

**THE HIGH COURT
BANKRUPTCY**

[2022] IEHC 236
[Bankruptcy No. 5052]

IN THE MATTER OF BRENDAN HADE (A BANKRUPT)

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IN THE MATTER OF SHEILA HADE (A BANKRUPT)

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 27th day of April, 2022

Introduction

1. This matter concerns applications by Brendan Hade and Sheila Hade ('the former bankrupts' or 'the applicants') to show cause against the adjudication of each of them as bankrupt on 11th November, 2019. The time for making the applications was extended by the court until 13th December, 2019, and the matter was first listed for hearing on 20th January, 2020. Unfortunately, various matters including pandemic restrictions have resulted in the hearing being delayed and ultimately taking place on 1st February, 2022. By that stage, both bankrupts had in fact been discharged on 11th November, 2020 from bankruptcy. Notwithstanding this, both seek to have their respective adjudications annulled.
2. Although there are separate applications by the former bankrupts, those applications are to all intents and purposes identical, and submissions both written and oral made on their behalf by counsel have been treated by the applicants as relating to both of them. Likewise, this judgment and its conclusions apply to each of the applicants.
3. The application was served on Feniton Property Finance DAC ('the petitioning creditor' or 'Feniton'), the petitioning creditor, which at all times contested the applications fully, and was represented by counsel at the hearing. Subsequent to the initiation of the present application, the petitioning creditor was placed in member's voluntary liquidation, although this fact does not affect its role in this application.

Background

4. There was an extensive interchange of affidavits between the parties in the course of the present application. The affidavits of the applicants in particular set out the circumstances in which they got into financial difficulty. It is not necessary, for the purposes of this application, to set these out in detail. However, as the applicants, in addition to invoking the court's power under s.16(2) of the Bankruptcy Act 1988 as amended ('the Act') to annul the adjudications on the grounds that the requirements of s.11(1) of the Act have not been complied with, rely on the court's power set out at s.85C(1)(b) of the Act to annul an adjudication "in any other case where, in the opinion of the Court, [the debtor] ought not to have been adjudicated bankrupt", it is necessary to consider the background to the matter.
5. In June 2008, the former bankrupts obtained a loan facility from Bank of Scotland ('the bank') in the sum of €2,210,000. This loan was secured on two properties in

Rathfarnham, Dublin 16 ('the Rathfarnham properties') which they owned, one of which was their principal private residence.

6. The applicants were at that time each, with another party, trustees for the Victory Christian Fellowship ('VCF'), which had substantial borrowings with the bank. The VCF was a church which had sought and obtained planning permission to build a "new church and centre" on lands at Firhouse Road in County Dublin. For this purpose, loans of €17.6m were advanced by the bank.
7. The applicants, who were deeply committed members of VCF, engaged a "financial broker" to deal with the financial and business affairs of VCF. As this person is not a party to the present proceedings and has therefore not had the opportunity to respond to the very serious allegations levelled against him by the former bankrupts, I will refer to him simply as 'Mr. L'. The applicants contend that a request and proposal by Mr. L that he be given a "participation role and involvement with the applicants in their capacity as trustees of VCF" were considered by them but ultimately refused. It is asserted by the applicants that Mr. L was "bitterly disappointed" with this decision, and that he informed the Revenue Commissioners "...that he considered that there may have been inappropriate claims for and on behalf of the Victory Christian Fellowship in respect of the entitlement to claim relief from VAT on various items purchased by the Victory Christian Fellowship and/or its Agents, which items were used in the construction of our new Church and Centre at Firhouse" ... [para. 17 grounding affidavit of Brendan Hade sworn 13th December, 2019].
8. The applicants claim that Mr. L then informed the bank of the likelihood that the Revenue Commissioners had concerns in relation to the reclaim of VAT expenses, and that this was likely to result in the Revenue Commissioners revoking VCF's charitable status. This did in fact come to pass on 14th May, 2013, retrospective to 1st January, 2009. It is asserted that Mr. L communicated the fact of this revocation to the bank, which called in the VCF borrowings and appointed Mr. Paul McCann and Mr. Patrick Dillon as receivers on 29th May, 2013. Mr. McCann ('the receiver') was on the same date appointed as receiver over the Rathfarnham properties.
9. It is fair to say that the applicants are aggrieved at their treatment by the bank. They contend that it was represented to them two months prior to the appointment of the receiver over the Rathfarnham properties that "...if [the applicants] agreed to sell No. 33/34 Main Street, Rathfarnham, the Bank would take the hit on any shortfall that might arise on the said sales and would accept the sum of €100,000.00 from us in full and final settlement of all monies due by us in respect of both properties..." [para. 25 grounding affidavit Brendan Hade]. They say that they were accordingly "greatly upset, shocked and distressed" that the bank called in the loan and appointed the receiver. They maintain that the alleged issues with VCF were "completely unrelated" to the Rathfarnham properties and that there was "no proper, lawful or equitable basis for the appointment of the Receiver by the Bank". [Paragraph 27 grounding affidavit of Brendan Hade].

