

## THE HIGH COURT

## BANKRUPTCY

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

## IN THE MATTER OF SEAN DUNNE (A BANKRUPT – 2478)

**JUDGMENT of Ms. Justice Costello delivered on the 13th day of February 2017**

**The issue**

1. This issue for decision is whether the bankrupt may cross examine the Official Assignee on affidavits he has sworn in an application brought by him pursuant to s. 85A of the Bankruptcy Act 1988. The Official assignee seeks an order pursuant to s. 85A(4) postponing the automatic discharge from bankruptcy of the bankrupt on the grounds that he has both failed to co-operate with the Official Assignee in the realisation of assets and has hidden from or failed to disclose to him income or assets which could be realised for the benefit of his creditors. He also seeks an order pursuant to s. 85A(3) directing further investigations into the matters complained of and that the bankruptcy period shall not stand discharged pending that investigation.

**Order 76 rr73 and 76**

2. The bankrupt argues that in fact he is entitled to serve a notice of cross examination upon the Official Assignee pursuant to O. 76, r. 73 of the Rules of the Superior Courts and that he does not require leave of the Court to serve such notice. This is disputed by the Official Assignee who argues that the matter falls to be decided under O. 76, r. 76 and that leave of the Court is required.

3. Order 76, rule 73 provides:—

*"Wherever 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."*

4. On the other hand r. 76 provides:—

*(1)"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..."*

5. The bankrupt argues that the Official Assignee has brought the s. 85A proceedings himself and has sworn affidavits in support of his own application. He, the bankrupt, is not a person "*wishing to require the attendance of the Official Assignee... to give evidence in their official capacity*". He therefore submits that the Official Assignee is (a) not a witness within the meaning of r. 73 and that (b) he is entitled to rely upon the provisions of r. 76. He says it follows that the bankrupt is entitled to rely upon the provisions of r. 73 and to serve a notice for cross examination on the Official Assignee without obtaining liberty so to do from the Court.

6. The issue has been considered in an earlier proceeding in this bankruptcy. In a judgment delivered on 6th March, 2014 in *In the Matter of Sean Dunne (a bankrupt)* [2014] IEHC 113 McGovern J. dealt with the bankrupt's application to cross examine the Official Assignee in relation to affidavits he swore to ground his application for warrants of seizure pursuant to s. 28 of the Bankruptcy Act 1988. On that occasion the bankrupt argued that he was entitled to cross examine the Official Assignee pursuant to r. 73 and the Official Assignee argued that he was subject to the provisions of r. 76 and that he was not a "*witness*" within the meaning of r. 73.

7. McGovern J. accepted the submission of the Official Assignee and stated that the Official Assignee was not a witness within the meaning of O. 76, r. 73. He said "*that is not to say that he is not, where appropriate, amenable to cross examination.*"

8. The bankrupt sought to distinguish the situation between the current application and the one before McGovern J. in 2014 on the basis that this application related to an application under s. 85A to extend the period of bankruptcy whereas the previous case concerned an application for a warrant of seizure pursuant to s. 28 of the Act. He submitted that an application pursuant to s. 85A was of graver consequence and therefore could not be compared with an application pursuant to s. 28.

9. I can see no justification in the Rules of the Superior Courts for differentiating between the functions of the Official Assignee under different sections of the Bankruptcy Act and therefore of the application of different rules in the Rules of the Superior Courts to the Official Assignee. Rule. 76 is not qualified or ambiguous. The fact that it extends also to officials working in the Office of the Official Assignee indicates that the rule is concerned with the performance of the statutory obligations and functions conferred upon the Official Assignee. I can see no merit in an argument that there should be a distinction between the statutory powers or functions being exercised for the purpose of construing this rule. I accept the authority of McGovern J. *In the Matter of Sean Dunne (a bankrupt)* [2014] IEHC 113, and I therefore reject the submission of the bankrupt that he is entitled to serve a notice to cross examine the Official Assignee pursuant to O. 76, r. 73.

