

**THE HIGH COURT**

**BANKRUPTCY**

**[2012 No. 2431 BANKRUPTCY]**

**IN THE MATTER OF**

**SECTION 85A OF THE BANKRUPTCY ACT 1988, AS AMENDED**

**AND**

**IN THE MATTER OF**

**THOMAS MCFEELY, A BANKRUPT**

**JUDGMENT of Ms. Justice Costello delivered on 1st day of June, 2016**

1. The bankrupt, Mr. Thomas McFeely, formerly of 2 Ailesbury Road, Ballsbridge, Dublin 4, is a well known former property developer in both Ireland and the United Kingdom. As with many property developers, he encountered severe financial difficulties and petitioned for his own bankruptcy in London and on 13th January, 2012, he was adjudicated a bankrupt in London. While a bankrupt he prepared a statement of affairs for his trustee in bankruptcy as he was required to do under the relevant insolvency legislation applicable in England and Wales. His bankruptcy in England was annulled on 15th June, 2012.

2. A creditor of Mr. McFeely petitioned for his bankruptcy within this jurisdiction. On 30th July, 2012, Dunne J. held that his centre of main interests was in Ireland and she adjudicated him a bankrupt in the state. At the date of his adjudication, his residence was 2 Ailesbury Road, Ballsbridge, Dublin 4, but the house was in the process of being repossessed and shortly thereafter NAMA took possession of the house.

3. Upon his adjudication as a bankrupt, all of his property and assets became vested in the Official Assignee. Mr. McFeely, as a bankrupt, became subject to various statutory obligations which are imposed upon all bankrupts pursuant to the Bankruptcy Act 1988, as amended. In particular, he became subject to the obligations set out in ss. 19 and 20 of the Act. The relevant sections provide as follows:-

*"19.—The bankrupt shall—*

*(a) unless the Court otherwise directs, forthwith deliver up to the Official Assignee such books of account or other papers relating to his estate in his possession or control as the Official Assignee may from time to time request and disclose to him such of them as are in the possession or control of any other person;*

*(b) deliver up possession of any part of his property which is divisible among his creditors under this Act, and which is for the time being in his possession or control, to the Official Assignee or any person authorised by the Court or otherwise under the provisions of this Act to take possession of it;*

*(c) unless the Court otherwise directs, within the prescribed time file in the Central Office a statement of affairs in the prescribed form and deliver a copy thereof to the Official Assignee;*

*(d) give every reasonable assistance to the Official Assignee in the administration of the estate;*

...

*20.—(1) A bankrupt shall forthwith notify the Official Assignee in writing of any change in his name or address which occurs during his bankruptcy."*

4. It follows that the bankrupt was obliged to furnish the Official Assignee all of the documentation that he had in relation to his estate and insofar as there was documentation in the possession of third parties he was obliged to identify that documentation and the parties who had possession of the documentation to the Official Assignee. He was required to swear a statement of affairs which must disclose all of his assets. He was obliged to deliver up possession of all of his property to the Official Assignee. He was obliged to confirm his name and address. If during his bankruptcy he changes his address or leaves the jurisdiction, he is obliged to notify the Official Assignee.

5. The Act confers various powers upon the Official Assignee to enable him to carry out his functions and obligations under the Act. He is entitled to interview the bankrupt and persons who may have information relevant to the assets of the bankrupt and the realisation of those assets. If persons having relevant information do not assist the Official Assignee, he may bring an application for leave to have the individual examined by the court pursuant to s. 21 of the Act. Automatically upon adjudication a s. 27 warrant of seizure is granted to the Official Assignee which provides as follows:-

*"27.—(1) The Court may by warrant direct the Bankruptcy Inspector or any of his assistants to seize any property of the bankrupt.*

*(2) An official acting under the warrant may seize any part of the bankrupt's property in the possession or control of the bankrupt and, for the purpose of seizing any such property, may enter and if necessary break open any house, building, room or other place belonging to the bankrupt where any part of his property is believed to be."*

In addition, where there may be assets or records of the bankrupt on premises other than those of the bankrupt, it is open to the Official Assignee to apply for a warrant pursuant to s. 28 of the Act which provides as follows:-

