THE SUPREME COURT

S:AP:IE:2020:000125

A:AP:IE:2019:000247

Bankruptcy No. 4549

O'Donnell J.
Dunne J.
Charleton J.
O'Malley J.
Baker J.

IN THE MATTER OF MICHAEL WYMES, A BANKRUPT

BETWEEN/

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES AND MICHAEL O'CONNELL

Petitioners/Respondents

- AND –

MICHAEL WYMES

Respondent/Appellant

Judgment of Ms. Justice Baker delivered on the 1st day of July, 2021

1. The question for consideration in this judgment surprisingly has not been the subject of any decision of our courts notwithstanding that the statutory provision at its core is found in

legislation since the 19th century. The question is this: can a debtor commit an act of bankruptcy when he or she has challenged the summons relied on by the creditor?

2. The debt at the root of these bankruptcy proceedings is a certificate of taxation of 31 July 2003 in respect of a costs order made in 1997 against Mr Wymes and another person. At the date of the certificate the debt was €3,297,493.33, which together with interest was €4,881,012.86 at the date relevant to the subject matter hereof. No payment has been made by the appellant. The debt has been finally determined and is not affected by any challenge to the bankruptcy process.

3. Mr Wymes was adjudicated bankrupt by order of Meenan J. on 23 March 2018 on the petition of the Minister in reliance on his failure to pay following service of a bankruptcy summons ([2018] IEHC 213). The appellant's challenge to the summons under s. 8(5) had previously been rejected by McGovern J. on 29 April 2010, and the appeal was finally determined by this Court on 9 March 2017 ([2017] IESC 16) and 26 July 2017 ([2017] IESC 58).

4. The petition issued on 11 June 2010, after the decision of McGovern J. but before the decision of this Court on appeal. The respondent had been restrained from acting on the petition pending the conclusion of the appeal process, and it came to be heard by Meenan J. on 23 January 2018.

5. This appeal concerns the post-adjudication challenge by Mr Wymes by Notice to Show Cause pursuant to s. 16 of the Bankruptcy Act 1988, as amended, ("the Act of 1988") *inter alia* on the ground that no act of bankruptcy had occurred in the three months preceding the petition, and his argument was that he could not have committed an act of bankruptcy whilst the validity of the bankruptcy summons had yet to be finally adjudicated. That argument comes for consideration in this judgment.

6. Pilkington J. rejected his arguments for the reasons set out in her written judgment ([2019] IEHC 245) and the Court of Appeal dismissed the appeal *per* Faherty J. (Kennedy and Ní Raifeartaigh JJ. agreeing) ([2020] IECA 182).

7. Leave to appeal was granted solely on the question of whether an act of bankruptcy can occur while a challenge to a bankruptcy summons remains undetermined, in the light of the provisions of ss. 7(1)(g), 8(5) and 11(1)(c) of the Act of 1988: [2021] IESCDET 8.

The issue in the appeal

8. The issue in the appeal is one of statutory interpretation, and can be stated as follows:

(1) Whether a debtor can commit an act of bankruptcy pursuant to s. 7(1)(g) of the Act of 1988 by failure to satisfy a bankruptcy summons within 14 days after service of the summons, if within the 14-day period provided under s. 8(5) of the Act of 1988, the debtor seeks dismissal of the summons;

or reformulated as:

(2) Whether the reckoning of time for an act of bankruptcy pursuant to s. 7(1)(g) of the Act of 1988, that occurs on the expiry of a 14-day period after service of a bankruptcy summons, is stayed or suspended pending determination of an application by the debtor pursuant to s. 8(5) of the Act of 1988 to dismiss the bankruptcy summons.

General purposes of bankruptcy legislation

9. The first Bankruptcy Act directly applicable in Ireland was the Act in 1722 11 and 12 Geo. 2, c.8, the stated purpose of which was to "prevent fraud permitted by bankrupts", but bankruptcy is now seen as having a much broader purpose and social effect as it permits an ordinary resolution of debt, fairness between creditors, and protection of debtors.

10. Prior to the amendment effected by the Personal Insolvency Act 2012 ("the Act of 2012"), the Act of 1988 identified seven discrete means by which an individual debtor commits an act of bankruptcy. Most are for the protection of creditors, a means of dealing with

fraudulent conveyances, fraudulent preferences, or activity intended to defeat, delay or evade creditors, or in the case of s. 7(1)(f) of the Act, if execution has been levied by the seizure of a debtor's goods. Only one of those, the commencement of the process by service of a bankruptcy summons, is relevant to the present appeal, that most frequently relied on by creditors.

11. The amendments made by the Act of 2012 provide for the happening of the event of bankruptcy also if a debt settlement arrangement or personal insolvency arrangement has either failed or been terminated under the Act of 2012.

12. The report of the Bankruptcy Law Committee Report (the Budd Report), delivered to the Minister for Justice in 1972, comments usefully that bankruptcy has a broad range of purposes and, although the fact is probably of no more than academic interest now, bankruptcy is not wholly a creature of statute but has a recognition at common law in *Moss v. Smith* 1 Camp. 489. The Act of 1988 is described as a consolidating Act and it does not expressly provide that the proceedings under the Act be the sole means by which a person may be declared bankrupt. Notwithstanding, it seems wholly improbable that a petition in bankruptcy issued other than in accordance with the procedures in the Act of 1988 could proceed with any confidence having regard to the fact that the machinery in the Act is complex and would not readily be available to a person seeking the common law remedy of bankruptcy.

13. The Budd Report noted and recommended that it was desirable that all bankruptcy provisions be consolidated into one statute, and this is what occurred.

14. It is useful to repeat the purposes or objects of bankruptcy identified in the Budd Report at para. 1.13.1 as this shows that in truth the bankruptcy process is not one which can now be considered to be wholly for the benefit of creditors, and it has equally a benefit for debtors including, more obviously now in the current statutory framework, the fact that the period of bankruptcy is considerably foreshortened to 12 months, and a person who is discharged from

bankruptcy may, as a result of the forgiveness of onerous and cumbersome debt, be in a position to engage in financial and commercial activity without fear of action from creditors whose debts were unsustainable.

