THE HIGH COURT

BANKRUPTCY

[2022] IEHC 608

[Record No. 3612P]

IN THE MATTER OF BW

JUDGMENT of Mr. Justice O'Moore delivered on the 4th day of November 2022.

1. In his judgment delivered on 30th September, 2021, Humphreys adjudicated BW bankrupt. While the decision was a relatively brief one, it very helpfully sets out the complex procedural history leading to this adjudication, the submissions made by BW in response to the petition, and the reasons for the rejection of each of these submissions.

2. By motion dated 2nd November, 2021, BW seeks to show cause against the validity of the adjudication of bankruptcy. The motion describes two reasons why it is said that the requirements of s.11(1) of the Bankruptcy Act 1988 had not been met. They are, in the words of BW's motion, that: -

> "11(1)(b) The debt relied upon in the bankruptcy summons herein was not a liquidated sum insofar as the amount claimed in the within petition and bankruptcy summons was in dispute.

11(1)(c) The Act of bankruptcy upon which the petition was founded did not occur in circumstances where the sum demanded on foot of the judgments relied upon in the petition and bankruptcy summons herein was overstated."

3. In his grounding affidavit, BW elaborates upon these assertions. He says that:-

"Two particular judgments relied upon in the Bankruptcy Summons and subsequent Petition for adjudication of Bankruptcy were in dispute and overstated. I say that this overstatement arose in part at least due to the inclusion of particulars in these proceedings which have already been the subject of earlier proceedings and has in fact been discharged. I say that the erroneous inclusion of these particulars was acknowledged by the Petitioner on affidavit."

4. BW goes on to state that "…there were further particulars contained within the Pleadings which were also disputed and which were not addressed by the Petitioner in replying affidavit during the course of proceedings."

5. In reply, the petitioner put forward an affidavit of Simon Attride. Subsequent to delivery of this affidavit, and on foot of an application by BW to seek to cross-examine Mr. Attride, most of the contents of this affidavit were withdrawn. The only relevant portions of the relevant affidavit which remain for consideration by me are the first three paragraphs (which are introductory) and the first two sentences of para. 4 of the affidavit of Mr. Attride. These sentences read as follows: -

"In response to para. 4 of the Respondent's Affidavit, I say that the Petitioner was not relying on that part of the relevant Judgments that was overstated (some €13,501.52). I say that the Petitioner was relying on additional judgment which had been obtained against the Debtor (averred to at para. 14 of the Petitioning Creditor's Affidavit of 1st April, 2021), including a judgment with €54,227.39, obtained on 12th May, 2016 and a judgment of €16,001.41, obtained on 9th September, 2016."

6. BW relies upon this portion of the affidavit of Mr. Attride in order to establish that, for the purpose of seeking to have BW adjudicated bankrupt, the petitioner was relying upon judgments other than the judgment on foot of which the bankruptcy summons was issued.

7. The affidavit of Mr. Attride is dated 10th November, 2021. In response, BW swore an affidavit on 6th January, 2022. This second affidavit was much more lengthy than the grounding affidavit sworn by BW. While I have considered all of the evidence put before me by BW in this application, I will highlight certain of the contents of his second affidavit: -

(a) BW states (at para. 3) that the amount claimed in the bankruptcy summons was not a liquidated sum because the bankruptcy summons relied on two specific High Court judgments "which were incorrect and which misled (BW) and consequently the bankruptcy summons herein should be dismissed and the adjudication of bankruptcy of 30th September, 2020 should be annulled."

(b) BW goes on to say that the petitioner, as a matter of fact, never relied on the judgments of 12th May, 2016 and 9th September, 2016 in respect of these bankruptcy proceedings and only sought to do so "retrospectively".

(c) While essentially a matter of legal submission, BW avers that the judgment of the Supreme Court in *Murphy v. Bank of Ireland* [2014] IESC 37 "was erroneously applied to the facts of this case and is not authority that the court can have regard for subsequent judgments which have not been particularised in the motion of intention to issue proceedings, bankruptcy summons or the Petition for adjudication of bankruptcy." In this regard, BW asserts that the judgment of Humphreys J is incorrect. This is a central issue between the parties, and one which I will address later in the judgment.

