



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2021:000034

**IN THE MATTER OF A BANKRUPTCY PETITION BY MICHAEL
GLADNEY COLLECTOR GENERAL OF SARSFIELD HOUSE, FRANCIS
STREET, LIMERICK, PETITIONING CREDITOR AND JOHN TOBIN OF
LEVEL 3, CORNMARKEt, ROBERT STREET, LIMERICK, DEBTOR**

**O'Donnell C.J.
MacMenamin J.
Dunne J.
Charleton J.
Hogan J.**

Between/

MICHAEL GLADNEY

Respondent / Petitioner

AND

JOHN TOBIN

Appellant / Respondent

Judgment of Ms. Justice Dunne delivered on the 2nd day of February 2022

Introduction

1. Mr. Tobin (“the Appellant” or “the Debtor” herein) was adjudicated bankrupt on the 13th November 2017 by the High Court (Costello J.) on foot of a Petition dated the 28th June 2016. A challenge to the bankruptcy summons was brought significantly outside the 14-day time limit prescribed under Order 76, Rule 13(2) of the Rules of the Superior Courts (“RSC”). On the 30th May 2017, the High Court refused an application for an extension of time to dismiss the bankruptcy summons as it was concluded that there was no basis put forward to demonstrate that an extension of time should be granted. Nevertheless, notwithstanding the decision to refuse the extension of time within which to make the application to dismiss the bankruptcy summons, the High Court (Costello J.) went on to consider the grounds on which it was sought to dismiss the bankruptcy summons, namely, that the summons overstated the amount owed by the Debtor. Essentially, the Debtor contended that he had made a payment to the Respondent/Petitioner (“the Respondent”) in the sum of €71,030, and that the bankruptcy summons did not reflect this. The High Court dismissed the arguments made by the Debtor. Having rejected the application to extend time and dismissed the application to dismiss the bankruptcy summons on its merits on the 30th May 2017, the High Court proceeded on the 13th November 2017 to adjudicate the Appellant bankrupt. The judgments of the High Court were appealed and upheld in the Court of Appeal ([2020] IECA 49, Donnelly, Haughton and Collins JJ.).

2. This Court by a Determination of the 14th June 2021 granted leave to appeal on a number of grounds. At the heart of this appeal is whether the adjudication of the Appellant should be dismissed on the basis that the sum particularised in the bankruptcy summons is overstated and is therefore inaccurate and incorrect. The Appellant relies on a long-standing common law precedent that a court should dismiss a summons where it contains an overstatement of the amount due by a debtor. The Court of Appeal expressed some misgivings about this approach even where the undisputed portion of the debt was many multiples of the statutory threshold. Accordingly, leave to appeal was granted in respect of that issue. Two other issues were also considered to arise: what is the credibility threshold that a party must meet when they seek to have a

summons dismissed due to an overstatement of the debt, and whether a delay in challenging the figure presented in the summons is fatal to raising this issue, assuming that there is legal merit in relation to the defence notwithstanding the delay, and it passes any threshold of credibility test.

Background

3. The Debtor was a solicitor who was retained by a client for the purchase of two plots of lands (“the H Lands” and “the O’C Lands”). In relation to the H Lands, the Debtor gave an undertaking on behalf of his client to the relevant financial institution that he would lodge with it the title deeds for the lands in question, which could not be done without payment in full of Stamp Duty and the receipt of a Stamp Duty Certificate. Without the payment of Stamp Duty, the client could not be registered as the owner of the lands, and the Debtor could not have complied with his undertaking. A similar undertaking was given to another financial institution regarding the O’C Lands which had an even greater liability in respect of Stamp Duty attached to it. The Debtor was not put in funds to pay Stamp Duty on either transaction and as result there was a significant liability in respect of Stamp Duty outstanding on behalf of the client which prevented the Debtor from fulfilling these undertakings.

4. The Debtor alleges that in order to comply with these undertakings, he paid a total of €96,850 from his own resources in partial discharge of a Stamp Duty liability on these lands. The Debtor made these payments on foot of information he received from the client that he (the client) was due substantial sums by way of forest grants and premiums from the Department of Agriculture, Food and the Marine for various lands, including the H Lands and the O’C Lands. In order to receive those grants, the Debtor had to certify title to them. The Debtor says that an agreement was reached between the Department, the Revenue and the Debtor that so much of the grants due to the client would be paid to Revenue for the purpose of discharging the remaining Stamp Duty liability on the lands. This would have, in turn, enabled the Debtor to comply with his undertakings to the relevant financial institutions by registering the transactions and delivering title. The Debtor alleges that as a result of the agreement together with the payments made personally by him in partial discharge of the Stamp Duty liability, an overpayment was made to the value of €71,030. It is this figure which the Debtor

believes gives rise to an overstatement of the debt in the bankruptcy summons, and for which he claims he is entitled to a refund. It should be noted that the Debtor never suggested that the Revenue agreed (or could have lawfully agreed) to attach more than was due in tax by his client in order to repay to the Debtor the sum paid by him in 2009.

5. The Revenue says that while it initially indicated it would be possible to attach monies for the purpose of discharging the Stamp Duty liability of the Debtor's client, it was subsequently explained to the Debtor that this would not be possible as the monies were being attached pursuant to s. 1002 of the Tax Consolidation Act 1997, which only allows for the attachment of monies for the discharge of Capital Gains Tax ("CGT") and Income Tax, but not Stamp Duty. Thus, the monies received by the Revenue on foot of the Notice of Attachment were applied to discharge other liabilities of the client relating to CGT and Income Tax but were not available to discharge any other tax liabilities that arose at the time. As such, the Stamp Duty liability owed by the client was never fully discharged.

6. It was contended by the Debtor that there had been an overpayment of Stamp Duty of €66,030 as of May 2012 in respect of the H Lands and that he made a further payment of €5,000 to the Revenue in April 2015 making a total of €71,030, which appears to be the amount by which it is contended there was a sum due to him by way of credit in respect of his personal liabilities to the Revenue, thus leading to the overstatement of the sums said to be due by him as set out in the Particulars of Demand on the Bankruptcy Summons. It is not disputed by the Debtor that a substantial sum in the order of €330,000 is due by him to Revenue. Equally, the Revenue do not dispute that a sum of €91,850 had been paid by the Debtor in discharge of his client's Stamp Duty liability but it was contended that insofar as he had made payments on behalf of his client, it was a matter for him to pursue with his client and that the Revenue could not refund such payments to the Debtor. Thus, it is the sum of €71,030 which is said to be an overpayment which is at the heart of these proceedings.

Proceedings in the High Court

7. The Respondent had obtained a total of seven judgments against the Debtor. The Particulars of the Demands and Notice requiring Payment issued on the 29th October 2015 in the sum of €405,808.66 allowing for certain credits which are not

relevant to these proceedings. A bankruptcy summons was issued on the 4th April 2016. It was served personally on the Debtor on the 18th April 2016. The Debtor did not apply to dismiss the summons in the prescribed 14-day time limit pursuant to section 8(1)(c) of the Bankruptcy Act 1988. As no challenge was brought, a petition to adjudicate the Debtor bankrupt was issued on the 28th June 2016. It was not until the 7th November 2016 that the Debtor issued a motion seeking to extend time to seek to dismiss the bankruptcy summons.

8. It should be noted that the matter appeared before the High Court on a number of occasions in the interim. On the 10th October 2016, when the petition was first listed before the Court, the Debtor was represented by counsel. At that stage, the matter was adjourned to allow the Debtor time to lodge a statement of affairs and a letter from a personal insolvency practitioner of proposals to discharge the debt otherwise than through bankruptcy as was normal practice. The petition was listed on a number of occasions. In the meantime, the Debtor had issued a motion to extend time to dismiss the bankruptcy summons returnable on the 5th of December 2016. Ultimately, following an exchange of Affidavits, the matter was heard on the 29th of May, 2017.

9. Giving judgment, Costello J. (*ex tempore*, 30th May 2017) dismissed the Debtor's application for an extension of time to apply to dismiss the bankruptcy summons having regard to the principles in *Éire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] IR 170. She noted that the Debtor had been aware of the alleged overpayment since 2012 but never raised any issue about it. She also noted that the Debtor engaged in discussions regarding the payment of the Stamp Duty with Revenue and had been represented by counsel throughout. She further noted at page 3 of the transcript that the Debtor's affidavits "*displayed a complete command of...the legal issues*" and "*gave no indication whatsoever that there was any difficulty in dealing with the matters in April 2016*" when the summons was originally served. He also offered no explanation as to why he delayed in raising the issue as the issue could have been raised at any time after May 2012 when he said an agreement had been reached with Revenue concerning his client's Stamp Duty liabilities. That being so, Costello J. refused an application to extend the time to challenge the summons under section 8(1)(c) of the 1988 Act.

