Neutral Citation No. [2011] NICh 20 | *Ref:* **McCL8343**

Judgment: approved by the Court for handing down | *Delivered:* **18/10/11**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

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BETWEEN:

NOEL F. MOORE
and
MARTIN F. GRIMLEY
Practising as Moore Grimley
Chartered Accountants

Applicants:

and

RODNEY WILLIAMSON,
Trading as COMMERCIAL VEHICLE SALES,
WILLIAMSON PROPERTIES,
R W FARM
and
NORMANDY INN

Respondent:

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McCLOSKEY J

The Shape of the Proceedings

[1] This is an appeal against an order of the Bankruptcy Master, which materialised in the circumstances and against the background outlined in the ensuing paragraphs. These are bankruptcy proceedings which have their origins in a Statutory Demand dated 4th September 2009. The Applicants are the creditor and the Respondent is the debtor. The Statutory Demand asserted a debt of £32,173.75 owing by the Respondent to the Applicants, described as an unsecured debt that was payable immediately. The "Particulars of Debt" asserted that the amount was due by the Respondent to the Applicants "*for professional services rendered by the* [Applicants] *between 26th May 2008 and 12th May 2009, as set out in the invoices detailed*

below …". There are four separate invoices, each of them dated 12th May 2009, specifying varying amounts. In respect of the second invoice, two separate credit payments totalling £4,000 are acknowledged. The Applicants claim that the invoices are founded on professional services rendered by them to each of four distinct businesses owned and/or operated by the Respondent. In short, the Respondent's asserted indebtedness to the Applicants is based on professional accountancy services said to have been rendered.

[2] It is common case that the Respondent did not attend the ensuing hearing. While the reasons for this are contentious, I consider this matter immaterial. By order dated 1st February 2010, the Master dismissed this application and further ordered that the Applicants be at liberty to present a bankruptcy petition. The Applicants duly did so, by petition dated 13th December 2010. The bankruptcy petition contained the following averment:

> "*The above-mentioned debt is for a liquidated sum payable immediately and the debtor appears to be unable to pay it*".

The bankruptcy petition, reflecting the aforementioned Statutory Demand, asserted a debt in the amount of £32,173.75 "*being the amount due on foot of a Statutory Demand served upon the debtor on 8th September 2009 in respect of accountancy services rendered to the debtor by the creditor*".

[3] There followed a further Statutory Demand, issued by the Applicants against the Respondent, dated 3rd December 2010. This is linked to an anterior order of the Master dated 1st November 2010, whereby the Applicants were granted the status of petitioning creditor in place of Atkins Limited. In the second Statutory Demand, the amount of the debt claimed totalled £73,298.20, the components being:

(a) A summary judgment granted in the Queen's Bench Division on 11th January 2010, in the amount of £56,000.

(b) Interest thereon of £1,633.24.

(c) The costs of the proceedings, certified by the Taxing Master to be £10,658.52.

(d) Further costs pursuant to a separate certificate of the Taxing Master, in the amount of £5,006.44.

In the Queen's Bench Division proceedings, the Applicants herein were the Plaintiffs and the sole Defendant was Joseph Rodney Williamson. As regards this second Statutory Demand, no further bankruptcy petition has materialised.

[4] The amounts the subject matter of the bankruptcy petition (£32,173.75) and of the summary judgment in the Queen's Bench Division, (£73,298.20) are separate and

distinct. The distinction between them is that they relate to claims for professional services rendered by the Applicants in respect of different years. Thus if the Applicants were to be successful, in whole or in part, in the bankruptcy proceedings, there would be no overlap or duplication. It is clear from the Queen's Bench Division affidavits that the summary judgment relates to the Applicant's claim for professional fees of £54,000 relating to year ended 31st March 2007. In contrast, the invoices appended to the Statutory Demand dated 4th September 2009 plainly relate to professional services allegedly rendered by the Applicants to the Respondents during the two succeeding years 2008 and 2009. The application for summary judgment in respect of year 2007 proceeded on the basis that the Respondents had *agreed* that they owed the Applicants the principal sum of £54,000 in respect of year ended 31st March 2007. However, this was not a simple claim for summary judgment for professional fees due and owing. Rather, per the relevant averments of the Applicants, it was a claim to recover the sum of £54,000 (plus interest) which they had been obliged to discharge to a finance agency pursuant to an indemnity executed by them to facilitate a loan of £54,000 to the Respondents which was designed, in turn, to be paid to the Applicants in satisfaction of their fees for year ended 31st March 2007. While the full amount of the summary judgment is the subject of a second and separate Statutory Demand, this has not matured into a second and separate bankruptcy petition.

