THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 21

Record Number: 2016/327

Peart J.
Hogan J.
Hedigan J.

IN THE MATTER OF SECTION 85 OF THE BANKRUPTCY ACT 1988

AS AMENDED

AND IN THE MATTER OF THOMAS MCFEELY,

AN UNDISCHARGED BANKRUPT – 2431

BETWEEN/

THOMAS MCFEELY

APPELLANT

AND

OFFICIAL ASSIGNEE IN BANKRUPTCY

RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 2ND DAY OF FEBRUARY 2017

1. To be declared bankrupt is one of the more unfortunate things that can happen over the course of a lifetime. Not only is it perceived to be a blot on one's escutcheon, but it has also certain practical implications. For example, the bankrupt cannot access credit, and neither may he be a director of a limited liability company. On the other hand, bankruptcy can provide an opportunity to begin again, in the sense that the debts owed to existing creditors disappear, after the Official Assignee, in whom the bankrupt's estate will have vested, has realised the assets of the estate, and used the proceeds to settle the debts owing to creditors on a *pro rata* basis, and usually for much less than full value.

2. This process necessarily takes time. The length of time will depend on the extent to which the bankrupt does or does not cooperate with the Official Assignee in the disclosure of his assets, including the provision of a complete and accurate statement of affairs, and comply generally with the obligations imposed by the statutory scheme upon the bankrupt.

3. Section 85 of the Bankruptcy Act, 1988 as amended ("the 1988 Act"), provides that a bankruptcy will be automatically discharged after a period of three years from the date on which the bankrupt is declared bankrupt. Once discharged he may once again try to access credit, become a director of a limited liability company, and generally speaking attempt to get going again in business, or otherwise earn a living, should he so wish, freed from the burden of the debts which had earlier overcome him.

4. However, circumstances may evolve during the currency of the bankruptcy which justify that three year period of bankruptcy being extended by up to a further five years under the provisions of s. 85A of the 1988 Act, the relevant provisions of which provide:

> *"(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:-*
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> > *(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 …*
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> *(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,*
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> *the Court may where it considers it appropriate to do so, order that in place of the discharge provided for in section 85, the bankruptcy shall stand discharged on such later date, being not later than the 8th anniversary of the date of the making of the adjudication order, as the Court considers appropriate."*

5. If the maximum extension of 5 years is applied, it follows that the entire period of the bankruptcy will have been 8 years in total from the date of adjudication. Given that the appellant was adjudicated bankrupt by order of Dunne J. on the 30th July 2012, his bankruptcy could not be extended beyond 30th July 2020 under these provisions.

6. The present appeal is against an order made by Costello J. on the 1st June 2016 in which she extended the period of bankruptcy until 30th May 2020. In a reserved judgment delivered on that date stated that she was reducing the maximum period permissible under the section very slightly on account of the age of the appellant, who was aged 67 at that time: see *Re McFeely, a bankrupt* [2016] IEHC 299. That order was made on foot of an application by the Official Assignee under s. 85(1) of the Act of 1988. In his affidavit grounding the application the Official Assignee stated that the appellant had failed to co-operate with him, or had failed to disclose assets belonging to his estate, or had sought to hide those assets.

7. More specifically, the grounds relied upon by the Official Assignee in this regard are set forth in the judgment of Costello J. as follows:

> (1) The appellant refused to furnish the Official Assignee with his actual address throughout the period of his bankruptcy;
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> (2) the appellant failed to disclose his interest in seven apartments as a development referred to as Aras na Cluaine, he failed to hand over documents relating to the seven apartments, and he failed to disclose that the documentation was held by a company which acted as his agent, Coalport Building Company Ltd.; and
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> (3) the appellant failed to disclose his interest in units 12–16, Old Saw Mills Industrial Estate, Lower Ballymount Road, Dublin 12, he failed to hand over documents relating to those five units, and he failed to disclose that the documentation was held by a company which acted as his agent, Coalport Building Company Ltd.

8. Having considered the affidavit evidence adduced by both the Official Assignee and the appellant, and having considered the legal submissions made by each party, the trial judge reached the following overall conclusion:

> *"26. In my judgment there is ample, cogent evidence which establishes clearly that the bankrupt has failed to co-operate with the Official Assignee in relation to the realisation of his assets and has hidden assets from or failed to disclose assets to the Official Assignee in breach of his statutory obligations. This has been deliberate and has persisted despite the attempts by the Official Assignee to secure his co-operation. It is continuing to this day in the case of his address and his failure to file a statement of affairs. I will therefore make an order pursuant to s. 85A extending the period of the bankruptcy in this case. The issue remaining to be determined is the duration of the extension."*

9. The trial judge then considered the provisions of s. 85A of the 1988 Act, noting that the Personal Insolvency Act 2012 had reduced the period of bankruptcy from 12 years to 3 years, and stated in that regard that:-

> *"as part of the rebalancing of the bankruptcy code affected by the Act of 2012, the Oireachtas conferred upon the court a power to make an order where it considered it appropriate so to do to extend the period of bankruptcy for a maximum period of a further five years. The section has to be understood in that context."*

10. Having so stated, the trial judge then considered the judgment of Clarke J. in the Supreme Court in *Killally (a bankrupt) v. The Official Assignee* [2014] 4 I.R. 365 to which she had been referred, and stated as follows:

> *"29. Clarke J. gave the judgment of the Supreme Court. First, he held that the court can simply extend the period of bankruptcy as a sanction to reflect the established failure to cooperate, hiding or failure to disclose relevant assets. It is not necessary that it be for the purpose of conducting further investigations. He acknowledged that a suspension of discharge from bankruptcy of that nature is necessarily penal in character and he stated that it followed that any wrongdoing would require to be clearly established before the jurisdiction is invoked. He also said that the extent of any extension of the period of bankruptcy order by the court should be proportionate to the established wrongdoing. At para. 3.20 of his judgment he stated:-*
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> > *"[o]n behalf of the Official Assignee, on the other hand, it was contended that the personal bankruptcy regime relies to a significant extent on individual bankrupts to co-operate fully with the Official Assignee and the process. In those circumstances it is said that it is entirely appropriate for the Oireachtas to consider, for the purposes of discouraging non-compliance, that the Court should be empowered, in an appropriate case, to extend the period of bankruptcy in cases of significant failure of compliance. In my view that argument is well-founded."*
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> *He referred to "the need to impose a significant discouragement to prevent bankrupts from failing to comply with the clear obligation to cooperate". Clarke J. emphasised that once the court is satisfied that there has been a failure to cooperate with the Official Assignee in relation to the bankruptcy or that the bankrupt has hidden from or failed to disclose to the Official Assignee income or assets that the extension of the bankruptcy period should be proportionate to the established wrongdoing. At para. 5.6 of the judgment, Clarke J. stated:-*
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> > *"[t]he trial judge was entitled to take the view, as he clearly did, that this was a serious breach of the obligation placed on Mr Killally to cooperate with the Official Assignee and not to seek to gain personal advantage by the sale of equipment which should have formed part of his estate for bankruptcy purposes. The seriousness of that breach needs to be measured in the light of the correct view taken by the trial judge that the maintenance of the integrity of the bankruptcy process is of the utmost importance and requires to be encouraged by the imposition of sanctions for breach. In the light of those considerations, and notwithstanding the fact that Mr Killally had already been sentenced by the criminal courts, I am of the view that it was within the range of sanctions open to the trial judge in all the circumstances of this case to impose, by way of additional civil sanction, an extension of one year on Mr Killally's bankruptcy".*
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> *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 attach the full period of extension and that lesser failures will attract a lesser sanction. The issue, therefore, for the courts to consider is where such along that spectrum do the particular established acts of each individual bankrupt fall.*
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> *31. In my opinion the breaches by the bankrupt in this case which have been established to my satisfaction are at the very grave end of the spectrum. In reality the bankrupt has refused to cooperate in any meaningful way with his bankruptcy. His initial interview in August, 2012 with the Official Assignee was, to his knowledge, misleading. He gave as his address the house in Claudy, Co. Derry when he knew that he never resided at that address and did not intend to*

reside there. He failed to disclose his interest in 12 properties. He presented the statement of affairs which he had prepared for his English trustee in bankruptcy to the Official Assignee as disclosing his assets when he knew that it was incomplete. He continued thereafter to fail to cooperate with his bankruptcy. He sought to dictate where he would be interviewed by the Official Assignee (by insisting that the Official Assignee should travel to Derry to interview him) and he required to be paid to travel to Dublin if he was to be interviewed by the Official Assignee. Unilaterally he decided that equitable claims by third parties were valid and that therefore his estate had no claim to certain properties. He decided his 20% interest in certain properties (and quite possibly 100% interest) was of nil commercial value, though there was no charge on the properties, without informing the Official Assignee of his interest and his decision. Unlike Mr Killally, his creditors are, or would be, but for the investigations of the Official Assignee, at a loss as a result of his persistent breach of his statutory obligations. In these proceedings, on affidavit, he has flatly refused to furnish the address or addresses where he has resided and where he now resides. He has failed to furnish a sworn statement of affairs and has furnished in purported compliance with the statutory obligation a statement of affairs prepared in his English bankruptcy which he knows to be false. He has greatly hindered the Official Assignee in the administration of his estate.

32. The effect of his non-co-operation has been severely to prejudice the realisation of his estate for the benefit of his creditors. The non-co-operation and the failure to disclose assets has been on the extreme end of the spectrum and it follows in my opinion that the extension period should reflect this fact."

11. Clearly the trial judge did not accept the appellant's denials in his affidavits of the allegations laid against him by the Official Assignee, and was completely satisfied on the evidence adduced that the appellant had failed to cooperate as required, had not disclosed all of his assets, and had indeed hidden assets – all in contravention of his statutory obligations under the Act of 1988. She stated that these actions and inactions by him were considered to be *"at the very grave end of the spectrum"*, and that she would therefore extend the period of the bankruptcy to just short of the maximum permitted under the section, allowing a deduction of just two months on account of the appellant's age.

12. The appellant has argued on this appeal that the trial judge erred in a number of respects.

13. Firstly, it is submitted that she wrongly admitted into evidence certain documents which he states were illegally obtained and removed from the premises of Coalport Building Company Limited ('Coalport') at 1, Holles Street, Dublin 2. It appears that the appellant was the freehold owner of these premises, and that Coalport occupied same on foot of a 25 year lease. The appellant had been a director of this company, and managed his business affairs from the premises. The Official Assignee attended at these premises and removed certain documents from filing cabinets, as well as two computers. The appellant submits that this was an unlawful entry as no warrant had been obtained pursuant to the provisions of s. 28 of the Act of 1988, and therefore, by virtue of the exclusionary rules of evidence as set forth in cases such as *DPP v. JC* [2015] IESC 31, the evidential fruits of this unlawful entry and search should not have been admitted into evidence and then relied upon for the conclusions reached. It is submitted that this unlawful entry and search by the Official Assignee constituted a "knowing, reckless or grossly negligent breach of constitutional rights".

