THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2020] IECA 49

Court of Appeal Record No 2017/291

Court of Appeal Record No 2017/552

Donnelly J
Haughton J
Collins J

BANKRUPTCY

IN THE MATTER OF A BANKRUPTCY PETITON BY MICHAEL GLADNEY COLLECTOR GENEERAL OF SARSFIELD HOUSE, FRANCIS STREET, LIMERICK, PETITIONING CREDITOR
AND JOHN TOBIN OF LEVEL 3, CORNMARKET, ROBERT STREET, LIMERICK, DEBTOR

BETWEEN

MICHAEL GLADNEY

PETITIONER/APPLICANT

AND

JOHN TOBIN

APPELLANT/RESPONDENT

JUDGMENT of Mr Justice Maurice Collins delivered on 3 March 2020

BACKGROUND

1. The Appellant ("*the Debtor*") was adjudged bankrupt by Order of the High Court (Costello J) made on 13 November 2017 on foot of a Petition dated 28 June 2016. The Debtor appeals that Order to this Court. He also appeals an earlier Order of the High Court (Costello J) of 30 May 2017 refusing the Appellant's application to dismiss the Bankruptcy Summons of 4 April 2016. The application to dismiss the Bankruptcy Summons was made significantly outside the prescribed time for bringing such applications (which Order 76 Rule 13(2) of the Rules of the Superior Courts provides is 14 days) and in her judgement given on 30 May 2017, the High Court Judge concluded that no basis for extending the time in which to bring such application had been demonstrated and refused an extension of time accordingly. However, she went to examine the grounds advanced by the Debtor on their merits and concluded that none of those grounds had been made out and thus held that, even if the Court had been persuaded to extend the time, the application to dismiss the Bankruptcy Summons should be dismissed. The Order made by the Court dismissed the application accordingly. The Debtor's appeal encompasses both the extension of time issue and also the Judge's findings on the merits.

2. The Bankruptcy Summons warned the Debtor that, unless within 14 days after service of the Summons on him (and it was served on him on 18 April 2016), he paid the sum of

€405,808.66 to Mr Gladney (who is the Collector General), or secured or compounded for that sum to Mr Gladney's satisfaction, he would have committed an act of bankruptcy for which he might be adjudicated a bankrupt "*unless you have within the time aforesaid applied to the Court to dismiss this Summons,* ***on the ground that you are not indebted to the said Michael Gladney in any sum or that you are only indebted to Michael Gladney in a sum of €20,000 or less****, or that before service of the Summons, you had obtained the protection of the Court*" (emphasis supplied). The Summons went on to tell the Debtor that he was "*specially to note*" a number of matters, including that if the Debtor was "*not indebted to the said Michael Gladney in any sum or* ***are only indebted to Michael Gladney in the sum of .. €20,000 or less****, you must apply to the Court to dismiss this summons within fourteen days after the service of this summons on you…*" (emphasis supplied).

3. The Bankruptcy Summons was in all material respects precisely in accordance with Order 76, Rule 10 and Form 1 which Rule 10 requires to be used. Section 8(5) of the Bankruptcy Act 1988 (as amended) ("*the 1988 Act*") provides for the form of such summonses to be prescribed. The form of Summons also accurately reflected the provisions of Order 76, Rule 13(2) which (as amended in 2013) requires notice to be endorsed on every summons to the effect that if the debtor disputes the debt and desires to dismiss the summons, he must swear an affidavit within 14 days *"(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"*(emphasis supplied)

4. The prescribed form also requires *Particulars of Demand* to be set out "*in detail*", reflecting the requirements of Order 76, Rule 12(4). Order 76, Rule 12(4) also provides that no objection shall be allowed to the particulars unless the Court considers that the debtor has been misled by them. Detailed Particulars of Demand were included in the Summons here, setting out the particulars of no less than seven judgments that the Collector General had obtained against the Debtor on various dates between 15 September 2011 and 8 January 2015, giving details of the Judgment amounts, costs payable, accrued Courts Act interest and payments/credits on account, yielding an overall net figure of €405,808.66.

5. The Debtor did not apply to dismiss the Summons within 14 days of its service on him. His application did not issue until 4 November 2016, some 6 months after the expiry of the prescribed period. The Affidavit sworn by him (on 3 November 2016) to ground that application offered no explanation for this failure. That Affidavit is also notable for the absence of any claim that the Debtor was not indebted to the Collector General in any sum or only in the sum of €20,000 or less, though as noted above that appears to be a mandatory requirement of Order 76. In fact, the only substantive point made in the Affidavit was to the effect that, for reasons set out in it (which are discussed in detail below) a sum of €71,030 was "*repayable to me by the Revenue Commissioners*" and, therefore, (the Debtor went on to say), "*I am due a refund of €71,030 together with interest thereon from February 2009*." The debt asserted by the Collector General

(including the amounts included for interest and costs, and the credits allowed against payments made) was not otherwise disputed, from which it followed that, even if Mr Tobin's claim to be entitled to a refund from the Revenue was well-founded, he nevertheless had a significant liability to it, significantly in excess of the statutory threshold of €20,000. [1]

6. That essential position has not altered in the course of the proceedings and at the hearing of this appeal, Counsel for the Debtor, John O' Donnell SC, very properly acknowledged that a significant sum - in the order of €330,000 - was in any event due by his client to Revenue.

7. The Debtor nonetheless says that the jurisprudence establishes that he is entitled to impugn the Bankruptcy Summons and/or resist his adjudication as a bankrupt by establishing (or, more correctly, showing that there is an issue) that the amount demanded of him was incorrect to any degree. The extent of the error is, the Debtor says, immaterial. That submission is addressed further below. However, I would observe that, if it be correct, it appears to follow that the provisions of Order 76 identified above, and the form of summons that it prescribes for use by creditors (which was the form of summons used by Revenue here) – premised as they are on an understanding that a summons can be challenged only by showing that no debt, or no debt satisfying the statutory minimum, is due – do not reflect the correct legal position.

8. In any event, after an exchange of affidavits, the Debtor's application to dismiss the Bankruptcy Summons (and for an order extending the time to bring that application) came on for hearing before the High Court on 29 May 2017. The Judge reserved her decision overnight and gave her Ruling on 30 May. She noted that while the Debtor had sworn three affidavits, none addressed the issue of delay or provided any basis why the Court should extend time. She also noted that when the Petition had first been before the Court in October 2016 (some six months after service of the Summons on the Debtor) no issue had been raised as to the validity of the demand or the non-allowance of any credit. In the circumstances, the Judge considered that none of the three limbs of the test set out in *Eire Continental Trading Co v Clonmel Foods Ltd* [1955] IR 170 [2] had been satisfied and accordingly refused the application to extend time.

9. Nevertheless, the Judge went on to consider the application to dismiss on its merits. The evidence of the Debtor (a former solicitor who was at the relevant time practising as such) was to the effect that he had paid a total amount of €96,850 from his own resources in (partial) discharge of a Stamp Duty liability of one of his clients ("*the*

[1] Section 8(1)(a) of the 1988 Act (as amended) requires proof of a debt of more than €20,000 before a bankruptcy summons may be granted and a similar threshold is stipulated for the presentation of a petition by section 11(1)(a) of the 1988 Act. That threshold is a significant increase on the previously applicable threshold of €1,900.

[2] In a recent decision, the Supreme Court has discussed in detail the status and appropriate application of the criteria in *Eire Continental*, emphasising that they are guidelines which should not be regarded as prescriptive or applied over rigidly but also emphasising the sound rationale that underpins them: *Seniors Money Mortgages (Ireland) DAC v Gately* [2020] IESC 3.

Client").[3] That payment was made because the Stamp Duty liability arose on a transaction (the purchase of property – to which I shall refer as "*the H Lands*" - by the Client) where the Debtor, as the solicitor acting for the Client, had given an undertaking to a financial institution to lodge the title documents with it on completion. Without a Stamp Duty Certificate (which would not be provided by Revenue unless the Stamp Duty payable, along with any applicable interest and penalties, was first discharged), the Client could not be registered as owner in the Land Registry and in turn the Debtor would not be in a position to comply with that undertaking: para 8 of the Affidavit of Mr Tobin sworn on 26 January 2017.

10. To complicate the position further, the Debtor had given a further undertaking, once again on behalf of the Client, to another financial institution in connection with the purchase of other property, to which I shall refer as "*the O' C Lands*". Again, the Debtor had not been put in funds to pay the Stamp Duty arising on that transaction and, as a result, there was a substantial Stamp Duty liability (significantly greater than the liability arising in relation to the H Lands) owing to Revenue in respect of this transaction also.

11. The Debtor's evidence was that in 2011/2012 the Client brought to his attention the fact that he (the Client) was due significant amounts from the Department of Agriculture in respect of forest grants and premiums. These payments related to various lands, including (it appears) the H Lands and the O' C Lands. The Debtor says that he had to certify title to those lands before the grants could be paid and says that agreement was reached between the Department, the Revenue and himself that the Department would pay to Revenue such sums as would discharge the Client's remaining Stamp Duty liabilities, thus enabling the issue of appropriate Stamp Duty Certificates by Revenue which in turn would enable the Debtor to register the transactions and deliver title to the respective funding institutions in compliance with the undertakings he had given to them. In this context, it is relevant to note that the Debtor has never suggested that Revenue agreed (or could have lawfully agreed) to attach (attachment being the statutory mechanism by which these payments could be made) more than was due in tax by the Debtor's client, in order to repay to the Debtor the sum paid by him in 2009.

