THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 304

Record Number: 2017/85

Finlay Geoghegan J.
Peart J.
Hogan J.

IN THE MATTER OF THE BANKRUPTCY ACT, 1988, AS AMENDED

AND IN THE MATTER OF SEAN DUNNE, A BANKRUPT 2478G

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 27TH DAY OF NOVEMBER 2017

1. On the 26th May 2016 the Official Assignee in Bankruptcy issued a notice of motion seeking the following reliefs against the bankrupt pursuant to section 85A of the Bankruptcy Act, 1988, as amended ("the Act of 1988"):

> 1. An order upholding the objection of the Official Assignee in Bankruptcy pursuant to Section 85A (1) of the Bankruptcy Act 1988 – 2015 to the discharge of the bankrupt from bankruptcy.
>
> 2. An order pursuant to Section 85A(3) that the bankruptcy shall not stand discharged until after conclusion of an investigation in relation to the assets of the bankrupt;
>
> 3. An order extending the bankruptcy period of Mr Dunne by 5 years, or such other period as this Court deems appropriate, pursuant to Section 85A(4) of the Bankruptcy Acts 1988 – 2015 on the basis that the bankrupt has failed to cooperate with the Official Assignee in the realisation of assets and failed to disclose information to the Official Assignee about income and assets which could be realised for the benefit of creditors;
>
> 4. An Order under Section 85 (D) for a bankruptcy payment order in the amount of €5000 per month for a period of five years;

2. Section 85A of the Act of 1988 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.
>
> (2) An application under subsection (1) shall be made on notice to the bankrupt and where made by the trustee in bankruptcy or a creditor, notice shall also be given to the Official Assignee.
>
> (3) Where it appears to the Court that the making of an order pursuant to subsection (4) may be justified, the Court may make an order that the matters complained of by the applicant under subsection (1) be further investigated and pending the making of the determination of the application the bankruptcy shall not stand discharged by virtue of section 85.
>
> (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 fails 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 a later date, being not later than the eighth anniversary of the date of the making of the adjudication order, as the Court considers appropriate.
>
> (5) Where the court has made an order under subsection (4), no further application may be made under subsection (1).
>
> (6) The making of an order under this section shall not prevent an application being made for discharge or annulment under section 85B."

3. The OA's s. 85A motion has not yet been determined because the bankrupt wishes first to cross-examine the OA and another deponent, Mr Miltenberger (the U.S. trustee in bankruptcy having carriage of the U.S. bankruptcy of Mr Dunne), in relation to their affidavits sworn in support of the s. 85A motion.

4. The OA filed three affidavits in support of his motion – the initial grounding affidavit sworn on the 25th May 2016, a second affidavit sworn on the 15th November 2016 in reply to the bankrupt's replying affidavit sworn on the 12th October 2016, and a third affidavit sworn on the 25th January 2017 in reply to the second affidavit of the bankrupt sworn on the 28th November 2016.

5. Having received the OA's third affidavit, the bankrupt issued a notice of motion on the 31st January 2017 (returnable for the 1st February 2017) in which, *inter alia*, the following reliefs were sought:

> 1. An order pursuant to Order 76, rule 76 (1) of the Rules of the Superior courts requiring the attendance of the Official Assignee, Christopher D. Lehane, for cross-examination on his affidavits sworn on the 25th May 2016, 15th November 2016, and 25th January 2017.
>
> 2. An order pursuant to Order 76, rule 73 of the Rules of the Superior Courts requiring the attendance of Timothy Miltenberger for cross-examination on his affidavit dated 25th January 2017;
>
> 3. Directions as to the time and venue for such cross-examination.

6. Pending the determination of the bankrupt's motion – and any cross-examination that may be permitted - the OA's s. 85A motion has been adjourned.

7. Having heard the bankrupt's application for leave to cross-examine on the 3rd February 2017, the High Court (Costello J.) refused the application by order dated 13th February 2017. Her reasons for so refusing are stated in her written judgment of the same date ([2017] IEHC 66). The present appeal is against that order. There are two aspects to it. Firstly, it is necessary to determine whether leave to cross examine was required, and if so, under what Rule of Court; and, secondly, if the correct position is that the bankrupt required leave of the court, whether the trial judge was correct in determining that his application for such leave should be refused.

Did the bankrupt require leave of the Court to cross-examine deponents?

8. Notwithstanding that he had been directed to bring an application for leave to cross-examine these deponents, the bankrupt argued in the High Court that he was entitled to serve notice to cross-examine on both the O.A. and Mr Miltenberger under O. 76, r. 73 RSC, and that, having done so, he required no leave of the Court to require these deponents to attend court and submit to cross-examination on their affidavits. However, counsel acknowledged that McGovern J. had decided in his judgment in another application in the within bankruptcy (*Re Sean Dunne, a bankrupt* [2014] IEHC 113) that O. 76, r. 76 was the appropriate rule under which to seek the attendance of the OA for cross-examination, and therefore the bankrupt's notice of motion sought his attendance under that rule. Counsel urges this Court on this appeal to decide that McGovern J. erred in so deciding, and that in fact the OA can be required to attend for cross-examination under O. 76. r. 73 RSC which provides:

> "Whenever a witness has made an affidavit or deposition in support of any application or proceeding in the Court, any party to such application or proceeding may by notice require the attendance of such witness for cross-examination".

