment**

12. By her order dated the 16th July, 2018, the High Court judge refused Mr. Carney's application to dismiss the bankruptcy summons. In her judgment she set out the circumstances in which the Court might accede to such an application. In particular, she relied upon the judgment of Dunne J. in *The Minister for Communications, Energy and Natural Rescoures v. Wood* [2017] IESC 16 and at para. 4 of her judgment summarised the guidance to be found in the leading authorities.

13. Commencing at para. 14 of her judgment the High Court judge dealt sequentially with the issues raised by Mr. Carney for her consideration and concluded, for the reasons therein set forth, that no lawful basis had been made out to support his claimed entitlement to have the bankruptcy summons set aside.

14. Costello J. concluded that many of the arguments raised by Mr. Carney were not open for consideration given that Ennis had obtained judgment on foot of the guarantee and he had no subsisting appeal against that judgment. Thus, both the standing of Ennis to maintain the bankruptcy proceedings and its entitlement to the benefit of the guarantee had finally been determined.

15. The High Court judge also rejected the procedural arguments advanced by Mr. Carney based upon his interpretation of the RSC. She concluded that no irregularity had been established in respect of the order of the Court made on the 19th June, 2017. The High Court judge was satisfied that the application was properly brought in accordance with the provisions of O. 76, r. 14(1) and O. 122, r. 3. Likewise, she rejected the submission made by Mr. Carney that the application made for substituted service had to be made on notice to the person who could not be served. This was not what was required under O. 76, r. 14(1).

16. In the course of her judgment the High Court judge also concluded that there was no merit to Mr. Carney's submission that if he was adjudicated a bankrupt he would be deprived of his property rights under the Constitution because he would then be unable to pursue the receiver for the return of certain chattels which he maintained the receiver was wrongfully withholding. She concluded that the property right relied upon by Mr. Carney was a chose in action that would form part of his estate if adjudicated a bankrupt. It followed that it would be for the official assignee to decide whether or not to pursue the proceedings against the receiver for the benefit of his estate. The normal consequences of adjudication did not, the High Court judge concluded, amount to a depravation of Constitutional or other property rights.

17. Finally, the High Court judge concluded that, as no issue of European law was engaged in the proceedings, there was no basis for any reference to the Court of Justice of the European Union under Art. 267 of the Treaty on the Functioning of the European Union. Likewise, the proceedings before her did not fall within the class of case in respect of which a case stated to the Court of Appeal might be appropriate.

**The Appeal**

**Mr. Carney submissions**

18. Mr. Carney submits that the High Court judge ought to have concluded that Ennis commenced the bankruptcy proceedings for an improper motive, namely to deny him his right to pursue his proceedings against Mr. Gearoid Costelloe, the receiver appointed by Ennis over the assets of Philisview. Thus, he refers to the bankruptcy proceedings as a "collateral attack" on those proceedings and an effort on the part of Ennis to "get him out of the game". He seeks to rely upon the decision in *McGinn v. Began* [1962] 1.I.R 364

19. Mr. Carney submits that the bankruptcy proceedings are premature because bankruptcy is a "nuclear option" and one which should not be deployed until the creditor has exhausted all other remedies. He lays emphasis on the fact that bankruptcy reflects badly on the character of the debtor and has long lasting effects and for such purpose relies on the judgment of McKechnie J. in *Patrick Murphy v. Governor and Co of the Bank of Ireland* [2014] IESC 37. In the present case, the receiver has not realised the assets of Phyllisview and these when sold, Mr. Carney submits, have the potential to extinguish his debt. Furthermore, he has a claim against the receiver for the return of certain chattels and possibly an action for consequential damages. A successful result in those proceedings might leave him in a position to discharge the debt due to Ennis and thus avoid bankruptcy.

20. Mr. Carney further maintains that the High Court judge erred in law in failing to set aside the bankruptcy summons on the basis that the proceedings will not achieve the objects of the bankruptcy legislation. He relies in this regard upon the Bankruptcy Law Committee Report (the Budd Report) 1962 wherein four particular objectives are identified.

21. According to Mr. Carney, one of the principle objectives of the legislation is to stop a debtor dissipating his or her assets. He, however, has no assets and Ennis had done no research from which it could have been satisfied that by making him bankrupt it would likely recover the outstanding debt. In circumstances where it was clear that Ennis had nothing to gain from the bankruptcy proceedings, the High Court judge erred in law in failing to set aside the summons. Furthermore, given that Ennis was not only unlikely to recover the outstanding debt but would also have to pay the official assignee for his services, it was to be inferred the bankruptcy proceedings were motivated for the improper purpose of shutting down his proceedings against the receiver.