10. The travails of VCF and indeed the former bankrupts made their way into the media, which "...caused enormous upset and huge distress to I, this Deponent, and my wife, Sheila Hade, and indeed also to many members of our congregation in Victory Christian Fellowship Church...". [Paragraph 30, grounding affidavit Brendan Hade].
11. The applicants in their affidavits refer to the "upset and distress... and exhaustion and stress that we were almost unable to cope with... [para. 31]. This caused them to adopt a certain stance in relation to legal matters, and in particular in relation to legal proceedings by Feniton, who by April 2016 had acquired legal ownership of the bank's debt in respect of the Rathfarnham properties: -

"32. I say and believe that we sought guidance, help and solace within our Church and its congregation and because of our state of mind and health at that time we decided to discharge our Solicitors and Legal Counsel and withdraw into our spiritual home of our ongoing Church at Victory Christian Fellowship. We duly, therefore, discharged our Solicitors and Counsel and withdrew from the legal turmoil and material loss and damage which we had suffered. I say that we did so because of the extreme difficulties we found ourselves in and the pressure we were no longer able to endure." [This paragraph sworn by each of the applicants at para. 32 of their respective grounding affidavits].
12. As a result, the applicants failed to appear in response to an application for summary judgment by Feniton, with the result that this Court (Noonan J) granted judgment on 26th April, 2016 against the applicants in the sum of €1,653,605.23, together with the costs of the proceedings. The petitioning creditor says that, in the affidavits submitted by the former bankrupts in response to the application for summary judgment, there was no assertion that there had been any agreement or representation by the bank prior to the appointment of the receiver as is now suggested by the former bankrupts in the present application, nor was any issue taken with the entitlement of the petitioning creditor to call in the loan or to appoint a receiver.
13. The main purpose of the present application seems to be that the applicants wish to bring proceedings against the bank, the receiver, Mr. L and Feniton for what they maintain is "breach of contract and/or estoppel, negligence and/or breach of confidence or fiduciary duty". The grounding affidavits of the former bankrupts seemed to suggest that they did not propose to include Feniton as a defendant. However, it is clear from subsequent affidavits, to which drafts of the proposed proceedings were exhibited, that it is now intended to proceed against Feniton also, and submissions on behalf of the applicants were made on this basis. For reasons set out in their grounding affidavits, on which it is not necessary to dwell here, the applicants consider that the Rathfarnham properties were sold by the receiver at an undervalue, and are very critical of the way in which the receiver managed the property and conducted the sale.
14. The difficulty that the former bankrupts face is that any right to sue the bank, the receiver or Mr. L or Feniton to recover damages regarding loss to their respective estates vested in the Official Assignee in Bankruptcy ('the OA') on their adjudication, and

continues to do so notwithstanding their discharge. If the applicants persuade this Court to annul their adjudication, they would be free to pursue the proposed proceedings in their own right.

The bankruptcy

15. Feniton served notice of particulars of demand in accordance with s.8(1)(c) of the Act on the former bankrupts on 5th December, 2018. Feniton subsequently issued a bankruptcy summons in respect of each of the former bankrupts on 11th March, 2019. The summons in each case contained the standard warning which identified the amount sought as follows: -

“You are hereby warned that unless within 14 days after the service of this summons on you, you do pay to Feniton Property Finance DAC of 1st Floor, 1-2 Victoria Buildings, Haddington Road, Dublin 4 the sum of €1,802,474.99, being the sum claimed of you by Feniton Property Finance DAC according to the particulars hereunto annexed or endorsed hereon, or unless you shall secure or compound for the same to its satisfaction, you will have committed an act of bankruptcy, in respect of which you may be adjudged a bankrupt, on a Petition being presented against you by the said Feniton Property Finance DAC unless you shall have within the time aforesaid applied to the Court to dismiss this Summons, on the ground that you are not indebted to the said Feniton Property Finance DAC in any sum or that you are only indebted to Feniton Property Finance DAC in a sum of €20,000 or less, or that before service of this Summons upon you, you had obtained the protection of the Court.”

16. The bankruptcy summons in each case therefore sought payment on its face of the sum of €1,802,474.99. This sum, as the above paragraph suggests, was particularised by attaching the “particulars of demand and notice requiring payment” which had been served on 5th December, 2018 as a precursor to the bankruptcy summons. The operative part of this notice in each case was as follows: -

“The following are the Particulars of Demand of Feniton Property Finance DAC (formerly Feniton Property Finance Limited) of 1st Floor, 1-2 Victoria Buildings, Haddington Road, Dublin 4 against you, [Brendan/Sheila] Hade, amounting to the sum of €1,802,474.99 (being the judgment sum of €1,653,605.23 plus interest in the sum of €90,907.93 at 8% per annum to the 31 December, 2006 €1,802,474.99 and interest in the sum of €57,898.83 at 2% per annum from the 1st January, 2017 to 1st October, 2018).

By order of the High Court dated 25 April, 2016, it was ordered and adjudged that Feniton Property Finance Ltd recovered against you [and Sheila/Brendan Hade] the sum of €1,653,605.23 together with costs (to include reserve costs) and interest when taxed and ascertained.

TAKE NOTICE that the said Feniton Property Finance DAC hereby requires immediate payment of the said judgment sum of €1,802,474.99 within *14 days* of

service of this Notice upon you at the above address and failing payment within that period, Feniton Property Finance DAC will apply to the High Court for the issue of a Bankruptcy Summons against you in accordance with Section 8 of the Bankruptcy Act 1988." [Emphasis in original].

17. It is important to note from the first paragraph of these particulars that they identify the judgment sum and the basis upon which statutory interest was calculated. It is not disputed by the bankrupts in the present application that the indicated dates upon which the interest rate changed are the appropriate dates at which the rate was amended by legislation.
18. It would appear from the grounding affidavits of each of the bankrupts that their decision not to respond to the application for summary judgment in April 2016 extended to the hearing in respect of the bankruptcy proceedings. No attempt was made to contest, pursuant to s.8(5) of the Act, the order giving leave to issue a bankruptcy summons, nor was there any appearance by either of the applicants in respect of the petitions on 11th November, 2019. This Court accordingly made orders of adjudication on 11th November, 2019. It was subsequent to the orders of adjudication that the former bankrupts embarked upon their present applications.