14. Secondly, it is submitted that by admitting the said materials into evidence unlawfully obtained the trial judge failed to give appropriate and balanced consideration to the need to uphold the integrity of the bankruptcy regime.

15. Thirdly, it is submitted that by admitting such materials into evidence the trial judge failed to consider the appellant's personal and property rights derived both from the Constitution and the European Convention on Human Rights, and failed to uphold and vindicate those rights.

16. Fourthly, it is submitted that the trial judge applied a disproportionate sanction by failing to properly consider the judgment of Clarke J. in *Killally (a bankrupt)* in which a 12 month extension of bankruptcy was ordered, and failed to take account of the fact that for most of the first 12 months following the date of his adjudication, and in breach of a legitimate expectation in this regard the Official Assignee made no contact with the appellant.

17. Fifthly, it is submitted that the trial judge failed to consider certain mitigating features such as the alleged misconduct of the Official Assignee (by entering the premises without first obtaining a warrant entitling him to do so), and the age of the appellant.

18. Sixthly, it is submitted that the trial judge erred in failing to consider or appreciate that while the wording of s. 85A of the 1988 Act gives a power to the Official Assignee to make an application for an extension of the bankruptcy, it does not mandate that he does so – in other words that he has a choice to make. It is submitted that his decision in this case to bring the application and seek the maximum extension of the bankruptcy was therefore a reviewable decision, and that the trial judge erred in determining that the Official Assignee's decision in that regard was immune from challenge *"under legal principles of natural justice, constitutional justice and the principle of objective bias"*.

19. Lastly, it is submitted that the trial judge erred by considering that part of the failure to co-operate with the Official Assignee was by not providing his home address. The address which he gave was 258, Foreglen Road, Claudy, Co. Derry. The appellant does not live there permanently, but, according to his affidavits, he gave that address as being one which was reliable as a postal address so that the Official Assignee could communicate with him by addressing correspondence to him at that address. It is submitted that the trial judge failed to appreciate the reality of this situation, and wrongly relied upon this issue as evidence of his non co-operation with the Official Assignee.

Issue 1 – unlawful entry and seizure of documents and computers

20. In his affidavit to ground the application for an extension of bankruptcy, the Official Assignee, having set forth a number of examples of lack of co-operation on the part of the appellant including his failure to disclose assets and file a proper statement of affairs, stated that in the absence of full disclosure of all information and documents in relation to the bankrupt's estate he had to conduct a time-consuming investigation to discover the extent of his assets and liabilities, and that in that regard he *"attended at his business premises at 1 Holles Street, Dublin 2 which was vacant to obtain information prior to the appointed Receiver taking possession of it"*. The appellant has sought to doubt the veracity of that particular statement by reference to what was stated by the Official Assignee in his third affidavit in answer to the appellant's objection to the use of material obtained from the Holles Street premises on the basis that it was unlawfully obtained, and where at para. 3 thereof he stated:-

"3. In fact I was invited into the premises by Grant Thornton on their appointment as Receiver thereof. The Lessor was Mr McFeely and his interest and his commercial records were vested in me and the Receivers as Lessees invited me in."

21. The issue raised by the appellant is his contention that given the power that he has under s. 28 of the 1988 Act to apply for a

warrant to enter and search a premises, the failure to apply a warrant in respect of the Holles Street premises results in an unlawful entry and search, rendering inadmissible as evidence any documents or other materials obtained during the course of the search which followed what is said to be the unlawful entry, as would be the case in a criminal trial, subject, of course, to the modification of the exclusionary rule contained in the majority decisions of the Supreme Court in *JC v. Director of Public Prosecutions* [2015] IESC 31.

22. It is worth mentioning at this point that the Official Assignee had obtained a warrant from the Court pursuant to s. 27 of the 1988 Act, but not one under s. 28. Those provisions provides as follows:

> "27(1) The Court may by warrant direct the Bankruptcy inspector or any of his assistants to seize any property of the bankrupt.
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> (2) An official acting under the warrant may seize any part of the bankrupt's property in the possession or control of the bankrupt and, for the purpose of seizing such property, may enter and if necessary break open any house, building, room or other place belonging to the bankrupt where any part of his property is believed to be.
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> 28. Where it appears to the Court that there is reason to believe that any property of the bankrupt is concealed in any house, building, room or other place not belonging to the bankrupt, the Court may grant a search warrant to the Bankruptcy inspector or any of his assistants, or any other person appointed by the Court, who may execute the warrant according to the tenor thereof."

23. The appellant relies on the fact that Coalport was the lessee and occupier of the premises under a 25 year lease which still existed, and that Coalport must be considered to be a separate legal entity. He says that while he had been a director of that company, he resigned as a director upon his adjudication as a bankrupt. It is submitted that absent a warrant being obtained under s. 28 the entry upon the premises of Coalport by the Official Assignee was unlawful.

