THE HIGH COURT

BANKRUPTCY

No. 3659

IN THE MATTER OF SECTION 85A OF THE BANKRUPTCY ACT, 1988
IN THE MATTER OF PAUL SHEERIN (A BANKRUPT)

BETWEEN

BRIANNE MCCARTHY

APPLICANT

AND

PAUL SHEERIN

RESPONDENT

AND

CHRISTOPHER LEHANE (OFFICIAL ASSIGNEE IN BANKRUPTCY)

NOTICE PARTY

JUDGMENT of Ms. Justice Costello delivered on 19th day of February 2018

1. Mr. Sheerin (the bankrupt) was adjudicated bankrupt, on foot of his own petition by order of the High Court dated 13th June, 2016. Absent an order made pursuant to s. 85A he would have been automatically discharged from his bankruptcy on the 12th June, 2017. By notice of motion dated 24th May, 2017 Ms. McCarthy (the applicant) sought an order pursuant to s.85A(3) of the Bankruptcy Act, 1988 as amended directing that the affairs of the bankrupt be further investigated by the Official Assignee, and that the bankrupt shall not stand discharged pending such investigation; or, in the alternative, an order pursuant to s.85A(4) that the bankrupt

shall not stand discharged from his bankruptcy until a date no later than the eighth anniversary of his bankruptcy or such other time as the court shall deem appropriate. Pending the determination of the motion an order was made pursuant to s.85A(3) postponing the discharge from bankruptcy of the bankrupt on 29th May 2017.

Section 85A of the Bankruptcy Act, 1988

2. Section 85A provides as follows:

"(1) The Official Assignee, the trustee in bankruptcy or a creditor of the bankrupt may, prior to the discharge of a bankrupt pursuant to section 85, apply to the Court to object to the discharge of a bankrupt from bankruptcy in accordance with section 85 where the Official Assignee, the trustee in bankruptcy or the creditor concerned believes that the bankrupt has —

(a) failed to co-operate with the Official Assignee in the realisation of the assets of the bankrupt, or

(b) hidden from or failed to disclose to the Official Assignee income or assets which could be realised for the benefit of the creditors of the bankrupt.

(2) An application under subsection (1) shall be made on notice to the bankrupt and where made by the trustee in bankruptcy or a creditor, notice shall also be given to the Official Assignee.

(3) Where it appears to the court that the making of an order pursuant to subsection (4) may be justified, the court may make an order that the matters complained of by the applicant under subsection (1) be further investigated and pending the making of a determination of the application the bankruptcy shall not stand discharged by virtue of section 85.

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

(a) failed to co-operate with the Official Assignee in the realisation of the assets of the bankrupt, or

(b) hidden from or failed to disclose to the Official Assignee income or assets this could be realised for the benefit of the creditors of the bankrupt,

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

Does the applicant have *locus standi* to bring the application?

3. Section 85A (1) permits an application to be brought by the Official Assignee, the trustee in bankruptcy or a creditor of the bankrupt. The applicant brings the application on the basis that she is a creditor of the bankrupt. This is denied by the bankrupt. She advanced four basis for contending that she is a creditor of the bankrupt. Firstly, in family law proceedings instituted between the applicant and the bankrupt, he is the subject of an interim order directing the payment to her of €300 per week in maintenance. This means that the bankrupt is under a recurring obligation to the applicant to pay a sum of money. Secondly, she says that she loaned the bankrupt the sum of €18,000 on the 24th January, 2012 and the sum has not been repaid. The bankrupt accepts that the money was received by him from the relevant account but denies that it was a loan. He says that in effect the account operated as a joint account. The applicant argues if the court accepts his evidence for the purposes of the application, nonetheless she is a creditor in respect of at least half of the sum paid to the bankrupt and therefore she is a creditor in the amount of €9,000. Thirdly,

she referred to the sale of a property held in their joint names in Romania and she claimed that she had yet to be repaid the full proceeds from the sale. The bankrupt denied this and said that she had been paid in full her moiety of the net proceeds of sale. She did not maintain her argument that she was a creditor on the basis of the proceeds of the sale of the property in Romania as she accepted that the court could not resolve the dispute in relation to this matter where the evidence before the court was on affidavit and there was no cross examination of the deponents.