15. The Budd Report identified the four main objects of bankruptcy as follows:

(i) To secure equality of distribution between creditors and to prevent any one creditor obtaining an unfair advantage over the others.

In the light of the modern legislative scheme, this purpose must be seen to be to the benefit of creditors and indeed of debtors, and to the benefit generally of commerce, trade and the financial lives both of debtors and creditors;

(ii) To protect bankrupts from vindictive creditors by freeing them from the balance of their debts when they are unable to pay them in full and to help "rehabilitate" them.

The Act of 2012 uses more modern language and speaks of the common good that is to be achieved by the return to solvency of a debtor, the need to ameliorate the difficulties experienced by debtors due to insolvency, to "lessen the adverse consequences for economic activity in the State", and to permit the orderly and rational recovery of debts as may reasonably be permitted in the light of the means of the debtor. The active participation of debtors in the economic activity of the State was recited in the long title as being in the interest of the common good including the stability of the financial system in the State;

(iii) To protect creditors, not alone from debtors who prefer one or more creditors to others, but also from the actions of fraudulent bankrupts;

(iv) To punish fraudulent debtors.

16. One means by which an act of bankruptcy is deemed to occur by statute is where the debtor himself or herself files in court a declaration of insolvency, and, since the economic crash in 2008, many debtors have themselves opted to seek bankruptcy as a means of regulating

their financial affairs. Debtors who avail of the so-called self-adjudication process do so with a view to regulating their financial affairs and being in due course restored to solvency.

17. Thus bankruptcy, while it still might be said to carry some degree of stigma, and whilst it may impact on future creditworthiness, has become a means by which a person may deal with debt and thereafter return to full economic activity and take part in the economic life of the State. The statutory provision that has now reduced the period of bankruptcy to 12 months in the normal course must be seen as a legislative support for a rapid return to normal financial activity by a debtor. The element of shame attached to the status is one which finds echoes in literature and history but may be less apparent now in the light of contemporary thinking on the societal impact of debt, and the shortened term.

The steps leading to adjudication

18. It is useful to briefly first set out the steps leading to adjudication provided in the Act of 1988, and I will later where necessary quote the precise statutory provisions in the course of the judgment.

19. The first step is to ascertain if the debtor has committed one of the acts of bankruptcy identified in the Act. One such act, that relevant to the present appeal, is the failure of the debtor to pay or secure to the creditor the debt demanded in a bankruptcy summons in the prescribed form.

20. The second step is the issuing and presentation of a petition for bankruptcy by the creditor in which the act of bankruptcy relied on is identified.

21. The third step is the hearing of that petition at which an adjudication may be made, following which the bankrupt takes on the status of a bankrupt person and his or her property vests in the Official Assignee.

22. The complication giving rise to the present appeal arises from the various statutory means by which the debtor may prevent adjudication or set aside an order of adjudication. The

debtor may by statute challenge the validity of the bankruptcy summons. In addition the debtor may seek by application to "show cause" why the adjudication should be set aside. This is an unusual element of the code, as it permits the setting aside of an order of adjudication other than by appeal.

23. A debtor may engage both forms of challenge, and the debtor and the creditor may also appeal in the ordinary way against the decision on the summons challenge, and on the show cause application against the order of adjudication. It may be that the drafters of the original code did not anticipate the number of possible appeals or the time these might take. The fact that the same arguments may be made on an application to show cause as on an application to set aside a summons suggests that a more speedy resolution at the level of the High Court may have originally been envisaged.

24. The present appeal is of a decision rejecting the show cause application. Mr Wymes had previously lost his appeal against the challenge to the summons.

25. This sequence of available remedies illustrates the fact that there exists a considerable degree of protection to a debtor faced with a bankruptcy, but also the sometimes cumbersome and lengthy process which can delay the collection of debt and the return of the debtor to meaningful economic activity when he or she exits from bankruptcy.

The statutory act of bankruptcy

26. A creditor must identify an act of bankruptcy to ground a petition for adjudication. Section 7 of the Act of 1988 reproduces in part, and in broad substance, the provisions of s. 21 of the Bankruptcy (Ireland) Amendment Act of 1872. Some of the older case law is therefore still relevant to the interpretation of the statutory scheme.

27. Section 7(1) of the Act of 1988 (as amended) identifies the means by which a debtor can be said to commit an act of bankruptcy.

"7.— (1) An individual (in this Act called a "debtor") commits an act of bankruptcy in each of the following cases —

(a) if in the State or elsewhere he makes a conveyance or assignment of all or substantially all of his property to a trustee or trustees for the benefit of his creditors generally;

(b) if in the State or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof;

(c) if in the State or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudicated bankrupt;

(ca) the individual has been subject as a debtor to a Debt Settlement Arrangement which has been terminated under section 83 of the Personal Insolvency Act 2012;

(cb) the individual has been subject as a debtor to a Debt Settlement Arrangement which under section 84 of the Personal Insolvency Act 2012 is deemed to have failed;

(cc) the individual has been subject as a debtor to a Personal Insolvency Arrangement which has been terminated under section 122 of the Personal Insolvency Act 2012;

(cd) the individual has been subject as a debtor to a Personal Insolvency Arrangement which under section 123 of the Personal Insolvency Act 2012 is deemed to have failed;

(d) if with intent to defeat or delay his creditors he leaves the State or being out of the State remains out of the State or departs from his dwelling-house or otherwise absents himself or evades his creditors;

(e) if he files in the Court a declaration of insolvency;

(f) if execution against him has been levied by the seizure of his goods under an order of any court or if a return of no goods has been made by the sheriff or county registrar whether by endorsement on the order or otherwise;

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

28. Kisbey in his text on the Irish Bankruptcy Act (1876) explains, what is still the case, that some of the acts of bankruptcy listed in the section relate to the person of the debtor, some to his own conduct in relation to his property, and some to the state of his circumstances. Not all of the acts require culpable action on the part of the debtor, and some of the acts of bankruptcy are acts which by their implication suggest an attempt to defraud.

