THE HIGH COURT

BANKRUPTCY

[No. 2478]

IN THE MATTER OF SEAN DUNNE, A BANKRUPT

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

JUDGMENT of Ms. Justice Costello delivered on the 2nd day of October 2018

1. The issue for decision in this case is whether the court should make an order postponing the automatic discharge from bankruptcy of the bankrupt pursuant to s. 85A (4) of the Bankruptcy Act, 1988 as amended on the grounds that the bankrupt has failed to cooperate with the Official Assignee in the realisation of his assets or has 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 second issue for consideration is whether the court should make a bankruptcy payment order pursuant to s. 85D of the Act of 1988 as amended and, if so, for how much?

The facts

2. On the 29th March, 2013 Mr. Sean Dunne ("the bankrupt") petitioned for bankruptcy in the United States and Mr. Richard Coan was appointed his trustee ("the US trustee"). The order of adjudication included a worldwide stay on creditor action against the bankrupt and his estate.

3. On the 12th February, 2013 Ulster Bank Ireland Ltd ("the petitioner") presented a petition to the High Court to have the bankrupt adjudicated bankrupt in this jurisdiction.

4. On 28th May, 2013 while the petition was still pending in the High Court, the petitioner filed an amended motion in the US bankruptcy court for entry of an order granting limited relief from the automatic stay to permit the petitioner to take all actions necessary

> (i) To perfect service upon the bankrupt and
>
> (ii) To obtain an order adjudicating the debtor "bankrupt" in the proceedings pending in the High Court.

5. The US trustee filed a statement in partial support of the petitioner's motion for relief from the worldwide stay. The bankrupt objected to the relief and on the 4th June, 2013 the US bankruptcy court, Judge Shiff, granted the relief sought by the petitioner and ordered:

> *"(a) to permit the petitioner and/or its successors and assigns to take all actions necessary under Irish law to perfect service upon the [bankrupt] in the "Irish bankruptcy proceedings"*
>
> *(b) to permit parties in interest to continue with the "Irish bankruptcy proceeding" and to take all actions necessary in connection with or relating to the petitioner's application to have the [bankrupt] adjudicated "bankrupt" in the "Irish bankrupt proceeding", with the proviso "that nothing in this order shall deprive this court of jurisdiction over the [bankrupt] or over the property of the bankruptcy estate.*
>
> *(c) to permit the parties in interest, in the event that the [bankrupt] is adjudicated "bankrupt" in the "Irish bankrupt proceeding", "to attend and participate in any proceeding for the nominating and/or voting in respect of the appointment of a trustee pursuant to s. 110 of the [Act of 1988], as amended, and to take all actions set forth under the laws of Ireland in connection therewith".*

The order specifically provided that *"…except as explicitly set forth herein the automatic stay shall not be modified or waived, and no party in interest in this case shall, except by leave of this court, take any affirmative action in the Irish bankruptcy proceeding that violates the terms of the automatic stay."*

6. Following on from this order and after the petitioner obtained an order for substituted service of the petition, the bankrupt was adjudicated a bankrupt on the 29th July, 2013.

7. The bankrupt brought an application to show cause and on the 6th December, 2013 the High Court dismissed the bankrupt's application. The bankrupt appealed to the Supreme Court and on the 15th May, 2015 Laffoy J. delivered the judgment of the court and dismissed the appeal and affirmed the order of adjudication.

8. On the 31st July, 2013 the Official Assignee wrote to the bankrupt's solicitors notifying him of his duty *"to fully cooperate with me in the administration of your estate which includes providing me with full contact details (i.e. address, phone numbers and email address)"*. He was asked to complete the enclosed statement of affairs and statement of personal information and return it completed to the Official Assignee by the 16th August, by email with originals in the post as soon as possible. A copy of s. 19 of the Act was enclosed to inform the bankrupt of his duties to the Official Assignee.

9. On the 28th November, 2013 the Official Assignee's solicitors, Messrs. O'Gradys, wrote to Clarkin Lynch, solicitors for the bankrupt, referring again to the obligation of the bankrupt to deliver a written statement of affairs and to attend for interview and to give every reasonable assistance to the Official Assignee in the administration of the estate. The letter stated that the bankrupt had failed to attend for interview and failed to file a statement of affairs and highlighted the provisions of ss. 19, 44 and 123 (1) (c) of the Act of 1988.

10. Messrs. O'Gradys wrote again on the 11th December, 2013 saying that in light of a finding of fact inimical to the bankrupt in in camera proceedings, *"the failure of the bankrupt to file a statement of affairs and attend for interview clearly puts the Official Assignee on notice that there may not be full disclosure of assets and there may be a breach of the bankrupt's duties and*

obligations pursuant to the Bankruptcy Act, 1988". He was again requested to file a statement of affairs forthwith and to attend for interview without delay.

11. On the 22nd May, 2014 the bankrupt was in Dublin but he did not contact the Official Assignee either in advance or while in Dublin to arrange to attend for interview. Messrs. O'Gradys wrote on the 29th May, 2014 pointing this out and asking that he advise when he would attend for interview. His solicitors replied four weeks later on the 18th June, 2014 suggesting that the interview be conducted by teleconference. He said he had been interviewed over four days as part of the proceedings in bankruptcy in the United States and the transcript of the s. 341 meeting (as it was called) had been made available by the US trustee to the Official Assignee. The letter stated:

> *"It cannot now be in dispute that he has made comprehensive and voluminous disclosure to your client. We understand that two of his former in-house accountants have agreed to meet with your client. Accordingly, there can be no suggestion that our client is not cooperating fully."*

12. On the 19th February, 2015 the Official Assignee wrote to the bankrupt at 22 Stillman Lane, Greenwich, Connecticut, CTO 6831, being the address obtained by the Official Assignee from the records in the US bankruptcy as the bankrupt had not provided the Official Assignee with his address. The letter was headed "request for attendance at interview". It stated that since the date of adjudication the bankrupt had failed to cooperate with the Insolvency Service of Ireland and had not attended for interview. It continued:

> *"We are aware that you have been in the jurisdiction on numerous occasions since 29th July, 2013 and have made no effort to seek an appointment with the office to attend and discharge your obligations under the Bankruptcy Act, 1988. Requests to Clarkin Lynch to have you detail your visits to Ireland over the last two years have been ignored. Given that you are from past experience likely to be in Ireland for Sunday week's rugby match against England in the Aviva, I am again requesting you to attend my office on a date suitable to you on your visit, so that we can discuss your bankrupt estate."*

13. The bankrupt did not reply, he attended the Ireland v. England match on the 1st March, 2015 and he did not arrange to meet the Official Assignee. The bankrupt later explained that he did not receive this correspondence as he was not in the United States between 19th February and 3rd March, 2015. The Official Assignee wrote to him again at Connecticut on the 9th March, 2015 noting the fact that the bankrupt had not contacted him for interview despite his attendance in Dublin and stating that the ongoing failure to cooperate with the office meant that he was in breach of his duties pursuant to s. 19 of the Act.

14. The Official Assignee was given the bankrupt's US statement of affairs and the transcript of the s. 341 interviews by the US trustee, not the bankrupt. The Official Assignee said that from the period 29th July, 2013 to 20th January, 2016 the bankrupt made no attempt to cooperate with his office in any meaningful way.

Commencement of purported cooperation

15. On 20th January, 2016 the bankrupt's US attorneys, Zeisler & Zeisler wrote to Messrs. O'Gradys as follows:

> *"We represent Sean Dunne in connection with his US chapter 7 case.* ***Mr. Dunne now seeks to obtain his discharge from his bankruptcy proceedings. Mr. Dunne will fully cooperate with the Official Assignee in this regard.*** *As you may know, the meeting of creditors, designed to give the Official Assignee's counterpart in the US, the trustee Richard Coan, and Mr. Dunne's creditors an opportunity to examine Mr. Dunne under oath regarding his financial affairs was concluded. I am enclosing copies of the transcript of the meeting of creditors in the event you do not already have them. On behalf of Mr. Dunne, we also supplied Mr. Coan with a large number of documents which we believe you have; and, if not, you may, of course obtain them directly from Mr. Coan. There had been a disagreement to the extent of Mr. Dunne's compliance that was resolved when we reached agreement with Mr. Coan on how documents protected by Ireland's in camera rule will be treated.*
>
> *Initially, when Mr. Coan supported Ulster Bank's motion for relief from stay that resulted in the Irish adjudication, Mr. Coan took the position that Mr. Dunne would not be unduly burdened by the dual proceeding, because any of the Official Assignee's requests would have to be initially directed to Mr. Coan since all of Mr. Dunne's records and the like were property of his US bankruptcy upstate. Moreover, it was represented that the dual case will be governed by a court approved protocol and that still has not materialised after two and a half years. That said, Mr. Dunne has no objection to addressing the Official Assignee's questions directly and suggests that a meeting occurred sometime after February 22nd at their mutual convenience. Please provide a number of available dates, and Mr. Dunne will confirm within seven days. It would also be helpful if you set out in writing what the Official Assignee requires of Mr. Dunne over and above what he supplied to trustee Coan. (emphasis added)*

16. The letter was written because the bankrupt was anxious to obtain his discharge from bankruptcy in Ireland. He undertook to cooperate fully with the Official Assignee in order to obtain his discharge. He relied upon the transcripts of the s. 341 meeting as disclosure of information and assets to the Official Assignee. He said that he had *"no objection to addressing the Official Assignee's questions directly"*.

17. O'Gradys Solicitors replied on 4th February, 2016, noting that the bankrupt now wished to obtain his discharge from bankruptcy and will fully cooperate with the Official Assignee in this regard. The letter pointed out that through 2014 and 2015, he engaged in litigation in relation to his bankruptcy and instructed lawyers to represent him in contesting issues in respect of his Irish bankruptcy. Nonetheless, at no stage did he endeavour to comply with his obligations under the Act and the Official Assignee is not even able to ascertain where he resides. The letter welcomed to the fact that he had now decided to cooperate and identified a number of issues that needed to be attended to. Firstly, that the bankrupt should furnish a sworn statement of affairs and statement of personal information in the format of the enclosed drafts. The returning of the completed documents was an absolute minimum requirement of a bankrupt under s. 19 of the Act. Secondly, once the documents were returned, it was likely that the Official Assignee would have numerous questions for the bankrupt. Once the statements have been furnished, it would be necessary for the bankrupt to attend for interview or examination before the court pursuant to s. 21 of the Act. The letter continued: -

> *"Your client should be aware that it is not accepted that it was adequate for the bankrupt to cooperate solely with Mr. Richard Coan, the US Trustee in bankruptcy. The bankrupt has separate statutory obligations in relation to his bankruptcy in Ireland. He declined to engage in any way with the bankruptcy in Ireland and if [he] had any doubts as to the extent of his obligations, he was perfectly able to engage with the Official Assignee to deal with same. The question of whether or not there has been in full compliance with the US bankruptcy process or cooperation with the US trustee*

is a matter for Mr. Coan.

Finally, for the avoidance of doubt, the Official Assignee has power under s. 85A of the Act to object to the discharge of the bankrupt from bankruptcy by reason of any failure to cooperate with the Official Assignee and the failure to disclose assets. In circumstances where cooperation is only forthcoming now, two years and seven months into a three year bankruptcy, that application will be made to the High Court in Ireland. Such cooperation as the bankrupt now commences may go some way toward mitigating the lack of cooperation to date. However, that will ultimately be a matter for the court."

18. The bankrupt then instructed Messrs. James Lucy & Sons Solicitors to act on his behalf. They wrote on 3rd March, 2016, enclosing a statement of personal information (which did not give his address) but no statement of affairs. The letter gave Mr. Dunne's address as 22 Stillman Lane, Greenwich, Connecticut. In relation to the statement of affairs, they stated: -

"We believe the correct legal position is that Mr. Dunne has no assets on the date of his Irish adjudication on 29th July, 2013, as all of his assets vested in Chapter 7 Trustee on 29th March, 2013 in USA. We understand the Supreme Court held as much in one of its judgments.

Mr. Dunne's statement of affairs of 29th July, 2013, is zero as all of his assets and liabilities have vested in his Chapter 7 Trustee, Mr. Coan in USA and enclosed is a copy of the summary of schedules for your assistance."

19. On 23rd March, 2016, James Lucy & Sons wrote again stating: -

"You might advise the areas you wish to examine Mr. Dunne in advance to ensure that the maximum progress is made during the interview. We will reiterate that Mr. Dunne has fully cooperated with his first in time USA bankruptcy Chapter 7 Trustee, Mr. R. Coan in the US and undertakes to fully cooperate with the Official Assignee in facilitating him in the conclusion of his investigations to allow our client to be discharged.

Our client respectfully suggests and indeed his US bankruptcy trustee, Mr. Coan also accepts that he has absolutely and fully disclosed and revealed all of his assets and in all the circumstances that he is entitled to that 'second chance' which the law provides for."

20. No decision of the Supreme Court was ever identified which held that Mr. Dunne had no assets on the date of his Irish adjudication on 29th July, 2013, on the basis that all of his assets had vested in the US Trustee on 29th March, 2013. On the contrary, the decisions of the Supreme Court illustrate that this is a matter which has yet to be determined. Secondly, the US Trustee's position, as disclosed by his attorney, Mr. Miltenberger in evidence to the court, is that Mr. Dunne has not cooperated and fully disclosed and revealed all of his assets to Mr. Coan. It follows that the correspondence from the bankrupt's solicitors in March 2016 in purported co-operation with the Official Assignee, in fact was itself based upon untruths and misrepresentations.

21. On 6th May, 2016, O'Gradys Solicitors again pointed to the bankrupt's failure to file a statement of affairs in accordance with section 19. On 17th May, 2016, Messrs. James Lucy & Son wrote again emphasising the bankrupt had fully cooperated with the US Trustee on all matters and categorically stated that it was the bankrupt's intention to fully cooperate with the Official Assignee but it did not provide a statement of affairs.

22. On 26th May, 2016, the Official Assignee brought a motion seeking orders pursuant to s. 85A (3) and (4) and a bankruptcy payment order pursuant to section 85D. It was grounded on the affidavit of the Official Assignee sworn on 25th May, 2016. In light of the promises of the bankrupt to fully cooperate with the Official Assignee in order to obtain his discharge, the Official Assignee sought an order pursuant to s. 85A (3) to enable him to continue his investigations into the estate of the bankrupt and in particular, into the matters of complaint raised in his grounding affidavit.

23. He identified a number of matters which remained to be investigated in the bankruptcy. The bankrupt needed to provide a statement of affairs and then attend for initial interview. There was an issue with the bankrupt's address as the address given was 22 Stillman Lane, Connecticut, USA but that property has been vacant for nearly two years. At para. 25, the Official Assignee explained as follows: -

"The particular difficulty which arises in this bankruptcy is that a large number of the assets which were ostensibly owned or controlled by the bankrupt prior to his adjudication was subsequently asserted to be owned by family members or subject to trusts in favour of the family members. However, the ownership of those assets, which are valued at many millions, is not clearly explained. Where assets are held on that basis, and in particular where there is no clear legal chain of title or ownership, the transactions require significant explanation but that has not been forthcoming."

24. He referred to two sets of proceedings in relation to purported assets transfers which he had instituted at that stage: -

Lehane v. Gayle Dunne [2014 No. 7820 P.]; and

Lehane v. Traviata Limited and John Dunne [2014 No. 8840 P.]

At para. 27 of his affidavit he explained: -

"However, having regard to the bankrupt's duty to cooperate with the court and my office, I am entitled to know what his justification is for the transfers, what his contentions are in relation to the ownership of those assets and all details surrounding same. I have been given none of that information and neither has the US trustee. In fact, no information has been forthcoming of any significance, save that either the bankrupt or the Transferee has deployed same during court proceedings.

25. In his affidavit he sets out that he wished to know what were the precise circumstances in relation to the agreements relied upon by Gayle Dunne in the first set of proceedings and what steps were allegedly taken to implement it in any jurisdiction and by what professional advisers. He says that the agreements are unusual transactions and his contention in the proceedings is that they are not enforceable at law and are liable to be set aside. The proceedings are fully contested by the transferee but he is entitled to an explanation from the bankrupt as to what transpired in relation to his estate.

26. At paras. 33 and 34 he stated:

> *"There are other assets of very significant value which are not recited in, but appear to be connected to, the above agreements. These include in particular Walford, 24 Shrewsbury Road, Ballsbridge, Dublin 4 which is a six bed property which was owned by a company called Yesreb Holdings Ltd from 29th March, 2013.* ***The beneficial owner of the property is currently unidentified****. Ms. Gayle Killilea states that it was given to her by the bankrupt in the context of the above agreements. The bankrupt provided funds for the original purchase of Walford from personal bank accounts held in his sole name. Some of the other funds came from his company DCD Builders Ltd. He was also heavily involved in the planning applications, development plans and legal instructions regarding Walford. All of this has been established piecemeal through s. 21 applications against the professionals involved.*
>
> *34. It has* ***not been possible to determine who the beneficial owner of Walford is or on what basis they can make this claim****. It is noteworthy that Walford was conveyed to Yesreb Holding Ltd on the same day that the bankrupt filed for bankruptcy in the United States, the 29th March, 2013. The property is of significant value and it is important to establish precisely what interest the bankrupt has in the property now****. If he has no interest in the property now it is necessary to establish who the current beneficial owner is and on what basis that claim is made."*** (emphasis added)

27. Thus the affidavit identifies particular areas of concern to the Official Assignee and the fact that the Official Assignee did not know at that time who was the beneficial owner of Walford. This is significant in assessing the response of the bankrupt in light of his undertaking to cooperate fully with the Official Assignee and his assertion that he has fully cooperated.