24. The Official Assignee submitted, firstly, that he did not require a warrant to enter those premises since the bankrupt's interest as Lessor of the premises had vested in him, thereby entitling him to enter the premises, but that in any event, on the facts as sworn to, he was invited into the premises by the Receiver appointed over the premises to enable him to take possession of any of the bankrupt's property found there. He submitted also that even if complaint can be made about this entry onto the premises without a warrant, it is a complaint that could be made only by Coalport itself and not by the bankrupt on its behalf.

25. The trial judge considered the submissions made in this regard. Having first stated that the Official Assignee was entitled to the documents themselves which he seized during the search since all the bankrupt's property had vested in him, and having also referred to the fact that the bankrupt was in any event obliged under s. 19 of the 1988 Act to deliver up possession of these documents to the Official Assignee, as well as to notify him that they were in the possession of Coalport, being the bankrupt's agent, she stated:

> "21. The bankrupt objected that the warrant of seizure issued pursuant to s. 27 did not extend to the premises leased by the bankrupt to Coalport Building Company Ltd. The Official Assignee argued that as the bankrupt was the lessor or and the receiver appointed over the bankrupt's interests had invited him into possession and the premises were vacant, that he was entitled to enter the premises.
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> 22. I do not accept that the s. 27 warrant authorised the Official Assignee to enter premises which were the subject of a 25 year lease to a third party (Coalport building Company Ltd) and which lease had not been determined. The fact that the bankrupt was the owner of the lessor's interest did not give him an entitlement to possession. Likewise, the receiver did not have the right to possession of the premises during the currency of the lease and therefore had no right to invite or permit the Official Assignee to enter the premises. It was open to the Official Assignee to obtain the consent of the party entitled to possession, the lessee, to enter the premises and take possession of the premises of the bankrupt or, in the alternative, to obtain a s. 28 warrant. The fact that the premises were vacant does not alter the limits of the Official Assignee's authority under the s. 27 warrant."

26. There is no cross-appeal against those conclusions, and it is unnecessary, therefore, to express any view on this point. In the absence of any cross-appeal, however, this Court is nonetheless obliged to proceed on the basis that the search was unlawful.

27. As to the arguments made by the appellant that the fruits of the unlawful entry without the necessary warrant should not have been admitted into evidence by virtue of the exclusionary rule the trial judge stated the following at paras. 23 and 24 of her judgment:

> *"23. The bankrupt sought to exclude from evidence the documents obtained from the premises of Coalport Building Company Ltd on the Basis of the Decisions in The People (Attorney General) v. O'Brien [1965] I.R.142, The People (Director of Public Prosecutions) v. Kenny [1990] 2 I.R.110 and DPP v. J.C. [2015] IESC 31. These cases all concerned the inadmissibility of evidence obtained in breach of the constitutional rights of an accused person. Each of those cases concerned the inviolability of the dwelling. They can have no application to this case. The bankrupt's dwelling was not searched. The premises which were entered were those of a limited liability company. The premises was a business premises, it was not residence. No constitutional right of the bankrupt was in anyway breached. The party entitled to make complaint of the Official Assignee was the company. It is noteworthy that the company complained that the Official Assignee had removed documents belonging to the company. It made no complaint concerning the removal of documents belonging to the bankrupt as of course the Official Assignee was entitled to those documents as of right. The Official Assignee did not purport to rely upon any of the company's documents in this application. He relied upon documents belonging to the bankrupt which were present on the premises of the company but were not company documents.*
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> *24. It is not open to the bankrupt to object to the Official Assignee taking possession of the bankrupt's documentation. It is not open to the bankrupt to object on behalf of Coalport Building Company Ltd to the entry by the Official Assignee of the leased premises. Any wrong that may have occurred (and I am far from holding that there was such a wrong) is a matter as between Coalport Building Company Ltd and the Official Assignee. It does not afford a basis for the bankrupt to object to the introduction of the documentation in evidence in these proceedings." [my emphasis]*

28. The appellant's first complaint under this ground of appeal is that the trial judge erred when she concluded that no constitutional right of his had been breached when this unlawful entry occurred. He submits that the constitutional protection provided by the requirement that a search warrant be obtained is not confined to the dwelling, but rather, as stated by Keane J. (as he then was) in *Simple Imports Ltd v. Revenue Commissioners* [2000] 2 I.R. 243 at p. 250 "it extends to every person's private property".

29. However, the point in the present case is that the Holles Street premises was leased to Coalport, and therefore did not comprise "property" of the appellant, as that phrase must be understood in the present proceedings. He was the freehold owner of the premises, but the rights invaded, if that be so, were the rights of the lessee company, as pointed out by the trial judge. Any rights that were inherent in the materials, documents and property of the appellant that were found on the premises had by this time already vested in the Official Assignee as being part of the bankrupt's estate, as also identified by the trial judge. The Official Assignee was, therefore, entitled to have them. Coalport had no entitlement to them that was superior to that of the Official Assignee.

30. I would stress, however, that - as illustrated by cases such as Simple Imports and Competition Authority v. Irish Dental Association [2005] IEHC 383, [2006] 1 I.L.R.M. 383 - the unlawful entry by agents of the State on to business premises is always a very serious matter and nothing in this judgment should be understood as diluting this basic principle, itself a cornerstone of personal freedom and the rule of law. An unlawful entry onto such premises by an agent of the judicial branch of government such as the Official Assignee is, furthermore, a particularly serious matter, given that all judges have made a solemn declaration pursuant to Article 34.6.1 of the Constitution to uphold the Constitution and the law. If, therefore, the Official Assignee had unlawfully entered the business premises occupied by the bankrupt – as distinct from the premises of which he was simply the reversionary lessor – then rather different considerations would have come into play. That, however, is not the position here, for all the reasons I have just mentioned.

