



**THE COURT OF APPEAL**

**CIVIL**

**[2019 IECA 345]**

**[2018 No. 491]**

**The President**

**McCarthy J.**

**Kennedy J.**

**IN THE MATTER OF SECTION 85A OF THE BANKRUPTCY ACT 1988,**

**AS AMENDED**

**IN THE MATTER OF PATRICK J DALY, A BANKRUPT**

**JUDGMENT of the President delivered on the 18th day of December 2019**

1. This is an appeal from a decision of the High Court (Costello J) of 18th October 2018. On that occasion, the High Court ordered that the bankruptcy of Patrick J Daly should be discharged on 23rd November 2025, that being ten years from the date of the making of the adjudication order on 23rd November 2015.
2. The matter came before the High Court on foot of an application brought by the Official Assignee, Mr. Christopher D. Lehane, for an order pursuant to s. 85A(1) and (4) of the Bankruptcy Act 1988, as amended, to postpone the automatic discharge from bankruptcy of the bankrupt. The reasons relied upon in support of the application were that Mr. Daly had purportedly failed to cooperate with the Official Assignee in the realisation of the assets of his estate or had hidden from or failed to disclose to the Official Assignee income or assets which could be realised for the benefit of the creditors.
3. It was the case on behalf of the Official Assignee that the bankrupt, Mr. Daly, had made no effort whatsoever to comply with his obligation under the 1988 Act until his risk of not being discharged from bankruptcy began to crystallise. In particular, it is pointed out that the appellant did not file a Statement of Affairs, nor did he initially file a Statement of Personal Information. The High Court considered that such cooperation as was forthcoming was limited in nature, aimed solely at achieving his discharge from bankruptcy. While Mr. Daly did participate in an interview with the Official Assignee, it was apparent that he was not forthcoming during that process, particularly with respect to the involvement of a Ms. Devon Anne McNeill, otherwise "Devon Anne Ralls", in a Panamanian investment consortium.
4. It will be necessary to say a little more about the background facts shortly, but before that it is worth considering the history and nature of the proceedings to date. The matter

came before the High Court by way of a Notice of Motion dated 25th October 2016. It sought a number of reliefs including:

- (i) An order extending the bankruptcy period of Mr. Patrick J Daly by five years pursuant to s. 85A(1) and (4) of the 1988 Act;
- (ii) an order pursuant to s. 85(3) of the 1988 Act that the bankruptcy period should not stand discharged until after investigation and pending the making of a final determination under the application; and
- (iii) for such relief as the Court deemed appropriate.

The matter was initially returnable for 7th November 2016, and on that occasion, an order in terms of the alternative relief sought at (ii) i.e. an order pursuant to s. 85(3) of the 1988 Act that the bankruptcy period should not stand discharged until after investigation and pending the making of a final determination under the application was made.

5. While a number of issues are raised in the course of this appeal, the core contention is that as the originating Notice of Motion had sought an extension of five years, and that said Notice of Motion was never amended, that the Court lacked jurisdiction to extend the disqualification by a ten-year period, and in purporting to do so, acted in excess of and without jurisdiction.

#### **History of the Bankruptcy**

6. Mr. Daly was adjudicated bankrupt on 23rd November 2015 on foot of a petition presented by the Bank of Ireland. It appears that prior to that, in May 2015, Mr. Patrick Daly left Ballinagore House, his former residence, a large family home in Westmeath. It is suggested that from there he went to live in Kent with his son. However, he did not provide the Official Assignee with an address or a telephone number. Further, he did not respond to emails sent to what had been his personal email address.
7. The Official Assignee obtained an email address for the bankrupt from the petitioner. His office emailed Mr. Daly on 1st December 2015, and furnished him with an information leaflet, a draft Statement of Personal Information, and a draft Statement of Affairs to be completed and returned to the Official Assignee. Mr. Daly was reminded in relation to his failure to comply with his statutory obligations by email of 8th January 2016. He was informed that if he did not provide the information sought within two weeks, that the Official Assignee would have to consider bringing an application to extend the period of his bankruptcy. A further and final letter of reminder was issued on 23rd February 2016 which read as follows:

“[o]ur office has attempted to contact you in relation to fulfilling your statutory obligations as a bankrupt on numerous occasions since December 2015, by post, email and phone, with no response. It is advised that your ongoing failure to cooperate with this office means that you are in breach of your duties pursuant to s. 19 of the Bankruptcy Act 1988, a copy of which I enclose for your reference.”