22. Mr. Carney submits that the High Court judge erred in law in concluding that there had been proper compliance with the RSC. Strict compliance was required because bankruptcy was a serious matter involving consequences that were penal in nature. Thus the preliminaries had to be properly complied with and they were not. He relied in this regard upon the judgment of Cave J. in *In re Collier, ex parte Dan Rylands Ltd* (91891) 64 L.T.742 and that of Hamilton P. in *O'Maoileoin v. Official Assignee* [1989] 1. I.R. 647.

23. Mr. Carney submits that Ennis was not entitled to avail of the provisions of O. 122 r. 7. This is because O. 76, r. 14 of the bankruptcy rules provides that service "shall be served within 28 days from the date of the summons". He emphasises the use of the

mandatory word "shall" in the aforementioned rule. Mr. Carney argues that because the relevant bankruptcy rules are set out in S.I. No. 120 of 2012, which was signed by the Minister and concerns the Bankruptcy Act of 1988, that these rules take precedence over the other rules in the RSC such as O. 122, r.7. Accordingly, he submits that the High Court judge erred in law in concluding that the Court had jurisdiction to extend the 28 day time limit provided for in O. 76, r. 14 by reason of the provisions of O.122 r. 7.

24. Mr. Carney further argues that the High Court judge should have concluded that the *ex parte* docket dated 16th June, 2017 was defective insofar as it did not record that any relief would be sought under O. 122, r.7 and neither did her order of 19th June, 2017 refer to that provision.

25. Finally, Mr. Carney submits that there was no good reason why the application made by Ennis to extend time and obtain substituted service had not been made the previous Friday, i.e 16th June, 2017 or indeed any day after the 6th June, 2017 when Ennis's third effort at personal service failed. He referred the Court, in this regard, to para. 5 of the affidavit of Regina Donnelly of 14th June, 2017.

26. Finally, according to Mr. Carney, the balance of justice favoured setting aside the bankruptcy summons as he had "way more to lose" than Ennis.

**Respondent submissions**
27. Mr. Gorman submits that there was no evidence that Ennis acted in pursuit of any ulterior motive. The evidence was that Ennis commenced the bankruptcy proceedings with a view to recovering the sum in respect of which judgment had been granted by the High Court. He relied upon the affidavit of Mr. Donal O'Sullivan sworn on 19th June, 2018 and in particular para.12 thereof, wherein he stated that the purpose of the bankruptcy petition was to recover the sum due by Mr. Carney.

28. There was no evidence, according to counsel, upon which the High Court judge could have concluded that Mr. Carney had no assets and thus have concluded that Ennis was pursuing bankruptcy for an improper purpose. At any stage Mr. Carney might have filed a statement of affairs to set out his financial situation, but he had chosen not to do so. In the absence of such a statement of affairs the Court could not conclude that he did not have assets that might be recovered in the course of the bankruptcy.

29. Counsel disputes Mr. Carney's assertion that, if the assets of Philisview had been realised that his liability to Ennis might have been extinguished. The evidence set out at paras. 10 and 11 of Mr. O'Sullivan's affidavit was to the contrary. A significant shortfall was anticipated. Furthermore, Ennis was under no legal obligation to await the outcome of the receivership or any other legal proceedings instituted by Mr. Carney before commencing bankruptcy proceedings.

30. While Mr. Carney sought to inpugn the motivation of Ennis in instituting bankruptcy proceedings based upon his assertion that he had no assets, in his own affidavit he claimed that the receiver was in possesion of chattels owned by him which had a value €80,000. Furthermore, he claimed an entitlement to pursue the receiver for damages for wrongfully withholding these assets. It was appropriate in such circumstances that the official assignee would have control over those proceedings so that he could manage any assets recovered and potentially recover the debt due to Ennis.

31. Mr. Gorman further submits that, as a matter of law, Ennis was not obliged to avail of any other enforcement procedures prior to commencing bankruptcy proceedings. Furthermore, in circumstances where Mr. Carney maintains that he has no assets, it is difficult to see how he could hope to rely upon any such asserted obligation on the part of Ennis.

32. Concerning the procedural irregularities relied upon by Mr. Carney, counsel submits that the time limit provided for in O. 76, r.14 is no different from any other time limit in the RSC. The fact that the bankruptcy rules were introduced by Statutory Instrument gives those rules no higher status than any other rules. The time provided for in O. 76, r. is not a statutory time limit and can accordingly be extended under the Court's discretion as provided for in O. 122, r. 7. The decision of McCracken J. in *Procter & Gamble v. The Controller of Patents, Designs and Trademarks* [2003] IESC 35 provided no support for Mr. Carney submission.