9. The OA countered that argument by saying that he is not a witness as such since he is the applicant. The OA argued instead that Order 76, r. 76 RSC was the applicable rule where the bankrupt wishes to cross-examine the OA on his affidavits. It provides:

> "Any person wishing to require the attendance of the Official Assignee or any other officer serving in the office of the Official Assignee at any court or place to give evidence in their official capacity or to produce any records in their custody, *shall first apply to the Judge for liberty to do so*. Where the Judge permits the attendance of any such officer to give evidence or to produce records, that officer shall be entitled to require that the person desiring his attendance shall deposit with him a sufficient sum of money to answer his just fees, charges and expenses, in respect of such attendance, and undertake to pay any further just fees, charges and expenses which may not be fully answered by such deposit." [emphasis added]

10. In response, the bankrupt submitted that he is not a person who wishes the OA to attend court to give evidence in his official capacity or to produce any records in his custody. He simply wishes to cross-examine the OA on affidavits which he has filed in support of his own s. 85A application. The bankrupt submitted that in such circumstances O. 76, r. 76 has no relevance, and that the matter fell to be considered only by reference to O. 76, r. 73 and argued that there is no real difference between the OA who is the applicant in the s. 85A application, and "a witness who has made an affidavit or deposition in support of [the] application" as referred to in O. 76, r. 73 RSC.

11. The trial judge referred to the judgment of McGovern J. in *Re Sean Dunne (a bankrupt)* [2014] IEHC 113 to which I have just referred in para. 8 above. That was an application by the OA for a search warrant under s. 28 of the Act of 1988. The bankrupt had wished to cross-examine the OA on his affidavit grounding that application. The trial judge noted that the same argument (i.e. that the bankrupt was entitled to cross-examine the OA without leave under O. 76, r. 73 RSC) was rejected by McGovern J. in favour of the OA's argument that O. 76, r. 76 was the applicable rule, and that leave of the Court was therefore required. The trial judge followed that judgment of McGovern J. and rejected the submission that the bankrupt was entitled to cross-examine the deponents without leave of the court by virtue of O. 76, r. 73 RSC.

12. The trial judge went on to refer to another judgment of McGovern J., again in this same bankruptcy, given on the 10th April 2014 in *Re Sean Dunne (a bankrupt)* [2014] IEHC 285. In that regard she stated:

> "At para. 11 he [McGovern J.] observed that anyone wishing to require the attendance in court of the Official Assignee or any other officer serving in the office of the Official Assignee must apply to the Court for liberty to do so. He stated:-
>
> > 'There are good public policy reasons for such a filtering process. It protects a court official from frivolous or vexatious applications which could have a significant impact on how he conducts the business of the court. The court should be sparing in the exercise of its discretion to order the attendance of the Official Assignee or one of his officers for cross-examination on affidavits sworn in bankruptcy proceedings'."

Appellant's submissions

13. Mr Shipsey for the bankrupt has again submitted on this appeal that no leave is required, and relies upon the wording of O. 76, r. 73 RSC itself. In as much as that rule refers to "a witness" he submits that even though the OA himself is the applicant he is nonetheless a "witness" in the sense that he has sworn affidavits for the purpose of providing evidence to the Court, and that a witness is simply a person who gives evidence to the court whether by affidavit or oral evidence. He submits that it is only if the Court concludes that the OA does not come within the meaning of "witness" in rule 7, that he would rely on O. 76, r. 76. But he does

not consider that rule 76 is intended to cover the circumstances in which the OA is required by the bankrupt for cross-examination on his affidavits.

14. Mr Shipsey has submitted also that if it was intended that leave of the court is required even where a notice to cross-examine is served under rule 73 it would have been a simple matter for the rules to have so provided, just as it did in relation to the general rule regarding affidavits which is contained in O. 40, r. 1 RSC, to which I will refer in more detail in due course. But that general rule, it is submitted, has manifestly been overridden by the specific rules within O. 76 RSC provided for in bankruptcy matters. Mr Shipsey has submitted also that if the intention was that O. 76, r. 73 RSC would apply to all witnesses *except the OA*, the rule would have so stated.

15. Mr Shipsey has referred to other rules within the RSC which override the general rule provided by O. 40, r. 1 such as O. 37, r. 2 in relation to proceedings commenced by summary summons procedure, and O. 38, r.3 in proceedings commenced by special summons, where evidence is given by affidavit, and where the relevant rule provides that upon service of notice to cross-examine the deponent specified therein is required to attend, and where he/she fails to attend for the purpose of cross-examination that affidavit may not be used without leave of the court.

