

THE HIGH COURT

BANKRUPTCY

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

AND IN THE MATTER OF ANGELA FARRELL, A BANKRUPT

[Bankruptcy No. 2594]

BETWEEN

CHRISTOPHER D LEHANE (AS OFFICIAL ASSIGNEE IN BANKRUPT IN THE ESTATE OF ANGELA FARRELL, A BANKRUPT)
APPLICANT

AND

ANGELA FARRELL

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 14th day of November, 2016

1. By notice of motion in these proceedings issued on 1st July, 2016, the applicant, the Official Assignee, sought an order extending the bankrupt period of Ms. Angela Farrell, the respondent, by five years pursuant to s.85A(1) of the Bankruptcy Act, 1988 on the basis that the bankrupt had failed to co-operate with the Official Assignee in the realisation of the assets of the respondent or had 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 respondent. On 25th July, 2016, I made an interim order extending the bankruptcy of the respondent pending further order of the Court and determination of motion. This judgment relates to the hearing of the motion which took place on 10th October, 2016, and 1st November, 2016.

The Official Assignee's case

2. The Official Assignee says that the respondent, Angela Farrell, was adjudicated a bankrupt by order of the High Court in Bankruptcy on 13th May, 2014. By virtue of the provisions of s. 85(1) of the Bankruptcy Act, 1988, as amended by s.10 of the Bankruptcy (Amendment) Act, 2015, she was due to be automatically discharged from bankruptcy on 28th July, 2016. He brought this motion in advance of her automatic discharge in order that her period of bankruptcy might be extended for a period pursuant to s.85A(1)(a) and (b). The subsection provides as follows:

"85A.—(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."

3. The Official Assignee swore an affidavit on 30th June, 2016, setting out the details of the respondent's failure to co-operate with the Official Assignee in the realisation of her assets and the fact that she had hidden from or failed to disclose to him income or assets which could have been realised for creditors of the respondent. In summary, he says that she did not disclose her address, or any address where she regularly could be contacted; she did not file a statement of affairs and she did not file a statement of personal information; she did not attend for interview with the Official Assignee; she was obliged to be summoned to court to be examined as to her assets pursuant to s.21 of the Act of 1988. While she furnished some information during the course of that examination, she subsequently refused to give the names and addresses of the alleged transferees of properties, the date of the alleged transfers, or any explanations for the transfer of assets previously owned by the respondent. As a result of information she provided to the Court, the Official Assignee was able to realise 2,558 shares held by the respondent in CRH plc. The proceeds of €68,592 have been paid into the bankrupt's estate. He says that they would not have been identified and realised for the benefit of the estate creditors in the absence of the s.21 examination. He says he has no information as to her income or the source of her income which finances her living expenses and her legal expenses (incurred in various proceedings brought by the respondent) and therefore, he is unable to ascertain whether or not there is surplus income available for distribution to her creditors. He says that she refuses to acknowledge her adjudication as a bankrupt and refuses in any way to acknowledge his title to the assets in her estate or his right to information concerning her assets.

The respondent's case

4. The respondent swore an affidavit on 30th September, 2016. It does not address any of the matters raised by the Official Assignee in his affidavit. At the hearing of the motion she did not contest any of these averments. Fundamentally her resistance to the application is based upon arguments that the order of adjudication of 13th May, 2014 is void and therefore, it is not binding upon her.

5. The respondent says that there are in fact no bankruptcy proceedings before the Court and in particular no proceedings bearing record number 2594. She says that the order of adjudication dated 13th May, 2014, in proceedings bearing record number 2594 are null and void and that as there are no bankruptcy proceedings in being, the notice of motion with which this judgment is concerned is not properly before the Court. The respondent submits that as the notice of motion is not properly before the Court, there are no proceedings before the Court and the Court did not have the power to make an interim order on 25th July, 2016. That being so, she says that even if there were bankruptcy proceedings in being, this application is now out of time as she was entitled to an automatic discharge from bankruptcy before this motion was heard and this judgment given. She also submits that the Court had no jurisdiction to make an interim order on the basis that the notice of motion did not seek any interim relief.

