THE HIGH COURT

BANKRUPTCY

[2024] IEHC 447

[Summons No. 6269]

BETWEEN

BLESSVILLE LIMITED

CREDITOR

AND

PATRICK DOHERTY

DEBTOR

JUDGMENT of Mr Justice Kennedy delivered on 22 July 2024.

1. This judgment concerns a short procedural point, namely, whether it is permissible for a bankruptcy summons to be served outside the jurisdiction. There is a degree of confusion in respect of the issue. The view that it may not be possible to serve such a summons out of the jurisdiction is based on a very old English authority, *Ex p. O'Loghlen* (1871) L.R. 6 Ch. 406 ("*O'Loghlen*"). However, there do not appear to be any reported authorities on whether that decision applies under the current Irish legislation. Furthermore, practice in respect of the issue appears to have varied and there are notable examples of Irish bankruptcy proceedings which were grounded on such service abroad. Mr Flynn, counsel for the creditor, submitted that *O'Loghlen* could be distinguished.

2. In the present case, the creditor is Irish, as is the debt, which arises from an Irish High Court judgment in proceedings actually initiated by the debtor in Ireland. The debtor has previously confirmed he lived in Ireland but has more recently indicated that he now lives at a particular address in Scotland (interestingly, while, post-Brexit, the Insolvency Directive is of limited assistance when dealing with UK debtors, prior to the United Kingdom leaving the European Union there were previous bankruptcy proceedings between the parties to the current application. In those "pre-Brexit" proceedings, the creditor apparently challenged the debtor's position that Scotland was his Centre of Main Interest ("COMI") and Sanfey J. granted leave to the creditor to serve the bankruptcy summons in Scotland. The question therefore arises as to the jurisdiction to do the same in the current, post-Brexit, scenario).

The Bankruptcy Act 1988, as amended ("the 1988 Act")

3. Before considering *O'Loghlen*, it is as well to note the modern statutory framework within which such a summons is issued. Section 8 of the 1988 Act provides:

"*(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 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 in the prescribed form to the debtor of the creditor's intention to apply for a bankruptcy summons and the debt remains unpaid.

(2) ...

(3) 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.

(4) The bankruptcy summons shall be in the prescribed form.

(5) A debtor served with a bankruptcy summons may apply to the Court in the prescribed manner and within the prescribed time to dismiss the summons.

(6) The Court—

(a) may dismiss the summons with or without costs, and

(b) shall dismiss the summons if satisfied that an issue would arise for trial."

4. The 1988 Act does not stipulate how a bankruptcy summons is to be served. There is no express provision for or restriction on service outside of the jurisdiction.

5. Order 76, rule 14 of the Rules of the Superior Courts ("RSC") provides:

"*(1) A bankruptcy summons shall be personally served within twenty-eight days from the date of the summons by delivering to the debtor a sealed copy of the summons with endorsed or annexed particulars of demand together with a true copy of the affidavit filed in accordance with rule 11. If personal service within the time limit cannot be effected, the Court may grant extension of the time for such service. If the Court is satisfied by affidavit that the debtor is evading service or that from any other cause prompt personal service cannot be effected, it may order service to be effected in the manner permitted by Order 9, rule 2 as if the debtor were a defendant, or make such order for substituted or other service, or for the substitution for service of notice by letter, public advertisement (in the Form No 8), or otherwise, as may be just.*"

6. Accordingly, the rules envisage that a bankruptcy summons should be served personally within 28 days. If the debtor is evading service, or for any other reason prompt personal service cannot be effected, the Court may order service to be effected in the manner permitted by Order 9, rule 2 (as if the debtor were a defendant in civil proceedings), or make an order for substituted or other service, or for the substitution for service of notice by letter, public advertisement, or otherwise, as may be just. Again, there is no express provision for or restriction on service outside of the jurisdiction.

<u>The nature of a bankruptcy summons</u>

7. In *The Minister for Communications, Energy and Natural Resources and Michael O'Connell v Michael Wymes* [2021] 1 IR 803 ("*Wymes*"), the Supreme Court confirmed that a bankruptcy summons is a formal notice or warning (unlike an originating summons or writ or

other document which commences legal proceedings). In paragraphs 37 and 38, the Supreme Court held that:

> "*37. The form and purpose of the bankruptcy summons is to act as a formal notice or warning to the debtor that he or she is at hazard that, in default of payment of, or the provision of security for, the debt, an act of bankruptcy will have been committed entitling the creditor to put in train the machinery leading to adjudication. The hazard is greater than that suffered by a debtor by the service of a simple demand for debt, and even greater than the service of a court judgment for debt, as the time limits for enforcement by the bankruptcy process provided by statute are short, and there is no express provision for the extension of time.*
> *38. In my view whilst the process leading to adjudication has been set in train by the service of a bankruptcy summons, a court process has not thereby commenced. The service of the bankruptcy summons is a gateway and it is more correct to treat the summons as a form of notice that the process could be commenced and to identify the time available to the debtor to avoid that occurrence. The bankruptcy summons is not therefore a "summons" in the sense used in the Rules of Court, and is not akin in function to a plenary, special or summary summons which commences legal action.*"

