

**THE HIGH COURT
BANKRUPTCY**

[2021] IEHC 598
[Record No. 6187 S]

**IN THE MATTER OF AN APPLICATION TO DISMISS A BANKRUPTCY SUMMONS
BETWEEN**

NOREEN HYNES ORSE NOREEN DUNPHY

APPLICANT

AND

JOHN ATKINSON AND BRIDGET ATKINSON

PETITIONING CREDITORS/RESPONDENTS

JUDGMENT of Humphreys J. delivered on Thursday the 30th day of September, 2021

1. Mrs Bridget Atkinson, one of the petitioning creditors and at the time a director of Hynes & Co. Financial Consultants Ltd., says that in January 2008 the petitioning creditors drew equity from a farm to invest in certain projects and were given approval in April 2008 to draw down €200,000. She says that Mr. Alan Hynes, another director of the company, sought a loan of €200,000 to be repaid within three weeks for an additional consideration of €10,000. She says that the loan was sought on behalf of himself and his wife. The three weeks from the giving of the loan on 30th April, 2008 has unfortunately become 13 years and counting.
2. When the loan was not repaid, summary proceedings were issued: *Atkinson v. Hynes* [2009 No. 358 S]. Judgment in default of appearance was obtained in the office on 23rd June, 2009.
3. The amount now due and owing is the amount of €200,000, costs in the amount of €316.63 and interest up to 22nd June, 2015, less a net sum recovered by Wexford County Sheriff on 1st April, 2014 in the amount of €4,369.24. The net total said to be owing is €291,582.36.
4. On 1st March, 2010, both debtors applied for the judgment to be set aside. Quirke J. made an order which would have facilitated that on condition that monies were paid into court, which was not done.
5. A letter of demand was issued on 8th October, 2020.
6. An affidavit for the issue of a bankruptcy summons was filed on 19th February, 2021.
7. I directed that a summons issue on 1st March, 2021 although that was in the context of an *ex parte* application so such an order in no way constrains the court from setting aside the summons if grounds are subsequently shown by an affected party.
8. The summons was served on 12th March, 2021 and an application to dismiss the summons was filed on 23rd March, 2021 returnable for 14th June, 2021. The matter was then heard on 22nd and 27th July, 2021.

Whether there is an issue for trial

9. A summons should be set aside if an issue arises for trial, such as an overstatement of the amount especially having regard to the penal nature of the proceedings (*Minister for Communications, Energy and Natural Resources v. M.W.* [2009] IEHC 413, [2010] 3 I.R. 1). However, a debtor has to do more than simply raise some asserted point. It has to be a point that represents a viable defence to the summons in the legal context in which that summons is in fact brought, as opposed to some hypothetical context unbounded by statutes of limitation or other legal constraints.
10. I agree that in the context of an application to dismiss a bankruptcy summons, the debtor does not have to definitively demonstrate that she is correct, but she must raise a credible point based on some evidence that might be accepted, by analogy with the law on summary judgment as set out in *Harrisrange Ltd. v. Duncan* [2002] IEHC 14, [2003] 4 I.R. 1, as indicated by Dunne J. (Denham C.J. and Charleton J. concurring) in *Minister for Communications, Energy and Natural Resources v. Wood* [2017] IESC 16, [2017] 3 JIC 0901 (Unreported, Supreme Court, 9th March, 2017).

Alleged lack of involvement in the underlying agreement

11. It is claimed on behalf of the debtor that there is no reference to her in the affidavit of Bridget Atkinson grounding the application for judgment in the office in 2009. That is irrelevant at this stage, but in fact is incorrect anyway. Paragraph 4 of the affidavit says that the loan was on behalf of Mr. Hynes and his wife. Paragraph 8 of the affidavit says that the defendants were written to, not just Mr. Hynes. That is reinforced by a contemporaneous email dated 27th October, 2008 addressed to both Mr. and Mrs. Hynes at their individual email addresses. It is claimed that Mrs. Hynes is not mentioned in the email, but it is addressed to her. That constitutes mention.
12. It was also submitted that there is a lack of proof of service of the summons grounding judgment in the office. That is also irrelevant at this stage, but in any event service would have had to had been demonstrated to obtain judgment in the office. More fundamentally it is an abuse of process to relitigate an underlying debt simply because the debt is being enforced. That issue is *res judicata*. A party cannot seek to go back and unravel an underlying judgment just because there is an effort to enforce it whether by bankruptcy or otherwise, leaving aside possibly extremely exceptional circumstances which certainly do not apply here.
13. Thus, the claim that the debt was not due and owing, that proceedings were not served and so forth are all completely inappropriate procedurally. The process moves on to the next stage. One cannot go back and unravel step 1 just because at a later point one dislikes the fact that it has certain consequences. The lapse of time does not help in that regard, but even without that, this is just not the correct procedure.
14. The debtor did informally suggest in oral submissions that the court could give liberty to reopen the underlying judgment under O. 13, r. 11 RSC. Even leaving aside the lack of any motion to that effect, that is not procedurally correct. Any such motions are not ones for the Bankruptcy List. More generally, the fact that a judgment is being enforced is not

a valid basis to set it aside years after the event. That is underlined by the debtor's affidavit at para. 6 where she says she was unaware of the nature and implications of the 2009 proceedings. She does not say she was unaware of the *fact* of the proceedings.

