THE HIGH COURT

BANKRUPTCY

[2024] IEHC 708

[Record Nos. 5263P & 6250S]

IN THE MATTER OF A PETITION FOR THE ADJUDICATION OF BANKRUPTCY BY STEPHEN BYRNE AGAINST CIARAN MAGUIRE

JUDGMENT of Mr Justice Liam Kennedy delivered 13th December 2024.

1. The Debtor has applied ("the Application") for an order dismissing a Bankruptcy Summons (the Summons) under s.8(5) and (6) of the Bankruptcy Act 1988, as amended ("the Act" - all statutory references in this judgment are to the 1988 Act). The Summons is grounded upon a District Court judgment ("the Judgment") but the Debtor asserts a countervailing claim against the Creditor which could not have been asserted in the proceedings giving rise to the Judgment. The Debtor requires an extension in order to bring the Application - it was filed more than 10 months after service of the Summons, long past the 14-day deadline. The Creditor denies that there is any issue which would justify the dismissal of the bankruptcy summons but maintains that in any event there are no grounds for such an extension.

2. Taking the Debtor's affidavit evidence at its height, I am satisfied that: (i) he has adduced prima facie evidence of a real and substantial claim against the petitioning creditor (for brevity, I shall refer to the latter and associated parties as "the Creditor")

and an arguable right of set off and (ii) the bankruptcy proceedings are arguably an abuse of process. He may well have had an unanswerable entitlement to the dismissal of the Summons if his application had been made promptly. However, for the reasons outlined below, his delay means that he is out of time. The relative strength of his Application is not enough to justify the substantial extension in the circumstances. Accordingly, he cannot apply to set aside the Summons. However, he may make the same arguments to seek the dismissal of the petition (and the Creditor has, rightly, acknowledged his entitlements in that regard).

The Background

3. The Summons was based on the Debtor's undisputed failure to pay the sum due under a District Court Order which was itself grounded on an order of the Residential Tenancy Board ("RTB"). There is no issue as to the validity of those orders, which have not been appealed, set aside or otherwise impugned by the Debtor. However, the Debtor asserts a claim against the Creditor. In summary, as long ago as July 2011, the Creditor leased a property ("the Property") to the Debtor, which became home for him and his young family, for many years. The order grounding the Summons relates to unpaid rents on the Property and, significantly, the Property also gives rise to the Debtor's countervailing claim. It is common ground that both parties originally envisaged that the Debtor would eventually buy the Property (but no agreement was ever concluded). The Debtor says that there were ongoing delays in the sale negotiations due to: (i) the Creditor's inability to show good title to the Property, including clarity as to its boundaries; (ii) doubts as to the future of an associated golf course (which would affect the sale price); and (iii) financial problems with the development generally. In the meantime, the Creditor was unable to fund maintenance and repairs. The Debtor says that: (i) the parties agreed that he should carry out various works on the basis that the

Creditor would reimburse such expenditure or set it off against the rent (or the purchase price); (ii) he incurred substantial expense with the Creditor's knowledge and consent - a figure in excess of the RTB/District Court jurisdiction, preventing him from raising the counterclaim in those proceedings. The Debtor has instigated High Court proceedings ("the Plenary Proceedings") in respect of the issue.

4. The issues include; (i) the proposal to sell the Property (although no agreement was ever concluded); (ii) sums allegedly paid by the Debtor in respect of the property; (iii) the rent arrears which are the subject of the Order grounding the Summons; and (iv) the Creditor's attempts to evict the Debtor. These and related issues have spawned ongoing litigation, including the Plenary Proceedings. The debtor claims that the bankruptcy proceedings are an abuse of process as his claim exceeds the debt grounding the bankruptcy proceedings. The Creditor denies the Debtor's allegations (in broad, general and nonspecific terms without engaging with their detail), submitting that they do not give rise to a fair issue to be tried and are a collateral attack on the District Court judgment and that there is no basis for an extension.

The Bankruptcy Proceedings

5. The Summons was in the usual terms, noting that the Creditor had given 14 days' notice of the intention to apply for the Summons and referring to the unpaid debt, warning the Debtor that he would have committed an act of bankruptcy (and might be adjudged bankrupt on the presentation of a petition) unless he paid €33,133.35 within 14 days. It also warned the debtor to apply to dismiss the Summons within 14 days if he was not in fact indebted to the creditor as alleged. (A petition based on the Summons cites the Debtor's failure to pay the sum claimed within the stipulated period as an act of bankruptcy. A dispute as to the service of the petition is irrelevant for present purposes).

The Evidence

6. On 26 July 2022 - *after* the Debtor had issued the Plenary Proceedings - the Creditor obtained the RTB Determination **(**"the Order") on which the Summons is grounded. It directed the Debtor to pay €32,414.50 in arrears and €650 costs. The Creditor duly served notice on the Debtor before applying for the Summons on the basis of the Order. The Debtor's grounding affidavit:

    a. explains the background to the dispute, referencing the litigation in the RTB and the Courts both before and after the 26 July 2022 District Court order.

    b. Confirms that the Creditor repeatedly represented that he would sell the property and the Debtor carried out significant investments and upgrades:

        > *"on the basis of that agreement and/or representations, and also representations from the petitioning creditor that he did not have funds for essential maintenance of the property".*

    c. exhibits a spreadsheet which details substantial expenditure, totalling €182,132.97 (and notes €15,000 to €18,000 other expenditure).

    d. refers to the effect of the dispute on his family and their affairs, including opportunities foregone, asserting a damages claim and suggesting that the Creditor's motivation for the bankruptcy proceedings was to prevent the Debtor from pursuing the Plenary Proceedings.

    e. Explains that the Debtor could not have sought damages in the District Court or RTB given the sums involved. The Debtor declined an RTB proposal to direct compensation for that reason.

7. The Debtor's plenary summons claims damages for breach of trust, gross negligence, breach of duty, misrepresentation, fraudulent misrepresentation, fraudulent misstatement, conspiracy to cause economic loss, deceit and unjust enrichment and

seeks judgment for €507,799.97 and punitive aggravated or exemplary damages. A summary of the Statement of Claim will suffice for present purposes and appears as a schedule to this judgment. It provides detailed particulars of the basis on which the Debtor claims that the sums allegedly owed to him by the Creditor greatly exceed the sums in issue in the bankruptcy summons.

8. The 5 November 2021 RTB adjudication report:

    a. notes the disputes about rent arrears, the termination notice, and the Creditor's claims that the Debtor was overholding.

    b. Summarises the Debtor's evidence that: (i) he told the Creditor that he was interested in buying the Property and he would make a large investment in it accordingly and they agreed to discuss the sale when the lease expired; (ii) At the end of the initial two-year period, the Creditor said that if the Debtor continued to invest in the property, they would deduct that from the purchase price. The Debtor expected the Creditor to resolve his issues as to the title and with the bank.

    c. Summarises the Creditor's evidence; (i) acknowledging the Debtor's wish to buy the property and the fact that the Creditor had not had the capital to refurbish it; (ii) Complaining about aesthetics and health concerns after the Debtor occupied the property. The Creditor did not accept that the property had been properly maintained by the Debtor; (iii) The Creditor claimed to have good title and denied that the debtor's solicitor had approached him in relation to the sale.

    d. noted that

> *"both parties confirm that as the cost of maintenance and/or the works carried out by the tenant were above the sum of €20,000 they were not asking for a decision in relation to those matters".*

e. concluded that: (i) there was a residential tenancy (not a caretaker agreement); (ii) the Creditor's notices of termination were invalid; and (iii) the Creditor was in breach of his obligations in failing to grant the tenant quiet enjoyment; (iv) the Creditor could not opt out of such statutory maintenance obligations; and (v) there were rent arrears.

f. notes the Debtor's evidence that he had agreed to carry out essential maintenance works and upgrade works because the Creditor was not fulfilling his obligations to maintain the property and had agreed that the Debtor's expenditure would be reimbursed, reiterated the parties' confirmation that any entitlement to reimbursement for maintenance and improvements was outside the RTB's monetary jurisdiction and would not be dealt with in the adjudication except insofar as it might be relevant to the termination notices.