31. Given the provisions of s. 28 of the 1988 Act it seems clear that the Official Assignee would have been able to make out a case for the issue of a warrant under that section to enable him to take possession of the bankrupt's property which was believed to be present on the premises leased to Coalport. However, I am satisfied that the trial judge was correct in concluding that the failure to do so, and to gain entry in the manner he did for the purpose of this search and seizure, did not infringe any constitutional right of the appellant. In relation to whether there was any breach of the rights of Coalport the trial judge stated specifically that she was far from holding that there was any such breach, but in any event even if there was, it was a matter for Coalport to pursue with the Official Assignee, and not the appellant. On the facts as disclosed, it appears that while Coalport raised an issue with the Official Assignee about the removal of some of its documents, it did not complain about the removal of documents belonging to the appellant. For the same reasons it cannot be said by the appellant that any right of his under Article 8 of the European Convention on Human Rights was engaged on these facts, much less infringed.

32. In my view, the trial judge was correct in her conclusions on this issue. In circumstances where a correct conclusion has been reached that no constitutional rights of the appellant himself were breached, and therefore that any documents and materials obtained during the search of the premises were not obtained in breach of any of his constitutional rights, the appellant has no basis upon which to urge the Court that the fruits of that search were admissible as evidence against him under the exclusionary rules of evidence.

33. Nevertheless, the appellant has urged that the very fact of the entry being an unlawful one is sufficient to engage the exclusionary rule, even if no constitutional right of the appellant was breached. The appellant submits that in circumstances where the entry into these premises has been found to be an unlawful entry since no warrant had been obtained under s. 28 of the 1988 Act, it constituted a "knowing, reckless or grossly negligent" breach of constitutional rights (if not of the appellant, then of Coalport), such that the behaviour comes within the newly formulated exclusionary rule of evidence as stated by Clarke J. (and with which the majority agreed)in the Supreme Court in *DPP v. JC* [2015] IESC 31. As stated by Clarke J. the newly formulated rule contains a number of elements; but that to which the appellant relies is that which states:

> *"Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context, deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct and state of mind not only of the individual who actually gathered the evidence concerned but also of any other senior official or officials within the investigating or enforcement authority concerned who are involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned."*

34. The appellant lays emphasis on the words *"deliberate and conscious violation of constitutional rights"*, and seeks to characterise the actions of the Official Assignee in gaining entry to these premises in the manner shown as being to that extremity, thereby meriting exclusion. That characterisation is urged upon this Court on the basis that the actions of the Official Assignee should not be considered to have been accidental or inadvertent, since, firstly, he knew that the bankrupt was no longer a director of Coalport, nor could he be given his adjudication as a bankrupt; and secondly on the basis that in many other cases the Official Assignee has obtained a warrant under s. 28 to gain entry to premises in circumstances such as these, and must therefore be taken to be aware of the necessity to do so in the present case, but deliberately chose not to.

35. Firstly I would note again that no finding of fact was made by the trial judge in relation to whether or not any rights of Coalport were breached. She specifically stated that she was "far from so finding". I read that as a reservation of that issue, and not a finding that no right was breached. However, it is unnecessary in my view to dwell upon that factual question because whether or not there has been a breach of Coalport's rights, and whether or not the entry upon the Holles Street premises was unlawful because no warrant had authorised the Official Assignee to enter the premises, the exclusionary rule as formulated in *JC* and which is relied upon by the appellant cannot avail him. No right of the appellant was breached.

36. The trial judge stated that the cases relied upon by the appellant had no relevance because each of them dealt with the inviolability of the dwelling. That is correct. She also stated that no constitutional right of the appellant had been breached. That is also correct. In such circumstances the exclusionary rule which requires that evidence obtained in breach of constitutional rights may not be deployed in evidence (subject, of course, to the exceptions identified by the Supreme Court majority in *JC*) simply does not avail the appellant. In so far as the entry was unlawful, though falling short of being in breach of the appellant's constitutional rights, there is clearly a discretion whether or not to admit the evidence obtained. In that regard I would refer to the judgment of Laffoy J. in *Universal City Studios Inc. v. Mulligan* (No.2) [1999] 3 I.R. 392. That was a civil action where the plaintiff sought injunctive relief and alleged that the defendant had made and sold pirated video tapes over which the plaintiff had copyright. Certain tapes had been seized from a vehicle, but the warrant authorising the search of the vehicle in question could not be produced at the hearing. The question then arose as to whether the fruits of the search were admissible in evidence. At p. 404 of her judgment she concluded as follows:

> *"Although this is a civil action, I am satisfied that as a matter of principle the exclusionary rule laid down by the Supreme Court in The People (Director of Public Prosecutions) v. Kenny [1990] 2 I.R. 110 in relation to the admissibility in criminal*

trials of evidence obtained by invasion of the constitutional personal rights of the citizen is applicable. In that case, delivering the majority judgement, Finlay C.J. said (at p.134):

> *'I am satisfied that the correct principle is that evidence obtained by invasion of the constitutional personal rights of the citizen must be excluded unless the court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its (the court's) discretion'.*

On the evidence, I am satisfied that the seizure of the video cassettes from the defendant at Ashbourne did not involve an "invasion of the constitutional personal rights" of the defendant. On the assumption that the evidence was nonetheless obtained by illegal methods, albeit methods which did not amount to an invasion of the defendant's constitutional personal rights, I consider that the rule applicable to the admissibility of such evidence in criminal trials applies, namely, that the court has a discretion to admit it. On the evidence, I am satisfied that Garda Tarrant acted bona fide in the discharge of his duties on the occasion in question and I rule that the evidence is admissible."

