THE HIGH COURT

BANKRUPTCY

[2024] IEHC 528

[Record No. 3991P]

PETITION OF BANKRUPTCY BY A PERSON OTHER THAN A DEBTOR AND IN THE MATTER OF A PETITION FOR ADJUDICATION OF BANKRUPTCY NATIONAL ASSET LOAN MANAGEMENT DAC AGAINST NOEL MARTIN

JUDGMENT of Mr Justice Mark Sanfey delivered on the 26th day of August 2024.

Introduction

1. In this application, Noel Martin, ('**the debtor**') seeks an order directing that the petition of bankruptcy issued against him by National Asset Loan Management DAC ('**the petitioner'**) or ('**NALM**') should proceed by way of plenary hearing, or in the alternative that the debtor should be given leave to cross-examine four witnesses who have sworn affidavits in support of the petition in respect of thirty-eight issues set out in a schedule to the debtor's notice of motion. The application is strongly opposed by the petitioner on a number of grounds.

2. The issue turned out to be one of surprising complexity; the statutory procedure for adjudication of a debtor by a creditor was analysed in minute detail by senior counsel for each of the parties, with very detailed written and oral submissions being made by both sides.

3. In order to understand the issues and points of controversy between the parties, it is necessary to set out in detail the procedural background to the application.

Background

4. On 01 February 2017, the debtor and his brother Patrick Martin were each served with "a particulars of demand and notice requiring payment prior to the issue of a bankruptcy summons". This notice is the standard precursor, required by s.8(1)(c) of the Bankruptcy Act 1988 as amended ('**the Act**'), to an application for liberty to issue and serve a bankruptcy summons. The notice set out a demand on behalf of the petitioner for €9,451,977.65 in respect of facilities made available to the debtor on foot of a facility letter issued by Bank of Ireland to the debtor and Patrick Martin accepted by them on 07 October 2008, and a supplemental facility agreement between the same parties on 23 April 2013.

5. A bankruptcy summons against each of the debtors issued on 24 July 2017. It proved necessary for the petitioning creditor to obtain an order for substituted service, and the bankruptcy summonses ultimately were served in October 2017. The sum sought in the notice requiring payment or the bankruptcy summons was not discharged, and neither Patrick Martin nor the debtor made application under s.8(5) of the Act to dismiss the summons. Accordingly, it is not disputed that both the debtor and Patrick Martin had committed an act of bankruptcy pursuant to s.7(1)(g) of the Act.

6. In January 2018, the petitioner issued petitions of bankruptcy against the debtor and Patrick Martin; notwithstanding the passage of time, it is the petition against him which the debtor now seeks to have determined by plenary hearing. The hearing of the matter has been adjourned from time to time in circumstances which I shall explain below.

The Receiver proceedings.

7. Loan facilities extended to Patrick Martin and the debtor and to Mardon Property Developments Limited ('**Mardon**') in 2007 and 2008 were acquired by the National Asset Management Agency ('**NAMA**') in 2010. In 2015, a receiver, Brendan O'Donoghue ('**the**

Receiver') was appointed by NALM over the interests of Patrick Martin, the debtor and Mardon in certain commercial and residential properties in counties Monaghan and Louth.

8. Ultimately, the Receiver issued proceedings in November 2016 against Patrick Martin and the debtor seeking orders in respect of alleged trespass by the defendants, accounts for rents and profits, delivery up of certain items and an order confirming the validity of the appointment of the Receiver. Certain injunctive reliefs were sought by the Receiver against Patrick Martin and the debtor in those proceedings (record number 2016/9712P) and in other proceedings against the parties and one Ben Gilroy (record number 2016/11154P). The reliefs were granted by the High Court following a fully contested hearing on 07 February 2017, and by a further order of 03 April 2017, an application to consolidate the two proceedings was granted by the court. I shall refer to the consolidated proceedings as 'the plenary proceedings'.