16. I also note the provisions of Order 40, rule 31 RSC which *apply* in proceedings where, either on the consent of the parties or by order of the court, the *trial of the action* (as opposed to some interlocutory application) proceeds on the basis of affidavit evidence only. That very specific rule provides:

> "31. When the evidence is taken by affidavit, *any party* desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of 14 days next after the end of the time allowed for filing affidavit in reply, or within such time as in any case the Court may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production. The notice shall be in Form No. 21 in Appendix C." [Emphasis provided]

17. In passing it is convenient also to refer to the different nomenclature used in the different rules in play in this appeal. Order 76. r. 73 for example refers to where "any witness" has sworn an affidavit "any party" to such application may by notice require the attendance of such *witness* … etc. . O. 76, r. 76 refers to "any person" as distinct from "any party" who requires the attendance of the OA having to make an application to the judge …". O. 40, r. 1 refers to "any party" wishing to cross-examine "any deponent". O 37, r. 2 and O. 38, r.3 refer to any party who wishes to cross-examine a deponent. So, a relevant question on this appeal may be whether the OA when making an application under s. 85A of the Act of 1988 is a party, or a witness and/or a deponent. For the purpose of O.76, r. 73 for example, is the OA to be considered to be a witness who has sworn an affidavit, and therefore a witness on whom a party (i.e. the bankrupt) may "by notice require [his attendance] for cross-examination", or is the OA *a party* rather than simply a witness, and therefore on a literal basis outside the scope of O. 76, r. 73 even though O. 76 provides rules of court for bankruptcy matters generally, and the OA's only functions relate only to bankruptcy matters. If the OA is to be considered to be a party and possibly outside the scope of O. 76, r. 73, is he then within the general rule regarding affidavits in O.40, r.1 being a "person who has made an affidavit" in relation to application, where evidence may be given by affidavit, and where an application for leave to cross-examine the deponent may be made by either party.

18. Without prejudice to his primary submission that the bankrupt requires no leave to cross examine the OA in the light of the wording of O. 76, r. 73 RSC, Mr Shipsey submits that if leave is required, perhaps by reliance on the general rule in O. 40, r. 1 RSC, then the nature of the application being made under s. 85A of the Act of 1988 (i.e. to extend the duration of the bankruptcy because the OA believes that the bankrupt has not co-operated with the OA) requires as a matter of constitutional fairness of procedures that the bankrupt be permitted to question the OA as to the facts subtending that belief, since inevitably his belief will be something that the Court will have regard to when considering whether it is satisfied that there has been non co-operation by the bankrupt for the purpose of any order it might make under s. 85A.

19. Mr Sanfey for the OA relies primarily on the provisions of O.76, r.76 RSC in relation to any cross-examination of the OA. He relies on the judgment of McGovern J. in *Re Sean Dunne, a bankrupt* [2014] IEHC 113 and the wording of the rule itself. He submits that the trial judge was correct to conclude that the OA in the present case came within that rule, when its words are given their ordinary and normal meaning. In other words, the bankrupt is "a person wishing to require the attendance of the [OA] at [a] court or place to give evidence in [his] official capacity …".

20. In so far as the bankrupt has not identified in his affidavits any particular primary facts deposed to by the OA which the bankrupt disputes, Mr Shipsey concedes that no such conflicts of primary fact have been identified. Nevertheless, it is submitted that the bankrupt must be entitled to cross-examine the OA where the Court will be asked to draw an inference from those primary facts that the bankrupt has not co-operated, and where the belief expressed by the OA in his affidavit will be something to which the Court will inevitably have regard when reaching its own conclusion as to whether there has been material lack of co-operation.

21. Mr Shipsey gave by way of example that, while the bankrupt accepts as deposed to by the OA that as a matter of primary fact it is correct to say that no statement of affairs was filed by the bankrupt in a timely fashion, the inference made by the OA from that primary fact, or that may be drawn by the Court from that fact in due course, that there was a failure to co-operate, is one that the bankrupt would wish to question or cast doubt upon by cross-examination. The basis on which he would seek to do so would be to refer the OA to the fact that some 800 pages of material including the statement of affairs which was filed in the U.S. bankruptcy was provided to the OA, which provided him with all the information regarding the bankrupt's assets and liabilities that would have been contained in a statement of affairs if it had been filed as required.. The bankrupt would hope to extract a concession from the OA by means of such questioning (or sow seeds of doubt in the mind of the judge hearing the application) that in fact the failure to file a statement of affairs in these circumstances does not amount to the level of non co-operation that would engage the provisions of s. 85A. Mr Shipsey suggests that where the Court will inevitably have regard to the belief of the OA, the weight to be attached to such belief may well be influenced by any concession, admission or response that the OA may give under cross-examination, even if the primary facts themselves are undisputed. He suggests that an impression will be given to the Court by a reading of the affidavits, and that a cross-examination has the capacity to alter that impression where the Court has the opportunity to observe the demeanour of the deponent when being cross-examined, having regard to the responses made.

22. Another example given was that the OA has averred that the bankrupt failed to provide certain information that was requested, or that the information provided by way of reply was incomplete. The bankrupt disagrees that incomplete information was provided, and wishes to cross-examine the OA in relation to that allegation. Again, it is submitted that if the OA, contrary to what he has sworn,

accepts that his averment is not correct, it could serve to undermine or dilute at least the basis upon which the overall belief as to non-cooperation was reached. Mr Shipsey suggested other examples which could form the basis for casting doubt upon the reasonableness of the inference of non co-operation drawn from the facts deposed to, even where the particular facts themselves are not disputed. There is no need to detail them here, since the point is made by what I have stated.

