

THE HIGH COURT

BANKRUPTCY

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

IN THE MATTER OF JOHN GAYNOR (A BANKRUPT – 3411)

JUDGMENT of Ms. Justice Costello delivered on the 23rd day of January, 2017

1. The Official Assignee in bankruptcy brought an application seeking an order extending the bankruptcy period of John Gaynor 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 bankrupt 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 bankrupt. If necessary he also sought an order pursuant to s. 85(3) of the Act that the bankruptcy period shall not stand discharged until the investigation and pending the making of a determination under the application.
2. The application was grounded upon the affidavit of Christopher Lehane, the Official Assignee, sworn on 24th November, 2016.
3. Mr. Gaynor ("the bankrupt") was adjudicated a bankrupt on 7th December, 2015 by me on foot of a petition presented by his former solicitors Messrs. Noel Sheridan and Peter Quinn. The bankrupt brought an application to show cause against the adjudication. That application was dismissed by O'Connor J. on 20th April, 2016. The bankrupt argued that this order ought not to have been made on the basis that he was ill and O'Connor J. ought not to have proceeded with the application. I am unaware of the details of what occurred before O'Connor J. On the face of it, there is a valid order of the High Court which has not been set aside on appeal.
4. The bankrupt appealed the adjudication to the Court of Appeal. Apparently this was out of time. The Court of Appeal (Ryan P., Irvine and Fulham JJ.) dismissed the appeal on 10th October, 2016 on the basis that the appeal was bound to fail.
5. It follows that the order of adjudication stands as a valid order, though the bankrupt is apparently applying to the Supreme Court for leave to appeal.
6. In his affidavit of 24th November, 2016 the Official Assignee said that the bankrupt had completely failed to co-operate in the bankruptcy. His position is summarised by an e-mail of 1st February, 2016 where he stated "*I reject the nonsense that I am a bankrupt*".
7. Initially he refused to co-operate with the bankruptcy inspector by giving him the necessary contact details. However, as the bankrupt wished to bring a show cause application, he arranged for the order of adjudication to be served upon him by consent on 1st February, 2016. That was the full extent of his co-operation in the bankruptcy.
8. On 10th December, 2015 the bankruptcy inspector sent the bankrupt a copy of a statement of affairs and a statement of personal information to be completed by him, as well as correspondence advising him of issues arising in his bankruptcy. As of the date of the hearing before me no statement of affairs had been filed and no personal information had been given to the Official Assignee.
9. The bankrupt did not attend for an interview in relation to his assets and he did not engage in any way with the process. On 17th October, 2016 the Official Assignee's office wrote to the bankrupt stating as follows:—

"Failure to comply — reminder

I refer to your adjudication as a bankrupt on 7th December 2015 on foot of a petition brought by Noel Sheridan and Peter Quinn.

Our office has previously attempted to contact you in relation to fulfilling your statutory obligations as a bankrupt. An e-mail issued on 10th December 2015 informing you that you were adjudicated bankrupt and requesting that you submit to this office a statement of personal information and a statement of affairs. To date you have not returned these completed documents.

It is advised that your ongoing failure to co-operate with this office means that you are in breach of your duties pursuant to s. 19 of the Bankruptcy Act 1988 a copy of which I enclose for your reference.

Please complete the enclosed statement of affairs and statement of personal information and return to this office by Wednesday 26th October 2016.

Please be advised that if you fail to provide this information by Wednesday 26th October 2016, the Official Assignee will have no alternative but to consider taking legal action in this case (e.g. High Court application to extend your bankruptcy discharge period).

I trust that this will not be necessary but wish to remind you that it is the duty of the Official Assignee to ensure compliance with the legislation in the best interests of the creditors of your estate."
10. The bankrupt did not reply to this letter and did not provide the information sought. On Thursday, 17th November, 2016 the bankruptcy inspector once again called to the bankrupt's house in an effort to have him complete his statement of affairs and statement of personal information. The Official Assignee averred that the bankrupt refused to engage with the inspector.
11. In addition to his complete failure to co-operate with the bankruptcy process, the bankrupt failed to disclose any assets at all to the Official Assignee. The Official Assignee was advised by the petitioning creditors that the bankrupt has assets. The Official Assignee says that the bankrupt has land comprised in folios 5864, 2299, 2538, 11873F, 11874F, 10753 and 7609, all in the County of Westmeath. He further understands that the bankrupt has livestock, farm machinery and motor vehicles. He is unable to give any indication as to the value of these assets and whether or not they are encumbered. He states:—

"I do not have a proper picture of the assets of the bankrupt as he has not disclosed same in any way."