*"28.—Where it appears to the Court that there is reason to believe that any property of the bankrupt is concealed in*

*any house, building, room or other place not belonging to the bankrupt, the Court may grant a search warrant to the Bankruptcy Inspector or any of his assistants, or other person appointed by the Court, who may execute the warrant according to the tenor thereof."*

6. Cooperation, first and foremost by the bankrupt, but by others also, with the Official Assignee is absolutely essential to the operation of the bankruptcy process. Quite simply, it cannot operate without the full cooperation of bankrupts. They have the information in relation to their estates and normally have possession of both the property and the relevant documentation or the relevant information and/or documentation is in the possession of their accountant, solicitor or other agents. It is essential to the integrity of the bankruptcy regime that the various obligations imposed by the Act on each bankrupt personally are observed and complied with fully and to the best of their respective abilities. There is no such thing as a minimum threshold of cooperation. It is for this reason that the Oireachtas has conferred a power upon the court to extend the period of bankruptcy and not to permit the automatic discharge from bankruptcy after the expiration of three (and now one) years from the date of adjudication where the court is satisfied that there has been either non-cooperation by the bankrupt with the Official Assignee in the conduct of the bankruptcy or there has been a failure to disclose assets or an attempt to hide assets from the Official Assignee. Section 85A(1) and (4) of the Act provides as follows:-

*"(1) The Official Assignee, the trustee in bankruptcy or a creditor of the bankrupt may, prior to the discharge of a bankrupt pursuant to section 85, apply to the Court to object to the discharge of a bankrupt from bankruptcy in accordance with section 85 where the Official Assignee, the trustee in bankruptcy or the creditor concerned believes that the bankrupt has—*

*(a) failed to co-operate with the Official Assignee in the realisation of the assets of the bankrupt, or*

*(b) hidden from or failed to disclose to the Official Assignee income or assets which could be realised for the benefit of the creditors of the bankrupt...*

*(4) Where the court is satisfied that the bankrupt has—*

*(a) failed to co-operate with the Official Assignee in the realisation of the assets of the bankrupt, or*

*(b) hidden from or failed to disclose to the Official Assignee income or assets which could be realised for the benefit of the creditors of the bankrupt,*

*the Court may where it considers it appropriate to do so, order that in place of the discharge provided for in section 85 the bankruptcy shall stand discharged on such later date, being not later than the 8th anniversary of the date of the making of the adjudication order, as the Court considers appropriate."*

### **The application**

7. This application was brought by the Official Assignee against the bankrupt pursuant to s. 85A of the Act. The initial grounding affidavit canvassed several instances of alleged non-cooperation on the part of the bankrupt but ultimately the application proceeded on the basis of three matters where the Official Assignee said that the bankrupt had not cooperated with him or had failed to disclose assets belonging to his estate or had sought to hide those assets. These are that:

(i) the bankrupt refused to furnish the Official Assignee with his actual address throughout the period of his bankruptcy;

(ii) the bankrupt failed to disclose his interest in seven apartments at a development referred to as Aras na Cluaine, he failed to hand over documents relating to those seven apartments and he failed to disclose that the documentation was held by a company which acted as his agent, Coalport Building Company Ltd.; and

(iii) the bankrupt failed to disclose his interest in units 12 – 16 Old Saw Mills Industrial Estate, Lower Ballymount Road, Dublin 12, he failed to hand over documents relating to those five units and he failed to disclose that the documentation was held by a company which acted as his agent, Coalport Building Company Ltd.

### **The address of the bankrupt**

8. At an interview with the Official Assignee shortly after his adjudication as a bankrupt in August, 2012 the bankrupt stated that his address was 258 Foreglen Road, Claudy, Co. Derry, Northern Ireland. It is common case and indeed was accepted by the bankrupt in his own affidavit that he did not reside at this address, it was his late parents' home and it is currently owned by his brother. At the very most, he may have stayed there from time to time. It is not necessary to detail the many letters and e-mails that were opened to the Court showing that the Official Assignee was constantly seeking the bankrupt's actual address. It is sufficient to note that the bankrupt can have been under no misapprehension that the Official Assignee required to know the address where he resided and not merely a postal address. One solicitor acting for the bankrupt stated that *"[s]ince September 2009 [the Bankrupt] has spent his time living and working in London"* and that the Derry address would suffice for correspondence. On one occasion it was referred to as his address for bankruptcy. In three affidavits sworn in response to this application he stated that he was from 258 Foreglen Road, Co. Derry, Northern Ireland, though each of the affidavits was sworn in London. In para. 42 of his affidavit sworn on 8th September, 2015, the bankrupt confirmed that for the entire duration of his bankruptcy he lived in London, apparently moving around and staying in different accommodation provided by benefactors whom he flatly refused to identify. All of this was either evidence directly from the bankrupt himself or evidence which was not controverted by the bankrupt.