10. Notwithstanding this refusal, the High Court judge continued to deal with the substantive challenge to the summons raised by Mr. Tobin. As previously mentioned, the Debtor sought to dismiss the summons on the ground that it did not take into account the personal payment he had made in partial satisfaction of the Stamp Duty liability arising from his client's transactions. He said that this overpayment arose following the agreement to attach the grants due to the client for the satisfaction of the Stamp Duty liability. The Debtor relied on long-standing authority (discussed below) to the effect that a court must dismiss a summons where there is an overstatement of the debt owing, as a failure to pay a sum greater than what is actually owed cannot constitute an act of bankruptcy. In response, the Revenue argued that the Debtor was not entitled to a refund of any monies as there had been no overpayment. They argued that the attachment of the grants was in satisfaction of other outstanding tax debts that the client owed. They also made the point that even if there was an overpayment, the Debtor had no claim to it as he was not the chargeable person. They further argued that the summons was based on seven judgments which had not been challenged or appealed, and that the Debtor was now, in effect, seeking to go behind these judgments.

11. Turning to section 8(6) of the 1988 Act, it requires the Court to dismiss a bankruptcy summons if satisfied that an issue would arise for trial. Citing a number of decisions, including *Minister for Communications v. MW* [2010] 3 IR 1, and *Marketspreads Ltd v. O'Neill and Rice* [2014] IEHC 14, Costello J. held that the threshold to be applied when considering if an issue arises is whether there is "a real and substantial issue" rather than one that is "unreal and illusionary" (*Marketspreads Ltd* at para 77). On the facts before her, Costello J. held that the Debtor was not entitled to a refund for any monies paid by him in discharge of the Stamp Duty. She held that the Debtor had offered no explanation as to how he was due a refund from the Revenue Commissioner despite not being himself the chargeable person. She held that, taking the Debtor's case at its height, he had not reached the threshold required under section 8(6), and she dismissed the challenge. At a further hearing on the 13th November 2017, Costello J. was satisfied that all of the requirements for a valid petition pursuant to section 11(1)(c) of the 1988 Act had been met and adjudicated the Appellant bankrupt.

Judgment of the Court of Appeal

12. Delivering judgment on behalf of the Court of Appeal, Collins J. upheld the decisions of Costello J. in respect of both the decision not to extend time and the refusal to dismiss the summons on the basis of the alleged overstatement contained therein.

13. The Court of Appeal considered the case by reference to three points. These were: (i) the extension of time, (ii) the bankruptcy summons issue, and (iii) compliance with the requirements under section 11(1)(c) of the 1988 Act.

Extension of Time

14. Collins J. found no error in the trial judge's decision to refuse an extension of time. Collins J. noted that absent an application to dismiss the bankruptcy summons, the Appellant would have been able to raise the argument as to overpayment at the subsequent hearing of the petition and could then have appealed the point. In any event, it was concluded that the Court of Appeal could make a decision on the merits of the challenge to the bankruptcy summons, while further concluding that the extension of time issue was effectively moot.

The Bankruptcy Summons Issue

15. Collins J. upheld the decision of the trial judge and refused to dismiss the summons due to the alleged overstatement of the debt owed by the Debtor. The Court of Appeal was invited by the Revenue Commissioner to "*review the position in Irish Law where a debtor/respondent to a bankruptcy summons claims an entitlement to a credit which would have the effect of reducing the sum to a sum less than the sum claimed in the Bankruptcy Summons*" (at para. 61).

16. Collins J. analysed the Irish authorities relating to the overstatement of the sum demanded in a bankruptcy summons and the well-settled position that such a flaw is critical to the validity of the bankruptcy summons. While clearly outlining his concerns about the appropriateness of this line of case law (see para. 47 of the judgment) echoing the "disquiet" of McGovern J. in *Minister for Communications, Energy and Natural Resources v. MW* [2010] 3 IR 1, he declined the invitation to depart from the approach taken previously and proceeded on the basis that the Debtor was entitled to challenge the bankruptcy summons on the basis of an overstatement.

17. Collins J. then turned to the threshold that the Debtor had to reach in order to satisfy the court that an issue would arise at trial, pursuant to section 8(6) of the 1988 Act. He held that the Debtor had to show that the issue was one that was “*real and substantial...and one which is, at least arguable and has some prospect of success*” (see *Minister for Communications, Energy and Natural Resources v. Wood and Wymes* [2017] IESC 16).

18. The Court of Appeal considered that in order to reach this threshold, the Debtor had to show two things: firstly, that there was an overpayment, and secondly, that the Debtor, as opposed to his client, was entitled to a credit for it. In the event, Collins J. held that the Debtor had not satisfied the Court of either. Dealing first with the existence of an overpayment of €71,030, Collins J. found no evidence of the precise extent of the tax liabilities of the client, which included liabilities other than those in respect of Stamp Duty in respect of the H Lands and the O’C Lands. It was further noted that while the overall extent of his client’s tax liabilities was unclear, and whether sums attached by Revenue had been sufficient to clear the liabilities in respect of Income Tax and CGT, what was clear was that a significant sum remained outstanding in respect of Stamp Duty in respect of the O’C Lands. While he accepted that the Debtor had contended that there was an agreement with the Department of Agriculture and the Revenue Commissioner to discharge the Stamp Duty liability through the attachment of grants, he found the evidence of the Revenue Commissioner to be compelling in respect of the fact that the monies attached were wholly applied in discharge of Income Tax and CGT liabilities (and had to be so applied, according to the Revenue). Having reviewed the affidavit evidence of both parties before him, Collins J. found that Mr. Tobin’s assertion of an overpayment was wholly lacking in credibility and unsupported by evidence, notwithstanding the existence of an email of January 2017 relied on by the Debtor (See paras. 75 – 77 of the judgment of the Court of Appeal). The Court of Appeal was satisfied that there had been no overpayment of the client’s liabilities. The Court of Appeal then considered how the Debtor, not being the chargeable person, might be entitled to claim a refund, if it was accepted that such a refund was due. The Debtor sought to rely on the principle of subrogation to support his claim of a refund. Collins J. did not accept that such a remedy was available on the facts of this case. It was

concluded that no basis had been demonstrated for contending that the Debtor would be entitled to a refund in respect of any overpayment, assuming there had been such an overpayment. As a result, the appeal was dismissed.

19. In concluding, the Court of Appeal at para. 97 of the judgment expressed its uneasiness with the state of the law in this area. It is useful to set out the precise comments made by Collins J.:

“Though it has no impact on these appeals, in my opinion the question of what it is necessary and/or sufficient for a debtor to show by way of answer to a petition for bankruptcy, or as a basis for seeking the dismissal of a bankruptcy summons or the setting aside of an adjudication of bankruptcy, demands attention. Existing Irish authority indicates that where a debtor succeeds in establishing an issue (in the sense explained in Minister for Communications v Wood & Wymes) to the effect that the amount set out in the bankruptcy summons exceeds – by whatever margin – the debt actually due by the debtor, it necessarily follows that the summons must be set aside (or, as the case may be, the petition must be dismissed or a prior adjudication must be set aside). That is so, it appears, even where the undisputed portion of the debt may be many multiples of the statutory threshold. As will be evident from the discussion earlier in this judgment, I share the disquiet and misgivings expressed by McGovern J in the High Court in Minister for Communications v MW about such an approach. Be that as it may, if that is the correct approach, it appears to me to follow that the terms of Order 76 require urgent review. As I noted at the commencement of this judgment, Order 76 (and the forms provided for it, including most significantly the form of the bankruptcy summons prescribed for use) appears clearly to be premised on the understanding that, in order to dismiss a bankruptcy summons, the debtor is obliged to establish more than the existence of some issue that might go to the amount of the debt at issue and has to show that he/she is not indebted as claimed (i.e. not at all) “or only so indebted to an amount of €20,000 or less.” It is on that basis – and only on that basis – that Order 76 provides for a debtor to apply for the dismissal of a bankruptcy summons. None of the authorities referred to earlier has squarely

addressed this aspect of Order 76. If the drafters of Order 76 were operating on a mistaken understanding of the law then Order 76 clearly needs to be revised. If, on the other hand, the drafters of Order 76 correctly understood the law, it appears to follow that the jurisprudence has taken a wrong turn, requiring correction from some quarter, whether judicial or legislative.”