**Liberty to cross examine the Official Assignee**

10. Pursuant to r. 76, the Official Assignee may be cross examined with liberty of the Court. This was recognised by McGovern J. in the judgment referred to above. He considered the matter a month later in *Re Sean Dunne (a bankrupt)* [2014] IEHC 285 in a judgment he delivered on 10th April, 2014. At para. 11 he 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."*

11. I had to consider whether to permit the cross examination of the Official Assignee under O. 40 r. 1 (not O. 76 r. 76) in proceedings against the bankrupt's wife, in *Lehane v. Dunne* [2016] IEHC 96. Ms. Dunne brought a motion seeking to have the proceedings dismissed on the grounds of *forum non conveniens*. A number of affidavits were filed by Ms. Dunne and the Official Assignee and attorneys acting on her behalf and on behalf of the Trustee in Bankruptcy of the bankrupt in proceedings in the United

States. Ms. Dunne brought an application for liberty to cross examine the Official Assignee and the Trustee's counsel, Mr. Miltenberger. In *Lehane v. Dunne* [2016] IEHC 96 I noted that it was not necessary that the conflict on the affidavits be one of fact. At para. 15 I identified the task of the court in determining whether or not to permit cross examination of a deponent under O. 40, r. 1 of the Rules of the Superior Courts as follows:—

*"[t]he 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 deponents' affidavits which have been identified as giving rise to the need for cross-examination. These must then be assessed in 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 added)*

12. In *Dunne (a bankrupt)* [2014] IEHC 113 McGovern J held that in order for the Court to decide whether or not to make an order that the Official Assignee be cross examined on his affidavits pursuant to O. 76, r. 76, it was necessary for the party seeking to cross examine the Official Assignee to set out on affidavit the matters on which he wished to cross examine the Official Assignee and why it was necessary for him to do so. In *Irish Bank Resolution Corporation Limited v. Moran* [2013] IEHC 295 Kelly J. ruled on an application to cross examine a deponent under O. 40, r. 1 stating at para 15:—

*"It is incumbent upon an applicant for such an order to demonstrate (1) the probable presence of some conflict on the affidavits relevant to the issue to be determined and (2) that such issue cannot be justly decided in the absence of cross examination."*

13. As already stated, the application pending is for orders under s. 85A(3) and (4) of 1988 as amended. Section 85A(4) was amended by the Bankruptcy (Amendment) Act, 2015 but it is not applicable to the application before the Court. I therefore set out the section as inserted by s. 157 of the Personal Insolvency Act 2012:—

*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.*

*(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 a 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 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.*

14. The Official Assignee is seeking an order pursuant to subs. (3) that the matters 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.

#### **The issue for determination on the motion**

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 which could be realised for the benefit of his creditors.

16. It is necessary then to consider the affidavit sworn in support of this motion to see what matters have been identified as giving rise to the need for cross examination of the Official Assignee. The deponent must demonstrate the probable presence of some conflict on the affidavits relevant to the issue(s) to be determined.

#### **The matters identified by the bankrupt upon which he seeks to cross examine the Official Assignee**

17. The bankrupt swore an affidavit running to five and a half pages. At para. 5 he identifies that in the three affidavits sworn by the Official Assignee he makes a number of allegations against the bankrupt including noncooperation, failure to provide his address and the hiding of assets. He says, *"In particular, the Official Assignee makes specific allegations in relation to the Lagoon Beach Hotel in South Africa, Walford, Shrewsbury Road, Ballsbridge, Dublin 4 and 19 Churchfields, Straffan, Co. Kildare."* He sets out averments in the affidavits of the Official Assignee and he recites how the Official Assignee has sought and obtained freezing orders against the

Lagoon Beach Hotel in South Africa and has issued proceedings against his wife, Gayle Killilea Dunne and his son, John Dunne, amongst others "*seeking to void bona fide transfers by me*". He says that as the proceedings have not been determined, the Official Assignee cannot in fact state that he has failed to disclose income or assets to the Official Assignee. He briefly outlines the Official Assignee's complaint and his response in relation to Lagoon Beach Hotel, South Africa, Walford and 19 Churchfields, the K Club. 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.

## Decision

18. The bankrupt's affidavit grounding the motion for liberty to cross examine the Official Assignee does not set out the matters on which he wishes to cross examine the Official Assignee or state why it is necessary for him to do so other than to say that it is equitable and just that the Official Assignee be made available for cross examination. He has not demonstrated the probable presence of some conflict on the affidavits *relevant to the issue to be determined*.