12. At para. 10 of his affidavit he states:—

"I further say that my office understands that the bankrupt withdrew the sum of €46,567.41 from his bank account in the days immediately following his adjudication and those funds remain unaccounted for."

13. Accordingly the Official Assignee sought the reliefs set out in his notice of motion on the basis of the non co-operation of the bankrupt and his non-disclosure of assets.

14. I am satisfied that the evidence adduced by the Official Assignee establishes a *prima facie* case of very grave non co-operation and a failure to disclose assets in this particular bankruptcy.

15. The first issue for the Court to consider therefore is whether the bankrupt has anything to say in relation to these matters. Far from seeking, albeit belatedly, to co-operate with his bankruptcy, the bankrupt persists in his obstruction and defiance of the process. The non co-operation continued in relation to service of proceedings. Niall Hayes, Bankruptcy Inspector, swore an affidavit of service of the papers on the bankrupt on 30th November, 2016. He stated as follows:—

"b. That I served a copy of the s. 85 motion papers by attempting to hand same to John Gaynor which he declined to accept. However I still managed to affect service by touching his shoulder and forearm with the s. 85A(1) motion papers at 1.40 pm on 29th November 2016 at Farthingstown, Rathconrath, Co. Westmeath, he having identified himself to me.

c. When the envelope containing the papers subsequently fell to the ground he took them up and threw them across the road, however I am fully satisfied that proper service was affected and John Gaynor was aware of what the papers were in the envelope. I was accompanied by a Garda from Ballynacargy Garda Station who witnessed this service."

16. The bankrupt did not swear an affidavit controverting any of the matters set out in the affidavit of the Official Assignee. He did not offer any explanation or excuse for his failure to complete a statement of affairs or a statement of personal information other than to insist that he was not properly adjudicated a bankrupt.

17. On the return day for the notice of motion, 5th December, 2016, the defendant produced an affidavit which he swore on that day and a document described as a notice of motion but which apparently had not been issued. He invited me to recuse myself from hearing any further matter relating to him. His grounds for the application were that I had a personal interest in the continuation of his bankruptcy and that he had not been afforded a proper or fair hearing when he was adjudicated a bankrupt on 7th December, 2015.

18. In relation to my alleged partiality, the bankrupt argued that the firm of solicitors in which my husband is a partner represented the Bank of New York Mellon *"who owns much if not all of the equity of Teck Ireland Limited, a company granted a licence upon my lands without my knowledge."* The only information before the Court in relation to any creditor of the bankrupt was in respect of the petitioning creditors, his former solicitors, Messrs. Sheridan & Quinn. I had and have no knowledge of either the creditors of the bankrupt or the clients of my husband's firm of solicitors. In those circumstances I ruled that this argument was not a proper basis upon which I should recuse myself from hearing the motion.

19. In relation to the allegation that he had not received a fair hearing when the petition for adjudication was heard on 7th December, 2015, the bankrupt had the opportunity to bring a motion to show cause and also appealed the order of adjudication to the Court of Appeal. If there had been merit in his second ground for asking me to recuse myself, he had the opportunity to raise the issue and have it considered by two different courts. His applications were rejected on both occasions. He may not relitigate the point now. As he himself said in his own affidavit, the Court of Appeal dismissed his appeal on the grounds that it was *"bound to fail"*. That conclusion necessarily implies that the hearing of the petition was not the unfair or biased hearing he has now alleged it to have been.

20. There is an obligation upon judges to recuse themselves in appropriate cases. This occurs as a matter of course relatively frequently. However there is also a duty on judges to hear cases that are assigned to them and not to accede to groundless applications to recuse themselves. Where an application is based upon alleged objective bias the test is whether a reasonable person with full knowledge of the facts would reasonably apprehend that the party seeking the recusal could not have a fair or unbiased hearing from that particular judge. Against this background I refused to recuse myself. On 5th December, 2016, due to the pressure of the work in the bankruptcy list, the motion could not be heard and I made an order directing that his bankruptcy should not be discharged until further order of the Court and adjourned the motion for hearing for one week. I did so in the knowledge that the list would be taken on that occasion by a different judge so he would have the opportunity to have the matter considered by a judge who had not previously dealt with his case notwithstanding the fact that I had refused his application to recuse myself.