Conclusions on whether the bankrupt requires leave of the Court to cross-examine

23. The first matter to note is that after certain amendments were made to the Act of 1988 by Part IV of the Personal Insolvency Act, 2012, including the substituting of a new s. 85, including s. 85A, new court rules were introduced by S.I. 120/2012. A new O. 76 was substituted for its predecessor, and new forms were substituted for some of the existing forms in Schedule O to the Rules. It is noticeable that while the new O.76 RSC prescribed special rules in relation to a wide range of matters arising in bankruptcies under the Act of 1988, as amended, as had its predecessor, none was introduced by S. I. 120/2012 specifically in relation to applications that the OA might make under the new provisions of s. 85A. Furthermore the provisions of O.76, rr. 70 -76 remained unaltered by the new O. 76.

24. It is necessary to consider whether O. 76 rr. 73 and 76 can be properly read as covering where the bankrupt wishes to cross-examine the OA (and a witness such as Mr Miltenberger) on their affidavits sworn to ground the OA's application under s. 85A.

O. 76, r. 76

25. It is convenient to address O. 76, r. 76 first. It provides:

> "Any person wishing to require the attendance of the Official Assignee or any other officer serving in the office of the Official Assignee at any court or place to give evidence in their official capacity or to produce any records in their custody, shall first apply to the Judge for liberty to do so. Where the Judge permits the attendance of any such officer to give evidence or to produce records, that officer shall be entitled to require that the person desiring his attendance shall deposit with him a sufficient sum of money to answer his just fees, charges and expenses, in respect of such attendance, and undertake to pay any further just fees, charges and expenses which may not be fully answered by such deposit."

26. I do not consider that this rule applies where the bankrupt is seeking to cross-examine the OA on an affidavit that he has filed to ground an application under s. 85A. Firstly, it refers to "any person" and not to "any bankrupt". Secondly, it refers to such person requiring the attendance of the OA "to give evidence in their official capacity". That clearly indicates a situation where the "person" wishes to call the OA as a witness, as distinct from wishing to cross-examine him on his affidavits. Thirdly, the rule refers to what is commonly referred to as a 'viaticum' where the person calling the OA as a witness must discharge the expenses incurred by the OA by attending the court where he is being required to give evidence. It would make no sense that a condition of being entitled to cross-examine the OA on a s. 85A application was that the bankrupt must discharge the OA's expenses where the OA is himself the applicant.

27. These three features of rule 76 exclude its application to the present situation. I respectfully disagree with the conclusion of McGovern J. in *Re Sean Dunne (a bankrupt)* [2014] IEHC 113. The rule is intended to apply where a party to some extraneous litigation requires the OA's attendance as a witness in that case in order to prove some document or to give evidence relevant to that litigation which the OA can give in his official capacity. I would describe rule 76 as being akin to the rule in relation to the issue of a *subpoena duces tecum* in respect of a public official where an application to the Master is required, and where a viaticum is also required to be paid.

28. In my view the trial judge erred in deciding that the application in relation to the OA fell to be considered under O. 76, r.76. For reasons that will become clear in due course, it does not follow that she was incorrect to consider that leave of the Court was required before the bankrupt was permitted to cross-examine the OA on his affidavits. I am merely concluding that rule 76 was not the correct rule under which to proceed.

O. 76, r. 73 RSC

29. The bankrupt urged that O. 76, r. 73 RSC applied. He submits that he needs no leave of the Court in order to require that the OA to be cross-examined on their affidavits, and that he may simply serve notice to cross-examine requiring their attendance for that purpose. For convenience I will set out r. 73 again:

> "Whenever *a witness* has made an affidavit or deposition in support of any application or proceeding in the Court, any party to such application or proceeding may by notice require the attendance of such witness for cross-examination".

30. What is meant by "witness" in rule 73? If the OA can properly be considered to be "a witness" within the meaning used in the rule in relation to his own application under s. 85A this rule would at first blush appear to avail the bankrupt. However, one must consider O. 76 as a whole, and in particular Part XV thereof which contains rules 70-76.

31. Looking at O.76 as a whole it is clear that in bankruptcy proceedings there are many different types of applications which come before the bankruptcy judge during the course of any bankruptcy and which are grounded on affidavit. Affidavits are filed in many different situations. For example, a creditor seeking to issue a bankruptcy summons under O.76, r.10 must, *inter alia*, lodge an affidavit verifying the facts relied upon as to the truth of the debt claimed. Similarly the debtor, when served with a bankruptcy summons, may wish to dispute the debt and in order to do so must file an affidavit showing that he is not so indebted, as provided in O.76, r. 15. Similar provisions apply where bankruptcy is being sought against a debtor by way of bankruptcy petition. Following an adjudication of bankruptcy, the bankrupt has an opportunity to show cause against the validity of the adjudication, and if he chooses to avail of that opportunity the bankrupt must swear an affidavit setting out the basis on which he disputes its validity. Thereafter a date will be set for the hearing of the application to show cause. These matters are dealt with in O. 76, r. 39.

