Neutral Citation No: [2018] NICh 29 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **DEV10798** ***Delivered:*** **6/12/18**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION [BANKRUPTCY]

2017 No. 129919/AO1

Re: ANTHONY BRENNAN

JUDGE DEVLIN

[1] This is an appeal brought by Anthony Brennan ['the appellant'] against the decision arrived at herein by Master Kelly on 27th April 2018 on foot of which the Master dismissed the appellant's application dated 1st December 2017 to have the Statutory Demand as served upon him set aside. By means of Statutory Demands each dated 30th October 2017, Ulster Bank Limited ['the Bank'] had previously sought from the appellant and his wife Grainne Brennan and each of them immediate payment of the sum of £426,136.52. On 27th April 2018 the Master also dismissed a parallel application from the appellant's wife to dismiss the Statutory Demand issued by the Bank against her. The appellant is legally qualified, and the Court was informed he had previously been in practice at different times both as a solicitor and as a barrister in this jurisdiction. The appellant was represented by counsel for the purposes of this appeal.

[2] Both the appellant and his wife Grainne appealed against the decision of the Master, initially by means of a joint putative Notice of Appeal dated 4th May 2018. Thereafter, individual Notices of Appeal dated 15th June 2018 were each issued by the appellant and by his wife. Although the time limit under the Rules is 28 days for the service of such a Notice of Appeal, no point was taken at the hearing before me as to the apparent lateness of these subsequent and compliant Notices of Appeal. The return date for the appellant's Notice of Appeal was 12th September 2018. On that date, the Court gave detailed directions as to the time period within which the filing by the appellant of an affidavit and skeleton argument in support of his appeal and a booklet of appeal were to be carried out. In advance of the date of the hearing before me on 30th November 2018 no steps would appear to have been taken by the appellant to comply with any of these directions of the Court as delivered on 12th September 2018. Further review of the two appeals took place on 8th October and on 19th November 2018 at which stage it was confirmed to the Court that the directions

dated 12th September 2018 had not been complied with by either the appellant or by his wife.

[3] On 30th November 2018, Mrs Brennan entirely failed to attend before the Court, and in the absence of any affidavit from her as directed by the Court some two and a half months earlier, and also in the absence of any reason or explanation for her absence, upon being informed that she was not in any way unwell or incapacitated, the Court dismissed her appeal. Mr Brennan however did attend, and was represented by Mr Mark McEwen of counsel. Shortly in advance of the hearing commencing, an affidavit from the appellant, sworn only on the morning of 30th November, was presented to the Court and to the other side, along with a skeleton argument. Counsel for the Bank, Mr David Dunlop BL having been afforded by the Court a short time to consider the contents of the documentation now provided indicated that he was in a position to proceed.

[4] The background to the matter is as follows. In 2014 the appellant and his wife were involved as defendants in substantial litigation brought against them by the Bank in this Division. These proceedings ['the main action'] bore the ICOS number 14/044441/02. In early May 2016 those proceedings were resolved, and a signed agreement entered into between the parties was by consent made the subject matter of a Tomlin Order. The Court was informed that the appellant and his wife were legally represented in those proceedings. The terms of the settlement were signed personally by each of the Brennans. However, the terms of the settlement not subsequently having been complied with by the Brennans, the Bank subsequently returned to the Court in order to secure for itself a money judgement, and also possession of a dwelling house at Strangford Park, Downpatrick, a course of action which the Bank was permitted to do pursuant to the express terms of the Tomlin Order and the settlement agreement which it incorporated. On 13th December 2016 by consent the Court ordered that the Bank was to have a money judgment against the Brennans and each of them in the sum of £598,448.87 and also possession of the subject property.

[5] Then the Brennans and each of them, together with the other individuals previously involved as defendants in the main action on foot of a summons and affidavit issued pursuant to the main action, applied to set aside the Consent Order made against them in the sum of £598,448 and the possession order. This application was refused by the Court on 13th February 2018.

[6] On the following day, 14th February 2018, the Brennans and each of them issued a Writ of Summons against the Bank in which they sought:

> *"1. An order for rescission/set aside of the contract/tomlin order* [sic] *entered into by the Plaintiffs and the Defendant on the 9th of May 2016 by reason of the breach of contract and misrepresentation of the Defendant.*

2. An order for the setting aside of the Court Order/Judgment dated 13th December 2016 by reason of the breach of contract and misrepresentation of the Defendant.