21. In the event the bankrupt chose not to deal with the matter before my colleague who was taking the bankruptcy list on 12th December but instead moved an application for judicial review before Humphreys J. Humphreys J. refused that application. The motion listed in the bankruptcy list was adjourned to 16th January, 2017.

22. On 16th January, 2017 the matter again came before me in the bankruptcy list. On that occasion the bankrupt sought to *subpoena* the petitioning creditor and officials in the Central Office. I refused these *subpoenas* on the basis that they were directed towards challenging the validity of the adjudication and thus were not relevant to the matters before the Court.

23. In reply to the application of the Official Assignee the bankrupt sought to relitigate many of the points which had been dealt with at the hearing of the petition. He produced no evidence relevant to these points but he submitted:—

- i. The application was improperly brought because the Official Assignee was not authorised to bring the application.
- ii. The application was improperly brought because the Official Assignee had no authority to instruct counsel.
- iii. The Court has engaged in a trespass and he referred to a hearing before Finlay Geoghegan J. This apparently referred to an order of possession made by Finlay Geoghegan J.
- iv. The Court had breached the Bankruptcy Act in adjudicating him a bankrupt and had failed to have regard to his human rights.

- v. The Court had formulated its own rules for bankruptcy.
- vi. Other members of his family were involved.
- vii. The Court had no jurisdiction to deal with a person who has no creditors. He had not been properly adjudicated a bankrupt.
- viii. The motion to show cause had not been properly heard. Therefore he was still entitled to appeal his s. 16 application.
- ix. He relied on the case of *McGinn v. Beagan* 2014 IEHC 344 and argued that the petition for his bankruptcy had been brought for an improper purpose.
- x. He wished to complain about his former solicitor to the President of the High Court.
- xi. The cause book in respect of which a judgment was obtained in 2003 (or as he said, had not been obtained) should be in court.
- xii. He was in extremely bad health.
- xiii. The Court had failed to comply with the provisions of s. 14(2) of the Bankruptcy Act, 1988, as amended, before he was adjudicated a bankrupt. He said the purpose of s. 14(2) was to give someone a chance to pay **after the adjudication (emphasis added)**.
- xiv. The order recording that I refused to recuse myself from hearing the application on 5th December, 2016 had not been perfected and therefore he had not been afforded an opportunity to appeal this decision. Accordingly the proceedings before me on 16th January, 2017 were flawed.
- xv. He applied to adjourn the application to the President of the High Court.

24. These points are not relevant to the issues for decision on the Official Assignee's motion. It is clear that the bankrupt is seeking to relitigate matters which either were dealt with before or were not originally argued by him or which, if valid, could have given rise to grounds for appealing the order of adjudication. I have ruled against some points (iii, ix, xi) and the Court of Appeal has taken the view that these and others are bound to fail (iv,v,vii,xiii). Some are unsustainable (i,ii,vi) or unsupported by any evidence (vi,xii). In any event I am bound by the fact that there exists a valid order of adjudication and I cannot go behind that order on the basis of the submissions of the bankrupt.

25. I do not believe that it is appropriate to adjourn the matter for hearing to the President of the High Court. The fact that the petitioning creditors in this case are solicitors is not sufficient reason to adjourn the matter to the President's solicitors' list.

The Law

26. Section 85A(1), (3) and (4) of the Bankruptcy Act 1988, as amended by the substitution of s. 157 of the Personal Solvency Act 2012, provides as follows:—

85A. - (1) The Official Assignee, the trustee in bankruptcy or a creditor or 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-

- i. failed to co-operate with the Official Assignee in the realisation of the assets of the bankrupt, or*
- ii. 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) Where it appears to the Court that the making of an order pursuant 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 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 no later than the 8th anniversary of the date of the making of the adjudication order, as the Court considers appropriate.

27. The order of adjudication in this case was 7th December, 2015. The bankrupt would have been discharged at midnight on 6th December, 2016, pursuant to the provisions of s. 85(1), the application of the Official Assignee was brought prior to that date and an order was made that the bankruptcy should not stand discharged by virtue of s. 85 until further order of the court on 5th December, 2016. Thus, I am satisfied that the application was brought prior to the automatic discharge of the bankruptcy in this case.

28. It is clear from the provisions of subs. (1) that the Official Assignee is authorised to bring the application. That being so, he is also authorised to instruct solicitor and counsel as he sees fit. I, therefore, reject any argument, to the effect, that he was not entitled to bring the application or to instruct counsel.