32. Other applications such as an application to establish or set aside a disputed document under r. 50 are provided for where a grounding affidavit is required, and an opposing party may file a replying affidavit. Another such application where a grounding affidavit is required is one by a person claiming to be the mortgagee of a bankrupt's property and who seeks an order for sale under r. 61. There are provisions also covering such matters as discovery and interrogatories in bankruptcy matters, all of which must be grounded on an affidavit. It is noticeable that none of the applications to which these rules refer relate to applications where it is the OA who is the applicant or deponent of an affidavit, though he will naturally be put on notice of such applications being the person in whom the property of the bankrupt will have vested upon adjudication.

33. I mention these matters because they appear ahead of rules 70-75 in Part XV of O. 76 which is headed 'Evidence'. It is worth setting out the entire of those rules as they assist in discovering the context in which the word 'witness' appears in rule 73:

> "70. Any affidavit to be used in any matter of bankruptcy or arrangement or proceedings under Part VI of the Act may be sworn before the Official Assignee or the proper officer.
>
> 71. A subpoena for the attendance of a witness at any sitting or trial shall be issued by the proper officer at the instance of the assignees, a debtor, or any party, with or without a clause requiring the production of books, deeds, papers and writings in his possession or control, and in such subpoena the name of only one witness shall be inserted. A subpoena may be issued in blank as to the name of the witness only.
>
> 72. A sealed copy of the subpoena shall be served personally on the witness within a reasonable time before the time of the return thereof, and service of the subpoena shall where required be proved by affidavit.
>
> 73. Wherever a witness has made an affidavit or deposition in support of any application, any parties to such application or proceeding may by notice require the attendance of such witness for cross-examination.
>
> 74. [not relevant]
>
> 75. The Court may in any matter omit the number of witnesses to be allowed on taxation of costs. The Court may allow the expenses of witnesses even though such witnesses have not been examined."

34. These particular rules make clear in my view that the word "witness" as used therein excludes the OA. Clearly for the purposes of r. 70 the OA could not swear his own affidavit before himself, so that rule must apply to witnesses or deponents other than the OA. Equally, the reference to a subpoena for a witness in rr. 71 and 72 could not refer to the OA. The OA is the moving party under s. 85A. He is not a witness in the sense used in these two rules. Then one comes to r. 73. By way of the *'noscitur a sociis'* principle of interpretation there is no reason for giving a different meaning to the word 'witness' in r. 73 to that which is mandated by the preceding rr. 71 and 72. One can also usefully observe that within r. 73 it is *any parties* to such application who may require the witness's attendance. This judgment is confined to determining whether the OA is not a witness for the purposes of r. 73. The question whether any other party should be considered to be a witness should be left over to another case in which that question properly arises for determination.

35. I would therefore hold that O.76, r. 73 does not permit the bankrupt herein to serve a notice to cross-examine the OA on his grounding and other affidavits.

36. It follows in my view that there is no provision within O.76 RSC which permits the bankrupt to require the attendance of the OA for cross-examination on his affidavits whether by service of a notice of cross-examination or by any application under rule 76. The question arises then as to whether the Court has jurisdiction to permit such cross-examination on an application of this kind. One such possible basis in the Rules of the Superior Courts is O. 40, r.1 RSC.

O.40, r.1 RSC

37. I have referred only briefly to O. 40, r.1 earlier in this judgment. It is a general rule relating to affidavits, and provides:

> "1. Upon any petition, motion, or other application, evidence may be given by affidavit, but *the Court may on the application of either party, order the attendance for cross-examination* of the person making any such affidavit." [Emphasis provided]

38. In the absence of any rule within the special rules for bankruptcy matter in O. 76, for doing so, a bankrupt wishing to cross-examine the OA on his affidavits sworn in support of a s. 85A application may resort to the general rule provided for in O.40, r.1. This rule applies in relation to "any petition, motion, or other application". Leave of the Court is required as so provided.

39. Such matters are to be distinguished from trials of actions being heard on affidavit evidence, either by consent of the parties or by direction of the court. Cross-examination on such affidavits is specifically provided for by O. 40, r. 31 which provides:

> "When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of 14 days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court may specifically appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the leave of the Court the party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production. The notice shall be in the Form No. 21 in Appendix C."

40. What is absolutely clear however is that, apart from under O.37, r. 2, O.38, r. 3, and O.76. r.73 it is only where the trial of an action is on affidavit that a party wishing to cross-examine on any affidavit filed for the purpose of such trial may, simply by serving notice of cross-examine on a deponent, require as of right the attendance of that deponent for cross-examination, with the consequence that if the deponent is not produced for cross-examination his affidavit may not be used in evidence at the trial.

41. It follows that the bankrupt herein was required to make an application for leave to cross-examine the OA, but under the provisions of O. 40, r. 1 RSC. The trial judge heard his application, albeit that leave was sought under O. 76, r. 76 .2and inter alia refused leave to cross-examine the OA.

Did the trial judge err in refusing leave to cross-examine the OA?