(d) BW sets out, at some length, certain of the procedural history of earlier actions, in the High Court, the Circuit Court and the District Court.

(e) BW goes on to refer to O.76 of the Rules of the Superior Courts, and s.8 of the Bankruptcy Act 1988. In this regard, BW recites the content of the affidavit sworn by Michael Gladney on 22nd November, 2016, which refers to debt in the amount of €249,135.85 due on foot of two specific judgments of the High Court (in proceedings record number 2013/382R and 2014/328R). BW goes on to state that the affidavit of

Mr. Gladney does not refer to any subsequent judgments or seek to rely upon any other debt.

(f) BW proceeds to set out lengthy portions of the judgment of Dunne J in *Murphy v. Bank of Ireland* judgment to which I have earlier referred.

(g) BW distinguishes the judgment of the majority in *Murphy* by reference to the fact that the further sums due in *Murphy* arose from the one judgment relied upon by the petitioner in that case; any payment made against that judgment has been offset by interest in the judgment sum. He says that in the instant case, debt on his part established by entirely distinct judgments (other than the judgments specifically relied upon for the purpose of the bankruptcy process) cannot be taken into account in assessing whether or not the sum claimed in the bankruptcy summons is actually due and owing.

(h) Finally, BW refers to passages from the judgment of Collins J in *Gladney v. Tobin* [2020] IECA 49 in which, BW says, Collins J "approved the strict requirements of compliance with the legislation and Regulations in bankruptcy."

8. Finally, the exchange of affidavits concluded with an affidavit of Joseph Howley, the Collector General. This affidavit dealt not only with the affidavit sworn by BW in the application to show cause but also with earlier affidavits sworn by BW prior to the judgment of Humphreys J in September 2021.

9. In his affidavit, Mr. Howley deals with an assertion by BW (in an affidavit of 31st May, 2021, sworn in the context of resisting Revenue's application that he be adjudicated bankrupt) to the effect that there were agreements in place between BW and Dennis I Finn Solicitors that "proceedings would issue on the basis of estimates raised by the Revenue Commissioners in relation to Circuit Court proceedings…and District Court proceedings…". Mr. Howley further gives evidence that no such "agreement" would have been required and that BW "simply had no defence to either of the proceedings…". Mr. Howley goes on to aver (at para. 9 of his affidavit) that: -

> "I further say, that neither, on the date of the issue of the bankruptcy summons, on 19th December, 2016, nor on the date of the presenting of the bankruptcy petition, on 20th April, 2017, had any VAT or PAYE/PRSI P.35 returns been made (or tax furnished in relation thereto including the 2013 Income Tax Return) that could discharge the estimates contained in the Circuit Court judgment of 12th May, 2016, nor the District Court judgment of 9th September, 2016."

Importantly, these judgment sums are described in Mr. Howley's affidavit as being respectively €54,227.39 (including costs) and €16,001.41 (including costs).

10. Mr. Howley goes on to deny the evidence of BW (in his affidavit of 6th January, 2022) that he was put at a significant disadvantage in trying to calculate the liquidated sum relating to the judgments obtained by Revenue in the High Court proceedings bearing record number 2013/382R. In fact, as Mr. Howley points out,

BW appears himself to have carried out that calculation in his affidavit of 6th January, 2022 "without any difficulties".

11. Mr. Howley goes on to give evidence that the sums of monies due by BW to Revenue at what he considers to be the relevant times. Mr. Howley says that in an affidavit he swore on 9th February, 2021 he stated that a figure of €201,066.09 was then due and owing by BW to Revenue. However, he conceded in an affidavit of 1st April, 2021 that there had been a double claim by Revenue in respect of €13,501.52. Against the sums so claimed twice, there had been a payment of €1,000. This reduced the amount of the double claim, in as much as it appeared in the figure of €201,066.09 to €12,501.52. In terms of the amount due on the judgments referred to in the bankruptcy summons and bankruptcy petition therefore, the sum was at all material times overstated by €12,501.52.