9. Pleadings were exchanged in the plenary proceedings. Ultimately, Patrick Martin and the debtor ('**the defendants**') issued a notice of motion of 17 April 2018 in which they sought the following reliefs:

> "(a) A declaration that the first and second named defendants do not require the leave of this honourable Court to deliver and serve the amended defence and counterclaim in the within proceedings on National Asset Loan Management DAC ('NALM');
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> (b) in the alternative, insofar as this honourable Court may deem necessary, an order granting the first and second named defendants leave to bring an application pursuant to s.182(2) of the National Asset Management Agency Act, 2009 in respect of the non-damages reliefs sought against NALM in the amended defence and counterclaim herein;
>
> (c) further, an order pursuant to s.182(2) of the National Asset Management Agency Act, 2009, permitting the first and second named defendants to seek reliefs in the

amended defence and counterclaim herein other than for damages against NALM and to deliver and serve the amended defence and counterclaim on NALM."

10. It should be noted that the proposed counterclaim of Patrick Martin and the debtor joined NALM as a defendant to the counterclaim which it wished to serve without leave of the court; NALM had not been a party to either of the proceedings prior to their consolidation.

11. Section 182 of the National Asset Management Agency Act 2009 ('**the NAMA Act**') provides essentially that a claim giving rise only to a remedy in damages that does not affect the "bank asset" as defined in that act can be instituted without leave of the court. Section 182(2) provides that a person may apply for an order that they may seek a remedy other than damages; however, an application for any such "non-damages" based remedy requires the leave of the court. Section 182(4) provides that leave will not be granted unless the court is satisfied that the application raises a substantial issue, that application for leave is made within thirty days – it was accepted in that case that the application was not made within thirty days – and finally, provided that the court is satisfied if outside of the thirty day time limit that there are substantial reasons why the application was not made within the period and that it is just and equitable to grant leave.

12. It was accepted that the application should be heard on notice to NALM, as NALM had in fact drawn the defendant's attention to the provisions of s.182, and what NALM considered to be the necessity for the defendants to obtain the leave of the court pursuant to s.182 in order to advance its counterclaim. The paragraphs of the counterclaim which did not relate solely to a claim in damages were those within paras. 7 to 10 of the counterclaim in the following terms: -

"7. A declaration that NALM acted in breach of contract in purporting to enforce security over the properties in or around April/May 2015;

8. further, or in the alternative, a declaration that NALM was estopped from enforcement of the alleged loans and/or the alleged security over the properties, including by appointing the Receiver over the properties, or any of them, whether in April/May, 2015 or at any time;

9. a declaration that the purported appointment of receiver over the properties, or any of them, is null and void and of no legal effect;

10. a declaration that NALM is estopped from pursuing the borrowers, or any of them, in respect of any residual debt remaining after realisation of the alleged security."

13. It is notable that the defendants sought to argue that the plaintiffs were estopped from enforcement in respect of the loans or security over the properties at issue, and precluded from appointing a receiver. In her judgment on the application, reported at [2019] IEHC 598, Pilkington J summarised the basis for this application as follows: -

"…There has been significant interaction between Mardon, the first and second named defendants and NALM from the acquisition of the loan facilities by NALM in 2010, the appointment of the plaintiff receiver and thereafter…The first and second named defendants rely upon certain events that occurred within this timeframe to contend that they were furnished with certain binding assurances by NALM upon which they relied and on foot of which they expended monies such as would preclude the appointment of the plaintiff receiver. More importantly, for this application, they argue that these assurances raise significant issues as to the entitlement of NALM to pursue the first and second named defendants personally or as guarantors of Mardon, in respect of any residual indebtedness…." [para. 2(d)]

14. In the course of her judgment, Pilkington J noted that the defendants/counterclaimants had "clearly recorded the representations upon which they rely. The question is whether these

are tantamount to raising a substantial issue to in turn ground the estoppel for which they contend…" [para. 53]. Having analysed the facts as contended for by the defendants and the relevant caselaw, Pilkington J concluded as follows: -