9. The Creditor's solicitor swore two replying affidavits - much of it gratuitous hearsay, being matters more properly deposed to by the Creditor but of dubious relevance in any event since for present purposes the Court is not required to resolve the substantive issues and is focussed on whether, taking the Debtor's affidavits at their height, a real and substantial issue arises for trial. In any event, the affidavits:

a. denied the Debtor's allegations in blanket terms, asserting that any issues arising from the respondent's occupation of the Property had been

> *"fully and conclusively dealt with by the Residential Tenancies Board and subsequent the Dublin District Court".*

(This averment is inconsistent with the terms of the RTB determination, but the Creditor and his solicitor do not address this in their three affidavits).

b. Focuses on the undisputed binding RTB determination and the fact that the Debtor has failed to pay the amount ordered (without addressing the substance of the counterclaim).

c. disputes the Debtor's claims about his ultimate eviction and in the Plenary Proceedings but without engaging with the detail beyond stating that

> *"I entirely deny the various allegations contained within those proceedings and consider same to be frivolous, vexatious, unnecessary and an abusive of the process of this honourable Court".*

d. notes the lack of any credible explanation as to why there was no application to dismiss the bankruptcy summons within the prescribed time.

Current Status of Plenary Proceedings

10. The Statement of Claim in the Plenary Proceedings was served on 24 June 2023, but the Creditor has not filed a Defence.

The 1988 Act and the Rules of the Superior Courts

11. The pertinent provisions include the following:

a. Section 8(1) empowers the Court to direct the issuance of a bankruptcy summons where; (a) the debtor owes a liquidated debt of €20,000 (or more); (b) the creditor has given the debtor at least 14 days' notice of the intention to apply for the summons; and (c) the debt remains unpaid.

b. The form prescribed for such a summons (pursuant to s.8(4)) calls upon the debtor to pay or compound for the debt or to apply to dismiss the summons within a prescribed period (14 days).

c. Section 8(5) permits the making of an application to dismiss the summons *"within the prescribed time".*

d. Section 3 provides that *"prescribed",* for these purposes, means as prescribed by rules of court.

e. O. 76 r.13(2) of the Rules of the Superior Courts ("RSC") duly provides that the person seeking dismissal of a bankruptcy summons must file an affidavit to that effect within fourteen days of service of the summons.

f. Under s.7(1)(g) the debtor commits an act of bankruptcy (which may ground a bankruptcy petition) if he fails to pay, secure or compound for the debt to the creditor's satisfaction within the prescribed period following service of such a summons. Such an act of bankruptcy can ground a petition.

g. Section 8(6) provides that the Court (a) *"may"* dismiss a bankruptcy summons with or without costs, and (b) "shall" dismiss it if an issue *"would arise for trial"*.

The nature of bankruptcy proceedings

12. In *Gladney v Tobin* [2022] IESC 3 *("Tobin")* Dunne J. cited para. 101 of her Supreme Court judgment in *Murphy v. Bank of Ireland* [2014] 1 IR 642

> *"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 ..."*

The test for setting aside a bankruptcy summons

13. The legal test for determining whether to set aside a bankruptcy summons on the basis of s.8(6)(b) is uncontroversial. In *Re Bankruptcy Summons by Marketspreads Ltd* [2014] IEHC 14, Dunne J. referenced the unreported Supreme Court judgment in *St Kevin's Company against a Debtor* (Ex Tempore, 27 January 1995), which concluded that if the debt grounding the summons was disputed, the Court should dismiss the summons without investigating (or determining) the merits of the dispute. Dunne J. added that an unreal or illusory issue will not justify the dismissal of a bankruptcy summons, a point reiterated in subsequent decisions including her own Supreme Court judgment in *Minister for Communications v Wood & Wymes* [2017] IESC 16 which noted that the issue must be real and substantial and have some credibility rather than being fanciful or unreal. Likewise, in her Supreme Court judgment in *Tobin*, again at

para. 83, Dunne J. endorsed the formulation adopted by Collins J. at para. 63 of his Court of Appeal judgment in that case [2020] IECA 49 - had the Debtor demonstrated a real and substantial issue which was at least arguable with some prospect of success? In a similar vein, in *Noreen Hynes v John and Bridget Atkinson* [2021] IEHC 598 Humphreys J. noted that a mere assertion will not suffice - the Debtor must raise

> *"a viable defence to the summons in the legal context in which that summons is in fact brought, as opposed to some hypothetical context unbounded by statutes of limitation or other legal constraints.*"

14. Humphreys J. drew an analogy with summary judgement - the debtor need not definitively demonstrate that she is correct but must raise "*a credible point based on some evidence that might be accepted".*

15. A bankruptcy summons may be set aside on the basis of a disputed issue even if it is grounded on another Court's judgment or order:

    a. In *Re a Debtor* (No. 991 of 1962) [1963] 1 WLR 51, the debtor issued proceedings against the creditor claiming the return of wrongfully detained property. The creditor subsequently issued a bankruptcy notice based on monies separately owed by the Debtor pursuant to a judgment for a lesser figure. Lord Denning MR reversed the Registrar's dismissal of an application to set aside the bankruptcy notice. He observed at p. 55 that the notice should be set aside if there was a genuine claim for an amount which equalled or exceeded the judgment debt which could not have been set up in the action.

    b. The judgment of Evans-Lombe J. in *Eberhardt & Co v. Mair* [1995] 1 WLR 1180 noted at p.1186 the Court's long-established power and duty to ensure that bankruptcy proceedings were not "*instituted in circumstances which amount to injustice"* observing that the Court had

> *"exercised a power to inquire into the consideration for the petitioning debt even to the extent of going behind judgments".*

c. Evans-Lombe J. added at p.1187 that although those authorities predated the 1986 legislation in the UK, although there was no direct authority on the point:

> *"there would seem to be no reason to take the view that the power of the bankruptcy court to inquire into the consideration for the petitioning debt and in the process to go behind judgments or orders has not survived the coming into force of the Act of 1986".*

(The same observations apply with equal force to our own 1988 Act). Evans-Lombe J. added in respect of the question as to whether an issue estoppel arose:

> *"just as the Bankruptcy Court would, in an appropriate case, go behind a judgment for the petitioning debt so it would go behind any issue estoppel arising from a judgment in the proceedings themselves. It follows, it seems to me, that no issue estoppel can be finally binding on a court of bankruptcy at the point when that court comes to consider whether to make a Bankruptcy Order."*

d. McGovern J. endorsed and followed these authorities in *Minister for Communications, Energy and Natural Resources v Wymes & Anor* [2009] IEHC 413 when dealing with a bankruptcy summons issued on foot of a costs taxation. The issue was whether interest arrears on the judgment debt were recoverable more than six years after the interest became due. McGovern J. referred at para. 8 to the need, under (and prior to) the Act, to comply strictly with the Rules and statutory provisions because the bankruptcy process has such serious consequences for a debtor. Although, irrespective of the interest issue, there was an undisputed debt which was sufficient to ground bankruptcy proceedings, McGovern J. dismissed the summons as there was a real and substantial issue which was at least arguable and with some prospect of success." (para. 24)

e. In *Tobin* at para. 84, Dunne J. cited the following passage from para. 60 of the decision of McGovern J. in *Minister of Communications, Energy and Natural Resources v Wood & Wymes* [2017] IESC 58:

> *"…Referring to the decision of the High Court in McGrath v O' Driscoll [2006] IEHC 195,[2007] ILRM 203, Dunne J. stated, at p. 5, 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 35 should be dismissed….'"*

Collateral attack

16. Although, as the previous paragraph notes, a bankruptcy summons may be set aside even if it is grounded on a judgment or order obtained in earlier litigation, the Courts will not permit such applications to become collateral attacks on previous judicial determinations. In *Doherty· v. Blessville Unlimited Company* [2023] IEHC 543 the creditor submitted that:

a. in view of orders obtained against the debtor, no issue arose for trial:

> "*Where a party has already sued and obtained a judgment for a debt...then it cannot be disputed that it enjoys the status of a creditor… judgment was obtained and has not been appealed or set aside and therefore, it is contended, should be given effect to.*" (para. 32)

b. the scope to dismiss a bankruptcy summons under s.8(6)(b) was narrow - an issue for trial would only arise:

> *" where a party obtains a bankruptcy summons on the basis of being a creditor, but the party's claim to be a creditor is disputed <u>and its claim has not been determined by a court at trial"</u>*(at para. 37) (emphasis added)