12. However, these two judgments were not, according to Mr. Howley, a comprehensive statement of the amount found by the courts to be due by BW to Revenue. He states that one must also take into account the judgments of the Circuit Court and the District Court (of 12th May, 2016 and 9th September, 2016 respectively). Para. 9 in this judgment the amounts found by the Circuit Court and the District Court on those dates to be due to Revenue by BW. These two judgments were based on estimates which Revenue was entitled to raise against BW. It is the case that tax returns were made by BW in respect of the taxes covered by the estimates, and payments were made in accordance with these returns, between June 2018 and August 2019. Mr. Howley says that there is still an outstanding amount of interest in the amount of €2,940.45 due and owing by BW to Revenue in relation to these returns.

However, such returns were made and taxes paid from June 2018 onwards. At the time that the bankruptcy summons issued, the sum stated in the bankruptcy summons to be due and owing to Revenue by BW (the amount of €249,135.85) was in fact due and owing if one takes into account the Circuit Court judgment and the District Court judgment. This was also the situation at the date of the bankruptcy petition, and the date of the swearing of the affidavit of Mr. Gladney on 14th March, 2017 grounding the petition.

13. On the uncontested evidence before me, therefore, the relevant dates appear to be the following: -

10th July, 2014 – judgment entered by Revenue against BW in the sum of €48,544.43 (including costs).

25th February, 2015 – judgment entered by Revenue against BW in the sum of €179,500.82 (inclusive of costs).

Including interest, these two judgments amount to a sum of €249,135.85 as of 18th April, 2016. However, in light of acknowledged double claim by Revenue, this amount (€249,135.85) is overstated as the sum due under the two High Court judgments either by the sum of €13,501.52 (BW) or €12,501.52 (Revenue).

26th January, 2016 – Revenue issued proceedings against BW in the Circuit Court.

10th June, 2016 – Revenue issued proceedings against BW in the District Court.

12th May, 2016 – Revenue obtains judgment against BW in the Circuit Court for €54,227.39 (including costs).

9th September, 2016 – Revenue obtain judgment against BW in the District Court for €16,001.41 (including costs).

19th December, 2016 – Bankruptcy summons requires payment to Revenue of €249,135.85 by BW to Revenue, failing which an act of bankruptcy will have been committed. This refers solely to the two High Court judgments.

14th January, 2017 – Service of the bankruptcy summons on BW.

20th April, 2017 – Revenue gives notice of a petition to seek the bankruptcy of BW.

June 2018 – BW begins the process of paying tax on foot of returns submitted in respect of the estimates which grounded the District Court and Circuit Court judgments. This process continues until August 2019.

14. In light of this evidence, and the evidence contained in the original application to adjudicate BW bankrupt, I now turn to the two issues currently argued by BW.

15. The first of these is that there was an agreement between BW and Denis I Finn, acting for Revenue, as described earlier in this judgment. In his judgment, Humphreys J found that any such agreement was unsupported by consideration and therefore was not something upon which BW could rely. BW has not really challenged this conclusion in any meaningful way. It is a finding with which I agree. BW has not therefore, on this ground, shown cause as to why the adjudication of bankruptcy is not valid.

16. The second ground advanced by BW is far more substantial. I have summarised this at paragraphs 3 and 4. Lengthy references to the judgment of Collins J in Gladney v Tobin are also relied on heavily by BW.

17. On this point, both Collins J in Gladney v Tobin and Dunne J on appeal in the same case accept that the central issue is whether the sums claimed in the Bankruptcy Summons are actually due by the debtor. This is clear from the following passage in the judgment of Collins J (referring to the judgment of Dunne J in Bank of Ireland v Murphy);

> "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…"

18. Much of the quotes from the judgment of Collins J which appear in BW's affidavit relate to a separate but related question, namely whether a Bankruptcy Summons is (or should be) considered valid and effective if the sums actually due by the debtor are less than the amount claimed in the summons but greater than the statutory threshold. Collins J rejected the invitation by Revenue in that case to review the jurisprudence which required the sum claimed in the Bankruptcy Summons to be due in its entirety, a decision clearly endorsed by Dunne J on appeal.