> "71. The documentation passing between the parties has been set out in full. The assurances and representations relied upon, both oral and written, have likewise been properly set out. Undoubtedly over time the parties discussed the issues outstanding between them; one of those issues was the issue of the residual indebtedness. In considering the affidavits, draft pleading and the written and oral submissions I can discern no argument that reaches the threshold criteria of substantial issue as to any alleged breach of contract by NALM in enforcing its security or its entitlement to appoint the plaintiff receiver. None of the written documentation establishes any basis in contract for the issues raised by the counterclaimants.
>
> 72. Neither can I discern any promise or assurance such as would ground [an] estoppel as contended for by the counterclaimants (not to pursue the residuary debt) which reaches or satisfies the criteria of reasonable, arguable or weighty as [*Daly & ors. v. NALM & ors*. (unreported, High Court, 12 September, 2011)] defines 'substantial issue.'
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> 73. I cannot discern any estoppel being raised to meet the threshold criteria of a substantial issue on the basis of any of the representations or assurances made; obviously to raise the estoppel one does not begin with the counterclaimants beliefs as to the substance of any assurance or representation made, but to the actual assurances or representations themselves. In my view none amounts to raising a substantial issue as defined within *Daly*. None comprises any assurance or representation that NALM would not pursue any residuary debt ultimately owing in respect of the various facilities. In my view none of the assurances or representations constitute a form of

legal obligation as required by McGovern J in [*Ulster Bank v. Deane* [2012] IEHC 248]. As set out above none of the documentation supports the contentions relied upon by the counterclaimants and I can see no other representation, written or oral, which displaces those documents as required by the Court of Appeal in [*NALM v. Breslin* [2017] IECA 283]."

15. Accordingly, Pilkington J concluded that she was "…not satisfied that a substantial issue has been raised by the counterclaimants within the matters pleaded in paras. 7, 8, 9 and 10 of their counterclaim, such as would be sufficient for them to be entitled to leave pursuant to s.182 of the NAMA Act 2009. Moreover, in my view there is no basis for reliefs to be granted within s.182(4)(b) …" (para. 78).

The present application.

16. The foregoing matters provide the context for the present application, which arises on foot of a notice of motion issued on 06 October 2022. In addition to orders seeking that the petition proceed by way of plenary hearing, with consequential directions as to pleadings, the debtor seeks in the alternative an order granting leave to cross-examine four witnesses who have sworn affidavits on behalf of the petitioner in relation to thirty-eight issues which the debtor says arise out of those affidavits, which issues are set out in a schedule to the notice of motion ('**the scheduled issues**').

17. Up until the present application, the debtor had relied on affidavits sworn by Patrick Martin in response to the petition against him; the debtor merely swore brief affidavits adopting the averments of Patrick Martin in his affidavits for the purpose of defending the petition against him. However, both Patrick Martin and the debtor had adduced expert evidence from Gabriel Greene, a chartered accountant specialising in forensic accounting. The petitioner responded with an expert report from Myles Kirby, also a forensic accountant, and both experts subsequently swore affidavits addressing their reports.

18. In his grounding affidavit of 06 October 2022, the debtor indicated that Patrick Martin had "…ceased our joint instruction of solicitors and counsel to resist the petitions and, … is seeking to reach some form of settlement with NALM…" [para. 6]. The present application therefore was being solely prosecuted by Noel Martin, who referred in the affidavit to the scheduled issues, and expressed the view that cross-examination on those issues was "likely to be unwieldy and confusing and ultimately does not lend itself as well to a fair disposal of the matters in dispute compared with a plenary hearing…" [para. 11].

19. William Greensmyth, a partner in the solicitors' firm on record for the petitioner, swore a replying affidavit on 18 November 2022. Mr Greensmyth averred that the debtor had sought to contend that NAMA was estopped from bringing the petition, and that he would ultimately be in a position to discharge his liability "because, in due course, his financial future will change. The primary reason for this latter contention is based on an alleged contingent (and at best highly speculative) claim for damages against the statutory receiver appointed over their [ie those of the debtor and Patrick Martin] assets. He also seeks to dispute the amounts he owes NALM on grounds that are manifestly unstateable…" [para. 5].