17. The Court accepted that, in the particular circumstances, the debtor faced an insurmountable difficulty arising from orders in earlier litigation. As the orders were never appealed, set aside or otherwise revisited there was no basis for revisiting them or questioning their validity. However, it is important to understand the context of this judgment. As appears from the judgment, the debtor had originally issued proceedings against the creditor, which were eventually resolved by a consent order requiring the debtor to pay €46,000 to the creditor by a particular date and to collect certain property from the creditor by a subsequent date, failing which the Debtor would be required to pay the creditor €151,000. The proceedings were adjourned. When they were relisted at the end of the specified period neither condition had been fulfilled. Pilkington J. accordingly entered judgment for the higher figure, which was then the basis for the summons. The debtor argued (in opposition to the Summons) that the creditor wrongfully prevented him from collecting his property in accordance with the first order and thus also deprived him of the resources required in order to fund the payment required by the first order. The debtor was present when the first order was made on consent. He was not in court when the second order was made although his counsel attended to come off record. In any event the debtor was informed of the making of that order that very day but took no steps to appeal or otherwise challenge it. In those circumstances O'Higgins J. concluded that no issue arose for trial because the debtor could and should have opposed the second order at the hearing at which it was made, or he could have appealed that order and sought to have it set aside. While noting the difficulty facing debtors seeking to reopen in bankruptcy proceedings issues which have been (or which should have been) resolved in earlier proceedings, O'Higgins J. did not suggest that the Court would never look behind an earlier judgment or order in bankruptcy proceedings. His conclusion at paras. 74 - 80 were more nuanced:

"74. I find the Debtor's reasons for not attending court on the 14 February 2020 unconvincing and wholly lacking in credibility. First, on his case, a burning injustice had occurred in that the Creditor had wrongfully frustrated his efforts to comply with the first order of Pilkington J. One would expect a litigant in such circumstances to be 'chomping at the bit' to explain his position and keen to take all necessary steps to ensure the Court is put right on the factual position and that, at the very least, he would be present in court for the return date to defend his position.

75. Second, it is apparent from the terms of the first Order of Pilkington J. dated 22 November 2019 that the Debtor's action stood adjourned to Friday, 7th February 2020. The Debtor knew this because he was present.

76. Third, it seems to me there is an inconsistency in the Debtor's position as to why he did not turn up in court in February 2020 or seek to revisit the matter later. On the one hand, he claims that he had no knowledge in advance or at the time of the application, and yet on the other hand he accepts that he was notified on the evening of the application. All of this is unconvincing and lacking in credibility, particularly in circumstances where he now claims he had a strong story to tell.

77. Apart from the factual merits, it seems to me that at a level of principle, the Debtor's argument necessarily involves the Court second guessing, or revisiting in some way, an Order made by the High Court more than 3 years ago. In my view, the Debtor cannot now 'unring the bell'. The High Court has already granted judgment in the sum captured in the bankruptcy summons.

78. In oral argument before me, the point was made that the Debtor had effectively taken the view that 'sleeping dogs should be let lie', and since the Creditor had held on to the retained chattels which on the Debtor's case exceeded the value of the sum owed, then that state of affairs would mean in substance that the debt was met and that, as a matter of justice, that should be the end of the matter. In my view, it simply wasn't open to the Debtor to adopt that position, if indeed that was the position he adopted. A debtor can't unilaterally choose to ignore a judgement or deem it no longer applicable. In my view, it is not open to

the Debtor in this instance to invite the Court to effectively ignore, or set aside, the order of Pilkington J. Those proceedings have long since come to an end and the final outcome was reached, resulting in the second order of Pilkington J. To hold otherwise would be to ignore the principle of finality and the doctrine of res judicata in my view.

79. … the issue comes down to whether the defence raised by the Debtor is 'real and substantial'. I hold that it is not. The point raised by the Debtor is unreal and depends on factual assertions which lack credibility. No sustainable argument has been made why the Court should overlook or disregard the Order made by Pilkington J. A mere assertion by the Debtor that he has a defence to the debt is not enough. Nor is it sufficient for the Debtor to say that Pilkington J. would not have made the Order had he been present in court to make the arguments that he now wishes to make. In Wood, Dunne J. makes clear that where an applicant for a dismiss order under s 8(6)(b) denies that he owes the money sought in a bankruptcy summons, but has already suffered judgement in that amount, 'then the conclusion that he does not owe the money would simply not be credible'.

80. Of course, the res judicata principle should not be applied inflexibly or in a manner that closes out a party's rights to fair procedures. There may well be exceptional cases where it will be appropriate to go behind a judgement that has been granted previously. I do not rule out such a possibility where a debtor puts forward cogent evidence that calls into question the reliability or fairness of the earlier proceedings. For instance, were a debtor to establish prima facie proof that the earlier judgement was procured by fraud or mistake, or in circumstances of fundamental unfairness such that it should be set aside, then the interests of justice might necessitate at least a revisiting of the earlier Order. In this way, the principle of finality will not operate as an inflexible or absolute rule and a Court will retain a residual discretion to revisit an earlier Order where the individual circumstances of a case may require it."

Abuse of Process

18. The authorities confirm the discretion to dismiss a petition or bankruptcy summons if it is an abuse of process:

    a. Counsel drew the Court's attention to the *Petition of Naseem Ahmed* (unreported, High Court, Dunne J, 18 April 2005). However, a copy of this authority was not provided, nor has the Court been able to secure a copy. In any event the reference to the decision in Sanfey and Holohan, *Bankruptcy Law and Practice in Ireland* (2nd ed, Roundhall, 2010) at [2-95] suggests that, despite its apparently unusual facts, it does confirm that a bankruptcy petition can be dismissed as an abuse of process including for material non-disclosure. The respective High Court and Court of Appeal judgments of Sanfey and Pilkington JJ in the *Petition of Oliver Kruda* [2022] IEHC 406 and [2023] IECA 317 also demonstrate that a bankruptcy adjudication may be annulled on the basis of non-disclosure. That case concerned a debtor's petition for self-adjudication, which, by definition is initiated on an ex parte basis, whereas a creditor's petition is resolved at an inter partes hearing. However, since the petition is founded on an act of bankruptcy in terms of failing to respond to a bankruptcy summons, and the bankruptcy summons cannot be issued except with leave of the Court on the basis of an ex parte application by the creditor, it seems to me that the same logic must apply and the creditor must disclose all matters material to the issuing of the summons, including any facts and matters of which the creditor is aware which might suggest that there is a real and substantial issue for trial.

    b. on the equally unusual facts of *McGinn v Beagan* [1962] IR 364, the Court was satisfied that the debt was due but the purpose of the summons was not to

secure its payment but to ensure the debtor was adjudicated bankrupt, rendering him ineligible for local elections. Budd J. stated:

> *" ...The proper purpose of bankruptcy proceedings is to make assets available to creditors…In my view McGinn brought this debtor's summons for improper reasons, and I am satisfied that proceedings were not taken to get payment, but to make Mr. Beagan a bankrupt and unseat him. Hence, the purchase of the debt and the issue of the summons was to enable Mr. McGinn to commence proceedings for a collateral purpose. It seems to me that I should not allow the Court's processes to be used for an ulterior and collateral purpose, and I will therefore stay all further proceedings, on the debtor's summons ..."*

Extension of time to apply to set aside a bankruptcy summons

19. Several judges (all noted for their bankruptcy expertise) have expressed varying views on the circumstances in which the Court may extend the time for a s.8(5) application. The issue is whether there is a general discretion, or whether the principles generally applied to applications for leave to appeal out of time also apply to s.8(5) applications or whether it is a statutory time limit which is not amenable to judicial extension. The general principles (applying to applications to extend the time for appealing a lower court's judgment) are known as the *Eire Continental* criteria, by reference to *Eire Continental Trading Company Ltd* v. *Clonmel Foods Ltd* [1955] IR 170) and have been recently restated by the Supreme Court (in the an application to extend the time for the appeal of a High Court order) in *Seniors Money Mortgages (Ireland) DAC v Derek Gately & Anor.* [2020] IR 441, [2020] IESC 3 ("*Gately*").
20. In *Gladney v O'M* [2015] IEHC 718 ("*O'M")* paras. 21 Costello J. was unconvinced by submissions that the *Eire Continental* criteria should apply an application to extend time for a s.8(5) application after a nine-month delay, observing at para 19 - 22 that:

"19. ... the analogy between an appeal from a judgment or order and an application to dismiss a bankruptcy summons is misconceived. A judgment or order is binding upon the parties and may be acted upon (on the assumption that there is no stay). A bankruptcy summons, on the other hand, is a procedural step which is taken by a creditor with a view to establishing an act of bankruptcy on the part of the debtor. It is a prelude to the presentation of a petition for the adjudication of bankruptcy of a debtor. It does not amount to a judgment (though it is frequently based upon previously obtained judgments). Crucially, a debtor is entitled to raise arguments in relation to the validity of a bankruptcy summons at the hearing of a petition by way of defence to a petition. In that sense, a debtor who is served with a bankruptcy petition and who fails to apply to dismiss it within the 14 days allowed under the Rules of court for such application is not precluded from raising those points at a later stage in the proceedings ie at the hearing of the petition. This is fundamentally different, in my opinion, to an appeal against any existing order or judgment. If no appeal is brought, there will be no further opportunity afforded to the would-be appellant to raise the issues which he may seek to raise by way of appeal.

20. Furthermore, because a bankruptcy summons is part of a procedure designed to lead to a hearing on foot of a petition in bankruptcy, the question of the efficient utilisation of court time is relevant to deciding whether or not to extend the time in which to allow a hearing to take place on the dismissal of a bankruptcy summons when the same arguments can be advanced in relation to the petition to adjudicate the debtor a bankrupt.

21. I do not accept that it is appropriate to apply the principles in relation to extending time to appeal a decision of a court as enunciated in Eire Continental and Goode Concrete to an application to extend the time to dismiss a bankruptcy summons. In my opinion, the Court has a general discretion and the differences between an appeal and an application to dismiss a bankruptcy summons are relevant to the exercise of that discretion.

22. ... I am not persuaded that the debtor has advanced good grounds upon which I should exercise my discretion to extend the time permitted by the Rules to bring an application to dismiss the Bankruptcy Summons. The onus rests on him to do so. ... the Bankruptcy Summons clearly states on its face that the application to dismiss the Bankruptcy Summons must be brought within 14 days

from the date of the service of the Summons upon the debtor. ...No real explanation was afforded as to why he delayed from 28th May, 2014, to 3rd December, 2014, in applying to dismiss the Bankruptcy Summons. In view of the fact that he will be allowed to raise by way of defence to the Petition to adjudicate him bankrupt those arguments which he wishes to present in support of his application to dismiss the Bankruptcy Summons, I cannot see that he would be in any way prejudiced by my refusal to extend the time in which to allow him to bring this application."

21. The Supreme Court subsequently briefly considered the issue in *Tobin* but the Creditor argued that the Supreme Court's observations were obiter as the Court had concluded that the Debtor had not raised a real and substantial issue for trial so there was no basis for an extension in any event. It is correct that Dunne J. acknowledged at para. 85 that it was not necessary to consider the extension issue because no issue arose for trial which would require the dismissal of the bankruptcy summons in any event. Obiter or not, the Court's observations are instructive. The 14-day period expired on 2 May 2016 but the Debtor issued the application in November and had not explained the delay or why the court should extend time. Dunne J. observed:

"85. ...The principles in relation to an extension of time were first set out in the case of Éire Continental v. Clonmel Foods Ltd. [1955] I.R. 170. That case set out the following principles, namely, that:
(1) The applicant must show that he had a bona fide intention to appeal formed within the permitted time. 37
(2) He must show the existence of something like mistake, and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient.
(3) He must establish that an arguable ground of appeal exists.
86. ... The application of those principles has been considered most recently by this Court in the case of Seniors Money Mortgages (Ireland) DAC v. Gately [2020] 2 ILRM 407. At para. 58 of the judgment in that case, O'Malley J. observed as follows:

'58. It was clear from the terms of the judgment of Lavery J. in Éire Continental that while the court saw the three matters identified by counsel as "proper matters for the consideration of the court", although even in that respect modifying them to some extent, the essential point \was the necessity to consider all of the relevant circumstances.
59. The jurisprudence of this Court consistently demonstrates this approach in such cases.
60. The analysis in Goode Concrete v. CRH [2013] IESC 39 sets out the purpose behind the obligation to consider all of the circumstances. Firstly, Clarke J. identified the objective of the court when considering an application to extend time (at para. 3.3): "The underlying obligation of the court (as identified in many of the relevant judgments) is to balance justice on all sides."
61. He then went on to identify certain considerations that are likely to arise in all cases. "Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice. Prejudice to 38 successful parties who have operated on the basis that, once the time for appeal has expired, the proceedings (or any relevant aspect of the proceedings) are at an end, must also be a significant factor. The proper administration of justice in an orderly fashion is also a factor of high weight. Precisely how all those matters will interact on the facts of an individual case may well require careful analysis. However, the specific Éire Continental criteria will meet those requirements in the vast majority of cases.'
87. O'Malley J. went on to say, at para. 62: 'While bearing in mind, therefore, that the Éire Continental guidelines do not purport to constitute a check-list according to which a litigant will pass or fail, it is necessary to emphasise that the rationale that underpins them will apply in the great majority of cases.'
88. She added, at para. 64:
'As Clarke J. pointed out in Goode Concrete it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside the time if the court is not satisfied that there are arguable grounds, even if the intention was formed and there was a very good reason

for the delay. To extend time in the absence of an arguable ground would simply waste the time of the litigants and the court.'

89. This is not an application for leave to extend time to appeal, but it does seem to me that the principles set out in Éire Continental could be applied by way of analogy to the delay in bringing an application to dismiss a bankruptcy summons in accordance with the time specified in the Rules for such an application. Accepting that those principles are not a set of rigid requirements to be met before an appeal, or in this case, an application could be allowed, but it has to be borne in mind that, on the facts of this case, there is no evidence at all to explain the failure to bring the application to dismiss the bankruptcy summons for such a lengthy period of time. However, more critically, this is a case where there is no arguable ground which could be relied on by the Appellant which would justify any extension of time. Accordingly, in these circumstances, it would not have been appropriate to extend the time within which to bring an application to challenge the bankruptcy summons".

22. Sanfey J. undertook a detailed and exhaustive analysis in *Re Liam Campion* [2023] IEHC 435 ("*Campion*") (albeit *Tobin* was not cited to him). He concluded that s.85(5) imposes a mandatory time limit, so there is no basis to invoke O. 122 r. 7 RSC:

"14. ... it is significant that the periods after which the act of bankruptcy will be deemed to have occurred pursuant to s.7(1)(g), and within which the debtor may apply to dismiss the summons, are co-extensive. The creditor seeks to bring about an act of bankruptcy as a precursor to initiating a bankruptcy process by service of a petition in bankruptcy. The alleged debtor can attempt to prevent the act of bankruptcy occurring by applying to dismiss the summons before the act of bankruptcy is complete. In doing so, the debtor is given the opportunity to apply to court to persuade it that the invocation of the bankruptcy regime in aid of the creditor is inappropriate because the court will be "satisfied that an issue would arise for trial"; until that issue is resolved, the court cannot proceed by way of bankruptcy summons and ultimately a petition for adjudication.

15. Once the fourteen day period under s. 7(1)(g) elapses, the debtor has, according to the Act, committed an act of bankruptcy. The creditor now has a basis for proceeding to petition for the debtor's bankruptcy, and is entitled to

invoke the jurisdiction of the court: in this regard, see particularly the dicta of Baker J. in re Wymes at para. 94 of that judgement. The debtor is still entitled to raise any infirmity in the bankruptcy summons at the hearing of the petition, or even after his adjudication pursuant to s. 16 of the Act. However, the creditor's position changes fundamentally when the fourteen day period expires without the debtor paying, securing or compounding the debt in the manner envisaged by S. 7(1)(g).