28. On the 14th of June, 2016 he furnished a sworn statement of affairs. On the 29th of June, 2016 he attended for interview with the Official Assignee and Mr. O'Gradys, the Official Assignee's solicitor.

Background to the interview

29. The bankrupt says in an affidavit sworn on 18th April, 2017 that in and around mid-June 2016 he "was cleared" (by whom is unclear) to meet with Patrick Doran to ascertain his best price [for Walford] and to try to broker a deal which would be put to the directors of Yesreb Holding Ltd ("Yesreb"). If this was accepted and contracts concluded, he would seek a fee for brokering the deal. He said the first meeting with Mr. Doran was on the 23rd June, 2016. He relayed information from the meeting to Mr. James Ryan and Mr. Don McAuliffe, solicitor for Yesreb.

30. Mr. Doran confirmed on affidavit that he met with the bankrupt in relation to the possible purchase of Walford in or about mid to end June 2016. At para. 4 of his affidavit he averred: -

> *"It seems to me that Sean Dunne did represent Yesreb Ltd. (sic) in some manner as he was in a position to discuss and agree price and closing date details …*
>
> *6. I was also leaving it to my solicitor to ensure that whatever was discussed and agreed with Sean Dunne was reflected in the legal documents produced by Don McAuliffe …"*

Mr. Doran confirmed that he had a number of further meetings with the bankrupt in relation to Walford as he needed to renegotiate various elements of the deal. These related to the closing date and the currency in which the consideration would be furnished. He said he had at least six such meetings.

31. During the s. 341 cross-examination in the United States on 28th February, 2014 the bankrupt stated under oath that the proceeds from the sale of Walford went to his wife. The following exchange occurred: -

> *"Question: You don't know who the purchaser was do you?*
>
> *S.D.: Could be you.*
>
> *Question: Could be your wife.*
>
> *S.D.: Could be my wife, could be my children.*
>
> *Question: Alright.*
>
> *S.D.: Could be anyone.*
>
> *Question: But you don't know whether or not she has any current involvement in that property.*
>
> *S.D.: No, I'm guessing if she sold it and got the money, she doesn't. It is only a reasonable guess."*

32. In evidence to the court the bankrupt said that the evening the s. 341 examination concluded, 28th February, 2014, his wife Ms. Dunne, informed him of "the facts about Walford" and that Mr. John Dunne, the bankrupt's son was the beneficial owner of Walford. [day 6 p. 37 of the transcript]

> *"And when I came home that evening Gayle asked me 'how did the 341 go?', and I said they were very interested in Walford, and it was that evening that she told me the facts about Walford. She told me 'by the way, John is the beneficial owner. I lent money to John to purchase the property and if there is an upside in the property it is held for our children', and I said 'great', and she said 'the reason I didn't tell you is because I don't want my information and our children's information plastered all over the Irish newspapers', and I think that she is entitled to that privacy."*

33. In the proceedings brought by the Official Assignee against Gayle Dunne, she and Mr Charalampous, a Cypriot solicitor, stated on affidavit that Yesreb is a company incorporated in Cyprus. Yesreb purchased Walford from Gayle Dunne. She lent it the money to enable it to pay the purchase price to her. The shares in Yesreb were beneficially held for her but she gifted them to John Dunne. They are held ultimately in trust for the children of Gayle Dunne and the bankrupt and Mr. John Dunne.

34. In summary, based on the evidence of the bankrupt and Gayle Dunne, from the evening of 28th February, 2014 the bankrupt knew that Yesreb, the owner of Walford, was beneficially owned by Mr. John Dunne and the children of the bankrupt and Gayle Dunne and that previously it had been owned by Gayle Dunne and she had gifted her beneficial entitlement to the shares to John Dunne.

35. When the bankrupt attended for interview on 29th of June, 2016 he had not corrected this exchange in the transcript of the s. 341 proceedings quoted above and he was expressly relying upon the transcript as fulfilling his statutory obligations in this jurisdiction. He did not inform the Official Assignee that Walford was beneficially owned by his children, despite the averments in the Official Assignee's affidavit quoted above. He made no reference at all to his role in the proposed sale of Walford to Mr. Doran in which he actively engaged at that time.

36. The transcript of the bankrupt's interview by the Official Assignee on the 29th of June, 2016 was exhibited. From p. 191 onwards the issue of the purchase and disposal of Walford was discussed. At p. 204 Mr. O'Gradys asked "Yesreb Holdings, can you tell us what is Yesreb Holdings?". The bankrupt answered "Have not a clue".

37. The transcript was sent to him for his approval so that he could correct any inaccuracies. He made no alterations to the transcript.

38. As of the 29th June, 2016 the Official Assignee remained ignorant of the beneficial ownership of Yesreb and believed that it was an unconnected third party who had purchased Walford on the 29th March, 2013. The bankrupt did not inform the Official Assignee of his information and knowledge of the purchase of Walford by Yesreb, the involvement of his wife and son, John Dunne in the purchase of Walford and the fact that the property was ultimately held for the benefit of John Dunne and the three children of the bankrupt and Gayle Dunne.

Developments after the interview

39. At the interview, the bankrupt had agreed to prepare written answers to any further queries raised by the Official Assignee. On the 17th August, 2016 the Official Assignee raised 22 specific queries. The bankrupt replied by letter dated 21st September, 2016 with an attached statement of affairs with schedules updated to 6th September, 2016.

40. By letter dated 6th October, 2016 the Official Assignee replied that the answers furnished on the 21st September, 2016 were not complete and that a further interview would not occur until such time as complete documentation had been furnished and analysed and the Official Assignee's office was in a position to conduct a meaningful second interview.

41. There was a further exchange of correspondence by letters dated 7th and 23rd November, 2016 from the bankrupt pressing the Official Assignee in relation to his cooperation culminating in his solicitor's letter of the 21st September, 2016. In December 2016 solicitors for the Official Assignee replied outlining the issues in respect of which they still sought information and clarification. There was no reply to the substance of that letter up to the date of the hearing of the motion in April 2018.

42. The next step was in these proceedings. The bankrupt swore a replying affidavit on the 12th October, 2016. He said his extensive and full cooperation with the US trustee must be taken into account regarding his discharge. He denied that he was being uncooperative in the context of his Irish bankruptcy. He explained that he did not reply to the Official Assignee's letter of the 19th February, 2015 as he did not receive the letter because he was not in the United States from 19th February, 2015 to 3rd March, 2015. This of course underscores the difficulties created by the failure to furnish email and telephone contact details never mind a residential address where he habitually resided. It does not explain why he could not have contacted the Official Assignee on a proactive basis given that he planned to attend the rugby match in Dublin.

43. He stated he had clarified where he lives and provided all forms fully completed as requested by the Official Assignee, though the statement of personal information did not include his address, where he habitually resided. He filed the statement of affairs in the Irish statutory form and answered all queries at interview on 29th June, 2016 last. Implicit in this response of course is the assertion that he has done so honestly and completely.

44. The Official Assignee swore an affidavit on the 15th November, 2016 in reply to that of the bankrupt. He acknowledged that he had received a considerable amount of material on the 23rd March, 2016 and that he had considerable more information than he previously and

> *"…there has been some measure of cooperation. While I have reservations about some of the answers given in March, June and September of this year, there was at least cooperation, which greatly enhanced my knowledge of the bankrupt's activities and estate…the amount I have learned this year is illustrative…of the fact that the bankrupt was aware of what was required to cooperate and comply with his statutory duties but chose not to do so for that period."*

He confirmed that the US trustee's attorneys stated that the bankrupt had not cooperated in the US and was still not cooperating and that the Official Assignee could advise the High Court of this position. Mr. Miltenberger's letter of 10th November, 2016 to O'Gradys solicitors stated:

> *"Mr. Dunne avers that he is fully cooperating with the trustee. For the avoidance of doubt, he is not …Mr. Dunne avers that he was assured of an ad hoc protocol…Mr. Dunne moved to compel a timetable for the trustee and the Official Assignee to negotiate a protocol. The US bankruptcy court denied Mr. Dunne's motion. The US bankruptcy court ruled that the* ***trustee and the Official Assignee could decide when, and if, there would be a protocol.***
>
> *We are concerned that if Mr. Dunne is discharged from bankruptcy in Ireland, he will never answer the trustee's subpoena calling for production of documents and,* ***as he has consistently shown to date, never cooperate with the trustee in his investigation of Mr. Dunne's complex financial affairs, the administration of the estate and the recovery of estate assets.****"* (emphasis added)

45. The bankrupt swore a further replying affidavit on the 28th November, 2016 saying that he had extensively engaged with the US trustee and does not accept that he failed to cooperate with the US trustee. In relation to his address, he referred to the transcript of the 29th June, 2016 where he said that when he was in America he spent the majority of his time in New York with his son John. This was subsequently denied by John Dunne in separate proceedings who said that the bankrupt stayed with him "the odd time".

46. In the meantime, the sale of Walford was proceeding in the background. Mr. Doran had executed the contract and delivered it to Don McAuliffe, solicitor for Yesreb, on the 11th August, 2016 but Yesreb never signed the contract and contracts were not exchanged. On 30th November, 2016 the Official Assignee was informed that Walford was to be sold, that the bankrupt was personally involved in the sale and that the purchase price was €15 million. He instituted proceedings entitled *"Lehane v Yesreb Holding Ltd 2016 10991 P"*. A *lis pendens* was registered in respect of Walford on 9th December 2016.

47. On the 5th December, 2016 the bankrupt arranged to meet Mr. Doran. The bankrupt advised him that the Cypriot representative

of Yesreb was in Dublin to sign all documents and that the bankrupt wanted Mr. Doran to close the sale immediately that same day. There was no explanation for this astonishing urgency, given that the contract had been signed by Mr. Doran on 11th August, 2016. Mr. Doran did not close the sale that day as there were certain matters yet to be resolved. He received a call either late that evening or the following morning from the bankrupt advising that a third party had purchased the property. Between the 7th and 9th December, 2016 there was engagement in relation to an indemnity in respect of stamp duty. On Monday 12th December, 2016 Mr. Doran was informed that a *lis pendens* had been registered against the property and from that point onwards Mr. Doran had no further interest in the purchase of Walford.

48. The Official Assignee was investigating the sale by Yesreb of Walford and representatives acting on his behalf spoke to Mr. Doran on the 21st December, 2016 who confirmed that he had dealt with the bankrupt with a view to purchasing Walford.

49. On the 5th January, 2017 a solicitor acting on behalf of Celtic Trustees Ltd, as trustee of the Merdon Trust, wrote to the Official Assignee stating that she was aware that the Official Assignee had issued proceedings and registered a *lis pendens* on the 9th December, 2016. She requested the Official Assignee to vacate the *lis pendens*. The letter stated that the trust, through Celtic Trustees Ltd, acquired Walford on 6th December, 2016 from Yesreb.

50. From 8th December, 2016, the date of the institution of the proceedings by the Official Assignee against Yesreb, the bankrupt volunteered no further information or purported cooperation to the Official Assignee. While there were more affidavits exchanged they were in the nature of arguments and assertions rather than further cooperation by the bankrupt with the Official Assignee.

Motions by the bankrupt

51. The bankrupt issued a motion seeking to cross examine the Official Assignee on his affidavits in support of the s. 85A motion. I heard that application on 1st February, 2017 and on 13th February, 2017 I refused the application. The bankrupt appealed to the Court of Appeal who upheld his appeal in December 2017. On 5th December, 2017 he served notices of intention to cross examine on the Official Assignee, Mr. Miltenberger and Mr. Doran.

52. On 8th December, 2017 the bankrupt brought a motion for discovery against the Official Assignee returnable for 15th December, 2017. It was given a listing for a day on 5th February, 2018. In the event it did not conclude within the day and was adjourned to 7th February. On the return date the bankrupt sought leave to file a further affidavit. He was granted leave to do so and the part-heard motion was put back to 1st March, 2018. The bankrupt then sought to have it listed for hearing for half a day, for the court to hear it and deliver judgment and the Official Assignee to make discovery (on the assumption the bankrupt was successful) before the date of the motion, 10th April, 2018. This was not possible due to pressure of other court commitments. He was told that the motion for discovery could be heard in the last week of the Hillary term and the hearing date of the s85A motion would be adjourned to June 2018. The bankrupt did not wish to adjourn the date and so he withdrew the motion for discovery in March 2018.

53. He also sought leave to seek judicial review of the decision of the Official Assignee not to apply to quash and/or strike out certain findings of fact made by the High Court critical of the bankrupt. The findings were that he had breached his obligations to disclose assets in earlier proceeding. The bankrupt said that these findings were untrue and ought to be quashed or appealed. The bankrupt was anxious that they should not be relied upon by the Official Assignee in this motion. He was informed that the court could not fix a date to hear the s.85A motion while the judicial review proceedings were outstanding as they could impact the matters which could be relied on at the hearing of the motion. In the event the bankrupt decided not to pursue the judicial review proceedings any further.

The Bankruptcy Amendment Act, 2015

54. The Bankruptcy Amendment Act, 2015 was commenced on the 29th January, 2016. It amended the provisions of s. 85A (4). The notice of motion issued on the 26th May, 2016. The parties are agreed that the matter is to be determined by reference to the amendments effected by the Act of 2015.

55. The first issue to be considered is whether events predating 29th January, 2016 may be taken into account by the court. In *O.H. v. O.H.* [1999] 2 I.R. 558 Barron J. in the High Court had to consider whether s. 29 (2) of the Judicial Separation and Family Law Reform Act, 1989 could have retrospective effect. Barron J. held that whether or not a statute should be regarded as having retrospective effect is a matter of construction of the provision concerned. While there is a presumption against retrospective construction, this is only another way of saying that unless there is a clear intention that it should be, it will not be so construed. On p. 563 of the report he held:

> *"In considering whether a statute should be construed retrospectively, a distinction is drawn between applying the new law to past events and taking past events into account. To do the latter is not to apply the Act retrospectively. This is expressed in Craies on Statute Law as follows: -*
>
> > *'But a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing.'"*

He held that the court was entitled to take into account periods during which the parties lived apart which predated the date upon which the Act came into force. If such facts were not taken into account, then for some time after the operative date a considerable portion of the jurisdiction created by the Act would be unenforceable.

56. O'Higgins C.J. in *Hamilton v. Hamilton* [1982] I.R. 466 adopted the definition taken from *Craies on Statute Law* to the effect that a statute is to be deemed to be retrospective in effect when it "*takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed.*"

57. In *Hefferon Kearns Limited (No. 1)* [1993] 3 I.R. 177 Murphy J. had to consider whether the liability created by s. 33 (1) (a) of the Companies (Amendment) Act, 1990 (which introduced a concept of civil liability of officers of a company in respect of debts of the company for reckless trading) was retrospective in its effect. Having considered the decisions in Hamilton v. Hamilton and *O.H. v. O.H.* Murphy J. held:

> *"If the legislation in the present case must be construed as operating prior to the operative date then unquestionably it is retrospective in the strict sense of that word. It would be the actual conduct of the officers of the company prior to the enactment of the legislation which would give rise to the statutory consequence. Their actions would not establish the conditions or prerequisites of liability but of themselves would (subject to the discretion of the court) give rise to a liability even if the conduct had ceased prior to the legislation coming into operation."* (p. 184).

He went on to hold that reckless trading was now an infringement of the law and to declare retrospectively innocent actions as constituting that wrong would necessarily amount to a breach of Article 15 of the Constitution. He therefore concluded that the Oireachtas did not intend (nor could it have intended) to make s. 33 of the Act operate retrospectively.

58. In *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 I.R. 64 Fennelly J. in the Supreme Court considered these authorities and in particular *Re Hefferon Kearns Limited*. At p. 86 he said:

> *"A retrospective interpretation of that provision would have attached serious legal consequences to past acts which they did not have at the time they were committed…In Re Hefferon Kearns Ltd (No. 1) [1993] 3 I.R. 177, Murphy J., observed at p. 187, that the "wrongdoing of reckless trading did not exist prior to the enactment of the 1990 Act."*

59. At p. 88 of the report he held that the two essential elements of the rule against retrospective legislation as it emerges from the authorities are:

> *"Firstly, it is designed to guard against injustice, in the sense that new burdens should not be unfairly imposed in respect of past actions; secondly, the rule is one of construction, not of law. It amounts to a presumption against retrospective effect which may be displaced by the clear words of the statute."*

Further on in the judgment, at p. 89 he said:

> *"It is, in any case, necessary to consider the nature of the vested or pre-existing rights that would be effected by reference to the words of the statute. More entrenched rights will require more clear language to affect them. Partial or marginal effects on such rights may more easily follow from the scheme of a legislative provision."*

60. In light of these authorities how should a court view s. 85A as amended by the 2015 Act? Section 85A was inserted by s. 157 of the Personal Insolvency Act, 2012 and commenced on the 3rd December, 2013. As and from that date the Official Assignee was empowered, prior to the discharge of a bankrupt, to apply to the court to object to the discharge of a bankrupt from bankruptcy in accordance with s. 85 where the Official Assignee believed that the bankrupt had:

> (a) Failed to cooperate 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.