12. The Debtor next says that there was an overpayment of Stamp Duty in relation to the H Lands. That overpayment was quantified by the Debtor as €66,030.00 as of May 2012 (para 11 of the Affidavit of Mr Tobin sworn on 26 January 2017). The Debtor made a further payment of €5,000 to the Revenue in April 2015 and that appears to be the basis on which he contends that the over-payment was in fact €71,030 (para 19). It is that sum which the Debtor asserted before the High Court was due to him by way of credit or refund and, on that basis, the Debtor contended that the amount set out in the Particulars of Demand and in the Bankruptcy Summons over-stated his liability to Revenue because it made no allowance for that credit or for interest on it (para 28). The Debtor also complained of the delay in the issuing of Stamp Duty Certificates by Revenue. The

[3] The Client is identified in the papers before the Court but, having regard to the fact that he is not a party to these proceedings, and bearing in mind the obviously confidential character of his tax affairs, I shall not identify the Client in this judgment

Certificate in relation to the H Lands had only issued in October 2015 and no Certificate had issued (or, it appears, has issued since) in relation to the O' C Lands.

13. In response, a number of affidavits were delivered on behalf of Revenue. In summary, Revenue's position (as set out in those affidavits) was to the effect that, while it had initially indicated that it would be possible to apply monies attached by it in discharge of the Stamp Duty liabilities of the Debtor's client, it had subsequently been explained to the Debtor that that would not be possible because of the fact that the monies in question had been attached pursuant to statute [4] by reference to income tax and capital gains tax (CGT) liabilities of the client and not by reference to any Stamp Duty liabilities of the Client. There is an issue as to whether this was in fact communicated to the Debtor which cannot be resolved on this appeal. Revenue did not dispute that an amount of €91,850 had been paid by the Debtor or that it had been applied in partial satisfaction of the Client's Stamp Duty liabilities, but its position was that, if and insofar as that amount came from his own funds, it was a matter for the Debtor to pursue with the Client. There was, as far Revenue was concerned, "*no circumstances where the Revenue Commissioners could refund such payments to Mr Tobin*" (Affidavit of Declan Hayes sworn on 15 March 2017, at para 27). Revenue also observed that the Debtor had not raised any defence or counterclaim based on any alleged credit or refund in any of the multiple applications for judgment against him. Revenue explained that the Stamp Duty Certificate for the H Lands had issued in October 2015 following a further payment made by the Debtor in April 2015 in relation to outstanding interest/penalties and after attempts to recover from the taxpayer (the Client). The other Stamp Duty Certificate had not issued because the liability of the taxpayer (the Client) had not been discharged (para 24).

14. Mr Hayes' Affidavit exhibited a detailed submission which had been prepared by Counsel (Mr Power BL) on the Debtor's behalf and submitted to Revenue in November 2014. The thrust of that submission was to the effect that the Revenue had represented to the Debtor that the forestry grant monies payable to his client would be set off against the Stamp Duty owed by him, the Debtor had relied on that representation by providing undertakings to the Department of Agriculture regarding the Client's title but Revenue had in fact allocated the monies attached by it against income tax and CGT liabilities of the Client rather than (as it had agreed) against his Stamp Duty liabilities. The submission argued that the statutory power of attachment given by section 1002 TCA did not fetter the allocation of monies received to tax referred to in the attachment notice. It also referred to various possible bases of claim against the Revenue. The submission did not, it should be noted, make any reference to or assert any claim to any credit or refund on the part of the Debtor, whether in the amount of €71,030 or otherwise.[5]

15. Mr Hayes also exhibited Revenue's response to this submission, a detailed letter of 3 March 2015. There is one aspect of that letter to which I shall refer further below. In

[4] The relevant provision being section 1002 of the Taxes Consolidation Act 1997 (the "TCA").

[5] On the contrary, the submission stated (at page 4) that a Notice of Assessment in respect of stamp duty issued dated 23 January 2012 "which assessed a balance due in the amount of €71,030." A breakdown of that figure is given in a footnote from which it is apparent that the amount of €71,030 was due to Revenue after allowance for the €91,850 that had been paid by the Debtor in 2009

broad terms, the letter joined issue with virtually all aspects of the submission and denied that Revenue had any responsibility for the difficulties in which the Debtor found himself (the submission referred to the fact that he was facing a risk of being struck off as a solicitor) or any liability to him.

16. The High Court Judge considered the evidence and arguments. She referred to section 8(6) of the 1988 Act (which provides that the Court "*shall dismiss the summons if satisfied that an issue would arise for trial"*) and to a number of authorities including the decision of the High Court (McGovern J) in *Minster for Communications, Energy and Natural Resources v MW* [2009] IEHC 413; [2010] 3 IR 1, the decision of that Court (Dunne J) in *Marketspreads Ltd v O' Neill* [2014] IEHC 14 and her own judgment *in ACC Loan Management v CM* [2015] IEHC 96. These decisions were authority for the proposition that an issue had to be "*real and substantial*" and not one which was unarguable or had no prospect of success in order to engage the Court's jurisdiction under section 8(6). [6]

17. Analysing what had been advanced before her as the issue arising for trial said to require the dismissal of the Bankruptcy Summons, the Judge noted that it was common case that the Debtor was not the chargeable person for Stamp Duty purposes. She also noted that she had invited Counsel for the Debtor to explain how his client could be entitled to a refund or credit from the Revenue even if there had been an overpayment of tax, given that he was not the chargeable person but no basis for that proposition had been identified. Taking the Debtor's case at its height, and therefore accepting for the purpose of her analysis that the grants should have been allocated to the Stamp Duty liabilities, that did not assist the Debtor because it did not follow that he was entitled to any refund from Revenue. If the Debtor had no case for a refund of the alleged overpayment, it followed that he could not show that the sums claimed in the Bankruptcy Summon were more than the amount actually due by him to Revenue. [7]

18. The Judge proceeded to consider and reject a contention that the Debtor had been confused. In the Judge's view, the Debtor had clearly understood the position, noting the submission to which I have already referred, as well as a letter written by the Debtor in March 2015 which made no reference to any refund but clearly proceeded on the basis that the Debtor was liable to pay the outstanding judgements.

19. Finally, the Judge explained that she did not consider that any issue for trial arose in relation to the alleged delay on the part of Revenue in issuing the Stamp Duty Certificate.

20. The Revenue then proceeded with its Petition and it was heard on 13 November 2017. It appears from the Judge's Ruling on the Petition that at least some of the issues that the Debtor sought to advance repeated arguments that had been made in the application to dismiss the Summons. Counsel for the Petitioner objected to this as a collateral attack on the Court's earlier Ruling (which at that point was the subject of appeal to this Court).

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[6] Transcript of the Ruling of 30 May 2019, page 6.

[7] *Ibid*, at page 7

That objection was upheld by the Judge who noted that, where no application to dismiss was brought, a debtor could raise arguments as to the validity of the summons at the adjudication stage, [8] but that the position was otherwise where (as was the case here) the debtor had availed of the opportunity to bring an application to dismiss. The Judge did, nonetheless, address what appears to have been a new point made by the Debtor in support of his contention that the Revenue owed him a credit/refund. Her Ruling records an argument to the effect that the Debtor was entitled to subrogate to the Revenue Commissioner's claim against the Debtor's former Client and to set off what his former Client might owe the Revenue against his obligations to the Revenue. So stated, it is very difficult to understand the import of that argument but in any event the Judge considered that it was dealt with by her finding that the claim was for the chargeable person to make, i.e. the Debtor's Client and not the Debtor. A version of this subrogation argument was advanced in this Court also and will be addressed below.

21. In addition to the arguments as to the validity of the Bankruptcy Summons, the Debtor advanced a separate argument to the effect that the Revenue had failed to comply with the provisions of section 11(1)(c) of the 1988 Act. Section 11(1) identifies certain conditions for the presentation of a petition and the effect of section 11(1)(c) is to require that "*the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition.*" Before the High Court (and again before this Court) it was argued on behalf of the Debtor that the Petition of the Revenue was founded on an act of bankruptcy that occurred on 18 April 2016 (the date of service of the Bankruptcy Summons) and that the Petition (which was presented on 21 July 2016) therefore was not presented within the period stipulated in section 11(1)(c).

22. The Judge rejected this argument. In her view, it was clear from section 7(1)(g) of the 1988 Act that it was the failure to pay the sum referred to in the Bankruptcy Summons within 14 days of service that constituted the relevant act of bankruptcy. Therefore, the act of bankruptcy occurred on 2 May 2017 and not at any point prior to that date and it followed that the Petition had been presented in compliance with section 11(1)(c). The Judge then proceeded to adjudicate the Debtor a bankrupt.