Application to show cause: non-compliance with section 11(1)(c)

19. The former bankrupts applied to the court to annul the adjudication under s.16(2) of the Act, and the general power under s.85C(1)(b) "...where in the opinion of the Court [the debtor] ought not to have been adjudicated bankrupt".
20. Section 16(2) of the Act is as follows: -
 - "(2) On an application to show cause under subsection (1) the Court shall, if within such time the bankrupt shows to its satisfaction that any of the requirements of section 11(1) have not been complied with, annul the adjudication and may, in any other case, dismiss the application or adjourn it on such conditions as the Court thinks fit, having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him."
21. The only part of s.11(1) relevant to the present application is s.11(1)(c), which is as follows: -
 11. - (1) A creditor shall be entitled to present a petition for adjudication against a debtor if -
 - ...(c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition..."
22. The act of bankruptcy relevant to the present application is that set out at s.7(1)(g) of the Act: -
 - "7. - (1) An individual (in this Act called a 'debtor') commits an act of bankruptcy in each of the following cases -

...(g) if the creditor presenting a petition has served upon the debtor in the prescribed manner a bankruptcy summons, and he does not within fourteen days after service of the summons pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor.”

23. One might be forgiven for thinking that the court, in considering a “show cause” application under s. 16(2) relating to a petition presented under s.11(1)(c), would only be concerned with whether the act of bankruptcy had taken place within three months prior to the presentation of the petition, rather than with a substantive challenge to the act of bankruptcy itself. However, the courts have always taken the view that, if it can be demonstrated on a show cause application that the act of bankruptcy is in some way defective or invalid, the court will hold that there has been no act of bankruptcy, and therefore no compliance with s.11(1)(c). In any event, the former bankrupts frame their applications, in as far as they relate to defects in the bankruptcy summons and thereby in the act of bankruptcy, as being pursuant to s.16(2), although this point could also have been raised under s.85C(1)(b).
24. The applicants claimed in their written submissions that the provisions of s.26 of the Debtors (Ireland) Act 1840 as amended did not automatically apply to the judgment debt, and that the amount claimed in the bankruptcy summons was therefore overstated. However, this submission was not pressed at the hearing and the argument centred solely on whether the sum demanded was correctly calculated or validly claimed, for reasons which I will set out below.
25. However, before doing so, it is appropriate to say something about the court’s approach to an overstatement of the amount claimed. It has long been the case that a demand in the bankruptcy summons for payment of a sum which is more than is owed by the debtor to the creditor in question is fatal to the validity of the bankruptcy summons. The relevant line of authority to which I shall refer below makes it clear that the reason for this principle is that the consequence for the debtor of not discharging or securing or compounding for the demanded amount is that he will have committed an act of bankruptcy under s.7(1)(g) of the Act which may well result in his adjudication as a bankrupt. The amount demanded must therefore either be accurate or less than the debtor owes to the creditor, and even an inadvertent or minimal overstatement of the debt actually due will result in the bankruptcy summons being regarded as invalid; as McGovern J commented in *Minister for Communications v. MW* [2010] 3 IR 1:
- “[8.] It seems to me that both before the Act of 1988, and since then, the courts have regarded it as necessary to strictly comply with the provisions of the Rules of the Superior Courts 1986 and statutory provisions in order to trigger the bankruptcy process because it has such serious consequences for a debtor.”
26. This has been the consistent position of the Irish courts in decisions such as *O’Maoileoin v. Official Assignee* [1989] IR 647, *in re Gerard Sherlock* [1995] 2 ILRM 493, *Allied Irish Banks plc v. Yates* [2012] IEHC 360, and in the decision of the Supreme Court in *Murphy*

v Bank of Ireland [2014] 1 IR 642, in which Dunne J, giving the judgment of the majority in that case, referred to her own dicta in *Yates* as follows: -

“Thus, I think it is clear beyond doubt that if the amount claimed on foot of the bankruptcy summons is in excess of that which is actually due, then in those circumstances there is no obligation to pay the amount claimed on foot of the bankruptcy summons and a failure to pay on foot of that summons will not constitute an act of bankruptcy.”

27. In the present case, as set out at para. 15 above, the amount demanded is €1,802,474.99. However, the applicants submit that, if the judgment sum of €1,653,605.23 and the sums of €90,907.93 and €57,898.83 in respect of interest as set out in the particulars appended to the bankruptcy summons are added together, the total of these figures is €1,802,411.99 – not the larger figure demanded in the bankruptcy summons itself of €1,802,474.99. In other words, if the figures set out in the particulars appended to the bankruptcy summons are added together and are correctly calculated, the amount demanded in the bankruptcy summons itself is overstated by €63. It is submitted that this “defect” is fatal to the bankruptcy summons, and thus to the alleged act of bankruptcy; if there is no valid act of bankruptcy, the applicants’ position is that an annulment of the adjudication in each of their cases must follow.
28. In his affidavit of 13th July, 2020, Mr. Donal O’Sullivan on behalf of the petitioning creditor attributes the differential between the amount demanded on the one hand, and the sum of the judgment and the two interest figures set out in the particulars appended to the bankruptcy summons on the other, to “a clerical error on the part of the Petitioner whereby the sum of €90,970.93 was incorrectly stated in the particulars of demand and notice requiring payment...as €90,907.93”. It was asserted in Mr. O’Sullivan’s first affidavit of 14th January, 2020 that, if one calculates the number of days from the date of the judgment – 25th April, 2016 – to the date before the interest rate changed from 8% to 2% - 31st December, 2016 – one comes up with a figure of 251 days, which at a rate of 8% applied to the judgment debt, gives a figure of €90,970.93. That this is a correctly calculated figure was not challenged by the applicants.
29. The net position therefore is that, while one of the constituent elements of the figure demanded in the particulars of demand appended to the bankruptcy summons is understated by €63, the amount actually demanded in the bankruptcy summons - €1,802,474.99 – is accurately calculated and correct. Counsel for the petitioning creditor attributed the “clerical error” to a simple inadvertent transposition of two digits: “€90,907.93”, when it should have been “€90,970.93”.
30. Counsel for the applicants however submits that this error is fatal to the validity of the bankruptcy summons, and in doing so, relies heavily on the dissenting judgment of McKechnie J in *Murphy v. Bank of Ireland*. In that case, the appellant attempted to show cause by arguing that the sum sought in the bankruptcy summons was in excess of the amount actually owed, in that the petitioning creditor had failed to give credit for payments made after the judgment was entered but before the bankruptcy summons

