

**THE HIGH COURT  
BANKRUPTCY**

**[Record No. 6054]**

**BETWEEN**

**GREENE KING BREWING AND RETAILING LIMITED**

**APPLICANT**

**AND**

**BRIAN BAKER**

**RESPONDENT**

**JUDGMENT of Ms. Justice Pilkington delivered on the 8th day of April , 2020**

1. This application concerns a Notice of Application to dismiss a Bankruptcy Summons issued on 22nd October, 2018. There is also an application to issue a fresh summons (in almost identical terms to that issued previously). Both Counsel considered that it would be preferable to hear both the application to issue a fresh summons and to dismiss the same summons within the same application and I have agreed to do so. I am dealing initially with the application to dismiss the bankruptcy summons.
2. It is against the following factual background:-
  - (a) On 10 August 2004 the petitioning creditor obtained judgment against the debtor from Harlow County Court, UK.
  - (b) On 2 June 2011 a European Enforcement Order ('EEO') was obtained from Lambeth County Court, UK.
  - (c) On 16 June 2012 an Order of *Fieri Facias* issued in this jurisdiction, on foot of the EEO.
  - (d) On 14 March 2012 a certificate of registration of the judgment was executed by the Master of the High Court, reflecting on its face the entry of the judgment on 16 January 2012.
3. The debtor has sworn his affidavit on 31st January 2019, within it and his counsel's submissions he contends:-
  - (a) That in respect of the UK judgment entered on the 10th August, 2004 and in this jurisdiction on 16 June 2012, the debt is now statute barred.
  - (b) An issue with the judgment date being shown as the 16th day of January, 2012, as opposed to 10 August 2004 coupled with a suggestion that judgment (in the form of an Order of *Fieri Facias*) is not a judgment properly obtained within this jurisdiction.
4. Counsel for the petitioning creditor contends that the issuing of a bankruptcy summons does not constitute an action upon a judgment but is rather a process of execution and accordingly is not 'caught' within the statutory definition of the relevant section of the statute of limitations. If that argument were to succeed then, it is contended, any issue

regarding the timing of the execution order does not arise nor any issue regarding the Order of *Fieri Facias*.

5. Section 8 of the Bankruptcy Act, 1988 (as amended) states:-

“(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.”

6. In respect of the dismissal of a bankruptcy summons, the case opened to me was that of Costello J. in *ACC Loan Management Ltd and C.M.* [2015] IEHC 96.

7. As pointed out within this judgment, the issue was extensively analysed by Dunne J. in *Marketspreads Limited v. O’Neill & Rice* [2014] IEHC 14 (‘Marketspreads’), when she in turn considered the test established by the Supreme Court in *St. Kevin’s Company against a Debtor (Supreme Court ex tempore, 27th January, 1995)* as considered by McGovern J. in the *Minister for Communications v. MW* [2010] 3 I.R. 1. In *MW*, McGovern J. stated:-

*“...the correct interpretation of s. 8(6)(b) of the Act of 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”.*

In *Marketspreads*, Dunne J. stated as follows:-

*“the obligation of the Court is to be satisfied that there is an issue between the parties and, if so, then one must dismiss the bankruptcy summons. It seems to me that in considering the approach of the Court in deciding whether or not there is an issue, one has to have regard, of course, to whether or not the issue is, to use the words of McGovern J., “a real and substantial issue and one which is, at least, arguable and which has some prospect of success”. To put it another way, if one was to re-phrase the test, could it be said that the summons should be dismissed if the Court was merely satisfied that there was an issue, that it was unreal and illusory, that it was not arguable and had no prospect of success, could it be said that in those circumstances, the Court is nonetheless obliged to dismiss the bankruptcy summons? Although there is no written judgment of the Supreme Court in the *St. Kevin’s* case, it is clear that the Court was of the view that there should not be an investigation into the merits of the case once it was clear that an issue arose. Equally, the Court indicated that such an issue was one which would have to be litigated separately outside the bankruptcy process. The Court therefore has to*

*consider the arguments that are put forward in any given case to satisfy itself that there is, in fact, an issue. An unreal or illusory issue raised by a party will not give rise to the dismissal of a bankruptcy summons...*

*In the course of the arguments, reference was made to the approach of the Courts in applications for summary judgment as to whether a defence has been raised requiring the matter to be adjourned to plenary hearing. I think that the test in such cases is of assistance in considering the test identified by McGovern J.*