23. As I have already noted, both the Orders of 30 May 2017 and 13 November 2017 were appealed to this Court by the Debtor (the latter appeal requiring an extension of time granted by this Court on 26 February 2018). On 26 February 2018 this Court stayed the Order of 13 November 2017 and on 25 June 2018 that stay was varied in terms which are not material for present purposes.

THE ISSUES ON APPEAL

24. Having regard to the Debtor's grounds of appeal and written and oral submissions, it appears to me that the following issues arise for determination in the appeals before us:

- Whether the Judge erred in refusing to extend time for the Debtor's application to dismiss the Bankruptcy Summons.

[8] Though not identified specifically, the Judge appears to have had in mind her own judgment in *Gladney v P O'M* [2015] IEHC 718, at para 19.

- Whether the Debtor has established good grounds for impugning the Summons. This in turn involves raises two issues. The principal issue is whether the Summons is bad because the total amount is overstated by the amount (€71,030 plus interest) which the Debtor says is due to him from Revenue. No other error or invalidity was alleged in the Summons. [9] The second issue is whether the Debtor has a claim against Revenue arising from the alleged delay in issuing the relevant Stamp Duty Certificates. It is fair to say that the first of these arguments was the primary focus of the Debtor's submissions to this Court.

- The third issue is whether the Petition should have been dismissed by reason of alleged non-compliance with section 11(1)(c) of the 1988 Act.

DISCUSSION

The Extension of Time Issue

25. As was indicated in the course of the hearing, it appears to me that this Court must review the merits of the Judge's Rulings, including her findings on the issue of the validity of the Bankruptcy Summons. It is common case that, absent any application to dismiss the Summons, it would have been open to the Debtor to raise arguments at the Petition stage directed to the validity of the Summons: *Gladney v POM* [2015] IEHC 718, at para 19. Here the Debtor sought to do so but was met with the objection that those arguments had already been considered by the Court. If the Judge had simply refused the application for an extension of time, without going on to address the merits of the arguments being advanced by the Debtor, no such objection would have arisen and the Judge would have had addressed the substantive arguments in adjudicating on the Petition. The Debtor would then have been entitled to appeal against the Judge's resolution of those arguments. The Judge's decision on the merits of the arguments made on the application to dismiss the Bankruptcy Summons cannot be regarded as mere *obiter dicta* and, in these circumstances, it appears to me that the Debtor cannot be deprived of his entitlement to have the High Court's decision on the merits of his challenge to the Summons reviewed by this Court. This was fairly accepted by Mr Hayden SC for Revenue.

26. In these particular circumstances, it appears to me that the extension of time issue is effectively a moot. That being so, I do not express any concluded view on that aspect of the High Court's Ruling of 30 May 2017. I do note that in *Gladney v POM* the High Court (Costello J) expressed the view that it was not appropriate to apply the *Eire Continental* criteria to an application to extend time to apply to dismiss a bankruptcy summons. Costello J was of the view that the discretion to extend was a general one, in which the fact that the debtor was in any event free to raise validity arguments as a defence at

[9] In the course of submissions Mr O' Donnell helpfully clarified that the Debtor was not contending that there had been a failure to give due credit for a payment of €12,000 made by him in March 2015, as the Debtor had appeared to suggest at para 4 of his Affidavit of 21 April 2107..

adjudication stage was an important factor. [10] Whatever the correct approach may be, it is not at all obvious to me that the Judge made any error in declining an extension of time. In any event, having done so, it would have been open to the Judge to stop there and, in that event, the Debtor would have been at liberty to advance his arguments by way of defence to the Petition. The High Court having gone on to address those arguments on their merits - no doubt with a view to avoiding any possible injustice or perceived unfairness to the Debtor - this Court is, in my opinion, obliged to do so also.

The Section 11(1)(c) Issue

27. As a matter of logic, this issue comes *after* the Bankruptcy Summons issues. However, the issue is a net one and, in my opinion, its correct resolution is clear. Accordingly, it is convenient to address it at this stage.

28. In my opinion, the argument that the act of bankruptcy relied on by Revenue here occurred on the date of service of the Bankruptcy Summons is wholly without merit.

29. The Debtor's argument flies in the face of the clear and unambiguous provisions of section 7(1)(g) which make it plain that it is the debtor's failure to pay the sum "*within fourteen days after service of the summons*" that constitutes the act of bankruptcy. Until that fourteen-day period has expired, there is no act of bankruptcy and, accordingly, the three-month period referred to in section 11(1)(c) does not start to run. There may be scope for argument as to precisely when that fourteen-day period ends but that issue was not canvassed before us for the simple reason that nothing turns on it on the facts here. It does not matter, on the facts here, whether the act of bankruptcy occurred on 1, 2 or 3 May 2017 because the Petition was presented well within three months of each of those dates.

30. The principle that the Bankruptcy code is penal and that ambiguities ought therefore to be construed in favour of debtors does not assist the Debtor. In the first place, no ambiguity in section 7(1)(g) has been identified by the Debtor. Secondly, even if there were any such ambiguity, the principle of strict construction would require the Court to *avoid* the construction urged by the Debtor precisely because it would involve a debtor being deemed to have committed an act of bankruptcy without having had the opportunity to pay the sum demanded that the 1988 Act ordains a debtor must be given. On the Debtor's argument, a petition could be presented by a creditor seven days after service of a bankruptcy summons (or indeed on the day following such service) a proposition that is irreconcilable with the clear language of the relevant provisions of the 1988 Act and inimical to the interests of debtors in equal measure.

The Bankruptcy Summons Issue

Relevant Legal Framework

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[10] At paras 20-22

31. The 1988 Act repealed and replaced a number of Victorian statutes, among them the Irish Bankrupt and Insolvent Act 1857 and the Bankruptcy (Ireland) Amendment Act 1872 which was the principal statute in this area. The 1988 Act had a rather protracted history, having been introduced as a Bill in 1982, based to a significant degree on the recommendations of what is commonly referred to as the Budd Committee which had been established in 1962 to examine Ireland's bankruptcy laws and which issued its final report in 1972.[11]

32. Despite its prolonged gestation, the 1988 Act did not constitute a radical break from the statutory regime it replaced. The 1872 Act had (in section 30) provided for the grant of a debtor's summons in terms similar (though not identical) to section 8 of the 1988 Act [12] and section 21(6) of the 1872 Act provided that failure to pay the sum set out in such a summons was an act of bankruptcy in the same way as failure to pay the sum set out in a bankruptcy summons is by virtue of section 7(1)(g) of the 1988 Act.

33. Section 21(6) of the 1872 Act was considered in *O' Maoileoin v Official Assignee* [1989] IR 647, the adjudication having occurred prior to the enactment of the 1988 Act. The debtor had been adjudicated bankrupt for failure to pay a judgment debt. He sought to have his adjudication annulled on the basis that, as of the date of the debtor's summons, a financial institution had obtained judgment against the petitioning creditor in respect of a lesser amount and a receiver by way of equitable execution had been appointed to collect that amount from the judgment that the petitioning creditor had obtained against the debtor. On this basis, the debtor argued that the petitioning creditor was not entitled to the full judgment amount and that the debtor's summons was defective accordingly.

34. It appears from the report that only the debtor participated in the hearing. Neither the petitioning creditor nor the Official Assignee was represented. Ultimately the debtor failed because the Court (Hamilton P) took the view that the appointment of a receiver by way of equitable execution did not amount to a stay in respect of the portion of the debt payable to the receiver, following *In re Bond, ex p Capital and Counties Bank Ltd* [1911] 2 KB 988. No such issue arises here and the principal interest of *O' Maoileoin* is its discussion, and apparent endorsement, of a number of decisions of the Courts of England and Wales, which I shall discuss briefly.

35. *In re Skelton ex p Coates* (1877) 5 Ch D 979 did not involve any alleged overstatement of the debt due to the petitioning creditor. Rather, the issue was the failure to allege in the petition that the debtor had departed from his dwelling house "*with intent to defeat or delay his creditors."* [13] Bacon CJ colourfully observed that the mere assertion that the

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11 *The Bankruptcy Law Committee Report on the Law and Practice concerning Bankruptcy and the Administration of Insolvent Estates of Deceased Persons* (Prl. 2714). The Report included a draft Bill, draft Rules and draft Forms. Those aspects of the Order 76 and of Form 1 to which I drew attention at the start of this judgment reflect the recommendations of the Committee

12 While there are differences between section 30 of the 1872 Act and section 8 of the 1988 Act (including the new language of section 8(6), reflecting recommendations made by the Budd Committee) it does not appear from the (brief) discussion in its Report that the Budd Committee regarded such changes as having any radical impact on the basis on which a bankruptcy summons might be dismissed.

13 That being an act of bankruptcy under the Bankruptcy Act 1869 (as it was in this jurisdiction by virtue of section 21(3) of the 1872 Act and continues to be by virtue of section 7(1)(d) of the 1988 Act)

debtor had departed his dwelling house announced nothing as he "*may have gone to bury his wife or his mother, or to a meet of foxhounds*." [14] In his opinion the petition was irregular because it did not conform to the law and could not be corrected by amendment. On appeal James LJ stated that to allow the appeal would be "*an encouragement to slovenly procedure*". The defect was, in his view, more than a matter of form: *"[t]he Act says you must tell the debtor what the act of bankruptcy is which you allege against him, so that he may have an opportunity of contesting it in the first instance.*"

36. The defect in *In re Skelton* was, therefore, a failure to conform with the provisions of the statute such that the petition failed to set out any act of bankruptcy.