20. Mr Greensmyth referred to the estoppel claim as "spurious" and as "already having been determined by Ms Justice Pilkington as not being permitted in the receivership proceedings…". He also expressed the view that the "highly speculative counterclaim" which was "primarily directed against the statutory receiver" could not bring the debtor back to solvency, and that the dispute as to the amounts owed by the debtor to NALM were "manifestly unstateable" [para. 9]. Mr Greensmyth contended that the bankruptcy petition was "not an opportunity for Mr Martin to prosecute the claims he has against the statutory receiver. Rather, [the issue] is whether the existence of those claims can be invoked in defence of the petition…" [para. 15].

Petition procedure: The statutory framework.

21. As we have seen, a bankruptcy summons was served on the debtor in October 2017. He did not discharge the amounts sought on the summons, "or secure or compound for it to the satisfaction of the creditor"; he could have applied pursuant to s.8(5) of the Act to dismiss the summons, but did not do so. In those circumstances, the debtor committed an act of bankruptcy pursuant to s.7(1)(g) of the Act.

22. Notwithstanding that s.8(5) was not invoked by the debtor, the procedure to set aside a bankruptcy summons assumed considerable significance in the submissions of the petitioner in particular. It is therefore appropriate to set out the relevant subsections of s.8:

> "(5) A debtor served with a bankruptcy summons may apply to the court in the prescribed manner and within the prescribed time to dismiss the summons.
>
> (6) The court –
>
> (a) may dismiss the summons with or without costs, and
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> (b) shall dismiss the summons if satisfied that an issue would arise for trial."

23. Section 11(1) of the Act governs the circumstances in which a creditor may present a petition for adjudication against a debtor:

> "11. – (1) A creditor shall be entitled to present a petition for adjudication against a debtor if –
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> (a) the debt owing by the debtor to the petitioning creditor (or, if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to more than €20,000,
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> (b) the debt is a liquidated sum,
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> (c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition, and
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> (d) the debtor (whether a citizen or not) is domiciled in the State or, within three years before the date of the presentation of the petition, has

ordinarily resided or had a dwelling-house or place of business in the State or has carried on business in the State personally or by means of an agent or manager, or is or within the said period has been a member of that partnership which has carried on business in the State by means of a partner, agent or manager." [Note, this has been amended by s.32 Courts and Civil Law (Miscellaneous Provisions) Act 2023. The amendment is not relevant for present purposes.]

24. Section 14(1) sets out the consequence of compliance by the creditor with the requirements of s.11(1):

> "14. – (1) Subject to subsection (2), where the petition is presented by a creditor, the court shall, if satisfied that the requirements of s.11(1) have been complied with, by order adjudicate the debtor bankrupt."

25. Counsel for the petitioner readily accepted at the hearing – although not in the written submissions proffered in advance of the hearing – that the debtor is entitled to raise, at the hearing of the petition, any matters relating to compliance with the criteria set out at s.11(1) of the Act, including any matter touching upon the validity of the act of bankruptcy. It was also accepted that this was so even where, as in the present case, the debtor had not availed of the power under s.8(5) of the Act to apply to dismiss the bankruptcy summons.

26. In fact, the debtor is not limited to contesting the validity of the petition at the hearing of the application for adjudication. Section 16(1) and (2) of the Act provides as follows: -

> "16. – (1) The bankrupt may, within three days or such extended time not exceeding fourteen days as the court thinks fit from the service of the copy of the order of adjudication on him, show cause to the court against the validity of the adjudication.
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> (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…."

27. Section 85C(1) also allows for the possibility that a court can annul an adjudication: -

"85C – (1) A person shall be entitled to an annulment of his adjudication –

(a) where he has shown cause pursuant to section 16, or

(b) in any other case where, in the opinion of the Court, he ought not to have been adjudicated bankrupt."