Section 85A (1) – (3) were not amended by the Act of 2015. Subsection (4) was amended by the substitution of a new subsection (4). This provided as follows:

> *(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 just to do so, order that in place of the discharge provided for in section 85 the bankruptcy shall stand discharged on such later date*
> *(i) being not later than the 8th anniversary of the date of the making of the adjudication order, as the Court considers just, or*
>
> *(ii) being no later than the 15th anniversary of the date of the making of the adjudication order, which the Court considers just in view of the seriousness of the failure to co-operate referred to in paragraph (a) or the extent to which income or assets referred to in paragraph (b) were hidden or not disclosed, or both, as the case may be."*

The first part of subs. (4) is not altered by the substitution effected by the Act of 2015. The word "appropriate" has been changed to read "just" and the court is granted an additional, alternative period of postponement of the date of discharge. Where the court considers it just in view of the seriousness of the failure to cooperate referred to in para. (a) or the extent to which income or assets referred to in para. (b) were hidden or were not disclosed, or both, as the case may be, then the court may order that in place of the discharge provided for in s. 85 of the Act the bankrupt shall stand discharged on a date not later than the 15th anniversary of the date of the making of the adjudication order.

61. The jurisdiction to postpone the automatic discharge from bankruptcy to a date up to the 15th anniversary of the date of adjudication is based upon a serious failure to cooperate or the hiding or non-disclosing of assets or both in accordance with provisions that applied to all bankruptcies from the 3rd of December, 2013. If the court is exercising the jurisdiction conferred by s. 85A (4) (ii) it is not imposing a liability on a bankrupt where none previously existed. It is not taking away or impairing any existing right acquired under existing laws. Under the Act of 1988 as amended in 2012, the bankrupt was entitled to an automatic discharge from his bankruptcy on the 29th day of July, 2016 assuming he complied with all of his obligations under the Act. He was at risk of having his automatic discharge from bankruptcy postponed if he failed to cooperate with the Official Assignee in the realisation of his assets or if he hid from or failed to disclose to the Official Assignee income or assets which could be realised for the benefit of his creditors. In my opinion, following the distinction drawn clearly by Barron J. in *O.H. v. O.H.* between the application of new law to past events and taking past events into account, the application of the potential penalty inserted by the 2015 amendment to the acts and omissions of the bankrupt prior to the 29th January, 2016 is taking past events into account. It is not applying the new law retrospectively.

62. Prior to the enactment of the 2015 amendment, the bankrupt had an obligation to cooperate with the Official Assignee. If he failed to cooperate in the recovery of assets or hid assets or failed to disclose assets to the Official Assignee, he was at risk of having his automatic discharge from bankruptcy postponed. The change effected by the Oireachtas in 2015 was to make additional provision for sanctioning particularly serious failures on the part of bankrupts in relation to their existing statutory duties and obligations. Clearly the Oireachtas believed that the prior provision, where the maximum period a person could remain in bankruptcy no matter how egregious the behaviour was eight years, was insufficient to deal with particularly serious behaviour. This is not a punishment for behaviour that previously did not attract any liability, rather it increases the power of the court to impose an appropriate sanction for offending behaviour and thereby to uphold the integrity of the bankruptcy process.

63. It was accepted by counsel for the bankrupt that if his argument is accepted then the court may not have regard to any conduct of the bankrupt prior to the 29th January, 2016 in determining this application. It is said that if the Official Assignee had wished to rely upon his conduct prior to that date in order to object to the discharge from bankruptcy on the 29th July, 2016 that the Official Assignee ought to have brought this motion under the provisions of the Act as it stood on the 28th January, 2016. As he did not, he must abide by his decision, and it follows that the bankrupt is entitled to the benefit of the amendment to the law with the result that the court may not have regard to any conduct prior to the 29th January, 2016.

64. In my opinion this argument is without merit. Firstly, whether a statute has retrospective effect is a matter of construction primarily. In this case, a bankrupt stood to have the automatic discharge from bankruptcy postponed on the basis of behaviour specified in s. 85A occurring between the 3rd December, 2013 and the 28th January, 2016. There is nothing in the amendment to subs. 4 of s. 85A of the Act to suggest that the Oireachtas intended to absolve a bankrupt of the consequences of his or her behaviour during this period. On the contrary, the Oireachtas has increased the powers of the court to mark its concern with regard to especially egregious behaviour.

65. Secondly, as was observed in *O.H. v. O.H.*, the implication of the argument is that the enactment could in practice have no effect for some considerable period of time and this would appear to be contrary to the intention expressed by the legislature. The rule against retrospective legislation is a rule of construction. I do not believe, properly construed, this is retrospective legislation.

66. The provisions of the Interpretation Act, 2005 are consistent with this view. Section 26 provides that where an enactment repeals another enactment and substitutes other provisions for the enactment so repealed, the enactment so repealed continues in force until the substituted provisions come into operation. Thus, in this case, s. 85A (4) as inserted by the 2012 Act continued in force until the version of s. 85A (4) substituted in 2015 came into effect. The earlier version was repealed and substituted by the 2015 text. Section 27 of the Interpretation Act specifies the effect of the repeal of an enactment. It provides as follows:

> *"27.(1) Where an enactment is repealed, the repeal does not—*
>
> *(a) revive anything not in force or not existing immediately before the repeal,*
>
> *(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,*
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or*
>
> *(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.*
>
> *(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed.*

67. The repeal of s. 85A (4) as inserted by the Act of 2015 does not affect the previous operation of the enactment. It does not affect any obligation or liability acquired, accrued or incurred under the enactment. Thus the obligation of the bankrupt to comply with the bankruptcy regime and in particular the provisions of the Bankruptcy Act, 1988 as amended applied from the date of his adjudication and continued to apply notwithstanding the substitution of s. 85A (4) by the Act of 2015. Legal proceedings in respect of an obligation or a liability acquired, accrued or incurred under the repealed enactment may be instituted, continued or enforced "and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out" as if the enactment had not been repealed. The bankrupt's submissions that he can have no liability for his actions prior to the 29th January, 2016 is contrary to the provisions of s. 27 (2). The Official Assignee was entitled to bring legal proceedings after the repeal of the 2012 enactment in relation to obligations or liabilities of the bankrupt acquired, accrued or incurred in respect of the repealed enactment. He was entitled to institute those proceedings as if the enactment had not been repealed. Any penalty or punishment in respect of any contravention of the enactment may be imposed by the court and carried out as if the enactment had not been repealed.

68. In my opinion the court is entitled to consider the actions of the bankrupt prior to the 29th January, 2016. This is not applying the legislation retrospectively. The substantive provisions of s. 85A were the same from the 3rd December, 2013. The fact that the court is empowered to postpone the automatic discharge from bankruptcy for a longer period does not alter this fact and does not make the application of the Act retrospective.

Jurisdiction to bring the application

69. The bankrupt argued that the Official Assignee had no jurisdiction to bring this application on three grounds.

> (1) The US bankruptcy was first in time and all of his estate vested in the US trustee. There was no vesting of any estate in the Official Assignee and therefore he had no jurisdiction to bring this application.
>
> (2) The bringing of this application breached the order of the US bankruptcy court which modified the worldwide stay on creditor actions.
>
> (3) The Official Assignee could not bring the application because, in breach of undertakings to the US bankruptcy court, no ad hoc protocol had been adopted by the Official Assignee and the US trustee.

Ground (1)

70. In *A.A v. B.A.* [2015] IESC 102 at para. 32 Charleton J. addressed the situation where B.A. had been adjudicated bankrupt both in the United States and in Ireland. He held:

> *"The High Court is entitled only to act on the basis of the legislation conferring authority on the courts of this jurisdiction… The claim by BA that the Official Assignee has no interest in the estate of this bankrupt because of the*

prior adjudication in bankruptcy under a foreign legal system has not been demonstrated."

At para. 34 he concluded:

> *"The duty under the Act of 1988 remains clear: once a person is adjudicated bankrupt in Ireland, the provisions of the legislation are to be followed."*

71. This decision was delivered on the 9th November, 2015 and is binding on the bankrupt. If the bankrupt had any legitimate doubt as to his obligation to comply with the requirements of the Irish bankruptcy code on the basis of his prior adjudication in the United States, he could have none after the delivery of this judgment.

72. These observations could not be clearer and are binding upon me (as well as the bankrupt). They were made in circumstances where the foreign bankruptcy occurred prior to the adjudication in Ireland. As in this case, the bankrupt asserted that his estate did not vest in the Official Assignee on date of his adjudication in Ireland but had vested in the foreign insolvency representative on the date of his foreign bankruptcy.

73. In my opinion there is a fundamental distinction to be made between the vesting of assets in a bankruptcy representative and the compliance of a bankrupt with his or her legal obligations under a bankruptcy regime. Whether ultimately the assets of the bankrupt are held to have been vested in the US trustee or the Official Assignee is not a matter which impacts upon the bankrupt's obligations to comply with the requirements of the Bankruptcy Act, 1988 as amended. There is nothing in any of the cases upon which the bankrupt sought to rely which alters this fundamental point. The vesting of a bankruptcy estate is not a precondition to the bringing of an application for an extension under s. 85A of the Act. In any event the Supreme Court has acknowledged that in relation to this bankruptcy the Official Assignee has at the very least an *ad colligenda* role. Therefore, the bankrupt is without question obliged to assist the Official Assignee in relation to the gathering in of the assets of the estate. This underscores his obligation to comply with his obligations of disclosure and cooperation under the Act of 1988. This ground for alleging that the Official Assignee has no jurisdiction to bring this application is rejected.

Ground (2)

74. Upon his adjudication as a bankrupt in the United States, a worldwide stay prohibiting creditor action against the estate of the bankrupt came into effect. On the 12th June, 2013 Judge Shiff in the US bankruptcy court in Connecticut granted the petitioner a limited relief and modified the automatic stay in the following terms:

> *"Parties in interest to continue with the Irish bankruptcy proceeding and to take all actions necessary in connection with or relating to Ulster's application to have the debtor adjudicated a bankrupt in the Irish bankruptcy proceeding, provided however that nothing in this order shall deprive this court of jurisdiction over the debtor or over the property of the bankruptcy estate.*
>
> *Ordered that until the High Court of Ireland makes an order adjudicating the debtor "bankrupt" in the Irish bankruptcy proceedings …Richard N. Coan, trustee of the bankruptcy estate of debtor, shall use his good faith reasonable judgment to minimise the costs and expenses he incurs in connection with matters that he believes, in his good faith reasonable judgment, are more appropriately resolved in concert with the representatives of the Irish bankruptcy proceeding…*
>
> *Ordered that this order is without prejudice to the ability of any party to seek relief from this court and this order, as appropriate, and this court reserves and preserves jurisdiction to consider any dispute with respect thereto".*

In the transcript of the hearing giving rise to the order of 12th June, 2013 Mr. Miltenberger, counsel for the US trustee, confirmed that he agreed to an order that would allow Ulster Bank to effect service, move the petition to determine whether Mr. Dunne is bankrupt and if appropriate for the Irish court to appoint a representative. The court noted that Mr. Dunne's attorney indicated that *"he would not be hostile to the* ***provision in an order*** *that no party in interest here or there would seek to affect the interests of property wherever it is without the order of this court, and perhaps without the order of both courts…so this court cannot, as you certainly know, direct any order to an Irish court. This court does not have authority to do anything like that. All I can do is direct people not to do things*."

75. There is nothing in the terms of the order modifying the worldwide stay or in this exchange between the court and counsel for the US trustee which would preclude the Official Assignee from bringing an application to this court pursuant to s. 85A of the Act of 1988 as amended. Judge Shiff was clearly aware that if the bankrupt were adjudicated bankrupt in Ireland that the Irish court would apply its own laws and he expressly was not directing any order to an Irish court. The issue of the distribution of the assets and the order of priorities amongst the creditors are matters which will require to be resolved in due course but it is clear that in neither jurisdiction has the issue of the vesting of the estate and the distribution of the assets been the subject of an application involving both the US trustee and the Official Assignee, still less a resolution by any court.

76. Further, the stay of the US bankruptcy court is upon creditor actions. This is not a creditor action. This is an action brought by a bankruptcy representative, the Official Assignee, seeking to uphold the integrity of the bankruptcy process in this jurisdiction by a penal sanction against the bankrupt personally. It does not affect the property of the bankruptcy estate one way or the other. Furthermore, it does not deprive the US bankruptcy court of jurisdiction over the debtor or the bankruptcy estate in any way.

Ground (3)

77. The bankrupt argued that the petitioning creditor and the US trustee had represented to the courts in the United States, (both the US bankruptcy court and the federal court on appeal) that they envisage entering into an ad hoc protocol with the Official Assignee in the event that he was adjudged a bankrupt in this jurisdiction. He complained that the failure to adopt such a protocol had led to a fundamental unfairness in the procedures and that the Official Assignee was not entitled to maintain the s. 85A proceedings in the absence of the protocol which he describes as the "bedrock" of the dual bankruptcy.

78. Despite the emphasis that the bankrupt placed upon the adoption of an ad hoc protocol, it is notable that the US trustee was not required to and did not give an undertaking to enter into an ad hoc protocol to the US bankruptcy court. Neither has it been ordered by any court in this jurisdiction. It was envisaged that this would be the appropriate way in which to pursue matters. The fact that the US trustee and the Official Assignee have not to date required an ad hoc protocol in order to progress the dual bankruptcies does not mean they have been in breach of any undertaking to a court in the United States still less to any court in this jurisdiction. On the contrary, when the bankrupt brought a motion to require the US trustee to enter into a protocol, the motion was denied by Judge Shiff and he has said that it is a matter for the US trustee and The Official Assignee.

79. Furthermore, the bankrupt was entitled to apply to the High Court pursuant to s. 61 (7) of the Bankruptcy Act, 1988 as amended in relation to any wrongful failure by the Official Assignee to adopt an ad hoc protocol in respect of the dual bankruptcy. He made no such application to this court. In the circumstances it is difficult to see how the fact that the Official Assignee and the US trustee have not agreed an ad hoc protocol can deprive the Official Assignee of the power to bring an application to court pursuant to s. 85A when that power is expressly conferred on him by statute. While I am by no means persuaded that a statutory power of this nature could be effectively forfeit by reasons of the actions or inactions of the Official Assignee, this is not a matter upon which I am required to rule as I am satisfied that the facts in this case fall below any possible threshold in that regard.

80. I am not persuaded that there is any reason arising out of the US bankruptcy or any orders made in the course of the US bankruptcy which deprives this court of jurisdiction to hear and determine an application brought by the Official Assignee pursuant to s. 85A of the Act of 1988 as amended.

Construction of s. 85A (4)
81. The bankrupt made several submissions in relation to the construction of this subsection and its application to the facts in this case. First, he submitted that where the court makes an order pursuant to s. 85A (3) and subsequently proceeds to consider the matter pursuant to s. 85A (4), it is not open to the court to have regard to any conduct of the bankrupt during the period when the Official Assignee was investigating matters pursuant to s. 85A (3). He treats the two subsections as distinct bases upon which the court may determine to postpone the automatic discharge from bankruptcy pursuant to s. 85 of the Act. This is reflected in the decision of the Supreme Court in *Killaly (a Bankrupt) v. The Official Assignee* [2014] 4 I.R. 365. Counsel emphasised that the postponement of the date of discharge from bankruptcy is penal in nature and this was a reason why the two subsections should be construed disjunctively. That being so, the court determining an application pursuant to s. 85A (4) could not have regard to the conduct of the bankrupt during the period of a s. 85A (3) order. This would amount to a quasi-double jeopardy.

82. It seems to me that this argument cannot be sustained on the basis of the provisions of subs. 3. Subsection 3 provides:

> *"(3) Where it appears to the Court that the making of an order pursuant to subsection (4) may be justified, the Court may take 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".*

83. The purpose of subs. (3) is to afford the Official Assignee further time to investigate matters of which he makes complaint pending the making of a determination of the application that the bankruptcy shall not stand discharged pursuant to subs. (4). This is necessary because the Official Assignee may not have completed his investigations into the estate of the bankrupt and therefore may not be in a position to present a comprehensive application to court prior to the date of the automatic discharge from bankruptcy. Of course, an order under s. 85A (3) must be justified and the Official Assignee must adduce evidence to satisfy the court that it should make an order under s. 85A (3), (see *Killaly and Lehane v Daly, ex temp.* unreported, High Court, Costello J, 31st January, 2017) but this should not distract from the fact that such an order may not be granted in its own right, but only as a preliminary to an application brought pursuant to s. 85A (4). The purpose of the investigation is to inform the s. 85A (4) application. It would defeat the statutory purpose if the conduct of the bankrupt during the period of the s. 85A (3) investigation and the results of that investigation could not be considered by the court on the hearing pursuant to subs. (4). It would be inconsistent with the decision in *Killaly* where Clarke J said :

> *"Where…the court feels that further inquiries require to be made, then the court can postpone making an order under s.85A(4) and direct inquiries under s. 85A(3). The court can, thereafter, consider what to do about making a substantive order under s. 85A(4) in light of the progress and results of the relevant inquiries."*

The progress and results of the inquiries must include the lack thereof. For this reason, I conclude that the court not only may, but must, have regard to the conduct of the bankrupt during the period that a s. 85A (3) order applied. To hold otherwise, could work a grave injustice to a bankrupt who remedied his previous default and cooperated fully with an Official Assignee during such the period of investigation. Could it be said that the court could not have regard to such conduct? I think not. If the court may look at the cooperation and disclosure of the bankrupt pursuant to a s. 85A (3) investigation, it must be entitled to have regard to any continued lack of cooperation or disclosure of information or assets.