*Therefore, it seems to me that, in considering if the party seeking the dismissal of the bankruptcy summons has raised an issue such that the summons should be dismissed, the Court could derive some assistance from the approach to be found in cases such as *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1 and to the well known principles set out in the judgment of McKechnie J."*

Dunne J. also referred to the decision of Clarke J. in *McGrath v. O'Driscoll* [2006] IEHC 195 where he held:-

*'... that a mere assertion of a defence is insufficient but any evidence of fact, which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that the issue of fact can be resolved'*

Costello J. then stated;

I accept that these are the principles which should be applied in determining whether or not the bankruptcy summons should be dismissed."

8. I also accept these are the applicable principles.
9. Section 11(6)(a) of the Statute of Limitations Act, 1957 is well known and clear in its terms. It states:-

"An action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable".

Section 2 of the same Act defines "action" as:-

"includes any proceeding (other than a criminal proceeding) in a Court established by law".

10. In essence, in my view, the issue that has been raised is whether "an action on a judgment" as defined within s. 11(6)(a) is the same as an execution upon a judgment.
11. In *Ulster Investment Bank Limited v. Rockrohan Estate Limited* [2009] IEHC 4, ('Rockrohan'), the plaintiff obtained a High Court well charging order and order for sale in 1987 against the defendant's interest in lands. The plaintiff was not in a position to seek enforcement, by seeking an order for possession, until 2008 and the issue was as to whether the plaintiff was statute barred in obtaining an order for possession.

12. In *Rockrohan*, Irvine J. considered the issue of an execution upon a judgment. The subsequent Supreme Court judgment (*Ulster Investment Bank Limited v. Rockrohan Estate Limited* [2015] IESC 17), makes it clear that her reasoning was endorsed and the quotation relied upon in her judgment is quoted by the Supreme Court, with approval, in its entirety as follows:-

"Given that so much of the submission of *Rockrohan* is based upon various provisions of the Act of 1957, it is worthwhile briefly reflecting upon the purpose of legislation of this nature. Limitation statutes are intended to prevent stale claims and to relieve certain classes of defendants of the uncertainty of late claims being made against them. They are designed to further remove the potential injustice that may be generated by the increased difficulty of proving a claim or defence after an extended period of time. Brady and Kerr in their 2nd Ed. of *The Limitation of Actions* at p. 3 described such concerns as follows:-

*"One can therefore conclude that the underlying rationales of the Statutes of Limitations 1957 and 1991, are threefold, and that they may be described as the certainty, evidentiary and diligence rationales."*

These considerations do not apply where one party seeks to enforce a judgment or order previously made against the other party thereto at some time removed from the date upon which it was made. There is no surprise or evidential unfairness inherent in such a process. This being so there are good policy reasons for the courts to distinguish between "actions" within the meaning of s. 2 of the Act of 1957 and procedures whereby an order or judgment may be executed. Similarly, there are good reasons, beyond the consideration of time limits, why a further distinction should be made between applications for leave to issue execution in respect of a prior order or judgment and an order required for the purposes of giving effect to an existing court order and these reasons emerge in the case law referred to later in this judgment".

13. Accordingly, is an action on a judgment and an execution on a judgment differing concepts? Is the issuing of bankruptcy proceedings an execution on a judgment?
14. Canny in his text *Limitation of Actions* (2nd ed.) deals with the position as follows (para. 5.07):-

"In *WT Lamb & Sons v. Rider* [1948] 2 KB, the Court of Appeal held that no limitation applies to execution on a judgment. The result of this case, though not the reasoning, was followed by the House of Lords in *Lowsley v. Forbes* [1999] 1 AC, where the plaintiff was allowed to execute on a judgment after the limitation period had expired. The Irish Courts have not yet had to decide whether this approach should be followed in this jurisdiction, while the judgment of Geoghegan J. in the Supreme Court in *Smyth v. Tunney* [2004] 1 IR considered the issues in some detail, he ultimately does not have to express a concluded opinion. Although the approach of the English Courts was followed by Irvine J. in *Ulster Investment*

*Bank Limited v. Rockrohan Estates Limited* [2009] IEHC and affirmed by the Supreme Court at [2015] IESC, the judgment of Finlay Geoghegan J. in *Allied Irish Banks PLC v. Dormer* [2009] IEHC would appear to be contrary to the English approach”.