19. In her judgment, Dunne J describes the effect of the relevant provisions in these terms;

> "72. These are the provisions (and their antecedents) that the courts have consistently held must be strictly complied with before an act of bankruptcy can occur. It is for the creditor to specify the amount of the debt required to be paid and particulars of that debt must be set out. It is the non-payment of the sum specified in the bankruptcy summons that constitutes an act of bankruptcy. The non-payment of that sum enables the creditor to present a petition for bankruptcy and, provided all is in order, will lead to an adjudication in bankruptcy. It is for that reason that an overstatement of the sum actually due cannot amount to an act of bankruptcy. The creditor is required to set out the particulars of the debt due which is required to be paid by the Debtor, if he or she is to avoid committing an act of bankruptcy, with accuracy. An individual cannot commit an act of bankruptcy by not paying a sum demanded which exceeds the amount of the debt due. Hence, the requirement for strict compliance with the Bankruptcy Code…"

20. It is clear from these judgments and the decision in Murphy v Bank of Ireland that it is essential that the sum claimed in the Bankruptcy Summons must be due by the debtor. In BW's case, this requirement is met. However, the provision of marginally inaccurate particulars is not stated, in any of the authorities opened to me, to be fatal to the validity of the Bankruptcy Summons. To some extent, BW accepts that this is so; his analysis of Murphy – which I have summarised at paragraph 7 (g) – proceeds on the basis that a credit due to a debtor (not mentioned in the particulars of the Bankruptcy Summons) can itself be offset by interest on the underlying judgment (even if this calculation does not appear in the particulars either). However, he says that this slightly permissive approach to the particulars in the Summons was accepted by the Supreme Court in Murphy because both the credit and the interest related to the judgments which were recited in these particulars.

21. I am not at all convinced that this analysis of Murphy is correct; nothing in the text of the judgment of Dunne J in that case expressly supports this reading of the decision. However, one authority relied upon by Revenue (and cited by Humphreys J) puts the matter beyond doubt (a least in this Court). In Gladney v P.O'M [2015] IEHC 718 Costello J considered a submission that the amount claimed in the Notice of Demand and the Bankruptcy Summons was overstated. Costello J held as follows;

> "30. Separately, the debtor argued that the sums claimed in the Notice of Demand of 18th February 2014 was overstated by 899.35. He alleged that it was also overstated in the Bankruptcy Summons. He argued that he was not obliged to pay a sum claimed in a bankruptcy summons if it claimed more than was due and owing to the creditor. The petitioner submitted that as of the

date of the issue of the Bankruptcy Summons the debtor was undoubtedly indebted to the petitioner for a sum well in excess of the sum demanded, 550,614.14 euro, as the petitioner had obtained further judgments against the debtor and which sums were not claimed as part of either the particulars of demand or in the bankruptcy summons.

31. On the 24th of February 2014 the petitioner obtained judgment against the debtor in the sum of 118,240.41 euro. On 19th March 2014, he obtained a judgment against the debtor in the sum of 14,333.93 euro. Subsequent to the issue of the Bankruptcy Summons the petitioner obtained judgment against the debtor on 9th June 2014 in the sum [of] 22,795.29 euro in respect of VAT liabilities from 1st July 2013 to 31st December 2013 together with interest thereon, calculated up to 19th February 2014. Finally, on 11th August 2014 the petitioner obtained judgment against the debtor in the sum of 26,181.22 euro in respect of Income Tax from 2012 and PAYE and PRSI from 2013.

32. It is thus clear that as of 19th May 2014, the date of the issue of the Bankruptcy Summons, the sum due by the debtor to the petitioner was considerably more than the sum claimed 550,614.14 euro. Following the Supreme Court decision in Murphy v Bank of Ireland [2014] IESC 37 and the decision of this Court in M.G. v K.M. [2015] IEHC 43, it is clear that the Bankruptcy Summons is therefore valid and the debtor has committed an act of bankruptcy in failing to pay on foot of the Bankruptcy Summons within the time allowed."

22. No submission was made to me that P.O'M. was wrongly decided. It is clear authority for the proposition that judgments not referred to in the Notice of Demand or Bankruptcy Summons can be taken into account in assessing whether or not the sum claimed in either of these documents is actually due and owing. This is precisely what Revenue (after some uncertainty, to put it mildly) has sought to do. On the basis of that authority alone, this objection on the part of B.W. fails. I should add that the decision of Costello J is, in my view, completely consistent with the judgments in Murphy and in Tobin.

23. I therefore find that BW has not shown cause against the validity of the adjudication of bankruptcy.