The debtor's approach.

28. Counsel for the debtor, Bernard Dunleavy SC, referred to the cases of *Re John Hoey, A Bankrupt*, [2018] IEHC 580 and *Re Seán Dunne, A Bankrupt* [2018] IECA 813 in relation to the court's jurisdiction to permit cross-examination on affidavits in a bankruptcy matter. Those cases related to post-adjudication applications by the Official Assignee ('**the OA**') under s.85A of the Act for an extension of the bankruptcy in each case. It was submitted that those decisions were authorities for the proposition that it was open to the court, in the context of a s.85A application, to permit cross-examination of the OA "as a matter of procedural fairness" in relation to the belief formed by the OA in accordance with s.85A(1) as to the bankrupt's failure of cooperation with the OA or the hiding or failure to disclose income or assets to which the sub-section refers.

29. It was also submitted that, while O.76 of the Rules of the Superior Courts, which deals with bankruptcy matters, does not expressly permit cross-examination of deponents on the hearing of a petition, part XV of that order which deals with "evidence" provides for the issue of subpoenae for witnesses "at any sitting or trial", and provides at r.73 that

"Wherever a witness has made an affidavit or deposition in support of any application or proceeding in the court, any party to such application or proceeding may by notice require the attendance of such witness for cross-examination".

30. The debtor also points out in his written submissions that the proof of debt provisions of the first schedule to the Act permit proof of debt to be given "on oath", and that the Act "supports the submission that the court has the jurisdiction, under the rules, to direct the hearing of *viva voce* evidence and thereby direct a plenary trial of any issue and/or the entirety of the petition, and is certainly not precluded from doing so" [para. 15].

31. Counsel submitted that, in considering whether or not to direct cross-examination or a plenary hearing, the court must consider two preliminary issues, expressed by counsel as follows: "…Is there a real issue? Is that issue one in which issue has properly been joined between the parties on the affidavits?" [transcript p.18, lines 17 to 19]. Counsel suggested that, if the court were satisfied that the answer to both of these questions was in the affirmative "*Dunne* and *Hoey* avail Mr Martin and the court ought to make the order that I have sought" [transcript p.18, lines 21 to 22].

32. Counsel spent some time in submissions before the court referring to the affidavit evidence with a view to demonstrating the existence of a "real issue" which had been "properly joined" by the parties on the affidavits.

<u>The petitioner's response.</u>

33. At the outset of his submissions on behalf of the petitioner, James Doherty SC acknowledged that the authorities supported the proposition that, even where an application to dismiss a bankruptcy summons had not been brought, this was "no bar to the debtor seeking to impugn every stage of the process leading to the grant of the bankruptcy summons" [p.85, lines 17 to 22]. He referred to the decision of Costello J in *Gladney v P.O'M* [2015] IEHC 718, and the decisions of the Court of Appeal (Collins J) ([2020] IECA

49) and Supreme Court (Dunne J) ([2023] 1 IR 190) in *Gladney v Tobin* ('**Gladney**') in this regard.

34. Counsel submitted that, in entertaining at the petition stage a challenge to the bankruptcy summons of the debt subtending it, "…the court has regard to the same types of argument that might have been raised at the dismiss the bankruptcy summons stage [*i.e.,* an application under s.8(5) of the Act] and applies the test that the Supreme Court reaffirmed in *Gladney* in terms of that type of challenge… [p.86, lines 2 to 13]". This test was "to ask whether or not the debtor had raised a real and substantial issue for the court's determination…" [p.86, lines 15 to 19].

35. It was further submitted that, if the court were satisfied that there were such a "real and substantial issue", the court would not conduct a plenary hearing to determine the issue; the proper course would be to refuse an adjudication "…either because [the court] takes the view that the summons ought not to have issued…or because the adjudication can't proceed in light of the problem" [p.87, lines 20 to 27]. Counsel expressed the petitioner's view of the debtor's application as follows:

> "…What [the debtor] is asking the court now to do is to say: don't let the petitioner have the opportunity to run its petition and persuade the court there is no triable issue. Have a mini trial on all of those issues where I get to cross-examine people…" [p.89, lines 15 to 19].