Mr. Daly was informed that a failure to disclose the assets set out in the aforementioned Statement of Affairs would result in an application by the Official Assignee for an extension of his discharge date. The Official Assignee brought a motion seeking to extend the bankruptcy. This motion was advertised in February 2017 in the 'Irish Independent' and 'Westmeath Examiner' newspapers, an order providing for service in this manner having been obtained. Up to this point, Mr. Daly had effectively ignored his bankruptcy.

8. On 24th March 2017, Mr. Daly swore a Statement of Affairs, and on 6th April 2017, delivered a Statement of Personal Information. He swore his first replying affidavit in response to the motion on 28th April 2017, and attended for interview with the Official Assignee on 25th May 2017.

### **Factual Background**

9. Mr. Patrick Daly and his wife, Ann Daly, were engaged in construction and property development over a number of years, operating through a number of companies and partnerships. They owned a substantial dwelling in Westmeath known as Ballinagore House, Ballinagore, County Westmeath. They were also the sole shareholders and directors of two companies, Star Alliance Ltd. and Jalpa Properties Ltd. Star Alliance owned property adjoining Ballinagore House which comprised an Equestrian Centre set upon approximately fifty acres. Mr. and Mrs. Daly also owned a holiday apartment which they held through a Spanish company.
10. Mr. and Mrs. Daly were in considerable difficulties. They were seriously insolvent and Bank of Ireland had instituted one set of proceedings and was threatening to commence a second set of proceedings. In May 2012, Mr. and Mrs. Daly took legal and financial advice in relation to their affairs. They then proceeded to enter into a number of transactions in relation to the assets referred to and those were as follows:
  - . The first transaction concerned Mr. and Mrs. Daly entering into a contract for the sale of Ballinagore House on 1st July 2012 which had been valued by Sherry Fitzgerald on 3rd July 2012 at €550,000. There were a number of unusual aspects to the sale. It involved reserving exclusive rights of residence in favour of Mr. and Mrs. Daly and their daughter, Laura. This had the effect of reducing the value of the house from €550,000 to €100,000. The house was sold to a friend and sometime business associate of Mr. Daly who resided in America, Ms. Devon Anne McNeill. Another unusual aspect of the sale was that the purchase price was to be paid by way of an initial payment of €5,000 and then subsequent annual instalments of €5,937.50 per year over a period of 16 years.
  - . A second transaction involved the issuing of shares in Star Alliance Ltd. to Jalpa Properties Ltd. for the sum of €23,000. This had the effect of reducing what up to then had been Mr. and Mrs. Daly's 100% ownership of Star Alliance Ltd. to less than 10% at a time when it was the owner of the Equestrian Centre and the other lands and buildings adjoining Ballinagore House. At the same time, substantial numbers of shares in Jalpa Properties Ltd. were issued to Mr. Brendan Daly, brother of Mr. Patrick Daly, in exchange for investment by him in Jalpa Properties Ltd, so

that Mr. Brendan Daly became the person with by far the most substantial interest in the assets held by Star Alliance Ltd. which was previously owned solely by Mr. and Mrs. Daly, jointly.

The third transaction in 2012 saw Mr. and Mrs. Daly transfer their shares in the Spanish company, which owned the apartment in Spain, to Mr. Brendan Daly, apparently in payment of unspecified debts due to him. Originally, Mr. and Mrs. Daly reserved right to stay in the apartment for a period of two weeks each year, though subsequently, they surrendered that right in 2014.

Alongside this, on 12th June 2012, Bank of Ireland commenced proceedings against Mr. and Mrs. Daly, claiming a sum in excess of €4.4m.

