

THE HIGH COURT

BANKRUPTCY

[No.3512]

IN THE MATTER OF SECTION 85A OF THE BANKRUPTCY ACT, 1988 AS AMENDED

AND IN THE MATTER OF JOHN HOEY, A BANKRUPT NO. 3512

BETWEEN

CHRISTOPHER D. LEHANE (AS OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF JOHN HOEY, A BANKRUPT)

APPLICANT

AND

JOHN HOEY

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 15th day of October, 2018

1. On the 29th February, 2016 Mr. John Hoey ("the bankrupt") was adjudicated bankrupt. The Official Assignee formed the belief that the bankrupt had failed to cooperate with him in the realisation of the assets of the bankruptcy estate or had hidden from or failed to disclose to him income or assets which could be realised for the benefit of the creditors of the bankrupt within the meaning of s.85A (1) of the Bankruptcy Act, 1988. He therefore brought an application on the 13th February, 2017 for an order extending the period of bankruptcy of the bankrupt pursuant to s. 85A of the Act and he sought orders pursuant to s. 85A (3) and (4). The application was grounded upon an affidavit sworn by the Official Assignee on the 13th February, 2017. The bankrupt swore an affidavit in reply on the 2nd March, 2017 and the Official Assignee replied to that affidavit on the 21st April, 2017. The bankrupt swore a second affidavit on the 27th March, 2018.

2. He also issued a motion pursuant to O. 40 r. 1 of the Rules of the Superior Courts seeking leave to cross examine the Official Assignee on his affidavits and this judgment is in respect of that application.

3. In *Sean Dunne, a bankrupt* [2017] IECA 304 the Court of Appeal granted the bankrupt in that case liberty to cross examine the Official Assignee on the affidavits sworn by the Official Assignee in the motion brought to extend the period of Mr. Sean Dunne's bankruptcy. At para. 64, Peart J., who delivered the judgment of the court, held as follows:

"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." (emphasis added).

4. This position is of course binding upon the High Court. The Official Assignee, as he is required to do pursuant to s. 85A (1) of the Act of 1988, has averred to his belief that the bankrupt has failed to cooperate with him in the realisation of the bankrupt's assets and has hidden from or failed to disclose to the Official Assignee assets which could be realised for the benefit of the creditors of the bankrupt. He has set out the factual basis for that belief. The effect of the decision of the Court of Appeal is that the bankrupt is entitled to cross examine the Official Assignee in relation to that stated belief.

5. However, an application brought pursuant to s. 85A is not a *lis inter partes*. It is not an invitation to a bankrupt to criticise the conduct of the bankruptcy and the administration of the estate by the Official Assignee and his officials. It is not concerned with the evidence which was presented before the court on previous applications during the course of the administration of the bankruptcy estate, such as applications for orders pursuant to either s.21 or s.28 of the Act.

6. In para. 5 of his affidavit sworn on the 11th April, 2018 to ground the application seeking to cross examine the Official Assignee, the bankrupt listed fourteen matters in respect of which he said cross examination of the Official Assignee was necessary. In fact, the matters set out are not in fact matters upon which the Official Assignee can be cross examined in the s.85A motion which is yet to be heard by the court. Peart J. made it crystal clear that the cross examination of the Official Assignee which a bankrupt is permitted to conduct on the basis of a bankrupt's entitlement to fair procedures relates to the belief of the Official Assignee as referred to above. He is not entitled to a wide ranging cross examination of matters which are not directed towards that belief.

7. On this basis, I will order that the Official Assignee be available for cross examination on his two affidavits sworn in support of the motion brought pursuant to s.85A of the Bankruptcy Act, 1988 as amended. The bankrupt must identify the particular passages or paragraphs in the two affidavits upon which he wishes to cross examine the Official Assignee. These must be confined to the belief of the Official Assignee as to the alleged wrong doing of the bankrupt in relation to the recovery of assets or the concealing of assets. In accordance with the ruling of the Court of Appeal in *Sean Dunne, a bankrupt*, the passages must be identified in advance of the hearing of the motion and he may not attempt to cross examine the Official Assignee on matters which fall outside the scope of these passages or which is not addressed to the belief of the Official Assignee as set out in s 85A (1) of the Act.