issued. The respondent's position was that the sum actually owed by the applicant was in fact far in excess of that stated on the bankruptcy summons, in that interest had accrued on the debt and at no time had the full indebtedness of the bankrupt been less than the sum demanded in the bankruptcy summons.

31. The High Court (McGovern J) rejected the show cause application, and the Supreme Court dismissed the subsequent appeal. Dunne J (MacMenamin J concurring) delivered the majority judgment, and McKechnie J delivered a substantial dissenting judgment. Dunne J approved of the approach of the High Court, and held that: -

"[99] I consider the approach of McGovern J. to be correct. The sum demanded was not in excess of that actually due and there was nothing in the bankruptcy summons which could have confused or misled the appellant as to what he was required to do in order to avoid committing an act of bankruptcy. Had the appellant paid the sum sought on the bankruptcy summons, he would not have committed an act of bankruptcy...

[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."

32. In his dissenting judgment, McKechnie J reviewed the case law dealing with alleged errors in the details of sums claimed in debtors' or bankruptcy summonses. At para. 54 of his judgment, McKechnie J gave a lengthy summary of what he considered to be the legal position in relation to alleged irregularities in the process leading to adjudication. Of particular relevance to the present application are the following points: -

- "(iii) where an act of bankruptcy is founded on a bankruptcy summons, the requirements of s.8 of the Act of 1988 must be strictly satisfied, as must s.11 regarding the follow on petition: in both instances, this includes compliance with the relevant rules of court;
- (iv) this means in the context of a summons, that the creditor must decide on and then specify what sum he demands payment of: having done so, it is by reference to that sum only by which any possible default is to be judged. No further

indebtedness, even if acknowledged as due, can form any part of this assessment. Once a creditor makes this decision he is bound by it for this purpose;

- (v) the sum in question must be due and owing and immediately payable: evidently, it must allow for any and all just credits and allowances which are properly to be offset against that particular sum at that time: it is only the net amount which can be said to be legally due and which can be enforced by the process;
 - (vi) it follows that any demand for a sum greater than that last described or arrived at, is an excessive demand unjustified in law; subject to any possible argument along the lines mentioned in sub-para. (ii) supra, the margin of excess is not relevant;
 - (x) as stated above, the sum claimed is the relevant sum for adjudication purposes. There is no obligation, so as to ensure the integrity of the summons, to expressly waive any balance which is left standing - subject to the qualification, that evidently, argument to that effect at the particular level may of course be open to the debtor;
 - (xi) the point last mentioned applies with equal force to the question of interest on a judgment debt, and for that matter also to the question of costs. The fact that interest applies automatically, that it is by operation of law, as distinct from contract, is irrelevant: the point at issue is not the accretion of interest, but rather the creditor's reliance on it for the purposes of the summons and thus for default purposes. He makes that decision. He can either claim it or not: if he does, it is part of the demanded sum, whereas if he does not, it must be disregarded;
 - (xiii) if interest is included in the bankruptcy summons, the same must be accurately calculated and the accumulative sum must be specified;
 - (xiv) finally, in addition to the specific matters above mentioned, the particulars given in the context of the summons must be such as to demonstrate in specific and accurate terms, the precise requirement demanded of the debtor, which if satisfied will thereby avoid him committing an act of bankruptcy."
33. Reference was made by McKechnie J at para. 6 and para. 55(iii) of his judgment to O.76, r.12(4) of the Rules of the Superior Courts, but as this sub-rule had not been relied upon by either party, he declined to express any view on its scope or application. The sub-rule, in as far as it is relevant to the present application, is as follows: -
- "(4) Detailed particulars of demand shall be endorsed upon or annexed to the bankruptcy summons. No objection shall be allowed to the particulars unless the Court considers that the debtor has been misled by them...".
34. McKechnie J took the view that, once the respondent bank had decided not to claim interest for the purpose of the demand for payment in the bankruptcy summons, it could not rely on any statutory interest which may have accrued but which had been omitted

from the sum demanded to avoid the consequences of a failure to give credit for part-payments in calculating that sum. As the court put it at para. 62:-

“...it appears to me that bankruptcy is a form of execution of choice and that nothing automatically happens unless it is caused to happen. This method of execution must be both set in train and founded upon a basis justified in law. That basis must comply with the provisions above outlined. Given the Bank's decision not to include interest as part of the process, its entitlement to rely upon it must stand outside the adjudication procedure. It follows that when the question of interest is disregarded, and when the credits are accounted for, the demand made in both the particulars of demand and notice requiring payment and more essentially in the bankruptcy summons was excessive.”