84. The second argument concerned the construction of the phrase "income or assets which could be realised for the benefit of the creditors of the bankrupt" in s. 85A (1) (b). The bankrupt submitted that the imposition of punitive sanctions for the failure to disclose assets which "could be realised" for the benefit of creditors demands the identification by the Official Assignee of assets which could in fact be realised, and not assets which the Official Assignee subjectively and/or unreasonably believes might be realised at some point in the future. For the purpose of the subsection, if an asset is to be realisable it has to be clearly and demonstrably an asset of the bankrupt's estate.

85. In reply counsel for the Official Assignee emphasised the fact that part of the estate which vests in the Official Assignee upon the adjudication is any chose in action in which the bankrupt is engaged or is entitled to pursue. The Official Assignee must be entitled to investigate whether or not the estate in fact has a good claim to any particular asset or assets. The duty of the bankrupt must be to cooperate with this investigation even if in the end it turns out that the asset is not in fact an asset of the bankruptcy estate. The Official Assignee must act bona fide in his investigations but that does not mean that he is required to show that he has a stateable case in the first place to the assets or income in question. He must be able to explore whether he can establish a stateable case. For this reason, the Official Assignee disagrees that for an asset to be realisable within the meaning of subpara. (b) it has to be clearly and demonstrably an asset of the bankrupt's estate. Subparagraph (b) refers to assets "which could be realised" for the benefit of creditors. If the Oireachtas had intended that the test should be assets which could in fact be realised the phrase "which could be realised for the benefit of the creditors of the bankrupt" is superfluous. An asset which could in fact be realised is an asset of the estate and sub para. (b) could simply have read "hidden from or failed to disclose to the Official Assignee income or assets".

86. I agree with the submission of the Official Assignee that the enquiry has to be bona fide. If the Official Assignee has a genuine query about an asset in respect of which there is a prospect that it could be recovered for the benefit of creditors, then he must be entitled to investigate that possibility. In that case, the bankrupt may not take the unilateral view that the asset is in fact not an asset of the estate and that therefore he, the bankrupt, is not obliged to provide the information available to him to the Official Assignee. That is the logical consequence of the construction of the section contended for by the bankrupt in this case. Such a construction is inconsistent with the wording of the section: it does not refer to assets that will or can be realised, but to assets that could be realised. It is also inconsistent with the overall role of the Official Assignee in gathering in the assets of the estate for the benefit of the creditors and the obligations on a bankrupt and other persons having information relevant to matters under investigation to cooperate with the Official Assignee in that regard.

87. In this regard it is relevant to consider the provisions of s. 21 (1) of the Act which provides:

> *"21.—(1) The Court may summon before it a bankrupt or any person who is known or suspected to have in his possession or control any property of the bankrupt or to have disposed of any property of the bankrupt or who is supposed to be indebted to the bankrupt, or any person whom the Court deems capable of giving information relating to the trade, dealings, affairs or property of the bankrupt.)"*

A bankrupt and indeed any other person coming within the scope of s. 21 whom the court deems capable of giving information relating to the dealings and affairs of the bankrupt may be summoned before the court and examined on oath concerning these matters. This underscores the scope of the obligation of the bankrupt to provide information to the Official Assignee in relation to his dealings and affairs. It is not confined to his assets in the narrow sense of the word.

88. Further, the construction contended for would have the effect of ensuring that the most egregious offenders would be the least likely to be sanctioned for their behaviour. The lack of cooperation of a bankrupt in the Official Assignee's efforts to determine whether or not an asset is an asset in the estate could be so obstructive that by the time an application pursuant to s. 85A (4) is heard the Official Assignee remains largely in the dark and is unable to demonstrate that it is an asset of the estate due precisely to lack of cooperation complained of, rather than the fact it is not an asset of the estate, with the result that no sanction can be applied against the bankrupt under s. 85A (4). This means that there will be no incentive – and indeed there may be a disincentive - for a bankrupt to cooperate with the Official Assignee. The bankrupt cannot be subjected to punitive sanctions if he frustrates the Official Assignee's efforts to establish that the asset is an asset of the estate. It potentially makes the section completely unworkable. I do not accept that the bankrupt's submissions in this regard are correct.

89. Thirdly, the bankrupt advanced a specific argument about the bankrupt's cooperation or lack of cooperation in the investigation into the ownership of Walford. Both the Official Assignee and the bankrupt agreed that the question of the ownership of Walford could not be decided in these proceedings and would be decided in other proceedings. On that basis, the bankrupt submitted that the court must not form a view as to the ownership of Walford or indeed in relation to the accuracy or truthfulness of any utterance or response of the bankrupt to any question on the issue of Walford. He argued that the question of the degree of the alleged non-cooperation of the bankrupt must be viewed in isolation from the Walford issue.

90. In my opinion this submission is without merit. The issue for determination is not whether the bankrupt had an interest in Walford and whether it forms part of the bankruptcy estate. The issue is whether the bankrupt has cooperated with the Official Assignee in his investigation into that very question. The fact that the proceedings relating to Walford have not concluded cannot mean that the issue of whether the bankrupt has cooperated in the investigation of the Official Assignee into the beneficial ownership of Walford cannot be even assessed, much less determined, by this court. There is nothing in the wording of s. 85A to support this argument. The section does not require the Official Assignee to demonstrate that an asset or income is in fact part of the bankruptcy estate. It follows that the fact and outcome (to date) of the Official Assignee's investigation into the assets of the bankrupt's estate must be considered as part of the court's assessment of a s. 85A application. Certainly it is no reason why the court may not assess the accuracy or truthfulness of any utterance or response of the bankrupt to any question on the issue of Walford. I therefore reject the submission that the degree of cooperation or hiding of assets by the bankrupt should be assessed without reference to any asset the subject of asset recovery proceedings, and in particular the investigation into the ownership of Walford.

91. In an additional submission, counsel on behalf of the bankrupt argued that in assessing the conduct of a bankrupt for the purposes of an application for an order pursuant to s. 85A (4) the court should have regard to the subjective belief of the bankrupt as to whether (1) he was required to cooperate with the Official Assignee in relation to his investigations and (2) whether he, the bankrupt, had an interest in Watford. This cannot be correct. A bankrupt cannot unilaterally decide whether an asset should be disclosed to the Official Assignee. A bankrupt's statutory obligations and liabilities cannot be limited by his alleged subjective belief as to the extent of those obligations and liabilities. They are as laid out in statute and as interpreted by the courts. Not only may a bankrupt not be the arbiter of which obligations he is required to comply with, he may not decide the extent of that co-operation or engagement. He cannot decide to disclose some information about some assets and unilaterally decided that this satisfies his obligations. There is no such thing as a minimum threshold of cooperation with the Official Assignee (see *In Re McFeely* [2016] IEHC 299). It is not sufficient simply to answer the questions of the Official Assignee as the Official Assignee frequently will not have sufficient information regarding the estate when he commences the investigation to enable him to investigate and inquire into all assets of the estate. (See *Lehane v. Webster* [2018] IEHC 41). This is particularly so where bankrupts seek to conceal assets. It is clear that the onus is on the bankrupt proactively to furnish the information available to him relevant to his estate to the Official Assignee.

92. In this case the bankrupt did not accept the validity of his adjudication in Ireland and he brought an application to show cause. This was rejected in the High Court and was appealed to the Supreme Court. Until the date of the decision of the Supreme Court, it was the bankrupt's subjective belief that he was not properly bankrupt in this jurisdiction and therefore was not required to cooperate in any way with the Official Assignee. However, this is inconsistent with the decision of Charleton J. in *AA v. AB*. It was also flatly denied by the Official Assignee.

93. The logic of the bankrupt's position is that he is entitled to withhold information about an asset on the basis of his subjective belief that it does not belong to him and is not an asset of his estate. That assessment no longer rests with him once he has been adjudicated a bankrupt. It is a matter for the Official Assignee to investigate and determine whether he wishes to make a claim to the asset in question. The obligation of the bankrupt to cooperate with the Official Assignee in relation to that investigation is clear. The subjective belief of the bankrupt does not and cannot alter that obligation. To hold otherwise would be to facilitate bankrupts in denuding their estates of assets prior to adjudication with a view to defeating creditors and would gravely undermine the integrity of the bankruptcy regime and is inconsistent with the provisions of the Act. I therefore will not assess this application having regard to the subjective belief of the bankrupt as to his obligations under the Act and as to the ownership of Walford in particular.

The relevant statutory obligations and duties

94. Sections 19 and 20 of the Act provide as follows:

> *"19.—The bankrupt shall—*
>
> *(a) unless the Court otherwise directs, forthwith deliver up to the Official Assignee such books of account or other papers relating to his estate in his possession or control as the Official Assignee may from time to time request and disclose to him such of them as are in the possession or control of any other person;*
>
> *(b) deliver up possession of any part of his property which is divisible among his creditors under this Act, and*

which is for the time being in his possession or control, to the Official Assignee or any person authorised by the Court or otherwise under the provisions of this Act to take possession of it;

(c) unless the Court otherwise directs, within the prescribed time file in the Central Office a statement of affairs in the prescribed form and deliver a copy thereof to the Official Assignee;

(d) give every reasonable assistance to the Official Assignee in the administration of the estate;

20.—(1) A bankrupt shall forthwith notify the Official Assignee in writing of any change in his name or address which occurs during his bankruptcy.

(2) For the purposes of subsection (1) a change in the name of a bankrupt shall be deemed to occur if the bankrupt in fact assumes the use of a different name or an additional name.

(3) A bankrupt shall, whenever required by the Official Assignee to do so, forthwith notify the Official Assignee in writing of the nature of any profession, vocation, business or employment in which he is engaged.

(4) A bankrupt who fails to comply with any of the provisions of this section shall be guilty of an offence. (e) disclose to the Official Assigne any after-acquired property.

These sections set out the duties and obligations of the bankrupt. In addition to the bankrupt, other parties are required to cooperate with the enquiries and investigations into the bankrupt's affairs and the Official Assignee may apply to court pursuant to s.21 for an order summoning to court for examination any person who is known or suspected to have in his possession or control any property of the bankrupt or to have disposed of any property of the bankrupt, or whom the court deems capable of giving information relating to the trade, dealings, affairs or property of the bankrupt.

95. Section 44 (1) provides that when a person is adjudicated bankrupt all property belonging to that person shall on the date of adjudication vest in the Official Assignee for the benefit of the creditors of the bankrupt. It is important to note that "property" is very widely defined in s. 3 and includes choses in action.

property" includes money, goods, things in action, land and every description of property, whether real or personal and whether situate in the State or elsewhere; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined;

96. In addition to the general duty to provide the Official Assignee with all books and records in relation to the estate and all information relating to his trade, dealings, affairs and property, a bankrupt has certain specific obligations. A bankrupt is required to notify the Official Assignee of his address and s. 20 (1) requires him to notify the Official Assignee in writing of any change of his address which occurs during his bankruptcy. The Court of Appeal in *McFeely* held that this requires a bankrupt to inform the Official Assignee of the address or addresses at which he actually resides or resided from time to time.

"His statutory obligations under the 1988 Act includes an obligation to inform the Official Assignee where he resides, not simply so that correspondence may be sent to him, but so that the Official Assignee can perform his own statutory functions for example by investigating the bankrupt's lifestyle as deposed to by him as I have set forth. In this case the appellant has decided what he will and will not choose to disclose as far as his living arrangements are concerned. He is not entitled to do that. His failure in this regard, despite the reason that he has given, is a matter which, with others, the trial judge was entitled to take account of when deciding whether the extent of his non co-operation overall merited an extension of his bankruptcy and the length of any such extension for the purposes of s. 85A of the 1988 Act."

97. The bankrupt is obliged to furnish certain basic personal information. A bankruptcy file is available for public inspection and the Official Assignee was conscious that information he required from bankrupts is personal to them and could facilitate identity theft. Therefore, his office produced a Statement of Personal Information form to be completed by all bankrupts and which is not placed on the public file. All bankrupts are required as a minimum to furnish the Official Assignee with an accurately completed Statement of Personal Information.

98. If the Official Assignee has any questions in relation to the estate, a bankrupt is required to attend for interview. In *McFeely's* case, I held that it was not open to the bankrupt *"to dictate where he would be interviewed by the Official Assignee (by insisting that the Official Assignee should travel to Derry to interview him)."* In *Lehane v. Webster* [2018] IEHC 41, para. 26 I described the obligation of the bankrupt in the following terms:

"To disclose on a proactive basis the necessary information regarding his or her assets, liabilities and affairs and it is not sufficient simply to respond to queries from the Official Assignee."

99. In *McFeely, a bankrupt* [2016] IEHC 299 at para. 6 I said:

"6. Cooperation, first and foremost by the bankrupt, but by others also, with the Official Assignee is absolutely essential to the operation of the bankruptcy process. Quite simply, it cannot operate without the full cooperation of bankrupts. They have the information in relation to their estates and normally have possession of both the property and the relevant documentation or the relevant information and/or documentation is in the possession of their accountant, solicitor or other agents. It is essential to the integrity of the bankruptcy regime that the various obligations imposed by the Act on each bankrupt personally are observed and complied with fully and to the best of their respective abilities. There is no such thing as a minimum threshold of cooperation. It is for this reason that the Oireachtas has conferred a power upon the court to extend the period of bankruptcy and not to permit the automatic discharge from bankruptcy after the expiration of three (and now one) years from the date of adjudication where the court is satisfied that there has been either non-cooperation by the bankrupt with the Official Assignee in the conduct of the bankruptcy or there has been a failure to disclose assets or an attempt to hide assets from the Official Assignee.

100. Also in *McFeely*, at para. 17 I rejected the idea that a bankrupt could comply with his obligation to provide a statement of affairs to the Official Assignee which had been prepared for bankruptcy proceedings in another jurisdiction. At para. 17 I stated

"As a matter of principle, this does not and cannot amount to compliance with the statutory obligation under the regime

in this jurisdiction."

101. Official Assignee has an obligation to gather in the assets of the estate and to discharge the liabilities of the estate in accordance with law. In order to carry out that function he is required to investigate the affairs of the bankrupt. He is required to ascertain if there are claims which the estate may make to assets held by persons other than the bankrupt, so called recovery actions. As a preliminary to bringing any recovery action, he must be entitled to investigate whether or not it is appropriate to bring such an action. This sets the parameters of the legitimate scope of his inquiries. The breadth of the enquiries which the Official Assignee is required to carry out in fulfilment of his statutory duties is reflected in the breadth of the matters in respect of which any person may be summoned to give information pursuant to s. 21: this applies to any person "whom the court deemed capable of giving information relating to the trade, dealings, affairs or property of the bankrupt". It is not limited technically to the assets of the bankrupt.

102. Section 85 as amended by the Personal Insolvency Act, 2012 provided for the automatic discharge from bankruptcy on the third anniversary of the date of the making of the adjudication order unless prior to the date the bankruptcy has been discharged or annulled subject to (2) and s. 85A. Section 85 was further amended by the Bankruptcy (Amendment) Act, 2015 so that, subject to subs. (2) and s. 85A, every bankruptcy shall on the first anniversary of the date of the making of the adjudication order stand discharged. Subsection 2 provides:

> *"(2) (a) Where an adjudication order in respect of a bankruptcy would, but for section 10 of the Bankruptcy (Amendment Act 2015, expire on any day during the period of 6 months from the commencement of that section, the bankruptcy concerned shall, subject to section 85A, stand discharged on that day unless it has otherwise been discharged or annulled.*
>
> *(b) Where an adjudication order in respect of a bankruptcy would, but for section 10 of the Bankruptcy (Amendment Act 2015, expire at any time after the expiration of 6 months from the commencement of that section, the bankruptcy concerned shall, subject to section 85A, stand discharged on the later of-*
>
> > *(i) 6 months after that commencement, or*
> >
> > *(ii) one year from the date that the adjudication order was made, unless it had otherwise been discharged or annulled."*

103. On the facts in this case, subject to s. 85A, the bankrupt would have been automatically discharged from bankruptcy on the 29th July, 2016 pursuant to the provisions of s. 85 (2) (b) (i).

104. Section 85A as amended by the 2015 Act provides:

> *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 just to do just so order that, in place of the discharge provided for in section 85, the bankruptcy shall stand discharged on such later date-*
>
> > *(i) being not later than the 8th anniversary of the date of the making of the adjudication order, as the Court considers just, or*
> >
> > *(ii) being not later than the 15th anniversary of the date of the making of the adjudication order, which the Court considers just in view of the seriousness of the failure to co-operate referred to in paragraph (a) or the extent to which income or assets referred to in paragraph (b) were hidden or not disclosed, or both, as the case may be.*
>
> *(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.*

105. The effect of the 2015 amendment was to amend subs. 4. In subs. (b) (i) the phrase "as the court considers appropriate" has been replaced by "as the court considers just". The major amendment is to insert the alternative option for the court as set out in (ii).

Discussion

106. There are two distinct grounds upon which an application for the extension of the period of bankruptcy may be brought:

> (a) Where the bankrupt has failed to cooperate with the Official Assignee in the realisation of the assets of the bankrupt or
>
> (b) Where the bankrupt has 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.