37. In the present case, in answer to the appellant's submission that the Official Assignee ought not to be permitted to rely upon any documents or materials gained as a result of this unlawful entry upon the Holles Street premises, I would similarly conclude, given the unlawful nature of the entry, that nevertheless the Court has a discretion whether or not to admit the fruits of the search into evidence, and therefore whether or not to permit the Official Assignee to rely upon what he obtained for the purpose of supporting his application for an extension of the bankruptcy, and that in exercise of that discretion the Court would be justified in permitting the evidence obtained to be relied upon.

38. I leave aside for the moment the Official Assignee's contention that even without placing reliance upon the fruits of this entry and search of the Holles Street premises there is more than enough evidence in his affidavits to justify the granting of the extension of the bankruptcy as sought.

39. A number of matters are relevant to my conclusion that the Court would have been justified in allowing reliance to be placed on the evidence obtained from the unlawful entry of the premises. Firstly, the evidence of the Official Assignee is that he was invited into the premises by the receiver. While I agree with the trial judge's conclusion that this did not render lawful the entry into the premises, it nevertheless goes to the *bona fides* of the Official Assignee in relation to the exercise of his statutory functions. Secondly, the documents and material found and seized by the Official Assignee were, in any event, materials that the Official Assignee the ownership of which had already vested in him by virtue of the adjudication of bankruptcy and of which he was therefore entitled to possession of. Thirdly, what was seized were documents and materials which in any event the appellant was obliged to furnish to the Official Assignee pursuant to s. 19 of the Act of 1988 and had failed to do so. Finally, the most critical consideration of all is that the unlawful search was not made of premises then occupied by the bankrupt for business or other purposes. As I have already indicated, if these had been the facts, then regard would have to have been had to entirely different considerations regarding the admission of any evidence, not least those mentioned by McKechnie J. in *Irish Dental Association*.

40. The appellant also made the case that he was prejudiced by the unlawful actions of the Official Assignee in removing documents from the premises. He refers to that prejudice at para. 7 of his affidavit sworn on the 4th December 2015. Firstly, he considers that he has been deprived of an opportunity of trying to contact tenants, both past and present in order to better verify the rental accounts furnished to the Official Assignee. Secondly, he averred that because the company's bank accounts were seized he cannot further verify the lodgment of a sum of €0.5 million which he has referred to earlier in that affidavit as having been lodged with the company by Eamon Gargan in 2005 to replace what he describes as *"a large sum of money to replace money that Larry O'Mahony" took out of the company (Coalport …)"*. It is unnecessary to describe the stated facts said to underlie that alleged lodgment.

41. The point being made is simply that he is unable to verify what he says about it because he has been deprived of access to the company's accounts. However, in my view, it is clear also that he has made no efforts to obtain the information upon which he wishes to try and rely. Indeed, if he had engaged appropriately with the Official Assignee (which he did not) he could I am sure readily have been provided with access to the materials in question if they would be of benefit to the case he wished to make. I would have thought that the obvious way in which to pursue those inquiries was with the Official Assignee. He did not do so. He cannot rely on any prejudice as alleged in these circumstances.

42. I therefore consider for all the reasons which I have stated, that the trial judge was correct in concluding that the Official Assignee was entitled to rely, in so far as he did, on the information gained from documents and material seized when he gained entry, albeit unlawfully, to the Holles Street premises.

43. By way of completeness I should add that a ground of appeal urged by the appellant is that by overlooking the unlawful nature of the entry and search, and by placing reliance upon documents and information gained from that unlawful entry, the trial judge failed "to give any appropriate, balanced consideration and/or any consideration at all to the integrity of the bankruptcy regime/system and the upholding of same". For the same reasons that I concluded that it was appropriate that any discretion to admit the materials into evidence even though gained on foot of an unlawful entry be exercised in favour of admission, I am satisfied that there was no failure on the facts of this case to uphold the integrity of the bankruptcy code.

Issue 2 – Non-Co-operation by the bankrupt

44. I have already set forth the trial judge's conclusions contained at paras. 31 and 32 of her judgment in relation to the failure by the bankrupt to comply with his statutory obligation to cooperate with the Official Assignee in relation to the furnishing of details of his assets, the filing of a proper statement of affairs, and in relation to providing details of where he resides. There is no need to do so again. In view of the conclusions which I have reached on the admissibility of the evidence gained as a result of the search of the Coalport offices it is clear that the trial judge was entitled to take into consideration all of the evidence adduced on affidavit by the Official Assignee, as well of course of what was stated in response in affidavits sworn by the appellant.

45. The appellant has submitted that in accordance with what was stated by Clarke J. in *Killally (a bankrupt) v. The Official Assignee* [supra] any allegations of wrongdoing or non-co-operation must be clearly established before the Court exercises its jurisdiction to extend the period of bankruptcy. He submits that this has not been established in the present case to that standard, and refers also to the penal nature of the jurisdiction again emphasising the need for clearly established facts.