37. While I have not been able to locate the report, no issue concerning an excessive demand and/or a dispute as to the amount due appears to have arisen in *In re Collier ex p Dan Rylands Ltd* (1891) 64 LT 742 either. Rather the issue appears to have been as to whether a company could be a petitioner and the proofs required in that context. It is clear from the passage from the judgment of Cave J set in *O' Maoileoin* that he emphasised the penal nature of the bankruptcy regime, from which it followed that "*it was important to see that the necessary preliminaries were complied with.*"

38. In *Re OCS (A Debtor)* [1904] 2 KB 161 the issue was that the bankruptcy notice was founded on two judgment debts which – so it had been held by the Court of Appeal in In re Low [1891] 1 QB 147 - was of itself a fatal defect. No issue of that kind is raised here. In any event, the Court of Appeal in *OCS* declined to allow an amendment of the notice because the defect was not, in the view of the Court merely formal and, while it was said that no injustice would be done by allowing an amendment, the Court was not sure of that and, in any event, "*we ought to be very careful about allowing an amendment of a bankruptcy notice, which is to some extent a penal proceeding*." [15]

39. Overstatement of the debt due was the issue in in *Re A Debtor*, *478 of 1908* [1908] 2 KB 684. The petitioning creditors had obtained judgment against the debtor. Some payments had been made against the judgment. A bankruptcy summons was served on the debtor which included an amount for interest. However, the interest was miscalculated, with the result that the amount set out in the summons (which was in excess of £948) overstated the actual liability of the debtor by between £1 and £2. The Court of Appeal held that this error was fatal. Cozens-Hardy MR considered that, as a matter of principle, it could not be said that to "*claim payment from a man of that which never was due from him*" was a mere formal defect. The defect was substantial. In his view, that conclusion was supported by authority. [16] Farwell and Kennedy LJJ gave judgments to similar effect.

40. The final case referred to in *O' Maoileoin* was another decision of the Court of Appeal of England and Wales, *In Re A Debtor* [1938] Ch 694. There the issue was that the

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[14] At page 980.

[15] Per Vaughan Williams J at page 162.

[16] Including a decision – *In re Threadwell* – where it appears a bankruptcy notice was set aside for failure to give a credit from the judgement debt. *In re Threadwell* does not appear to be reported and it is not clear from the discussion of it in *Re A Debtor, 478 of 1908* what were the circumstances in which that credit arose.

judgment on which the bankruptcy notice was founded was for a debt which, in part, pre-dated the enactment of the Law Reform (Married Women and Tortfeasors) Act 1935. The significance of that fact was that, while the Act made a married woman amenable to bankruptcy, it prohibited enforcement of pre-Act obligations in bankruptcy. The Court (per Greene MR) considered that the notice was bad, the notice being an enforcement step (and not, as was argued by the creditor, a step preliminary to enforcement) that had issued in the face of a statutory prohibition. In the circumstances the notice was a nullity and the debtor's failure to pay the amount set out in it could not be regarded as an act of bankruptcy.

41. According to Hamilton P:

> *"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 a 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.****" (at page 654; emphasis supplied)*

42. The next relevant recorded Irish decision is that of the High Court (Murphy J) in *In re Sherlock (a Bankrupt)* [1995] 2 ILRM 493. Mr Sherlock sought to show cause against his adjudication as a bankrupt pursuant to section 16 of the 1988 Act. The relevant facts were that the petitioning creditor had, subsequent to obtaining judgment against the debtor (for £167,506.92), received a payment in respect of interest from a garnishee which was not reflected as a credit in the bankruptcy summons (the credit involved was in the order of £1,000). Murphy J was in no doubt that the failure to credit the payment was inadvertent and also observed that "*on any computation, the amount due by the bankrupt far exceeds the minimum sum required to found an order for adjudication*." [17] However, having referred to *O' Maoileoin* and the authorities cited by Hamilton P, Murphy J concluded that "*applying those principles to the present case where I have accepted that the sum demanded of the debtor exceeded the amount due by more than £1,000, it follows that the cause shown must be allowed and the adjudication set aside*."

43. Some months before the High Court's judgment in *Sherlock*, the Supreme Court gave an *ex tempore* decision in an appeal, *In the matter of a Bankruptcy Summons by St Kevin's Company against a Debtor* (Unreported, 22 January 1995). The judgment(s) of the Court do not appear to survive (and appear to have been delivered *ex tempore*) but there is a detailed note on the decision available [18]from which it appears that the debtor contended

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[17] At page 495

[18] O' Higgins, "Challenging a Bankruptcy Summons – A New Way Out for Debtors", 1995 *Commercial Law Practitioner* 173-176

that, post-judgment, an agreement had been reached under which the debtor's liabilities would be compromised by the payment of a much-reduced sum. There was, it seems, no dispute that such a compromise had been agreed but the Credit Union argued that the agreement had lapsed due to the debtor's failure to pay the compromise sum. In response the debtor said that he had transmitted the money to his solicitors for payment on to the creditor and that, in any event, the agreement remained operative unless the Credit Union advised him that it would lapse unless payment was made within a specified period. The High Court Judge (as it happens, Murphy J) preferred the arguments of the Credit Union and declined to dismiss the summons. The Supreme Court reversed on the basis that there was clearly an issue for trial for the purposes of section 8(6)(b) from which it followed that the summons had to be dismissed.

44. While the author of the note offers a comment to the effect that the decision might prompt the legislature to amend the 1988 Act so as to take account of "*the loophole which subsection 8(6)(b) undoubtedly affords*", it is clear from the note that there was a substantial issue between the parties which required to be determined. Furthermore – and this appears to me to be an important point – the debtor's defence went to the entirety of the judgment debt. It appears not to have been the case – as it was in Sherlock – that there was an undisputed debt "*far exceed[ing] the minimum sum required to found an order for adjudication.*"

45. There are a number of subsequent Irish decisions to which I will come but it seems appropriate to pause here, given that those later decisions all proceed on the basis that the law was settled by the three decisions just referred to.

46. The result in *Sherlock* appears to me to be rather surprising. The error identified by the debtor equated to less than 0.6% of the debt claimed by the creditor and the remainder of the debt was undisputed. Thus, it was not in dispute that the debtor owed an amount that exceeded the then statutory minimum of £1,500 by a multiple of more than 100. It is not obvious to me from reading the judgment of the High Court in *Sherlock* why that undisputed fact appeared to be considered as wholly irrelevant to the question of whether the adjudication should be set aside. Instead, the Court appears to have proceeded on the basis that the authorities cited by Hamilton P in *O' Maoileoin* and, in particular, the judgment of Cozens Hardy MR in *In re A Debtor* dictated that the debtor must necessarily succeed. Notably, the conclusion of the Court was not explained by reference to any specific provision of the 1988 Act and no reference is made in the judgment to section 8(4). Equally, no reference is made in *Sherlock* to the terms of the relevant Rules and there is no discussion of whether, even if the approach articulated by Hamilton P in *O' Maoileoin* was the appropriate approach to the 1872 Act, a different approach to the 1988 Act might be warranted.

47. I confess that I do not find the reasoning of Cozens Hardy MR in 1908 either attractive or convincing in 2020. Accepting for the purpose of this analysis the premise that the bankruptcy code is to be characterised as penal– and it may be thought that there is some scope for debate about that in light of the ongoing reform of the bankruptcy regime

beginning with the enactment of the 1988 Act and continuing with further significant change in recent years including the reduction of the basic period of bankruptcy from 12 years to 3 years and now to 1 year – it is not obvious to me how it flows from that premise that **any** error in the amount set out in a bankruptcy summons must necessarily and without qualification be deemed fatal to it and/or to any subsequent adjudication. Notably, such an approach is not (as I understand the position) actually taken in the context of criminal law. For instance, the misstatement in an indictment of a monetary amount allegedly stolen, or of the value of goods allegedly stolen, will not necessarily result in the dismissal of the indictment. On the contrary, such an error can be cured by an amendment to the indictment, at least in the absence of some unavoidable prejudice. [19] Equally, a tax demand will not necessarily be set aside on the basis that it misstates the amount of tax due.

48. To this it may be said that a debtor is prejudiced by being made subject to pay a sum that is not in fact due and statements to that effect are to be found in the passages I have set out above. But, as was observed by the Court of Appeal of England and Wales in *In re a Debtor* (No 1 of 1987) [1989] 1 WLR 271, and the subsequent decision of the Chancery Division (Hoffman J) in *In re A Debtor* (No 490-SD-1991) [1992] 1 WLR 507 (both cited by Revenue in this appeal), it is always open to a debtor to pay the undisputed portion of the debt and then to dispute any additional alleged liability. Furthermore, while the position might arguably be different if there is genuine uncertainty as what is due, in *Sherlock* (and in *In re A Debtor* (1908)) the debtor was in a position to calculate with precision the portion of the claimed amount that was undoubtedly due but, it appears, made no attempt to discharge that amount.

