THE HIGH COURT
BANKRUPTCY

[2022] IEHC 215
[No. 1914S]

BETWEEN

LEONARD AND WOODS DEVELOPMENT LIMITED

APPLICANT

AND

A.A

RESPONDENT

THE HIGH COURT
BANKRUPTCY

[No. 1915S]

BETWEEN

LEONARD AND WOODS DEVELOPMENT LIMITED

APPLICANT

AND

S.H

RESPONDENT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 25th day of March, 2022

1. These are two separate, but related, applications for the issuing of bankruptcy summonses against A.A. and A.A.'s daughter, S.H.

2. These matters were originally returnable before me on the 17th January, 2021. An unusual aspect of the applications is they are not grounded upon any judgment in favour of the applicant against either A.A. or S.H. Instead, the applicant relies upon a settlement agreement made between the applicant, A.A. and S.H. Given the absence of a judgment in favour of the applicant, and given concerns expressed by Humphreys J. in *National Bank of Ras Al-Khainah trading as RAK Bank v. F.K.* [2021] IEHC 541, I directed that submissions be made as to whether or not a bankruptcy summons should issue in the circumstances of the current case. The submissions were not only to address the decision of Humphreys J. to which I have referred, but also the general question as to the circumstances in which (in the absence of a judgment in favour of an applicant against a debtor) a bankruptcy summons should issue.

3. These submissions were provided to me by the adjourned date of the 31st January, 2022. This is now my decision on the applications.

4. It is important to set out the facts of this case. According to the affidavit of William Smyth grounding these applications, the debt upon which the applicant relies is a debt which "arises out of the failure to discharge [the sum of €275,000] pursuant to clause 2 of a settlement agreement dated the 16th December, 2019…" (para. 2 of the grounding affidavit of Mr. Smyth).

5. The affidavit then sets out the proceedings to which A.A. (and his daughter) were parties.

6. The affidavit then goes on to state that:

> "It was a condition of the Settlement Agreement that a sum of €200,000 be paid to the Applicant's company's solicitors by 31st January, 2020. That initial payment was made and received. Pursuant to Clause 2 if the Agreement the Respondent was to pay an additional sum of €275,000 on or before 31st December, 2020."

7. Importantly, in my view, the settlement agreement also stipulated that:

> "In the event that the second named defendant [A.A.] fails, refuses or neglects to meet any or both of the aforesaid payments in full, then the first and second defendants [A.A. and S.H.] hereby jointly and severally consent to summary judgment in the amount outstanding."

8. As the second tranche of the settlement sum was not paid, this provision came into effect

9. The applicant issued summary proceedings against A.A. and S.H. on the 31st May, 2021 seeking the judgment to which the applicant says it is entitled given the terms of the compromise of the earlier proceedings. An appearance to the summary proceedings was entered on behalf of A.A. and S.H. on the 4th August, 2021. However, rather than press on with these proceedings the applicant on the 20th October, 2021 served the required documentation ("particulars of Demand, and Notice requiring Payment prior to the issue of a Bankruptcy Summons") on A.A. and S.H. It now seeks, in furtherance of the bankruptcy process, to have a bankruptcy summons issued against each of these individuals.

10. The reason why the applicant is not pressing on with the summary proceedings is described at para. 8 of the grounding affidavit:

> "However, I am concerned at the time it may take, firstly, to obtain judgment of the said proceedings and secondly, to duly enforce same in order to recover the amount due. Accordingly, the Applicant Company is petitioning to have the Respondent adjudicated bankrupt. I say that [the] Applicant company is reserving its position in respect of the summary proceedings pending the outcome of the within bankruptcy application."

11. Apart from describing the background to this application, the grounding affidavit also provides the required proofs for the issuing of a said required formal proofs for the issuing of a bankruptcy summons.

12. Mr. Smyth goes on to exhibit with his grounding affidavit the agreement by which the earlier proceedings were resolved.

13. One notable aspect of the settlement agreement is that, as I have already noted, it is A.A. who is obliged to make the payments of €200,000 and €275,000. There is no obligation on S.H. The furthest her obligations run is to consent to summary judgment so that she is then liable on a joint and several basis for any outstanding sums due to the applicant under the settlement arrangements.

14. In his submissions on behalf of the applicant, counsel refers to *Harrahill v. Cuddy* (Supreme Court, ex tempore, 20th February, 2009). In summarising the effect of his judgment, the authors of Sanfey and Holohan on *Bankruptcy Law and Practice* (2d ed., 2010) stated the following in para. 2-42:

> "As a result of the Supreme Court decision it is now open to apply for the issue of a Bankruptcy Summons, even where one did not have a judgment. However, it is necessary that the debt be undisputed if one is certain to keep the summons free from challenge."