3. A declaration that Grainne Brennan should not have been a party and is not a party to any proceedings brought by the Ulster Bank in their action brought against Grainne Brennan as Grainne Brennan had no involvement in the matters pleaded by the Ulster Bank in their action against Grainne Brennan as the Ulster Bank was already aware that Grainne Brennan was not involved in any matters pleaded to by the Ulster Bank prior to the Ulster Bank issuing proceedings against Grainne Brennan.

4. Damages for loss and damage suffered by the Plaintiffs as a result of the breach of contract and misrepresentation of the Defendant.

5. Consequential Loss.

6. Any other relief as the Court may think fit

7. An order for the costs of this action."

[7] On 22nd March 2018 the Bank through its solicitors entered an Appearance to the Writ of Summons issued and served upon it by the Brennans. Since then there has been no service of a Statement of Claim by or on behalf of the Brennans or either of them, in spite of the passage of some nine months as and from the date of issue of the Writ of Summons.

[8] In the affidavit sworn earlier today by the appellant, Mr Brennan having set out the background to his application to set aside the terms of the Tomlin Order and the settlement which it encompassed, and having also set out details of his unsuccessful application to the Court in February of this year went on to state at paragraphs 6 and 7 as follows:

"After the issue of the applications to set aside the Statutory Demands, I prepared and issued a Writ which makes the claim that the settlement and the judgment should be set aside…….. In that matter, my wife and I are representing ourselves, which is still at an early stage.

……. I respectfully say that the dispute to the Statutory Demand is based on the proceedings seeking to set aside the settlement and the judgment. I invite this Honourable Court to find that there is an issue to be tried through the medium of the proceedings which my wife and I have

issued, and that until that action is determined, it would be premature to rule that there is no dispute to the Statutory Demand."

[9] On an appeal such as this, it is clear that the matter is to be dealt with by way of a rehearing, and the Court has a discretion to exercise afresh the discretion of the Master at first instance. The matter is governed by Rules 6.004 and 6.005 of the Insolvency Rules (NI) 1991 as amended. The most relevant part of these Rules provide as follows:-

"Hearing of application to set aside

6.005 . . .

(3) On the hearing of the application, the court shall consider the evidence then available to it, and may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.

(4) The court may grant the application if –

(a) the debtor appears to have a counter claim, set off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or

(b) the debt is disputed on grounds which appear to the court to be substantial; or

(c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.1001 (6) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

(d) the court is satisfied, on other grounds, that the demand ought to be set aside."

The Court of Appeal in England in Re a Debtor (Lancaster No 1 of 1987) [1989] 1 WLR 271 held that the category of "other grounds" as specified in (d) above must be of the same degree of substance as those set out in (a), (b) and (c). Here, the only provision upon which reliance is placed by the appellant is as per [b] above, namely that, as the appellant contends, the debt is disputed on substantial grounds.

[10] The provisions in question have previously been given judicial consideration in a number of reported decisions. In James Moore Earthmoving v Commissioners of Inland Revenue [2002] NI 26, Girvan J as he then was pointed out that the prevailing view was that if a debtor were to fail at this stage he could not raise the same arguments again in regard to the debt at the hearing of a petition. He concluded therefore that a debtor should not be in a worse position than a party seeking to set aside a judgment, or a party seeking leave to defend a case in order to avoid summary judgment. The language in the former situation is of a defendant showing that he has an arguable case. In the latter the court considers whether it is in the interests of justice for the defendant to be allowed to defend. Subsequently, Girvan J as he then was in Re Sheridan Millennium Limited [2004] NI 117 confirmed that if a debtor wished to set aside a statutory demand on the ground outlined at [b] above, he must show that he has a 'potentially viable defence'. Both parties arguing the current appeal before me agreed that the test here to be applied by the Court is broadly analogous to the threshold needing to be satisfied by a party seeking to set aside a judgment in default, or to avoid Order 14 Summary Judgment.