46. In my view there is ample evidence adduced by the Official Assignee which, even when read in conjunction with what is stated in response in the appellant's replying affidavits, and giving the appellant the benefit of any doubt, justifies the conclusion for the purposes of the s. 85A application that the appellant failed to comply with his statutory obligations of co-operation under s. 19 of the Act of 1988.

47. It has been averred that at the second interview that was conducted with the appellant on 7th August 2012 the appellant informed the Official Assignee that he would be going to live at his parents' house in Claudy, County Derry. There is no dispute that this is not an address at which he ever resided for present purposes. It is a property owned by his parents. He states that he provided it as an address for correspondence to be received from the Official Assignee. Nevertheless, all of his affidavits commence by stating "I, Thomas McFeely of 258 Foreglen Road, Derry, Northern Ireland BT47 4EE make oath and say as follows ….", yet they are sworn before solicitors at addresses in London. At para. 40 of his affidavit sworn on the 8th September 2015 he states:

> *"As I have explained I am a British citizen. I hold a British passport. I was born in Northern Ireland and my principal place of residence is 258 Forglen Road, Derry, Northern Ireland BT47 4EE. I gave this information to Mr Lehane at the outset. He has never visited the property. He has persisted in refusing to accept it is my address and on each occasion he has requested me to provide an address. I have reminded him that this is my correct address ……".*

48. At para. 41 of the same affidavit he states, inter alia, that he has no permanent place of abode, that he relies for accommodation on friends in the United Kingdom and never stays for *"longer than a few days or weeks at a time"*. He goes on to state that while the Official Assignee has insisted that he provide details of the people who provide this support, he is not prepared to do so *"because I do not want to expose these friends to the same media harassment that myself and my family have had to endure"*.

49. The Official Assignee has stated that he was aware that the appellant's family home on Ailesbury Road, Dublin 4 at the date of his bankruptcy had later been repossessed by the National Asset Management Agency, but was unaware of where the appellant then resided thereafter. He stated in his affidavit sworn on the 17th July 2015 that the appellant does not reside at the Claudy address provided. He went on at para. 17 to state:

> *"… It is important that I am able to assess whether a bankrupt is living in a substantial residence, whether owned by him directly or indirectly or rented at an excessive cost. I have no means whatsoever to check on his activities, wealth or lifestyle. I have made repeated requests for his address by letters/emails all of which have been refused …".*

50. It is relevant to note the provisions of s. 20 (1) of the Act of 1988 which provides:

> *"20.(1) A bankrupt shall forthwith notify the Official Assignee in writing of any change in his name <u>or address</u> which occurs during his bankruptcy" [my emphasis]*

51. In my view there was ample evidence adduced, which the trial judge was entitled to accept, that the appellant had failed to cooperate by reference to the refusal to provide an address or indeed 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.

52. The trial judge concluded also that the appellant had failed to disclose all of his assets. The Official Assignee had stated on affidavit that the documents obtained following the search of the Holles Street premises which the appellant was obliged to furnish to him under s. 19 of the 1988 Act showed clearly that what had been disclosed to him by the appellant up to that point was incomplete. The trial judge sets out these failures in detail. It suffices for me to draw attention to the fact that the documents and records recovered from the search of the premises at Holles Street showed that in addition to certain apartments referred to as Aras na Cluaine which the appellant had provided details of at interview, he was the owner of six further apartments at that address which he had failed to disclose. This information was available from leases, memos and management company records recovered at the premises. The trial judge was entitled to reject the explanations offered on affidavit in relation to these assets.

53. In addition details of other undisclosed assets were recovered from documents seized in respect of properties at Old Sawmills Industrial Estate, Dublin 12. Again, the appellant attempted to distance himself from ownership by reference to some unsubstantiated arrangement he had with his brother who, he says, put up 80% of the purchase money and that he himself was to have a 20% share of the ownership, but that "due to the economic collapse the value of the units plunged below the amount owed to my brother rendering any proposed share worthless and/or of no financial relevance". Again, this statement evinces a certain *'a la carte'* attitude on the part of the appellant to his statutory obligations of disclose his assets following his adjudication as a bankrupt. The trial judge was entitled to conclude as she did in relation to this matter, and the other matters which the Official Assignee relied upon for his application for an extension.

54. It is noteworthy that the appellant has never filed a proper statement of affairs. The attempts made by the Official Assignee in correspondence with the appellant and solicitors who acted for him at times, but to no satisfactory avail. The appellant averred in his first affidavit that he provided the Official Assignee with "all the paperwork in relation to my assets and liabilities in the English bankruptcy investigation", and that he had collected all the documents that he had provided to his English bankruptcy trustee, and further that *"these documents gave full and detailed information in relation to my assets and liabilities"*. This statement could not have been correct on any view of the evidence. In my view the failure to have provided a proper and complete statement of affairs is another aspect of non co-operation which the trial judge was entitled to rely upon for her overall conclusion that the extent of the non co-operation was such that an extension of bankruptcy was warranted in this case.