[5] Next, by Notice dated 17th January 2011, Mr. Williamson (who is, in substance, all of the Respondents) signalled his intention to defend the bankruptcy petition noted in paragraph [2] above on three grounds:

(a) The amount claimed "*comprises invoices for professional services which have not been agreed or established by legal process and is therefore not a liquidated sum*".

(b) He had "*compounded for the debt in the petition and other liabilities*".

(c) He had "*a cross claim which equals or exceeds the amount claimed by the Petitioner*".

With direct reference to this Notice, the court enquired about the shape and scope of the hearing at first instance before the Master. Both counsel were agreed that the Master's adjudication had been confined to the first of these grounds of opposition viz. the liquidated sum issue, in circumstances where the second ground barely flickered and the third was not pursued at all. This discrete issue was ventilated by the court at the outset of the hearing of this appeal. In response, Mr. Gowdy (on behalf of the Respondents) confirmed that his clients' Notice of opposition is now confined to ground (a) only. The riposte of Mr. McEwen (on behalf of the Applicant) was that the court would, nevertheless, remain at liberty to consider the totality of the Respondents' evidence, including that embracing ground (b).

[6] In his grounding affidavit, the main Respondent (Mr. Williamson) describes a typical accountant/client relationship. He acknowledges that he controlled the businesses in question. He asserts that there was neither any retainer letter nor any agreement about rates to be charged. He claims that by May 2009 the Applicants were pursuing fees from him in the amount of some £105,000. He asserts that at a meeting held on 27th May 2009, Mr. Grimley (one of the Applicants) agreed with him a reduced debt of £70,000 in respect of all professional services rendered between June 2007 and May 2009, to be paid by monthly instalments of £2,000. The Respondent asserts that he made a total of six such payments during the period May to November 2009. He claims that he "*reached a composition with the petitioning creditor for the petitioning debt and for other liabilities to the petitioning creditor*". He asserts that the aforementioned order of the Bankruptcy Master dated 1st February 2010 was made in his absence, occasioned by ill health. Finally, the Respondent asserts that his business affairs were mishandled by the Applicants, with the result that certain assets were inappropriately written down for the averred purpose of reducing a tax liability, giving rise to a formal HMRC investigation culminating in penalties and interest in the sum of some £50,000. He further asserts unparticularised interest and fines due to non-filing of his business accounts.

[7] Mr. Grimley duly rejoined by affidavit. He does not challenge the Respondent's description of the professional relationship between the parties which, he avers, had a duration of some twenty years. Referring to the Respondent's five monthly payments of £2,000, he avers that only two of the cheques could be encashed, as the other three were deficient and non-negotiable on their face. He disputes the Respondent's claim of compounding of the debt. He highlights that the Respondent's cross-claim is of late advent, in circumstances where the grounding facts must have been known to him by January 2010. He draws attention to the paucity of detail in the Respondent's averments. He appears to accept that there was indeed an HMRC investigation of the Respondent's businesses in 2008, initially involving the Applicants until the Respondent instigated a change of accountants.

The Impugned Order of the Master

[8] The Bankruptcy Master duly adjudicated upon the Respondent's Notice of Opposition, in the circumstances outlined in paragraph [5] above. At this stage, the proceedings were shaped by the following three landmarks:

(a) The Applicants' initial Statutory Demand, dated 4th September 2009.

(b) The Applicants' petition for bankruptcy, dated 2nd November 2010.