8. The creditor submitted that it was significant that a bankruptcy summons is not subject to the same procedural rules and restrictions as an originating summons or writ - it is essentially a formal notice and/or warning, with the result that Order 11 RSC has no direct application to a bankruptcy summons as it provides, *inter alia*:

> "*1. Provided that an originating summons is not a summons to which Order 11A applies, service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court…*"

The creditor submitted that a bankruptcy summons is only subject to the express provisions of the Bankruptcy Act 1988 and Order 76 RSC, neither of which preclude foreign service.

Ex p. *O'Loghlen* (1871) L.R. 6 Ch. 406

9. Although an English authority involving English legislation, this decision has an Irish hue in that the creditor, debtor and debt all happened to be Irish. The Irish creditor had obtained judgment in England against a debtor who resided in Ireland. The creditor then applied in London for a debtor summons (the equivalent of a bankruptcy summons). The creditor's grounding affidavit wrongly stated that Mr O'Loghlen resided in London. In fact, he resided in Ireland with a London office. The creditor also sought leave to serve the summons in Ireland, wrongly alleging that Mr O'Loghlen was in Dublin to evadeservice. Mr O'Loghlen successfully appealed the order of adjudication on the basis that he committed no act of bankruptcy as, under the Bankruptcy Act 1869 ("the 1869 Act") and the General Order of January 1870, a debtor summons could not be served outside of the jurisdiction.

10. Significantly, section 2 of the Bankruptcy Act 1869 expressly excluded Ireland and Scotland, unless expressly provided for, stipulating that:

> "*This Act shall not, except in so far as is expressly provided, apply to Scotland or Ireland.*"

11. James L.J. noted that Mr O'Loghlen was falsely described as living in London in the debtor summons, adding at p. 409:

> "*If an Irish gentleman can thus be served in Ireland with a summons from the English Court of Bankruptcy, on the application of an Irish creditor, the power to direct such service must exist in the case of a debtor and creditor resident in any part of the world, for in the Act of 1869 Ireland and Scotland are excepted, so that the provisions of the Act apply no more to two Irishmen resident in Ireland than to two Parisians.*"

12. James L.J. rejected the creditor's argument that the judgment was English, having been obtained in England, observing at p. 410 that:

> "*... it is said that this was an English debt, because a judgment had been recovered here. That appears to me just as material as it would be that a bill of exchange, on which*

a foreigner was liable, was written on English paper with an English pen and with English ink."

13. Mellish L.J. focused on the provisions of the 1869 Act, stating at p. 411:

"*In dealing with the Acts of Parliament of this description, which are intended only for particular parts of the United Kingdom, the true principle of construction is, that all thing which are to be done under the authority of the Court must be done within the jurisdiction, unless the Act expressly or by necessary implication enables them to be done elsewhere.*"

14. Mellish L.J. determined that a debtor summons could not be served out of the jurisdiction, because service out of the jurisdiction was not provided for. The key point was that the 1869 Act was expressly stated not to apply to Ireland (unless expressly provided for).

15. The creditor submitted in the present case that *O'Loghlen* should be distinguished on the basis that the 1869 Act explicitly stipulated that it did not apply to Ireland unless expressly provided for. There is no such provision in the 1988 Act. While the latter does not expressly provide for (or prohibit) the service of a bankruptcy summons outside of Ireland, the absence of an express provision either way means that the Irish position must be distinguished from the English position under the 1869 Act.

Foreign residents under the 1988 Act.

16. A fundamental distinction from *O'Loghlen* is that foreign residents can be adjudicated bankrupt under the 1988 Act. Section 11(1)(a) to (d) stipulates the requirements for a creditor's bankruptcy petition. Subsection 11(d) concerns jurisdiction and provides, *inter alia*, that a creditor can present such a petition if:

"*the debtor (whether a citizen or not) –*

(I) is domiciled in the State or,

(II) within 3 years before the date of the presentation of the petition –

(A) has ordinarily resided or had a dwelling-house or place of business in the State or

> *(B) has carried on business in the State personally or by means of an agent or manager, or*
> *(C) is, or within the said period has been, a member of a partnership which has carried on business in the State by means of a partner, agent or manager.*" [Emphasis added]