55. At para. 26 of her judgment the trial judge stated as follows:

> *"26. In my judgment there is ample, cogent evidence which establishes clearly that the bankrupt has failed to co-operate with the Official Assignee in relation to the realisation of his assets and has hidden assets from failed to disclose assets to the Official Assignee in breach of his statutory obligations. This has been deliberate and has persisted despite the attempts by the Official Assignee to secure his co-operation. It is continuing to this day in the case of his address and his failure to file a statement of affairs. I will therefore make an order pursuant to s. 85A extending the period of bankruptcy in this case. The issue remaining to be determined is the duration of the extension."*

56. I have no hesitation in stating that this was a conclusion that she was entitled to reach on the evidence adduced, and I reject the submissions made to the contrary.

Issue 3 – Reviewability of Official Assignee's decision to bring an application under s. 85A for an extension of bankruptcy

57. Essentially the appellant's point here is that given the fact that s. 85A of the 1988 Act permits rather than mandates the Official Assignee to bring an application under the section for an extension of the bankruptcy, his decision to do so in this case involves a decision to do so, and that this decision, being an administrative one, is subject to review in the normal way under "the legal principles of natural justice, constitutional justice, and the principle of objective bias". The trial judge rejected this argument in short order stating that it was without merit or authority. I express my complete agreement with that conclusion. There is no doubt that the section provides that the Official Assignee may bring an application to object to the discharge of the bankruptcy under s. 85 (*i.e.* after 3 years) in certain circumstances, namely where "he "believes" that the bankrupt has failed to co-operate or has hidden assets…" etc. Presumably an Official Assignee acting reasonably would not form such a belief without some evidential basis to support it. However, if he did launch an application with clearly no grounds for same, it will be quickly refused. But I can see no basis for considering that when a notice of motion is served on the bankrupt seeking an extension of his bankruptcy on the grounds permitted in s. 85A, the bankrupt could immediately launch proceedings by way of judicial review in order to have a question determined ahead of any decision on the motion itself whether or not the Official Assignee was acting unreasonably, with bias, or that the bringing of the motion was irrational. Might such an applicant then seek an order of prohibition seeking to restrain the bringing of an application under s. 85A. It is frankly a ludicrous contention in my view.

58. As for any argument as to unreasonableness and / or irrationality in the decision to bring an application, clearly the same issues would arise as on the motion itself. As to objective bias on the part of the Official Assignee, any such complaint must be unstateable given the statutory basis for his existence. If he is objectively biased in one case by virtue of his position, he must be objectively biased in all cases. That makes no sense at all. Actual bias could be another matter altogether, but that is not what has been pleaded in this case. It is an allegation of objective bias arising in particular from the fact that the Official Assignee recommends an extension of the bankruptcy to the Court.

59. As for the argument that the decision to issue a motion to seek an order under s. 85A is reviewable on the basis of fair procedures or constitutional justice, it cannot be seriously contended, for example, that before bringing a motion for an order under s. 85A the bankrupt must be given an opportunity to put forward reasons why such a motion should not be brought. The decision to bring the motion does not impinge on any right of the bankrupt. It is the determination of the motion that may or may not affect the bankrupt, depending on the outcome.

60. The trial judge was correct to conclude that these arguments were unstateable and without authority to support them.

Issue 4 – Proportionality of the extension order granted

61. Under s. 85A of the Act of 1988 the maximum period of extension of a bankruptcy that may be ordered is an additional 5 years. In this case the trial judge considered that the degree of non co-operation found to exist on the part of the appellant merited an extension just two months short of that maximum period. She allowed a deduction of 2 months from the maximum available by virtue of the appellant's then age of 67 years.

62. The appellant submits that the trial judge fell into error in the application of this near maximum extension of the bankruptcy, and that it is disproportionate. He seeks support from the fact that in the *Killally* case to which I have referred in another context an extension of just one additional year was ordered, and submits that the trial judge failed to have proper regard to that decision. He also submits that the trial judge failed to take into account the fact that for the first twelve months of his bankruptcy the Official Assignee failed to make contact with him, despite stating that he would do so, and further that she failed to have regard to what are described as "mitigating factors" such as the conduct of the Official Assignee regarding the unlawful entry, and the age of the appellant.

63. In my view the appellant has no basis for submitting that the trial judge failed to have proper regard to the *Killally* case. In fact paragraphs 28 and 29 covering more than two full pages are devoted to a consideration of that case both in relation to the first instance judgment of McGovern J. in the High Court and that of Clarke J. in the Supreme Court. She refers to it again in paragraph 31 and in paragraph 34, on each occasion referring to the very different underlying facts which distinguish it from the present case. Having considered the *Killally* decision comprehensively, she reached her conclusion that the degree of non cooperation was markedly more serious and *"at the grave end of the spectrum"*. I have already set out passages from her judgment, namely paras. 26, 29-32 where her conclusions are set forth in a fully reasoned manner.

64. I find no error of fact or law in those conclusions. Despite the appellant's protestations by way of attempting to refute the Official Assignee's allegations of non co-operation, I am completely satisfied that it was open on the evidence for the trial judge to conclude that the level of non co-operation is established to the upper end of the spectrum of gravity, and that it was deliberate and ongoing. In my view, the trial judge was justified in ordering the extension of 4 years and 10 months, allowing a small deduction of two years on account of the appellant's age, though she considered also that little if any weight ought to be attached to the age of the bankrupt having regard to the aim of the section, namely *"not just to deter the individual bankrupt but also to deter others and to protect the public"*.

65. For all these reasons I would dismiss this appeal.