42. The bankrupt has submitted firstly that there is nothing unusual about a party against whom significant reliefs are being sought seeking to question the evidence on which the application is based, and that this is the way matters are normally dealt with in an adversarial system. It is submitted that it would be manifestly unfair if the Court was to simply accept the belief of the OA as evidence that the bankrupt has failed to co-operate without permitting the basis for that belief to be tested by cross-examination. Mr Shipsey draws attention to the wording of s. 85A which requires first that the OA believes that there has been a failure to co-operate on the part of the bankrupt, and only in that event may he apply in order to object to the automatic discharge of the bankruptcy under s. 85 and go on to seek the reliefs provided from in s. 85A. In other words the holding of that belief by the OA is the predicate for seeking relief under the section. He draws attention also to the fact that an order under s. 85(4) requires that the Court be *satisfied* that there has been a failure to co-operate. He submits that where the OA's opinion (drawn by way of inference from primary facts) that the bankrupt has failed to co-operate is itself part of the evidence that that is before the Court for the purpose of being so satisfied under the section, fairness of procedures requires that the bankrupt be permitted to cross-examine the OA as to the

basis on which he drew the inference of non-co-operation.

43. Mr Sanfey in reply drew the Court's attention to what he considered to be an error in the bankrupt's submission which seemed to refer to the OA's *opinion* that the bankrupt has not co-operated, whereas s. 85A makes no mention of the OA's opinion, but rather to his "belief" in that regard. Mr Sanfey suggests that a lower threshold applies to a belief as opposed to an opinion, and that cross-examination on the former could serve little if any purpose once the belief is subjectively held by the OA. However, I think the distinction sought to be drawn by Mr Sanfey between the OA's opinion and his belief is more apparent than real. The point is that the belief must be held by the OA before he may apply under s. 85A. It is, so to speak, the gateway to an application seeking reliefs under subs. (3) and/or (4). Whether one refers to it as a belief or an opinion does not seem to me to matter very much.

44. Mr Sanfey has submitted that the bankrupt has failed to disclose any particular facts on which the OA would be cross-examined, and that he must do so before cross-examination may be permitted. He submits that the unchallenged facts provide an ample basis for the OA's belief that the bankrupt has not fulfilled his statutory obligation to co-operate with the OA. He gives an example by reference to the address at which the bankrupt informed the OA that he resides when in the United States. The OA carried out inquiries in relation to the address provided, and these revealed that the house was vacant, unfurnished and for sale. The bankrupt has not disputed that that averment. It has been submitted that in those circumstances the OA is entitled to believe that the bankrupt has not provided full information as to where he resides in the U.S. Mr Sanfey suggests that no purpose can be served by cross-examination since there is uncontradicted evidence from which a reasonable inference of non co-operation can be drawn. He refers also to the evidence that no statement of affairs was filed for a period of three years following adjudication. He submits that the fact that information provided to the U.S. trustee in bankruptcy was eventually provided to the OA cannot mean that the bankrupt discharged his statutory obligation to co-operate in this jurisdiction generally.

45. In her judgment at para. 15 the trial judge described the issue to be determined on the OA's motion when it comes to be heard, in the following manner:

> "15. The issue that falls to be determined by the Court on the Official Assignee's motion therefore is whether it appears to the Court that the making of an order pursuant to subs. (4) may be justified. A court may make an order pursuant to subs. (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) has hidden from or failed to disclose to the Official Assignee income or assets the benefit of his creditors."

46. Having identified the issue to be determined on the OA's motion, the trial judge then stated that on the bankrupt's motion for leave to cross-examine it was necessary to see what matters he has identified as giving rise to the need to cross-examine the OA. She stated in that regard that the bankrupt "must demonstrate the probable presence of some conflict on the affidavits *relevant to the issue(s) to be determined*". [Emphasis provided]

47. Having further identified from the bankrupt's affidavits certain matters which the bankrupt considers are relied upon for the OA's belief that he has failed to cooperate, and in particular specific allegations relating to the Lagoon Beach Hotel in South Africa, a property known as "Walford" on Shrewsbury Road, Ballsbridge, Dublin 4, and another property 19, Churchfields at Straffan, Co Kildare, and having described further averments from the bankrupt's affidavits, the trial judge stated:

> "He touches briefly on other matters in dispute relating to the US bankruptcy and he says that given the gravity of the application to extend his bankruptcy and the nature of the disputes between the parties it is equitable and just that the Official Assignee be made available for cross-examination".

48. The trial judge went on to note that the bankrupt's grounding affidavit for the motion for leave to cross examine does not set out the matters upon which he wishes to cross-examine the OA, or state why it was necessary for him to do so, other than to say that it was "equitable and just that the Official Assignee made available for cross-examination". She considered that the bankrupt "has not demonstrated the probable presence of some conflict on the affidavits *relevant to the issue to be determined or that such issue cannot be justly decided in the absence of such cross examination*". [Emphasis provided]

49. The trial judge again noted that on the OA's s.85A motion (to be heard in due course) the Court "is focused on the acts and, where relevant, the failures to act, of the bankrupt". She went on to state that the bankrupt in fact does not contest most of the facts in relation to his engagement with the OA as set out in the affidavits of the OA, and that she was "[unable] to identify conflicts on the affidavits relevant to the issues to be determined such that I could conclude that the issue cannot justly be decided in the absence of cross-examination."