19. When the Court hears the s. 85A application it will not be determining issues as to the ownership of Lagoon Beach Hotel, Walford, or 19 Churchfields. It will not be determining the extent of the bankrupt's co-operation with his trustee in bankruptcy in the United States. It will not be assessing the extent of the Official Assignee's information in relation to the bankrupt's estate acquired from sources other than the bankrupt. The Court is focused on the acts and, where relevant, the failures to act, of the bankrupt.

20. I have carefully read the affidavits of the Official Assignee sworn on 25th May, 2016, 15th November, 2016 and 25th January, 2017, and the two affidavits of the bankrupt sworn on 12th October, 2016 and 28th November, 2016 as well as the affidavits of Mr. James Birman, the bankrupt's attorney in the United States and Mr. Timothy Miltenberger, the US Trustee in Bankruptcy's attorney. The bankrupt in fact does not contest most of the facts in relation to his engagement with the Official Assignee set out in the affidavits of the Official Assignee. He relies to a large extent upon correspondence, transcripts and other documents to resist the Official Assignee's application. I have not been able 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. The affidavit grounding this application does not assist in this regard.

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. 85A(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 him 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.

22. In submissions to the Court counsel for the bankrupt argued that cross examination was required as it would not be possible for the Court to decide the s. 85 application without deciding "*where the truth lies*". He said the bankrupt requires to cross examine the Official Assignee in order to challenge the factual underpinning of his belief that the bankrupt has not co-operated with him or has hidden assets from him. It was submitted 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.

23. He relied upon the decision of O'Donovan J. in *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369. In that case an application was brought by the Director of Corporate Enforcement seeking the disqualification of the respondent as a director pursuant to s. 160(2) of the Companies Act 1990. The application was based upon a report of inspectors appointed under s. 8 of the Companies Act 1990 to investigate the affairs of National Irish Bank Limited and National Irish Bank Services Limited. The report was published by order of the High Court on 23rd July, 2004. In the report there were findings of improper conduct on the part of the two companies and findings as to the responsibilities of persons in the two companies for this conduct. The report was relied upon by the applicant in bringing the proceedings pursuant to s. 160. The respondent raised few if any material points of factual disagreement with the averments in the affidavits sworn on behalf of the Director but, he strenuously disputed all and any criticisms of his conduct in the report of the inspectors. The Director sought leave to cross examine the respondent on his affidavits. O'Donovan J. held:—

*"The function of cross examination is to cast doubt upon the veracity, accuracy or reliability of evidence given by a witness. In this case, the issue to be determined by the court is... the commercial probity of the respondent's conduct. In that regard, s. 22(b) of the Companies Act, 1990, provides that the report of an inspector appointed under s. 8 of the Act shall be evidence of the opinion of the inspector and, accordingly, it seems to me that, if that opinion is challenged, notwithstanding that the facts upon which the opinion is based are not disputed, the court is entitled to know the mindset of the challenger and, in my view, the only way that that can be ascertained is by confronting the challenger under cross examination."*(Emphasis added)

He concluded that in the absence of such a cross examination it would be difficult if not impossible for the trial judge to come to a reasoned conclusion with regard to the commercial probity of the respondent and accordingly the interests of justice required that such a cross examination be conducted. Counsel for the bankrupt urged that where there are disputes of fact on affidavit which the Court will have to resolve in order to reach its decision on the s. 85A application then these disputes can only be resolved by cross examination. For this reason he said it was necessary to cross examine the Official Assignee on his affidavits.

24. 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 cooperated with the Official Assignee or as 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. Therefore the case of *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369 does not assist the bankrupt in his argument. In fact it is authority for the proposition that the reliability and indeed reasonableness of the contrary views expressed by the bankrupt should be tested by cross examination but that does not arise in this application. In *Seymour's* case, the person to be cross examined was the person whose conduct was to be assessed by the Court, in that case as to his commercial probity. In this application it is the bankrupt's conduct which is under scrutiny not that of the Official Assignee, unless it can be said that the conduct of the Official Assignee provides an answer to the complaints made against the bankrupt.

## Conclusion

25. The bankrupt has not demonstrated either the probable presence of some conflict on the affidavits relevant to the issues to be

determined or that such issue cannot be justly decided in the absence of such cross examination. In view of the fact that 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 the bankrupt proceedings, in the exercise of my discretion, I refuse the application to cross examine the Official Assignee on the affidavits sworn in support of the motion for relief under s. 85A.