

**THE HIGH COURT  
Bankruptcy**

[2022] IEHC 477  
Record No. [3512]

**IN THE MATTER OF SECTION 85 OF THE BANKRUPTCY ACT, 1988  
AS AMENDED AND IN THE MATTER OF J.H., A BANKRUPT, NO. 3512**

**BETWEEN**

**MICHAEL IAN LARKIN  
(AS OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF J.H.,  
A BANKRUPT)**

**APPLICANT**

**- AND -**

**J.H., DAVID MERRON,  
(DAVID MERRON IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF  
THE ESTATE OF ERIC MERRON DECEASED)  
AND PATRICK MCKAY**

**RESPONDENTS**

**Judgment of Mr. Justice Brian O'Moore delivered the 28<sup>th</sup> day of July 2022**

1. This is a motion brought by the official assignee in respect of an interest by J.H. in the latter's family home.

2. The motion seeks the following reliefs:

*“(1) An Order pursuant to s. 85(3D) of the Bankruptcy Act, 1988 as amended extending the time within which the unrealised property of the bankrupt set forth in the schedule to this notice of motion (“the property”) shall remain vested in the official assignee for the benefit of creditors by a period of 36*

*months from the date of the making of the Order or such other period of time as to this Honourable Court may seem meet.*

- (2) *Directions as to the manner of proceeding on service upon the registered owner, legal owner, beneficial owner and/or occupants of the Property of any Order extending the time within which the Property shall remain vested in the Official Assignee.”*

3. The application was grounded upon the affidavit of Denis A. Ryan, the deputy official assignee. This grounding affidavit sets out the following facts:

- “(a) The bankrupt was adjudicated in bankruptcy by Order of this Court dated the 29<sup>th</sup> February, 2016.*
- (b) The property the subject matter of the motion is stated to be the principal private residence of the bankrupt.*
- (c) The property was due to re-vest automatically in the bankrupt on the third anniversary of his adjudication. That was the 28<sup>th</sup> February, 2019. The date upon which the automatic re-vesting was to occur was extended by order of Pilkington J. dated the 1<sup>st</sup> April, 2019. On foot of that order, therefore, the Property was to re-vest automatically in the bankrupt on the 1<sup>st</sup> April, 2022.*
- (d) The administration of the bankrupt’s estate was time consuming and extremely problematic for the official assignee’s office. This was as a result of non-cooperation by the bankrupt. An application was brought in 2017 to extend the period of bankruptcy. This application culminated in the order of Pilkington J. of the 13<sup>th</sup> July, 2020, extending the period of bankruptcy in*

*this case to the 28<sup>th</sup> February, 2024. While that order was appealed, the appeal was ultimately dismissed by order of the Court of Appeal dated the 29<sup>th</sup> July, 2021.*

- (e) *The affidavit further sets out complications arising from the interest in the Property on the part of the second and third respondents to this motion. These individuals remain on the title of the folios which make up the property, notwithstanding the fact that they had transacted with the fourth respondent to dispose of the property to that individual. While the second and third respondent wished to avoid selling these folios to the bankrupt, the fourth respondent was “acting for and on behalf of the bankrupt” in his dealings with the second and third respondents. In any event, the second and third respondents have no objection to the relief sought by the official assignee in the current motion, as they have no continuing interest in the property.*
- (h) *Within the initial three-year period post-adjudication the official assignee has serious difficulties in selling the property because of the existence of judgment mortgages in the name of one Michael Quinn. Ultimately, these judgment mortgages were dealt with by an order of Noonan J. (of the 5<sup>th</sup> July, 2017) striking out the proceedings underpinning the judgment mortgage. This application was brought on behalf of the official assignee. That order was ultimately upheld by the Court of Appeal on the 2<sup>nd</sup> July, 2019. Subsequently, at times which are not specified in the grounding affidavit, the solicitors for the official assignee issued further motions to obtain orders directing the Land Registry to remove the judgment*