4. Ultimately the principal ground upon which she contended that she was a creditor derived from the family law proceedings. She instituted proceedings against the bankrupt prior to his adjudication on the 25th September, 2015. She claimed an order directing the bankrupt to pay a lump sum payment for her support and for that of her dependant children and she sought an order for costs. She referred to the decision of the Supreme Court of England and Wales *In Re Nortel GmbH* [2014] AC 209. At para. 89 Lord Neuberger held:

> *"In my view, by becoming a party to legal proceedings in this jurisdiction, a person is brought within a system governed by rules of court, which carry with them the potential for being rendered legally liable for costs, subject of course to the discretion of the court. An order for costs made against a company in liquidation, made in proceedings begun before it went into liquidation, is therefore provable as a contingent liability under r. 13.12(1)(b), as the liability for those costs will have arisen by reason of the obligation which the company incurred when it became party to the proceedings."*

5. Lord Sumption stated at para. 136:

> *"....those who engage in litigation whether as claimant or defendant, submit*

themselves to a statutory scheme which gives rise to a relationship between them governed by rules of court. They are liable under those rules to be made to pay costs contingently on the outcome and on the exercise of the court's discretion. An order for costs made in proceedings which were begun before the judgment debtor went into liquidation is in my view provable as a contingent liability, as indeed it has been held to be in the case of arbitration proceedings: In re Smith, Ex p Edwards (1886) 3 Morr 179. In both cases, the order for costs is made against someone who is subject to a scheme of rules under which that is a contingent outcome. The fact that in one case the submission is contractual while in the other it is not, cannot make any difference under the modern scheme of insolvency law under which all liabilities arising from the state of affairs which obtains at the time when the company went into liquidation are in principle provable. Of course, an order for costs like many other contingencies to which a debt or liability may arise, depends on the exercise of a discretion and may never be made. But that does not make it special. It is not a condition of the right to prove for a debt or liability which is contingent at the date when the company went into liquidation that the contingency should be bound to occur or that its occurrence should be determined by absolute rather than discretionary factors"

6. Counsel for the applicant argued that precisely the same principles applied where the insolvent debtor was a bankrupt rather than a company in liquidation and that this represented the law in this jurisdiction also. I agree with these submissions and I accept the statements of the law of Lord Neuberger and Lord Sumption.

7. The applicant instituted the family law proceedings on the 28th September, 2015. The bankrupt was adjudicated a bankrupt on the 13th June, 2016. At the date of his adjudication he was subject to a scheme of rules whereby he could, at the discretion of the court, be subject to an order for costs in favour of the applicant. That

as a matter of law makes her a creditor of his estate. That is sufficient to establish her *locus standi* to bring this application pursuant to s. 85A(1).

8. As I have reached my decision that she has standing to bring the proceedings on this ground, I propose to leave to another day the question whether an applicant in receipt of an interim maintenance order or a party to a joint bank account are creditors of the bankrupt and thus have standing on that basis to bring an application pursuant to s. 85A(1).

Section 85A (3) of the Bankruptcy Act, 1988

9. In order to bring an application pursuant to s. 85A the applicant must believe that the bankrupt has either failed to cooperate with the Official Assignee in the realisation of the assets of the bankrupt or that the bankrupt has hidden from or failed to disclose to the Official Assignee either income or assets which could be realised for the benefit of the creditors of the bankrupt.