49. No doubt, where the correct amount due is less than the statutory threshold or where (as in *In the matter of a Bankruptcy Summons by St Kevin's Company against a Debtor*) the entire debt is disputed (on sufficient grounds) or there is a dispute about such part of the stated debt as would (or might) bring it below the statutory threshold, the rationale for dismissing the summons is clear. Where, however, any error or dispute would not bring the debt below the statutory threshold, it is not obvious to me why the presentation or further prosecution of bankruptcy proceedings should effectively be barred. Notably, that does not appear to be the approach that appears to be taken in the context of winding-up petitions on the company side: see *Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd* [1996] 1 IR 12, at 24-25.[20]

50. In any event, there are a significant number of decisions post-dating the decision in *Sherlock*, many of them referred in in the written and oral submissions on this appeal, in which this issue has been considered. In *Minister for Communications, Energy and Natural Resources v MW* [2009] IEHC 413, [2010] 3 IR 1, the applicants claimed that the

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[19] See the discussion in *Walsh on Criminal Procedure* (2nd ed; 2016) at para 18-100 and following

[20] The intended petition in *Truck and Machinery Sales Ltd* was not based on a section 214(a) 21 day demand (now section 570(a) of the Companies Act 2014) so, to that extent, the position was not on all fours with a challenge to the validity of a bankruptcy summons based on an error in the debt demanded and/or a dispute about part of that debt but the logic of the judgment of Keane J would appear equally applicable where a corporate debtor seeks to dispute a part of the sum demanded by such a notice where the undisputed portion is in excess of the statutory threshold.

respondents were indebted to them in a substantial amount in respect of costs and interest arising from the *Bula/Tara* litigation. Several arguments were advanced by the respondents, including that part of the amount claimed in respect of interest was statute-barred. Having examined the authorities, including *O' Maoileoin, St Kevin's Company against a Debtor and Sherlock*, the High Court (McGovern J) found that "*a real and substantial issue and one which is, at least arguable and which has some prospect of success*" [21] had been established by reference to the limitation argument and held that, having regard to section 8(6)(b) of the 1988 Act and following the decision of the Supreme Court in *St Kevin's Company against a Debtor*, he had to dismiss the summons. He did so "*with some disquiet and misgivings*" given that it was evident that the respondents were very significantly indebted to the applicants. [22]

51. The threshold test articulated by McGovern J in *Minister for Communications v MW* was applied by the High Court (Dunne J) in *Allied Irish Banks v Yates* [2012] IEHC 360. Notably, Dunne J rejected an argument made by the bank that the summons could only be dismissed if in fact there was no sum due or a sum less than the statutory threshold (then €1,900) and that, given that there was no dispute that a sum in excess of that amount was due, the application had to be dismissed. In support of that argument, the bank referred to the wording of the bankruptcy summons. While the High Court allowed that the wording was open to such an inference (that any dispute had to go to the entirety of the debt or such of it as would being the debt below the statutory threshold), in its view such an inference "*flies in the face of the long and well-established authorities to which reference has already been made*" which included *O' Maoileoin* and *Sherlock* as well as the decisions cited in *O' Maoileoin* , in particular *Re A Debtor* [1908] 2 KB 684. [23] On the evidence, Dunne J held that a number of issues had been raised concerning the correctness or otherwise of the petitioner's calculation of the amount due by the debtor which were "*real and substantial and have some prospect of success*" and which would have to be litigated separately outside the bankruptcy process. Accordingly, the bankruptcy summons was dismissed.

52. In *Marketspreads Limited v O' Neill and Rice* [2014] IEHC 14 the High Court (again, Dunne J) rejected an argument made on behalf of the debtor that the "*real and substantial issue*" test was overly demanding from the debtor's point of view and was not consistent with the decision of the Supreme Court in *St Kevin's Company against a Debtor*. Noting that there was no written judgment in that case, Dunne J nonetheless stated that it was clear that the Court was of the view that there should not be an investigation into the merits of the case once it was clear that an issue arose. However, "*an unreal or illusory issue*" should not result in the dismissal of a bankruptcy summons. [24] The Judge expressed the view that the approach adopted in cases where summary judgment was sought was of assistance in considering the test identified by McGovern J

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[21] At para 24.

[22] Para 25.

[23] At pages 10-11. No express reference is made in this context to the actual terms of Order 76 itself

[24] At page 23

(in *Minister for Communications v MW*). Dunne J then looked at the various arguments advanced by the debtors and concluded that none reached the real and substantial threshold and so the applications to dismiss the bankruptcy summonses failed.

53. There is then an important decision of the Supreme Court, *Murphy v Bank of Ireland* [2014] IESC 37, [2014] 1 IR 642. In *Murphy*, the debtor argued that the amount set out in the bankruptcy summons exceeded what was actually due because it failed to give credit for payments made (by a tenant of the debtor to the debtor which the bank then credited to his loan account) in the period between judgment and the issuing of the bankruptcy summons. The judgment obtained by the bank was in an amount in excess of €9 million, whereas the payments made amounted to €4,025. The fact of those payments and the fact that they had not been credited against the judgment amount set out in the demand and in the bankruptcy summons was not in dispute. However, the bank contended that the amount stipulated in the summons (and previously demanded by it) did not, in fact, exceed what was due by Mr Murphy because the summons amount did not include Courts Act interest on the judgment amount. Again, it was not in dispute that the applicable Courts Act interest far exceeded the amounts paid by the debtor.

54. In the High Court decision in *Murphy* [2011] IEHC 541, McGovern J refused to set aside the adjudication on the basis that, even allowing for the missing credits, the debt due by the debtor *exceeded* considerably the amount set out in the demand and in the summons. There was, therefore, no issue of an excessive demand having been made and authorities such as *O' Maoileain* were not on point. On appeal, the Supreme Court upheld that decision by a 2:1 majority, with Dunne J giving the majority judgment (MacMenamin J agreeing) and McKechnie J dissenting.

55. In her judgment, Dunne J reviewed the authorities in detail. Ultimately, she agreed with the approach taken by the High Court. The key factor, in her opinion, was that the sum actually due to the bank was significantly in excess of what was demanded so that the demand was not excessive. Her reasoning is evident from the penultimate paragraph of the judgment, which is in the following terms:

> *"[101] It has been noted time and again that the consequences of adjudication in bankruptcy are penal in nature and for that reason strict compliance with the Bankruptcy code is necessary before an individual can be adjudicated a Bankrupt. The requirement of strict compliance is to protect debtors from being adjudicated in respect of a sum that is not due but it is difficult to see how the requirement for strict compliance could be relied on to annul an adjudication in Bankruptcy because of an apparent failure to give credit for a payment made in reduction of the overall sum due when the sum actually due is greater than the sum demanded on the Bankruptcy Summons. As I have said, the purpose of the requirement of strict compliance is to ensure that an individual is not adjudicated bankrupt in respect of a sum which is not due. It is difficult to see how that requirement could be used for the benefit of a debtor and to the detriment of a creditor in circumstances where*

the debtor was not asked to pay more than was due but, in fact, was asked for less than was due."

56. McKechnie J took a different view. In his opinion, once the creditor specified the sum being demanded, it was by reference to that sum only that any issue of default falls to be assessed. The sum demanded "*must be due and owing and immediately payable*" [25] If the amount demanded exceeded the amount due (after allowance for any and all just credits), it was an excessive demand unjustified by law. Neither the margin of excess nor the fact (if fact it be) that the excessive demand was due to inadvertence or other understandable reason was irrelevant. [26] In the case before the court, the demand was for the judgment amount – not for that amount plus Courts Act interest. It followed, in McKechnie J's opinion, that the amount set out in the demand and in the summons was excessive because it failed to allow a credit for the payments made after judgment was obtained.

57. There does not appear to have been any dispute in *Murphy* that, in the event that the amount set out in a bankruptcy summons exceeds the amount actually due by the debtor, the summons would be invalid. In any event, that was clearly the view taken by McKechnie: see the principles summarised at paragraph 54 of his judgment. Though Dunne J did not express her views in quite the same way as McKechnie J. did, it is clear from her judgment that she also proceeded on the basis that, if in fact there had been an excessive demand, the bankruptcy summons would have been bad and the adjudication of the debtor would have had to be set aside.

58. Before leaving *Murphy*, I would observe in passing that the recent authorities from England and Wales that Revenue relied on in this Court do not appear to have been cited to the Supreme Court. It also appears from the judgments that the Court was not asked to review or reconsider the earlier Irish authorities.

59. The final decision I shall refer to is another decision of the Supreme Court, *Minister for Communications, Energy and Natural Resources v Wood & Wymes* [2017] IESC 58. [27] This involved the same parties as the decision of McGovern J in *Minister for Communications, Energy and Natural Resources v MW* [2009] IEHC 413, [2010] 3 IR 1 and involved appeals by Messrs Wood and Wymes from the refusal by McGovern J to dismiss later bankruptcy summonses arising from the same orders for costs. Dunne J gave a judgment setting her reasons for dismissing the appeals, with Denham CJ and Charleton J agreeing with that judgment. That judgment gives further guidance as to the threshold test to be applied where there is said to be an issue as to the amount due by the debtor such as to warrant the dismissal of a bankruptcy summons by reference to section 8(6)(b) of the 1988 Act.