[11] Then most recently in Allen –v- Burke Construction Limited, [2010] NI Ch. 9 Deeny J as he then was, restated the wording of the same test in the following terms:

> *"It may be thought that the words of the relevant Rule are clear i.e. in this case, is the debt 'disputed on grounds which appear to the court to be substantial?' The court is not holding a full trial of the matter; it must only decide if the grounds appear to be substantial. They must be genuine. The grounds of dispute must not consist of some ingenious pretext invented to deprive a creditor of his just entitlement. It must not be a mere quibble."*

[12] In the present case, the obligation which the appellant must satisfy if he is to successfully establish the existence of a substantial dispute is on the face of it rendered all the more daunting by reason of the fact that the Bank's debt rests not simply upon a judgment, but upon a consent judgment. Moreover, that consent judgment arose out of the clear failure on the part of the appellant to satisfy the terms of a previous Tomlin Order in the same action, and in connection with both matters the Court understands the appellant to have had the benefit of professional legal representation. The passage appearing at paragraph 3.18 of Individual Insolvency, Law and Practice in Northern Ireland, [2009] SLS Publications certainly suggests that the learned authors of that text at least are of the view that absent some grounds such as fraud or collusion such as to vitiate the judgment relied upon by the creditor, a debtor may not be able to have a statutory demand set aside on the grounds that the debt is disputed on substantial grounds whenever that debt is a judgment debt.

[13] In the present case, counsel for the appellant sought to draw attention to the issue of the Writ of Summons by the appellant on 14th February 2018, and to its contents. He argued that it was clear that the appellant by now issuing these proceedings was seeking to challenge both the judgment and the settlement upon

which that judgment was based. He argued that by reason of its issue, and having regard to its contents, until such time as these proceedings had been determined, it could not be said that there was no dispute to the Statutory Demand relied upon by the Bank.

[14] The difficulty which the appellant faces with this line of argument is that what he is required to demonstrate to the Court, the burden clearly resting upon him in this regard, is not simply that there is a dispute as to the debt relied upon by the Bank, but rather that the Bank's debt is disputed upon grounds which appear to the court to be substantial. If the appellant fails to discharge that burden, he cannot hope to succeed in this appeal.

[15] Upon any realistic assessment the appellant has demonstrably failed to satisfy this requirement. In his affidavit, the appellant had the opportunity to set out in detail what might be the essential features of his dispute with the Bank, together with an outline of the facts and circumstances upon which that dispute was alleged to be based. That was not done either in the appellant's affidavit nor perhaps unsurprisingly in the skeleton argument which was based upon that affidavit. Neither the appellant's affidavit, nor the skeleton argument submitted to the Court on his behalf, in any respect whatsoever condescends upon particulars of the alleged dispute to the Bank's debt now sought to be put forward. Effectively, all that is relied upon by the appellant is the fact that in February of this year the appellant moved to issue a Writ of Summons against the Bank in which a challenge to the consent judgment relied upon by the Bank was set out. No supporting particulars of what the appellant might conceivably have been able to show to be a substantial dispute to the judgment, or to the Tomlin Order based settlement upon which that judgment was based has been provided, even though the appellant has now been permitted a substantial period of time within which so to do. It cannot be sufficient simply for a debtor to do no more than merely to issue proceedings in which a challenge is made to a judgment based debt relied upon by a creditor, and thereafter to take no steps to either particularise the grounds for dispute relied upon nor to advance the proceedings. If that were the law, which it is not, it would effectively be open to any debtor to quite easily avoid the service of a Statutory Demand upon him by the easiest of methods namely the mere issue of proceedings in which an application is made to set aside the judgment, but in connection with which no details or supporting particulars are provided either with the proceedings or indeed subsequently.

[16] On the material placed before the Court, the appellant has demonstrably failed to show that the grounds upon which he claims to be disputing the Bank's judgment debt are grounds which are substantial. The unexplained failure on the part of the appellant to serve a Statement of Claim, or to otherwise progress the proceedings in the period between the date of issue of the Writ of Summons and now only enhances the Court's concern that the mere issue of the Writ of Summons by the appellant is not illustrative of the existence of any ongoing substantial dispute as between himself and the Bank, but is merely a further delaying tactic which the appellant has chosen to adopt. The appellant's appeal is hereby dismissed.