10. An applicant seeking relief under s. 85A is not required to establish that there has been either a failure to cooperate with the Official Assignee or a hiding of or failure to disclose income or assets to the Official Assignee within the meaning of subs. (1). The applicant merely must have a belief to that effect, but the belief must be reasonable and it must be established on an objective basis. It is sufficient to bring an application pursuant to s. 85A (1) if the applicant establishes a reasonable belief either that there has been a failure to cooperate with the Official Assignee in the realisation of the assets of the bankrupt or a hiding or failure to disclose income or assets to the Official Assignee which could be realised for the benefit of the creditors of the bankrupt. Then the court must, in its discretion, assess whether the matters complained of in the application warrant further enquiry and whether an order pursuant to s.85A(3) is appropriate.

11. Subsection (3) allows the court, if it is satisfied that an order under subs. (4) **may be justified**, to order a further investigation in relation to the matters complained of. In those circumstances the court may make an order that the matters complained of be further investigated and that the bankruptcy shall not stand discharged pending the making of a determination of the application for an order pursuant to subs. (4). So, in order for a court to be satisfied that it should make an order under s. 85 (3) it must only be satisfied that the making of an order pursuant to subs. (4) may – not that it must – be justified at the end of the investigation into the matters complained of. The threshold for a court considering an order pursuant to s. 85 A (3) is thus less onerous, than for an order pursuant to s.85A(4). Nonetheless, in each case the order is penal in nature, as was recognised in *Killaly a bankrupt [2014] 4 I.R. 365*, and it is not an order that should be made lightly. As I state in *Michael Daly, a bankrupt, (unreported, High Court, Costello J, ex t. 31st January, 2017)*, the default position is that a bankrupt is entitled to an automatic discharge from bankruptcy one year after the date of adjudication.

The applicant's case for an order pursuant to s.85A(3)

12. Eight substantial affidavits were filed in respect of the motion and the materials before the court ran to more than one thousand pages. The applicant raised a considerable number of issues regarding the bankrupt's former business as a building contractor. She said there were "wholesale non-disclosures" by the bankrupt in his statement of affairs. She referred to the failure to attribute any value to work in progress when he ceased trade as a builder, she raised issues regarding the transfer of work in progress to a limited liability company with which she said the bankrupt was connected. She said there was an understatement with regard to retention debts recorded in his statement of affairs, she disputed the value attributed in the statement

of affairs to various assets and, through her forensic accountant, she was severely critical of the records maintained in respect of the business.

13. In three replying affidavits, the bankrupt rejected her allegations that he had hidden assets from or failed to disclose assets to the Official Assignee. He insisted that his statement of affairs was accurate and he provided answers to the queries raised by the applicant and the applicant's forensic accountant.

14. Counsel on behalf of the applicant accepted that in an application heard upon affidavit in respect of which there was no cross examination, the court could not resolve conflicts of fact. Therefore, while the applicant did not accept many of the answers or explanations given by the bankrupt on affidavit, she accepted that she could not rely upon matters which he had explained on affidavit in support of her application for an order pursuant to s.85A(3). This quite proper concession considerably narrowed the basis of her application.

15. In the event, the applicant advanced her case pursuant to s. 85A (1) (b) on two grounds.

(1) The bankrupt filed amended tax returns for the years 2012, 2013 and 2014 in April, 2016, one week before he swore the statement of affairs used to support his petition for his own bankruptcy. The amendments were necessary because the bankrupt had under declared cash receipts and cash payments made during those years. The amendments were as follows:

	Original Return 2012	**Amended Return 2012**	**Increase**
Turn Over	2,878,586	2,918,586	40,000
Purchases	1,537,817	1,574,817	37,000

	Original Return 2013	Amended Return 2013	Increase
Turn Over	3,355,685	3,583,185	227,500
Purchases	1,592,089	1,801,589	209,500
	Original Return 2014	**Amended Return 2014**	**Increase**
Turn Over	4,251,976	4,533,976	282,000
Purchases	1,452,073	1,711,073	259,000

Thus the total additional cash receipts returned came to €549,500. The bankrupt confirmed that all cash payments on projects between the years 2012 and 2015 were accounted for and disclosed to the Revenue and that the true cash payments for works carried out amounted to €645,500. The amended tax returns disclosed additional cash payments in the amount of €505,500 for the years 2012, 2013 and 2014.