29. Section 7(1)(g) is relevant to the present appeal.

The bankruptcy summons

30. This judgment concerns one means by which a person may commit an act of bankruptcy, by the creditor serving a bankruptcy summons and thereafter petitioning for bankruptcy in default of payment of the sum referred to in the summons, or the securing or compounding of that sum to the satisfaction of the creditor.

31. The application to issue the summons is made *ex parte* under O. 76, r. 11(3) of the Rules of the Superior Courts and the statutory form provides for detailed particulars of the debt. The summons must state the bankruptcy consequences of not paying the debt, and that the debtor, if he wishes to dispute the debt and have the summons dismissed, must do so by signing an affidavit within 14 days. Section 8(1) provides the proofs that must be met before a court will grant a summons to a person, including that the debt be of more than €1,500, that it be a liquidated sum, and that the creditor has warned the debtor of an intention to apply for a summons. Section 8(1) was amended by s. 144(a) of the Act of 2012, to change the threshold debt to €20,000. The bankruptcy summons considered in this judgment was granted prior to the 2012 amendment.

32. The provisions of s. 8(1) are new and are not found in the 1872 Act, although they reflect to some extent the provisions of the old s. 30, and broadly mirror, but are more onerous than, the procedure by which a creditor petitioning to wind up a company must serve a demand for payment, although in that case leave of the court is not required.

33. Once liberty has been granted to issue the summons it must be served within 28 days (r. 14(1)) and personal service is required.

34. Recent Irish case law has borrowed from the old English authorities and developed the principle that an overstatement of an amount claimed in a bankruptcy summons is an error that makes the summons invalid. The rules for issuing and serving a bankruptcy summons must be strictly followed and the leading case remains the decision of Hamilton P. in *O'Maoileóin v. Official Assignee* [1989] IR 647 which dealt with the requirement that service be properly effected, and that the amount claimed be accurately stated. Holmes L.J. in the much earlier authority, *In Re Moore* [1907] 2 IR 151, described the process of the issue of a debtor's summons as "a summary and drastic proceeding", one which required strict compliance of the prescribed provisions which he regarded as not merely formal but also matters of substance.

35. This latter point must derive from the fact that failure to pay the amount said to be due in a summons is itself an act of bankruptcy entitling the petitioning creditor to thereafter take the step of presenting a petition for bankruptcy.

36. 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 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.

37. 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.

38. 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 the 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.

39. Support for this view is found in the comments of Fitzgibbon L.J. in *In Re Moore* 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 (at p. 158).

40. 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.

41. 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.

42. For reasons of certainty, and for protection for both creditor and debtor, it seems to me that it is important that the provisions dealing with the grant of liberty to issue a bankruptcy summons and the contents of that summons be clear and that the time limit for the debtor to pay or secure the debt be fixed. Vagueness around the time limit could leave a debtor in some uncertainty as to what needs to be done to avoid the commencement of the bankruptcy process and the presentation of the petition. A debtor must know what to do to avoid adjudication, and precisely what the time limits are within which that must be done.

43. The creditor too needs certainty and clarity as to the time limits within which payment or the provision of security must occur.

44. The Budd Report considered what was then called a "debtor's summons" in some detail and noted that the grant of a debtor's summons to a creditor "creates immediate and severe difficulties for the debtor", a procedure the report described as "severe". The Committee recommended that the procedure be retained notwithstanding protests.

45. At the level of principle at least, the requirements of court approval for the issue of a summons and that the debt be a liquidated sum offer some protection for a debtor, as a genuine dispute over the amount or liability for the debt, taken together with the provisions permitting a debtor to seek to dismiss the summons, must be seen as relieving against a harsh or unfair use of the summons procedure.

The petition

46. The proceedings are commenced by petition in accordance with s.11 which provides the conditions for the presentation of a petition. At issue is s. 11(1)(c) which fixes the time limits:

"11.— (1) A creditor shall be entitled to present a petition for adjudication against a debtor if— […]

(c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition […]"

47. The Acts of 1857 and 1872 provided a time limit of six months such that an act of bankruptcy relied on by a petitioner must have been committed not more than six months before the filing of the petition. That time has been foreshortened and the Act of 1988 now provides for the service of a petition on foot of an act of bankruptcy occurring within three months before it is presented.

48. The procedure by petition was contained in s. 121 of the Irish Bankrupt and Insolvent Act of 1857 and then repeated with a variation of the minimum amount of debt by s. 20 of the 1872 Act. The Budd Report recommended that the procedure of commencing the process by presentation of a petition be retained as it was one "without unnecessary formalities or delay", and therefore was particularly suitable to ensure that no delays occurred which would facilitate fraudulent dealings with a bankrupt's property (para. 2.6.1).

49. The process is commenced by the presentation of a petition in the High Court and that petition must rely on and identify an act of bankruptcy committed by the debtor within the preceding three months. The petition is presented by first filing a petition and grounding affidavit, together with a second affidavit proving the bankruptcy summons in the Central Office of the High Court, following which the Examiner will endorse the time of filing and allocate a date for court hearing. The form is prescribed in Form No. 11 and must contain those matters set out in O. 76, r. 19 and the notice of the date fixed by the Examiner for the hearing will be endorsed on the petition (r. 32). The petition is to be signed by the petitioning creditor, and in practice is usually signed also by the creditor's solicitor as a petitioner cannot personally file a petition unless he or she identifies himself or herself sufficiently to the Examiner (r. 22).

The creditor must lodge monies with the Official Assignee to cover anticipated costs and expenses of the Official Assignee.

50. Thereafter a copy of the petition containing a notice of the date fixed for hearing must be served not less than seven days before the date appointed for the bankruptcy hearing (r. 25). The service must be personal although there are provisions for substituted service. The petition then is listed in the Monday Bankruptcy List where the judge may make an order of adjudication or adjourn the hearing either to deal with objections by a debtor or to allow the debtor to come to another arrangement. Statutory provisions exist now by reason of the Act of 2012 to deal with the possibility that the debtor might be in a position to resolve his or her indebtedness by a Personal Insolvency Arrangement or Debt Settlement Arrangement under the personal insolvency regime.