(c) The Respondent's Notice of Opposition, dated 18th January 2011.

The Master's adjudication took place on 13th June 2011. While the Respondent's Notice of Intention to defend the bankruptcy proceedings had specified three grounds (paragraph [5], *supra*), it is evident that (as confirmed by both counsel) the

main focus of the hearing before the Master was the first ground only viz. the liquidated sum issue. Finding in favour of the Respondents, Master Kelly made an order dismissing the bankruptcy petition. The Applicants appeal against such order to this court. It is common case that the Master's sole reason for dismissing the bankruptcy petition was that the claims for payment made by the Applicants did not constitute a liquidated amount. I compliment both counsel for the quality and economy of their submissions. This greatly facilitated advance preparation for the hearing and the allocation of a proportionate measurement of court time thereto.

The Issues and Arguments Canvassed

[9] The arguments of both parties placed particular emphasis on the decision in ***Truex –v- Toll*** [2009] EWHC 396 (Ch). It is evident that this was stimulated by, *inter alia*, the terms in which the Master's *extempore* ruling was expressed. This was a first instance decision in England, in which the Statutory Demand was based on an unassessed and untaxed solicitor's bill of costs arising out of legal services rendered in matrimonial proceedings. The Statutory Demand was followed by the presentation by the solicitor of a bankruptcy petition. By Section 267(1) and (2) of the Insolvency Act 1986:

> "*(1) A creditor's petition must be in respect of one or more debts owed by the debtor and the petitioning creditor … must be a person to whom the debt or (as the case may be) at least one of the debts is owed*
>
> *(2) … a creditor's petition may be presented to the court in respect of a debt only if, at the time the petition is presented …*
>
> *(b) the debt, or each of the debts,* ***is for a liquidated sum*** *payable to the petitioning creditor … and is unsecured*."

[My emphasis].

The equivalent Northern Irish statutory provisions are Article 241(1) and (2) of the Insolvency (NI) Order 1989, which are couched in materially indistinguishable terms. In ***Truex,*** the court held, firstly, that a claim for solicitor's fees which had not been judicially assessed or determined is not a claim for a liquidated sum and cannot, therefore, be the subject of a bankruptcy petition. The court held, secondly, that a solicitor's unassessed bill of costs could be converted into a claim for a liquidated amount by a binding creditor/debtor agreement. While the court acknowledged certain exceptions to the first of its conclusions, these relate to cases where the amount claimed by the solicitor could be arithmetically computed.

[10] In another first instance decision more directly in point, ***Re A Debtor No. 32 of 1991 (No. 2)*** [1994] BCC 524, the petitioning creditor was, as in the present case, a

firm of accountants. These decisions were reviewed in the course of his judgment, Vinelott J stated, at p. 526:

> "*The court must therefore always be alert to the danger that a Statutory Demand may be used to put pressure on a debtor to pay a debt, liability for which has not been established by judgment and which is disputed …*
>
> *The court must be confident that the debt is one liability for which cannot be honestly and reasonably disputed if it is to refuse to set aside the Statutory Demand which is not founded on a judgment.*"

The learned judge continued:

> "*These principles are particularly important where a demand is made for a payment of reasonable remuneration for services rendered or for a reasonable price for goods supplied. I do not say that a Statutory Demand can never properly be presented in such case – that the creditor must always quantify his claim by obtaining a judgment before serving a Statutory Demand. There may be cases where the minimum sum due can be ascertained by reference to some objective standard. There may be cases where the rate of charging is agreed and the minimum that had to be spent on the task for which remuneration is sought can be similarly established; or advance or periodic payments may have been agreed.* ***But these cases must be regarded as exceptional. In the present case the charges were based solely on the assertion of the creditor as to the time that had been spent and as to the quality of the staff employed to do the work***."

[My emphasis].