15. This conclusion is, of course, consistent with the provisions of s. 8 of the Bankruptcy Act, 1988, subs. 1 of which reads as follows:

> "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 £1,900 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."

16. I will return to the application of s. 8 (1) of the 1988 Act to the facts of this case, in particular when considering the position of S.H.

17. The authors of Sanfey and Holohan, having set out the general rule resulting from the decision of the Supreme Court in *Harrahill v Cuddy*, then consider the issue of what constitutes a liquidated sum. They conclude (at para. 2-46) as follows:

> "The conclusion therefore is that there must be no question but that the sum claimed in the bankruptcy summons, in the event that one does not hold a judgment, is beyond dispute. This presumably would only arise in the case of a debt which has been acknowledged by the debtor or, or (sic) where evidence of acknowledgment is forthcoming, for example, by means of a countermanded cheque."

18. The current case concerns the settlement of earlier proceedings, the agreement to pay specific amounts of money on specific dates, and an acceptance on the part of both A.A. and S.H. that (insofar as these monies are not paid) there would be consent to summary judgment for the outstanding sums due. Short of an actual judgment, it is difficult to imagine clearer evidence of an acceptance of obligations on the part of both A.A. and S.H. This is particularly so in circumstances where the settlement agreement, and the signatures of S.H. and A.A. to that agreement, are witnessed by solicitors who appear to have been acting in the original proceedings (compromised by the settlement) and are certainly acting for S.H. and A.A.in the subsequent correspondence with the applicant solicitors arising out of the failure to pay the €275,000 (the second tranche of monies due

on foot of the settlement). The solicitor who witnessed the signatures of S.H. and A.A. to the settlement agreement is also the solicitor who entered an appearance on their behalf in respect of the summary proceedings which were issued by the applicant because of the non-payment of the €275,000. I think it is fair to come to the view that this solicitor (who has consistently represented S.H. and A.A., and who seems to have represented them in negotiating the settlement agreement) actually advised them as to the contents of that agreement. In addition, and apart altogether from the fact that a settlement agreement was entered into presumably with legal advice, nothing in the subsequent open correspondence exhibited to the affidavit of Mr. Smyth suggests that either A.A. or S.H. has sought to avoid the settlement agreement by suggesting that it is in any way legally infirm or inoperable.

19. Given those facts, certainly as far as A.A. is concerned, in as much as I am required at this stage in the bankruptcy process to be satisfied that a liquidated sum is owed to the applicant company, I am so satisfied.

20. The position with regard to S.H. is somewhat different. S.H. was not obliged to pay or contribute to the payment of the first tranche of €200,000. Equally, S.H. was not obliged to pay or contribute to the payment of the second tranche of €275,000. The only liability assumed by S.H. under the settlement agreement, as I read it, was in the event that summary judgment was to be entered against her. While she consented to the entry on that summary judgment, this is yet to occur. Until judgment is entered against A.A. and S.H., S.H. arguably has no liability to the applicant company. While this may seem unusually uneven situation, it is precisely the situation which arises from the settlement agreement which the applicant company has negotiated with A.A. and S.H. Given the terms of the settlement agreement, I am not satisfied to the level of certainty suggested in Sanfey and Holohan, namely that there is "no question" about the liability of S.H. to the applicant company in respect of the sum of €275,000.

21. With regard to the judgment of Humphreys J. in *F.K.*, I agree with the submission of counsel for the applicant that the facts in that case are very different to the facts in the current application. In particular, as I have already decided, the settlement agreement in this case is a far more sure way of establishing the debt claimed by the applicant than the rather uncertain evidence about the debt in *F.K*. *F.K*. also involved features which are to found nowhere in the current application, notably the question of foreign law and the canvassing of defences to the alleged debt.

2. I therefore decide that these two applications as follows:

    1. I will issue a bankruptcy summons in respect of A.A.

    2. I will not now issue a bankruptcy summons in respect of S.H. I am not satisfied, as I have indicated earlier in this judgment, that at this point in time S.H. has a liability to the applicant company given the very specific terms of the settlement agreement. However, as I am conscious that this particular issue was not one on which I have yet been addressed by Counsel for the applicant, I will not dismiss

the application for the issuing of a bankruptcy summons against S.H., but rather adjourn it generally with liberty to re-enter before me in the event that the applicant wishes to persuade me that my initial view about the settlement agreement (and the obligations it places on S.H.) should be revisited.