Compliance with the Requirements under Section 11(1)(c) of the 1988 Act

20. For completeness, it is noted that Collins J. also held that the requirements for a valid bankruptcy summons under section 11 were met, although no such issue arises for consideration on this appeal.

Issues and Submissions of the Parties

21. The Appellant then sought leave to appeal to the Supreme Court, which was granted in a Determination dated June 14th, 2021 ([2021] IESCDET 67). The issues to be resolved were identified in the Determination of the Court as follows:

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

The Effect of an Overstatement of Debt

22. The Appellant argues that the overstatement of debt on the summons is fatal and therefore the summons is void. He distinguishes his position from that of a mere error in computation, and in comparison, he says that the overstatement arising in this case is a matter of substance as it relates to a dispute about the amount owed. He notes

that the requirement for a Petitioner to state on the summons the amount due dates back to at least 1877 in *In re Skelton, ex parte Coates* (1877) 5 Ch. D. 979. This age-old principle has stood the test of time. On a number of more recent occasions, the courts, and this Court, have endorsed the principles from *Re Skelton* and other similar cases (see *Murphy v. Bank of Ireland* [2014] 1 IR 642). The Appellant relies on the dissenting judgment of McKechnie J. in *Murphy* and his comments to the effect that the serious impact on a bankrupt of such a status requires that the exacting procedures of the code be followed. It is said that the Court, pursuant to section 8(6)(b) of the 1988 Act, must dismiss the summons if it is shown that an issue would arise at trial. The “issue” in question is said to be the mere existence of some issue relating to the figure on the summons, rather than a precise argument seemingly provided for under Order 76, Rule 13(2) of the RSC, that the sum can only be challenged if the Debtor can show (a) he does not owe any money, or (b) he is only indebted for the amount of €20,000 or less. It is argued that this does not accurately reflect the 1988 Act and the provisions therein. The Appellant also argues that as the Bankruptcy Act has been classified as a penal statute, then it must be interpreted as such in light of the principle of doubtful penalisation. Even if this is not so, the Appellant submits that the Court must interpret the statute in light of the ordinary meaning of the words. As such, it is suggested that if the Oireachtas intended to limit the Debtor in challenging the figure on a bankruptcy summons to situations where it was alleged they owed no money at all, or owed less than €20,000, this would have been provided for. As the Act does not limit a Debtor to these parameters, it is argued that they do not apply.

23. The Respondent’s starting point is that no overpayment was made by the Debtor and therefore no refund is due to him, and that the judgments of the High Court and the Court of Appeal in this regard should not be overturned. Without prejudice to this position, the Respondent submits that were this Court to find there had been an overstatement, it should not, in itself, be sufficient to dismiss a bankruptcy summons, provided that the statutory minimum of €20,000 (see section 8(1)(a) of the Bankruptcy Act 1988) is uncontested. In this case, although the Debtor argues that the summons is overstated by €71,030, there remains an outstanding debt of €334,778.66 which is undisputed.

24. The Respondent cites the decision of Dunne J. in *Murphy v. Bank of Ireland* [2014] 1 IR 642 at page 672, that the reason underlying the requirement of strict compliance is to protect debtors from being adjudicated bankrupt in respect of a sum that is not due. Thus, it is said that the purpose of the overstatement rule is not contravened if the Court took the position that the Debtor must be required to repay the undisputed amount on the bankruptcy summons, once that figure exceeded €20,000. The Revenue say that this position is also supported by the wording of Order 76, Rule 13(2)(a), that it is implicit that a bankruptcy summons may proceed where the amount due exceeds the statutory minimum, notwithstanding that there is a dispute about the excess. The Respondent accepts that the Irish jurisprudence in this area provides that any overstatement is fatal to the validity of a bankruptcy summons. The Respondent suggests that the case law endorsing this principle dates back to the decision of Cozens-Hardy M.R. in *In re a Debtor* [1908] 2 KB 684, a decision from a time when the bankruptcy code was much harsher than the code that exists now. It is submitted that since the Bankruptcy (Amendment) Act 2015, the consequences of being adjudicated bankrupt have considerably diminished. Thus, it is said that this principle might have been appropriate under the old regime, but it ought to be reviewed in light of the recent amendments to the Bankruptcy Act.

25. The Respondent also relies on provisions in English personal insolvency law in support of their position. It is submitted that Rule 10.5(5)(a) of the Insolvency (England and Wales) Rules 2016 (SI 1024 of 2016) gives effect to the position that a statutory demand will only be set aside where the Debtor “*appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand.*” The Respondent also draws an analogy with Irish corporate insolvency law and relies on *Truck and Machinery Sales Ltd v. Marubeni Komatsu Ltd* [1996] 1 IR 12, where at page 24 Keane J. commented that once the statutory minimum (which was £1,000 at the time) is met, the creditor should not be restrained from presenting a petition even where the excess is disputed. It is argued that similar principles ought to apply to personal insolvency.

26. The Respondent also relies on *Moore v Inland Revenue Commissioners* [2002] NI 26, where the debtor disputed a part of the sum claimed on the statutory demand.

In that case, Girvan J. set aside the demand on the condition that the undisputed portion be paid within 28 days. It is said that this type of order would not prejudice the Debtor and would do justice to both parties in this case.

The Credibility Threshold

27. The Appellant says that the credibility threshold that a debtor must meet is that an issue would arise for trial that is not fanciful, illusory or unreal. He says that once a court is satisfied that such an issue arises, it is not for them to inquire any further into the merits of the issue at that stage. In this regard it is submitted that the Court of Appeal erred in reaching conclusions on the merits of the Debtor's challenge, rather than remitting the matter to the High Court for hearing.

28. In this case, there is both an issue of fact and an issue of law that the Appellant seeks to argue. The factual issue that arises is whether there was an overpayment of Stamp Duty liability. The legal issue is whether the Debtor, taking the view that there was such an overpayment made, not being the chargeable person, is entitled to a refund of the overpaid sum. In respect of the factual grounds, the Appellant says that they "*must have some credibility*" (see the Court of Appeal at para. 60). In other words, "*any evidence of fact which would, if true, arguably give rise to an issue that requires to be litigated*" (see *Minister for Communications v Wood* [2017] IESC 16 at para. 13). It is the Appellant's case that the overpayment of €71,030 arose out of the arrangement he entered into with the Revenue Commissioners and the Department of Agriculture. He says that he proffers a number of evidential bases in this regard, and therefore this cannot be regarded as a "mere assertion" and clearly passes the credibility threshold.

29. In relation to the legal issue, the Appellant submits that the correct approach is that there must be no doubt as to the point of law raised by a debtor in order to justify upholding the summons. It is said that there is no reason in principle why the Debtor is not entitled to a refund of any overpayment where the parties made an agreement to this effect. While the Court of Appeal cited *Wiley v. Revenue Commissioners* [1994] 2 IR 160 in rejecting the Debtor's claim for a refund, he argues that *Wiley* is distinguishable from this case as there is no legal provision precluding such an agreement being reached by the Revenue.

30. The Respondent says that the credibility threshold required to be met by the Debtor is that set out by McGovern J. in *Minister for Communications v. MW* [2010] 3 IR 1 at para. 24: “...a real and substantial issue and one which is at least arguable and has some prospects of success.” This test was approved and expanded upon in *Marketspreads Ltd. v O’Neill and Rice* [2014] IEHC 14. It is submitted that, in the alternative, the credibility threshold applied should be that of an arguable case used for the purposes of granting leave for judicial review pursuant to *G v. DPP* [1994] 1 IR 374. The Respondent argues that the Debtor meets neither of these standards on the facts and offers no evidence or legal basis for his claim that there has been an overpayment.

Extension of Time

31. The Appellant accepts that the starting point for a request for an extension of time to appeal are the *Éire Continental* principles. However, the Appellant relies on *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] 2 IR 441 and notes that the Court retains discretion to grant an extension of time even where none or only some of the *Éire Continental* principles are satisfied, if granting such an extension would be in the interests of justice. *Seniors Money* is also relied on to the effect that, in deciding whether it would be in the interests of justice to grant an extension, the Court must consider all of the circumstances of the case. On the facts here, the Appellant says that there is an arguable ground of appeal. In explaining his reason for delay, he submits that he suffered from health difficulties from May 2016 and for some months thereafter. He also says that he was left confused by the state of affairs between the Revenue and himself in light of their initial statements that the Stamp Duty liability would be discharged by the attachment of the forestry grants, which was later reneged on. The Appellant also argues that the balance of justice lies in his favour. He says that no prejudice would emerge for the Respondent in granting an extension of time. In comparison, the Appellant would be prevented from arguing his case for the dismissal of the summons, which has much greater implications for him. Thus, the Appellant submits that the delay in itself should not be a barrier preventing him from raising the issue of an overstatement on the summons.