9. The following conclusions emerge:

(a) The bankrupt gave an address to the Official Assignee as his address when in fact he never resided at that address. This did not comply with his statutory obligation.

(b) The bankrupt knew that the information he had given to the Official Assignee was false or at best misleading and at no stage sought to rectify this default and comply with his statutory obligation.

(c) The bankrupt was aware from numerous requests from the Official Assignee that he was constantly seeking his

address and therefore was fully aware both of his statutory obligation to provide this information, and the fact that the Official Assignee continued to require the information. The bankrupt has refused on affidavit to state where he has resided in the past and where he currently resides.

This amounts to a knowing, deliberate breach of his statutory obligations. The breach has been continuous, deliberate and is ongoing.

10. In his defence, the bankrupt sought to blame the Official Assignee for the bankrupt's failure to comply with the bankrupt's statutory duties and obligations in this matter. He blamed the Official Assignee for not contacting him for more than a year after he had given him the address at Claudy, Co. Derry as his address, he blamed the Official Assignee for not seeking to visit him at the address in Derry (where he did not reside). Also he blamed the Official Assignee for not paying him to travel to Dublin to meet the Official Assignee as it would involve a trip to Ireland on the grounds of his lack of funds. All of these arguments are spurious and irrelevant. The bankrupt knew that he was not residing at that address in Derry and at all stages it was open to him to provide the correct address at which he was residing to the Official Assignee. Insofar as he is suggesting that he had no fixed abode for the three and a half years which elapsed since his date of adjudication to the date of the hearing of the motion, and therefore could not comply with the statutory obligation, I simply do not accept that this is credible in all the circumstances. The bankrupt gave evidence that he was working in London, completing a major building project and that he had the use of an apartment at the development. The bankrupt was the owner of many apartments and there is no reason to believe that he could not have resided in one of these. Far from being homeless, he was the owner of many residential properties and he has been careful not to state that he had nowhere to live.

11. In all the circumstances I am satisfied that there is very cogent evidence to the effect that the bankrupt has persistently refused to furnish the Official Assignee with his true residential address and continues to this day with his refusal.

#### **Apartments at Aras na Cluaine**

12. In November, 2012, the Official Assignee attended at the premises 1 Holles Street, Dublin 2. The freehold was owned by the bankrupt and a receiver had been appointed to the property. The premises had been leased for 25 years to Coalport Building Company Ltd., a company of which Mr. McFeely had been a director prior to his adjudication as a bankrupt in England. Coalport Building Company Ltd. acted as the agent of the bankrupt in relation to his property interests. The Official Assignee said that the receiver over the property invited him into the premises, though the leasehold interest of Coalport Building Company Ltd. was still subsisting. The Official Assignee and his assistants attended at the premises and removed documents from filing cabinets and two computers. The bankrupt objected strenuously to the admission of any of the material obtained as a result as evidence in these proceedings. I shall consider the question of the admissibility of the evidence below.