At a later stage of his judgment, the learned judge formulated the touchstone to be applied in the following terms [at p. 531]:

> "*The court, in deciding whether to set aside or to refuse to set aside a Statutory Demand, is not called on to decide and has no jurisdiction to decide whether the debt claimed to be due is in fact due. The issue is whether on the evidence before the court the claim appears to be so plainly established as to justify the bankruptcy petition. The court does not exercise a summary jurisdiction comparable to its jurisdiction under Order 14.*"

The outcome was an order setting aside the Statutory Demand, on the ground that the fees properly chargeable had been neither agreed between the parties nor determined by the court [see p. 531]. The creditor's claim, therefore, was not for a liquidated sum.

[11] I consider without hesitation that every case will be unavoidably fact sensitive. Thus it is correctly highlighted on behalf of the Applicants that this court should be alert to various features of the factual matrix in ***Re A Debtor No. 32.*** Clearly, it is factual distinguishable from the present case. However, I am more concerned with the principle to be extracted from the *ratio decidendi* of the judgment of Vinelott J. This, in my view, is to the effect that in circumstances where the debt underpinning a Statutory Demand has not been the subject of judicial adjudication, is disputed and is a claim for reasonable remuneration which has not been fully quantified, the court must proceed with caution. As this formulation of the principle in play makes clear, it is constituted by several ingredients and is *not* confined to the question of whether the underlying debt is a liquidated sum. Moreover, the learned judge was careful not to formulate the principle in the terms of an absolute rule. The Applicants' arguments focussed on the factual points of distinction between ***Re A Debtor No. 32*** and the present case. There was no criticism of the underlying principle (as I have formulated it) and no suggestion that same should not be followed by this court. I am not of course bound by the decision in ***Re A Debtor No. 32***. However, having considered a number of the decisions belonging to this field, I find no good reason for declining to follow it.

[12] The Applicants' alternative argument is that their claim falls within the ambit of the exceptional cases discussed in the second of the excerpts from the judgment of Vinelott J reproduced above. In support of this argument they refer to the evidence relating to the "pattern of trading" between the parties over the years, together with the amount of £54,000 in respect of services rendered during year ended 31st March 2007 which, per Mr. Grimley's affidavit (for summary judgment), the Respondents were apparently willing to pay. In the event of the Applicants' primary and secondary contentions being rejected by the court, their third and final contention is that, at its zenith, the Respondent's case entails an acknowledgement of the compounding of the debt in the amount of £70,000, giving rise to an unavoidable conclusion that £14,000 is due to the Applicants in respect of the sums claimed in the Statutory Demand (having made allowance for the summary judgment amount of £56,000). The Applicants advance the further argument that the Respondent is precluded from relying upon the composition agreement asserted by him as he has acted in breach thereof, only two payments totalling £4,000 having been made.

[13] The arguments advanced on behalf of the Respondent, seeking to uphold the order of the Master, highlight the undisputed evidence which establishes that there was no retainer letter, no prior (or any) agreement between the parties about amounts or rates to be charged and, in particular, no agreement about hourly rates of remuneration. Thus, it is argued, by reference to Section 15 of the Supply of Goods and Services Act 1982, that the Applicants are entitled to recover a "*reasonable*

charge" only, pursuant to an implied term in their contractual arrangement with the Respondent. Section 15(2) provides:

> "*What is a reasonable charge is a question of fact*".

I would observe that where (as here) the facts are disputed, a determination of the material facts remains to be made: It has not yet occurred. The Respondent's arguments are to the effect that the thrust of the decided cases (summarised above)militate clearly against the legitimacy of the bankruptcy petition and particular reliance is placed on ***Re A Debtor No. 32 of 1991***.

Conclusions

[14] The decision in ***Re A Debtor No. 32 of 1991*** [*supra*] is, obviously, very much in point. A preponderance of the decided cases is concerned with the correct characterisation of **solicitors'** claims for services rendered. The decisions are reviewed in ***Truex*** and include the case of ***Turner –v- Palomo SA*** [1999] 4 All ER 353, where the Court of Appeal made a very clear distinction between a solicitor's claim for reasonable remuneration and a claim for a liquidated sum [see p. 367]. I refer also to the English Court of Appeal decision in ***Watts –v- Smith*** [1998] 2 Costs LR 59, where the court laid emphasis on the characterisation of a solicitor's claim for professional costs as "*one in which a Plaintiff is applying for an unquantified sum which has to be quantified by a judicial process before judgment can be awarded …*" [at pp. 73-74] and, in particular, the statement of Sir Richard Scott VC:

> "*Where a quantum meruit for work done, the benefit of which has been obtained under a contract but where the contract sum has not been agreed is claimed, there may be an order for judgment to be entered for the Plaintiff with the quantum to be assessed …*".