33. By reason of the provisions of O. 122, r. 7, the Court is empowered to extend the time for service of a bankruptcy summons. In the present case, the 28 days within which the summons ought to have been served expired on 18th June 2017, which was a Sunday. However, because the 28th day was a Sunday, under O. 122, r. 3 Ennis was entitled to serve the summons on the 19th June, 2017 and that was the date upon which it applied to extend the time. According to counsel, it was irrelevant that Ennis might have applied to extend the time for service or for substituted service on the previous Friday or any other day.

**Discussion and decision**
34. The starting point for my consideration of this appeal is the provision relied upon by Mr. Carney to support his application to dismiss the bankruptcy summons. His application to the High Court was made pursuant to s. 8(6) of the Bankruptcy Act, 1988

35. The relevant subsections provide as follows:

> 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.
>
> 8(6) The Court –
>
> (b) shall dismiss the summons if satisfied that an issue would arise for trial."

36. As to when and in what circumstances the Court is obliged to exercise its jurisdiction under s. 8(6)(b) the decision of Dunne J. in *The Minister for Communications, Energy and Natural Resources v. Wood* [2017] IESC 16, is of assistance, a judgment to which Costello J. had regard in determining Mr. Carney's application. In particular, she noted that:

> "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 ..."

37. At para. 4 of her judgment, the High Court judge succinctly identified the principles identified by Dunne J. in her aforementioned decision. The following is her summary of the guidance provided in the passages which she quoted from that judgment:

> "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."

38. Ultimately, having considered the evidence and the legal submissions, the High Court judge concluded that Mr. Carney had not established any real or substantial issue which warranted the dismissal of the summons and, having carried out the same exercise myself, I have come to a similar conclusion. In particular, I am entirely satisfied that the High Court judge correctly determined each and every one of the issues detailed at paras. 14-16 of her judgment.

39. In his oral submission Mr. Carney did not address all twenty grounds of appeal set out in his notice of expedited appeal, and this may well be because he now understands that the legal effect of the judgment obtained against him by Ennis on the 27th February, 2017 is that his grounds of appeal numbered 1, 2, 4 and 5 are unstateable given that they seek to unwind the said judgment. The Court must assume that Ennis has a lawful and un-appealable judgment against Mr. Carney for €100,000.

40. Apart altogether from the Court's jurisdiction to dismiss a bankruptcy summons under the provisions of s.8(6)(b) of the Act, the Court also enjoys the discretion to stay bankruptcy proceedings if satisfied, on the evidence, that the petitioner is pursuing bankruptcy for an improper motive, as was found by Budd J. in *McGinn*.

41. In *McGinn*, the debtor claimed that the debtor's summons had been issued for an improper motive, namely to have him declared a bankrupt so that he would be disqualified from membership of the Castleblaney Urban District Council. The evidence established that it was well known to the petitioner that the debtor had no means of paying his debts which were significant and that efforts to execute judgments obtained against him had been unsuccessful because he had no available property. Instalment orders had not been met by the debtor, his farm had been sold as a result of a mortgage suit and he was living in rented accommodation. The Court had comprehensive information concerning his income and property, and was even made aware of the fact that his furniture was subject to a hire purchase agreement. Furthermore, the evidence established that there had been a long history of ill will between the two men. Both were members of the Castleblaney Urban District Council and had had disputes with each other concerning their respective roles and entitlements.

42. Of particular significane in *McGinn* was the fact that it was not denied by the petitioner that he knew there were no assets that could be taken in the bankruptcy proceedings, and neither did he deny that the summons had been brought, not to recover the debt, but rather for the purpose of unseating Mr. Beagan from the Castleblaney Urban District Council.

43. Having considered all of the evidence and the prevailing legal authorities, Budd J. concluded that the debtor's summons could not be dismissed, because the debt remained lawfully due to the petitioner. However, he was satisfied that the proceedings could be stayed in the exercise of the Court's inherent jurisdiction given that it was accepted fact that the summons had not been brought for the purpose of having the debtor's goods made available for his creditors.

44. In the present case, however, there is simply no evidence that Ennis commenced the bankruptcy proceedings for an improper purpose. Indeed, it is stated to the contrary at para. 12 of the affidavit of Mr. Donal O'Sullivan of the 19th June, 2018. Furthermore, Mr. Carney has not laid bare his financial situation, as was the case in *McGinn*, such that it could be stated with any degree of certainty that he does not have assets which might be available to satisfy his liability to Ennis. Whilst he states that he was never directed to file a statement of affairs, he could have done so at any time to support his application to set aside the bankruptcy summons. Furthermore, it is beyond doubt that on his own evidence he has assets with a value of something in the region of €80,000 which are currently in the possesion of the receiver.