35. Counsel for the applicants relies heavily on the erroneous statement of interest in the particulars appended in the present case to the bankruptcy summons as invalidating the bankruptcy summons itself, and refers to the statement of McKechnie J at para. 54(i) of his judgment that: -

“(i) the bankruptcy code must be strictly construed and its essential provisions rigidly applied: particular vigilance is to be displayed regarding acts, steps and requirements which are central to the statutory regime and which give rise to the penal consequences above described; ...”.

36. Reliance is also placed on para. 54(xiii) quoted at para. 32 above, to the effect that interest “must be accurately calculated and the accumulative sum must be specified...”, and the statement by Romer LJ in *In re HB* [1904] 1 KB 94 at p.103, cited with approval by McKechnie J, that “[c]learly, in a bankruptcy notice the debtor is entitled to see from the notice exactly what is claimed to be due on the judgment debt.” It is further submitted that the finding by Dunne J in *Murphy* cited above at para. 31 that there was “nothing in the bankruptcy summons which could have confused or misled the appellant...” does not apply to the facts of the present case.

37. Counsel for the petitioning creditor on the other hand refers to the misstatement of interest as a “clerical error”, and relies heavily on the fact that the actual sum demanded of €1,802,474.99 was correctly calculated. It is submitted that the error did not prejudice the applicants in that it was clear from the summonses what sum they had to pay in order to avoid bankruptcy. It was suggested that the court should apply the principle of “*de minimis non curat lex*”, and excuse this “clerical error”.

38. McKechnie J did in fact refer to the possible application of this maxim at para. 54 of his judgment: -

“(ii) Whether there exists any legal basis upon which an irregularity may possibly be excused has not been explored in this case: the *de minimus* [sic] principle has not been raised and neither has the possibility of correcting errors, even those which are patently obvious and evidently observable from, for example, the bankruptcy

summons, or those which truly could be described as trivial, peripheral or insubstantial. Therefore, further debate on this must await another occasion; ...”

39. On the subject of excusing irregularities or correcting errors, McKechnie J cited with approval the decision in *re a Debtor* [1908] 2 KB 684. In that case also, the amount claimed in the bankruptcy notice was overstated as a result of an inadvertent error in the interest calculation. The excess was only between one and two pounds; yet the court did not accept that it fell to be amended under s.143(1) of the Bankruptcy Act 1883 [‘the 1883 Act’], which provided that “[n]o proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court”.

40. McKechnie J referred to the leading judgment in that case of Cozens-Hardy MR, and to the concurring judgment of Farwell LJ, referring to the latter’s judgment as follows: -

“[44]. Farwell LJ, in a concurring opinion, made two observations that have a relevance to the instant appeal. At pp. 689 and 690, the judge said:

‘I cannot think [that] it is a mere formal defect to include in a bankruptcy notice not only the amount payable under the judgment, but also a sum which is not due and owing at all, and *which the debtor has no means of seeing on the face of the notice is not due and owing*’ (emphasis added).

This last reference related to *Ex parte Johnson In re Johnson* [1883] 25 Ch. D. 112 where the court treated a clerical error as a formal defect, when its nature was readily discoverable from the document as a whole and when to do so would not result in any injustice to the bankrupt. However, that was not the case which the court was dealing with in *A Debtor, In Re* [1908] 2 KB 684 and accordingly the Lord Justice would also treat the notice as invalid.”

41. It does not appear that there is any statutory provision in Irish bankruptcy law equivalent to that contained in s.143 of the 1883 Act: there is however O.76, r.12(4), quoted at para. 33 above, the effect of which is considered below.

Bankruptcy summons: conclusions

42. There can be no doubt that it is clearly established by the case law surveyed by Dunne J and McKechnie J in *Murphy* that where the amount demanded in the bankruptcy summons is in excess of what is actually owed by the debtor, even inadvertently or by a very small amount, such overstatement is fatal to the validity of the bankruptcy summons and to the act of bankruptcy based upon non-compliance with the demand.

43. However, in the present case, the amount demanded in the bankruptcy summons was, at the date of issue of the bankruptcy summons, correctly calculated and due and owing by the applicants to Feniton. One of the constituent elements of the figure demanded as set out in the particulars appended to the bankruptcy summons was incorrect; the question is

whether this error in those particulars vitiates the summons itself, notwithstanding that the amount demanded by the summons was correct.