15. *Allied Irish Banks PLC v. Dormer and Roe* [2009] IEHC 586 (‘Dormer’) was an application by a notice party to enforce a judgment mortgage by way of a well charging order and order for sale. He did so in circumstances where, in an action between the plaintiff and the defendant’s interest in the lands, prior to any advertisement for incumbrances within that process, the action between the plaintiff and defendant settled. Indeed, the notice party who had taken no steps to recover its judgment or enforcement of his judgment mortgage, became aware of matters for the first time when notified of the plaintiff’s proposed application to discharge its order, pursuant to settlement, then applied to take over the Order for Sale pursuant to O. 33 r. 8 of RSC.

16. The facts of that case can in my view be distinguished from *Rockrohan*. In a detailed review of the relevant authorities Finlay Geoghegan J. posited the following question: -

“If, as in this case, the plaintiff and the defendant by agreement apply to vacate the well-charging order and order for sale and strike out the proceedings, does the fact that the order for sale has come into effect give the incumbrancer who has not yet proved or otherwise joined in the proceedings a right to be notified in the proceedings, order for sale and proposed application and a right to apply in the proceedings for an order for sale for the purpose of realising its debt? I have concluded that the answer to this question must be no.”

17. It is clear that on the facts and exhaustive distillation of the authorities that Finlay Geoghegan J. was considering in *Dormer*, it was a very different issue from the statutory time limit for the enforcement of a judgment. In *Dormer* the notice party was not a party to the judgment and thereafter, following a settlement of the case between plaintiff and defendant, sought to avail of the orders for sale granted by the Court. In my view that involves a consideration of different and more nuanced issues. The notice party in *Dormer* was seeking to avail of the judgment obtained by another and thereafter seek an Order for Sale pursuant to its terms. That is very different from the facts and arguments advanced in this case and in *Rockrohan*.

18. The only case opened to me (and referenced within Mr. Canny’s text) where the court considered whether the statute of limitations can be applied in respect of a judgment creditor seeking to issue a Bankruptcy Summons is the UK Court of Appeal decision of *Ridgeway Motors (Isleworth) Limited v. ALTS Limited* [2005] EWCA 92 (Civ) (‘*Ridgeway Motors*’) where Mummery L.J. raised the following question at the outset of his judgment: -

“Does the Limitation Act 1980 have any impact on the right of a judgment creditor to present a winding up petition? HHJ Rich QC, sitting as a Deputy High Court judge, held that a judgment creditor of a company is not statute-barred from

presenting a winding up petition after the expiration of six years from the date on which the judgment became enforceable. The company against whom the petition was presented challenges the ruling. It appeals to this Court for an order striking out the petition”.

In analysing the decision of *WT Lamb & Sons v. Rider* [1948] 2 K.B. 331 (*Lamb*) cited in the Canny text above, the court stated as follows:-

“In the light of the conclusions reached by the court on its historical survey, *Lamb* is authority for the proposition that the limitation period set by s. 2(4) only applied to an action brought by a judgment creditor suing upon his existing judgment for another judgment. For limitation purposes an action brought upon a judgment to obtain another substantive judgment was distinct from the procedural steps taken to execute an existing judgment”.

In conclusion, the court stated:-

“I agree with Ridgeway's submissions to the extent that (a) a winding up petition is, in a general sense, a “proceeding in a court of law” and that (b) it is not proper to characterise it as the individual execution of a judgment obtained by a creditor of the company. This is not, however, sufficient to meet the difficulty that in *Lowsley* it was unanimously held by the House of Lords that the expression “an action upon a judgment” in s. 24(1) has a special legal meaning derived from its legislative history. “An action upon a judgment” has been treated since *Lamb* by the courts, by the Law Reform Committee and by Parliament itself as having the special or technical meaning of a “fresh action” brought upon a judgment in order to obtain a second judgment, which can be executed. Insolvency proceedings, whether personal or corporate, do not fall within the scope of the special meaning of “an action upon a judgment”. A winding up petition is neither (a) an action upon a judgment in the special sense of being designed to re-establish by legal proceedings the liability of the company to pay a judgment debt and obtain another judgment for it, nor (b) a process of execution of the judgment on which the petition is based. It is *sui generis*, being in the nature of a wider legal proceeding available for the collective enforcement of the admitted or proved debts of the company for the benefit of the general body of creditors on a *pari passu* basis: see, for example, *Re Lines Bros. Ltd* [1983] Ch 1 at 20. Whatever its correct juristic classification may be, a winding up petition is not, according to authorities binding on this Court, “an action upon a judgment” within s. 24(1) and is not statute barred”.