45. Accordingly, there was no evidence from which the High Court judge could reasonably have concluded that the bankruptcy proceedings had been instituted to bring to an end Mr. Carney's proceedings against the receiver and there was little by way of evidence to make it clear that Mr. Carney had no assets from which he might discharge his liability to Ennis.

46. I also reject Mr. Carney's submission that the judgment of the High Court judge is to be faulted because she did not conclude that the bankruptcy proceedings were premature by reason of the fact that Ennis had not sought to enforce its judgment by adopting one or more of the possible range of enforcement procedures available to a creditor.

47. It is true indeed that a creditor may seek to avail of a range of enforcement proceedings. Six such procedures are relied upon by Mr. Carney namely:-

(1) Registration of a judgment in the High Court.

(2) Seizure by the sheriff of goods which may later be sold.

(3) Attachment of debts/garnishee orders.

(4) Judgment mortgage.

(5) Instalment order.

(6) Bankruptcy.

48. While Ennis might have elected to pursue one or more such enforcement procedures prior to commencing bankruptcy proceedings, it was under no obligation to do so. Thus, the High Court judge cannot be stated to have erred in law in failing to set aside the bankruptcy summons. I have to say that I also consider this argument as one which is somewhat contrived and without merit given that it is clearly inconsistent with Mr. Carney's repeated insistence that he has no assets against which Ennis might realistically execute its judgment. How then would availing of these alternative execution procedures assist Ennis? If what Mr. Carney states concerning his assets is true, bankruptcy would appear to be the only execution procedure likely to benefit Ennis given that the only assets he admits to owning are those chattels which he claims the receiver has wrongfully withheld. And, bankruptcy will allow the official assignee the possibility of taking over those proceedings to ensure that any such valuable assets are captured and ultimately made available to creditors in the bankruptcy.

49. Likewise, there is no authority for the proposition that, before Ennis was entitled to commence the bankruptcy proceedings, it had to await the outcome of the receivership lest the assets recovered might lead to the extinguishment of Mr. Carney's liability. Neither is there any legal basis for Mr. Carney's claim that Ennis was required to await the outcome of his claim against the receiver, lest he recover sums sufficient to discharge the outstanding debt. This is apart altogether from the fact that Mr. Carney did not challenge the evidence of Mr. O'Sullivan contained at para. 10 of his affidavit of the 19th June, 2018 which stated that Philisview, at that time, owed Ennis €3,894,191.95 and that the sale of its property was expected to achieve €1.5m. with the result that a sum in excess of €100,000 would clearly remain owing after the company's assets had been realised. Furthermore, insofar as Mr. Carney's proceedings against the receiver are concerned, absent his estate coming under the control of the official assignee, Ennis would have no control over Mr. Carney's litigation or any assets recovered as a result thereof. Accordingly, not only is this argument as advanced by Mr. Carney without legal foundation, but on the facts of the present case is one which is without merit.

50. Mr. Carney is indeed correct that the consequences of bankruptcy are significant and it is for this reason that creditors who claim the benefit of this significant sanction must strictly comply with the legislation and the rules which govern the procedures. The following passage from the judgment of McKechnie J. in *Patrick Murphy v. Bank of Ireland* [2014] IESC 37 serves well to bring home the real life consequences of bankruptcy:-

> "34. The adjudication of a person as a bankrupt is, in light of the consequences of such an Order to that effect, a very serious matter for that person, his immediate dependants and wider family, and for the future direction of his life. Immediately on becoming operative, all of his assets automatically vest in the Official Assignee, all subsequently acquired property, under pain of criminal sanction, must be notified to the Official Assignee who can then claim it and any salary or income earned or received thereafter, is liable to be attached for the benefit of the creditors. Whilst there are some exceptions to these consequences, they have little effect on the grave impact of such an Order. Further, a bankrupt is disqualified from acting as a Director or from being involved in the management of a company without leave of the Court and he/she cannot continue to serve or otherwise hold, elected representative office. In addition, this virtually complete loss of control over one's affairs can last for a very considerable time, at least as the law stood in 2010 (s. 85 of the 1988 Act). And finally, bankruptcy is regarded, historically at least, as reflecting badly on one's character and reputation: it carries a stigma and an odium which continues even well beyond one's discharge from that status. It is as if, once a bankrupt, a bankrupt forever."