15. It is also notable that the order of Quirke J. in respect of the previous application and O. 13, r. 11 is expressed in terms of rejecting an application by both defendants and awarding costs against them both. And indeed it was accepted on behalf of the debtor here in reply that that was so and that the application was brought by her as well as her husband.
16. It is true that Peart J. said that "[c]learly a wide discretion is given to the Court in its task of achieving justice between the parties" under O. 13, r. 11 (*Allied Irish Banks Plc. v. Lyons* [2004] IEHC 129, [2004] 7 JIC 2102 (Unreported, High Court, 21st July, 2004), at para. 12). But that was in the context of judgment obtained in the office on 16th December, 2003 at a time when the defendants were attempting to enter an appearance. That was notified to the defendants by letter of 7th January, 2004 followed by a letter of 21st January, 2004 on behalf of the defendants seeking consent to the judgment being set aside. Such timely action is the context of the comment about wide discretion. It has no relevance whatsoever to the notion of applying to set aside a judgment 12 years on merely because it is being enforced, having already unsuccessfully applied once 11 years ago.

Oppressive seizure of materials

17. It is alleged that electronic equipment was seized by the sheriff which included stored images of the debtor's children. That is naturally concerning, but the debtor does not seem to have done anything about it at the time and it is going to be very hard to unravel at this point. If the debtor had agitated the matter immediately, no doubt any court seized of the issue would have directed that the contents of such devices including any stored images or data would be copied, returned to the debtor and irretrievably removed from devices before their sale. But it's hard to see the point in raising such an issue many years later. The main cause of the seizure of electronic equipment was the applicant's indebtedness. It has not been made out in any way beyond assertion that property seized was sold at an undervalue, but in any event, all of the issues to do with the seizure are a matter for the Wexford County Sheriff and not the petitioning creditor, and do not amount to a basis to set aside the bankruptcy summons absent some form of oppression which has not been made out here.

Alleged harassment and vendetta

18. It is alleged that the debtor was harassed over the debt. The allegations are very vague and historical, and relate to the 2009 to 2010 period in the main. A claim of vendetta is boilerplate in such situations. Debtors frequently feel that they are the victim of a vendetta whereas all that is normally happening, and certainly all that has been established here, is that they are being held to their obligations. Occasionally, some genuinely oppressive conduct can arise that would render it unfair to allow a creditor to proceed further, but that is very much the exception rather than the rule and does not apply here.

Penal nature of bankruptcy

19. It is true that some caselaw refers to bankruptcy as penal, although one has to point out that it is vastly less penal than it used to be. Not only is the duration of bankruptcy ordinarily one-twelfth of what it was, and not only has a parallel system of personal insolvency protection been established, but even the scope of the traditional disqualifications applying to a bankrupt has been eased (see *Godsil v. Ireland* [2015] IESC 103, [2015] 4 IR 535). In such a context, I wonder whether some of the references in old caselaw to the penal nature of bankruptcy arguably need to be mildly de-dramatised nowadays. Nonetheless, in view of the impact on the personal status of a debtor (or the penal nature of the proceedings if you want to call it that), a court does need to be clear that the legislation has been complied with if it is proposing to make an order that has such an effect. That has to be balanced against the adverse effect on a creditor of not making an order, in any context where an evaluation of the impacts on both sides is required.
20. However, none of this helps the debtor here because it is clear that the legislation has been complied with and accordingly I have to conclude that the bankruptcy summons was correctly issued.

General hardship

21. The debtor claims that she is of limited means, that she must be treated as distinct from her husband, and that the bankruptcy could cause hardship and prejudice in the workplace, and so forth. However, while accepting all that, those are all consequences of indebtedness, and analogous *ad misericordiam* points could be made by most or all debtors. They certainly do not amount to a ground for dismissing a bankruptcy summons either in general or in this case.

Order

22. Accordingly:
- (i). the application to dismiss the bankruptcy summons is refused and
 - (ii). the petitions regarding the debtor and Mr. Hynes will be listed for mention in the next Monday bankruptcy list to fix a date for hearing.