44. When a bankruptcy summons is issued and served on a debtor, the sum demanded may be paid by the debtor, so that the debt is discharged. If the sum is not paid, or the part payment of the sum leaves an outstanding debt of more than €20,000, the creditor can rely on the failure to discharge the sum demanded as an act of bankruptcy which will ground a petition for adjudication of the debtor. The serious consequences for the debtor of non-payment require that the debtor be clear that discharge of the amount demanded will bring the bankruptcy process to an end, and thus that the amount demanded is accurate and due and owing.
45. It is said on behalf of the applicants in the present case that they were not afforded the requisite clarity, and that the error of specifying "€90,907.93" rather than €90,970.93" meant that the debtors were entitled to infer that the amount demanded was possibly overstated by €63. It is submitted that, in the absence of certainty as to the accuracy of the amount demanded, they were entitled to decline to pay this amount, as the summons was invalidated by the inaccuracy.
46. From a perusal of the bankruptcy summons, the following is clear: -
 - (1) The amount of €1,802,474.99 was demanded on the face of the bankruptcy summons, which in the usual format warned the debtor of the consequences of failing to pay, secure or compound for the amount demanded;
 - (2) applying the appropriate Courts Act interest to the judgment sum, the demanded sum was correctly calculated;
 - (3) the particulars annexed to the summons identified the date and amount of the High Court order granting judgment in the sum of €1,653,605.23;
 - (4) the particulars set out the basis for the creditor's calculation of statutory (Courts Act) interest, identifying the dates upon which the rates of interest changed;
 - (5) one of the interest figures (i.e. 8% from the date of judgment to 31st December, 2016, at which point the rate changed from 8% to 2%) was incorrectly stated: €90,907.93 rather than €90,970.93.
47. The applicants could have discharged the demanded sum of €1,802,474.99, which was the correct sum. They did not do so; to their credit, they do not aver that this was due to any uncertainty on their part as to the correct sum, or that they decided not to pay on the basis that the sum demanded might be overstated by €63. The applicants did not raise the point with Feniton in response to service of the summons; they did not avail of their right to apply to court under s.8(5) of the Act to dismiss the summons; as we have seen, they did not contest the hearing of the subsequent petition for adjudication. Their position is that they were not obliged to take any of these steps, or otherwise show prejudice; by reason of the error in the particulars, they contend that the bankruptcy summons is

“invalid, void and of no legal effect”, and that it suffers from a “fatal infirmity” ... [paras. 4 to 6 of each of the applicant’s grounding affidavit].

48. The facts of the present case are different to those in *Sherlock* or in *re A Debtor*. In those cases, the amount of the debt in the debtor’s or bankruptcy summons was clearly overstated. In *Murphy*, if the interest not included in the bankruptcy summons were not taken into account, the sum demanded in the bankruptcy summons was also overstated. In the present case, the amount demanded on the face of the summons was correct, and payment of it by the debtors would have brought an end to the process.
49. The act of bankruptcy on which Feniton relied was that the applicants did not “pay the sum referred to in the summons or secure or compound for it to the satisfaction of the creditor” [Section 7(1)(g)]. Their failure to pay a correctly calculated debt was, in each case, a clear act of bankruptcy unless the court can be persuaded that they were entitled to refuse to pay in the circumstances. As McKechnie J commented at para. 50 of *Murphy*:

“It is an essential requirement of the statutory scheme that the summons speak to the debtor in such a way that he can readily, immediately and clearly see what is required of him so as to terminate the process, and thereby avoid the drastic effects of adjudication.”

50. The fact that the amount demanded on the bankruptcy summons is the correctly calculated amount is in my view what differentiates the case from *Sherlock*, *In re a Debtor* and *Murphy*. The applicants had the means to check whether the sum demanded was accurate, in that they could add together the judgment sum and the two interest sums contained in the particulars. On finding that these figures suggested that the amount demanded might be overstated by €63, the particulars supplied the details by which the accuracy of the interest figures could be checked. A few minutes with a calculator would have been sufficient to perform the calculation which would have made it clear to the applicants that the correct figure for interest from 25th April, 2016 to 31st December, 2016 was in fact €90,970.93 rather than the stated €90,907.93, that the latter figure was most likely a clerical error, and that the demanded sum on the bankruptcy summons itself was correct.
51. Thus, while I agree with the statement by McKechnie J at para. 54(xiii) of his judgment quoted above that “if interest is included in the bankruptcy summons, the same must be accurately calculated and the accumulative sum must be specified”, this is in fact what happened in the present case – the interest was correctly calculated and included in the sum demanded, which was also correctly calculated.
52. Also, I am mindful of the provisions of O.76, r.12(4) as quoted at para. above. There can be no objection to the “detailed particulars of demand” annexed to the bankruptcy summons “...unless the Court considers that the debtor has been misled by them...”. In circumstances where what clearly was a transposition of two digits in one of the cumulative interest figures in the particulars could be easily identified as a clerical error

by a rudimentary arithmetical calculation, I do not consider that the applicants could be said in any meaningful sense to have been misled; indeed, as I have pointed out above, the applicants do not make the case that they were actually misled, nor did they raise any query in relation to the figures at the time. I note that the court in *ex parte Johnson* referred to by McKechnie J at para. 44 of his judgment and which was quoted above at para. 41, treated a clerical error as a formal defect which did not invalidate a bankruptcy notice “when [the] nature [of the error] was readily discoverable from the document as a whole and when to do so would not result in any injustice to the bankrupt”. This decision was based on the application of s.82 of the Bankruptcy Act 1869, the statutory predecessor of s.143 of the 1883 Act, rather than a rule of court; however, I do consider that the court’s conclusion is of some assistance in relation to the application of O.76, r.12(4).

53. In summary, for the reasons set out above, I do not consider that the error in the particulars annexed to the bankruptcy summons invalidated the summons itself, which demanded the correctly calculated amount of the debt.
54. By way of final comment, I should say that it has always seemed strange to me as a matter of principle that a bankruptcy summons can be invalidated if an excessive amount is demanded, even if a very substantial sum in excess of the €20,000 threshold in s.8(1)(a) of the Act is in fact owed by the debtor. This is not the position in relation to companies, where the undisputed portion of the debt must be paid in order to prevent a demand under s. 570 of the Companies Act 2014 leading to a winding up petition: see *Truck and Machinery Sales Limited v. Marubeni Komatsu Limited* [1996] 1 IR 12. I note that Collins J in *Gladney v. Tobin* [2020] IECA 49, having reviewed the bankruptcy authorities in this area, shared this concern:

“97...in my opinion, the question of what 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...”.