36. Having submitted that the question of whether there was a "real and substantial" or "triable" issue was properly one for the court hearing the petition on the basis of the affidavit evidence, counsel nonetheless made extensive submissions intended to demonstrate that none of the thirty-eight issues on which the debtor wished to cross-examine the petitioner's deponents in fact comprised a "real and substantial issue" which would warrant cross-examination, even if the court were minded to allow it. In aid of this, the petitioner set out in

grid form its responses to each of the thirty-eight issues in a document attached to its written submissions, each response purporting to set out the "reason why cross-examination is not necessary".

37. The petition suggests that the thirty-eight issues break down into four general topics, none of which is valid or stateable. Firstly, the petitioner contends that, given the findings by Pilkington J regarding the estoppel point, it is no longer open to the debtor to allege that the petitioner is estopped from pursuing part or all of the debts set out in the petition. Secondly, it is submitted that any issue contending that there has been an "overpayment" by the debtor is patently false and unstateable.

38. Thirdly, the petitioner submits that any suggestion by the debtor that his assets are in fact greater than his liabilities to NAMA is likewise untenable; it is stated that on the debtor's "best case scenario" he identifies "€13m" of debt to NAMA, but contends that he has got "lots of really good counterclaims against the Receiver". Counsel submits that any such counterclaims cannot be laid at NAMA's door as a matter of law, and that NAMA has "no liability for anything to do with the Receiver": see transcript p.91, line 27 to p.92, line 14.

39. Finally, the petitioner states that the debtor maintains that the petition is an abuse of process. Counsel points out that, far from the petition being presented to prevent counterclaims, those counterclaims were in fact initiated after the petition was presented. He draws attention to the remark of Pilkington J at para. 43 of her judgment that "…in my view, it would be unrealistic not to perceive a link between the bankruptcy process and the timings with regard to the amended defence and counterclaim".

Discussion

40. The submissions to the court, both written and oral, were wide-ranging and comprehensive. In the foregoing summary, I have in the interests of concision made reference

only to submissions which are particularly relevant to the decision which I have set out below. I have however taken into account all submissions made to the court.

41. At the outset, I should say that the debtor's application is both novel and unusual. In the years after the Act became law, the practice of the court was to require a petitioner to have obtained judgment and attempted execution before applying for a bankruptcy summons; bankruptcy was regarded as a "remedy of last resort" for the judgment creditor who had not been able to obtain satisfaction of its judgment . In *Harrahil v. Cuddy* [2009] IESC 022001, the Supreme Court abolished the practice, stating that it was "satisfied that there should be no such rule of practice as any such rule conflicts with the Act and the Rules of Court". The Act does not in fact require that a creditor obtain a judgment before proceeding to avail of the bankruptcy code; however, the overwhelming majority of creditors who issue a petition for the adjudication of a debtor have already obtained judgment against that debtor. In such a case, a dispute as to the debtor's indebtedness to the petitioner will not normally arise; however, in the present case, NALM has not obtained judgment against the debtor

42. Section 14 of the Act provides that an order of adjudication will be made if the court is "satisfied that the requirements of s.11(1) have been complied with…". As regards s.11(1)(a), the court must therefore be satisfied that "…the debt owing by the debtor to the petitioning creditor…amounts to more than €20,000…".

43. In essence, although the debtor did not challenge the bankruptcy summons pursuant to s.8(5), he now argues that he does not owe to the plaintiff the sum sought, or any sum more than €20,000. The issue therefore arises as to what test the court must apply in deciding whether or not the petitioner satisfies the court that a debt of more than €20,000 is in fact owing in circumstances where this is denied on affidavit by the debtor.