6. Most of the respondent's submissions were directed towards the alleged nullity of the order of adjudication of 13th May, 2014. She argues that the petitioning creditor is not a creditor and that a fraud is being perpetrated. She argues that there have been multiple breaches or ignoring of the provisions of the Bankruptcy Act, 1988 prior to the order of adjudication of 13th May, 2014. In summary,

she complains that there were numerous errors by the petitioner (who she says is not a creditor) and by the judge dealing with the bankruptcy list at the relevant time, the Central Office and various registrars in the period of 2013 to 27th May, 2014. As a result, she says she was never properly adjudicated a bankrupt; the order of 13th May, 2014, is a nullity; the Official Assignee has no title to any of her assets; she is not a bankrupt and therefore the provisions of the bankruptcy code do not apply to her; her assets were re-vested in her free from all claims by any creditors by order of the High Court of 17th February, 2014. The Court should not have any regard to the order of 13th May, 2014, which she says is void and a nullity and therefore these proceedings should be dismissed.

Discussion

7. The arguments relating to the validity (or invalidity) of the order of adjudication of 13th May, 2014, are all *res judicata*. The petitioning creditor obtained a judgment against the respondent on 21st September, 2010. The respondent sought to have this judgment set aside and on 14th November, 2013, Cooke J. refused to set aside the judgment. His order has never been appealed. Therefore the judgment stands. By virtue of the judgment the petitioning creditor must be recognised as a creditor of the respondent. Thus all of her arguments to the effect that the petitioner is not a creditor of the respondent are of no avail to her in this case.

8. Originally the respondent was adjudicated a bankrupt by order of the Court on 9th December, 2013. The respondent brought a motion to show cause seeking to annul the bankruptcy. However, the Court acknowledged that it had not considered the matters set out in s. 14(2) of the Bankruptcy Act, 1988 as amended by s. 147 of the Personal Insolvency Act, 2012 when it made the adjudication on 9th December, 2013. Therefore, on 17th February, 2014, the Court heard the notice to show cause and made the following order;

"The Court DOTH REFUSE to annul the Adjudication of Bankruptcy and DOTH DISMISS the said Application to show cause and in order to consider the matter set out in Section 14, Subsection (2) of the Bankruptcy Act, 1988 as amended by Section 147 of the Personal Insolvency Act, 2012

IT IS ORDERED that the said Order herein dated the 9th day of December, 2013 be set aside and that the hearing of the Petition of FCR Media Limited (formerly Truvo Ireland limited) bearing record number 833P for an order that Angela Farrell be adjudged Bankrupt in main proceedings in accordance with Article 3(1) of Council Regulation (EC) number 1346/2000 be adjourned unto the 24th day of March 2014

....And IT IS ORDERED that any and all the property of the said Angela Farrell which vested in the Official Assignee pursuant to the said Order of Adjudication be and the same is hereby re-vested in the said Angela Farrell."

9. McGovern J., delivered a written judgment on 13th May, 2014, when he adjudicated the respondent a bankrupt. The judgment deals with the adjourned petition for bankruptcy brought by the petitioning creditor and notices of motion issued by the debtor, the respondent, seeking various reliefs in the bankruptcy proceedings. It is clear from his judgment that most, if not all of the matters complained of and the points raised by the respondent before me were in fact argued before McGovern J. and are dealt with in his judgment.

10. On 12th January, 2015, the respondent brought a notice of motion in bankruptcy proceedings Record Number 2594 seeking:

"1. An Order pursuant to Section 135 of the Bankruptcy Act, 1988 rescinding the order of Mr. Justice McGovern on the 13th and the 27th of May 2013 respectively.

2. A Declaration that s. 85(c) of the Personal Insolvency Regulations, 2012 makes an inseparable connection between the setting aside of the order of Bankruptcy on the 9th of December 2013 and its annulment

3. An Order of Annulment pursuant to Section 85C(1)(b) of the Bankruptcy Act, 1988 in respect of the order of bankruptcy dated 9th December, 2013.

4. An Order terminating Bankruptcy Proceedings.

5. An Order providing for interim damages.

6. An Order for damages to include general, exemplary and compensatory damages

7. Further and Other Relief as the Court deem meet."

11. On 19th January, 2015, I made an order refusing the reliefs and dismissing the motion.

12. In the circumstances, the respondent has already raised or has had the opportunity to raise and have considered arguments which she says invalidates the entire bankruptcy procedure and the adjudication of bankruptcy of 13th May, 2014. These arguments have been heard, adjudicated upon and rejected by two judges of the High Court. Furthermore, there was an order of the High Court establishing the fact that the petitioning creditor was entitled to judgment against her and a judge of the High Court refused to set aside the judgment. Her remedy in respect of each of these orders of the High Court lay by way of an appeal. She is well aware of this fact and acknowledges the fact that she was informed on more than one occasion that if she was dissatisfied with an order of the High Court that her remedy lay in an appeal. She argues that as the orders according to her, are nullities, she is not obliged to appeal them and furthermore that no person may rely upon the orders, in particular the order of adjudication of 13th May, 2014. I reject this submission.