While this observation was made in the context of a claim for solicitors' professional charges, it seems to me, logically, to form a more general principle applicable to comparable claims for other professional charges, *where the evidence warrants this analogy,* having regard particularly to the decision in ***Re A Debtor No. 32 of 1991.***

[15] In one of the leading textbooks belonging to this field, one finds the following commentary:

> "*… the debt must have been liquidated at the time the petition was presented; any post petition agreement or conduct is irrelevant. There are categories of debts which have not been, and are not, accepted as liquidated for this purpose.* ***Any debt, or claim of indebtedness, which requires or awaits some further act or proceeding, or the passage of a further period of time, in order to mature, or in order to reach a certain and fixed value,***

will be categorised as unliquidated and as incapable of supporting a petition."

[See Muir-Hunter on Personal Insolvency, Volume 1, paragraph 3/308 – my emphasis]

In a later passage in the same work, the authors address specifically the topic of *professional charges* and suggest that earlier decisions in ***Re A Debtor No. 88 of 1991*** [1993] Ch. 286 and ***Re A Debtor No. 833 of 1993*** [1994] MPC 82 must now be considered in the light of the later Court of Appeal decision in ***Watts –v- Smith*** (*supra*). They draw attention to those passages in the judgment of Sir Richard Scott VC set out above. Having done so, they formulate the following proposition:

> "*The effect of these decisions is that a claim for unpaid unassessed solicitors' fees, which have neither been agreed with the client nor otherwise acknowledged as being due, is not a claim for a liquidated sum and cannot be the subject of a bankruptcy petition*".

[Op. cit., paragraph 3/312].

Finally, the attention of the court was directed to the following passage in Fletcher, The Law of Insolvency (4th Edition), paragraph 6-048:

> "*The decisive hallmark of a liquidated claim is that the process of quantification is already complete and there is an absence of any element of 'penalty' to be imposed over and above the actual loss sustained. …*
>
> *Claims in contract … are generally liquidated in nature at all stages, but if the sum includes an element which is held to be 'penal', this will render the claim an unliquidated one.*"

I would merely add that the correctness of this general proposition will, inevitably, depend upon the nature and terms of the relevant contract, as found by the court.

[16] In the particular context of the present case, I consider the central question to be whether the debt underpinning the bankruptcy petition is, in the language of the statute, one "*for a liquidated sum*". This, in my view, is the correct formulation of the basic question to be determined by this court. Turning to consider the asserted debt on which the bankruptcy petition is founded in the present case I find that, from the perspective of remuneration, the arrangements between the parties were of an informal, rolling and unstructured nature. Based on the evidence, I find that during a period of some twenty years there was no retainer note, no written contract and no breakdown of hourly rates of remuneration. Payment was made by the mechanism of the Applicants levying an account, engaging in subsequent discussion with the Respondent and the parties reaching agreement accordingly. All of this suggests

that the fees levied by the Applicants were at no time considered by any of the parties to be final, liquidated sums. Rather, they were claims for amounts which were then the subject of negotiation, particularisation and clarification, maturing in consequence into agreed final liquidated sums. This analysis, in my view, is borne out by the terms in which the Applicant's professional services invoices were framed. These provide a series of brief, summary descriptions of the works and services rendered, followed by a rounded money figure which is unparticularised and has no breakdown of any kind. This is the recurring pattern of all of the invoices in question. The evidence further establishes that, historically, the amounts levied by the Applicants in their professional fees invoices did not equate with the amounts subsequently paid to them by the Respondents. Rather, payment was made by the mechanism described above. All of this, in my view, points unequivocally to a professional relationship between the parties whereby the Applicants acquired an entitlement to recover a reasonable charge (within the meaning of Section 15 of the 1982 Act) which, if not agreed between the parties (as here) must be the subject of judicial adjudication. I conclude that this matrix is the very antithesis of a claim for a liquidated sum. These are my findings and conclusions in relation to the fact sensitive matrix of the present case and I determine the main issue accordingly.