51. Bowen L.J. in the old Court of Appeal decision of *Quartz Hill Consolidated Gold Mining Company v. Eyre* (1883) 11 Q.B.D. 674 at p. 691, thought that the presentation of a bankruptcy petition against a trader might, if done falsely and maliciously and without reasonable or probable cause, be actionable because of the likely damage caused to the credit of a trader which was, he says, "as valuable as his property". There he was considering a petition to wind up a company which he thought would strike a blow at the company's credit once advertised and that special damage could be involved in the very institution of the proceedings such that an action would lie against a person who falsely or maliciously so instituted proceedings. The Irish High Court considered the question in the judgment of Costello J. in *Dorene Ltd v. Suedes (Ireland) Ltd* [1981] IR 312, which concerned the general question of whether a claim for damages at common law lies for the institution and maintenance of civil action without reasonable or probable cause or maliciously. Costello J. considered that an action did so lie and referred to *Quartz Hill v. Eyre* in the course of his judgment as a useful illustration of the principle.

52. I quote those cases not to express any view regarding the availability of a remedy on account of a false and malicious presentation of a bankruptcy petition, but rather to highlight the nature of the petition and the fact that the presentation of a petition in bankruptcy is not a matter that is to be taken lightly, and can damage credit worthiness. The Act of 1988 itself and the rules made thereunder for that reason require the petitioning creditor to set out in some considerable detail the amount of the debt and to specify exactly the act of bankruptcy relied on, as well as the requirement that the petitioning creditor will provide financial security for the cost of the Official Assignee.

53. Following adjudication the bankrupt may under s. 16 of the Act of 1988 bring application to have the adjudication annulled. That is done by notice in prescribed Form No. 16 and is grounded on affidavit. This is the stage at which the application the subject of the present appeal came to be heard and Mr Wymes served a notice to show cause against the bankruptcy which then took its course in the High Court and later the Court of Appeal, set out above.

The act of bankruptcy must be identified in the petition

54. The creditor's right to present the petition for bankruptcy arises by reason of the committal by a debtor of an act of bankruptcy within the meaning of s. 7(1) which provides in unequivocal terms that an individual commits an act of bankruptcy on the happening of one of the listed events. The provision is in effect a deeming provision, and in the case of s. 7(1)(g) after the passing of 14 days from service of a summons and absent payment or the provision of security the act of bankruptcy can be said to have occurred.

55. Mr Wymes, who represented himself and made helpful submissions to the Court argues however, that no act of bankruptcy can occur if the summons grounding the petition is challenged in accordance with the provisions of s. 8 to which I now turn.

Challenge to a summons

56. A debtor may challenge the bankruptcy summons by reason of s. 8(5):

> "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."

57. Judicial authority for over 150 years has been clear that a debtor is entitled to challenge a summons *inter alia* on the grounds that it does not correctly represent the amount of debt. As noted above accuracy in stating the amount of debt that a creditor claims is important and protective of the debtor, as under the statutory scheme failure to meet the amount said to be owed in the summons is an act of bankruptcy. The present appeal does not concern a challenge to the summons, as its validity has been conclusively determined, but rather the appellant argues that a challenge to a summons must act as a stay or suspension of the deeming provisions by reason of which an act of bankruptcy is deemed to have been committed if payment is not made or security not provided within the statutory period of 14 days.

58. Mr Wymes submits that there is legislative ambiguity on the interplay between ss. 8(5) and 11(1)(c) of the Act of 1988. He argues that a question arises as to whether the 14-day period following the service of the bankruptcy summons pursuant to s. 11(1)(c) continues to run when an application to dismiss the bankruptcy summons is made pursuant to s. 8(5) within that 14-day period.

59. It is his case that the correct interpretation of the statutory provisions is that the running of time is stayed or suspended once an application to dismiss a summons is made pursuant to s. 8(5) of the Act of 1988, and that an act of bankruptcy cannot occur while a challenge to the summons is in being. He submits that the judgment of Dunne J. in *McConnon v. Zurich Bank* [2012] IEHC 587, [2012] 4 IR 737 supports this argument. It will be necessary to review in some detail the analysis of Dunne J. later in this judgment

60. He further argues that unless the 14-day period set out in s. 7(1)(g) is suspended an unjust situation would arise, as a debtor would have to make immediate payment on foot of the summons to avoid bankruptcy, even when a challenge to the bankruptcy summons has not been determined. He argues that an absurdity could occur, so that if the application to dismiss the summons is successful, then the act of bankruptcy did not occur, whereas if the application to dismiss is not successful, then an act of bankruptcy did occur.

61. The Minister argues that ss. 8(5) and 11(1)(c) should be interpreted literally as no ambiguity arises, and contrasts s. 16(3) of the Act of 1988 which states:

> "16(3) Nothing in this section shall be construed to prevent the immediate seizure of the goods of the bankrupt on his adjudication."

62. The Act of 1988 does not provide that the 14-day period in s. 7(1)(g) is stayed or suspended if the bankruptcy summons is challenged, and it is argued accordingly that if the legislature had intended that no act of bankruptcy could occur during the 14-day period set out in s. 7(1)(g) when an application to dismiss under s. 8(5) had been brought, the legislation would have so expressly provided. Section 50 of the Personal Injuries Assessment Board Act 2003 is noted as an example of where legislation expressly suspends the reckoning of time.

The effect of a challenge to the summons

63. There is nothing in the legislation that makes provision for the suspension of the statutory time limits, whether for the committal of an act of bankruptcy or for the presentation of a petition for adjudication within three months of such act, pending the decision on an application by a debtor to dismiss a bankruptcy summons nor, as is apparent from the judgment of Dunne J. in *McConnon v. Zurich Bank,* if the application to dismiss fails.

64. General Orders were made in 1872 for the purposes of the Act of 1872 and General Order 44 did make provision:

> "A debtor shall not be adjudged bankrupt … where such debtors shall have applied for the dismissal of such summons, until after the hearing of the application, or where the summons has been dismissed, or during a stay of the proceedings thereon."

65. Kisbey refers to General Order 44 to state the general proposition at p. 94 of his text that:

> "When the act of bankruptcy, proceeded on, is that described in sub-section 6, an adjudication will not be made pending the hearing of an application to dismiss the summons; or, when it has been dismissed, or during a stay of proceedings thereon."