107. In his closing submissions counsel for the Official Assignee applied for the order postponing the automatic discharge of the bankrupt from bankruptcy on the following grounds: -

> (a) The failure to deliver a statement of affairs until the 14th June, 2016.
>
> (b) The failure to disclose the address at which he actually resides until 1st December, 2017.
>
> (c) The failure to provide basic essential information in his statement of personal information which was not delivered until the 3rd March, 2016 and his failure to attend for interview until the 29th June, 2016.
>
> (d) His failure to disclose assets which could be realised for the benefit of his creditors while actively concealing from the Official Assignee the nature and extent of his interest in and dealings with major assets which could be realised for the benefit of creditors.
>
> (e) The court was asked to consider his conduct both prior to the issuing of the motion and since the motion issued. The court was asked to consider the explanations advanced by the bankrupt for his conduct and to consider the fact that he lied to the Official Assignee at interview on 29th June, 2016.

Failure to deliver a statement of affairs

108. There was a clear breach of the statutory obligation on any bankrupt to deliver a statement of affairs by the bankrupt until the 14th June, 2016. For much of the duration of the bankruptcy the bankrupt insisted that the estate was nil as all of his assets had vested in the US trustee. This was a legal conclusion which was unilaterally arrived at by the bankrupt. His solicitors wrongfully stated that this reflected the decision of the Supreme Court. It did not provide a valid basis for refusing to complete a statement of affairs or indeed a statement of personal information or to attend for interview. He was simply not entitled to say that he had fulfilled his statutory obligation by furnishing a statement of affairs or the equivalent document prepared or submitted in respect of a bankruptcy in another jurisdiction. This has been held in the High Court and the Court of Appeal in the case of *McFeely*. It is clear that he only filed the statement of affairs because he would not otherwise obtain a discharge from bankruptcy within this jurisdiction. His failure to comply with his statutory obligations for the period of 34 of the 36 months of his bankruptcy was wilful and deliberate in light of the extensive correspondence from the Official Assignee and his solicitors repeatedly calling for the delivery of a sworn statement of affairs.

Failure to complete a Statement of Personal Information

109. In addition, he failed to complete the statement of personal information until the 3rd March, 2016. The bankrupt did not receive the letter requesting him to arrange to attend for interview at the time he was expected to be in Dublin for an international rugby match because he did not give the Official Assignee the required personal contact details which would have enabled him to contact the bankrupt directly. The statement of personal information was only furnished towards the end of his bankruptcy period with a view to seeking his discharge from bankruptcy. Even then it was incomplete as it did not give personal contact details or basic personal information such as whether he owned or rented the house where he lived and whether he provided for his dependant young children. It was not done in order to cooperate with the Official Assignee in relation to the administration of his estate. The information included in the statement was effectively withheld from the Official Assignee for nearly the whole duration of the normal bankruptcy period.

Failure to make himself available for interview and to hand over all relevant documents

110. He repeatedly failed to inform the Official Assignee when he would be present in the jurisdiction and to make himself available for interview. He suggested that the Official Assignee conduct the interview in the United States or by teleconference despite the fact the uncontroverted evidence was that he was in the jurisdiction many times post his adjudication and never sought to contact the Official Assignee's office to inform them of his availability within the jurisdiction. It was suggested that the Official Assignee participate in the s. 341 examination in the United States. Finally, it was suggested that the questions be provided in advance of the interview.

111. The cumulative effect was greatly to obstruct the Official Assignee in his administration of the estate by withholding the information known or available to the bankrupt in relation to his dealings, affairs and property from the Official Assignee and forcing the Official Assignee to rely upon information obtained from the US trustee, or from third parties connected with the bankrupt. In particular, the Official Assignee was required to resort to s. 21 interviews with persons who either acted for the bankrupt or had dealings with the bankrupt for information regarding his assets dealings and affairs. He was also required to obtain assets and documents of the bankrupt within the jurisdiction on foot of s. 28 warrants of seizure.

112. The bankrupt attended for interview with the Official Assignee on the 29th June, 2016 after the bankrupt had provided the statement of affairs on the 14th June, 2016. The Official Assignee accepted that during the first nine months of 2016, including the interview on the 29th June, 2016, the bankrupt engaged with the Official Assignee and provided more information than had previously been made available to the US trustee in relation to his affairs and bankruptcy estate. However, as I discuss below, the bankrupt sought to give the appearance of cooperation for his own ends with a view to securing a discharge rather than to provide the substance of cooperation and information actually required by the Official Assignee. The bankrupt has consistently and, indeed, vehemently, denied that the Official Assignee has any right to the information which the Official Assignee seeks from the bankrupt in

relation to valuable assets held or beneficially owned by the bankrupt's wife and children which the Official Assignee says warrant investigation to establish whether they are part of the bankruptcy estate.

Failure to give his address

113. The bankrupt deliberately withheld his residential address from the Official Assignee from the date of his adjudication until 1st December, 2017. Initially the Official Assignee had to obtain an address from the papers filed in the US bankruptcy. The bankrupt maintained he resided at 22 Stillmann Lane, Connecticut. Both the US trustee and the Official Assignee were aware of the fact that, while this may once have been true, this was not so as the house was for sale and was either empty or largely unfurnished for two years. At his interview on the 29th June, 2016 the first question put to him by the Official Assignee was his address. He maintained that Stillman Lane was his principal private residence even though he did not live there all the time. He said "I don't need furniture to live in a house". When cross examined in court he said:

> *"I have slept in all sorts of conditions. I go to townships in Africa where we sleep in tents. Yes, I can live without furniture.*
>
> *Question. And that is your explanation.*
>
> *Not for the rest of my life, but certainly, yes there are occasions and for me to be in Greenwich, Connecticut, and have the peace and quiet of a house without furniture, what do you need furniture for".*
>
> *Later in evidence he said "I don't spend a great amount of time there".*

114. He rejected the idea that the Official Assignee needs to know the living circumstances of a bankrupt. This is completely inconsistent with the decision of the Court of Appeal in *McFeely*.

115. On the 6th September, 2016 the bankrupt wrote directly to the Official Assignee giving his address as 22 Stillman Lane but stating that his second place of residence in the USA is 232 Mott Street Apt. New York. He says this is an apartment leased by his son John. When Mr. John Dunne was cross examined by Mr. Miltenberger, attorney for the US trustee, in proceedings in the United States brought by the US trustee, Mr. John Dunne said that his father did not live with him and that he slept there "the odd time". Thus neither of these addresses can be considered to be the principal place of residence of the bankrupt for the period of his bankruptcy.

116. At the interview of the 29th June, 2016 the bankrupt was informed that he could notify the Official Assignee of his residence by a letter to the Official Assignee's solicitors and this letter would not appear on the file available for public review. This was to meet the stated concerns of the bankrupt relating to press intrusion on the privacy of his family and in particular his young children. Notwithstanding this assurance, the bankrupt did not in fact furnish his residential address in response to that offer.

117. In separate commercial court proceedings, the bankrupt's wife swore an affidavit without giving her address. She was required to do so and her solicitor handed her address into court on a piece of paper to avoid publicity. However, it was not until a further seven months later on 1st December 2017 that the bankrupt confirmed that the address she furnished to the court was his address. Thus, three years and four months after his adjudication he complied with this basic obligation applicable to all bankrupts

118. Notwithstanding these facts, the bankrupt denied that he had failed to comply with his statutory obligation and in evidence to the court said that there had never been an issue about his address. He said "we looked at the Irish bankruptcy filing and nowhere could we see that it was required that we provided a home address. It was 'provide an address'".

119. This evidence is frankly incredible in light of the correspondence from the Official Assignee and his solicitors, and the decision of the Court of Appeal in *McFeely*.

120. The bankrupt was asked why he did not avail of the option of writing to the Official Assignee's solicitors after the interview of the 29th June, 2016. He replied:

> *"I didn't trust the OA. I wouldn't trust him with that information. I knew he already had it. [I] knew that way he acted. The OA acted, and has acted in this bankruptcy as a bounty hunter, and that is why. I don't trust the man."*

It is thus clear that the bankrupt deliberately refused to comply with his statutory obligation. He could at best be described as disingenuous in giving his address for more than three years as (a) a house which for two years was for sale and essentially unfurnished and (b) his adult's son's apartment, where he slept "the odd time". Even after his wife informed the court of her address in England he refused for a further seven months to confirm to the Official Assignee that this was also his address. I conclude that he only confirmed that this was his address because it was no longer possible to deny it.

Actively misleading the Official Assignee since January 2016

121. On the 20th January, 2016 the bankrupt's US attorneys wrote stating that he will fully cooperate with the Official Assignee as he seeks to obtain his discharge from his bankruptcy proceedings. Far from cooperating with the Official Assignee it is absolutely clear that he deliberately withheld from the Official Assignee information to which he was entitled. He continued to withhold his address. He continued to rely upon his incomplete statement of affairs filed in the United States. He failed to supply significant relevant documentation in relation to assets of the estate. He maintained initially that he had no Irish estate at all and so was not required to provide any information about his estate to the Official Assignee. In particular, he deliberately withheld all information in relation to Walford and Yesreb and he actively and intentionally misled the Official Assignee in relation to his family's beneficial interest in Walford and his active role in selling Walford in 2016. As part of that alleged cooperation they sent a copy of the transcripts of the s. 341 interviews. In March 2013 he was asked about the sale of Walford to Yesreb as follows:

> *"Q. Do you know whether or not your children have any current interest in that property?*
>
> *A. I wouldn't know. You would own it for all I know.*
>
> *Q. Do you know whether any companies that are owned or controlled by any of your children have any ownership interest in that property?*
>
> *A. No."*

122. In cross examination the bankrupt accepted that his evidence in his s. 341 examination in relation to Walford could be summarised as follows: - Gayle Dunne got the money from the sale of Walford. He did not know if the children had any current interest in the property. He did not know if his children or any company owned or controlled by any of his children had any ownership in the property. He had no interest in the development or plans for development of Walford and he did not know who the purchaser was. When asked who the purchaser was he answered "it could be anyone".

123. Having agreed that this was the import of his evidence, he then explained that Gayle Dunne told him the true position regarding Walford the evening his s. 341 interview concluded. He said:

> *"And when I came home that evening Gayle asked me 'how did the 341 go?' and I said they were very interested in Walford, and it was that evening that she told me the facts about Walford. She told me 'by the way, John is the beneficial owner, I lent money to John to purchase the property and if there is an upside in the property it is held for our children', and I said 'great', and she said 'the reason I didn't tell you is because I don't want my information and our children's information plastered all over the Irish newspapers', and I think she is entitled to that privacy."*

124. In the proceedings brought by the Official Assignee against Ms. Dunne, Gayle Dunne, John Dunne and a director of Yesreb, Mr. Charalampous averred that Gayle Dunne was the beneficiary of a trust in relation to Walford. Yesreb purchased Walford in March 2013 with money she lent to Yesreb although she was the vendor and no money actually changed hands. She took security over the title deeds of the property pending repayment of the loan facility. The shares in Yesreb were originally held in trust for Gayle Dunne but she gifted them to John Dunne. The shares in Yesreb were put in trust for John Dunne and he agreed with Gayle Dunne that any profit from the sale of Walford will be divided between John Dunne (as to 25%) and the children of Sean and Gayle Dunne (as to 75%).

125. Without in any way determining the ownership of Walford, it is clear from the bankrupt's own evidence to this court, that the evidence he gave in the s. 341 examination in relation to Walford was incorrect and he knew this from the evening of 28 February, 2014. He took no step to correct the record and to inform the US trustee as to the position as set out by Gayle Dunne, John Dunne and Mr. Charalampous. Incidentally, despite this, he maintains that he has fully cooperated with the US trustee in relation to the US bankruptcy.

126. Knowing that the transcript of his s. 341 examination was false and misleading, nonetheless, on the 20th January, 2016 he proffered this transcript to the Official Assignee as representing his information in relation to these assets and his cooperation with the Official Assignee as required under the Bankruptcy Act, 1988.

127. When he attended for interview with the Official Assignee on the 29th June, 2016 he was fully aware of the fact that the Official Assignee required information from him in relation to Walford (as is clear from the extract from the affidavit of the Official Assignee I have quoted above) and all the transactions and dealings in relation to Walford. He did not accept and to this day does not accept that the Official Assignee has any entitlement to enquire into these matters because he, the bankrupt, asserted that this was never an asset of his and therefore it was of no concern to the Official Assignee. I have already held that it is not open to the bankrupt subjectively to determine the scope or limits of his cooperation with the Official Assignee but, aside from a refusal to provide information or cooperate with enquiries or questions, actually positively misleading or lying to the Official Assignee could not on any account be regarded as cooperation with the Official Assignee.

128. At the interview on the 29th June, 2016 the Official Assignee's solicitor asked the bankrupt who was Yesreb. He replied that he hadn't a clue. Based on the evidence before this court, including his own testimony, that was clearly a lie. While he distanced himself from his wife's business affairs, he accepts that "she told me the facts about Walford".

129. At the time of his interview with the Official Assignee, the bankrupt was in active negotiations with Mr. Doran with a view to selling Walford. He made no reference to his continued involvement with the property to the Official Assignee who believed at that time that Yesreb was an unconnected independent third party company based in Cyprus. The bankrupt offered a number of explanations for his failure to inform the Official Assignee of his information regarding Walford and his ongoing involvement in the sale of Walford.

130. In his affidavit of 28 April 2017 he gave as his reason for not informing the Official Assignee at interview of his involvement in the sale of Walford, that he was not asked and he did not see it as his function or duty to advise the Official Assignee of the ownership of assets held by others. In evidence to the court firstly he said that he had been badgered and subject to misrepresentation by the Official Assignee and his solicitors and that he "had enough of it and I knew that this was another trawl to get into assets owned by my family, *owned by my children*, and I just had had enough of it." (emphasis added).

131. Then he said "I actually thought he said: 'what does Yesreb do' and I just said 'I haven't a clue, just leave me alone, stop annoying me and move on'". Counsel put to him that this was completely inconsistent with the first explanation to which the bankrupt replied that he would have said "haven't a clue" no matter what the Official Assignee asked him at that stage because he had had enough.

132. In accordance with normal practice, the bankrupt had been given a copy of the transcript of the interview at the 29th June, 2016 for his review. He had signed it and returned it and had not corrected the question to suggest that he actually thought that the question posed was "what does Yesreb do". Nor did he make any other amendments to disclose that Yesreb (and thus Walford) was owned by his family, his children as he stated in evidence to this court.

133. On the 28th April, 2017, the bankrupt swore his third affidavit in this motion. This was sworn after the Official Assignee had delivered an affidavit setting out his then knowledge of the bankrupt's involvement in the sale of Yesreb and the role of Gayle Dunne and John Dunne in Yesreb. In response to the accusations that the bankrupt had actively misled the Official Assignee, the bankrupt said it was obvious that the Official Assignee wanted the bankrupt to discuss the affairs of others and that it was an abuse of process. He did not allege that he had been harassed or badgered at interview or that he had misheard the question. When this was put to him in cross examination the bankrupt explained that by an abuse of process he meant that it was not an open transparent process and he knew where the Official Assignee was going *"all he was seeking to do was use my bankruptcy as a ruse to gather up information on my family."* Finally, in cross-examination he said he did not tell the Official Assignee anything about Walford because his wife asked him not to.

134. I am satisfied that the bankrupt was failed to cooperate with the Official Assignee in the realisation of assets of the bankrupt and has hidden from or failed to disclose assets of the bankrupt which could be realised for the benefit of his creditors. Thus it is a *prima facie* appropriate to make an order pursuant to s. 85A(4) posting this automatic discharge from bankruptcy. The issue to be decided is whether any of the remaining arguments advanced on his behalf in opposition to the application would make it unjust to

make an order under s. 85A(4).

Response of the bankrupt
135. The bankrupt maintains that he has cooperated fully with the Official Assignee and complied with all of his statutory obligations in this jurisdiction. He says that he has provided extensive information concerning his estate to the Official Assignee. He also says that he has cooperated fully with the US trustee and that cooperation with the US trustee is *de facto* cooperation with the Official Assignee.

136. He said that there was no issue with his address or that, after the interview on 29th June, 2016, he believed that the issue regarding his address had been resolved.

137. His central tenet was that he was not obliged to give information or documentation to either the Official Assignee or the US trustee about assets which he does not and never owned. He was therefore perfectly justified in withholding any information about Walford and refusing to volunteer any information about it and confining himself to answering the specific questions put to him either in the s. 341 proceedings in the United States or at interview with the Official Assignee in June 2016.

138. A significant part of his defence to the proceedings was to challenge and to criticise the actions of the Official Assignee both in his administration of the estate and in relation to affidavits sworn in support of his motion and in the related discovery motion.