13. Amongst the papers seized were documents showing that the bankrupt was the owner of seven apartments which had not been disclosed by the bankrupt to the Official Assignee. There were leases signed by the bankrupt in respect of Apartments 93B, 184C and 185C dated respectively 13th December, 2011, and 1st April, 2012 (this latter being during the period when the bankrupt was bankrupt in England and Wales). There was a statement of account from Aras na Cluaine Management Company which referred to the bankrupt's ownership of 21 apartments between 2006 and 2010. This listed 15 apartments which were notified to the Official Assignee but did not list the further seven apartments and a commercial/office unit at the front of the complex which had no number which had not been disclosed to the Official Assignee. The Official Assignee received an Aras na Cluaine Management Company management fee bill dated 1st April, 2012, and a statement of account in respect of the bankrupt's 22 apartments and the outstanding management fees in respect of these apartments. He has paid these outstanding fees. The Official Assignee confirmed on affidavit that a receiver was appointed in 2014 by IBRC over the interest of the bankrupt in the 22 apartments and the commercial unit and that he provided all details in relation to the rent and tenants of the 22 apartments to the receiver. The bankrupt did not contest the authenticity of his signatures or deny the fact that he was the landlord of these properties. He said that third parties were beneficially entitled to the premises and, therefore, he was not under an obligation to disclose the interest he had in these premises to the Official Assignee.

14. Whether or not third parties were entitled to claim the whole or part of the beneficial interest in these premises, in no way alters the fundamental statutory obligation of the bankrupt to disclose to the Official Assignee the existence of his interest in these premises and to assist the Official Assignee in taking possession and control of the premises. The interest of the bankrupt in these premises had vested in the Official Assignee upon his adjudication. It is not for the bankrupt, in effect, to determine the validity of the third party claims which is the effect of his non-disclosure of his interest in the premises to the Official Assignee. That is a matter for the Official Assignee and ultimately, if necessary, the court. The Official Assignee was called upon to pay the management fees in respect of those apartments by the management company and he has discharged this debt. He has also worked with the Receiver appointed by IBRC over these apartments. It is thus clear that he has ample evidence of the bankrupt's ownership of these assets obtained completely independently from the visit to 1 Holles Street, Dublin 2 and which the bankrupt never disclosed to him. Whether or not the evidence obtained by the Official Assignee at 1 Holles Street, Dublin 2 is admissible, which I shall consider below, I am satisfied that the Official Assignee has adduced evidence of the bankrupt's interest in these properties which was not obtained as a result of his attendance at the premises of Coalport Building Company Ltd. and that the failure of the bankrupt to disclose his ownership of these seven apartments amounted to a very significant failure of cooperation with the Official Assignee in the administration of his bankruptcy and amounted to a failure to disclose his assets and an attempt to hide the assets from the Official Assignee.

#### **Units 12 – 16, Old Sawmills Industrial Estate**

15. The Official Assignee adduced evidence recovered from the premises, 1 Holles Street, as described above, which established that the bankrupt was the owner of Units 12 – 16 of the Old Sawmills site. The combined value of the units was estimated as between €750,000 to €1,000,000. There was a letter of loan offer from Bank of Scotland (Ireland) Ltd. to the bankrupt and Mr. Larry O'Mahony dated 20th September, 2004, which was to part-finance the acquisition of Units 12 – 16, Old Sawmills Industrial Estate, Lower Ballymount Road, Dublin 12. The offer was accepted by Mr. O'Mahony and the bankrupt. There was a memo on Coalport Building Company Ltd. headed notepaper recording that the bankrupt and Mr. O'Mahony were the owners of these units and that they intended to retain the property as an asset. There was a letter signed by Mrs. Mary McFeely for and on behalf of the bankrupt on his personal headed notepaper dated 26th June, 2006, stating that the units were owned by the bankrupt and Mr. O'Mahony. There was a lease for 10 years from 1st June, 2006, of Units 12 and 13 executed by the bankrupt and Mr. O'Mahony as landlord to Ms. Pauline Gibson. There was a lease by the bankrupt in his sole name of Unit 15 dated 1st September, 2009, for a period of 4 years, 9 months to Mr. Martin Laird of Autoview Cars Ltd. and there was a lease of Unit 16 dated 1st April, 2006, by the bankrupt and Mr. Laurence O'Mahony as landlord to Apex Tool and Plant Hire as tenant executed by the bankrupt.

16. In response to this claim, the bankrupt asserted that his brother was beneficially entitled to the properties and he asserted that he was entitled to only a 20% interest in the properties. It is, thus, clear from his own admission that he had an interest in these properties and this interest had vested in the Official Assignee regardless of the issue of the admissibility of the documents obtained from 1 Holles Street, Dublin 2. He was obliged to disclose the existence of this interest and it was a matter for the Official Assignee

thereafter to realise the interest as he saw fit. It was not for the bankrupt to determine that the interest, in fact, was of no value. For the reasons I have set out in relation to the apartments at Aras na Cluaine, I do not accept that this amounts to an excuse I can accept for the breach of his statutory obligations to deliver up his property including documentation, to disclose information regarding his assets and to cooperate with the Official Assignee.