66. A clear statement of that effect does not exist in the Act of 1988 or in the current Rules of the Superior Courts governing proceedings in bankruptcy, and hence the need to consider whether the proposition arises as a matter of law under the current legislative scheme.

67. Forde and Simms at para. 4.25 of their text suggest that when an application was made to dismiss a summons the court could put a stay on the procedure, usually on the provision of suitable security, pending the trial of the validity of the debt claimed but state a belief that "this option no longer seems to be available". I assume that is a reference to the fact that the provisions of General Order 44 were not repeated in the new Rules of Court nor in the amending legislation in 1988.

68. The Budd Committee Report makes no reference to any problem that might arise in the continuation of the procedure when an application is made to dismiss a summons, and therefore it is not possible at this juncture to conclude that a deliberate choice was made by the Oireachtas to exclude the possibility of the court having a power to either stay the process or make such other order as seems appropriate in the interests of justice.

69. Kisbey quotes the decision of the old Chancery Appeal Court in *Ex parte Wier, In re Wier* (1871) L.R 6 Ch. App. 875, decided under 7th section of the English Bankruptcy Act of 1869, broadly the equivalent of s. 8 of the Act of 1988. What was in question there was whether

a petition was served on time, and the date at which it could be said there was a "complete act of bankruptcy", a phrase which is not found in the Act of 1988 or the old Irish or English legislation, but which, while not a statutory term, came to have some prominence in the course of oral argument before this Court. The creditor had served a debtor's summons and the debtor filed an affidavit denying the debt. He obtained an order that should he give security within seven days the proceedings could be stayed until the court had come to a decision on the enforceability of the debt. He never gave the security and thereafter the creditor filed a petition for adjudication on the grounds of failure to pay, secure or compound for the debt. It was held that there was a complete act of bankruptcy at the expiration of three weeks from the service of the summons (the then relevant timeframe; it now being 14 days), but that the petition had not been served on time and that it was therefore too late.

70. Mellish L.J. thought that while the act of bankruptcy was "complete" on the expiration of the time limit if the person served with the debtor's summons did not pay or secure or compound the debt within the statutory time limit, and while the section did not in its terms say how and when the proceedings in bankruptcy were to be stayed by reason of the service of a motion to dismiss the summons, it would be absurd if proceedings leading to adjudication could be determined before the challenge to the debt was resolved.

71. He identified three possible answers: that the completion of the act of bankruptcy is postponed until the application to dismiss the summons has been disposed of; that an act of bankruptcy may still have been committed but that a petition cannot be presented; or that, although an act of bankruptcy has been committed, and though a petition may be presented, no order of adjudication may be made.

72. The then relevant English legislation did not contain any provision that would throw light upon which of these solutions is to be preferred. However, there did exist Rules of Court which provided that an adjudication could not be made until after the hearing of the application

to dismiss the summons. That seemed to assume that an act of bankruptcy may still have been committed, and a petition presented, but that the court could not proceed to adjudication until the validity of the summons had been determined. The reasoning of the court was that if no act of bankruptcy could have been committed or no petition presented, it would have been unnecessary to make that rule.

73. It is unfortunate, notwithstanding the identification in 1871 of that problem arising from the machinery of the Act, that the Irish amending legislation in 1988, and the Rules of Court providing for practice and procedure in bankruptcy, did not provide a clear answer as to what was to happen in precisely the circumstances identified *In Re Wier*, and which have arisen in the present appeal. *In Re Wier* is not a useful authority as to the answer but it does offer a useful discussion as to the three possible solutions, albeit it points to the fact that none may be directly derived from the Act.

74. Nothing is express in the Act of 1988 to suggest that a motion to dismiss a bankruptcy summons acts as a stay on the process, or on whether a debtor will be considered to have committed an act of bankruptcy notwithstanding service of a notice to challenge under s. 8(5). In that regard it may be of some note that, on an application by the debtor, the court has an option in its discretion to dismiss the summons with or without costs but is mandated to dismiss the summons if satisfied that an issue would arise for trial. That would suggest that the summons continues to be operational until such time as the motion to dismiss has been heard. That may be said to flow from the fact that a bankruptcy summons is not issued solely at the option of a creditor and may be issued only where the court has granted liberty to issue. A degree of scrutiny has happened at that point in time and the summons is a result of the judicial act which the legislature does not appear to have considered to be suspended or abrogated by an application to dismiss.

75. The interests of justice and the ordinary management of a bankruptcy process in a given case can, and usually will, require that the court make orders that have the effect that an adjudication in bankruptcy may not be made while a challenge to the act of bankruptcy itself, including an application to dismiss a summons, remains undetermined. Fairness would suggest that adjudication cannot occur whilst the challenge remains undetermined, but it must also be the case that as the court is to be satisfied that an act of bankruptcy has been committed by the person to be adjudicated the court will have to be satisfied that the proofs are met. Thus for reasons of logic and fairness the challenge must be decided before adjudication, although it may be that in many the challenge to the summons and the hearing of the petition happen at the same hearing and by the same judge.

76. The present appeal concerns the question of the effect of a challenge to a summons on the committal of an act of bankruptcy, and because the bankruptcy summons is not, as discussed above at para. 35, a court process, it is less readily resolved by considerations of fairness of process or by the adjournment of court proceedings pending the resolution of the challenge to the summons. Mr Wymes argues by analogy from *McConnon v. Zurich Bank* that the Act must be interpreted so that the application to dismiss the summons operates as a stay on the happening of an act of bankruptcy, in the light of the judgment of Dunne J. that the court may extend the three month period in s. 11 within which a petitioning creditor must present a petition after the happening of an act of bankruptcy.

Delay in presenting the petition: the decision in *McConnon*

77. Dunne J. in *McConnon v. Zurich Bank* was faced with a different problem from that arising in the present case, as the time limit provided in s. 11 of the Act of 1988 for the presentation of a petition can expire during the currency of an application to dismiss the summons, and in many, if not most cases would expire before the determination of the application to dismiss and any appeal. She considered that the three month period to present

the summons could be extended so that a creditor could still rely on an act of bankruptcy grounded on a failure to meet a summons which was challenged and the challenge dismissed.