[17] Turning to the alternative case advanced on behalf of the Applicants, in my opinion, these asserted debts and the formulation thereof are far removed from the exception to the general principle recognised in ***Re A Debtor*** and ***Truex***, [paragraph 34], which contemplates cases "*… where the proper amount of the bill can be established by a purely arithmetical process*": that is plainly not this case. The suggested comparisons with previous years I find crude, simplistic and unparticularised. Furthermore, the parallel Queen's Bench proceedings based on the Respondent's asserted failure to fulfil a loan agreement, giving rise to an indemnity liability on the part of the Applicants and culminating in summary judgment in the amount of £56,000, provide no support whatever for the Applicants' quest to establish that the bankruptcy petition in the present proceedings is founded on a liquidated sum. The aforementioned summary judgment is entirely separate from the debt on which the bankruptcy petition is based.

[18] I now turn to consider the question of whether the debt underpinning the bankruptcy petition in the present case has acquired the characteristics of a liquidated sum by virtue of an agreement between the parties. In this respect, the Respondent's affidavit asserts a composition arrangement, whereby the total fees of around £105,000 were reduced by agreement between the parties to £70,000, a further term whereof related to the amount and frequency of repayments by him (£2,000 per month). In this respect, the parties advance diametrically opposing cases. The Applicants strongly dispute the existence of any such agreement. In relation to this discrete issue I consider that there are two particularly significant factors. The first is that, per his counsel's unequivocal submission to this court, the Respondents no longer assert the composition in question. The second is that the evidence before the court is purely of the affidavit variety, is evidently inadequate

and unsatisfactory in certain respects and, in consequence, does not permit this court to make confident findings of fact about this discrete issue. While I treat the first of these factors with some circumspection, I attribute substantial weight to the second. It follows that in the context of this appeal I am unable to find that there was any composition arrangement between the parties and I decline to do so.

[19] The final issue to be determined concerns the Applicants' fallback contention that, taking the Respondent's case at its zenith, £14,000 is due to the Applicants in respect of the sums claimed in the Statutory Demand. In my view, this second alternative contention is characterised by certain incongruities:

(a) It is based on the asserted existence of a composition arrangement which the Applicants vigorously dispute.

(b) It is based on the existence of a composition arrangement which the Respondents no longer assert.

(c) For the reasons proffered in the foregoing paragraph, I have declined to make any finding about whether any such composition arrangement existed.

For these reasons, the Applicants' secondary alternative contention must be rejected. I would add that, in any event, I struggled with the logical and arithmetical ingredients in this contention (which entailed deducting the basic summary judgment amount of £56,000 from the asserted composition amount of £70,000 – why?). Moreover, the consequential contention that the Respondent is precluded from relying upon the asserted composition because he is in breach thereof does not follow as a matter of either principle or logic and no authority in support of this contention was cited. This contention, in my view, also entails some conflation of the Queen's Bench proceedings (culminating in summary judgment in favour of the Applicants in the sum of £56,000) with the present bankruptcy proceedings. As observed above, the two proceedings are entirely separate. Furthermore, I have deemed it inappropriate to make any final determination regarding the composition agreement asserted by the Respondent in his affidavit. Finally I consider that, as a general rule, the appropriate recourse in a case where there are alleged breaches of a composition arrangement is to sue thereon, seeking a remedy accordingly.

[20]` It follows from the above that I concur with the order of the Master and, accordingly, dismiss this appeal. The Respondent was awarded his costs of the hearing at first instance and is further entitled to the costs of this appeal, to be taxed in default of agreement.