#### **Failure to swear and file a statement of affairs**

17. The Official Assignee also advanced his application to court based upon the bankrupt's failure to swear and file a statement of affairs but he placed less emphasis upon this failure than those discussed already. Nonetheless, he drew that failure to the attention of the court. In response, the bankrupt stated that he had furnished the Official Assignee with a copy of the statement of affairs which he had prepared for his English bankruptcy and which he had furnished to his trustee in bankruptcy in England. As a matter of principle, this does not and cannot amount to compliance with the statutory obligation under the regime in this jurisdiction. That obligation extends to disclosing all the property of a bankrupt of which the bankrupt is aware. Mr. McFeely was aware of his interest in the properties at issue in these proceedings in Aras na Cluaine and the Old Sawmills. None of these properties are disclosed in the statement of affairs prepared for the English bankruptcy. Other than to say that, in effect, he had done enough by forwarding a copy of his English statement of affairs, Mr. McFeely has made no attempt to explain or excuse his failure for three and a half years to comply with this statutory obligation. This is in circumstances where he knew that the English statement of affairs did not disclose all his assets. It is a breach which stands proud of the three other complaints and applies whether or not the evidence obtained by the Official Assignee from the premises of Coalport Building Company Ltd. is admissible or not and applies whether or not the bankrupt has properly notified the Official Assignee of his address.

#### **Section 85A application**

18. The bankrupt asserted that the bringing of this application by the Official Assignee amounted to a decision and that the decision was flawed for a number of reasons. He said that the Official Assignee offended the rule *nemo iudex in sua causa*. It is said that the conduct of the Official Assignee entitled the bankrupt to a dismissal of the application on the basis of objective bias and it was said that the conduct of the Official Assignee had "contaminated" the application. Each of these submissions, even if factually correct, which I am very far from accepting, was predicated upon a fallacy. The Official Assignee is not the decision-maker and therefore the legal principals relied upon have no application to his actions in this case. The Official Assignee has brought an application to court in order that the court may make a decision. The structure of the Act requires that the Official Assignee assesses whether or not there may be a case to answer by a bankrupt under s. 85A of the Act. The Official Assignee has no power to make the impugned decision. It is a matter for the court. The fact that he has made a recommendation to the court as part of the application does not alter the fact that it is solely a matter for the court. This was made clear by the Supreme Court in *Killally (a bankrupt) v. The Official Assignee* [2014] IESC 76 which is discussed more fully below.

19. Insofar as it is argued that the decision to bring the application before the court attracts these administrative and procedural protections, this argument is without merit or authority. The whole purpose of requiring the Official Assignee to bring the application before the court is in order that a judge who has not been a party to the administration of the bankruptcy may independently consider and assess the evidence adduced on both sides in relation to the issue raised. I dismiss any of the arguments advanced on behalf of the bankrupt to the effect that the application should be dismissed *in limine* on the grounds that the Official Assignee was somehow prevented or prohibited from bringing the application before the court.

#### **Admissibility of evidence obtained at 1 Holles Street, Dublin 2**

20. The Official Assignee removed from the premises, 1 Holles Street, Dublin 2, documents belonging to the bankrupt and pertaining to assets belonging to the bankrupt. He had a right to those documents by virtue of the vesting of all of the estate of the bankrupt in him upon the date of adjudication. Furthermore, the bankrupt had an obligation pursuant to s. 19 to deliver up possession of those documents to the Official Assignee and to notify him of the fact that they were in the possession of Coalport Building Company Ltd., the bankrupt's agent.

21. The bankrupt objected that the warrant of seizure issued pursuant to s. 27 did not extend to the premises leased by the bankrupt to Coalport Building Company Ltd. The Official Assignee argued that as the bankrupt was the lessor and the receiver appointed over the bankrupt's interests had invited him into possession and the premises were vacant, that he was entitled to enter the premises.