44. In *Gladney*, the debtor Mr Tobin was adjudicated bankrupt by Costello J in the High Court on 13 November 2017. The court had previously refused an extension of time for the

debtor to make an application to set aside the bankruptcy summons; the court in any event rejected a contention by the debtor that he had made a payment to the petitioner – the Revenue Commissioners – in the sum of €71,030, and that the bankruptcy summons did not reflect this. The judgment and order of the High Court were upheld in the Court of Appeal (Donnelly, Haughton and Collins JJ) ([2020] IECA 49).

45. The Supreme Court granted leave to appeal to that court. The issues to be resolved were set out in the court's determination – and again at para. 21 of the judgment of Dunne J – as follows: -

> "1. Does any overstatement of a claim of debt in bankruptcy cause the dismissal of the petition or does it suffice that, making all due allowances, at least €20,000 is due no matter how overstated a bankruptcy summons is in amount?
>
> 2. What threshold of credibility must be passed by a debtor whereby he or she may dispute as an overstatement a sum claimed in bankruptcy?
>
> 3. Is the failure to assert a defence in time fatal to the running of this defence, supposing for the sake of argument, if it has any legal merit, or may have a potentially strong legal merit notwithstanding delay, or passes any threshold of credibility test?"

46. In relation to the second of those issues – what the court called the "credibility threshold issue" – Dunne J referred at para. 82 to para. 60 of the judgment of Collins J in the Court of Appeal, in which that judge referred to the test for dismissing a bankruptcy summons, first articulated by McGovern J in *Minister for Communications v MW* [2010] 3 IR 1, and to the decision of the Supreme Court in *Minister for Communications, Energy and Natural Resources v Wood & Wymes* [2017] IESC 58, and then stated as follows: -

> "Approving again (this time as a Supreme Court judge) the test articulated by McGovern J in *Minister for Communications, Energy and Natural Resources v MW*, Dunne J emphasised 'that the issue must be a real and substantial issue' that

'should not be fanciful or unreal'. It may be an issue of fact or law. If an issue of fact, 'it must have some credibility'. If an issue of law, where the issue was one as to which there was no doubt, that could not justify dismissing the summons. As she had done in her judgment in the High Court in *Marketspreads Limited v O' Neill and Rice*, Dunne J expressed the view that the principles applicable to applications for summary judgment were of assistance. In looking at the situation overall 'one must of course consider whether what is deposed to on affidavit by the applicant is credible.' Referring to the decision of the High Court in *McGrath v O'Driscoll* [2007] ILRM 203, Dunne J stated that she would adopt the approach adopted by Clarke J there 'so that a mere assertion that an issue arises would be insufficient to succeed in an application to dismiss a bankruptcy summons but any evidence of fact which would, if true, arguably give rise to an issue that requires to be litigated outside the bankruptcy proceedings would be sufficient to establish that the bankruptcy summons should be dismissed.' Dunne J then went on to closely examine the various arguments made by the appellants before concluding that none satisfied the threshold of 'real and substantial issue' and dismissing the appeals."

47. Dunne J then stated at para. 83 of her judgment that she saw "no reason for coming to any different conclusion now on the test to be applied before dismissing a bankruptcy summons, and the basis on which that test is to be considered…". She agreed with the conclusion of the High Court and Court of Appeal that there was "no basis in this case for saying that the issue raised by the appellant herein could be described as a real and substantial issue".

48. *Gladney* involved a challenge to an adjudication in bankruptcy. The present matter is at a different stage – the petition has yet to be heard, and the issue is whether or not the consideration of the matter requires cross-examination or an oral hearing. However, the basis

for the debtor's challenge to NALM's bankruptcy petition is fundamentally the same as that of Mr Tobin in *Gladney* – a denial of the debt, and the contention that the bankruptcy summons is accordingly invalid and must be set aside.