17. Mr Flynn submitted that there have been many instances of foreign residents being adjudicated bankrupt in Ireland. In *Re Dunne (a bankrupt)* [2013] IEHC 583 ("*Dunne*"), the debtor, Mr Dunne, claimed to be living in the United States and applied to set aside an Irish bankruptcy adjudication on the basis of, *inter alia*, alleged lack of jurisdiction. The High Court (McGovern J.) held that the 1988 Act applied as, *inter alia*, Mr Dunne had carried on business in the State in the three years prior to the presentation of the petition. Interestingly, although it does not discuss the issue in detail (suggesting that the proposed course was not considered controversial), the judgment also notes at para. 3 that leave was granted to serve the petition outside of the jurisdiction in the United States of America pursuant to O. 11, r. 1(c) RSC.

18. Although the Court granted leave in accordance with Order 11 in that case, that was in the context of the service of a petition, not a bankruptcy summons – it is clear that such a petition is akin to an originating document in proceedings whereas, as the Supreme Court confirmed in Wymes, a bankruptcy summons is not.

19. In *Re O'Donnell* [2013] IEHC 395 ("*O'Donnell*"), Charleton J. adjudicated the debtors bankrupt on foot of two petitions. The decision largely concerned their COMI under the EU Insolvency Regulation 2015, and was upheld on appeal to the Supreme Court. At least one of the petitions was presented on foot of a failure to comply with a bankruptcy summons, which was served at a time when both debtors resided in London. While an order for substituted service was made in respect of the service of the summons, the manner of service is not stated in the judgment. At the very least, the decision is authority for the proposition that substituted

service can be granted in respect of a bankruptcy summons against a debtor who resides outside of the jurisdiction.

20. There appears to have been little, if any, discussion of the issue in either *Dunne* or *O'Donnell,* but nor does there appear to have been any expression of concern in that regard.

Presumption against Extraterritoriality

21. In response to my question as to the presumption that – absent a contrary intention appearing from the terms of the legislation in question – Irish legislation is presumed not to have been intended to have extraterritorial effect, counsel submitted that the mere service of the bankruptcy summons in Ireland would not mean that the legislation was being given extraterritorial effect. The debt arose on foot of a judgment of the Irish Courts and both parties had been Irish resident, although there was an issue as to whether the debtor remained an Irish resident. He also noted that there does not appear to have been any suggestion in *Dunne* that the service of a bankruptcy petition in the United States raised any issue of extraterritoriality. I accept this submission, but I would also add that, by specifically providing for Irish bankruptcy proceedings against non-residents in the narrow circumstances defined in the 1988 Act, the Oireachtas has made clear that it intends to allow such proceedings. Accordingly, if such proceedings are characterised as extraterritorial, then they are nevertheless permitted by the Act and to that extent the presumption against extraterritoriality has been overridden.

Conclusion

22. I do not consider that the 1871 English decision in *O'Loghlen* assists with the interpretation of the 1988 Act. While I would not disagree with the learned judgment, it is an ancient decision in respect of different legislation. Furthermore, the 1869 Act actually

stipulated that it did not apply to Ireland, unless expressly provided for. The 1988 Act is in very different terms.

23. When interpreting the 1988 Act, the starting point is that the legislation is explicit in certain respects. Foreign resident debtors can be made bankrupt in Ireland if the specified conditions are met. The Act makes clear that a debtor need not reside in Ireland at the time of the petition provided that they had resided in Ireland, or had a house in Ireland, or conducted business in Ireland) within the previous three years. I agree with the creditor's submission that it follows that, in order to serve such persons who are no longer Irish residents, the foreign resident debtor will need to be served outside of the jurisdiction.

24. As appears from *Dunne*, it seems to be accepted that a bankruptcy petition can be served outside of the jurisdiction. It would be perverse if foreign service was allowed for a petition but not for a bankruptcy summons, given the different status of those documents, and since there is no express restriction on such service outside of the jurisdiction.

25. As noted above, another possibility would be to order substituted service of a bankruptcy summons regarding a foreign resident debtor (as occurred in *O'Donnell*). Mr Flynn submitted that the Court could also order, for example, "*substituted service*" or "*the substitution for service of notice by letter*" at the debtor's former address in Dublin, which he claims his son still lives in, noting that such an approach would in fact negate the need to serve the bankruptcy summons outside of the jurisdiction.

26. I will grant leave to serve the bankruptcy summons by prepaid post, sent to the debtor both at his address in Scotland and also at his Irish address (as there is some controversy as to the debtor's actual address). For the benefit of the debtor, I will also direct substituted service by prepaid post addressed to the debtor, care of his son (who continues to reside at the Irish address). In circumstances in which the debtor has deposed as to his Scottish address, these steps are appropriate to ensure that he is on notice of the bankruptcy summons.