22. I do not accept that the s. 27 warrant authorised the Official Assignee to enter premises which were the subject of a 25 year lease to a third party (Coalport Building Company Ltd.) and which lease had not been determined. The fact that the bankrupt was the owner of the lessor's interest did not give him an entitlement to possession. Likewise, the receiver did not have the right to possession of the premises during the currency of the lease and therefore had no right to invite or permit the Official Assignee to enter the premises. It was open to the Official Assignee to obtain the consent of the party entitled to possession, the lessee, to enter the premises and take possession of the documents of the bankrupt or, in the alternative, to obtain a s. 28 warrant. The fact that the premises were vacant does not alter the limits of the Official Assignee's authority under the s. 27 warrant.

23. The bankrupt sought to exclude from evidence the documents obtained from the premises of Coalport Building Company Ltd. on the basis of the decisions in *The People (Attorney General) v. O'Brien* [1965] I.R. 142, *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110 and *DPP v. J.C.* [2015] IESC 31. These cases all concerned the inadmissibility of evidence obtained in breach of the constitutional rights of an accused person. Each of those cases concerned the inviolability of the dwelling. They can have no application to this case. The bankrupt's dwelling was not searched. The premises which were entered were those of a limited liability company. The premises was a business premises, it was not a residence. No constitutional right of the bankrupt was in any way breached. The party entitled to make complaint of the Official Assignee was the company. It is noteworthy that the company complained that the Official Assignee had removed documents belonging to the company. It made no complaint concerning the removal of documents belonging to the bankrupt as of course the Official Assignee was entitled to those documents as of right. The Official Assignee did not purport to rely upon any of the company's documents in this application. He relied upon documents belonging to the bankrupt which were present on the premises of the company but were not company documents.

24. It is not open to the bankrupt to object to the Official Assignee taking possession of the bankrupt's documentation. It is not open to the bankrupt to object on behalf of Coalport Building Company Ltd. to the entry by the Official Assignee of the leased premises. Any wrong that may have occurred (and I am far from holding that there was such a wrong) is a matter as between Coalport Building Company Ltd. and the Official Assignee. It does not afford a basis for the bankrupt to object to the introduction of the documentation in evidence in these proceedings.

25. The bankrupt sought to invoke a constitutional right to fair procedures as the basis for excluding these documents. He argued that because the Official Assignee had possession of the documents and he did not that he was prejudiced in responding to this application. He also stated that he could not obtain copy bank statements which would assist in demonstrating the source of funds for the purchase of the apartments and units and which would therefore assist in demonstrating that the bankrupt's brother was

beneficially entitled to 80% of the ownership of the units at Old Sawmills and that third parties were entitled to some or all of the apartments at Aras na Cluaine. It was not explained why copies of the bank statements could not be obtained by the bankrupt. More fundamentally, it appeared that in the five months between the bringing of the application and the hearing, no attempt had been made by the bankrupt to obtain copies of the documents. He did not ask the Official Assignee for copies of the documents which he said were in the possession of the Official Assignee and which would assist him in dealing with the application. Apparently he did not ask the relevant bank for copies either. In those circumstances, the objection that he was not afforded fair procedures cannot be sustained on a factual basis. It is therefore, not necessary to consider the legal arguments predicated upon the alleged fact of denial of fair procedures as the bankrupt's case on this ground must fail.

### **Conclusion on the issue of extension of the bankruptcy**

26. In my judgment there is ample, cogent evidence which establishes clearly that the bankrupt has failed to cooperate with the Official Assignee in relation to the realisation of his assets and has hidden assets from or failed to disclose assets to the Official Assignee in breach of his statutory obligations. This has been deliberate and has persisted despite the attempts by the Official Assignee to secure his cooperation. It is continuing to this day in the case of his address and his failure to file a statement of affairs. I will therefore make an order pursuant to s.85A extending the period of the bankruptcy in this case. The issue remaining to be determined is the duration of the extension.