On 30th July 2012, Mr. and Mrs. Daly consented to judgment in favour of the bank in the amount of €4,435,278.61, together with the costs of the proceedings.

11. While the question of whether a court has the jurisdiction to make, of its own motion, an order going beyond the terms of the Notice of Motion is at the heart of the appeal, the appellant has other criticisms to make. It is said that no order can be made on the motion, whether it to be facilitate investigations or to extend the bankruptcy simpliciter unless the statutory requirements are fully met and the evidence deployed in aid of meeting the test provided for by statute is admissible according to the rules of evidence and the rules of fair procedure governing the process. The appellant says that this has not occurred and that the Official Assignee has failed to establish a case. Moreover, it is said that the extension of bankruptcy is penal in nature, and insofar as the Court is about the business of imposing a sanction, that any sanction imposed must be proportionate to the wrongdoing involved. It must also be proportionate with regard to the personal circumstances of the bankrupt and such factors as may be present in the bankrupt's favour. Two specific reasons are given in this regard. First, it is said that the Official Assignee's case contains a great amount of hearsay evidence. Second, it is suggested that significant conflicts of fact emerge and that these were conflicts which no Court could resolve without cross-examination. This was not a case where disputed conflicts of fact could be resolved on affidavit.
12. Having read the various affidavits and considered how the history of the bankruptcy was dealt with by the High Court judge in her judgment, I am not of the view that there was any real point substance in the submissions made in respect of cross-examination or hearsay evidence. Both sides accept that the bankrupt has a statutory duty to cooperate with the Official Assignee. What he did and did not do in the context of that duty is beyond question.
13. In *McFeely v. The Official Assignee in Bankruptcy* [2017] IECA 21, the Court of Appeal stated as follows:

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

'26. In my judgment, there is ample, cogent evidence which establishes clearly that the bankrupt has failed to cooperate 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 cooperation. 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 saying that this was a conclusion that she was entitled to reach on the evidence adduced, and I reject the submissions made to the contrary."

14. In my view, in this case, as in McFeely, there was ample cogent evidence which established clearly a failure on the part of the bankrupt to cooperate, despite attempts to give the appearance of cooperation. There remains for consideration the question of whether it was open to the High Court to extend the bankruptcy beyond the period specified in the Notice of Motion, and if that is decided in the affirmative, a further question arises of whether the sanction imposed was proportionate.
15. Turning to deal first with the Notice of Motion point. It will be recalled that the Notice of Motion had sought:
  - (i) An order extending the bankruptcy period of Mr. Patrick J Daly by five years pursuant to s. 85A(1) and (4) of the Bankruptcy Act 1988 on the basis that the bankrupt has
    - (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 credit of the bankrupt.
  - (ii) In the alternative, an order pursuant to s. 85(3) that the bankruptcy period shall not stand discharged until after investigation and pending the making of a final determination under the application and
  - (iii) Such other relief as this Court deems appropriate.
16. I have to confess that my first reaction on seeing the Notice of Motion was one of surprise at the reference to "extending the bankruptcy period by five years". As I explained during the course of the hearing of the appeal, I would have expected that the order sought would be extending the period "for such period as the Court deems proper" or for such period, not exceeding the statutory maximum period provided for, as the Court deems proper. In fact, it seems the formula deployed in the motion of 28th October 2016 was

very much a standard one. Crucially, however, it has to be seen in the context of the statutory regime then applicable.

17. It appears that the standard form motion, which is what I understand it to be, was influenced by the statutory architecture that was then in place. It will be recalled that s. 157 of the Personal Insolvency Act 2012 had substituted a new section for the former s. 85 of the Bankruptcy Act 1988. The new section provided that every bankruptcy should, subject to certain exceptions, be discharged on the third anniversary of the date of the making of the adjudication order. Section 85A(4) made provision for a situation where there was a failure to cooperate or disclose assets to the Official Assignee. In that situation, the duration of the bankruptcy could be extended for up to eight years from the date of the adjudication order i.e. extended by five further years. However, those sections were amended by sections 10 and 11 of the Bankruptcy (Amendment) Act 2015. Section 10 substituted for s. 85 (as amended by s. 157 of the Act of 2012), the Act of 1988, by providing a new subsection which made provision for the discharge, subject to certain exceptions, of every bankruptcy on the first anniversary of the date of the making of the adjudication order.