Right to a fair hearing
139. The bankrupt argued on a number of grounds that he could not, or in the alternative, did not obtain a fair hearing in relation to the s. 85A application and, by inference, accordingly the relief sought should be refused. These were:

> (1) The s. 85A (3) application was improperly brought.
>
> (2) The s. 85A(3) investigation amounted to an improper use of his powers.
>
> (3) The Official Assignee failed to tell the court when his investigation pursuant to the order made under subs. (3) had concluded and to move for a hearing of the s. 85A (4) application forthwith and, related to this, there was an unfair delay in the hearing of this application.
>
> (4) By reason of the misconduct of the Official Assignee the bankrupt cannot get a fair hearing of the s. 85A application. The Official Assignee's conduct in relation to two s. 21 interviews (with Mr. Patrick Sweetman solicitor and Mr. Colin Rogers of KPMG) were conducted in an inaccurate, unfair and misleading fashion. There are a number of errors in the Official Assignee's various affidavits. The court should therefore conclude that the Official Assignee was motivated by *mala fides* towards the bankrupt.
>
> (5) The conduct of the two s. 21 interviews with Mr. Sweetman and Mr. Rogers breached the bankrupt's right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights.
>
> (6) The court should exclude the evidence of the Official Assignee on the basis of the errors in the affidavits and the bias displayed in the s. 21 interviews.
>
> (7) The s. 21 interviews should all have been conducted in open court and the manner in which they were conducted infringed the bankrupt's right to a fair hearing in the s. 85A application as guaranteed by Article 6 of the European Convention on Human Rights. He said the bankrupt was entitled to be represented at s. 21 interviews before the court.
>
> (8) He says he should be furnished with the transcripts of others. 21 interviews on the basis of fair procedures and in particular the doctrine of *audi alteram partem*.

140. Separately, he argues that the application infringes his constitutional right to hold property as it impacts upon his right to hold after acquired property.

Was the s. 85A (3) application improperly brought?
141. The bankrupt was adjudicated on the 29th July, 2013 and would in the normal way have automatically have been discharged from bankruptcy on the 29th July, 2016 under the provisions of s. 85 of the Act as amended. If the Official Assignee intends to bring an application pursuant to s. 85A requesting the court to postpone the automatic discharge from bankruptcy of the bankrupt, he must do so prior to the date of the automatic discharge.

142. When the motion issued on the 26th May, 2016 it is abundantly clear that the Official Assignee had by no means concluded his investigations into the estate of the bankrupt. Furthermore, the bankrupt had been completely uncooperative with the Irish bankruptcy process prior to 20th January, 2016 and in particular the involvement of his new Irish solicitors in March 2016. Both the bankrupt's US attorneys and his Irish solicitors had indicated that he intended fully to cooperate with the Official Assignee.

143. In those circumstances, it was entirely appropriate for the Official Assignee to seek an order pursuant to s. 85A(3)- as the non-cooperation to date would justify the making of an order pursuant to s. 85A(4)- and to afford the bankrupt the opportunity, at this late stage in his bankruptcy, to cooperate with the Official Assignee and to provide him with the information he required in relation to the matters he was investigating and all other aspects of the estate of the bankrupt. Accordingly, I rejected this argument of the bankrupt and it is not a valid reason to refuse to make an order pursuant to s. 85A(4).

Was there a misuse by the Official Assignee of his powers under s. 85A(3)
144. The bankrupt complained that the Official Assignee wrongfully was misusing his power to investigate the bankruptcy estate with the benefit of an order under subs. (3) when the purpose of the investigation was to gather information to be used in other litigation brought by the Official Assignee against Gayle Dunne and John Dunne.

145. This argument is misconceived. The Official Assignee has averred that an application would have been brought to extend the period of bankruptcy in any event based upon the failure of the bankrupt to cooperate with him in any meaningful way for 2 years and 7 months, regardless of the outcome of his further investigations in order to uphold the integrity of the bankruptcy process. He expressly stated that if the bankrupt lived up to his promises and was fully cooperative that this could be taken into account at the hearing of the motion, which would be brought one way or another. One of purposes for conducting investigations pursuant to subs. (3) was to afford the bankrupt the opportunity to rectify the matters complained of before the court made a final decision on the

application under subs. (4).

146. The point of an order pursuant to s. 85A (3) is to allow the Official Assignee further time to carry out his investigations into the matters about which he complains to the court. If the complaint is that a bankrupt has been hiding assets from him, he may need to inquire further into those assets. He may use information he obtains through this investigation in recovery actions against third parties. The whole reason for investigating the estate is to ensure that all possible assets of the estate are recovered for the benefit of the bankruptcy estate. It is not investigation for the sake of investigation: it is investigation with a view to either (1) discounting assets as not assets of the estate or (2) attempting to realise them for the benefit of the creditors of the estate. It would be pointless if the Official Assignee was entitled to investigate assets but not pursue them based on the information and evidence he uncovered.

147. For these reasons it is not an abuse of his powers if the Official Assignee uses information obtained while investigating the affairs of the bankrupt pursuant to an under s. 85A(3). There is no question of the Official Assignee having instituted the application wrongfully and for the purpose of acquiring information to be used in the recovery actions. The motion issued in April 2016 at a time when the Official Assignee believed that Yesreb was an unconnected third party based in Cyprus. The proceedings could not on any version of the facts have been brought with a view to assisting the Official Assignee in his existing recovery litigation. It follows that there has been no misuse by the Official Assignee of his powers under s.85A(3) as alleged.

Was the Official Assignee responsible for an unfair delay in the hearing of this application?
148. The bankrupt filed a very substantial replying affidavit on the 12th October, 2016. The Official Assignee required time to respond which he did by an affidavit sworn on the 15th November, 2016. The bankrupt responded to that affidavit in turn on the 28th November, 2016. His US attorney swore an affidavit on 23rd November, 2016. So far, it cannot be said that there was any undue delay in the conduct of the motion.

149. In November and December 2016 the Official Assignee was investigating the imminent sale of Walford by Yesreb. This involved making applications to court pursuant to s. 21 of the Act, instituting proceedings against Yesreb and dealing with the solicitors for Celtic Trustees Ltd. The Official Assignee then swore a very lengthy affidavit on the 25th January, 2017 which both replied to the affidavit of the bankrupt sworn on the 28th November, 2016 and dealt with significant issues which arose since his affidavit of the 15th November, 2016. He stated that matters had arisen in the last number of weeks including up to the day before the affidavit "which clearly require further investigation" and he would ask the court to direct such an investigation within the meaning of s. 85A(3) and require the bankrupt to furnish information immediately under s. 21 of the Act. He said he had not sworn an affidavit prior to the 25th January, 2017 *"because I am in receipt of information on an ongoing basis in relation to the matters set out below. The bankrupt wishes the matter to proceed on the 31st January, 2017 as is his prerogative and I will do so on the information currently available. My application to the court will be to extend the bankruptcy to continue my investigations."* In addition, Mr. Patrick Doran swore his first affidavit in these proceedings on the 17th January, 2017 and the US trustee's attorney, Mr. Miltenberger swore an affidavit on 25th January, 2017.

150. The bankrupt issued a motion seeking to cross examine the Official Assignee on his affidavits and the application was heard on the 1st February, 2017. On the 13th February, 2017, I rejected the application and the bankrupt appealed that decision to the Court of Appeal. Pending the outcome of the appeal, all parties were agreed that the motion could not be heard. The Court of Appeal delivered its decision in December 2017 permitting cross examination of the Official Assignee. On the 5th December, 2017 the bankrupt served notices of intention to cross examine the Official Assignee, Mr. Timothy Miltenberger, and Mr. Doran. The Official Assignee served notices of intention to cross examine on the bankrupt and Mr. James Berman, his US attorney.

151. While the appeal was pending the bankrupt swore two replying affidavits on the 8th April, 2017 and the 28th April, 2017, Mr. Berman swore a second affidavit on 17th April, 2017, Mr. Miltenberger replied to that on 13th September, 2017, and Mr. Doran swore a second affidavit on the 14th September, 2017 and the Official Assignee swore a fourth affidavit on the 18th September, 2017. The affidavits in relation to the motion were largely closed before the appeal was decided by the Court of Appeal. Two further affidavits were delivered with the leave of the court, one sworn by the bankrupt on 12th December, 2017 and one in reply by the Official Assignee on 15th January, 2017.

152. The parties estimated that the motion would last two weeks in light of the fact that the papers now ran to eleven large lever arch files and five deponents were to be cross-examined. The earliest date that the court could list a motion of this length, was on the 10th April, 2018, the first two weeks of the Easter term.

153. As explained above, the bankrupt had issued a motion seeking discovery which required to be determined before the motion could proceed and he had also sought leave to seek judicial review in relation to a decision of the Official Assignee which would require to be resolved before the motion could be heard. In the event the bankrupt chose not to pursue the judicial review proceedings and discontinued the motion for discovery.

154. In the circumstances, any failure by the Official Assignee to tell the court when his investigation pursuant to the s. 85A(3) order had concluded had no bearing whatsoever on the date when the s. 85A(4) application was ultimately heard. There was no unfair delay in the hearing of the application and none which was attributable to any action by the Official Assignee. I therefore reject this ground for alleging that the bankrupt did not obtain a fair hearing in respect of the application and it does not justify the court in declining to make an order pursuant to s. 85A.

Misconduct of the Official Assignee means that the bankrupt cannot get a fair hearing of the s. 85 application.
155. The Official Assignee was cross examined at length about interviews he conducted pursuant to orders made under s. 21 of the Bankruptcy Act, 1988 with Mr. Patrick Sweetman, solicitor and Mr. Colm Rogers of KPMG. The bankrupt says that these interviews were conducted in an inaccurate, unfair and misleading fashion.

156. An examination pursuant to s. 21 of the Act is for the purposes of obtaining information from that person regarding any property of the bankrupt which may be in his possession or control or which the bankrupt may have disposed of or who is indebted to the bankrupt or who is *"capable of giving information relating to the trade, dealings, affairs or property of the bankrupt."*. The court may also require such a person to produce any books of account and papers in his possession or control relating to these matters.

157. The section is clearly directed towards providing information in relation to the estate of the bankrupt. It is not concerned per se with the conduct of the bankrupt, though a bankrupt may be the subject of a s. 21 order. Specifically, it is not concerned with the cooperation of the bankrupt with the Official Assignee and the realisation of assets of the bankrupt or with a failure by a bankrupt to disclose to the Official Assignee income or assets which could be realised for the benefit of the creditors of the bankrupt. It exists to enable the Official Assignee to carry out his statutory functions.

158. The bankrupt's complaints in relation to the conduct of the two s. 21 interviews must be seen in this context. At the very most the complaints might go to the weight which a court might place upon the statements of Mr. Sweetman and Mr. Rogers if Official Assignee sought to rely upon the transcripts of the interviews, either in this hearing or in other proceedings.

159. In this case the Official Assignee complains about the conduct of the bankrupt. *His* case is not based upon the transcripts of the interviews with Mr. Sweetman and Mr. Rogers. The transcript of the interviews with Mr. Sweetman and Mr. Rogers were exhibited by the Official Assignee in his fourth affidavit on the 18th September, 2017 to refute an averment made by the bankrupt in his affidavit of April, 2017. At para. 23 of his affidavit the bankrupt stated:

> *"It is evident from the file note of Patrick Sweetman dated the 16th July, 2009 that pursuant to the terms of the declaration of trust (being the trust dated 23rd July, 2005) that all correspondence and dealings regarding Queenstown/Walford should be with my wife Gayle Kililea Dunne as beneficial owner".*

The Official Assignee said that neither Mr. Sweetman nor Mr Rogers was aware of either the declaration of trust of the 23rd July, 2005 or the property transfer agreement of the 23rd March, 2005. He relied upon the transcripts solely to refute the averment of the bankrupt. No objection is taken to these parts of the transcripts.

160. The section of the transcript with which the bankrupt took issue was on p. 25 of the transcript where the Official Assignee wrongly told Mr. Rogers that Mr. Sweetman was "absolutely categorical that he had always advised [the bankrupt]" that he could never buy Walford in trust for anyone else. In cross examination, the Official Assignee accepted that Mr. Sweetman had not told the Official Assignee this personally. The Official Assignee clarified that he had read this advice in the file obtained from Mr. Sweetman's firm in attendance notes and emails. Thus while the question posed by the Official Assignee to Mr. Rogers was based on an inaccurate premise, it reflected the substance of the contemporaneous advice given by Mr. Sweetman to the bankrupt.

161. The objection to the transcripts of Mr Sweetman's interview was that the Official assignee did not ask Mr Sweetman who he believed was the beneficial owner of Walford, that the Official Assignee's solicitor asked a leading rather than an open question in relation to this issue and that issues raised in the first interview were not followed up at the second interview.

162. The court is concerned with whether the bankrupt has cooperated with the Official Assignee's investigation into a possible asset of the estate or whether the bankrupt has concealed information or sought to mislead the Official Assignee in relation to the asset and dealings relating to the asset. The issues raised in relation to the conduct of the s.21 interviews are peripheral at best and not relevant to any issue to be decided by the court.

163. It follows that the conduct of the interviews can have no direct bearing on these proceedings and certainly do not undermine the fairness of the procedure afforded to the bankrupt in respect of the application brought pursuant to s. 85A of the Act of 1988.

164. Counsel for the bankrupt argued that there were a number of errors on the Official Assignee's affidavits. It was submitted that the court should conclude that the Official Assignee was motivated by malice towards the bankrupt and therefore the bankrupt could not and did not get a fair hearing in relation to this application. Counsel for the bankrupt referred to the fact that in his first affidavit, the Official Assignee stated that prior to the letter in January 2016 from his New York attorneys, the bankrupt had provided the Official Assignee with no information whatsoever. Counsel said that this was incorrect or at least misleading as it failed to recognise that the Official Assignee had been furnished by the US trustee with a considerable amount of documentation filed and generated in the US proceedings, such as the statement of affairs filed in the US proceedings, and the transcript of the s. 341 examination of the bankrupt. Under cross-examination the Official Assignee accepted that this was so. The Official Assignee indicated that he had received the transcript but not the supporting documentation. He said that he had "huge issues" with the American statement of affairs and that, having read the transcripts of the s. 341 interviews, the answers of the bankrupt were "wholly deficient" in giving him the detail he needed in order to administer the bankruptcy estate.

165. The Official Assignee exhibited the letter from Mr. Miltenberger of November 2016 in his affidavit. The letter stated:

> *"We are concerned that if Mr. Dunne is discharged from bankruptcy, he will never answer the trustee's subpoena calling for the production of documents and, as he has consistently shown to date, never cooperate with the trustee in his investigation into Mr. Dunne's complex financial affairs."*

In referring to this letter the Official Assignee averred:

> *"Furthermore, I am advised and believe that while his creditors and the US trustee do not wish to see him discharged until such time as the litigation is over, this is not a relevant matter for the court."*

It was put to him that this was an incorrect restatement of the letter and that in fact he was acting on representations from creditors of the bankrupt to keep him in bankruptcy. The Official Assignee rejected this. He said he would have brought these proceedings irrespective of the attitude of the creditors primarily to uphold the integrity of the bankruptcy process in the State.

166. In his fifth affidavit the Official Assignee averred that files were transferred from Matheson solicitors to Donal McAuliffe, solicitor, pursuant to a letter from Sean Dunne. The letter exhibited in support of this averment was a draft and was undated and unsigned. In fact, the letter of authority for the transfer of files from Matheson to Donal McAuliffe was one signed by Gayle Dunne in 2012. In his affidavit sworn in the discovery motion the Official Assignee accepted that what he had averred in his fifth affidavit was incorrect and that the file was actually transferred pursuant to a letter of authority undated but signed by Gayle Dunne.

167. He was severely criticised for the inaccuracy in his affidavit and in fact the court was asked to conduct an inquiry into how his affidavit had been drafted. This application was refused.

168. Parties who swear affidavits are required to ensure that they are true and accurate and present a fair statement of the evidence to the court. The court should not lightly overlook clear errors. However, Homer nods. Typographical errors can occur. These may be explained and the courts normally accept the explanation and apology of the deponent. In this case, the court is asked to assess the weight to be attached to the errors which were established and whether the court should draw an inference that the Official Assignee is acting male fides against the bankrupt.

169. The Official Assignee exhibited a draft letter which existed on the file from Matheson's. He did not invent the document. His error lay in not checking further in the file which showed that there was an email requiring that the letter of authorisation be changed and put in the name of Gayle Dunne and that the file was in fact transferred pursuant to the letter signed by Gayle Dunne. The Official

Assignee corrected this error himself in the affidavit sworn in the discovery motion prior to the hearing of the s. 85A(4) motion and apologised to the court. He confessed to and explained an error which he accepts should not have occurred. It is not evidence of *male fides* in my opinion. The bankrupt was in no way prejudiced by the mistake. The mistake was corrected and there was an apology. The court did not rely on the erroneous evidence and it has in no way coloured or altered the determination of this motion.

170. Similarly, I do not attribute any great weight to the fact that the Official Assignee did not expressly refer to the fact that he had received the bankrupt's US statement of affairs and the transcript of the s. 341 proceedings from the US trustee prior to the letter of 20th January, 2016 from the bankrupt's US attorneys. The Official Assignee's grounding affidavit was directed towards cooperation by the bankrupt with the Official Assignee, not cooperation by other parties who provided information relevant to the affairs and estate of the bankrupt. It would be impossible to read the Official Assignee's grounding affidavit without concluding that he had a certain amount of information regarding the estate of the bankrupt, none of which had been previously provided by the bankrupt. The bankrupt did not allege that he provided any of the information directly to the Official Assignee prior to the offer of his attorneys in January 2016. So, the essential complaint of the Official Assignee is correct. Any information the Official Assignee received from the bankrupt -as opposed to third parties – prior to 20th January, 2016 was information which as was deployed by the bankrupt (or Gayle Dunne) in the course of proceedings for his/her own purposes and not volunteered to the Official Assignee. It would be wholly wrong in the circumstanced to state that the omissions from the first affidavit were evidence of *male fides* on the part of the Official Assignee.