*mortgages as burdens from the relevant folios. These judgment mortgages had in any event to be removed so that other commercial properties (The Wayside Inn and a commercial unit on Shercock Road) could be sold by the official assignee.*

- (i) *The Wayside Inn was sold on the 2<sup>nd</sup> December, 2020, and the net proceeds recovered by the creditors of the estate. I am then told that “shortly thereafter” the office of the official assignee took steps to sell the Shercock Road asset. Contracts for sale were issued to Monaghan County Council in January, 2021, but the Council pulled out of the transaction “in circumstances where threats of violence were made to the officials involved.” An alternative purchaser for that property has yet to be found. It subsequently transpired that the purchasers of The Wayside Inn “have also been the subject of very grave intimidation since the sale closed.” That intimidation was described.*
- (k) *Because of the facts set out in the affidavit, the official assignee understandably has grave concerns about the ease with which the property (which is the subject of this motion) can be sold. Strikingly, it is stated in the affidavit that previous officers of the official assignee were “required to make arrangements to present certain applications to the Court sitting in camera in order to enable him to arrange to attend the property in the company of armed gardai; unfortunately, ongoing threats of violence have been a feature of this case.”*

4. The situation, particularly with regard to intimidation and threats of violence, is troubling. While the grounding affidavit displays a lack of detail, it appears to be the case that the bankruptcy has been a complicated and difficult one.

5. The affidavit concludes (at para 19): -

*“Accordingly, the Official Assignee requires the order sought at para. 1 of the Notice of Motion herein to an aid in advance of [1<sup>st</sup> April, 2022] simply to preserve the status quo. I am seeking an extension of time for 36 months or such other period as to this Honourable Court may seem meet. ...”*

6. No evidence was put before me on behalf of the official assignee, nor was any submission made to me on by counsel appearing for the official assignee, as to the form that the order sought at para. 2 of the Notice of Motion should take.

7. This motion was listed for hearing on the 29<sup>th</sup> March, 2022. Despite adequate service, there was no appearance on behalf of B.H. None of the other notice parties appeared, despite the service of the motion upon them.

8. At the hearing, and despite requests, counsel did not offer any guidance as to any of the legal issues that arose in the context of the motion. Instead, I was told that in previous applications the court had decided such motions on the facts. I therefore put the matter in for ruling on the 31<sup>st</sup> March, 2022. This was to allow me to consider any legal issues that might arise in the context of this application.

9. Section 85(3A) of the 1988 Act, (as amended) reads as follows: -

*“Subject to subsections (3B) to (3F) on the third anniversary of the date of the making of the adjudication order in respect of a bankruptcy –*

(a) *the unrealised property of the bankrupt referred to in subsection (3) includes an estate or interest in what was, at the date of the making of the adjudication order, the family home, shared home or principal private residence of the bankrupt, and*

(b) *in the case of the family home or shared home, the Official Assignee has not applied to the Court for an order for sale of that home,*

*that estate or interest shall, on the third anniversary, stand re-vested in the bankrupt without the need for any conveyance, assignment or transfer.”*

Section 85(3D) of the Act reads: -

*“(3D) Subsection (3A) shall not apply where, on application by the official assignee at any time after the date of the making of the adjudication order in respect of that bankruptcy but prior to the third anniversary of that date, the Court substitutes for that third anniversary such longer period as the Court considers just in all the circumstances.”*

**10.** On its face, section 85(3D) permits any application under that subsection to be made prior to the third anniversary of the date of the adjudication order. Any subsequent application is out of time. The third anniversary of the adjudication order on the bankruptcy of B.H. was the 28<sup>th</sup> February, 2019. The current application was clearly made well beyond that date.

**11.** It is the case that s. 85(3E) provides that where an order is made under subsection (3D),

*“subsections (3A), (3B) and (3C) shall apply subject to the modification that each reference to the third anniversary and those subsections shall be taken to be a reference to the longer period substituted by the court under subsection (3D) for such third anniversary.”*

Importantly, s. 85(3E) does not amend the provisions of s. 85(3D). In light of the clear terms of s. 85(3D), the current application is well outside the time specified by s.85(3D).