32. The Respondent says that the courts do not have a discretion to extend the time to challenge a bankruptcy summons under the 1988 Act. They note that Order 76, Rule 13(2) is mandatory in nature, stating that a debtor “*must file an affidavit within 14 days*” of the service of the summons. They also note that the Debtor never sought to challenge the judgments underlying the figure on the bankruptcy summons, which were obtained between September 2011 - January 2015, when the Debtor had knowledge of the alleged overpayment. The Respondent says that the attempts made by the Debtor to challenge the figures at this stage amounts to a collateral attack on the previous decisions of the courts. It is said that the Debtor should be precluded from raising such issues now under the rule in *Henderson v. Henderson* [1843-60] All E.R. Rep. 378. If this Court finds that they have a discretion to extend time, the Respondent submits that it should decline to exercise this discretion as the Debtor satisfied none of the criteria adopted in *Éire Continental*. The Respondent says that the High Court found that the Debtor offered no sworn explanation for the delay to challenge the bankruptcy summons or the judgments upon which it is based, despite filing three separate affidavits. Further, the lower courts found no credible evidence for the Debtor’s allegation that an overpayment had occurred or that an issue would arise for trial noting, as pointed out above that the judgments remained unchallenged. Alongside the *Éire Continental* principles, the Respondent relies on *MOS v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 ILRM 149 that where a party seeks an extension of mandatory time limits under the RSC, they must show “*good and sufficient reason*” for that extension. It is argued that the Debtor has not proffered good and sufficient reason to warrant the exercise of the Court’s discretion to grant an extension. Considering all of these circumstances, the Respondent says that no extension ought to be granted. It should be noted that while both parties have dealt with the third issue under a consideration of whether time should be extended for the raising of an issue, this Court was not concerned as such with the principles applicable to an extension of time as provided for in *Éire Continental* so much as whether a delay in raising an arguable defence is fatal to a party’s entitlement to rely on such a defence.

Legislative Overview

33. At this stage, it is useful to set out the relevant statutory provisions for consideration. As noted in the Court of Appeal, the Bankruptcy Act 1988 replaced the Bankruptcy Act 1872. It is the current statutory regime regulating bankruptcy, but it has been subject to a number of amendments in recent years.

34. Section 8 of the 1988 Act deals with bankruptcy summons. Section 8(1) details the requirements for a valid bankruptcy summons, including the minimum debt that a creditor must show they are owed. Forde and Simms, *Bankruptcy Law* (2009, Round Hall) note at para. 4-42 that up until 1988, the statutory minimum required for issuing a summons was £40. With the commencement of the 1988 Act, the statutory minimum increased to £1,500. Prior to amendment, the section 8(1) of the 1988 Act stated:

“8.—(1) A summons (in this Act referred to as a “bankruptcy summons”) may be granted by the Court to a person (in this section referred to as “the creditor”) who proves that—

- (a) a debt of £1,500 or more is due to him by the person against whom the summons is sought,
- (b) the debt is a liquidated sum, and
- (c) a notice in the prescribed form, requiring payment of the debt, has been served on the debtor.”

35. With effect from 1 January, 2002, the statutory minimum was changed to €1900 (see the Bankruptcy Act, 1988 (Alteration of Monetary Limits) Order, 2001 S.I. 595/2001). Section 8(1)(a) was replaced by section 144 of the Personal Insolvency Act 2012, which increased the statutory threshold to issue a bankruptcy summons to €20,000. Section 8(1)(c) was also amended by section 28 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013. Section 8(1), as amended, now reads as follows:

“A summons (in this Act referred to as a ‘bankruptcy summons’) may be granted by the court to a person (in this section referred to as ‘the creditor’) who proves that—

- (a) a debt of more than €20,000 is due to the creditor concerned by the person against whom the summons is sought,
- (b) the debt is a liquidated sum, and

(c) the creditor concerned has given not less than 14 days' notice to the debtor of the creditor's intention to apply for a bankruptcy summons and the debt remains unpaid."

36. Section 8(6)(b) provides that the court may dismiss a bankruptcy summons where it is "*satisfied that an issue would arise for trial.*"

37. Order 76 Part III of the RSC regulates the issuing of bankruptcy summons. Rule 10 provides for the circumstances by which a party commits an act of bankruptcy:

"10. A bankruptcy summons shall be in the Form No 1 and shall:

(a) require the debtor, within fourteen days after the service of the summons upon him, to pay the debt to the creditor or to secure the payment of the debt to the satisfaction of the creditor or to compound the debt to the satisfaction of the creditor, and

(b) state that in the event of the debtor failing to pay the sum specified in the summons or to secure or compound for it to the satisfaction of the creditor such default shall be an act of bankruptcy."

This reflects section 7(1)(g) of the 1988 Act, which states that "*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.*"

38. Order 76, Rule 13(2) provides for the circumstances where the Debtor disputes the debt upon which a bankruptcy summons is based. It has also been subject to amendment. It reads as follows:

"There shall be endorsed on the summons in addition to an intimation of the consequences of neglect to comply with the requisition of the summons, a notice to the debtor that if he disputes the debt and desires to obtain the dismissal of the summons he must file an affidavit within fourteen days after service of the summons stating (a) that he is not so indebted or only so indebted to an amount of €20,000 or less or (b) that before the service of the summons he had obtained

the protection of the Court or (c) that he has secured or compounded the debt to the satisfaction of the creditor.”

39. Prior to 2013, Rule 13(2)(a) provided that a debtor could dispute the debt in a summons if he could show “*that he is not so indebted or only indebted to a less amount than €1904.61*” (see Rules of the Superior Courts (No. 3), 1989 S.I. 79/1989).

Discussion on the effect of an overstatement of the sum due by the debtor to the creditor

40. In this case, it is contended that the sum due by the Appellant to the Revenue is overstated by the sum of €71,030. Assuming for the sake of argument that there is an overstatement of the sum due, is that overstatement an error which requires the dismissal of the bankruptcy summons (as contended for by the Appellant), or is it sufficient for the creditor, in this case, the Revenue, to show that there is, in any event, a sum due by the Debtor in excess of €20,000, the threshold sum below which a bankruptcy summons will not be issued?

41. The question posed in these proceedings requires a consideration of the provisions of the Bankruptcy Act, 1988, as amended. Before doing that, I want to consider some of the authorities referred to in the judgment of Collins J. in this matter. These judgments demonstrate an approach by the courts in this jurisdiction and in the courts of the United Kingdom to the effect that, having regard to the effect of an adjudication of bankruptcy, strict compliance with the legislative requirements leading to an adjudication must be demonstrated. This approach is evident from the judgment of Hamilton P. in the case of *O’Maoileoin v. Official Assignee* [1989] I.R. 647. In his judgment he referred to the case of *Re O.C.S., ex parte debtor* [1904] 2 K.B. 161; *Re Debtor, ex parte debtor* [1908] 2 K.B. 684; *In re Collier, ex parte Dan Rylands Ltd.* (1891) 64 L.T. 742, amongst others.

42. Hamilton P. cited the following passage from the judgment of Cave J. at page 743 in *In re Collier*, where it was stated:

“Due service of a bankruptcy notice is necessary in order to constitute an act of bankruptcy, and it is more important that the rules and regulations should be properly complied with than in the case of a petition for adjudication. When the

act of bankruptcy has been committed, then the petition is a less formal matter, and one as to which it is not necessary to take exactly the same view. Very soon after the Act of 1883 came into operation several cases were brought before the courts with reference to a bankruptcy notice, and, on more than one occasion, the members of the Court of Appeal expressed the opinion that, since the commission of an act of bankruptcy was a serious matter, and involved consequences of what has been called a penal nature, it is important to see that the necessary preliminaries were complied with.”

