

**THE HIGH COURT
BANKRUPTCY**

[2020] IEHC 544
[2019 No. 4582 P]

BETWEEN

MARTIN O'BRIEN

APPLICANT

AND

JAMES FARRELL

RESPONDENT

AND

[2019 No. 4583 P]

BETWEEN

MARTIN O'BRIEN

APPLICANT

AND

GRAINNE FARRELL

RESPONDENT

**JUDGMENT of Mr. Justice Richard Humphreys delivered on Friday the 6th day of
November, 2020**

1. Before the court is an application to have a husband and wife adjudicated bankrupt. I will outline the facts as they affect the husband as that gives a representative overview of the state of play.
2. The dispute arises from a breakdown in relations between four shareholders in a company called Business Mobile Security Services Limited. The debtors hold 58% of the shares and the petition is by one of the minority shareholders. The other minority shareholder has apparently since died.
3. The company began from a modest base in 2007 and had considerably expanded by 2012, obtaining the contract for security for the Corrib Oil pipeline. On 13th February, 2017 Mr. Cian Ferriter S.C. sitting as an arbitrator made an award in favour of the petitioner. He then made an award of costs on 29th March, 2017.
4. In proceedings to enforce the award [2017 No. 158 MCA], McGovern J. gave judgment for the petitioner on 27th June, 2017 for €315,000. The petitioner has a judgment mortgage over the debtors' property (Folio 18910F) in Co. Kildare. The value of that asset was €385,000 at the time of the petition. Ulster Bank holds the first legal charge in the amount of €235,000 and the petitioner ranks equally with another joint creditor for €286,000.
5. On 24th November, 2017 a first protective certificate was issued in Trim Circuit Court. On 5th February, 2018 a first bankruptcy summons issued. However, in a judgment in *O'Brien v. Farrell* [2018] IEHC 524 (Unreported, High Court, 30th July, 2018), Costello J. held that the creditor was not entitled to issue the bankruptcy summons because the protective certificate had been renewed at the point in time when it issued.

6. A second bankruptcy summons was issued on 19th November, 2018 and was served on 14th January, 2019. The petitions were filed on 25th March, 2019. On 15th July, 2019 the debtor got a second protective certificate, but the debtor's proposals were rejected by a creditors' meeting. Her Honour Judge O'Malley Costello in the Circuit Court, who dealt with the matter most recently, noted that the debtors had had ample opportunities to deal with the matter.
7. On 22nd July, 2019, one week after the second protective certificate, the company, Business Mobile Security Services Ltd., went into liquidation. In a further set of proceedings [*Walsh v. Farrell*, 2019 No. 284 COS], O'Connor J. directed the debtor to repay €61,957 to the liquidator for the company having deemed that payment to be an invalid and unfair preference.
8. On 12th November, 2019 the debtor applied to Trim Circuit Court under s. 115A of the Personal Insolvency Act 2012, but on 28th May, 2020 that application was withdrawn.
9. On 22nd June, 2020 the debtor swore an affidavit grounding an application for relief under s. 91(3) of the 2012 Act, to dispense with the usual conditions for seeking a personal insolvency arrangement on the grounds of exceptional circumstances, but didn't actually issue that motion until August 2020. The learned Circuit Court Judge placed emphasis on that delay. Thereafter, papers were not actually served until 14th September, 2020 and again that was a factor that weighed with the learned Circuit Court Judge.
10. In a written ruling, *In re Farrell* (2019 No. 001182, Eastern Circuit, County of Kildare, 22nd September, 2020), Her Honour Judge O'Malley Costello refused the s. 91(3) application and said that it would be "*unjust and unfair*" if the bankruptcy petitions were "*further delayed*". The debtors have appealed that ruling and the appeal is due to have a first mention date in the Personal Insolvency List on 9th November, 2020 although if the present application to have the debtors adjudicated bankrupt is granted, then that appeal will be rendered moot. I have now received helpful submissions from Mr. Eoin Martin B.L. for the petitioner and from Mr. Keith Farry B.L. for the debtors. On 12th October 2020, after hearing the matter I informed the parties of the order being made and indicated that reasons would be given later.

Adjournment application

11. Counsel for the debtors sought an adjournment for a number of reasons, the main one being the existence of an appeal against the Circuit Court refusal of an order under s. 91(3) of the 2012 Act. Relatedly, Mr. Farry relied on s. 14(2) of the Bankruptcy Act 1988 and submitted that the court was required to consider what alternatives to bankruptcy were available. However, insofar as it is relevant to the question of the adjournment, I very much agree with the very helpful judgment of Her Honour Judge O'Malley Costello. The debtors have already had multiple opportunities to explore alternatives to bankruptcy. In addition, their delay in making various applications doesn't help their position. One might perhaps add that the making of a preferential payment that was set aside by O'Connor J. probably doesn't help that position either. Overall, I would endorse

Her Honour Judge O'Malley Costello's conclusion that it would be unjust and unfair if the bankruptcy petitions were further delayed.

Whether the debtors should be adjudicated bankrupt

12. Under this heading, Mr. Farry relied on the requirement to consider alternatives to bankruptcy by virtue of s. 14(2) of the 1988 Act and suggested that the applications should be refused or adjourned to allow an offer to be made. He also emphasised that an order of adjudication would have serious consequences for Mrs. Farrell, who resided in the property in question, and submitted that the bankruptcy would be oppressive and that the application was not brought for commercial benefit, relying on *McGinn v. Beagan* [1962] I.R. 364. He called it "*a vindictive personal application*" rather than being commercial in nature. However, I don't accept that. It is simply an attempt to enforce the order of McGovern J. of 27th June, 2017 which remains unsatisfied more than three years later.
13. The fact that there may or may not have been some heated exchanges between the parties and a breakdown in relationships doesn't mean that the application is being made for an improper purpose; certainly that has in no way been demonstrated. As regards the alternatives to bankruptcy, I have considered those, but the debtors have had ample opportunity to explore any such alternatives. The fact that there may be serious consequences for debtors is not in itself a reason not to adjudicate them bankrupt, either as a general proposition or in this particular instance having due regard to all of the circumstances. Such an order is appropriate here and the conditions for it have been satisfied.

Order

14. Accordingly, the order made on 12th October, 2020 was:
 - (i). that the adjournment application be refused; and
 - (ii). that the debtors be adjudicated bankrupt.