51. It follows that the Court has always regarded the statutory code as one which must be strictly complied with and it is with that guidance in mind that I have considered the procedural arguments made by Mr. Carney in relation to the Court order of the 19th June 2017.

52. I must first reject the submission made by Mr. Carney that the bankruptcy rules take precedence over the other RSC. It follows that the time limits provided for in the new bankruptcy rules are no different to the time limits set out in any of the other Rules of Court which are all amenable to enlargement or abridgment under O. 122 r.7.

53. While Mr. Carney is correct that the present bankruptcy rules were introduced by Statutory Instrument No. 120 of 2012, that does not afford the new rules or the time limits therein provided with any special status. The Statutory Instrument is only the mechanism whereby the bankruptcy rules which prevailed prior to the commencement date were amended.

54. A Statutory Instrument is not a Statute and the fact that it refers to a Statute, i.e. The Bankruptcy Acy 1988, does not give it or the rules and the timelimts therein specified any particular impenitrability. Mr. Carney needs to understand the difference between a time limit which is fixed by statute and one fixed by the RSC. The former cannot be enlarged or abridged by the Court whereas the latter can.

55. Insofar as Mr. Carney relies on the use of the word "shall" in Ord. 76, r. 14(1) to contend that the time limit for serving the summons, i.e. within 28 days, cannot be extended, that is a submission which is, in my view, unstateable. There is nothing magical about the use of the word "shall" in the context of the time specified for the delivery of documents or pleadings under the RSC. In respect of almost every time limit set out in the RSC it is provided that the party concerned "shall" act within the time prescribed. For example, under O. 21 a defendant who enters an appearance to a plenary summons, "shall" deliver his defence within 28 days of the delivery of the statement of claim. Similar provisions exist in relation to almost every step to be taken by parties to proceedings. And, in every such instance, the Court has the power to extend that time limit under O.122 r.7. Furthermore, O. 76 r. (14)(1) itself makes clear that if personal service within the time limit provided cannot be effected the Court may grant an extension of time for such service. Likewise, the rule makes clear that the Court has the jurisdiction to order substituted service should it be satisfied that the debtor is evading service. Each of these provisions makes clear that in certain circumstances the justice of the case may require the 28 day period for service be extended.

56. Returning briefly to consider the facts of the present case, the 28 day time limit for service of the bankruptcy summons on Mr. Carney expired on Sunday the 18th June, 2017.

57. O. 122, r. 3 provides;-

> "3. 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."

58. Accordingly, Ennis could lawfully have served Mr. Carney on the following day i.e. Monday 19th June. However, instead, on that day, when the summons was still valid, it applied to extend the time for service. It follows that the application to extend the time for service of the summons was validly made in accordance with O. 122, r. 3.

59. The fact that the *ex parte* docket completed by Ennis for the purposes of flagging its intended application makes no mention of an application to extend the time for service of the summons, is irrelevant. A completed *ex parte* docket which recites each and every order or rule to be relied upon forms no part of the proofs required in order for the Court to exercise its discretion on such an application. Neither does the fact that the order of Costello J. of the 19th June, 2017 does not refer to the provisions of O. 122 r. 3 or 7 impact in any way on the validity of the order made.

60. Furthermore, the fact that Ennis might have made its application to extend the time for service of the bankruptcy summons or apply for substituted service on Friday the 16th June 2017 or any other day earlier that week, is entirely irrelevant. The application was made within the permitted time, i.e. on the date when the Court Office was next opened following the expiry of the 28 day period ending on Sunday 18th June, 2017.

61. Finally, I reject Mr. Carney's submission that the High Court should have set aside the bankruptcy summons because "the balance of justice" warranted such an approach. First, that the balance of justice would favour the outcome proposed by Mr. Carney was not clearly established on the evidence. More importantly however is the fact that where the "balance of justice" lies forms no part of the Court's assessment on an application to set aside a bankruptcy summons. It is not for the Court on such an application to engage in any merits based assessment of the circumstances of the parties. The Court must determine whether or not it has been established that "an issue would arise at trial" (s.8(6)(b)). If it is so satisfied it must dismiss the summons. Alternatively, if the Court were to conclude that the bankruptcy summons had been served for an improper motive, it might choose to exercise its discretion and stay the proceedings. On the facts of the present case Mr. Carney failed to establish his right to either relief.

**Conclusion**

62. For the reasons earlier set forth I am satisfied that the High Court correctly concluded that Mr. Carney had not established any lawful basis which would justify setting aside the bankruptcy summons. I would accordingly dismiss the appeal.