23. At para. 16 of his judgment Sanfey J. concluded (citing *Proctor and Gamble v. Controller of Patents* [2003] 2 IR 580*)* that although O.122 r.7 RSC gives the Court an extensive power is to enlarge periods prescribed by the rules, it could not be invoked to extend a mandatory statutory time-limit. He concluded at para. 20 that:

"the fourteen day period within which the application to dismiss must be brought is in fact a time-limit mandated by s. 8(5), albeit finding expression in 0. *76 r.13(2). I do not consider that 0.122, r.7 can be used to side-step this period, within which the sub-rule provides that the debtor "must file an affidavit ... ". Even if the fourteen-day period is not properly regarded as a mandatory statutory time-limit, it seems to me that the period is deliberately co-extensive with the period of fourteen days referred to in s. 7(1)(g), and permits the debtor to apply to dismiss the summons on the basis that the bankruptcy jurisdiction has been inappropriately invoked in circumstances where "an issue would arise for trial". It is notable that s. 8(6) does not require the court to decide the issue; it is effectively asked to conduct an exercise the object of which is to determine whether the process of creating an act of bankruptcy should be permitted at all in circumstances where there may be an issue which would arise for trial between the parties. If satisfied that there is such an issue, the court has no option but to dismiss the summons.* However, *if the debtor does not apply within the fourteen days, an act of bankruptcy occurs by operation of law. and it is in mv view too late for a debtor to seek to persuade the court that the creditor cannot proceed to petition for his bankruptcy.*

Even if there were such a jurisdiction to enlarge the lime limit in respect of a s. 8(5) application. I consider that such an enlargement should only be granted in very compelling circumstances. and where the delay is small to the point of being

de minimis - days rather than weeks. In the present case, given that that the application was brought over eight months after the fourteen-day period expired, and six months after the creditor's petition in bankruptcy was filed, there are no circumstances in which an enlargement of time can be granted, even if the court has such a jurisdiction. The fact that some of that time may have been spent between the parties in attempting to negotiate settlement is irrelevant. "

24. While *O'M*, *Tobin* and *Campion* adopt different approaches it should be noted that although in *Tobin,* the respondent appears to have advanced the jurisdictional argument that succeeded in *Campion*, the Supreme Court did not need to address that submission since the appellant failed even on the *Eire Continental* criteria. Secondly, and this was presumably a function of the timing of the respective hearings and judgments, it does not appear that *Tobin* was cited in *Campion.* Accordingly, until the issue is clarified at appellate level, there is scope to argue as to whether the *Eire Continental* principles or the *Campion* approach should apply to s.8(5) applications.

Debtor's Submissions

25. The Debtor says that the bankruptcy summons must be dismissed because:

    a. the claim in the Plenary Proceedings is an issue for trial and an abuse of process as its object is not to secure payment of the rent arrears but to prevent the Debtor pursuing his claim in the Plenary Proceedings. There is a bad history between the parties and the Court should be sceptical about the Creditor's intentions. The Creditor failed to disclose the full details of the poor relationship and the dispute between the parties in his application or his affidavit of debt, including the existence and basis for the Plenary Proceedings. The Defendant drew an analogy with nondisclosure in *McGinn.*

    b. In considering the extension, the Court should follow *Tobin* and grant an extension on *Eire Continental* principles. There were strong arguable grounds to dismiss the summons (unlike *Tobin*), there would be no prejudice to the

Creditor due to the extension or the dismissal of the bankruptcy summons, as they would still have the benefit of the original District Court Order and could progress or dismiss the Plenary Proceedings as provided for in the rules.

c. The Debtor only asserted that the third *Eire Continental* condition was met – a strong, arguable, issue for trial but he relied on the observation of O'Malley J. at para. 71 of the Supreme Court's decision in *Gately* to the following effect:

> *"I would therefore find against the appellant on the basis that there is no arguable ground. However, even if the situation was less clear-cut, such that it could be said that the appellant's case was "arguable" or "stateable", I would nonetheless consider that in the circumstances of this case the Court should not exercise its discretion in favour of extending time. As I said earlier, it seems to me that where there is significant delay before seeking an extension, the appellant will need to show a correspondingly strong case. Since the objective is to do what is just in the circumstances as presented on the facts of each individual case, an argument based purely on a technical error by the trial judge, that cannot be described as having brought about an unjust result, may be insufficient. In my opinion, that is the situation in this case. It might be pointed out that the appellant in this case, unlike many of the possession cases that come before the courts, has continued to reside in the property while the debt increases, but with no personal liability for that debt. She had inherited her mother's estate but, as the trial judge pointed out, she could not inherit the property free from the mortgage. The fact that she and her husband reside there does not alter that proposition. The lender was entitled, on the evidence before the court, to an order for possession of the property securing the loan, appellant."*

Creditor's Submissions

26. The Creditor submitted that no extension should be granted because:

a. The Debtor failed to apply within the prescribed time. He committed an act of bankruptcy by ignoring the Bankruptcy Summons. Having had the benefit of

legal advice at the time, he should not be given an extension. *Tobin* was obiter and the Court should follow *Campion*. The conclusions of Sanfey J. in *Campion* are equally applicable in these proceedings.

b. No issue would arise for trial between the parties pertaining to the Bankruptcy Summons and the debt to the Creditor identified therein. There is no controversy as to the outstanding financial obligation, which has been determined by the RTB and affirmed by the District Court. The Debtor had raised fanciful issues, which have no credibility to obfuscate inescapable financial obligation to the Creditor with wholly unrelated allegations from the Plenary Proceedings against the Creditor. The Plenary Proceedings are devoid of merit, frivolous, vexatious, an abuse of process, bound to fail and fully contested by the Creditor (although no defence).

c. There was no abuse of process by the Creditor nor any non-disclosure in his application and affidavits. The debt owed by the Debtor to the Creditor emanated from the binding Determination/ Order of the Residential Tenancies Board, as affirmed by the District Court. It was unnecessary for the Creditor to lay the Debtor's version before the Court.

d. The Court’s discretion and inherent jurisdiction (to dismiss as oppressive or an abuse of process a bankruptcy summons issued for an ulterior motive) was noted in a recent judgment of the High Court of England and Wales by Kelly J. in *King v. Bar Mutual Indemnity Fund* [2023] 1 EWHC 1408 (Ch) 126 *et seq,* at paras. 129 and 130 but Kelly J. emphasised the high standard of proof to show such an abuse of process in Bankruptcy proceedings, noting that *“a mixed motive on the part of the Creditor does not amount to an abuse of process."* The Creditor has no such mixed motive in seeking to adjudicate the

Debtor bankrupt. He wishes to recover as much of his undisputed debt as possible from the Debtor's estate in bankruptcy. Even if the Debtor was adjudicated bankrupt and his property was to vest in the Official Assignee, the Official Assignee could continue to litigate the Plenary Proceedings against him. Indeed, even the Debtor's adjudication as a bankrupt, would not automatically mean that he would be divested of his interest in the proceedings. The Creditor denies the Debtor's unfounded assertion as to an ulterior motive for the Petition, which, to the contrary, stems from an unappealed, unchallenged binding Determination of the Residential Tenancies Board, as affirmed by the Court.

e. The Residential Tenancies Board has made a binding Determination on 26 July 2022 requiring the Debtor to pay the Creditor €32,414.50 for arrears arising from his occupation of the property (plus costs). He has never challenged the Determination, nor has he paid any part of the sum due. He has never disputed that such sum is due and owing to him, nor made any proposal towards addressing this indebtedness.

Discussion

Issue for Trial

27. Taking the Debtor's case at its height (as I am required to do for present purposes), I am satisfied that there is an issue for trial (and that, if those principles are applicable, the third *Eire Continental* condition is satisfied). The Debtor has established that the claim in the Plenary Proceedings (summarised in the schedule hereto) meets the *"real and substantial"* requirement. The Debtor has particularised his claim in the Plenary Proceedings and his affidavit sets out the basis for the claim in detail. His position is

corroborated (if corroboration was required) by the RTB report. The Creditor's Replying Affidavit does not alter this assessment. While denying the claim in blanket terms, the Creditor blandly avers that he does *"not intend to go into the merits of the case"* (para. 8) and incorrectly states that the Debtor has not delivered a Statement of Claim in the Plenary Proceedings.