49. Counsel for the debtor submits that, if there is a "real issue" which is properly being "joined" between the parties, *Hoey* and *Dunne* suggest that cross-examination is appropriate. However, I do not think that those cases necessarily assist the debtor. Section 85A(1) requires the formation by the OA of a belief that certain criteria are satisfied; *Hoey* and *Dunne* are authorities for the proposition that the debtor may be entitled to cross-examine the OA in relation to the basis for that belief. It does not necessarily follow that, where there is a "real issue" as to whether a debt is owed, the debtor is entitled to cross-examination or a plenary hearing.

50. However, as we have seen, the plaintiff in fact accepts that if the debtor persuades the court that there is a "real and substantial issue" as to compliance by the petitioner with s.11(1)(a), cross-examination will not be necessary as the petition should be refused by the court. The petitioner's position is that an examination of the issues as set out on affidavit and consideration of the appropriate legal principles will demonstrate to the court that the contention of the debtor that there is a real or substantial issue as to the petitioner's compliance with s.11(1)(a) is spurious and completely unfounded.

Conclusions

51. It is important to remember that this Court is not tasked with presiding over the hearing of the petition. The application to the court is for orders directing a plenary hearing or cross-examination of the affidavits. It is not for this Court to pronounce upon the relevance to s.11(1)(a) of the scheduled issues, much less to make determinations in relation to them.

52. I accept that, in circumstances where the debtor makes the case that he does not owe the sums sought by the petitioner, or that his assets in fact exceed his liabilities, the

"credibility threshold" for the making of such a case is to be assessed by the court according to the summary by Collins J at para. 60 of his judgment in *Gladney* set out at para. 46 above of the principles set out by Dunne J and accepted by her as applicable at para. 83 of her judgment in *Gladney*.

53. However, the petitioner is in my view correct in contending that cross-examination is not necessary for the application of these principles. There is justice in the claim of counsel for the petitioner that the debtor is seeking to put the cart before the horse. If the court is satisfied that there is a real and substantial issue as to whether or not there has been compliance with s.11(1)(a), there will at that point have to be a resolution of that issue. This may involve a plenary hearing or cross-examination; this would be a matter for the judge hearing the petition to decide.

54. The petitioner argued trenchantly at the hearing before me that it was demonstrable from the affidavits as they stand, and from the applicable legal principles, that there was no real or substantial issue as to compliance with s.11(1)(a). It seeks an opportunity to make that case to the court hearing the petition. If it does not succeed in persuading the court that there is no such issue, or the court accepts the debtor's position that there is indeed such an issue, the petitioner accepts that the petition cannot satisfy the requirement under s.11(1)(a) and must fail.

55. It seems to me that this interpretation is correct. The debtor does not require an oral hearing to resolve the thirty-eight scheduled issues in advance of the hearing of the petition; he needs simply to persuade the court that the petitioner is wrong in contending that there is no real or substantial issue arising as to the compliance of the debt on which the petitioner relies with s.11(1)(a). That objective does not require the resolution of the thirty-eight issues by an oral hearing or cross-examination.

56. I am also mindful that the decisions of the Supreme Court in *RAS Medical Limited v The Royal College of Surgeons of Ireland* [2019] 1 IR 63, the High Court (Butler J) in *Re Bayview Hotel (Waterville) Limited* [2022] IEHC 516, and this Court in *Re Green D Project Ireland Limited* [2023] IEHC 773 may suggest that contested evidence on affidavit in insolvency matters may now be more likely to be regarded as requiring cross-examination. However, whether that is so in the present case will be entirely a matter for the court hearing the petition.

Orders

57. There will be an order dismissing the debtor's application. I propose to list the petition for mention only in the bankruptcy list on Monday 14 October 2024 for consideration by the judge in charge of that list of how the matter should proceed.

58. My preliminary view is that the petitioner, having been entirely successful in resisting the debtor's application, is entitled to its costs. If either party takes a different view, or considers that any further or other orders should be made, that party should deliver written submissions of not more than 1,500 words within 14 days of the date of this judgment. Unless I consider that an oral hearing would be appropriate – in which case the parties would be informed – I will proceed to finalise the order of the court without further reference to the parties.