43. Hamilton P. also quoted at length from the judgment of Cozens-Hardy M.R., at pages 686 to 689 of his judgment in *Re Debtor ex parte debtor*:

“This appeal, though it relates only to a small amount, undoubtedly raises a point of importance. The petitioning creditors obtained a final judgment against the debtor. Certain sums were either paid or allowed by way of set-off so that the amount of the judgment debt was reduced. A bankruptcy notice was served on the debtor, and in the margin of that notice there are inserted certain figures which bring out the result that a sum of £984.7s.1d. is the balance of the amount due on the final judgment. The bankruptcy notice proceeds in the usual form requiring payment and stating that a non-compliance with the bankruptcy notice will involve the consequences, which to some extent are penal consequences, of bankruptcy. The amount claimed in the bankruptcy notice was not due. There was a mistake in the calculation of interest. For the present purpose I care not what the precise amount of the mistake was. It was, I believe, between one and two pounds. But putting aside the question of amount, this was a bankruptcy notice which said ‘If you do not pay a judgment debt which is due and also a further sum which is not due you are liable to be made bankrupt.’ It is said that is a formal defect which can be set right under s.143, sub-section 1 of the Bankruptcy Act, 1883, and that we ought to disregard it or treat it as formal and amend the bankruptcy notice and allow the bankruptcy proceedings to go on. On principle I am not prepared to accede to that argument. I cannot regard it as a mere formal defect that you claim payment from a man of that which never was due from him. It is not necessary to say that there was any

attempt on the part of the petitioning creditors wilfully to exact payment of that which they knew was not due. My judgment does not depend upon that. It seems to me that a defect of this kind is substantial, that it is not formal, and does not fall within the language of s.143. So much in point of principle.”

44. He concluded his judgment by saying:

“Both on principle and on authority it seems to me that when you find a notice including in the claim for payment a sum which is not due from the debtor at all, that is not a mere formal defect within s.143, sub-s. 1. The appeal must therefore be allowed.”

45. Having referred to those authorities, Hamilton P. stated:

“These cases clearly establish that the bankruptcy code, having regard to the consequences which flow from an adjudication of bankruptcy, is penal in nature and that the requirements of the statutes must be complied with strictly; that the debtor's summons to be served within the provisions of s. 21 of the Bankruptcy Ireland (Amendment) Act, 1872, must be served in the prescribed manner and the amount due in accordance with a judgment, when a judgment is relied upon, must be accurate and that a claim for an amount in excess of the amount due in accordance with such judgment would render the notice defective and a subsequent adjudication void.”

46. In that particular case, Hamilton P. was satisfied that the debtor's summons was in the correct form and thus the application to have the debtor's summons annulled was dismissed.

47. The approach of Hamilton P. was subsequently followed by Murphy J. in *In the matter of Gerard Sherlock* [1995] 2 ILRM 493, who quoted extensively from the judgment in *O'Maoileóin*, and applied the principles set out by Hamilton P. at 651 and 652 of his judgment, which are set out above.

48. It is interesting to note the criticism of the judgment in *Sherlock* at para. 46 of the judgment of Collins J., where he stated as follows:

“The result in Sherlock appears to me to be rather surprising. The error identified by the debtor equated to less than 0.6% of the debt claimed by the

creditor and the remainder of the debt was undisputed. Thus, it was not in dispute that the debtor owed an amount that exceeded the then statutory minimum of £1,500 by a multiple of more than 100. It is not obvious to me from reading the judgment of the High Court in *Sherlock* why that undisputed fact appeared to be considered as wholly irrelevant to the question of whether the adjudication should be set aside. Instead, the Court appears to have proceeded on the basis that the authorities cited by Hamilton P in *O'Maoileóin* and, in particular, the judgment of Cozens Hardy MR in *In re A Debtor* dictated that the debtor must necessarily succeed. Notably, the conclusion of the Court was not explained by reference to any specific provision of the 1988 Act and no reference is made in the judgment to section 8(4). Equally, no reference is made in *Sherlock* to the terms of the relevant Rules and there is no discussion of whether, even if the approach articulated by Hamilton P in *O'Maoileóin* was the appropriate approach to the 1872 Act, a different approach to the 1988 Act might be warranted.”

49. Collins J. added in the following paragraph the following observation:

“I confess that I do not find the reasoning of Cozens Hardy MR in 1908 either attractive or convincing in 2020. Accepting for the purpose of this analysis the premise that the bankruptcy code is to be characterised as penal ... it is not obvious to me how it flows from that premise that any error in the amount set out in a bankruptcy summons must necessarily and without qualification be deemed fatal to it and/or to any subsequent adjudication.” (Emphasis in original)

50. The Court of Appeal in its judgment then proceeded to consider two further judgments, that of this Court in the case of *St. Kevin's Company against a Debtor*, (*ex tempore*, Supreme Court, 27th January, 1995), and the decision of the High Court (McGovern J.) in *Minister for Communications v. MW* [2010] 3 I.R. 1, which, in turn, followed the decision of this Court in *St. Kevin's*.

51. As can be seen, the decision of the Supreme Court in *St. Kevin's* was delivered *ex tempore*, and the most detailed account of the decision is to be found in an article by Mícheál P. O'Higgins in *Commercial Law Practitioner* (1995), page 173. It is

summarised as follows in Bankruptcy Law & Practice, 2nd Edition, by Sanfey & Holohan, as follows, at para. 2-73:

“McGovern J. in his judgment referred to Re the matter of a bankruptcy summons by St. Kevin’s Company against a Debtor, where the Supreme Court, in an unreported ex tempore judgment expressed the view that the correct interpretation of s.8(6)(b) of the Bankruptcy Act 1988, was that the High Court should not undertake an investigation into the merits of the case once it was satisfied that an issue arose on the summons. In those circumstances, the Supreme Court stated that it was mandatory for the court to dismiss the summons if it was satisfied that an issue arose between the parties, and the issue would have to be litigated separately outside the bankruptcy process.”

52. As it happens, McGovern J.’s reference to the decision in *St. Kevin’s* in the course of his judgment in *Minister for Communications v. MW* is somewhat terse, as will be seen momentarily.

53. Having referred to the decision in *St. Kevin’s*, Collins J. in his judgment stated at para. 49 as follows:

“No doubt, where the correct amount due is less than the statutory threshold or where (as in In the matter of a Bankruptcy Summons by St Kevin’s Company against a Debtor) the entire debt is disputed (on sufficient grounds) or there is a dispute about such part of the stated debt as would (or might) bring it below the statutory threshold, the rationale for dismissing the summons is clear. Where, however, any error or dispute would not bring the debt below the statutory threshold, it is not obvious to me why the presentation or further prosecution of bankruptcy proceedings should effectively be barred. Notably, that does not appear to be the approach that appears to be taken in the context of winding-up petitions on the company side: see Truck and Machinery Sales Ltd v Marubeni Komatsu Ltd [1996] 1 IR 12, at 24-25.”

54. Thus, it would appear that the issue for the Court of Appeal was what should happen when the area of error or dispute did not reduce the amount due below the statutory threshold or, presumably, where the totality of the amount due was not in issue.

55. At this stage, it would be helpful to refer to the judgment of the High Court in *Minister for Communications v. MW*. The background to the proceedings was the Bula/Tara litigation, and concerned an order for costs in favour of the Minister against the respondents. Costs were taxed and ultimately a bankruptcy summons was issued in respect of the amount said to be due. The dispute in that case concerned the amount of interest due on the sum in respect of costs, which had been duly taxed at that stage. McGovern J. in the course of his judgment referred to a number of the decisions previously referred to, such as that in *St. Kevin's*, *In Re Sherlock*, *Re Collier*, and *O'Maoileóin*, to which reference has already been made. He commented, at para. 8 of his judgment:

“It seems to me that both before the 1988 Act, and since then, the courts have regarded it as necessary to strictly comply with the provisions of the Rules of the Superior Courts 1986 and statutory provisions in order to trigger the bankruptcy process because it has such serious consequences for a debtor.”

56. He went on to identify the issue in dispute between the parties as being whether or not the debt claimed was due and owing by reason of uncertainty over the issue of enforceability of the order for costs, or a contention that the amount for interest was overstated on the grounds that no interest in respect of the judgment debt (being the costs) was recoverable after the expiration of six years from the date on which the interest became due. The first issue was rejected by McGovern J., as he did not consider that there was a reasonable prospect of success in an appeal then pending before the Supreme Court as to whether the order for costs was enforceable.

57. The second issue concerned the question of interest on the sum due by way of costs. McGovern J. accepted that the respondents could not claim to have been misled by the manner in which interest was stated as the rates of interest and the periods claimed for that interest were fully set out in the Particulars of Demand. However, he did conclude that there was an issue as to whether or not interest beyond the period of six years could be claimed, giving rise to an issue as to whether the correct sum had been claimed. He concluded by saying, at para. 24:

“In my view, this is a real and substantial issue and one which is, at least, arguable and which has some prospect of success.”