13. In addition, at the hearing of the application for an interim order on 25th July, 2016, I already ruled that the adjudication order of 13th May, 2014, was binding and valid.

14. As I have ruled that the order of adjudication of 13th May, 2014, in case number 2594 was valid and noting that the respondent never sought to appeal the order of adjudication, it must follow that the motion of the Official Assignee was properly brought in these proceedings pursuant to O.76, r.47 of the Rules of the Superior Courts. It follows from this conclusion that the court had power to make an interim order on 25th July, 2016. This order was made before the respondent was automatically discharged from bankruptcy. Consequently, the argument that the application is out of time must also be rejected.

Conclusion on the Issue of Extension of the Bankruptcy

15. In my judgment, there is considerable uncontroverted evidence which establishes that the respondent bankrupt has failed to cooperate with the Official Assignee in relation to the realisation of her assets and has hidden assets from or failed to disclose assets

to the Official Assignee in breach of her statutory obligations. There was a very limited degree of cooperation during the course of a s.21 examination but otherwise the attitude of the respondent could best be described as obstructive and uncooperative. Her refusal to acknowledge the validity of the bankruptcy and therefore her refusal in any way to cooperate with the bankruptcy process has continued to this day and, therefore, I will make an order pursuant to s.85A extending the period of bankruptcy in this case.

16. In the matter of *Thomas McFeely, A Bankrupt* [2016] IEHC 299, I considered the principles applicable in considering the duration of extension of bankruptcy. I applied the principles established by the decision of the Supreme Court in *Killally (a bankrupt) v The Official Assignee* [2014] IESC 76, where Mr Justice Clarke held that any extension of the bankruptcy period should be proportionate to the established wrongdoing. I held that graver breaches will attract a longer period of extension than lesser wrongs.

17. In my opinion, the wrongdoings of the respondent in this case established by the Official Assignee are grave. She has failed to cooperate in any meaningful way with the bankruptcy. She has placed obstacles in the path of the Official Assignee in contacting her. He has been obliged to serve her by way of substituted service on more than one occasion. He was obliged to summon her pursuant to s. 21 in order to obtain information from her. On the return date for the resumption of examination pursuant to s.21, she failed to attend. No explanation was forthcoming for her absence.

18. Ultimately, the Official Assignee decided that he would be in a position to make inquiries without further cooperation from the respondent and he withdrew the s.21 motion. As a result of limited cooperation by the bankrupt, certain assets were realised for the benefit of creditors of the estate. It would appear that the assets which were not disclosed by the respondent originally to the Official Assignee were charged in favour of secured creditors and, therefore, no benefit from these properties was ever going to accrue to the creditors of the respondent. While it is true that the Official Assignee has no insight whatsoever into the income of the respondent and, therefore, cannot say whether or not the respondent's creditors have been prejudiced by her refusal to disclose her income, he did not lay great emphasis on this point.

19. The non-cooperation of the respondent was severe but the effect of the non-cooperation was not greatly to prejudice the realisation of her estate for the benefit of her creditors. In my opinion, this is a mitigating factor in her favour. When the Supreme Court says that the extension of the period of bankruptcy should be proportionate to the established wrongdoing, I take that to mean not merely the wrongful acts or omissions of the bankrupt but also the consequences to the creditors of the bankrupt. In this case, it has not been clearly established that the creditors have been gravely prejudiced by the admittedly egregious behaviour of the respondent.

20. I am also very mindful of the fact that the aim of the legislation is not only to deter the individual bankrupt from non-cooperation but also to deter others and to protect the public. As was acknowledged in the *Killally* case, an order may be made under s.85A which is solely penal in nature with a view to protecting the bankruptcy process in the jurisdiction.

21. In my judgment, there have been serious, multiple, continuous breaches and wrongdoings by the respondent during the course of her bankruptcy. It is important to maintain the integrity of the bankruptcy process and to encourage bankrupts to cooperate fully with the bankruptcy process. It has not been established that the acts or omissions of the respondent damaged her creditors, as opposed to the bankruptcy process. I am, therefore, of the opinion that while grave, this is not the most extreme case to come before the courts. I am empowered to extend the period of adjudication in this case for a period of up to five further years. In my opinion, the appropriate period of extension should be four years in the circumstances, and I, therefore, extend the duration of the bankruptcy of the respondent for a period of four years from the date when she would otherwise have been automatically discharged from bankruptcy by operation of law.