**12.** I express no view as to whether or not repeated extension applications could be made within the three-year period. However, it seemed to me that s.85 (3D) did not facilitate the bringing of any such application after the expiry of the three-year period post-adjudication.

**13.** When the matter was before me for the delivery of my judgment at 10am on the 31<sup>st</sup> March, 2022, and conscious of the fact that I had been offered no submission on this point, I invited counsel for the official assignee to address me on the timing of this application. On this issue, Counsel's first submission was that if no application was made under s. 85 (3D) prior to the third anniversary of the adjudication, no application could be made.

However, Counsel went on;

*"The Official Assignee in this case did make an application previously before the end of the third anniversary. That seems to have stopped the clock and this matter has come on before the expiration of the time in that Order."*

Counsel was then asked about the significance of s. 85 (3E). Ultimately, the question put to Counsel was;

*"... on what basis do I read into s. 85 (3E) a stipulation that the time limit in (3D) is varied by the making of an Order [within the original 3 year period] ?"*

The response was a candid acceptance that the interaction between s. 85 (3D) and (3E) had not been given any consideration before the motion was called for hearing on Monday the 29th of March 2022.

**14.** I therefore proposed adjourning the hearing to allow full argument on this issue. I advised JH (who attended the hearing at 10 am on the 31st of March) to obtain legal representation to enable him to deal with what was a technical legal issue. However, Counsel for the Official Assignee requested that the hearing take place later that day, as the automatic vesting of the disputed property in JH would take place overnight. This fact starkly illustrates the desirability of this application having been brought earlier, and with greater preparation. Dealing with the motion later on the 31st of March meant that a case at hearing would be disrupted, and that JH's ability to obtain legal representation to deal with a key point (not previously notified to him) would be hampered. However, given the nature of the asset at issue and the fact that the motion would be rendered moot should it be adjourned by more than a few hours, the resumed hearing was listed for 2 pm.

**15.** At 2 pm on the 31st of March, JH was without legal representation notwithstanding his attempts to contact his solicitor. It must be noted that JH had made no effort, prior to the return date of the motion, to obtain legal advice or legal representation.

**16.** Counsel for the Official Assignee made this submission on the timing of the application;

*“Thank you judge for giving us time to consider the matter. I accept the point the court puts forward about the link between the provisions of 3D and 3E. My respectful submission would be that the appropriate way to deal with this particular application is disclosed in the question the court asked me in our engagement earlier in relation to the time that was applied for by the official assignee in the initial application and*



*the court enquired whether the effect of 3D meant that the ONA had to apply in the first instance or the period of time within which he felt it would be reasonably required to deal with the situation. The difficulty within that question is that it potentially comes into conflict with the circumstances that lead to this court and the court before to confirm that Mr Hoey is a bankrupt whose bankruptcy warrants extensions because of the circumstances of the young corporation. It seems to me, having regard to those circumstances that can arise the appropriate way to look at section 3D and such that follows. The 3-year time limit that's referred to in 3D is an absolute guillotine provision within which an application for an extension of time must be made. If he only waits until after the three-year limit, he cannot make such application. However, if the OA applies within the three-year period and obtains an extension of time and then comes back to court and looks for a further extension what the OA is actually doing is not coming to court, *ab initio*, seeking an initial order, he is actually looking for an extension of the period of time that the court has already afforded him. If the court looks at it in that prism it is really an application for an extension of time of that order rather than an application brought outside of the three-year period from the date of adjudication. The court undoubtedly has jurisdiction to extend the time in relation to any order that is made pursuant to the Bankruptcy Act. It has a general entitlement to do that subject to any statutory provision from the rule, pursuant to order 122 rule 7 but it has a specific entitlement pursuant to section 135 of the Bankruptcy Act. And if the court looks at it in that way, the way that 3E operates is that when the court extends the period of time afforded to the official assignee in the original order, section 3E operates to move on the time period that would otherwise operate in respect of 3A 3D and 3C. That in my submission affords the court the jurisdiction to make the order the OA is seeking....*