(2) In his statement of affairs the bankrupt listed two loans about which the applicant raised concerns. The first was a loan to the bankrupt's parents and their crèche business in the amount of €230,000. The second was a loan to Loyalty Vision Ltd in the sum of €290,000. The loan did not appear to be recorded in the company accounts of Loyalty Vision Ltd filed with the CRO and the applicant said that there were discrepancies between the amount set out in the statement of the affairs as due to the company and those appearing in cash flow statements she obtained from a drop box maintained by the bankrupt. Loyalty Vision Ltd is a company owned and controlled by relatives of the bankrupt.

16. The applicant's case in relation to the bankrupt's amended tax returns was straightforward. It was clear that the bankrupt had operated his business as a building contractor on the basis that he was paid a certain amount in cash and that he in turn paid subcontractors and builders' suppliers in cash. However there were no records whatsoever to support either the cash receipts or the cash payments. She asked how could he prepare amended tax returns in April 2016 in respect of the years 2012, 2013 and 2014 without a single contemporaneous document supporting these new figures? She emphasised that the evidence disclosed that he had been dishonest in relation to his tax affairs both when he filed the original returns and when he was the subject of a tax audit in respect of his affairs up to the end of 2013. She pointed to the fact that no accounts as such had been furnished and said it was clearly necessary to investigate the issue further in order to ascertain whether there was undisclosed cash held by the bankrupt. She emphasised the fact that the bankrupt's explanations in his affidavits sworn in response to this motion contrast with his nil tax return for 2015. She also observed that the increase in purchases should have required the filing of amended VAT returns and that it would appear that no such VAT returns were filed.

17. In relation to the second ground advanced by the applicant, she said she has concerns about the legitimacy of family loans allegedly owed to the bankrupt's parents. She is also concerned as to the legitimacy of the loan allegedly due to Loyalty Vision Ltd. She points to the fact that there was no documentation to support these loans which is particular curious in view of the fact that the loan to Loyalty Vision Ltd is described as a secured loan. She says that these matters require further investigation by the Official Assignee.

The position of the Official Assignee

18. All of the assets of the bankrupt vest in Official Assignee upon adjudication of the bankrupt. He is the person charged with investigating the affairs of the bankrupt and gathering in the assets for the general body of creditors.

19. Most important from the perspective of an application brought pursuant to s. 85A(3) by a party other than the Official Assignee is the fact that the Official Assignee investigated the affairs of the bankrupt in the normal way following receipt of the bankrupt's statement of affairs and statement of personal information. The bankrupt answered any questions put to him by the Official Assignee. The applicant furnished the Official Assignee with the documents which grounded her concerns that the bankrupt was hiding assets from or failing to disclose assets to the Official Assignee. He reviewed the material. Despite this information, the Official Assignee chose not to bring a s. 85A application to the court.

20. The Official Assignee was served with the material available to the applicant which induced her to bring the application in the first place. He was also served with the affidavits of the applicant sworn on the 23rd May, 2017 and the 21st July, 2017 which each exhibited reports from the applicant's forensic accountant, Ms. Kingston of Browne Murphy and Hughes. He received the replying affidavits of the bankrupt sworn on the 3rd July and 5th October, 2017. He considered all of the information provided and on the 2nd November, 2017 his representatives had a meeting with the bankrupt to address queries arising from their investigations to date and to address some of the issues raised by the applicant. The evidence established that the Official Assignee had considered all of the material and had compiled a list of questions and queries to be answered by the bankrupt and that the bankrupt answered every query put to him by officials from the Official Assignee's office.