58. He continued, at para. 25, by saying:

“That being the case, it seems to me that I have to dismiss the summons by virtue of s. 8(6)(b) of the Bankruptcy Act 1988, and following the decision of the Supreme Court in St. Kevin’s Company against a Debtor (ex tempore, 27 January, 1995). It is with some disquiet and misgivings that I reach this conclusion because there can be no doubt but that the respondents are very significantly indebted to the applicants on foot of the orders for costs which have been made against them and properly taxed and ascertained. I am also aware of the numerous court actions or appeals in which the applicants have sought to frustrate the effect of judgments given against them, whether for costs or otherwise. In the case of In re Sherlock [1995] 2 ILRM 493 at p.495, Murphy J. said of a bankrupt:

“... he is and was entitled to a credit of something in excess of £1,000 against the amount of the principal sum. I have no doubt whatever that the failure to give credit for this sum was due to an oversight. Furthermore, there can be no doubt that, on any computation, the amount due by the bankrupt far exceeds the minimum sum required to found an order for adjudication. Nevertheless, the question remains, whether this error invalidates the bankruptcy summons and in turn the order for adjudication based on it.”

In the circumstances of that case, the learned High Court Judge directed that the adjudication should be set aside. That decision is in line with the other authorities which I have set out above. Therefore, as I am satisfied that an issue arises for trial on the question of the interest recoverable the respondents are entitled to the order which they seek.”

59. The approach taken in that case, and in a number of subsequent decisions, is clearly of some concern to the Court of Appeal, as expressed in para. 49 of the judgment, as set out above. Reference was made in para. 47 of the judgment to the fact a misstatement in an indictment of a monetary amount allegedly stolen, or in relation to the value of goods allegedly stolen, will not result in the dismissal of an indictment,

and can be cured by an amendment to the indictment. But, of course, it should be borne in mind that there is a statutory basis for such an amendment.

60. The test identified by McGovern J. in *Minister for Communications v. MW*, namely, that the issue raised was a real and substantial one, which is at least arguable and has some prospect of success has been applied in a number of subsequent cases, and it would be appropriate to refer to those now. For example, in the case of *Allied Irish Banks Plc. v. Ivan Yates* [2012] IEHC 360, having referred to a number of the earlier authorities, it was observed at para. 32 (Dunne J.):

“...I think it is clear beyond doubt that if the amount claimed on foot of the bankruptcy summons is in excess of that which is actually due, then in those circumstances there is no obligation to pay the amount claimed on foot of the bankruptcy summons and a failure to pay on foot of that summons will not constitute an act of bankruptcy. Therefore, I disagree with and do not accept the submission on behalf of the applicant to the effect that the application to dismiss the summons can only be brought if there is in fact no sum due at all or alternatively a sum less than €1,900.”

61. Further consideration was given to the circumstances in which a bankruptcy should be dismissed in the case of *Murphy v. Bank of Ireland* [2014] 1 I.R. 642, a decision of this Court. In that case, McGovern J. in his concluding remarks in the High Court ([2011] IEHC 541) had observed, at paras. 26 onwards, as follows:

*“26. In the course of the hearing, counsel were unable to cite any case which dealt specifically with this point, namely, whether an understatement of the amount actually due brought a debtor within the ambit of in *In Re Sherlock* [1995] 2 ILRM 493 and the cases referred to therein.*

*27. I am satisfied that the jurisprudence established by *In Re Sherlock* [1995] 2 ILRM 493 developed in order to protect debtors from the rigours of Bankruptcy following a demand for payment which was excessive, even if the excess was minimal, and arose due to an oversight or innocent mistake.*

28. *That judgment is not authority for the proposition that a claim for a liquidated sum, which is less than the sum actually due, gives rise to a "cause shown" against the validity of an adjudication of bankruptcy under s. 16 of the Bankruptcy Act 1988, and where no mistake or carelessness has been shown in the computation of the figures set out in the Notice of Demand or the Bankruptcy Summons.*"

62. Giving the majority judgment of this Court in that case, I observed, at para. 99, as follows:

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

100. Thus, in circumstances where the sum actually due is significantly in excess of that sought on the bankruptcy summons, it is difficult to see how the appellant can contend that the amount claimed in the bankruptcy summons was excessive by failing to give credit for the sum of €4,425 as against the sum of €495,938.87 which had accrued due for interest as set out above."

63. The judgment concluded at para. 101, as follows:

"It has been noted time and again that the consequences of adjudication in bankruptcy are penal in nature and for that reason strict compliance with the bankruptcy code is necessary before an individual can be adjudicated a bankrupt. The requirement of strict compliance is to protect debtors from being adjudicated in respect of a sum that is not due but it is difficult to see how the requirement for strict compliance could be relied on to annul an adjudication in bankruptcy because of an apparent failure to give credit for a payment made in reduction of the overall sum due when the sum actually due is greater than the sum demanded on the bankruptcy summons. As I have said, the purpose of the requirement of strict compliance is to ensure that an individual is not

adjudicated bankrupt in respect of a sum which is not due. It is difficult to see how that requirement could be used for the benefit of a debtor and to the detriment of a creditor in circumstances where the debtor was not asked to pay more than was due but, in fact, was asked for less than was due.”

64. For completeness, reference should also be made to one final decision of this Court, the *Minister for Communications v. Michael Wymes* [2021] IESC 40.

65. This decision was delivered after the hearing in the Court of Appeal, but before the hearing before this Court. In the course of a comprehensive judgment, reviewing to some extent the history of bankruptcy, Baker J. commented, at para. 34, as follows:

“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.”

66. It can be seen from the above case and the cases cited previously that there is a long line of authorities supporting the proposition that there must be strict compliance with the Bankruptcy Code, having regard to the consequences of adjudication of bankruptcy.

67. Undoubtedly, the argument can be made that, as a result of changes to the Bankruptcy Code in recent years, an adjudication in bankruptcy should no longer be regarded as having the same effect as was previously understood to be the case. The

period of bankruptcy is now significantly shorter than was the case under the 1988 Act, as a result of a number of legislative changes made in recent years. Further, as has been pointed out, the number of those seeking self-adjudication in bankruptcy has increased, thus lending support to the contention that an adjudication in bankruptcy is no longer seen to be “penal in nature”. The introduction of the Personal Insolvency Regime adds further support to this argument.

68. It is also the case that misgivings have been expressed about the fact that an overstatement, even of a small amount of the debt said to be due, can result in the dismissal of the bankruptcy summons. In this context, the comments of McGovern J. in *Minister for Communications v. MW* have been set out above, together with the comments of Collins J. in his judgment herein, at para. 49, and also set out above.

69. Despite these misgivings, Collins J. rejected the invitation from the Revenue to “*use the opportunity presented by the facts in this case to review the position in Irish Law where a debtor/respondent to a bankruptcy summons claims an entitlement to a credit which would have the effect of reducing the sum to a sum less than the sum claimed in the Bankruptcy Summons.*” Collins J., in para. 62 of his judgment, pointed out that there was a significant difficulty with such an invitation given that what was being asked was that the Court of Appeal should review the established jurisprudence of the Supreme Court. He took the view, having regard to decisions of this Court in *Murphy v. Bank of Ireland* [2014] 1 IR 642 and *Minister for Communications, Energy and Natural Resources v. Wood & Wymes* [2017] IESC 58, that any such review could only be undertaken by this Court. In those circumstances, he took the view that it was appropriate to follow the approach described in the case of *Minister for Communications, Energy and Natural Resources v. Wood & Wymes* in 2017, and to consider the matter by reference to whether there was “*a real and substantial issue and one which is, at least arguable and which has some prospect of success.*”

70. It seems to me that the suggestion that there should be a review of the established jurisprudence in this area leading, presumably, to a conclusion that an overstatement of the amount due should not result in the dismissal of the bankruptcy summons if the sum stated to be due in the Bankruptcy Summons is above the threshold set out in the legislation is problematic having regard to the existing legislation. The

underlying premise of the argument is that there is no longer a justification or need for strict compliance with the Bankruptcy Code, by reason of recent changes in that Code as set out above. However, notwithstanding such changes, it is necessary to consider the statutory framework which leads to an adjudication in bankruptcy. Section 7(1) of the Act of 1988 sets out those events that can amount to an act of bankruptcy. Section 7(1)(g) provides as follows:

“(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.”(Emphasis added)

The words underlined set out the requirements for an act of bankruptcy to be committed as has been pointed out repeatedly in the large body of case law which has been referred to above and which has been key to the interpretation of the words used in the section over many years and which has repeatedly emphasised the plain meaning of those words. In this jurisdiction, the long established interpretation of the language of Section 7(1)(g) was strongly affirmed in the case of *O’Maoileóin* and the wording of the section has not been altered since.