28. Unlike *Doherty*, the Debtor could not raise his claim in the Residential Tenancy Board proceedings– the RTB determination confirms this. The Creditor's submissions sidestepped the fact that, as appears from the determination, the RTB did not address the Debtor's right to reimbursement. The Plenary Proceedings are not a collateral attack on the RTB/District Court determination/order which postdated and did not refer to them. The situation would be different if the debtor was resurrecting a defence or counterclaim which he had already asserted (or, as in *Doherty*, could or should have asserted) in the original proceedings.
29. The language used by Lord Denning MR in *Re a Debtor* (that the notice should be set aside if there was a genuine claim for an amount which equalled or exceeded the judgment debt, and which could not have been set up in the action) reflected statutory language which does not appear our legislation. However, those concepts are helpful in determining whether a summons should be dismissed in this jurisdiction. As *Doherty* demonstrates, if a bankruptcy summons is grounded on a judicial determination which has not been appealed or set aside, then the bankruptcy court will be reluctant to look behind another Court's order or determination or to relitigate the merits of earlier proceedings or reopen issues determined (or which should have been determined) previously. However, that is not the case here.
30. I disagree with the Creditor's characterisation of the issues raised by the Debtor as devoid of merit, frivolous, vexatious, an abuse of process, bound to fail, fanciful,

lacking credibility and as an attempt to obfuscate his inescapable financial obligation to the Creditor with wholly unrelated allegations against the Creditor. The factual basis for these epithets was not explained. It is not obvious to me that any of these criticisms of the Plenary Proceedings are well founded, and it is wrong to characterise those allegations as unrelated to the debt in issue in the bankruptcy proceedings.

31. Other than blanket denials, no rebuttal of the claim advanced in the Plenary Proceedings was forthcoming from the Creditor. He did not provide a meaningful response to the allegation that the debtor spent circa €200,000 on the property with his knowledge and consent and on the basis of his assurance that that expenditure would be offset against rent or, if the sale proceeded, against the price of the property. He has not filed a defence in the Plenary Proceedings.

32. In the circumstances, the Plenary Proceedings would have provided a basis for the Application if the Application had been made without delay. The claim would also meet the third *Eire Continental* criterion (if those criteria should apply). If the Application had been issued in good time, the summons would inevitably have been dismissed on this ground alone and costs may have been sought against the Creditor, perhaps on a legal practitioner and client basis in circumstances in which the issuing of a summons appears inappropriate. However, no application to set aside the summons on that basis was made within the period prescribed by law. Accordingly, the Applicant requires an extension in order to belatedly bring the Application.

Abuse of Process

33. It was arguably an abuse of process for the Creditor to issue the Summons while the Plenary Proceedings were ongoing. I cannot accept the Creditor’s submission that no issue as would arise for trial between the parties pertaining to the Summons and the debt identified therein in circumstances in which the debt represents arrears of rent on

the Property and the Debtor's far larger claim in the Plenary Proceedings relates to very substantial expenditure which, he claims, was to be reimbursed to him or offset against the rent or the price of the Property. I am surprised that the application for the summons failed to disclose such a substantial and closely related claim between the parties. The existence of those Plenary Proceedings should certainly have been fully and fairly disclosed on the application for the Summons (if, indeed, there was any basis to proceed while those proceedings were pending). It is not appropriate to apply (ex parte) without adverting to anticipated defences or counterclaims.

34. The inexplicable failure – contrary to good professional practice – to directly inform the Debtor's solicitor of the issuance of the Summons and the intention to progress it is also a pertinent consideration. In view of the draconian implications of bankruptcy proceedings, creditors are expected to behave fairly and professionally in the manner in which they seek to invoke the statutory powers. If a party is known to be represented then, unless there are exceptional reasons for not doing so (such as urgency or a concern as to the need to preserve evidence) their solicitors should be informed of the intention to issue proceeding or applications, including bankruptcy proceedings. They should be invited to confirm whether they have instructions to accept service and, in any event, they should be informed when proceedings or applications are issued or served on the client. Any unreasonable or unexplained failure to do so may invite adverse inferences in appropriate cases (including as to motivation and as to whether the Creditor's actions constitute an abuse of process) and may also impact on the Court's exercise of discretionary powers, including as to costs. For all these reasons, I would probably have dismissed the Summons on this ground as well if the Application had been made without delay. However, once again, the Applicant requires an extension in order to dismiss the summons on that ground.

Application for extension

35. The legal submissions focussed at length on the *Tobin/Campion* dichotomy, but I am not satisfied that there would be a basis for an extension on the basis of *Tobin,* the authority which seems most favourable to the Debtor. The Summons was served *"in or around late January 2023"* but the Application was only issued on 14 December 2023. No good reason has been advanced for the ten month delay. It appears from the Debtor's affidavit and submissions that:

    a. The debtor justifies the delay by arguing that nothing happened in the bankruptcy proceedings for most of that period until around the same time as the Creditor's eviction of the Debtor and his family from the Property, their home. This argument does not advance matters. The statutory deadline expired in mid-February but the Debtor took no step to deal beyond forwarding the Bankruptcy Summons to his then solicitor. There is no meaningful explanation for his inertia. If he was waiting to see whether the Creditor pursued the issue, it was a high-risk strategy because he was ignoring the statutory requirements. He was subject to a 14-day time limit and no agreement was sought (or forthcoming) from the other side to withdraw the summons or to agree to extend the time for his response;

    b. The Debtor says that he tried to resolve matters amicably with the Creditor and sent a *"without prejudice"* proposal to him on or about 29th November 2023 but the latter failed to engage, leaving him with no option but to issue the Application. Unilateral attempts to resolve disputes by negotiation are commendable. However, they do not – at least in the absence of an express standstill agreement – abridge statutory deadlines. As Sanfey J. noted in *Campion*, such negotiations are irrelevant in the context of an extension

application. In any event, the statutory deadline had passed – giving rise to an act of bankruptcy – 10 months before the without prejudice correspondence. Accordingly, that correspondence does not avail the Debtor;

c. The controversies concerning the Creditor's attempts to evict the Debtor and his family and to serve a Bankruptcy Petition (several months after the service of the bankruptcy summons) would doubtless have been understandably traumatic for the Debtor and his family but they are irrelevant to the issues determining the Application. They do not explain the Debtor's failure to apply to set aside the bankruptcy summons within the statutory period.

d. The Debtor criticised the Creditor's solicitors for not corresponding with the Debtor's solicitors either in respect of the intention to apply for a bankruptcy summons or when it was issued. I agree that the Creditor's failure to do so is both surprising and contrary to good professional practice. His solicitors knew their counterparts' identity. They were representing the Debtor in related litigation. However, for reasons which have not been satisfactorily explained, the Creditor's solicitors only wrote to the Debtor's solicitors in October 2023. It would have been prudent and good practice for the Creditor's solicitor to inform the debtor's solicitor when serving the notice of intention to apply for the bankruptcy summons and when serving the summons itself. In some cases such an omission might be a reason for an extension if the Creditor's solicitor's actions had prejudiced the Debtor or delayed their recourse to legal advice. In this case, however, although I do not condone the unedifying departure from normal professional practice, the omission does not justify the Debtor's request for an extension. The facts remain that: (a) service was effected in accordance with the requirements of the Act and the RSC; and (b)

no prejudice arises in respect of the failure to copy the Debtor's solicitor since the debtor himself promptly forwarded the documents to his solicitor. The Creditor's solicitor's omission does not explain the Debtor's failure to bring the application within the period laid down by law.

36. I appreciate that the Debtor may have been preoccupied with resisting the attempts to evict him and his family from their home. The immediate threat of eviction (rather than possible bankruptcy proceedings) may well consumed the focus of his attention for much of the period following the service of the Summons. Furthermore, once the Debtor had been evicted in July 2023 he may have assumed that further action was unlikely on foot of the Summons issued on 16th January 2023. Furthermore, he may not have been in a position to obtain legal advice in view of the urgent need to rehouse his family. However, these points do not explain the overall 10 month plus delay in applying to dismiss the bankruptcy summons.