50. In circumstances where the trial judge was satisfied that the bankrupt required the leave of the Court before he be permitted to cross examine these deponents on their affidavits, she went on to consider the circumstances in which the court might exercise its discretion to permit such cross-examination. She referred to her own judgment in *Lehane v. Dunne* [2016] IEHC 96 in which the respondent was the wife of the present bankrupt, and who had brought a motion seeking to have the OA's proceedings dismissed on the grounds of *forum non conveniens*. In that judgment she was considering the provisions of Order 40, rule 1 RSC to which I have referred in para. 37 above, and which provides a general rule in relation to cross-examination of deponents of affidavits filed "upon any petition, motion, or other application …".

51. Having made reference to that rule, the trial judge went on to note what she had stated at para. 15 of her judgment in *Lehane v. Dunne* in relation to the Court's task in determining whether or not to permit cross examination under O.40, r.1 RSC as follows:

> "The Court must first identify the issues that fall to be determined on the motion in respect of which the affidavits were filed. It is then necessary to consider any matters in the deponent's' affidavits *which have been identified as giving rise to the need for cross-examination. These must then be assessed in the light of the issues that must be determined on the motion*. If there is a conflict on the affidavits in relation to an issue that needs to be determined, can this issue be justly decided in the absence of cross-examination?" [Emphasis in original]

52. At para. 21 of her judgment the trial judge stated:

> "21. I am not satisfied that there are disputes of fact which the Court will have to resolve when determining the application for orders under s. 85(A) (3) and/or (4). It will not be necessary for the Court to determine whether or not the Official Assignee was correct or indeed even reasonable in forming his belief as set out in his affidavits. The obligation is on the Official Assignee to bring an application before the Court grounded upon the facts which lead to his belief that the bankrupt in question has not co-operated with them or has hidden assets from him. The application is on notice to the

> bankrupt who is entitled to put before the Court such evidence as he or she sees fit. It is then for the Court to be satisfied on the totality of the evidence placed before it whether or not the bankrupt has co-operated with the Official Assignee or whether he or she has hidden assets from the Official Assignee as the case may be."

53. The trial judge went on to note the bankrupt's submission that he needed to cross examine the OA "in order to challenge the factual underpinning of his belief that the bankrupt has not co-operated with them or has hidden assets from him", and "that the Court could not extend the period of bankruptcy without relying upon the opinion of the Official Assignee and that accordingly the bankrupt must be permitted to cross-examine the Official Assignee to test the basis of that opinion". Her conclusion in relation to this submission is contained in para. 24 of her judgment where she stated

> "The decision of the Court does not involve any weighing of the belief of the Official Assignee expressed in his affidavits. As I have stated, it is for the court to be satisfied on the basis of all the evidence whether or not the bankrupt has co-operated with the Official Assignee or has hidden assets or income from him. It follows that cross-examination in relation to the conclusions of the Official Assignee or the inferences he draws from the facts he has put before the Court is not necessary for any issue which requires to be determined by the Court."

Conclusions on whether leave was correctly refused

54. At the conclusion of the appeal to this Court counsel for the OA, Mark Sanfey SC, having taken specific instructions from the OA who was present in court, confirmed that on the hearing of his s. 85A motion in due course, the OA would be seeking only an order in terms of s. 85A(4) above, and not one for further investigation under s. 85A(3). I refer to that fact in view of what is stated by the trial judge at para. 14 of her judgment, namely "the [OA] is seeking an order pursuant to subs. (3) that the matter as he complains of under subs. (1) be further investigated and pending the making of a determination of the application the bankruptcy shall not stand discharged by virtue of s. 85".

55. I mention that clarification because if the trial judge had been so informed she would no doubt have expressed herself differently when describing the issue that she had to determine. As I have already set forth at para. 46 above she described that issue at para. 15 as being "whether it appears to the Court that the making of an order pursuant to subs. (4) may be justified". That is clearly a reference to whether or not an order for further investigation should be made, and not to an order under subs. (4) to extend the date of discharge. It is only under subs. (3) that the Court considers whether the making of an order under subs. (4) "may be justified", and if so may make an order for further investigation of certain matters. In describing the issue as she did, it seems clear that he attention was focussed only on whether an order under (4) may be justified such that further investigation as provided for in (3) may be necessary, and therefore whether cross-examination was necessary to determine that issue

56. That, in my view, was the context in which she stated that the bankrupt "must demonstrate the probable presence of some conflict on the affidavits relevant to the issue(s) to be determined".

57. While at para. 21 of her judgment the trial judge referred to the OA's application as including an order under subs. (4) she nevertheless again refers to the OA's belief stating that on the OA's motion "it will not be necessary for the Court to determine whether or not the Official Assignee was correct or indeed even reasonable in forming his belief as set out in his affidavits." Again, at para. 24 she stated that "the decision of the Court does not involve any weighing of the belief of the Official Assignee expressed in his affidavits". In my view, focussing upon the OA's "belief", and her statement that "the decision of the Court does not involve any weighing of the belief of the Official Assignee" suggests to me that she was considering whether or not cross-examination was necessary only by reference to the predicate for reliefs under s. 85A (i.e. the OA's belief), and whether an order under s. 85A(4) "may be justified" and not in the context of the Court having to be satisfied by the evidence put before it on affidavit on the OA's motion in due course, that there was a failure to co-operate such that it would be appropriate to order that the bankruptcy should not stand discharged until some later date, as provided.