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[25] Para 54(v)

[26] Para 54(vi) & (vii)

[27] A number of other High Court decisions were cited to us, including *ACC Loan Management v Murphy* [2015] IEHC 96, *MG v KM* [2015] IEHC 43 and *Gladney v POM* [2015] IEHC 718, all decisions of Costello J. It is not necessary to refer to those decisions in this context

60. Approving again (this time as a Supreme Court judge) the test articulated by McGovern J in *Minister for Communications, Energy and Natural Resources v MW*, Dunne J emphasised "*that the issue must be a real and substantial issue*" that "*should not be fanciful or unreal*". It may be an issue of fact or law. If an issue of fact, "*it must have some credibility*". [28] If an issue of law, where the issue was one as to which there was no doubt, that could not justify dismissing the summons. As she had done in her judgment in the High Court in *Marketspreads Limited v O' Neill and Rice*, Dunne J expressed the view that the principles applicable to applications for summary judgment were of assistance. In looking at the situation overall "*one must of course consider whether what is deposed to on affidavit by the applicant is credible.*" [29] Referring to the decision of the High Court in *McGrath v O' Driscoll* [2007] ILRM 203, Dunne J stated that she would adopt the approach adopted by Clarke J there "*so that 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*." [30] Dunne J then went on to closely examine the various arguments made by the appellants before concluding that none satisfied the threshold of "*real and substantial issue*" and dismissing the appeals.

61. The Revenue's written submissions invite this Court to "*use the opportunity presented by the facts in this case to review the position in Irish Law where a debtor/respondent to a bankruptcy summons claims an entitlement to a credit which would have the effect of reducing the sum to a sum less than the sum claimed in the Bankruptcy Summons"* with the Court being invited to take the view that, where there has been no attempt to discharge "*the undisputed element of a demand*" – though presumably only in those cases where that "*undisputed element*" exceeds the statutory threshold - a court should adjudicate the debtor bankrupt on that basis. In other words, the Court is invited to take the approach that appears now to be taken in England and Wales. [31]

62. A significant difficulty with that invitation is that the explicit premise on which it is extended – namely that this Court is being asked to "*review the established jurisprudence of the High Court*" – is very questionable. In light of the decisions of the Supreme Court in *Murphy v Bank of Ireland and Minister for Communications, Energy and Natural Resources v Wood & Wymes*, it appears to me that there is a strong argument that if the "*established jurisprudence*" in this area is to be reviewed, such an exercise can only be undertaken by the Supreme Court. In any event, even if it were open to this Court to review the "*established jurisprudence*" as suggested, it appears to me that the Court would require far more detailed argument than it has heard in this appeal before it could properly do so.

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[28] At page 4
[29] At page 5
[30] Also at page 5
[31] Para 4.13 of Revenue's written submissions. See also para 4.10.

63. In these circumstances, I propose to assess the arguments made by the Debtor here on the basis of the approach set out by the Supreme Court in *Minister for Communications, Energy and Natural Resources v Wood & Wymes* and thus to consider whether the Debtor has demonstrated that there is a "*a real and substantial issue and one which is, at least arguable and which has some prospect of success*" to the effect that the sum set out in the Bankruptcy Summons here (and previously set out in the Demand made of the Debtor) in facts exceeds the sum "*due and owing and immediately payable*" by him. That was, of course, the test applied by the Judge.

The Alleged Failure to Make Allowance for a €71,030 "overpayment" of Stamp Duty

64. The essential facts relating to this alleged "*overpayment*" have already been set out. There are two aspects – one of fact and one of law. The issue of fact is whether there was any such "*overpayment*". The issue of law is whether, even if there was any such "*overpayment*", the Debtor (rather than the Client) was entitled to a credit for it.

65. Before addressing these issues in more detail, it will be recalled that the amount set out in the Bankruptcy Summons - €405,808.02 - was based on seven separate judgments entered against the Debtor on various dates between September 2011 and January 2015. If – as is now suggested by the Debtor – a "*refund*" of €71,030 was due to him as and from February 2009 – before even the first of the actions against him brought by Revenue - his failure to assert an entitlement to that refund and/or a consequent entitlement to a set-off or credit in that amount against Revenue's claims against him appears inexplicable. The explanation offered – to the effect that the claims against the Debtor were summary in nature and thus no set-off could easily be asserted – is, in my opinion, wholly implausible. It is also inexplicable why, in the detailed submission made by counsel to Revenue on his behalf in November 2014, no reference was made to any refund being then due to the Debtor.

66. As to whether there was any "*overpayment*" of the Client's tax liabilities, the first point to make is that there is no evidence before the Court as to the precise extent of those liabilities. There is evidence of the extent of his liabilities in respect of Stamp Duty arising from two specific transactions – the purchase by him of the H Lands and the O' C Lands. That may or may not be the extent of his liabilities in respect of Stamp Duty. What is clear, however, is that, unfortunately, the Client had significant other liabilities to Revenue over and above his liabilities arising from the purchase of the H Lands and the O' C Lands. These liabilities related to income tax and CGT. While significant sums appear to have been attached in respect of those liabilities, the evidence does not enable the Court to form any view as to whether undischarged income tax and CGT liabilities remain on the part of the Client.

67. A second – and related – point is that the evidence before the Court clearly suggests that there is an undischarged and significant liability for Stamp Duty in relation to the O' C Lands. In so stating, I do not overlook the point the Debtor makes to the effect that the Revenue agreed that this liability would be discharged from the monies due to the Client from the Department of Agriculture and also represented to him that this had in fact been

done. However, the evidence of Mr Hayes to the effect that the attached monies were, **as a matter of fact**, wholly applied (and, in the view of Revenue, had to be applied) to the discharge/reduction of the Client's income tax and CGT liabilities, (and not to his Stamp Duty liabilities), does not appear to be challenged and it is difficult to see any basis on which it could be challenged.

68. Accordingly, the evidence before the Court clearly indicates that, far from the Client having overpaid his tax liabilities or being due a refund from Revenue, he has a significant residual Stamp Duty liability arising from the purchase of the O' C Lands. [32] In any event, even if some or all of the monies attached by Revenue *had* been applied in discharge of the Client's Stamp Duty liabilities, his income tax and CGT liabilities would have been left unreduced *pro tanto*. Either way, the evidence before the Court is wholly at odds with any suggestion that the Client had overpaid his tax liabilities and was due a refund and with any suggestion that the Debtor might have had any reason to believe that to be the case.

69. I turn now to the specific documents relied upon by the Debtor. The first is a letter from Revenue to the Debtor of 27 March 2009 to the Debtor which indicated that Revenue was prepared to mitigate the penalty payable in relation to the Stamp Duty on the H Lands from €76,030 to €49,957.07. On that basis, the letter then calculated what was due *after* applying what is referred to in the letter as a "*deposit*" of €91,850 – which was the sum that had been paid by the Debtor as of that date. That amount – the balance due *after* crediting the amount paid by the Debtor – is €44,957.07.

70. Next there are two Revenue letters dated 18 May 2012, one dealing with the H Lands and the other dealing with the O' C Lands. Both letters were signed by the same Revenue officer, to whom I shall refer as ID. As to the former, the letter states that whereas the duty had been paid, only €5,000 had been paid toward interest of €49,000. It notes that a total of €91,850 (the amount paid by the Debtor) had been received. The letter goes on to state that the outstanding liability, including late penalty and interest, was now "*frozen*" at €71,030 (€76,030 minus the €5,000 credited against interest/penalties). These figures were consistent with the figures set out in the letter of 27 March 2009, the difference between the balance stated in the earlier letter and the "*outstanding liability*" set out in the later letter being related to the mitigation of the penalty. [33] The letter of 18 May 2012 concludes by stating (in bold type) that *"[o]n instruction from John A Tobin I agreed to transfer €71,030 to [this account] from payments already received from the Forest Service, Dep of Agriculture Food & the Marine"*. In other words, the letter is indicating that the "*outstanding liability*" would be discharged from the Forestry Service payments.

71. The other letter of 18 May 2012 discloses a total Stamp Duty liability of €317,080 (inclusive of interest and late surcharge) then owing in relation to the purchase of the O' C Lands. Again, the letter concludes by reciting the writer's agreement, on the instruction

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[32] Which, in his affidavit of 26 January 2017, the Debtor quantifies €185,400 plus interest and charges, totalling €317,080.00

[33] The submission made to Revenue in November 2014 to which I have previously referred states that a Notice of Assessment assessing a balance due of €71,030 issued in January 2012. That Notice is not before the Court

of the Debtor, to transfer €317,080 to the relevant Stamp Duty account from payments already received from the Forestry Service.

72. As already noted, there is a dispute as to whether and/or when Revenue informed the Debtor that it was not possible to apply the attached monies to the Client's Stamp Duty Liabilities. Pat Molan – at the relevant time a Principal Officer in Revenue – avers that he communicated this to the Debtor on or about 9 March 2012 but that is disputed by Mr Tobin. That issue cannot be – and does not need to be - determined on this appeal.