37. I see the force of the competing arguments as to the correct approach to applications to extend the time for s.8(5) applications. It is clear that some views were expressed obiter or in passing and the issue would benefit from resolution at appellate level. In the meantime, if approaching the matter *tabula rasa*, I would tend to the analysis cogently set out by Costello J. (as she then was) in *O'M* and by Sanfey J. in *Campion*, approaching the issue as a matter of statutory interpretation in view of the words of s.8 in their statutory context and the evident design and intended operation of the legislation. It should also be noted that the 14-day deadline is not as harsh as might appear to be the case. It is only one of the statutory protections for the Debtor. As noted above, he will already have received warning of the impending bankruptcy proceedings because, as part of the proofs on the application for leave to issue the bankruptcy summons the Creditor must demonstrate that the Debtor has been given

notice of the intention to apply for the summons. That process was duly followed on this occasion and no objection was taken by the Debtor or his then solicitors.

38. As noted above, once the bankruptcy summons is served the debtor has 14 days to pay or compound for the debt or to move to dismiss the summons. Sanfey J. has observed that that it is not coincidental that the period prescribed for the debtor's response to the summons (so as to avoid presentation of a bankruptcy petition) is coextensive with the period prescribed (albeit by the Rules) for an application to set aside the summons. Accordingly, an elastic approach to extensions would be inconsistent with the statutory framework, which is designed to ensure the orderly, efficient, cost effective and expeditious progress and resolution of bankruptcy proceedings in a manner which is fair to both sides. Furthermore, a s.8(5) application does not automatically operate as a stay. Accordingly, an extension for the Application would not of itself change the fact that an act of bankruptcy had occurred under s.7(1)(g), triggering the entitlement to present a bankruptcy petition.

39. Significant extensions to the periods for launching s.8(5) applications could delay and obstruct the presentation of petitions contrary to the evident statutory intention. The creditor may have – entirely legitimately - filed a Petition on the strength of the act of bankruptcy arising from the debtor's inertia – as actually happened here. (In practice, a creditor might be open to criticism if they were to file a petition *after* the debtor served a s.8(5) application. A Court might well dismiss any such petition or stay it until the application had been resolved. However, the situation is different if - as in this case - the creditor issued the petition long after the expiry of the time provided for the debtor's response and in the absence of any indication that the debtor intended to apply to set aside the Summons).

40. In the absence of an appropriate response (or, in this case, any response) to the Summons within the stipulated period (allowing, perhaps, a short period of grace), the Creditor can scarcely be faulted for issuing the bankruptcy petition (save to the extent noted in para. 34 in respect of the Summons). That is the process mandated by the Act. Nor should the Creditor be prejudiced by the Debtor's failure to apply to set aside the summons within the required period.

41. Perhaps the Court can invoke its inherent jurisdiction to grant a short extension in exceptional cases, such as those identified by Sanfey J. in *Campion,* but I agree with his observation that the Court should be more reluctant to grant an extension to dismiss a bankruptcy summons when there has been a long delay and even more cautious once the creditor has filed a petition relying on s.7(1)(g). As Sanfey J. observed, any such enlargement**:**

> *"…should only be granted in very compelling circumstances. and where the delay is small to the point of being de minimis - days rather than weeks".*

In that case the court concluded that it could not entertain an application brought eight months late and the Supreme Court came to the same conclusion in *Tobin* in respect of a similar delay (by a slightly different route, applying *Eire Continental*), whereas we are dealing with an even worse delay here.

42. There are two further reasons for not granting an extension of the time to strike out a bankruptcy summons once a petition has issued. Firstly, the debtor suffers no real prejudice because, as has been pointed out in many authorities including by Sanfey J. in *Campion* and *Re Noel Martin* [2024] IEHC 528 ("*Martin*") and by Collins J. in the Court of Appeal judgment in *Tobin* and as was acknowledged by the Creditor in this case, the Debtor remains entitled to oppose the petition on the very same grounds on which he could have opposed the Summons as well (as any additional grounds which might apply such as, in this case, in relation to the service of the petition).The nature

of a bankruptcy summons should also be borne in mind. The Supreme Court judgment in *The Minister for Communications, Energy and Natural Resources and Michael O'Connell v Michael Wymes* [2021] 1 IR 803 *("Wymes"),* confirmed that a bankruptcy summons is a no more than a formal notice or warning (unlike an originating summons or writ or other document which commences legal proceedings). At paras. 37 and 38, the Supreme Court noted that the form and purpose of the bankruptcy summons is:

> *"to act as a formal notice or warning to the debtor that he or she is at hazard that, in default of payment of, or the provision of security for, the debt, an act of bankruptcy will have been committed entitling the creditor to put in train the machinery leading to adjudication. The hazard is greater than that suffered by a debtor by the service of a simple demand for debt, and even greater than the service of a court judgment for debt, as the time limits for enforcement by the bankruptcy process provided by statute are short, and there is no express provision for the extension of time".*

43. Furthermore, at paras. 40-45, the Court states

> *"[40] The first question to consider is the legal nature of a bankruptcy summons and Forde and Simms in their text Bankruptcy Law (Round Hall, 2009) suggest at para. 4–16 that it is not a process in the sense of being an action or a mode of enforcing judgment. I agree but would comment further as follows.*
>
> *[41] The form and purpose of the bankruptcy summons is to act as a formal notice or warning to the debtor that he or she is at hazard that, in default of payment of, or the provision of security for, the debt, an act of bankruptcy will have been committed entitling the creditor to put in train the machinery leading to adjudication. The hazard is greater than that suffered by a debtor by the service of a simple demand for debt, and even greater than the service of a court judgment for debt, as the time limits for enforcement by the bankruptcy process provided by statute are short, and there is no express provision for the extension of time.*

[42] In my view whilst the process leading to adjudication has been set in train by the service of a bankruptcy summons, a court process has not thereby commenced. The service of the bankruptcy summons is a gateway and it is more correct to treat Fthe summons as a form of notice that the process could be commenced and to identify the time available to the debtor to avoid that occurrence. The bankruptcy summons is not therefore a "summons" in the sense used in the rules of court, and is not akin in function to a plenary, special or summary summons which commences legal action.

[43] Support for this view is found in the comments of Fitzgibbon L.J. in In re Moore. [1907] 2 I.R. 151 at pp. 157–158 that the procedure by debtor's summons in its essence is not a process for the recovery of a debt but a procedure to bring about an act of bankruptcy and which affects the status of the debtor and the rights of his creditors.

[44] The process of adjudication commences with the presentation of the petition, and the commencement of action by petition is also the means prescribed to wind up a company. The presentation of the petition is the commencement of the action and the issue of the bankruptcy summons itself cannot lead to an adjudication and whether it does is in the hands of the debtor.

[45] It is true that there is an element of judicial oversight, not found in corporate insolvency, in that leave is required before a bankruptcy summons can issue, and an additional element of protection is found for the debtor in the provisions of s. 8, permitting an application to be made to dismiss the summons even after a court has sanctioned its issue. This does not in my view make the issue of the summons the commencement of a bankruptcy action. It will be necessary in due course to return to this observation in the analysis of the effect of an application to dismiss a summons on the course of the process."

44. Accordingly, while a process potentially leading to adjudication is set in train by the service of a bankruptcy summons, the summons itself does not originate the

bankruptcy proceedings. It is the petition which does that. The summons is simply an additional protection for the debtor before bankruptcy proceedings are launched. The bankruptcy summons is not therefore a "summons" in the sense in which that term is generally used in the Rules of Court and does not function as an originating pleading (as would a plenary, special or summary summons).

45. More latitude might have been required if the refusal of an extension would have had the draconian consequence of rendering the debtor liable to adjudication without being able to raise substantive issues. However, that scenario does not arise. The Debtor can still raise his objections based on the Plenary Proceedings at the hearing of the petition just as effectively in opposition to the petition.

46. The Act provides for the issuing of a bankruptcy summons before a petition and also allows for such a summons to be (quickly) challenged, so as to give the debtor the chance to satisfy the debt or to move to set aside the summons and thus avoid the embarrassment of an unnecessary petition being issued. The utility of an application to set aside a summons is to save the debtor the distress, embarrassment and reputational damage of having to defend an unnecessary bankruptcy petition. Once the petition has lawfully issued, that ship has sailed and the benefit of applying to set aside the summons is largely eliminated. An act of bankruptcy occurred when the 14-day period expired. The petition was lawfully issued (subject to any abuse of process issue). Accordingly, a subsequent application to set aside the Summons is of negligible utility (if not moot) once the petition has issued because, even if an extension is granted, it does not mean that there was no act of bankruptcy nor does it require the withdrawal of the petition (although, if the Summons is ultimately dismissed, that would presumably impact the position, the mere issuing of the application would not have that effect).