55. Collins J took the view that any review of the authorities could only be undertaken by the Supreme Court: see para. 62 of his judgment in this regard. The position regarding such

a review was considered by the Supreme Court in the appeal of *Gladney v Tobin* [2022] IESC 3, in which judgment was delivered by the Supreme Court (Dunne J) on 2nd February, 2022 – the day after the present application was heard before this court.

56. Dunne J suggested that “the suggestion that there should be a review of the established jurisprudence in this area leading, presumably, to a conclusion that an overstatement of the amount due should not result in the dismissal of the bankruptcy summons if the sum stated to be due in the Bankruptcy Summons is above the threshold set out in the legislation is problematic having regard to the existing legislation” [at para. 70]. Having referred to s. 7(1)(g) and s. 8(3) of the Act concerning the service of particulars prior to the application for a bankruptcy summons, Dunne J states as follows:

“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. It is impossible, in my view, to read into s.7(1)(g) or s.8(3) a suggestion that all that is required for an act of bankruptcy to be committed is that the sum due by the Debtor to the creditor is more than the threshold amount required for the issue of a bankruptcy summons. Any alternative view would be a clear disregard for the express words of the legislation. The fact that a different approach may be seen in the area of corporate insolvency is neither here nor there.” [at para. 72]

57. Dunne J went on at para. 73 to express the view that aligning bankruptcy practice with the practice applicable in corporate insolvency could be effected by legislation. Accordingly, the Supreme Court has confirmed that the law as set out in *Murphy* as regards the effect of an excessive demand on the bankruptcy summons remains applicable. In the circumstances, it was not necessary for me to give the parties to the present application an opportunity, before finalising this judgment, to address the Supreme Court’s decision in *Gladney v Tobin*.

Section 85(c)(1)(b): the just and equitable ground

58. In their written submissions, the applicants make the case that, if the bankruptcy summonses are deemed by the court to be valid, the adjudication orders should nonetheless be annulled pursuant to s.85C(1)(b); that is to say, on the grounds that it would be just and equitable to do so. The applicants cite the dicta of Dunne J in *Harrahill v. Kennedy* [2013] IEHC 539 as follows: -

"Showing cause is, in my view, something other than raising an issue which has to be litigated elsewhere. In *Bankruptcy Law and Practice* (2nd Ed.), Sanfey and Holohan expressed the view at para. 2.102 that 'the court has to be satisfied that it is just and equitable to annul the adjudication'. That seems to me to be a helpful approach to adopt in cases where the application to show cause against the validity of the adjudication arises in circumstances other than a failure to comply with the criteria set out in section 11(1)... Decisions such as that in the *Minister for Communications v. M. W.* arose in the context of seeking to have a bankruptcy summons dismissed: the approach of the court on such an application as explained by McGovern J. in that case at para. 24, was that if an issue arises, which is a real and substantial one and which is at least arguable and has some prospect of success then, having regard to the decision of the Supreme Court in *St. Kevin's Company against a Debtor*, the bankruptcy summons must be dismissed. The test under s. 16(2) is, as I have said, slightly different [to that in s.8(6)(b)] and I am satisfied that apart from a failure to comply with the criteria set out in s. 11(1) the court can annul the adjudication if satisfied that it is just and equitable having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him. Raising an issue that could be tried elsewhere does not seem to me to be the correct basis upon which to consider an application under section 16(2)."

59. These *dicta* were cited with approval by Costello J in *Danske Bank v. O'Shea* [2016] IEHC 732 and by Faherty J in the Court of Appeal decision of *Minister for Communications, Energy and Natural Resources v. Wymes* [2020] IECA 182 at para. 22. Faherty J went on to make the point that: -

"23. Although, undoubtedly, the discretion vested in a court when just and equitable grounds are raised in an application to show cause [is] an unfettered one, it is the also case that, in the words of Costello J. in ... *Danske Bank v. O'Shea*, '[a]n application to show cause is not an appeal against matters previously ruled upon on the occasion of an adjudication.' Thus, the distinction between exercising discretion under the 'just and equitable' grounds and an appeal is a distinction which must be carefully observed even though it may sometimes be a nuanced matter as to which side of the line a particular issue falls."

60. It should also be noted that the Court of Appeal accepted in that case that, where the notice to show cause merely cites s.11(1) of the 1988 Act but the grounds relied upon go beyond the allegations of non-compliance with that provision, the "just and equitable" jurisdiction is engaged even though there is no express reference to s.85C(1)(b) in the application to show cause: see para. 21 of the judgment of Faherty J in this regard.
61. The former bankrupts urge the court to annul the adjudication on just and equitable grounds. In their written submissions at para. 39, they state that "...[t]his is principally so that the applicants can pursue the proposed proceedings against the Bank, [Mr. L], Patrick Dillon and Patrick McCann, and Feniton". A draft plenary summons and statement

of claim are exhibited to the supplemental affidavit of Brendan Hade. As the submissions state, "...these proceedings primarily seek (i) to pursue a breach of confidence claim against the Bank and [Mr. L], (ii) a breach of equitable and fiduciary duty claim against the receivers, and (iii) seek to challenge the transfer and assignment of the loan and mortgages over the Properties [to Feniton] in November 2015...As appears from the proposed proceedings, the Applicants seek various reliefs aimed at protecting and preserving the family home, as well as an Indemnity from the Bank, [Mr. L] and/or the Receivers in respect of the Judgment..." [Paragraphs 39-40 submissions].