73. The Debtor paid a further amount of €5,000 towards the Client's Stamp Duty liability in respect of the H Lands in the course of 2015. [34] This payment is of some significance because, if it was the case that the Debtor considered at that stage that not merely had the liability been fully discharged, but that in fact a significant refund was due (whether to the Client or to the Debtor), then obviously there would have been no basis for making any additional payment at that stage. It is also significant that, as the High Court Judge observed, in a letter written to Revenue shortly before this payment was made – on 27 March 2015 – the Debtor made no suggestion that any credit/refund was due to him or, more generally, that he had any answer to the various judgments that had been obtained against him by that point.

74. Reliance is then placed by the Debtor on his averment (in para 5 b) of his affidavit of 28 June 2017) that, in or about October 2015, at a meeting with Revenue in Limerick "*it was acknowledged to me that I was entitled to a tax credit in relation to the Stamp Duty which had been overpaid and that the credit in this regard would be arranged*." However, the affidavit does not identify who made this acknowledgement on the part of Revenue or explain the context in which it arose or how, at that stage, it was considered that there had been an "*overpayment"* of Stamp Duty.

75. I next come to the document most heavily relied on by the Debtor, a further email from ID sent in January **2017** (i.e. some considerable time after the presentation of the Petition). Before discussing the content of that email, I should note that, in December **2015**, the Debtor had been written to by a different officer of Revenue, a Ms Hendrick, and advised that all future correspondence to or contact with Revenue's Limerick District should be directed through her. In any event, ID's email of January 2017 referred to the payments made by the Debtor (a total of €96,850) and then stated that:

> *"Prior to May 2012 an amount of €71,030 was transferred from the Department of Agriculture & Forestry grants of [the Client] and* ***requested to be applied*** *to Stamp Duty.*
>
> *Effectively a total of €167,880 was paid &* ***earmarked*** *for Stamp Duty, notwithstanding that the agreed liability was €96,850.00 The Stamp Duty Certificate, which ultimately issue in September 2015, confirms that amount.*

[34] It appears that a draft in this amount was tendered by the Debtor by way of a "*without prejudice*" offer in April 2015 and accepted by Revenue in September 2015, following which the Stamp Duty Certificate issued

In the circumstances therefore it would appear on the face of it that John Tobin is due a credit of €71,030.00." (emphasis supplied)

76. The precise circumstances in which this document came to be written are unclear, but it is reasonable to assume that it was procured by the Debtor. In any event, the Debtor was well aware that the suggestion that a "*credit*" was due to him was untrue. While apparently endeavouring to give the impression that the amount of €71,030 had in fact been applied against the Client's Stamp Duty liabilities (in which context I note the highlighted text above), the email stops short of actually stating that it was and the Debtor in any event knew that it had not been – the whole thrust of the submission made on his behalf to the Revenue in November 2014 was that the Revenue should have so applied the attached monies but had wrongfully failed to do so. [35] Secondly, the Debtor was well aware that the "*agreed liability*" had not been €96,850. Revenue's letter of 27 March 2009 had indicated a total liability (after mitigation of penalty) of €136,807.7 and ID's letter of 18 May 2012 had indicated an even higher total liability of €162,880 (€91,850 + €71,030). If €71,030 had been available to be applied to the Stamp Duty liability in relation to the H Lands in May 2012, it would have simply discharged the "*outstanding liability*" in that amount and there would have been no question of an overpayment. In fact – as certainly the Debtor knew and as ID must surely have been aware also – it was precisely *because* nothing more could be recovered from or on behalf of the Client that Revenue had ultimately (and, the evidence suggests, reluctantly) accepted a further payment from the Debtor of €5,000 in 2015 as discharging the Client's remaining liability in respect of the H Lands.

77. I should next record that on 16 February 2017 - 3 weeks after ID's email - Revenue's District Manager, Tom Murphy, wrote to the Debtor with reference to that email.[36] Having referred to the December 2015 letter from Ms Hendrick (already referred to above) Mr Murphy went on to state that *"[ID] issued that email without reference to Ms Hendrick, myself or any other officer currently dealing with the case and, as such, [ID] did not and does not have the authority to deal with this case on behalf of Revenue."* This statement by Mr Murphy was, it appears, not contradicted or challenged at any stage by the Debtor, either in contemporaneous correspondence or on affidavit subsequently. The letter then went on to explain why it was not the case that any credit was due to the Debtor, explaining (as had been explained previously to the Debtor) that all sums received by Revenue on foot of the Notices of Attachment issued by it had been brought to account against outstanding liabilities of the Client in respect of income tax and CGT and were not available for off-set against any other tax liabilities. As I have said, that does not appear to be disputed as a matter of fact.

78. While the Debtor asserts that a credit/refund was due to him, that assertion is, in my opinion, wholly lacking in credibility for the reasons I have indicated and does not derive

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[35] For completeness, I should record that a comprehensive response to this submission was issued by Revenue in March 2015

[36] This letter was not before the Judge. It was exhibited in an affidavit sworn by Mr Murphy on the Revenue's behalf in March 2018, apparently in response to a query raised by this Court in the context of the Debtor's application to extend time for appeal. It is not clear why this letter – which is obviously significant was not made available to the High Court Judge

any credible support from the documents relied on by the Debtor, including the email of January 2017. There was no overpayment of the Client's liabilities and the Debtor was at all times fully aware of that fact. If there was no overpayment, then no question of any refund or credit – whether in favour of Client or Debtor – could possibly arise.

79. It follows that, as a matter of fact, the Debtor has not established any "*real and substantial issue*" that the amount set out in the Bankruptcy Summons overstated the Debtor's liability by failing to allow him a credit in the amount of €71,030 in respect of any supposed overpayment of Stamp Duty.

80. Even if the position were otherwise, and assuming that (contrary to the finding just made) the Debtor had established some credible basis for contending that there had been an overpayment of Stamp Duty, a further hurdle would then confront the Debtor here, namely how such an overpayment might plausibly give rise to an entitlement to a refund or credit on the part of the Debtor, rather than the Client (who was, of course, the chargeable person at all times).

81. The High Court Judge noted in her judgment that Counsel for the Debtor had not been able to point to any authority that might support the proposition that the Debtor - not being the chargeable person - might nonetheless be entitled to receive the benefit of any refund/credit arising from an overpayment of liability. Equally, no argument was advanced in this Court to the effect that the Debtor could have any statutory or other entitlement to receive any refund/credit, in circumstances where he was not the chargeable person.

82. What was argued before this Court was that, on the particular facts here, the Debtor would have been subrogated to the position of Revenue and would have been in a position to seek a garnishee order directing the payment of the monies to the Debtor. That, it is said, would have "*accommodated a credit and/or a set-off*". [37] The decision of the Court of Appeal of England and Wales in *Orakpo v Manson Investments Ltd* [1977] 1 All ER 666 was cited in support of that submission and Orakpo was also relied on by Mr O' Donnell SC in his oral submissions.

83. The facts in *Orakpo* were complex. Briefly, the defendants were registered moneylenders who had lent money to the plaintiff, a property dealer, to enable him to complete a number of separate property transactions. The transactions were completed but the plaintiff brought proceedings asserting that the lending transactions were unenforceable because they did not comply with the relevant provisions of the Moneylenders Act 1927. By way of counterclaim, the defendants claimed to be entitled, by way of subrogation, to unpaid vendor's liens and/or equitable charges (depending on the circumstances of the particular transaction) in relation to the transactions. The counterclaims failed on the basis that they were statute-barred, even though the substantive issues were determined in the defendants' favour.

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[37] Debtor's written submissions filed on 11 May 2018, at para 34

84. The facts in *Orakpo* are obviously remote from the facts here but the Debtor relies on the following holding of the Court (as stated in the headnote):

> *"Where a person lent money to another ('the borrower') for the purpose of paying off an existing debt of the borrower to a third party, the doctrine of subrogation did not operate to make the lender an assignee of the third party's rights; the effect of the doctrine was that the lender was treated in equity as if he were an assignee of the third party's rights to the extent necessary to enable him to exercise those remedies against the borrower which the third party could have exercised but for the payment to him, and subject to all equities and set-offs which the borrower might have against the lender. It followed that, for the defendants to be able to assert against the plaintiff the rights to which they had been subrogated, they did not have to show a cause of action based on any contract, i.e. on the loan contracts".*

85. I do not understand how this statement of principle is said to assist the Debtor here. In brief, what the Court of Appeal held was that where a lender (L) lent money to a borrower (B) for the purpose of paying off an existing debt of B to a third party lender (TP), L was treated in equity as if it were the assignee of TP's rights to the extent necessary to enable L to exercise those remedies against B which TP could have exercised absent repayment of TP. Here, there was no loan. Rather, so far as the evidence goes, it appears that the Debtor unilaterally decided to make a payment against the Stamp Duty liabilities of the Client arising from the purchase of the H Lands. A more fundamental problem, from the Debtor's point of view, is that such a payment at most might enable the Debtor to exercise the remedies that *Revenue had against the Client*. It would not, on any view, give the Debtor a remedy *against Revenue* or any claim *against Revenue* (including any claim to a credit or set-off as against Revenue in respect of the Debtor's indebtedness to it). In other words, L steps into the position of TP *vis à vis* B (subject to any equities and/or set-offs that B may have against L). It seems to me that a real issue arises as to how such subrogation might apply where TP is (as here) a statutory body which has a variety of statutory remedies available to it that may not be available to other persons but, even if one overlooks that potential difficulty, the fundamental point is that the doctrine of subrogation would not appear to give the Debtor any remedy or claim *against Revenue*. Rather it would give the Debtor a remedy *against his Client*. For whatever reason – and no explanation appears to have been provided to the High Court and certainly none was offered to this Court - the Debtor appears to have elected not to pursue any claim against the Client.