78. Mr Wymes relies on the statement at para. 35 of her judgment:

> "It seems to me that looking at the provisions of s. 8 (5) and s. 11 (1)(c) of the Act of 1988 together there is some ambiguity in the legislation. On a literal interpretation of s. 11(1)(c) of the Act of 1988, I think that one would have to say that the creditor in this case would have to begin the process all over again leading to the issue of a further bankruptcy summons, leading, no doubt, to a similar application to dismiss. However, I do not think that s. 11 (1)(c) of the Act of 1988 can be looked at in isolation from s. 8 (5) of the Act of 1988. Counsel for the respondent pointed out in his submissions that if there was not, in effect, a stay on the three month period pending the determination by the court of the validity of the bankruptcy summons, then the applicant would have to pay the debt due notwithstanding the challenge to the validity of the bankruptcy summons in order to avoid committing an act of bankruptcy. As I have said, it seems to me that when one looks at the Act as a whole and at the purpose of the legislation, it would be illogical to interpret those sections as giving what amounts to a stay to a debtor pending the determination as to whether or not an act of bankruptcy has occurred while not affording the creditor what amounts to the same facility in respect of the determination of the time when the act of bankruptcy could be said to have occurred. Accordingly, I am satisfied that an act of bankruptcy has been committed by the applicant. I am of the view that the respondent is now in a position to present a petition on foot of that act of bankruptcy."

79. I do not understand the judgment of Dunne J. to say that the time to present a petition does not run during a period when a bankruptcy summons has been challenged, but that the court can in a suitable case extend time. She herself described it as a practical solution, but it

could also be considered as the exercise by her of a jurisdiction necessary to do justice between the parties, the effect of which was that the debtor could continue the challenge to the summons until final determination, but the creditor would not be prevented from relying on that very same summons as a trigger for the presentation of a petition, if the challenge had failed.

80. *McConnon v. Zurich Bank* can be distinguished as in the present case the provisions of both s. 7 and s. 11 were complied with and the creditor did present a petition in bankruptcy within the statutory period. It was the event that intervened by the application to dismiss the summons that causes the complications in implementation, because the challenge does not act as a stay on the summons. The decision of Dunne J. was one regarding court proceedings, and whether the time to issue and serve could be extended. She was not considering whether the provisions of s. 7, which are not a court process but statutory deeming provisions, had been satisfied.

The form of the summons

81. In *In re Wier,* as in the present case, the debtor placed some reliance on the form of the debtor's summons which it was argued was so framed as to lead a debtor to believe that if he applied to dismiss the summons he would not as a result have committed an act of bankruptcy at the end of the 21 day period. The court considered that the form was consistent with the construction put on the Act with the assistance of the Rules of Court and that:

> "… it only holds out to the debtor that he will not be adjudicated a bankrupt, and does not hold out to him that he will not commit an act of bankruptcy if he really owes the debt and does not pay it within the twenty-one days."

82. An issue that arose in that case was whether if an act of bankruptcy was committed following the 21 days after the service of the summons a creditor could thereafter safely receive payment of the debt, as he would do so on notice of an act of bankruptcy. But the court considered that that consequence did not necessarily flow as once payment was made the act

of bankruptcy ceased to be an act of bankruptcy on which the debtor could be adjudicated a bankrupt.

83. Mr Wymes says that by analogy with the case law, and the need for accuracy in a summons, including the decision of this Court in *Murphy v. Bank of Ireland* [2014] 1 IR 642, the debtor must know when payment is to be made to avoid an act of bankruptcy, and I agree. It is for that reason that the bankruptcy summons in its statutory form provides by way of warning that the debtor will be adjudicated bankrupt unless payment is made and the fact that the Oireachtas permitted by s. 8 an application to challenge a summons that could lead to its dismissal must be taken as meaning that adjudication could not happen if the summons was dismissed. The form of the summons suggests that an adjudication will not happen if a challenge is commenced, and I agree with Mr Wymes that a person who has made a challenge cannot be obliged to pay while the challenge remains undetermined. That must mean that, whilst a challenge remains extant, adjudication may not occur, but it does not follow that an act of bankruptcy cannot be deemed to have happened in accordance with the statutory deeming provisions. Further, the form of the summons cannot offer an interpretative tool to displace the otherwise clear provisions of s. 7(1).

Discussion: the language of the Act

84. The question then is how to reconcile the plain meaning of s. 7(1)(g) which provides for the happening of an act of bankruptcy 14 days after service of the bankruptcy summons, and those of s. 11 providing for the commencement of the court process leading to adjudication, with s. 8(5) by which a summons may be challenged. Mr Wymes in the course of his oral submissions used the phrase that an act of bankruptcy could not be "complete" if the bankrupt availed of the statutory option to challenge those summons and, although that language is not used in the Act, it is used in the old case law and is a useful word to describe the deeming event for which s. 7(1)(g) provides. It is in my view material that the act of bankruptcy is committed

under s. 7(1)(g) by reason of the failure to pay on foot of the summons, and that is stated without condition and without a statutory stay on the deeming provision.

85. It has not been possible to find in the authorities any case law to support a reading of the Act that suggests that the application by a debtor to dismiss a bankruptcy summons has the effect of suspending or staying the process, but equally it has not been possible to find any case law, nor has any been opened by counsel in the course of the argument, that would support the opposite proposition. In the case decided in 1871 *Ex parte Ellis*, *In Re Kain* 6 Ch. App. 602, the question was whether the registrar in bankruptcy was correct to stay proceedings under a summons until a decision had been taken on a challenge to a debtor's summons. That decision was appealed and James L.J. started his judgment by making the following comment:

> "I do not mean to lay down any such rule as that it is impossible to suspend proceedings on a debtor summons; but the doing so is a very different thing from refusing an adjudication of bankruptcy, which may be refused on various grounds. The Act says that a creditor to whom a certain amount is due may take out a debtor summons, and if the debtor does not do certain things he is to be deemed to have committed an act of bankruptcy."

86. He concluded that the debtor had no basis on which to dismiss the summons, but more importantly that the registrar was wrong to interfere at that stage in the process as the action of the debtor, founded as it was on a challenge of improper purpose, was more properly one to be considered at the point at which the petition was heard, "when adjudication is applied for". Mellish L.J. agreed.