18. Because of its significance to the present appeal, it is convenient to set out s. 11 in full:

“11. Section 85A (inserted by s. 157 of the Act of 2012) of the Act of 1988 is amended by the substitution of the following subsection for subsection (4):

(4) Where the Court is satisfied that the bankrupt has –

- (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,

and the Court may, where it considers just to do so, order that, in place of the discharge provided for in s. 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 cooperate referred to in para. (a) or the extent to which income or assets referred to in para. (b) were hidden or not disclosed, or both, as the case may be.”

These sections were commenced on 29th January 2016.

19. Notwithstanding the change in the statutory architecture that came about on 29th January 2016, the affidavit sworn by the Official Assignee grounding the Notice of Motion dated 25th October 2016, concluded with a prayer for relief in the following terms:

"28. I therefore pray this honourable Court for an order pursuant to s. 85A(1) of the Bankruptcy Act 1988 for a five-year extension of the Bankruptcy term on the basis that the Bankrupt has failed to cooperate with me in the realisation of the assets and hidden from or failed to disclose to me as Official Assignee income and/or assets which could be realised for the benefit of the Creditors of the Bankrupt."

This approach was maintained in a further affidavit sworn by the Official Assignee on 19th June 2017. There, the concluding affidavit stated:

"33. I therefore pray this honourable Court for an order extending the Bankruptcy for a period of eight years from the date of adjudication being 23rd November 2015 to 22nd November 2023."

The question of the duration of the extension was addressed by Mr. Lehane in the course of an affidavit sworn by him on 31st August 2017. At para. 31 of that affidavit, he refers to the fact that the originating Notice of Motion does seek an order seeking to extend the deponent's bankruptcy by five years from the date thereof. It goes on to say that he was at all times seeking the maximum period of extension for the bankruptcy due to the conduct of the bankrupt. In accordance with s. 85A (as it was at the date of his adjudication), that maximum period of extension was one of five years which if success would result in a bankruptcy period of eight years from the date of adjudication, taking into account the initial three year bankruptcy period which would have already elapsed. Due to the change in the law, the bankrupt's initial adjudication period was shortened, but it had always been his intention to seek the maximum period of extension. At para.32, he comments that the ongoing conduct of the bankrupt in the face of the application has not in any way convinced him that he should alter the recommendation which he gave to the Court to anything less than the maximum period. He says that the extension should be until 22nd November 2023, but that it was entirely a matter for the Court as to what the length of the extension period would be and that he fully acknowledges that. An affidavit sworn on 6th February 2017 in relation to an application for an order providing for substituted service also made reference to the fact that the order was sought in relation to an application to extend Mr. Daly's bankruptcy by five years from the date of adjudication.

20. The High Court judge began her consideration of the duration of the extension by referring to s.85A of the Bankruptcy Amendment Act 2015, which came into effect on 29th January 2016, commenting that for reasons explained in the decision of Sean Dunne, *A Bankrupt* [2018] IEHC 813, that section applied to the application. She observed that the making of an order pursuant to s. 85A(4) is made, inter alia, to protect the integrity of the bankruptcy process and acts as a sanction against the individual bankrupt. She referred to the fact that as she had said in *McFeely*, the Oireachtas contemplated a spectrum of orders reflecting a variety of more or less egregious behaviour by bankrupts. She said that in Mr. Daly's case, the non-cooperation of the bankrupt was initially total and deliberate and a matter of choice. His continued non-cooperation, she said, was likewise deliberate and a matter of choice. His refusal to

explain or to provide proper information regarding the three transactions addressed in the judgment was ongoing. He insisted, and continues to insist, that each of the transactions was bona fide. In relation to the purported sale of Ballinagore House, his actions potentially cost his creditors €250,000 or more. Not only that but his approach to the bankruptcy was obstructive. He failed to furnish a contact address and he did not acknowledge emails which he clearly received. This required the Official Assignee to make extensive enquiries of local Gardaí, and ultimately, to obtain an order for substituted service by way of advertisements in newspapers.