62. Mr. Hade referred in his supplemental affidavit to a "corporate credit proposal summary", an internal document of the bank, of 30th April, 2013 in relation to the affairs of VCF in which a strategy of "consensual receivership" was recommended "...given the potential leverage of the Hades' personal debt and the relatively clean security review...". It is suggested at para. 7 of the affidavit of 25th May, 2020 by Mr. Hade that the primary reason for the appointment of the receivers was to exert such leverage on the former bankrupts, and this is the subject of particular complaint at para. 21 of the draft statement of claim. It is submitted that the true purpose of the bankruptcy proceedings was to prevent the applicants from issuing these proceedings, and that the bankruptcy petition therefore represented an abuse of process such as that contemplated by Budd J in *McGinn v. Beagan* [1962] IR 364.
63. The applicants suggest that Feniton will suffer no prejudice from an annulment of the bankruptcy "where they would have paid a significantly reduced price for the mortgages". It is also submitted that an inability on the part of the former bankrupts to challenge the bank and the receiver in proceedings will effectively deprive them of their ability to challenge the making of a well-charging order if one is sought by Feniton on foot of judgment mortgages held by it. In such circumstances, the applicants urge the court to hold that it would be just and equitable to annul the bankruptcy.
64. It is clear from a perusal of the draft statement of claim that the proceedings contemplated by the former bankrupts are such that they relate entirely to the respective estates of the former bankrupts. A mere glance at the reliefs sought makes this very clear. As such, it is trite law that the right of the former bankrupts to initiate such proceedings is a chose in action which vests pursuant to s.44(1) of the Act in the OA. It is solely a matter for the OA as to whether a cause of action does in fact lie against the proposed defendants, and whether it would be in the interests of the estates of the bankrupts and their creditors for him to initiate such or any proceedings.
65. By a letter of 6th May, 2020, the applicants' solicitors wrote to the OA enclosing a copy of the proceedings and asking whether the OA "would be agreeable to issuing the said Summons on behalf of our clients". By letter of 3rd June, 2020, the OA confirmed that the right to issue proceedings remained vested in him, and stated: -

"In the event that the High Court dismisses your clients' applications seeking to have their adjudications annulled, then the Official Assignee will consider any representations you or your clients wish to make in respect of the proposed

proceedings. However, the Official Assignee does not consent to proceedings being issued or prosecuted at this present time, and in the event that such proceedings have been issued, your client either requires the authorisation of the Bankruptcy Court to continue same or they should be withdrawn.”

66. While the OA was not placed on notice of the present application, a representative of his office did attend at the hearing before me and informed the court that the OA’s position remains unchanged since that letter.
67. The position, then, is that the former bankrupts do not currently have the right to prosecute the intended proceedings. Accordingly, they ask the court, in all the circumstances, to annul their respective bankruptcies so that they can prosecute the proceedings in their own right.
68. In my view, this request is misconceived. An annulment is not necessary for proceedings to be taken on behalf of the bankrupts’ estates. This can be done by the OA if he is of the view, having taken legal advice, that it is appropriate to do so. However, the decision on whether or not to initiate proceedings is that of the OA alone. As his letter referred to above suggests, the OA will be amenable to discussing the viability of such proceedings with the former bankrupts. An option to consider would be whether or not, if the OA were unwilling to initiate proceedings himself, he might be prepared to assign the cause of action to the former bankrupts on terms: in this regard: see Bankruptcy Law and Practice, 2nd Edition (2010), paras. 6.15 to 6.19.
69. However, the inability of the former bankrupts to prosecute proceedings in their own right does not constitute a reason in itself for annulling the adjudication orders. Such an inability is one of the normal consequences of adjudication. There are no circumstances in the present case which would suggest that it would be just and equitable to annul the bankruptcy to allow the former bankrupts to institute the proposed proceedings. Even if the suggested motivation for appointing the receivers were established – and I do not accept that I can infer from the bank’s document of 30th April, 2013 that the appointment of the receiver was necessarily or solely motivated by a desire to apply pressure on the applicants in respect of the VCF debt – that issue can be canvassed by the OA in proceedings if he were to decide to do so. It is difficult in any event to see how this document could be relevant to the question of whether the bankruptcies should be annulled, given that it is Feniton, and not the bank, which is the petitioning creditor.
70. It must also be said that the former bankrupts acknowledge that, for the reasons set out at para. 32 of their respective affidavits quoted at para. 11 above, they chose not to contest Feniton’s application for judgment; they did not move to set aside the bankruptcy summons when served with it; and they did not contest the petitions for their respective bankruptcies. It is in these circumstances that they now ask the court to reverse the entire process and allow them to sue a number of individuals and entities, including Feniton. While I have sympathy for the former bankrupts, both of advanced age, regarding the predicament in which they have found themselves, they chose not to fight their corner in the courts, but now want the court to come to their aid and set at nought

the efforts of Feniton to set in place a mechanism for realisation of the estates of the bankrupts with a view to recovering payment of the debt owed to it, notwithstanding the considerable trouble and expense incurred by the petitioning creditor to date. It is difficult to see how such a course of action could be "just and equitable" to the petitioning creditor, and the creditors as a whole.

71. I can find no circumstances which would render the annulment of the adjudications of the applicants "just and equitable", and accordingly I do not consider that orders under s.85C(1)(b) are appropriate.

Conclusion

72. For the reasons set out above, the applications on behalf of the former bankrupts for orders of annulment of their respective adjudications as bankrupt are refused.
73. I will give the parties 14 days from the date of delivery of this judgment to deliver short written submissions – not more than 1,000 words – as to consequential orders, including the costs of the matter. On receipt of these submissions, I will finalise the orders in the respective applications without further reference to the parties.