71. It should also be borne in mind that s.8(3) of the 1988 Act provides that:

“The notice requiring payment of the debt shall set out the particulars of the debt due and shall require payment within 14 days’ after service thereof on the debtor.”

72. These are the provisions (and their antecedents) that the courts have consistently held must be strictly complied with before an act of bankruptcy can occur. It is for the creditor to specify the amount of the debt required to be paid and particulars of that debt must be set out. It is the non-payment of the sum specified in the bankruptcy summons that constitutes an act of bankruptcy. The non-payment of that sum enables the creditor to present a petition for bankruptcy and, provided all is in order, will lead to an adjudication in bankruptcy. It is for that reason that an overstatement of the sum actually due cannot amount to an act of bankruptcy. The creditor is required to set out the particulars of the debt due which is required to be paid by the Debtor, if he or she is to avoid committing an act of bankruptcy, with accuracy. An individual cannot commit an

act of bankruptcy by not paying a sum demanded which exceeds the amount of the debt due. Hence, the requirement for strict compliance with the Bankruptcy Code. It is impossible, in my view, to read into s.7(1)(g) or s.8(3) a suggestion that all that is required for an act of bankruptcy to be committed is that the sum due by the Debtor to the creditor is more than the threshold amount required for the issue of a bankruptcy summons. Any alternative view would be a clear disregard for the express words of the legislation. The fact that a different approach may be seen in the area of corporate insolvency is neither here nor there.

73. To reach a different conclusion would be to ignore the express and unambiguous words of the legislation and would be a significant shift in the understanding and interpretation of the provisions of the 1988 Act. Such a change to the way in which the legislation has been understood and operated for over 100 years could only be brought about by legislative change. For that reason, I would reject any suggestion that, as the legislation now stands, all that is required is that the sum due be in excess of the threshold amount required to issue a bankruptcy summons.

74. That is not to say that the law as it currently stands is entirely satisfactory. In the first instance, Collins J. highlighted an issue as to the correctness of the present wording of O 76 r.13 (2) of the RSC (as inserted by the Rules of the Superior Courts (Bankruptcy) 2013 (SI No. 461 of 2013)). Inasmuch as this provision suggests that the debtor must first indicate, *inter alia*, that he is only “indebted to an amount of €20,000 or less” before he can seek to have the bankruptcy summons dismissed this would seem to be plainly inconsistent with the actual language of s. 8(5) of the 1988 Act. This is a matter which clearly requires to be reviewed with some urgency by the Superior Courts Rules Committee. Secondly, as set out in the judgments of McGovern J. in *MW* and Collins J., both have expressed misgivings about the fact that a bankruptcy summons has to be dismissed because a debtor can point to a small discrepancy in the sum said to be due notwithstanding that the debtor clearly is indebted to the creditor in a far larger sum. Whether such a strict approach as required in the provisions of Section 7 is still warranted is a matter that could be reconsidered by the legislature having regard to the significant changes in the Bankruptcy Code in recent years which have gone so far in ameliorating the penal nature of the Bankruptcy Code. The current

stringent requirements of Section 7(1)(g) seem out of place in the modern commercial world.

Has there been an overpayment?

75. Given my conclusion that a demand on a bankruptcy summons for a sum that is not in fact due cannot result in an act of bankruptcy in the event of non-payment of the sum said to be due, it is now necessary to ask whether there has been an overpayment of the sum due in this case by the Appellant. This is a question that was dealt with in detail in the High Court and the Court of Appeal. Effectively, the Appellant has claimed that a sum of €71,030, together with interest thereon, is repayable to him by the Revenue Commissioners. It is not in dispute that the Appellant paid a sum of €71,030 on behalf of his client in respect of Stamp Duty.

76. In the course of his judgment in the Court of Appeal, Collins J. set out the arguments of the Appellant, and his conclusions on that argument, at paras. 64 to 95 of his judgment. It is not necessary to reiterate all of the details set out in the judgment of Collins J. Suffice it to say, a number of points are made by Collins J. in relation to the arguments of the Appellant.

77. First of all, Collins J. dealt with the suggestion that the Appellant's client was due a refund in respect of his tax liabilities. It was noted that the client had significant liabilities to the Revenue over and above those related to Stamp Duty (para. 66). He also owed further sums in respect of Stamp Duty (para. 67). Collins J. concluded at para. 68:

“Accordingly, the evidence before the Court clearly indicates that, far from the Client having overpaid his tax liabilities or being due a refund from Revenue, he has a significant residual Stamp Duty liability arising from the purchase of the O’ C Lands. In any event, even if some or all of the monies attached by Revenue had been applied in discharge of the Client’s Stamp Duty liabilities, his income tax and CGT liabilities would have been left unreduced pro tanto. Either way, the evidence before the Court is wholly at odds with any suggestion that the Client had overpaid his tax liabilities and was due a refund and with any suggestion that the Debtor might have had any reason to believe that to be the case.”

78. The Court of Appeal then went on to consider specific documents relied upon by the Appellant in support of his arguments to the effect that there was an overpayment of Stamp Duty. In particular, reliance was placed on an email from a staff member of the Revenue sent to the Appellant in January, 2017 referring to certain payments that had been made, and concluding at the end:

“In the circumstances therefore it would appear on the face of it that John Tobin is due a credit of €71,030.00.”

This was dealt with at paras. 76 and 77 of the judgment of the Court of Appeal, and it would be helpful to set out what was stated there in full:

“76. The precise circumstances in which this document came to be written are unclear, but it is reasonable to assume that it was procured by the Debtor. In any event, the Debtor was well aware that the suggestion that a “credit” was due to him was untrue. While apparently endeavouring to give the impression that the amount of €71,030 had in fact been applied against the Client’s Stamp Duty liabilities (in which context I note the highlighted text above), the email stops short of actually stating that it was and the Debtor in any event knew that it had not been – the whole thrust of the submission made on his behalf to the Revenue in November 2014 was that the Revenue should have so applied the attached monies but had wrongfully failed to do so. Secondly, the Debtor was well aware that the “agreed liability” had not been €96,850. Revenue’s letter of 27 March 2009 had indicated a total liability (after mitigation of penalty) of €136,807.7 and ID’s letter of 18 May 2012 had indicated an even higher total liability of €162,880 (€91,850 + €71,030). If €71,030 had been available to be applied to the Stamp Duty liability in relation to the H Lands in May 2012, it would have simply discharged the “outstanding liability” in that amount and there would have been no question of an overpayment. In fact – as certainly the Debtor knew and as ID must surely have been aware also – it was precisely because nothing more could be recovered from or on behalf of the Client that Revenue had ultimately (and, the evidence suggests, reluctantly) accepted a

further payment from the Debtor of €5,000 in 2015 as discharging the Client's remaining liability in respect of the H Lands.

77. *I should next record that on 16 February 2017 - 3 weeks after ID's email - Revenue's District Manager, Tom Murphy, wrote to the Debtor with reference to that email. Having referred to the December 2015 letter from Ms Hendrick (already referred to above) Mr Murphy went on to state that "[ID] issued that email without reference to Ms Hendrick, myself or any other officer currently dealing with the case and, as such, [ID] did not and does not have the authority to deal with this case on behalf of Revenue." This statement by Mr Murphy was, it appears, not contradicted or challenged at any stage by the Debtor, either in contemporaneous correspondence or on affidavit subsequently. The letter then went on to explain why it was not the case that any credit was due to the Debtor, explaining (as had been explained previously to the Debtor) that all sums received by Revenue on foot of the Notices of Attachment issued by it had been brought to account against outstanding liabilities of the Client in respect of income tax and CGT and were not available for off-set against any other tax liabilities. As I have said, that does not appear to be disputed as a matter of fact."*

79. The judgment went on to state that, while the Appellant asserted that a credit/refund was due to him, that assertion was *"in my opinion, wholly lacking in credibility for the reasons I have indicated and does not derive any credible support from the documents relied on by the Debtor"*. It was concluded that there was no overpayment of the client's liabilities, and that the Debtor was aware of that fact. As Collins J. went on to observe: *"If there was no overpayment, then no question of any refund or credit – whether in favour of Client or Debtor – could possibly arise."* (para. 78).