87. In a case decided in the Irish Court of Bankruptcy a few years later in *In Re MD, An Alleged Debtor* [1875] 9 I.L.T.R 63, Miller J. stayed all proceedings on the debtor's summons until the determination of the proceedings which had led to the issuing of the debtor's

summons, those being specific performance proceedings in respect of real property where there was a conflict on the affidavit evidence that could not be resolved at that juncture.

88. The time limit in s. 7(1)(g) is clear and must be read as a gateway section which identifies the act of bankruptcy and in its plain language provides that an act of bankruptcy is committed on the happening of that event. Were s. 7(1)(g) to be read as meaning that the act of bankruptcy did not occur if a debtor lodged a notice to dismiss that summons, confusion and practical difficulties would arise in the operation of the machinery of the Act.

89. There is in that sense no conflict between s. 7(1)(g) and s. 11 which makes the link between the presentation of the petition and the happening of the event of bankruptcy. There is no statutory provision that an application under s. 8(5) to dismiss a summons operates as a stay on the effect of the summons, and there being no ambiguity it cannot readily be implied. Rather, it seems to me that on a reading of s. 8(5) by which the debtor is enabled to bring an application to dismiss the summons, the summons continues to subsist while the application remains pending. I would extrapolate from that that the statutory effect of failing to meet the demand in the summons must also continue to have effect.

90. Indeed, I consider that the scheme of the Act and the machinery provided by the combined ss. 7 and 11 means that the happening of an act of bankruptcy must be identifiable with certainty as it is that that enables the process to be activated and enables the creditor to present a petition for adjudication. Thus the service of a debtor's summons puts the debtor at risk that the process leading to adjudication would be commenced as the expiration of the time provided in the summons entitles the creditor to avail of the statutory provisions of s. 11. It may also be noteworthy that s. 11 is stated in the positive form that a creditor "shall be entitled to present a petition for adjudication against a debtor" if the conditions set out in s. 11(1) are met. These are matters which the Oireachtas has carefully framed to provide certainty as to

the date and means by which an act of bankruptcy can occur, and certainty as to when and how a creditor may present a petition for adjudication.

91. It seems to me that the conclusion of the argument advanced by Mr Wymes is that the petition cannot be presented within the three month statutory time period if the challenge to the summons is mounted, as he argues no "complete" act of bankruptcy has occurred to ground that petition. That proposition flies in the face of the clear language of ss. 7 and 11, both of which provide statutory time limits, and both of which provide the steps that must be taken by both creditor and debtor to engage the bankruptcy process. The judgment of Dunne J. in *McConnon v. Zurich Bank* does not conclude that the time to present a summons must be extended if challenge to the summons is made, or indeed that time does not run at all in the occurrence of such challenge. Dunne J. did not have to, nor did she, decide that time did not run, but rather that time ran but could in appropriate circumstances be extended.

92. The statute provides a definition of an act of bankruptcy and deems certain happenings to be an act of bankruptcy. The deeming provision makes no provision for what should happen should the summons be challenged, but does provide in its plain terms that the combination of the service of the summons and the failure to pay is sufficient to constitute an act of bankruptcy, even if thereafter that act of bankruptcy is found not to be one on which a petitioner is entitled to an order of adjudication. In that regard I consider it relevant also that s. 8(5) provides for an application to dismiss a summons, not one to deem that an act of bankruptcy had not occurred.

93. Some, albeit limited, assistance can be found from s. 9, which provides for the arrest of a debtor who may be absconding and provides that after a summons has been granted against a debtor and served on him or her but before a petition can be presented, an order for the arrest of the debtor may be made if the court is satisfied that the debtor is about to leave the State or otherwise abscond with a view to avoiding payment. That somewhat draconian power would suggest that the Oireachtas intended that the service of a bankruptcy summons would have

some coercive effect, so that between the service of the summons and the presentation of the petition therefore is a period of some importance in respect of which the court has the power to direct the arrest of a debtor. In turn that would suggest that the Oireachtas did not intend the summons would cease to have any statutory function or effect in the period between service and the presentation of the petition.

94. Section 16(3) does expressly provide that an application to show cause does not act as a stay on all of the rights of the petitioning creditor following an order of adjudication. It is regrettable that no such clarity is found with regard to the parallel process which allows a debtor to challenge a bankruptcy summons after it has been served, but it does suggest that the Oireachtas was alive to the importance of time limits in protecting the creditor by providing for the seizure of goods to secure payment of a debt.

Discussion: prejudice to the debtor?

95. Against that backdrop it may also be said that the presentation of a petition in bankruptcy, while it might increase the risk to a debtor, does not in itself lead inexorably to an adjudication, and a judicial determination is required at which the debtor is entitled to be represented and heard before the order of adjudication is made. Section 14 requires that the court be satisfied that the requirements of s. 11(1) have been met, one of which is that an act of bankruptcy has occurred.

96. The jurisdiction exercised in the old Chancery Courts was to stay action upon a debtor's summons in certain cases even when the summons was not dismissed. That is a jurisdiction to manage proceedings in being, vested in a court hearing proceedings, whether this arises in equity or by reason of procedural fairness. Fairness is imported in the court process, but is not required in the reading of the gateway provisions before the court process commences. As noted above, the bankruptcy summons is a notice or warning and not a writ or initiation of court action.

97. Mr Wymes relies on the judgment of Dunne J. in *McConnon v. Zurich Bank* and the question in that case was not whether a petition could be served while a challenge to a debtor's summons remained unresolved, but rather whether time could be extended to present the petition in bankruptcy if a challenge to a debtor's summons had been made within the statutory time period and where a creditor considered it inappropriate to present the petition while the validity of the summons remained undetermined. The decision of Dunne J. was made in the course of proceedings, quite a different context from that in the present appeal.

98. It has to be said that there is nothing in the Act that makes the presentation of the petition wrongful while an application to dismiss remained undetermined, nor anything that stays the process itself. Undoubtedly, as was noted by Dunne J. in *McConnon v. Zurich Bank*, fairness dictates that a court would not proceed to adjudication on foot of a petition while an application to dismiss the summons remains undetermined, as the summons is the triggering point on which the hearing of the petition proceeds, and the service of a valid summons is an essential prerequisite to adjudication.