21. The day after that meeting the Official Assignee swore an affidavit in these proceedings. His evidence to the court was that he did not bring an application to extend the bankruptcy of the bankrupt in circumstances where there was no demonstrable non cooperation by the bankrupt. He confirmed that all the normal steps in the bankruptcy process took place and that a statement of affairs was filed and a statement of personal information was furnished. Correspondence and queries were responded to and the bankrupt gave no cause for complaint as regards non cooperation with the process. He confirmed that his office carried out the usual investigations and had not identified any property or assets that were undisclosed or identified any assets that appeared likely to be recoverable for the benefit of the bankruptcy estate prior to the bankrupt's automatic date of discharge. For that reason he did not bring an application to extend the bankruptcy at that time.

22. At para. 7 of his affidavit he averred:

> *"Having reviewed the affidavits exchanged to date between the applicant and [the bankrupt], and my office having continued its investigations in light of same, I have yet to identify any undisclosed assets which would be recoverable for the benefit of the Creditors of the Bankruptcy Estate. Nor, to date, has my office, on the facts available to it, been in a position to determine whether any asset in the Bankrupt's possession as at the date of his adjudication was not disclosed."*

23. He confirmed that his office was continuing to investigate issues raised and in submissions to the court it was clarified that this related to the two loans of the bankrupt highlighted by the applicant. He was investigating the loans to ascertain whether there had been preferential treatment of these creditors and whether any sums repaid by the bankrupt should be recovered for the benefit of the bankruptcy estate.

He confirmed that he could continue his investigation and pursue assets regardless of whether the bankrupt remained in bankruptcy, and, that if he uncovers an identifiable asset that could be recovered for the benefit of the bankruptcy estate, his office will take such steps as are necessary, including the commencement of legal proceedings, to recover it for the benefit of the creditors of the bankruptcy estate.

24. At the hearing, counsel for the Official Assignee confirmed that the Official Assignee was not seeking an order postponing the automatic discharge from bankruptcy of the bankrupt and that he was adopting a neutral stance in relation to the application. He does not require an order pursuant to s.85A(3) in order to continue to investigate the estate of the bankrupt and that he is continuing to investigate the estate. He remains in a position to pursue any assets of the bankrupt which may be uncovered. He confirmed that he had satisfied himself in relation to cash receipts of the bankrupt and he has not identified undisclosed cash assets of the bankrupt as a result.

Discussion

25. All of the applicant's submissions regarding the bankrupt's amended tax returns are valid. Despite extensive explanations, the bankrupt cannot support the revised figures regarding his cash receipts and his cash payments as reflected in the amended tax returns. They represent very considerable figures and they were detailed in some cases four years after the relevant receipt or payment. It is clear that the bankrupt conducted his business in a manner which was not tax compliant at the time. This is a matter which no court can condone. But it does not necessarily follow that an order pursuant to s.85A(3) is required to investigate the affairs of the bankrupt further.

26. The pre-adjudication under declaration of tax is primarily a matter for the Revenue Commissioners. The Revenue Commissioners have the tools available to investigate the tax affairs of the bankrupt further if they believe this is required. It is also worth emphasising that the Revenue Commissioners are creditors of the bankrupt and are in a position to assist the Official Assignee if so required. They have an obvious interest in ensuring that any undisclosed cash held by the bankrupt is realised for the creditors of the bankrupt..

27. It appears to me that in effect the applicant has already achieved the investigation of the affairs of the bankrupt she sought pursuant to s.85A(3). All of the evidence confirms that the Official Assignee has thoroughly investigated his affairs and the issue she raised in relation to the quality of the information furnished by the bankrupt. He has said that he is continuing his investigation and he does not require the imposition of an order pursuant to s.85A(3) to do so in the future. It has to be borne in mind that the focus of the court in considering whether to make an order pursuant to s.85A(3) in respect of an allegation that the bankrupt has hidden from or failed to disclose to the Official Assignee income or assets which could be realised for the benefit of the creditors of the bankrupt is whether such income or assets exists or is likely to exist and thus whether a further investigation of the affairs of the bankrupt **on foot of a s.85A(3) order is warranted**.