80. The Court of Appeal in the course of its judgment then went on to deal with the proposition that, even if there was a credible basis for stating that there had been an overpayment of the client's Stamp Duty liability, the question would arise as to how

that could give rise to an entitlement to a refund or credit on the part of the Appellant, as opposed to the client. At para. 81, Collins J. noted as follows:

“The High Court Judge noted in her judgment that Counsel for the Debtor had not been able to point to any authority that might support the proposition that the Debtor – not being the chargeable person - might nonetheless be entitled to receive the benefit of any refund/credit arising from an overpayment of liability. Equally, no argument was advanced in this Court to the effect that the Debtor could have any statutory or other entitlement to receive any refund/credit, in circumstances where he was not the chargeable person.”

81. Ultimately, the Court of Appeal rejected all the arguments of the Appellant in regard to the issue of an overpayment, as was stated at para. 89:

“It follows, in my view, that the attack on the Bankruptcy Summons on the basis that it overstates the amount due by the Debtor fails both as a matter of fact and as a matter of law. The Summons did not overstate the amount due and the suggestion that the Debtor believed that it did is, in my opinion, wholly lacking in credibility. No overpayment had been made (as the Debtor was fully aware) and there was no basis on which the Debtor could have considered that he was entitled to any credit/refund. It follows that, regardless of whether the test is objective, subjective or some hybrid of the two (and it is not necessary to decide which it is), the Debtor has no plausible claim to have been “confused” by the demand made by Revenue and then repeated in the Bankruptcy Summons. Nor, in my opinion, is there any basis for any suggestion that the Debtor was “misled” by the particulars of demand here. To the contrary, the evidence before the Court clearly indicates that the material primarily relied on by the Debtor – the email of January 2017 – only came into existence subsequent to the making of the demand, the issuing of the Summons and the presentation of the Petition, that its issue was not authorised by Revenue and – most significantly – that the Debtor was at all times aware that the suggestion in the email that there had been an overpayment of Stamp Duty, and the consequential suggestion that the Debtor was due a “refund” of Stamp Duty, had no foundation whatever.

90. *The exact circumstances in which the email of January 2017 came to issue are not disclosed in the papers before the Court and it would not be appropriate for the Court to go further than is necessary to dispose of this appeal. What is clear from the evidence before the Court is that the case made by the Debtor on this issue of overpayment/credit/refund is fundamentally lacking in credibility for the reasons I have set out above and no real or substantial issue has been established.*”

82. In reaching his conclusions on the issue of the alleged overpayment, the Court of Appeal judge had regard to the test for dismissing a bankruptcy summons, first articulated by McGovern J. in *Minister for Communications v. MW*, and having first referred to a judgment of this Court in a subsequent case involving those parties, *Minister for Communications, Energy and Natural Resources v. Wood & Wymes* [2017] IESC 58, he observed at para. 60 as follows:

“Approving again (this time as a Supreme Court judge) the test articulated by McGovern J in Minister for Communications, Energy and Natural Resources v MW, Dunne J emphasised “that the issue must be a real and substantial issue” that “should not be fanciful or unreal”. It may be an issue of fact or law. If an issue of fact, “it must have some credibility”. If an issue of law, where the issue was one as to which there was no doubt, that could not justify dismissing the summons. As she had done in her judgment in the High Court in Marketspreads Limited v O’ Neill and Rice, Dunne J expressed the view that the principles applicable to applications for summary judgment were of assistance. In looking at the situation overall “one must of course consider whether what is deposed to on affidavit by the applicant is credible.” Referring to the decision of the High Court in McGrath v O’ Driscoll [2007] ILRM 203, Dunne J stated that she would adopt the approach adopted by Clarke J there “so that a mere assertion that an issue arises would be insufficient to succeed in an application to dismiss a bankruptcy summons but any evidence of fact which would, if true, arguably give rise to an issue that requires to be litigated outside the bankruptcy proceedings would be sufficient to establish that the bankruptcy summons

should be dismissed.” Dunne J then went on to closely examine the various arguments made by the appellants before concluding that none satisfied the threshold of “real and substantial issue” and dismissing the appeals.”

83. I see no reason for coming to any different conclusion now on the test to be applied before dismissing a bankruptcy summons, and the basis on which that test is to be considered. To take the facts of this case at their simplest, the contention is that the Appellant, having paid a sum of money due by his client to the Revenue in respect of Stamp Duty, was entitled to a credit/refund against his own liabilities. Such a proposition is simply unstateable, and no authority was provided to support such a contention. Put at its simplest, if A pays a debt of C due to B, and A also has a debt to B, A cannot get the benefit of the payment of C’s debt to B in respect of his own indebtedness. It simply cannot be. Accordingly, there is no basis in this case for saying that the issue raised by the Appellant herein could be described as a real and substantial issue. As can be seen from the passage referred to above, Collins J. in his judgment at para. 60 referred to the decisions in *Minister for Communications, Energy and Natural Resources v. MW*, and *Marketspreads Limited v. O’Neill and Rice*. I do not believe that there is any necessity to reconsider the proper approach to be taken in considering whether or not a party has raised an issue that amounts to “a real and substantial issue”. It is quite clear from the authorities that, if an issue is raised which meets the test set out by McGovern J. in the original *Minister for Communications v. MW*, and further considered in cases such as *Marketspreads Limited v. O’Neill and Rice*, then the bankruptcy summons should be dismissed. However, if the point raised does not meet the test set down in those cases, then the question of dismissing the summons simply does not arise. In this case, the issue raised by the Appellant does not reach the threshold for the dismissal of the summons. Finally, it could be observed that, if any issue arose which required to be litigated outside the bankruptcy process, that issue could only be an issue between the Appellant and his client in relation to the sum paid by the Appellant on behalf of his client and which, presumably, he has not recovered from his client. However, there is no issue that could be litigated as between the Appellant and the Revenue in relation to the issues sought to be raised by him.

Delay in raising the issue

84. Strictly speaking, it could be said that it is not necessary to consider this question, given that I am satisfied that no issue arises for trial which would require the dismissal of the bankruptcy summons in this case. Nevertheless, I will deal briefly with the arguments on this issue. Under the Bankruptcy Code, a debtor who wishes to have a bankruptcy summons dismissed has up to 14 days after the service of the bankruptcy summons to do so (See Order 76, Rule 13(2)). It provides for the filing of an affidavit within that time for the purpose of challenging the bankruptcy summons. In this case, the bankruptcy summons was issued on the 4th April, 2016, and served on the 18th April, 2016. That being so, the Appellant had until the 2nd May, 2016 to bring his challenge. It was not until the first affidavit sworn in these proceedings by the Appellant on the 3rd November, 2016 that any issue as to a refund was raised. As was pointed out by the High Court judge, the Appellant had made “*no attempt to address the issue of delay and why the court should extend time*”. This remained the position even though a number of affidavits were sworn in support of his arguments in this regard. Indeed, when the matter was first before the High Court, on the 10th October, 2016, nothing was said to the Court about the possibility of challenging the bankruptcy summons, and no issue was raised at that time in relation to the validity of the demand, or the requirement to afford the Appellant a credit which had not been given to him or reflected in the affidavit sworn by him. The first time the matter was raised appears to have been when a motion was issued on behalf of the Appellant on the 7th November, 2016 seeking to extend the time to dismiss the bankruptcy summons, and seeking to dismiss the bankruptcy summons. As stated previously, there was no explanation for the delay in relation to making that application.

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.

(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. These principles were considered and applied by the learned trial judge in the High Court, and in circumstances where no explanation whatsoever was given for the delay in making the application, she refused to extend time. 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

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.

Conclusion

90. In the circumstances, there is no basis for allowing the appeal of the Appellant. The Appellant has claimed that he was due a credit/refund in respect of monies paid by him on behalf of his client. There is no basis upon which the payment of monies on behalf of his client could, in any shape or form, amount to an entitlement to the Appellant to claim a refund from the Revenue or a credit in respect of that sum. In those circumstances, no issue could arise for trial which would have required the dismissal of the bankruptcy summons. In any event, the application to dismiss the bankruptcy summons was out of time and there was no basis for extending the time within which to make such application. Regardless of the delay, both the High Court and the Court of Appeal considered the issues raised by the Appellant in detail and were satisfied that the Appellant simply did not meet the test for a bankruptcy summons to be dismissed. For the reasons and to the extent set out above I agree with their conclusions. In all the circumstances, I would dismiss the appeal.