171. Finally, I likewise attribute no significant weight to the fact that the Official Assignee wrongly identified the source of his information regarding the advice furnished by Matheson to the bankrupt during the interview of Mr. Rogers in relation to the purchase of Walford. It is true that Mr. Sweetman did not state in interview with the Official Assignee that Mr. Sweetman had advised the bankrupt that it would not have been possible for him to have purchased Walford in trust in 2005: he advised the bankrupt to this effect.

172. Accordingly, I do not accept that there was misconduct on the part of the Official Assignee such that the bankrupt could not get a fair hearing of his s. 85A application. There was no evidence that the proceedings were motivated by *male fides* towards the bankrupt or an inappropriate desire on the part of the Official Assignee (or the US trustee or the creditors of the bankrupt) wrongfully to keep the bankrupt in bankruptcy. This ground for opposing the making of an order must be rejected.

Article 6 of the European Convention on Human Rights
173. Article 6 of the European Convention on Human Rights provides as follows:

> *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

174. It is concerned with a person's right to a fair trial. Interviews conducted pursuant to s. 21 of the Bankruptcy Act, 1988 are not trials. They are part of the investigation and administration of the estate of a bankrupt. Neither Mr. Sweetman nor Mr. Rogers were the subject of a trial. Unsurprisingly, the bankrupt could not adduce any authority to support his proposition that the rights under Article 6 of the European Convention on Human Rights extended, even by analogy, to interviews conducted pursuant to s. 21 of the Bankruptcy Act, 1988, as, the proposition, is in my opinion, unstateable.

Should the evidence of the Official Assignee be excluded?
175. Counsel for the bankrupt submitted that the evidence of the Official Assignee in total should be excluded on the basis of the errors in the affidavits (which I have discussed above) and on bias displayed in the s. 21 interviews with Mr. Sweetman and Mr. Rogers. The Official Assignee has accounted for the errors in his affidavit as I have discussed above. It is a matter for the court to determine the weight it should attribute to both the identified and admitted errors and to the evidence of the witness as a whole. In this regard, it is important to note that a considerable amount of the evidence of the Official Assignee is based upon documents which have been exhibited and which have been accepted by the bankrupt or upon the timeline, which is not disputed. Most of the bankrupt's evidence did not go towards contesting the primary facts averred to by the Official Assignee but rather contesting the accuracy or fairness of the inferences he drew from those facts and that he invited the court to draw from the facts.

176. It was said that the s. 21 interviews were biased because the Official Assignee's solicitor did not ask an open question regarding the ownership of Walford and because the Official Assignee refrained from asking Mr. Sweetman or Mr. Rogers directly who, in their opinion, was the beneficial owner of Walford. It was submitted that this indicated that the Official Assignee did not wish to obtain information which did not assist in his preconceived ideas relating to the ownership of Walford.

177. I am not satisfied that any court should exclude the evidence of the Official Assignee on this basis. The transcripts of the interviews were available for the court to read. The Official Assignee was extensively cross examined in relation to the two interviews. The court was in a position to assess whether or not the Official Assignee showed bias in the conduct of the s. 21 interviews and further, to assess, whether and to what extent, this coloured or undermined the evidence given to the court in respective of the motion. It is important to reiterate that the Official Assignee did not bring his case based upon the transcripts of the s. 21 interview. They were introduced very late into the exchange of affidavits in rebuttal of averments made by the bankrupt. Even taking the bankrupt's case at its height, the matters complained of do not detract from the essential case placed by the Official Assignee before the court. I see no valid basis to exclude the evidence of the Official Assignee as contended. I therefore reject this argument of the bankrupt also.

The conduct of the s. 21 interviews.
178. The bankrupt complained that the interviews conducted pursuant to s. 21 with Mr. Sweetman and Mr. Rogers were not conducted in open court. He said the bankrupt was entitled to be represented at these interviews before the court and that the manner in which they were conducted, in private with the Official Assignee and his solicitor, infringed the bankrupt's right to a fair hearing in the s. 85A application as guaranteed by Article 6 of the European Convention on Human Rights.

179. The s. 21 interviews are separate from the s. 85A application. The court regularly hears s. 85A applications which do not involve any s. 21 interviews. Likewise, s. 21 interview may be conducted in bankruptcies in respect of which no s. 85A application is brought. As I have already stated, s. 21 is a power conferred to enable the estate of a bankrupt to be properly investigated. It is not always necessary that the s. 21 interviews be conducted in open court. Sometimes parties are perfectly willing to cooperate with the Official Assignee in his investigations but by reason of professional or contractual obligations of confidentiality, they cannot do so unless an order is made pursuant to s. 21. Once such an order is made many such witnesses are perfectly happy to cooperate with the Official Assignee. This is what occurred in the case of Mr. Sweetman and Mr. Rogers.

180. On the other hand, sometimes the investigation is conducted before the court. This occurred in the case of Mr. Donal McAuliff,

solicitor. Mr. McAuliffe chose to be represented by senior counsel when giving evidence before the court pursuant to s. 21.

181. It is also important to bear in mind that even interviews before the court may be held in private. Section 134 of the Act provides:

> *"The Court may direct that the whole or any part of any sitting of the Court or proceeding in any matter under this Act shall be in private."*

Where the court makes such an order, everyone not directly concerned with the examination including the bankrupt is excluded. It is clear therefore that the bankrupt is not entitled to be represented at the s. 21 interviews, wherever they are conducted.

182. The bankrupt's submission on this point is predicated on a fallacy: that the s. 21 interviews amount to some form of *inter partes* litigation. They are interviews in an investigation that usually does not result in court proceedings. In any event, the bankrupt has been unable to identify how he alleges the actual conduct of these interviews infringed the fairness of the hearing of the s. 85 application before the court. In my opinion, there is no link between the manner in which the s. 21 interviews were conducted in this case and the conduct of the s. 85A motion before the court. The bankrupt was afforded all of the procedural opportunities to protect and advance his position, such as the right to cross examine deponents and the opportunity to seek discovery. I am not satisfied that the bankrupt has made out this ground for complaint and I refuse to reject the application on the basis of this argument.

The transcripts of the others. 21 interviews.
183. Witnesses other than Mr. Patrick Sweetman and Mr. Colin Rogers were interviewed by the Official Assignee pursuant to orders made under s. 21 of the Bankruptcy Act. The bankrupt sought the transcripts of these interviews in his motion for discovery. The bankrupt decided not to continue with his motion for discovery as I have explained above. He was given the opportunity to continue with the motion if he saw fit. He cannot now complain that he has not been furnished with the transcripts in those circumstances. In effect this argument means that, notwithstanding the fact that he voluntarily chose not to pursue his discovery motion, nonetheless he should have been furnished with the transcripts in circumstances where the Official Assignee was opposing the application for discovery. I cannot accept that such a procedure is required in order to meet the bankrupt's entitlement to fair procedures. He could have pursued the motion to a determination by the court. That is how his entitlement to fair procedures is met in this regard under the rules of court. He cannot rewrite them to suit his requirements.

184. Counsel for the bankrupt has not clarified how the doctrine *audi alterum partum* could conceivably apply in relation to this matter. The bankrupt moved his motion for discovery. He may or may not have been ultimately successful and the Official Assignee might have been ordered to discover the transcripts to him. But he has been heard: it was he who withdrew the motion. As he has no entitlement to participate in some form of representative or legitimates contradictor role in the actual interviews conducted under s. 21 orders, there is no other party to be heard in respect of the s. 21 interviews.

185. I reject this submission as being without merit.

Constitutional right to hold after acquired property
186. The bankrupt has not challenged the constitutionality of s. 85A of the Bankruptcy Act, 1988. The Oireachtas has authorised the court to postpone the automatic discharge of a bankrupt from bankruptcy. This continues the automatic limitations deriving from the status of bankruptcy for such period of time as the court thinks just. If such an order is made, it has the effect of extending the period during which property which is acquired by or devolves on a bankrupt before the discharge vests in the Official Assignee if and when he claims it (s. 44 (5)).

187. If the bankrupt had wished to challenge the constitutionality of either s. 85A or s. 44 of the Act of 1988 he has to do so in accordance with the rules. He must institute plenary proceedings and the attorney general is a necessary party. Clearly this has not been done by the bankrupt. It follows that this argument likewise is without merit.

Conclusion on s. 85A application
188. In light of all of the above, I have no hesitation in concluding that the bankrupt has failed to cooperate with the Official Assignee in the realisation of assets of the bankrupt and has hidden from or failed to disclose to the Official Assignee income or assets which could be realised for the benefit of creditors for the bankrupt. It is appropriate to make an order pursuant to s. 85A (4). The issue to be considered is the duration of the postponement of the automatic discharge from a bankruptcy.

189. As discussed above, this application is brought pursuant to the subsection as amended in 2015. That being so the court must also consider whether "in view of the seriousness of the failure to cooperate…or the extent to which income or assets…were hidden or not disclosed, or both, as the case may be", it would be just to consider postponing the discharge from bankruptcy to a date not later than the 15th anniversary of a date of adjudication as opposed to a date not later than the 8th anniversary of the date of the adjudication.

190. In *Killaly v. The Official Assignee* [2014] 4 I.R. 365 at p. 378 Clarke J. for the court held that *"by virtue of the serious consequences of an extension of bankruptcy, any sanctions so imposed must be proportionate to the wrongdoing on which it is based"*. In *Lehane v. Farrell* [2016] IEHC 637 I held that this observation of the Supreme Court applied *"not merely the wrongful acts or omissions of the bankrupt but also to the consequences to the creditors of the bankrupt."* In *Killaly* Clarke J. also referred to *"the need to impose a significant discouragement to prevent bankrupts from failing to comply with their clear obligation to cooperate with the Official Assignee"*.

191. At para. of my decision in *Lehane v. McFeely* [2016] IEHC 299 I said:

> *"30. 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."*

With the amendment effected by the Act of 2015, the Oireachtas has empowered the court to extend the period of bankruptcy up to fifteen years from the date of adjudication if the justice of the case so requires. From this the court can conclude that the Oireachtas decided that in some cases it might be appropriate to extend the period of bankruptcy for more than eight years after the date of adjudication.

192. In my opinion the breaches of the statutory duties of the bankrupt and in particular the provisions of s. 85A(4) of the Act are extremely grave, serious, persistent and deliberate. Indeed, it is difficult to conceive of a more thorough determination not to cooperate with the bankruptcy process and to seek to hide and conceal assets legitimately being investigated by the Official Assignee other than a cynical, spurious attempt to present the illusion of cooperation in order to achieve a discharge from bankruptcy. I am of the view that the case clearly comes within the terms of subs. (4) (b) (ii) given the seriousness of the failure to co-operate within the meaning of para.(a) and the extent to which assets, referred to in para. (b) were hidden or not disclosed.

(1) The bankrupt deliberately withheld his habitual residential address from the Official Assignee until December 2017. Official Assignee was obliged to rely upon the US bankruptcy records in order to obtain his address in Stillman Lane. He gave a myriad of excuses for this obvious and egregious breach of his statutory obligations. It was clear since the decision in *McFeely*, if he was ever in any doubt, that he was required to furnish his residential address to the Official Assignee. He said that he read the Act and effectively reached his own conclusion that he was not required to do so. He then persisted in maintaining that he was residing in a house in 22 Stillman Lane in Connecticut which was either unfurnished or had minimal furniture. In oral evidence he accepted that he stayed there sometimes with his children who slept on inflatable beds. This cannot have been his habitual residence. He then stated that he lived at Mott Street in New York with his son, Mr. John Dunne. Mr. Dunne in evidence in the United States stated that his father, the bankrupt, slept there "an odd time". Notwithstanding this, the bankrupt persisted in the fiction that 22 Stillman Lane was his address when he completed his statement of affairs in June 2016. At interview in June 2016 he was informed that he could give his address in a letter to the Official Assignee where it would be kept off the file available for public scrutiny. He did not avail of this opportunity. A year later, Ms. Gayle Dunne was required by the court to give her residential address as it had been withheld from an affidavit filed in proceedings brought by the Official Assignee. Her solicitor handed the address in writing. Finally, seven months later in December 2017 the bankrupt confirmed that the address furnished by his wife's solicitors to the court in other proceedings was his address. Neither the Official Assignee nor the court knows for how long the bankrupt has resided at that address, whether he rents it or has a mortgage or whether it is paid for entirely by his wife. This is extremely significant as it would appear that her assets ultimately derive from either the bankrupt or one or other of companies formerly owned and/or controlled by him. Finally, in cross examination, the bankrupt eventually explained that he simply refused to give the Official Assignee his address as "I didn't trust the man". Despite all of this, the bankrupt asked the court to believe that he had in fact fully cooperated in furnishing his address. I find his attitude to be simply incredible in the circumstances.

(2) The bankrupt is required to furnish a statement of affairs. He eventually furnished a statement of affairs on the 14th June, 2016, 45 days before he was due to be automatically discharged from bankruptcy. The purpose of providing a statement of affairs is to enable the estate to be administered. Even if a completely accurate and comprehensive statement of affairs had been delivered on that date, given the delay, it would warrant an extension of the bankruptcy period as amounting to a clear failure to cooperate with the Official Assignee in the administration of the estate. In this case the bankrupt sought to rely upon his statement of affairs filed in America. As was held in *McFeely's* case, this is not permissible as a matter of principle. Furthermore, the Official Assignee gave evidence that the American statement of affairs has grave deficiencies. He also says that the bankrupt failed to give him the vouching documentation which is necessary to enable him to consider the assets in an estate of this complexity. A two page very high level document is completely inadequate as a basis for informing the Official Assignee of the equitable claims to assets which may or may not form part of the bankruptcy estate held through a bewildering array of companies and trusts around the globe. He initially refused to complete a statement of claim. His solicitor said that he had no assets at the date of his adjudication because his entire estate is vested in his US trustee and asserted that the Supreme Court "held as much in one of its judgments". This seriously misrepresents the decisions of the Supreme Court who did not hold that there were no assets in his estate when he was adjudicated a bankrupt in Ireland and, by inference, that he was not required to file a statement of affairs. The bankrupt has known since January 2017 that the Official Assignee is of the view that his statement of affairs is incomplete because he has not provided the required back up and supporting documentation to enable the Official Assignee to investigate his estate. However, once the Official Assignee delivered his affidavit of January 2017 dealing inter alia with the sale of Walford in December 2016 the bankrupt ceased in any way to cooperate or to provide any further information to the Official Assignee and in particular to respond to the queries which then remained outstanding in relation to his estate. The significance of his failure to provide a statement of affairs, with sufficient supporting documentation to enable the Official Assignee to administer the estate, is that each asset of the estate needs to be investigated. There can be a need to refer back for further information from the bankrupt. As he never provided the detailed information vouching the assets set out in the statement of affairs, but rather only provided high level information, this did not enable the required investigation to take place. This failure of the bankrupt was continuing and ongoing as of the date of the hearing of the application. It is no answer to refer to the quantity of material actually provided by the bankrupt, albeit very belatedly; the issue is whether the information is comprehensive and complete. In this case it clearly was not.

(3) The bankrupt sought to determine the manner and the level of cooperation he would offer to the Official Assignee. He ignored all requests for a statement of affairs, a statement of personal information or to attend for interview from the Official Assignee for two and half years. He sought to have the Official Assignee travel to the United States to interview him or to have the interview conducted by teleconference. He suggested the Official Assignee participate in the s. 341 examination in the US bankruptcy proceeding. This was completely unreasonable in view of the fact that it was the uncontroverted evidence before the court that he was frequently in Ireland on predicable occasions and that it would have been possible to schedule an interview in person between the bankrupt and the Official Assignee long before the interview of June 2016. He sought to control the interview that did take place by requesting the Official Assignee to provide the questions to him in advance. He only delivered a partially completed statement of personal information in March 2016 because he wished to obtain his discharge from bankruptcy in Ireland. He specifically withheld his residential dress from the statement of personal information because he chose not to furnish the information to the Official Assignee.

(4) He maintained that cooperation with the US trustee was de facto cooperation with the Official Assignee. He said that the information provided by the bankrupt to the US trustee complied fully with his obligations to cooperate with and disclose all his assets to the Official Assignee. He maintained this position at the end of the hearing notwithstanding the fact that he had accepted under cross examination that the evidence he had given in the s. 341 interviews in relation to the beneficial ownership of Yesreb was inaccurate. He furnished information through his solicitors in March 2016 which he had withheld from the US trustee for three years. He sought to outsource compliance with his personal obligations to other individuals. The US trustee was to furnish the US statement of affairs and the transcript of the s. 341 interviews to the Official Assignee. This of course did not include the necessary underlying documentation which vouched and explained the assets and the transactions. He ultimately relied upon his wife's solicitors to inform the court and the Official Assignee of his actual residential address in London. He wanted the Official Assignee to interview his former in-house accountants

to provide information to the Official Assignee which he ought to provide personally. He has sought to rely upon his supposed full cooperation with the US trustee as cooperation with his bankruptcy process in this State. Mr. Miltenberger, counsel for the US trustee, gave evidence to the court to the effect that the bankrupt is not a cooperative bankrupt. He believes that the bankrupt is not going to comply with US law "absent contempt sanctions by the bankruptcy judge." The US trustee specifically authorised Mr. Miltenberger to inform the High Court that he did not regard the bankrupt as a cooperative trustee. Judge Schiff found as a fact that the bankrupt had been non cooperative. As late as 2nd August, 2017, Judge Manning, the successor to Judge Schiff in the US bankruptcy court in Connecticut, held that the bankrupt was in contempt of court for failing to comply with a subpoena to produce documents. Judge Manning said that the bankrupt "is not a cooperative debtor" in the US. He said "his actions throughout have been more consistent with a bankrupt who is seeking to conceal information as to assets." In the light of this evidence, it is impossible to accept that the alleged cooperation of the bankrupt in the US bankruptcy procedures and proceedings can constitute cooperation with the Official Assignee in this jurisdiction.