21. The judge went on to refer to the fact that the bankrupt, in his first affidavit, had sought to refer to information that was available to the Official Assignee from third parties, or to rely upon disclosure made by the bankrupt to other parties in other proceedings. This, she observed, was not sufficient compliance with his statutory obligations. The bankrupt was afforded an opportunity to rectify the situation and to cooperate with the Official Assignee, but he did not really avail of this opportunity, and to a significant extent, his cooperation was still wanting. While his solicitor's file in relation to the Ballinagore House sale was handed over, he refused at interview to give any explanation for the three transactions at issue. He has withheld meaningful, substantive cooperation with the Official Assignee in the administration of his estate and has failed, by and large, to produce the necessary supporting documents which he is required by law to produce. The judge then offered, by way of example, of how the bankrupt had sought to make life difficult for the Official Assignee by referring to the situation of Ms. Devon Anne McNeill. The bankrupt had not clarified that she was the same person as Devon Anne Ralls who was involved in a consortium that included the bankrupt and which had invested in Panama. The Official Assignee wished to ascertain whether any monies, in fact, had been recovered from the failed Panamanian investment and to explore whether monies furnished by Ms. McNeill/Ms. Ralls to the solicitor of Mr. Daly were in respect of the Panamanian investment rather than in respect of Ballinagore House. The High Court judge concluded her consideration of the issue by saying that she regarded Mr. Daly's failure to cooperate as being on the very serious end of the spectrum. He made belated, qualified efforts to cooperate, but meaningful, substantive cooperation had still been withheld. She regarded this failure to take the opportunity to comply with his statutory obligations as an exacerbating factor and therefore ordered that the bankruptcy should stand discharged on the 10th anniversary of the date of the making of the adjudication order on 23rd November 2015.
22. In considering whether the order made in the High Court was an appropriate one, it is necessary to remind oneself that the power to extend the period of bankruptcy is penal in character (see remarks to that effect in *Killaly (a Bankrupt) v. The Official Assignee* [2014] 4 IR 365 and in *Sean Dunne, A Bankrupt* [2017] IECA 304). It is not in doubt that because of the serious consequences of an extension of bankruptcy any order so providing must be proportionate to the wrongdoing on which it is based. For my part, I would have no doubt that proportionality extends to a consideration of the personal circumstances of the bankrupt. An extension period which, in other circumstances, could not be regarded as disproportionate, might be so regarded if the bankrupt was



particularly old or particularly frail. I am also conscious that it is clear from the jurisprudence that an appellate court should only interfere with the assessment of a trial judge as to the appropriate sanction to impose, if either there has some significant error of principle in the way in which the judge approached the question in the first place, or where the sanction is, in this Court's view, outside the range of sanctions which the trial judge should properly regard as appropriate.

23. In my view, the trial judge was correct to conclude that the non-cooperation was at the serious end of the spectrum. A very significant extension was, in the circumstances, inevitable. It is the case that the extension is penal in character, but the converse of that is that someone who emerges from bankruptcy obtains a considerable benefit and that benefit has to be earned by full and unqualified cooperation. In my view, the period of extension ordered is obviously a very significant one, and beyond question, represents a severe sanction. Undoubtedly, the judge might have decided on a somewhat shorter period, but I cannot conclude that the period decided upon fell outside the available range. It falls well short of the midpoint of the eight to fifteen-year period for serious cases provided for in subsection (4)(ii). I have considered whether, in a situation where the Official Assignee had on a number of occasions, referred to an eight-year period, that choosing a figure beyond that could be seen as oppressive or disproportionate. However, in this case, the High Court judge was clear in her view that this was a serious case. The judge then, in effect, proceeded to impose a sanction at Point 2 of a seven-point scale, ten when the maximum available was fifteen. While undoubtedly a significant sanction, I have not been persuaded that it was so severe as to be disproportionate and not such that it should be set aside or varied by this Court.
24. Accordingly, I would dismiss the appeal.