29. I am satisfied from the uncontroverted evidence of the Official Assignee in his affidavit of 24th November, 2016, that there has been a total failure of the bankrupt to cooperate with the Official Assignee in relation to the bankruptcy process. He has failed to

comply with the duties of a bankrupt set out in s. 19(c) in relation to a statement of affairs. It is quite clear that he has failed to cooperate with the Official Assignee in the realisation of his assets and by definition has hidden from or failed to disclose to the Official Assignee any income or assets which could be realised for the benefit of the creditors of the bankrupt.

30. Of particular concern is the withdrawal of a significant sum of money from his bank account just days after his adjudication and the failure to account for any of the monies to the Official Assignee.

31. In all the circumstances, I am satisfied that it is appropriate to make an order that the bankruptcy shall not stand discharged by virtue of section 85.

32. The next matter for consideration is the duration of the extension of the bankruptcy period. *In Killally (A Bankrupt) v. Official Assignee* [2014] 4 I.R. 365, Clarke J. in the Supreme Court stated at para. 54:—

"...s. 85A of the Act of 1988 confers on the Official Assignee a jurisdiction to seek, and on the High Court a jurisdiction to impose, a postponement of the entitlement of a bankrupt to be discharged provided that the court is satisfied that a failure to cooperate or a hiding of or failure to disclose assets, in accordance with the terms of the section, has been established. That jurisdiction exists even though any wrongdoing thus established may be completed and, indeed, remedied."

33. In *McFeely (A Bankrupt)* [2016] IEHC 299, I considered the decision in *Killally (A Bankrupt)* and noted that Clarke J. had emphasised that once a court is satisfied that there has been a failure to cooperate with the Official Assignee in relation to the bankruptcy or that the bankrupt has hidden from or failed to disclose to the Official Assignee income or assets that the extension of the bankruptcy period should be proportionate to the established wrongdoing. At para. 30 of my judgment, I stated:—

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

34. In *McFeely's* case, I took the view that the wrongdoings were at the very grave end of the spectrum. I did not extend the period for the full duration as I took account of the bankrupt's age and I reduced the period by three months.

35. In *Lehane v Farrell* [2016] IEHC 637, I held that there had been serious multiple continuous breaches and wrongdoings by the respondent during the course of her bankruptcy. However, in view of the fact that it had not been established that the acts and omissions of the respondent damaged her creditors, as opposed to the bankruptcy process, I did not extend the period of bankruptcy for the full period open to the court. I extended 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.

36. In this case, there is limited evidence which establishes that the creditors have been prejudiced by the wrongdoings of the bankrupt, though the extent of that prejudice is not clear. In particular, the withdrawal of the sum of €46,567.41 from his bank account in the days immediately following his adjudication is a very grave matter. It would also appear that there are assets in the form of livestock, farm machinery and motor vehicles which could be realised for the benefit of his creditors. There are obviously folios of land in Co. Westmeath in which he is said to have an interest. Somewhat surprisingly, very limited information is before the court in relation to this. At the very least, it must remain a possibility that the failure to disclose these assets to the Official Assignee has resulted in further prejudice to the creditors of the bankrupt.

37. The conduct of the bankrupt in relation to his bankruptcy challenges the integrity of the bankruptcy process. It cannot be ignored by the court. The maintenance of the integrity of the bankruptcy process requires to be encouraged by the imposition of sanctions for breaches of the process, as was held by Clarke J. in *Killally's* case following the decision in the High Court of McGovern J.

38. In this case the creditors of the bankrupt have suffered further losses over and above those they inevitably will suffer arising out of his bankruptcy by reason of his wrongdoings. He has not enabled any recovery to be made for the benefit of his creditors. He has deliberately hindered it by withdrawing €46,567 from his account. While this may not appear to be a very large sum in the context of the indebtedness of some estates—and possibly this estate also—the fact that the Official Assignee cannot identify any greater loss sustained cannot by itself be a ground to reduce the term of the possible period of postponement of the discharge from bankruptcy. That would be to permit the wrongdoer to benefit from his wrongdoing: concealing the existence and value of his assets. What is important from the perspective of the court is the degree of non co-operation and concealment of assets which has led to loss. The actual level of loss thereby caused to his creditors is a factor to be taken into account but it does not necessarily follow that a proved lesser loss to creditors will result in a shorter period of postponement of the discharge from bankruptcy, especially where the court knows that there is very little information available in relation to the assets of the bankrupt.

39. For these reasons I extend the duration of the bankruptcy of the bankrupt for a period of five years from the date when he would otherwise have been automatically discharged from bankruptcy by operation of law.