#### **Order of Fieri Facias**

19. It is only if a court were to hold that the statute of limitations did not apply on the facts of this case then the issue of the *Fieri Facias* would, in my view, not be of relevance.
20. The Order of FI-FA headed “The High Court - In the Matter of the European Communities (European Enforcement Order) Regulation, 2005” between the same parties states:-

“It was ordered that the plaintiff Greene King Brewing and Retailing Limited recover against the defendant Brian Baker the sum of GBP £38,524.08 and GBP £535 for costs. And the said order having been certified as a European enforcement order on the 2nd day of June, 2011”.

That document order is dated the 16th day of January, 2012.

21. The registration in this jurisdiction of the Order of *Fieri Facias* is in accordance with the Council Regulation (EC) No. 805/2004 concerning a document that can be sought in respect of an order which can be obtained in this jurisdiction, so as to enforce a judgment obtained pursuant to the terms of that regulation. Accordingly, in my view, no issue arises in that regard.

### **Conclusion**

22. To the extent that any consideration of the dismissal of this bankruptcy summons initially requires leave to issue a fresh summons then I would propose to grant such leave. What follows therefore is my determination as to whether there is any basis for the dismissal of the bankruptcy summons pursuant to s.8(6) of the Bankruptcy Act, 1988 on the basis of the grounds advanced.
23. On the facts of this case, no technical objection of any kind in respect of the bankruptcy summons has been raised on behalf of the debtor, other than the contention that the debt itself is statute barred and an issue regarding the registration of the Order of *Fieri Facias*. I have dealt with the latter issue above.
24. As set out above, *ACC Loan Management Ltd and C.M.* and the cases cited within it is authority for the proposition that if the debtor wishes or is to be successful in the dismissal of his bankruptcy summons, he must do so by satisfying this Court that there is a real and substantial issue between the parties which has some prospect of success. The mere assertion of a defence is insufficient.
25. In my view this application would have benefitted with some additional case law as to criteria for dismissal of a bankruptcy summons, in addition to the question as to whether the issue raised is correct as a matter of law. It seems to me that the case that has been opened makes the principle clear; this court is precluded from adjudicating the issue as a matter of law, not as to whether the argument of the petitioning creditor as to the law is correct, but rather whether the issue raised on behalf of the debtor stands ‘some prospect of success’.
26. Adopting and applying that criteria, I am satisfied that a real and substantial issue has been raised; the question, in my view, is as to whether that issue stands ‘some prospect of success’. On the facts of this case there may potentially be an issue as to whether the Supreme Court’s endorsement of the quotation of Irvine J. in *Rockrohan* above, forms part of its *ratio decidendi* and is, apposite to the facts of this case and therefore binding upon this court. I was informed, by counsel for the petitioning creditor, that there is no

case directly on point, dealing specifically with whether a bankruptcy summons is a process of execution (as in *Ridgeway Motors* above) in this jurisdiction.

26. I note the comments of McGovern J. in *Minister for Communications v. MW* quoted above, to the effect that the court should not conduct an investigation into the merits of the case once it is satisfied that an issue arises. Section 8(6) of the 1988 Act states that the court may dismiss the summons with or without costs simpliciter and dismiss it if satisfied that an issue would arise for trial.
27. Accordingly, I express no view on the merits of any case that would arise for trial but, confirm my view that an issue does arise for trial as to whether the statute of limitations can be raised to bar some or all of the applicant's claim. In short there is, in my view, an issue which does arise for trial pursuant to Section 8 (6)(b) of the 1988 Act, particularly as this section also makes it clear that if such an issue arises for trial that the court shall dismiss the summons. Accordingly, the summons stands dismissed pursuant to Section 8 (6)(b) of the 1988 Act.
28. Having made that adjudication, I will then hear the parties as to what, if any consequential or other orders now arise, including any order as to costs.