### **Duration of extension of bankruptcy**

27. Section 85A was inserted by s. 157 of the Personal Insolvency Act 2012. The Personal Insolvency Act 2012 reduced the period of bankruptcy from 12 years to three. As part of the rebalancing of the bankruptcy code effected by the Act of 2012, the Oireachtas conferred upon the court a power to make an order where it considered it appropriate so to do to extend the period of bankruptcy for a maximum period of a further five years. The section has to be understood in that context.

28. The section was considered by the Supreme Court in *Killally (a bankrupt) v. The Official Assignee*. The bankrupt in that case had been convicted in the Circuit Criminal Court of theft involving goods which formed part of his estate. Having pleaded guilty at his arraignment, prior to his sentencing hearing, he paid into the Bankruptcy Office the full value of the goods. Thus the creditors of the estate were not at any loss. He was sentenced to three years imprisonment with the full term suspended and directed to serve 240 hours of community service. An application to extend the period of his bankruptcy was brought and the bankrupt argued that he had already been punished in the criminal proceedings and therefore should not be subject to a further punishment by way of the extension of his period of bankruptcy. The High Court (McGovern J.) ultimately added a 12 month period out of a maximum possible extension of 36 months (due to the length of time the bankruptcy had already been in existence). The bankrupt appealed to the Supreme Court.

29. Clarke J. gave the judgment of the Supreme Court. First, he held that the court can simply extend the period of bankruptcy as a sanction to reflect the established failure to cooperate, hiding or failure to disclose relevant assets. It is not necessary that it be for the purpose of conducting further investigations. He acknowledged that a suspension of discharge from bankruptcy of that nature is necessarily penal in character and he stated that it followed that any wrongdoing would require to be clearly established before the jurisdiction is invoked. He also said that the extent of any extension of the period of bankruptcy ordered by the court should be proportionate to the established wrongdoing. At para. 3.20 of his judgment he stated:-

*"[o]n behalf of the Official Assignee, on the other hand, it was contended that the personal bankruptcy regime relies to a significant extent on individual bankrupts to cooperate fully with the Official Assignee and the process. In those circumstances it is said that it is entirely appropriate for the Oireachtas to consider, for the purposes of discouraging non-compliance, that the Court should be empowered, in an appropriate case, to extend the period of bankruptcy in cases of significant failure of compliance. In my view that argument is well-founded."*

He referred to "the need to impose a significant discouragement to prevent bankrupts from failing to comply with their clear obligation to cooperate." Clarke J. emphasised that once a court is satisfied that there has been a failure to cooperate with the Official Assignee in relation to the bankruptcy or that the bankrupt has hidden from or failed to disclose to the Official Assignee income or assets that the extension of the bankruptcy period should be proportionate to the established wrongdoing. At para. 5.6 of the judgment, Clarke J. stated:-

*"[t]he trial judge was entitled to take the view, as he clearly did, that this was a serious breach of the obligation placed on Mr. Killally to cooperate with the Official Assignee and not to seek to gain personal advantage by the sale of equipment which should have formed part of his estate for bankruptcy purposes. **The seriousness of that breach needs to be measured in the light of the correct view taken by the trial judge that the maintenance of the integrity of the bankruptcy process is of the utmost importance and requires to be encouraged by the imposition of sanctions for breach.** In the light of those considerations, and notwithstanding the fact that Mr. Killally had already been sentenced by the criminal courts, I am of the view that it was within the range of sanctions open to the trial judge in all the circumstances of this case to impose, by way of additional civil sanction, an extension of one year on Mr. Killally's bankruptcy."* [Emphasis added]

30. The Oireachtas empowers the court to extend the period of bankruptcy up to the eighth year anniversary of the date of adjudication. The Oireachtas clearly contemplates a spectrum of such orders. It is clear that grave breaches of the statutory obligations by bankrupts will attract the full period of extension and that lesser failures will attract a lesser sanction. The issue, therefore, for the court to consider is where along such a spectrum do the particular established acts of each individual bankrupt fall.