28. The jurisdiction of the court to make an order pursuant to subs. (3) is the possibility that the court may subsequently be justified in making an order pursuant to subs. (4). For a court to make an order pursuant to subs. (4) the court must be satisfied that the bankrupt has, on the established facts, 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. Absent such a likely outcome to an

investigation, it is unlikely that a court may be justified in making an order pursuant to subs. (4). If a court may not be justified in making an order pursuant to s.85A(4), there can be no reason for the court to make an order pursuant to subs. (3). It is always to be borne in mind that any order postponing the disclosure from bankruptcy is penal in nature and requires to be justified.

29. In this case the alleged possible basis for making an order under s.85A(4) is the hiding of cash from the Official Assignee. The Official Assignee says he has investigated the bankrupt's disposal of cash receipts. He is satisfied that no further investigation into the cash is required. He has accepted the answers and explanations of the bankrupt. In those circumstances, where there is no new evidence or train of investigation to be pursued which has not already been investigated by the Official Assignee, it is difficult to see what the purpose of an order under s. 85A(3) would serve, other than to further penalise the bankrupt. It must be borne in mind that if the cash receipts of the bankrupt have been spent – as he says and the Official Assignee in effect accepts – then they cannot constitute assets which could be realised for the benefit of the creditors of the bankrupt. The underlying basis for making orders under either s.85A(3) or (4) derives from a failure of the bankrupt to comply with his obligations under the Act. If there is no such failure, or no such failure is apparent following investigation by the Official Assignee, then no such order is justified.

30. The second remaining ground advanced for making an order pursuant to s. 85A(3) relates to loans advanced by the bankrupt to his parents and their crèche business and to Loyalty Vision Ltd. In each case these loans were clearly set out in his statement of affairs. They were disclosed to the Official Assignee. The Official Assignee has made no complaint regarding the information provided by the bankrupt to him in relation to these loans. He has investigated them. His investigation is

continuing with a view to ascertaining whether any repayments by the bankrupt prior to the date of his adjudication could be recovered for the benefit of the bankruptcy estate. That is an entirely separate matter from the bankrupt's obligation to cooperate with the Official Assignee and to refrain from hiding or failing to disclose assets to the Official Assignee. Where the liability has been disclosed, the Official Assignee has investigated it, the bankrupt has cooperated with the Official Assignee in that investigation, it seems to me that an order pursuant to s. 85A(3) or (4) cannot be justified.

31. It is also worth recording that the bankrupt offered to meet Ms Kingston with a view to explaining his accounts and answering the issues she had raised on behalf of the applicant but his offer was declined. It is unfortunate that this meeting did not occur as it is possible that much of the applicant's suspicion and scepticism, which was the characteristic of her submissions to the court, might otherwise have been assuaged or eased and the expense associated with this application avoided or reduced.

Conclusion

32. Since the bringing of her application, considerable material has been brought to the attention of the Official Assignee (and the court). He has had the opportunity to investigate the affairs of the bankrupt in still greater detail. He makes no complaint regarding the cooperation of the bankrupt in that investigation. He himself is satisfied that no further investigation into the vast majority of the matters raised in her application is required. His investigations into two discrete matters which were set out in the statement of affairs are continuing. In effect, due to the exchange of affidavits and the time taken to list the application for hearing, the further investigation sought by the applicant when she initiated the application has taken

place. No further investigation under a s. 85A(3) order is required. The Official Assignee has clearly indicated that he is in a position to continue his investigations without the order remaining in place. The existence of the order is preventing the automatic discharge from bankruptcy to which the bankrupt, in ordinary course is entitled pursuant to the provisions of s.85. The postponement of his discharge from bankruptcy is penal in effect. It is not required either to assist in the administration of his individual bankruptcy or in order to maintain the integrity of the bankruptcy process as a whole. Accordingly I refuse the reliefs sought and vacate the interim order granted pursuant to s.85A(3) on the 29th May, 2017.