47. In practical terms, the Court ultimately needs to determine whether the Debtor's substantive objection constitutes a real and substantial issue. However, once a petition has issued, it makes scant practical difference whether any such objection is dealt with in the context of a challenge to the summons or the petition (or both simultaneously). The Debtor's rights and procedural protections are arguably the same or more extensive at the petition stage and the outcome should be the same whether on an application to dismiss the petition, the Summons or both. The right to cross examine is unlikely to be an issue because, as the decision of Sanfey J. in *Martin* demonstrates, cross examination will generally not be required in practice to determine whether there is a real and substantial issue for trial since the Debtor's affidavits are taken at their height for that purpose.

48. Secondly, I am concerned to ensure the efficient use of court time and to avoid unnecessary expense or delay for the parties. If a challenge to the Summons and petition would essentially raise the same fundamental issue – as appears to be the case here - then they should ideally be dealt with simultaneously. There is no obvious logic to having separate hearings to allow the debtor to agitate the same challenge, first in respect of the summons and then in respect of the associated petition. Nor would such duplication be in the interests of the parties.

49. Accordingly, once the associated petition has been filed, matters have moved on and I can see little benefit in allowing extensions for the period for a challenge to a bankruptcy summons - the debtor can agitate all defences at the hearing of the petition. In terms of efficient use of judicial resources and in order to reduce delay and expense, it would be undesirable and inappropriate (save in exceptional cases) to grant leave to extend time to set aside a summons once a petition has been filed following

the debtor's failure to respond to that summons within the prescribed period save in the "*very compelling circumstances*" noted in *Campion.*

50. Even leaving aside my foregoing observations, I should note my agreement with the outcome in *O'M*, *Tobin* and *Campion* on their respective facts. None of the formulations posited in any of those cases would justify an extension in this instance. I have explained why no enlargement would be appropriate on the basis of the *Campion* analysis and I consider that the *O'M* approach would not avail the Debtor in this case for the same reason.

51. The *Tobin/Gately/Eire Continental* approach to the enlargement application might appear potentially more favourable for debtors but even that approach would not avail the Debtor in this case. The delay here is similar to *Tobin* (although unlike *Tobin* there is a substantial issue to be tried). The Debtor essentially relied on the third *Eire Continental* condition, without seriously submitting that the other conditions were met. On the first condition, formation of an intention to appeal, there seemed to be a hint that the Debtor may have moved earlier with his Application if the Creditor had evinced any intention to issue the petition but the point was not pursued with any vigour and I do not consider that this would suffice to satisfy the condition. The Act stipulates when an application should be brought; it does not allow the debtor to adopt *"wait and see"* tactics – if the debtor does so, then he jeopardises his entitlement to challenge the summons. Solicitors would doubtless advise clients in receipt of such a bankruptcy summons that if the debtor wishes to challenge the summons rather than to pay the money then they should do so without delay, unless a standstill agreement can be negotiated, or they will be deemed to have committed an act of bankruptcy and may be exposed to the presentation of a petition.

52. The Creditor argued that no *Eire Continental* criteria were met (for the same reasons as he argued that there was no fair issue to be tried and no abuse of process). I think that there is an issue to be tried and, if the *Eire Continental/Gately* criteria are applicable, then the third condition is clearly satisfied but there is no basis for me to conclude that there was an intention to apply to dismiss the Summons within the statutory time period. There is no evidence as to any mistake nor any real explanation as to why the Application was not made in time. He has not addressed the fact that he committed an act of bankruptcy in mid-February 2023 by failing to answer the Bankruptcy Summons and he took no steps until 15 December 2023.

53. Of course, the *Eire Continental* principles are not a checklist and it is significant that the Debtor has a strong position in respect of third and most important condition. Counsel for the Debtor emphasised the observation of O'Malley J. at para. 71 of the Supreme Court's decision in *Gately* that:

> *"... where there is significant delay before seeking an extension, the appellant will need to show a correspondingly strong case. Since the objective is to do what is just in the circumstances as presented on the facts of each individual case, an argument based purely on a technical error by the trial judge, that cannot be described as having brought about an unjust result, may be insufficient."*

54. I do consider that the Debtor has shown a reasonably strong case on principle 3 but I do not consider that that outweighs the extraordinary delay, the lack of adequate explanation or the failure to address the other two criteria. Nor do I consider that it is just to extend the period in circumstances in which the delay is so extensive and entirely of the Debtor's making and where it could impact on steps lawfully taken by the Creditor following the Debtor's failure to respond to the Summons. Most importantly, I do not consider that the Debtor will be prejudiced since he can still oppose the petition on the same basis as he would have opposed the Summons.

55. Accordingly, the Debtor is out of time to apply to dismiss the Summons and, irrespective of the divergence between the authorities, there is no basis to extend that deadline in the particular circumstances of this case (even applying the *Eire Continental* principles*)*. However, the Debtor can still oppose the Petition on the basis of his alleged countervailing claim in the Plenary Proceedings.

56. I will list the matter for directions in the first Bankruptcy List of the new legal term.

Schedule

Summary of Statement of Claim in Plenary Proceedings

In brief, the Statement of Claim alleges that:

a) in July 2011 the parties signed a two-year lease, on the expiry of which the lease was to be on a continuous basis pending the Debtor's purchase of the Property subject to terms and conditions being agreed.

b) the parties agreed heads of terms for the sale subject to issues concerning: (i) the Property boundary; (ii) an adjoining golf course which was integral to the valuation of the property; and (iii) rights of way or easements. Any deposit was to be conditional on receiving solicitor's details to resolve the concerns raised by the Debtor, but the Creditor did not provide these, preventing the Debtor from undertaking due diligence to progress the sale. The debtor offered proof of funds, but the golf course went into receivership (with plans to convert it to housing) and it was agreed that a new price would need to be negotiated.

c) In October 2007 the Debtor informed the Creditor that urgent essential maintenance was required and the Creditor was not fulfilling his obligations. The Debtor agreed to fund the essential maintenance because the Creditor did not have the necessary finance. He duly carried out the urgent maintenance and continued to carry out "maintenance and upgrade works" thereafter, on the basis that:

> *"all costs would be reconciled off the revised price of the property and be in lieu of a deposit or be credited for all costs incurred later from future rent due".*

d) The Creditor's delays in demonstrating proper title continued, but he assured the Debtor that the latter would receive a good deal on the property and that all upgrade works and maintenance *"would be reconciled off the price of the property or the plaintiff would receive credit for the amounts spent".*

e) There were ongoing negotiations as to a revised purchase price (making allowance for sums already paid by the Debtor) but these may have been complicated by the creditor's financial difficulties and his negotiations with the banks funding the development.

f) by January 2021 three months' rent arrears had accrued, but the Creditor had given no credit for the Debtor's expenditure of more than €200,000 on essential maintenance and upgrades to the property. The creditor told the Debtor that he could not apply the agreed credit at that point due to his cashflow issues.

g) The parties agreed a payment schedule on the basis that the Debtor would receive; (i) rent statements and receipts dating back to the start of the tenancy; (ii) the Creditor's solicitor's details and a draft agreement for the sale of the Property. However, the defendants still failed to show good title. The Debtor made payments as agreed but the Creditor still failed to provide receipts. The Debtor had no alternative but to apply to the RTB. The creditor submitted false evidence to the RTB to discredit the plaintiff.

h) On 28 April 2021 a letter from the Creditor proposed a different sale price and wrongly characterised the debtor as a caretaker rather than as a tenant. The debtor rejected the document.

i) The Creditor repeatedly and unlawfully attempted to repossess the Property causing significant distress and disruption to the Debtor and to his family and impacting their financial affairs, causing them to suffer loss.

j) Due to the Creditor's ongoing failure to establish good title to allow the sale to proceed, the Debtor spent eleven years investing into what he thought was his family home and missed the chance of buying other properties on the basis of his deal with the Creditor.

k) There were continued attempts to repossess the Property following the RTB ruling and also following the debtor's demands for reimbursement of his expenditure on the property.

l) The schedule to the statement of claim suggests that the debtor spent €182,132.97 on investments in and upgrades to the Property.