58. As I have said, I think if the trial judge had been informed that an order only under subs. (4) was being sought by the OA, she may have considered the question of whether cross-examination was necessary somewhat differently, and not primarily by reference to the belief predicate.

59. Before an order may be made under s. 85A(4) the Court must be satisfied that the bankrupt has (a) failed to co-operate with the OA in the realisation of his assets, or (b) has hidden from, or failed to disclose income or assets to, the OA which could be realised for the benefit of the creditors of the bankrupt. The onus of proof to the civil standard is upon the OA when applying for such an order. The evidence before the Court is by way of grounding affidavit(s) and replying affidavit(s). In the present case the OA is of the opinion (or believes) that the bankrupt has failed to co-operate as required by the Act. He has deposed to numerous facts from which he has formed that view. The view is formed by way of an inference which he draws from those primary facts. Those primary facts are largely uncontested. Nevertheless the bankrupt seeks to cross-examine the OA in an effort to test and undermine the basis for such an inference of non-co-operation. The bankrupt considers that the accumulated primary facts do not, when properly examined and scrutinised, lead to a reasonably drawn inference of non-co-operation. He believes that such a cross-examination may well persuade the Court hearing the OA's motion that it ought not to be satisfied on a balance of probabilities that he has failed to co-operate.

60. The consequences for the bankrupt for an order under s. 85A being made against him are clearly significant. An adverse finding of non-co-operation can lead to a significant extension of his bankruptcy. The length of any such extension will be a question upon which submissions will be made to the Court by both sides. Cross-examination on the factual basis for the OA's inference may well influence the Court's decision as to the length of any extension to be ordered. It should also be borne in mind that an extension of the period of the bankruptcy is a sanction or penalty following upon a finding of non-co-operation.

61. The opinion of the OA itself is clearly evidence that will be before the trial judge. It will form part of the evidence. The other evidence will be the largely uncontested primary facts deposed to by the OA on affidavit. If the OA's opinion or belief derived by way of an inference from the primary facts as to non-co-operation is itself part of the evidence to which the Court will have regard, the bankrupt is in my view entitled to cross-examine the OA upon that inference in an effort to undermine its weight as evidence. To that extent it does not seem to me to matter that the bankrupt has failed to identify issues of primary fact which he contests. The evidence adduced by way of inference from those primary facts is just as much evidence as are primary facts, and which will form part of the evidence to be considered when the OA's application under s. 85A is heard.

62. This adverse opinion or belief evidence which may well form the basis of adverse inferences cannot be effectively challenged in these circumstances by the bankrupt without the possibility of cross-examination. As Hardiman J. observed in *Maguire v. Ardagh* [2002] IESC 21, [2002] 1 IR 385:-

> "Where a person is accused on the basis of false statements of fact, or denied his civil or constitutional rights on the same basis, cross-examination of the perpetrators of these falsehoods is the great weapon available to him for his own vindication. Falsehoods may arise through deliberate calculated perjury ….through misapprehension, through incomplete knowledge, through bias or prejudice, through failure of memory or delusion. In some cases a witness may not be aware that his evidence is false. A witness may be telling the literal truth but refrain, or be compelled to refrain, from giving a context which puts it in a completely different light. And a witness called to prove a fact favourable to one side may have a great deal of information which he is not invited to give in evidence, favourable to the other party."

63. It is true that those comments were uttered in the context of an Oireachtas investigation into the circumstances which resulted in the shooting dead of a member of the public by members of an elite Garda squad where the good name of members of the force was at stake and the evidence in question comprised statements of fact, These comments nonetheless highlight the value of the role of cross-examination. Similar thinking is evident in the judgments of the Hamilton C.J. and O'Flaherty J. in *Gallagher v. Revenue Commissioners* [1995] 1 I.R. 55, where the Supreme Court held that a Revenue official facing allegations of deliberately undervaluing used cars for excise purposes could not be forced to accept at face value written statements regarding such valuations from third party valuers. The Court held that if the substance of the applicant's constitutional right to fair procedures was to be protected, the right to cross-examine these valuers was essential, no matter how inconvenient the result.

64. The same holds true so far as the present case. The OA has given evidence of his belief or opinion which the High Court will be invited to take into account as relevant evidence and draw inferences adverse to the applicant. This may all culminate in findings which will have implications for the duration of the bankruptcy and, for that matter, the bankrupt's ability to exit the bankruptcy process. As this evidence cannot effectively be challenged absent the right of cross-examination, in my view he ought as a matter of procedural fairness be entitled to cross-examine the OA in respect of basis for his beliefs or opinions.

Conclusions

65. In summary, therefore, I am of the view that the appeal should be allowed. I would instead grant the bankrupt leave pursuant to O. 40, r. 1 to cross-examine the OA on his affidavits in respect of his opinions and beliefs as they appear in those affidavits. In that regard he should serve a notice to cross-examine identifying those parts of the OA's affidavits in respect of which he proposes to cross-examine.