86. In these circumstances, I do not accept that, in the event that the Debtor could be subrogated to the position of Revenue, he would have been in a position to seek a garnishee order directing the payment of monies to him – if by that is meant the payment of monies to the Debtor by Revenue – or that this would have "*accommodated a credit and/or a set-off*" of the kind relied on by the Debtor here. Of course, if monies were indeed repayable by Revenue to the Client (and I have already expressed the view that there is no basis whatever in the evidence for considering that such was the position)

then, in the event that the Debtor obtained judgment against the Client for repayment of the monies paid by the Debtor to Revenue, it may be that he could have sought to garnishee that repayment. But that is unrelated to the doctrine of subrogation and no authority has been opened to this Court to suggest that the availability of garnishee in such (hypothetical) circumstances could properly be considered to give rise to a claim for "*a credit and/or a set-off*" against Revenue in any event.

87. In light of these findings, it is not necessary to consider Revenue's submission that the remedy of subrogation (as an equitable remedy) is not available where there is a common law remedy available to the claimant (as, Revenue says, there was here).

88. Therefore, notwithstanding the fact that additional arguments were advanced to this Court, I agree with the Judge's conclusion that, even assuming an overpayment of Stamp Duty, no basis has been demonstrated for contending that the Debtor would be entitled to a refund in respect of that assumed overpayment.

89. It follows, in my view, that the attack on the Bankruptcy Summons on the basis that it overstates the amount due by the Debtor fails both as a matter of fact and as a matter of law. The Summons did not overstate the amount due and the suggestion that the Debtor believed that it did is, in my opinion, wholly lacking in credibility. No overpayment had been made (as the Debtor was fully aware) and there was no basis on which the Debtor could have considered that he was entitled to any credit/refund. It follows that, regardless of whether the test is objective, subjective or some hybrid of the two (and it is not necessary to decide which it is), the Debtor has no plausible claim to have been "*confused*" by the demand made by Revenue and then repeated in the Bankruptcy Summons. Nor, in my opinion, is there any basis for any suggestion that the Debtor was "*misled*" by the particulars of demand here. To the contrary, the evidence before the Court clearly indicates that the material primarily relied on by the Debtor – the email of January 2017 - only came into existence subsequent to the making of the demand, the issuing of the Summons and the presentation of the Petition, that its issue was not authorised by Revenue and – most significantly – that the Debtor was at all times aware that the suggestion in the email that there had been an overpayment of Stamp Duty, and the consequential suggestion that the Debtor was due a "*refund*" of Stamp Duty, had no foundation whatever.

90. The exact circumstances in which the email of January 2017 came to issue are not disclosed in the papers before the Court and it would not be appropriate for the Court to go further than is necessary to dispose of this appeal. What is clear from the evidence before the Court is that the case made by the Debtor on this issue of overpayment/credit/refund is fundamentally lacking in credibility for the reasons I have set out above and no real or substantial issue has been established.

The Revenue's Alleged Delay in issuing Stamp Duty Certificates

91. The second (and subsidiary) ground relied on by the Debtor as providing a basis for setting aside the Bankruptcy Summons (and consequently his subsequent adjudication as

a bankrupt) relates to the alleged delay of Revenue in issuing a Stamp Duty Certificate in respect of the H Lands and its failure to issue such a Certificate in respect of the O' C Lands.

92. The High Court Judge saw nothing in this ground. I agree. In my view, no error on the part of Revenue has been demonstrated, less still any form of error that might give rise to an action for damages at the suit of the Debtor.

93. In the first place, insofar as it is said that Stamp Duty Certificates should have issued (in relation to the O' C Lands) or should have issued earlier (in the case of the H Lands) on the basis that the Client's Stamp Duty liabilities *were* discharged in 2012, that is not correct as a matter of fact. The evidence indicates that, as a matter of fact, the liabilities were not discharged in 2012 and that, whereas Revenue treated the H Lands liability as having been discharged when it accepted the Debtor's offer of a further payment of €5,000 (an offer made in April 2015 and accepted in September 2015 and which resulted in a Stamp Duty Certificate issuing in October 2015), the liability in relation to the O' C Lands remains undischarged.

94. Secondly, insofar as it is said that these liabilities *ought to have been* discharged in 2012, and that the Revenue's failure to do so results in a liability on its part to the Debtor, the following points appear to me to be relevant:

- It is evident that, as of November 2014 at the latest (on the Revenue's case it was much earlier, in March 2012), the Debtor was aware that Revenue had not, in fact, applied the monies attached by it from the monies due to the Client by the Department of Agriculture. That is apparent from the detailed submission made on his behalf in November 2014. It was open to the Debtor to bring proceedings against Revenue at that stage (and the November 2014 submission explicitly threatened such proceedings). For reasons which have not been explained, he did not do so.

    - As and from (at latest) March 2015, when Revenue responded to the November 2014 submission, the Debtor was on notice that Revenue's position was that it was precluded as a matter of law from applying any of the attached monies against the Client's Stamp Duty liabilities because the notices of attachment related to the Client's income tax and CGT liabilities and not to any Stamp Duty liabilities of his. No argument was made in the written or oral submissions of the Debtor in these proceedings to the effect that Revenue's position was incorrect as a matter of law.

    - Even if Revenue had agreed to apply the attached monies against the Stamp Duty liabilities (and there was a significant issue on the affidavit evidence as to what had been agreed), if (as Revenue contended) it could not lawfully do so then any such agreement was beyond the powers of Revenue and *prima facie* could not be enforced against it, whether by way of claim in contract, estoppel or legitimate expectation: *Wiley v Revenue Commissioners* [1994] 2 IR 160. No argument to the contrary was identified by the Debtor.

- Equally, the Debtor failed to articulate **any** basis on which a claim for negligence or breach of duty might be made by him against Revenue, having regard to authorities such as *Pine Valley Developments v Minister for Environment* [1987] IR 23, *Glencar Explorations plc v Mayo County Council* (No 2) [2002] 1 IR 84 and the more recent decision of *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6, [2017] 1 IR 119. That failure is particularly acute in circumstances where, as the High Court Judge rightly emphasised, the Debtor was not the chargeable person.

- As the Judge observed, significant issues arise in relation to timing and causation which the Debtor has also failed to address.

- Finally, the Debtor failed to articulate any basis on which any potential claim against Revenue for (unliquidated) damages might provide a valid basis for seeking to set aside the Bankruptcy Summons here.

95. In conclusion, this second issue is also, in my opinion, one where the Debtor simply asserts that an issue arises, without any credible basis for that assertion. No "*real and substantial issue*", with any prospect of success at trial, has been demonstrated to arise.

CONCLUSIONS

96. For the reasons given in this judgment, I would dismiss the appeals from the judgments and orders of Costello J in the High Court.

97. Though it has no impact on these appeals, in my opinion the question of what it is necessary and/or sufficient for a debtor to show by way of answer to a petition for bankruptcy, or as a basis for seeking the dismissal of a bankruptcy summons or the setting aside of an adjudication of bankruptcy, demands attention. Existing Irish authority indicates that where a debtor succeeds in establishing an issue (in the sense explained in *Minister for Communications v Wood & Wymes*) to the effect that the amount set out in the bankruptcy summons exceeds – by whatever margin – the debt actually due by the debtor, it necessarily follows that the summons must be set aside (or, as the case may be, the petition must be dismissed or a prior adjudication must be set aside). That is so, it appears, even where the undisputed portion of the debt may be many multiples of the statutory threshold. As will be evident from the discussion earlier in this judgment, I share the disquiet and misgivings expressed by McGovern J in the High Court in *Minister for Communications v MW* about such an approach. Be that as it may, if that is the correct approach, it appears to me to follow that the terms of Order 76 require urgent review. As I noted at the commencement of this judgment, Order 76 (and the forms provided for it, including most significantly the form of the bankruptcy summons prescribed for use) appears clearly to be premised on the understanding that, in order to dismiss a bankruptcy summons, the debtor is obliged to establish more than the existence of some issue that might go to the amount of the debt at issue and has to show that he/she is not indebted as claimed (i.e. not at all) "*or only so indebted to an amount of €20,000 or less*." It is on that basis – and only on that basis – that Order 76 provides

for a debtor to apply for the dismissal of a bankruptcy summons. None of the authorities referred to earlier has squarely addressed this aspect of Order 76. If the drafters of Order 76 were operating on a mistaken understanding of the law then Order 76 clearly needs to be revised. If, on the other hand, the drafters of Order 76 correctly understood the law, it appears to follow that the jurisprudence has taken a wrong turn, requiring correction from some quarter, whether judicial or legislative.