(5) The bankrupt sought to justify the positions he adopted based upon alleged decisions of the courts in the United States and in Ireland. However, he consistently misrepresented those decisions. For example, he said that the adoption by the US trustee and the Official Assignee of an ad hoc protocol was the "bedrock" of the order of Judge Schiff lifting the worldwide stay which enabled the Irish bankruptcy case to proceed. The court was furnished with the transcript and the judgment and order of Judge Schiff. It is quite clear that the adoption of an ad hoc protocol was not part of the order and no undertaking was given by the US trustee that an ad hoc protocol would be adopted in due course if the bankrupt were adjudicated a bankrupt in Ireland. Furthermore, the bankrupt failed to inform the court in any of his affidavits or even in oral testimony that he had applied to Judge Schiff to compel the US trustee to adopt an ad hoc protocol and Judge Schiff had refused his application. He also says that the appellate court held that it would not be necessary for him to file a statement of affairs or answer queries of the Official Assignee as well as the US trustee. This was a submission made to the court but was not part of the decision of the court to refuse the appeal. Furthermore, as was explained by Mr. Miltenberger, the submission was made very early in the bankrupt's bankruptcy in the US when it was anticipated that the bankruptcy would proceed in the normal fashion. The bankrupt in fact was anything but a cooperative bankrupt and therefore seriously misrepresents the position. Insofar as the dual bankruptcy has proved to be onerous to the bankrupt, this is attributable to his failure to cooperate with either bankruptcy representative. I have already indicated that the bankrupt misrepresented the decisions of the Supreme Court as regards the vesting of assets and sought to rely upon this misreading to justify a refusal to furnish a statement of affairs.

(6) The bankrupt has consistently sought to mislead the Official Assignee in relation to his estate and affairs. When he offered his cooperation to the Official Assignee he sought to rely upon the statement of affairs filed in the United States, his cooperation with the US trustee and the transcripts of the s. 341 interviews as accurate and comprehensive information upon which the Official Assignee could rely. It is clear that this information was both inaccurate, incomplete and positively misleading. On the bankrupt's own case to the court, he knew as of the evening of 28th February, 2014 that his s. 341 interview was materially inaccurate and misleading with regard to Yesreb. He never sought to correct this sworn testimony even though he knew it was misleading and he expressly sought to rely upon it in this jurisdiction as representing cooperation with the Official Assignee in relation to the administration of his estate and disclosure of assets as required under the Bankruptcy Act, 1988. He was fully aware that the Official Assignee was investigating the ownership of Walford and the beneficial ownership of Yesreb. At his interview with the Official Assignee in June 2016 he said he had no clue who Yesreb was. This can only be regarded as a completely dishonest answer, an outright lie, in light of his subsequent evidence to this court. Not only was he aware of the beneficial ownership of Yesreb and of the complex involvement of his wife and his son Mr. John Dunne in its affairs, his evidence to the court that he withheld this information from the Official Assignee at interview because his wife had requested him so to do. Not only did he withhold information regarding the continued involvement of his wife, his son and his minor children in Yesreb, he did so at a time when he himself was actively negotiating the sale of Walford on behalf of Yesreb to Mr. Doran. He then signed the transcript of the interview as being true and accurate and he never sought to correct the information given at the interview. On the contrary, he swore an affidavit on the 12th October, 2016 stating that he had fully cooperated with the Official Assignee and had fully complied with his statutory obligations. He in fact never corrected either transcript even up the date of the hearing of the s. 85A motion.

(7) In effect the bankrupt decided unilaterally what information the Official Assignee was entitled to and he decided to withhold information which he decided the Official Assignee was not entitled to. He decided unilaterally only to comply with those laws which he believed applied to him.

193. The actions and omissions of the bankrupt have obliged the Official Assignee to conduct time consuming investigations simply to discover the extent of the assets and liabilities of the estate. He was obliged to make a number of applications to family law courts which were contested by the bankrupt until determinations were made against him by Abbot J. and McGovern J. He was obliged to bring a very large number of s. 21 applications and he was obliged to bring a number of s. 28 applications to recover assets and documents from the K Club which ought to have been delivered by the bankrupt to the Official Assignee in the normal way. His actions have added greatly to the cost of the administration of the estate and have therefore been at the cost of the creditors. He has also failed to assist the Official Assignee in the recovery of exceedingly valuable assets which might have been recovered and may in future be recovered for the benefit of the bankruptcy estate. He has undoubtedly delayed any such successful recovery. All of this clearly amounts to significant detriment to the creditors.

194. His wholesale noncompliance with his statutory obligations and his failure to cooperate with the Official Assignee and his hindering of the Official Assignee in the conduct of the administration of the bankruptcy commenced on the day of his adjudication and persisted to the hearing of the s. 85A application. It is not a once off. The Official Assignee has described him as the most duplicitous bankrupt he has ever encountered. In the High Court, Abbot J. found as a fact that the bankrupt

> *"has been guilty of several intentional or unintentional concealment of assets either through simple denial in the examination process under s. 341 of the US bankruptcy or by inappropriate invocation of the in camera rule in this and in another non EU jurisdiction and by failing to properly define the status of wife number two and her relationship to various assets and transactions queried in the interrogation process."*

In proceedings brought by the liquidator of one of Mr. Dunne's companies in Ireland, *In the Matter of MJBCH Ltd. (In Liquidation)* [2016] IEHC 145, Binchy J. found, at para. 72, that there had been complete non-cooperation by the bankrupt with the liquidator and he restricted him from acting as a director of a company for the maximum period of time permissible under the Companies Acts, 1963 as amended, five years. In the United States both Judges Schiff and Manning have expressly held that he is a non-cooperative bankrupt. On the bankrupt's own case, his evidence at the s. 341 interview was at best incorrect and certainly misleading in relation

to Yesreb and the involvement of his wife and children in Yesreb. He learned on the evening the interview concluded that his evidence had been incorrect and he never sought to correct it. At his interview with the Official Assignee he lied and misled him to his express knowledge as I have stated. He did so, on his evidence, at the express request of his wife. He then tried to stand over these two interviews as true and not misleading. There were other judgments from in camera proceedings which indicate that other judges have likewise found him to have concealed assets which ought to have been discovered in past proceedings.

195. In light of all of the above I find it difficult to conceive of a bankrupt who could be more obstructive and less cooperative with the bankruptcy process. I found him to be a deeply dishonest witness whose evidence was not credible or reliable. He remained unrepentant throughout the hearing and sought to present himself as the aggrieved party. He gave multiple explanations in relation to his address and his response to queries about Walford and Yesreb. The explanations changed as the Official Assignee discovered more information which showed that his previous statements or evidence was untrue or a lie. He impressed me as a person who knew exactly what he was doing and who was determined at all costs to conceal as much information as possible from the Official Assignee.

196. He displayed a deeply hostile attitude towards the Official Assignee. In evidence he said "I do not trust the man" and he likened him to a bounty hunter. He was deeply resentful of the Official Assignee's persistent enquiries in relation to Walford and Yesreb and characterised it as a persecution. It was not. He was attempting to carry out his statutory obligations in the face of very considerable obstruction and resistance. I formed the opinion that he had no intention whatsoever of fulfilling his statutory obligations or cooperating in any meaningful way with the Official Assignee save and insofar as it might assist him in obtaining a discharge from bankruptcy. It is for this reason that I do not give him any credit for the purported cooperation between 20th January 2016 and December, 2016: he merely attempted to give the illusion of cooperation and to do so provide information to give the appearance of cooperation while withholding the essential information, that is all. As such it does not provide the basis for reducing the otherwise appropriate period of postponement of the date of discharge from bankruptcy. To do otherwise would be to condone the behaviour and to fail to uphold the integrity of the bankruptcy process.

197. I conclude that it is appropriate to make an Order pursuant to s. 85A (4) postponing the discharge from bankruptcy until the 29th April, 2028. I reduce the maximum possible duration by three months to take account of his age as I did in the case of McFeely.

Bankruptcy payment order
198. Relief number 4 in the notice of motion is an order under s. 85 D for a bankruptcy payment order in the amount of €5,000 per month for a period of five years. Section 85D was inserted by the Personal Insolvency Act, 2012 and commenced on the 3rd December, 2013. The section in turn was amended by the Bankruptcy Amendment Act, 2015 and the parties are agreed that the application is to be considered by reference to the section as amended which came into effect in January 2016. The section provides as follows:

> *85D.— (1) The Court may, on application being made to it by the Official Assignee or the trustee in bankruptcy, make an order requiring a bankrupt to make payments to the Official Assignee or the trustee in bankruptcy from his income or other assets for the benefit of his creditors (a 'bankruptcy payment order').*
>
> *(2) An application for a bankruptcy payment order may not be made after the bankrupt has been discharged from bankruptcy, but where an application for such an order is made before the discharge of the bankrupt, the Court may make a bankruptcy payment order after the date of discharge as if the bankrupt had not been so discharged.*
>
> *(3) Subject to subsections (3A) and (3B), an order made under subsection (1) shall have effect for no longer than 5 years from the date of the order coming into operation, and where, during the order's validity, the court has varied the order under subsection (5) such variation shall not cause the order to have effect for a period of more than 5 years, and in any event, any order made under subsection (1) or varied under subsection (5) shall cease to have effect on the 8th anniversary of the date on which the bankrupt was adjudicated bankrupt.*
>
> …
>
> *(3B) Where the Court has made an order under section 85A(4), the bankruptcy payment order made under subsection (1) shall have effect for no longer than 5 years from the date of that bankruptcy payment order coming into operation, and where, during that bankruptcy payment order's validity, the court has varied that order under subsection (5) such variations shall not cause that order to have effect for a period of more than 5 years, and in any event, any bankruptcy payment order made under subsection (1) or varied under subsection (5) shall cease to have effect on the 8th anniversary of the date on which the bankrupt was adjudicated bankrupt.*
>
> *(4) In making an order under subsection (1) the Court shall have regard to the reasonable living expenses of the bankrupt and his or her dependants and the Court may also have regard to any guidelines on reasonable living expenses issued by the Insolvency Service under the Personal Insolvency Act 2012 or by the Official Assignee.*
>
> *(5) The Court, on the application of the bankrupt or the Official Assignee or the trustee in bankruptcy, may vary a bankruptcy payment order granted under subsection (1) where there has been a material change in the circumstances of the bankrupt.*
>
> *…"*

199. It is clear that the Official Assignee (or the trustee in bankruptcy) may apply to court for a bankruptcy payment order. The purpose of such an order is to increase the assets available to the estate of the bankrupt for the benefit of the creditors. In enacting s. 85D the Oireachtas balanced the desirability of a discharged bankrupt starting afresh free from his or her debts with the interests of creditors. The application for a bankruptcy payment order may be made at any time prior to the date of discharge, but the Official Assignee may not apply for such an order once the bankrupt has been discharged from bankruptcy. In striking the balance between the interests of the creditors and the interest of the discharged bankrupt, the Oireachtas has limited the scope of a bankruptcy payment order. It may not have effect beyond the time fixed by the Oireachtas. Originally in 2012 the Act provided that an order made under s. 85 D (1) may not have effect for a period of more than five years and in any event "shall cease" to have effect on the 8th anniversary of the date of adjudication of the bankrupt. There was no provision made specifically dealing with cases where an order postponing the discharge from bankruptcy might be made pursuant to s. 85 (A) (4) of the Act.

200. Section 85 D was then amended in 2015. A bankruptcy payment order may not have effect for a period of more than three years and in any event shall cease to have effect on the fourth anniversary of the date of adjudication. However, this amendment is

expressly subject to the provisions of subs. (3B). Where a court has made an order under s. 85A(4) different rules apply. In this case a bankruptcy payment order is limited to a maximum of five years, not three years and the back stop, the date when any such order shall cease to have effect, is the eighth anniversary of the date of adjudication rather than the fourth anniversary.

201. In this case the motion issued prior to the discharge of the bankrupt from bankruptcy. The motion sought orders under s. 85A(3), 85A(4) and 85D. Clearly the application for a bankruptcy payment order was made before the date of discharge as required by subs. (2). Once an application is made within time the court has discretion whether to make a bankruptcy payment order. Subsection (4) requires the court to have regard to the reasonable living expenses of the bankrupt and his or her dependents. The court "may" also have regard to any guidelines on reasonable living expenses issued by the insolvency service or the Official Assignee. There are no other restrictions on the court's power to make such an order. Subsection (3) is concerned with the maximum length of the order and the maximum extension of the order. It does not govern the power of the court to make the order but says when any order made pursuant to subs. (1) shall cease to have effect.

202. Subsection (3) is subject to subs. (3B). It likewise is concerned with the maximum duration of an order made pursuant to subs. (1) and when any order so made shall cease to have effect. Where the court has made an order under s. 85A(4) the potential duration of a bankruptcy payment order is longer and the back stop date for any such order is consequently likewise extended. The subsection does no more.

203. The bankrupt argued that subs. (3B) could only apply to a bankruptcy payment order application brought after the court had made an order under s. 85A(4). The wording of subs. (3B) is clear: where the court has made an order under s. 85A(4) then any bankruptcy payment order made under subs. (1) shall cease to have effect on the eighth anniversary of the date on which the bankrupt was adjudicated bankrupt. The order is made pursuant to subs. (1). The Act says "where 'such an order is made, not' when" such an order is made.

204. An application for an order pursuant to 85A(4) must be brought before a bankrupt is discharged from bankruptcy. Normally a period of time must elapse before the court will be in a position to hear and determine such an application. It is implicit in the terms of s. 85D subsections (3) and (3B) that the bankruptcy payment order may either be made in advance of such a determination or be varied inter alia in the light of the court making an order pursuant to s. 85A(4). This is because the court is authorised to make bankruptcy payment orders of longer duration where it makes an order pursuant to s. 85A(4). But the statute does not provide that if the s. 85D application has been brought but not yet determined that it must be determined within the time period limited by subs. (3) if there is an application for an order under s. 85A (4) pending but not yet made.

205. I therefore reject the argument of the bankrupt that it is no longer open to the court to make a bankruptcy payment order pursuant to s. 85D(1) as the fourth anniversary of the date of his adjudication has passed without the making of such an order and the court has yet to make an order pursuant to s. 85A(4) of the Act. I hold that it is open to the court in the circumstances of this case to make a bankruptcy payment order for a period of a maximum of five years subject to a back stop date of eight years from the date of his adjudication, i.e. 29 July, 2021.

206. In written submissions the bankrupt argued that the Official Assignee had no jurisdiction to bring the application at all as a bankruptcy payment order was not in conformity with the US bankruptcy code. It was said that it was in clear violation of Judge Schiff's order granting limited relief from the worldwide stays and no application had been made to the US bankruptcy court for leave to file or pursue the bankruptcy payment order.

207. This submission is without merit. The worldwide stay relates to creditor action as was made clear from the evidence of Mr. Miltenberger. A bankruptcy payment order requires a bankrupt to make payment for the benefit of his creditors *from his income or other assets*. It applies to income and assets acquired post the date of adjudication. It has nothing to do with creditor action against a bankrupt.

208. Furthermore, the submission ignores the express clear observations of Charleton J. in the Supreme Court where in *A.A. v. B.A.* he held that *"the duty under the Act of 1988 remains clear: once a person is adjudicated bankrupt in Ireland, the provisions of the legislation are to be followed."* In those circumstances it is clear that the bankrupt is subject to the provisions of s. 85D and the court has jurisdiction to make a bankruptcy payment order.

209. The Official Assignee has been unable properly to assess the bankrupt's income and assets for the purposes of assessing his ability to make payments for the benefit of his creditors and the appropriate level of such payments. He has been unable to establish what, if any, reasonable living expenses are discharged by the bankrupt in respect of his and his dependant's expenses. The bankrupt said in his affidavits that his income is fully expended on legal expenses "I am not in a position yet to contribute towards the cost of looking after my family." It would appear from the limited information available to the Official Assignee, credit card statements and so forth, that the normal personal expenses of a bankrupt are being paid other than from his salary of US $120,000 paid by Mountbrook USA and Euro €12,000 per annum from Amrakbo.

210. The court is required to have regard to the reasonable living expenses of the bankrupt but does not have any evidence as to what these are. The bankrupt has in effect stated that they are zero. On the other hand, evidence was adduced of what might be described as lavish or luxury expenditure by the bankrupt, though these may be discharged by his wife or his employer, a company owned and controlled by his wife. Certainly, the expenses included hotel, restaurants and travel expenses in Ireland, England, South Africa and the United States some of which might be payable by an employer but they also included expensive items of personal clothing one would normally expect to pay for personally.

211. I will make a bankruptcy payment order but I do so on the basis that the information before the court is limited and incomplete. This is so because the bankrupt has failed to provide the Official Assignee or the court the necessary information. If either party adduces further evidence, it may be possible to vary this order either upwards or downwards in the light of such evidence. In particular, I have been given no information regarding the tax liability which may attach to the salary paid to the bankrupt by Mountbrook USA. In the absence of such information I order the bankrupt to pay the sum of €7,000 per month commencing on the 25th day of September, 2018 and ending on the 25th day of May, 2021.