31. In my opinion the breaches by the bankrupt in this case which have been established to my satisfaction are at the very grave end of the spectrum. In reality the bankrupt has refused to cooperate in any meaningful way with his bankruptcy. His initial interview in August, 2012 with the Official Assignee was, **to his knowledge**, misleading. He gave as his address the house in Claudy, Co. Derry when he knew that he never resided at that address and did not intend to reside there. He failed to disclose his interest in 12 properties. He presented the statement of affairs which he had prepared for his English trustee in bankruptcy to the Official Assignee as disclosing his assets when he knew that it was incomplete. He continued thereafter to fail to cooperate with his bankruptcy. He sought to dictate where he would be interviewed by the Official Assignee (by insisting that the Official Assignee should travel to Derry to interview him) and he required to be paid to travel to Dublin if he was to be interviewed by the Official Assignee. Unilaterally he decided that equitable claims by third parties were valid and that therefore his estate had no claim to certain properties. He decided his 20% interest in certain properties (and quite possibly 100% interest) was of nil commercial value, though there was no charge on the properties, without informing the Official Assignee of his interest and his decision. Unlike Mr. Killally, his creditors are, or would be, but for the investigations of the Official Assignee, at a loss as a result of his persistent breach of his statutory obligations. In these proceedings, on affidavit, he has flatly refused to furnish the address or addresses where he has resided and where he now resides. He has failed to furnish a sworn statement of affairs and has furnished in purported compliance with the statutory obligation a

statement of affairs prepared in his English bankruptcy which he knows to be false. He has greatly hindered the Official Assignee in the administration of his estate.

32. The effect of his non-cooperation has been severely to prejudice the realisation of his estate for the benefit of his creditors. The non-cooperation and the failure to disclose assets has been on the extreme end of the spectrum and it follows in my opinion that the extension period should reflect this fact.

33. The bankrupt argues that two factors should reduce any period of extension which the court may consider imposing. Firstly, it is said that he is aged 67 and an extension of the bankruptcy period into his seventies would be unjust. Secondly, it is said that the court should take into account the period of five months during which he was bankrupt in England and look at the totality of his period in bankruptcy.

34. In relation to the latter point, in my judgment this is impermissible in principle. Section 85A is concerned with whether or not the bankrupt has complied with his duties under Bankruptcy Act 1988, as amended, in this jurisdiction and whether or not he has cooperated with the Official Assignee. An order may be made under s. 85A which is solely penal in nature with a view to protecting the bankruptcy process in this jurisdiction. In my opinion this is fundamentally different from the situation that occurred in the Killally case. In that case the Supreme Court held that in assessing the proportionality of the period of extension it was appropriate to have regard to the sanction imposed by the criminal courts for the same acts which grounded the application for the extension of the period of Mr. Killally's bankruptcy. That is by no means the same as taking account *simpliciter* of the period of bankruptcy in another jurisdiction where the bankruptcy was annulled. In any event, the bankrupt has chosen not to explain to the court the basis for the annulment of his bankruptcy in England and therefore I am not in any position to reach any conclusions in relation to the English bankruptcy other than the fact that it commenced in January, 2012 and was annulled in June, 2012. As there could be any number of reasons why this occurred I cannot assess the implications, if any, for the decision I must make in the absence of evidence. I have not taken the period of the English bankruptcy into account in assessing the appropriate period of extension in this case.

35. The bankrupt could point to no authority where age was a factor which should reduce the duration of an extension of bankruptcy. On the other hand the Official Assignee referred to the English case of *The Official Receiver v. Tilbrook* [2008] EWHC 2732 (Ch). The Deputy District Judge extended the period of Mr. Tilbrook's bankruptcy for two years. In so doing, he considered the age of the bankrupt as being a matter which merited a reduction of the period for the extension of the bankruptcy. The High Court on appeal concluded that age and the fact that Mr. Tilbrook was then 60 did not count for very much by way of mitigation having regard to the aim of the legislation not just to deter the individual bankrupt but also to deter others and to protect the public. It thus seems that little, if any, weight ought to be attached to the age of the bankrupt in considering whether or not to extend the period of bankruptcy and for how long.

### **Conclusion**

36. The bankrupt was adjudicated bankrupt in this jurisdiction on 30th July, 2012. Therefore the maximum period which his bankruptcy may be extended pursuant to s. 85A is to 30th July, 2020. For the reasons set out above, I am of the view that the discharge should be delayed for the maximum period permissible with a slight reduction due to the age of the bankrupt. I therefore extend the duration of the bankruptcy of Mr. McFeely to 30th May, 2020.