99. Another proposition that underlies the argument of Mr Wymes is that a debtor is in some way prejudiced by the service of a bankruptcy summons, and more especially if an act of bankruptcy can occur before the challenge is decided. I do not consider that is the effect of the statute.

100. As discussed above the summons is not a step in litigation, but rather a warning notice. Section 7 identifies those events that are deemed to be an act of bankruptcy, and whilst the Act refers to the "committal" of an act of bankruptcy on the happening of the events, the provisions are deeming and do not in themselves constitute the debtor bankrupt, without the engagement of a court process. The provisions of s. 570 of the Companies Act 2014 use more neutral language to the same effect, and a company is thereby deemed to be insolvent if it fails, within 21 days of service, to satisfy or secure to the creditor a debt demanded in writing. The

presentation of a petition to wind up will in normal circumstances be restrained if there is a dispute regarding the enforceability of the debt: see *Stonegate Securities v. Gregory* [1980] 1 All ER 241; and Courtney, The Law of Companies (4th ed., Bloomsbury Professional, 2016) at para 24.103 *et seq*.

101. Whilst there is no judicial involvement in the service of the 21 day warning letter, the first stage in the process of corporate insolvency, the deeming provisions have a broadly similar function to those in s. 7(1) of the Act of 1988, albeit expressed in more contemporary language than those in the Act of 1988.

102. The service of a bankruptcy summons is not a matter of shame or stigma, any more than a service by a creditor of a demand for payment in the ordinary course. The notice acts rather in two ways: as a warning to the debtor that the creditor is contemplating the presentation of a petition, and which the debtor is afforded an identified time to pay. The deeming provision operates as a precondition to the presentation of a petition, but also as the identification of an essential proof and how that is to be met. I can see no harm being done to a debtor by the service of a bankruptcy petition, and no harm in deeming the happening of certain events to be an act of bankruptcy entitling a creditor to commence the process, but rather the statutory deeming provisions operate by achieving clarity for the benefit of both the creditor and the debtor.

103. Mellish L.J. in the course of the judgment in *In Re Wier* put it more eloquently: "no harm can be done to a man by making him commit an act of bankruptcy of which no use can be made against him".

104. Further, there is in my view no prejudice to the debtor by the presumptive act of bankruptcy after the elapse of the 14-day period and no injustice in putting the debtor on his election to either pay the debt or challenge the summons. If a debtor succeeds in having the summons dismissed, there would be no act of bankruptcy and no prejudice could arise.

105. It is also of note that the immediate seizure of the goods of the bankrupt on his adjudication is not prevented by an application to show cause:

> "16(3) Nothing in this section shall be construed to prevent the immediate seizure of the goods of the bankrupt on his adjudication."

106. Finally, the Minister argues that the interpretation for which the appellant contends could lead to the absurd or oppressive consequence that a debtor could issue an unmeritorious motion to dismiss a summons merely to frustrate presentation of the petition, and that this could lead to the debt becoming statute barred. There is no suggestion of improper purpose in the present case, but insofar as that absurd result could flow from the reading for which Mr Wymes contends, it must be of some relevance that the literal interpretation of s. 7 read in conjunction with s. 8(5) does not provide for the postponement of the happening of an act of bankruptcy and would not lead to such consequence.

Summary and conclusion

107. In summary, Mr Wymes says the Act is deficient in not providing for a postponement or enlargement of time for the happening of an act of bankruptcy. His argument is difficult to reconcile with the plain language of the Act which does not say that the time limit in s. 7(1)(g) is suspended or postponed or that time does not run for the happening of the act of bankruptcy if a challenge to a summons is issued. There is no statutory language linking the provisions of s. 7(1)(g) with s. 8(5). The Act of 1988 does not provide that an application to dismiss acts as a stay.

108. The act of bankruptcy is under the statutory scheme the failure to pay on foot of a summons. Mr Wymes seeks that this Court would add to its interpretation of the section language that provides that the act of bankruptcy is the failure to pay on foot of the summons, *provided that summons has not been challenged*, or when that challenge has been concluded.

There being no ambiguity in the section or how it operates in conjunction with s. 11, a lacuna is apparent only if one ignores the clear language of ss. 7(1)(g), 8(5) and 11.

109. I agree with counsel for the Minister that nothing in the Act postpones the happening of the act of bankruptcy and that time is a factor in ss. 7(1)(g), 8(5) and 11 and in each case the statutory time limit is for a purpose. Counsel accepts that there cannot be an adjudication until the motion to dismiss is disposed of, but the petition is still valid and has been validly presented.

110. *McConnon v. Zurich Bank* is consistent with the proposition advanced by the Minister that the act of bankruptcy, the condition precedent to the presentation of a petition, can occur notwithstanding a challenge.

111. The happening or identification of an act of bankruptcy is no small matter, and the authorities referred to above explain the reason why accuracy in a summons is important, but the real point at which a debtor is at hazard is at the point of adjudication, not at the point of the presentation of the petition or the service of a summons. A debtor is, once a summons has been served, at his election to pay the amount claimed, challenge the summons or wait until the point of adjudication and seek to show cause thereafter. There is no prejudice in a debtor paying, or being called upon to pay, a debt which is due.

112. It seems to me that the correct answer to the net question raised in this appeal as to whether an act of bankruptcy can occur if a step is taken to have a bankruptcy summons dismissed, must take as its starting point the plain language of s. 7(1)(g) of the Act which does not import any discretion, does not require a judicial determination, and is in its plain terms a definition of when an event is deemed to occur. Certainty as to the date of that event is important, probably essential, for the operation of the machinery of the Act, and that importance inures for the benefit of the debtor as well as for the creditor, as the debtor knows once the summons is served on him or her of the grave risk faced by failing to act on foot of the summons or failing to take a step to set it aside.

113. For these reasons I would dismiss the appeal, as an act of bankruptcy can occur by failure to satisfy a bankruptcy summons, notwithstanding challenge under s. 8(5).