*O'Moore J: That's not what the motion seeks though is it*

*...I suppose the motion that seeks an extension of time pursuant to order 85 (3d) but it is brought in the context of an application that has been already made in the court. In my submission the appropriate way to see it is, it really is an application of the extension of the time that's already been afforded by the court"*

**17.** JH had no observations to make on this submission. In the circumstances, this is not surprising.

**18.** On the basis of these final submissions by his Counsel, the Order actually sought by the Official Assignee is one pursuant to either Order 122 Rule 7 or s. 135 of the Bankruptcy Act 1988 varying the Order of Pilkington J made on the 1st of April 2019. It is entirely possible that such an order might, on appropriate evidence, be made. Such evidence would probably explain how unforeseen events, after the original order now required the earlier order to be varied. That relief, relying on these provisions, is not what is sought in the Notice of Motion. It is not the form of relief notified to JH. It is not the Order sought when Counsel moved the application on the 29th of March 2022. It is not even the precise Order sought when Counsel appeared before me at 10 am on the 31st of March. It is therefore not an Order that I am prepared to make. It may be that, in a less significant application, there could be a degree of latitude extended to the form of relief sought in a Notice of Motion though I am by no means convinced that this would be an appropriate approach to take. In this application, what is at stake is JH's interest in his family home. This interest was to revert to him the following day. The significance of this asset is the very reason why the Official Assignee was facilitated by an abnormally brief adjournment of his motion on the 31st of March. However, the same reason supports my decision that the motion should be decided within the terms in which it was drafted and

advanced and not within the terms of a recast version produced in response to questions from the Court.

**19.** I therefore decided as follows;

1. The relief sought in the Notice of Motion is not the relief ultimately sought by Counsel for the Official Assignee;
2. Even if the relief sought in the Notice of Motion continued to be sought by the moving party, the application under s. 85 (3D) simpliciter is out of time. It is possible that this defect in the motion could have been cured by an application to extend the time within which the motion under s. 85 (3D) was to be brought, but no such extension of time was sought either in the motion or (on my understanding of his submissions) by Counsel for the Official Assignee. Each of these omissions are in my view enough to lead to the refusal of the motion as issued.
3. The final form of Order actually sought, at the third hearing before me, is not sought in the Notice of Motion.

**20.** In all of these circumstances, I refused the Official Assignee's application. The parties were informed of my decision on the afternoon of the 31st of March 2022.

**21.** It should be emphasised that this decision, turning as it does on the precise terms of the Official Assignee's application, is not an overhang from times when bankruptcy legislation was interpreted in what might have been considered an excessively technical way. I respectfully agree fully with the sentiments expressed by Collins J in *Gladney v Tobin* [2020] IECA 49, to the effect that the characterisation of the bankruptcy code as penal may need to be revisited in light of the reform of that regime beginning with the 1988 Act. The current judgment does no more than to respect the need for persons seeking

Orders from this Court to set out, clearly and precisely, what is being sought and the rule or provision upon which reliance is being placed. In this case, it is plain that the application was brought at the eleventh hour, that the interaction between the constituent provisions of s. 85 was not considered at all, and that the Official Assignee simply ran out of time to issue a fresh motion; indeed, no application was even made to amend the motion as issued. While the Court facilitated the Official Assignee in every way in progressing the application so that it was decided within time, the failure to bring the motion until the of 2022 proved unfortunate. Of the 36-month extension granted by Pilkington J, over 35 months had passed before the Official Assignee brought the motion seeking a further extension. I want to make it clear that this is not a criticism of either the assignments office, which handles an enormous workload, or the parties involved. However, the timing of the motion did not make its resolution any easier.