THE HIGH COURT

BANKRUPTCY

[No. 3590]

IN THE MATTER OF SECTIONS 85 AND 85 (A) OF THE BANKRUPTCY ACT, 1988 (AS AMENDED)

BETWEEN

CHRISTOPHER D. LEHANE IN HIS CAPACITY AS THE OFFICIAL ASSIGNEE IN BANKRUPTCY

APPLICANT

AND

BREDA WEBSTER

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on day of 2018

Introduction

1. The applicant (the Official Assignee) has brought an application seeking to postpone the automatic discharge of the respondent (the Bankrupt) from bankruptcy pursuant to the provisions of s. 85A of the Bankruptcy Act, 1988, as amended, on the grounds that she has hidden from or failed to disclose to him assets which could be realised for the benefit of the creditors of the Bankrupt.

The facts

2. The Bankrupt petitioned for her own bankruptcy and she was adjudicated bankrupt on the 18th April, 2016. Her petition was accompanied by a statement of affairs sworn by the Bankrupt on the 30th March, 2016. There is a requirement in Part 1 of the statement of affairs to list the debts (if any) due to the debtor. This is marked not applicable in the statement of affairs. On the final page she states that her debts exceed her assets by the sum of €41,592.63. In fact, it was accepted that this was incorrect and the correct figure should have been €26,593.63.

3. Section 19 (d) of the Act of 1988 requires a bankrupt to *"give every reasonable assistance to the Official Assignee in the administration of the estate"*. It is standard practice for the Official Assignee to require all persons who are adjudicated bankrupt to complete a form described as a statement of personal information. This is not a statutory form but represents a reasonable manner in which the Official Assignee seeks to ensure the assistance of bankrupts in the administration of their estates. On p. 2 of the form it is stated that if the person requires any help to complete the form they should contact the bankruptcy division of the Insolvency Service of Ireland at the address, telephone number or email given on the form. It is accepted that the Bankrupt did not seek assistance in completing this form either from the Insolvency Service of Ireland or her solicitors. She therefore must accept the consequences of any errors she made in the information she furnished to the Official Assignee which might have been avoided had she sought guidance in completing the form.

4. The Bankrupt retired from her employment with the HSE in July 2015 upon reaching her 65th birthday. She was entitled to receive a lump sum payment. The sum of €72,460.34 was paid to her on the 1st September, 2015. By the time she presented her petition for bankruptcy and swore her statement of affairs these monies had been dissipated in the manner discussed below. It was not suggested that the sum should have been disclosed in the statement of affairs as it had been dissipated by the time of swearing that document. However, it was argued that failure to disclose this payment on p. 8 of the statement of personal information amounted to a wrongful omission on the part of the Bankrupt. Under the heading "Investments" each bankrupt is asked:

"Have you received any payment from an investment fund in the past five years?"

The answer given was No. It was not disputed by Mr. Lynch, solicitor, who appeared on behalf of the bankrupt, that she should have filled out this section by referring to the lump sum payment received on the 1st September, 2015. He accepted that a payment from an investment fund included a lump sum pension payment from her employer.

5. The statement of personal information also requested details of assets transferred within the last twelve months. The Bankrupt was requested to:

"Please detail all payments of money over €5,000, transfers of property to any creditor, or any charges created by you on property in favour of a creditor, in the twelve month period prior to your adjudication as a bankrupt."

This part of the form was left blank by the Bankrupt and again it was accepted on her behalf that certain payments ought to have been disclosed in this section.

6. The bank statements of the Bankrupt disclosed four payments from her account which should have been disclosed in this section of the statement of personal information. These are:

(1) On the 10th September, 2016 she repayed a loan to AIB in the sum of €16,289.15.

(2) On the 16th September, 2015 she withdrew €5,400 which was used to repay a loan of €5,000 advanced to her by her brother on the 25th August, 2015 (the extra €400 was never explained).

(3) On the 17th September, 2015 she withdrew the sum of €12,500, which she used to purchase a new car. The car was included in her statement of affairs at an estimated value of €11,000.

(4) On the 18th December, 2015 she withdrew the sum of €12,703.50. This was used to pay the expenses she, her daughter and her grandson incurred attending the wedding of her son in New Zealand and other expenses, as explained below.

7. The Official Assignee became aware of the receipt of the pension lump sum and the payment of certain sums by the Bankrupt prior to the date of her adjudication from examination of her bank statements. On the 3rd August, 2016 a member of staff in the bankruptcy division of the Insolvency Service of Ireland wrote to the Bankrupt asking for an explanation of the four transactions identified above together with five other withdrawals; those being on the 10th September, 2015 in the sum of €4,000, on the 16th September, 2015 in the sum of €600, on the 25th September, 2015 in the sum of €3,000, on the 21st March, 2016 in the sum of €2,248.50 and on the 21st March, 2016 in the sum of €2,440.

8. The Bankrupt promptly replied to the letter and explained that the €600 withdrawn on the 16th September, 2015 was to pay for her car insurance and tax; the €3,000 withdrawn on the 25th September, 2015 was explained as "car bought for son plus insurance and tax as he is unemployed"; the €4,000 withdrawn on the 10th September, 2015 was to pay solicitor's fees.

9. On the 24th March, 2017, Mr. Alex Mathews of the Insolvency Service of Ireland wrote to the Bankrupt raising further queries but these proceedings had issued before the Bankrupt had an opportunity to respond. The application herein was grounded upon an affidavit of the Official Assignee sworn on the 27th March, 2017.

10. On the 3rd April, 2017 I made an order pursuant to s. 85A (3) of the Act of 1988 that the matters complained of by the Official Assignee be further investigated and that the bankruptcy of the Bankrupt be extended pending the making of a

determination on the motion. The matter was adjourned to the 8th November, 2017 to afford the Bankrupt an opportunity to reply to the affidavit of the Official Assignee.

11. She swore a replying affidavit on the 25th October, 2017. She confirmed that she repaid the loan to AIB in the sum of €16,289.15 on the 10th September, 2016 at a time prior to considering bankruptcy as a means of dealing with her debts. She corrected what she has stated in her letter to the Official Assignee regarding the payment of the 10th September, 2015 in the sum of €4,000. She stated that this was used to repay a Credit Union loan. She further explained that a payment of €2,000 made to Ms. Mairead O'Keeffe on the 16th October, 2015 was repayment of an advancement of monies provided by Ms. O'Keeffe to allow the Bankrupt to pay for urgent medical treatment which took place on the 24th August, 2014. It was not a loan for the repurchase of her motor vehicle, as had been suggested in correspondence from the Insolvency Service of Ireland.

12. In relation to the withdrawal of €12,703.50 made on the 18th December, 2015 she said this was used to pay for the flights to New Zealand so that she, her daughter and her grandson could attend her son's wedding. It also covered the costs of accommodation , food, car hire and the extra fees required for an earlier flight to return to Ireland for health reasons.

13. She accepted that the sum included €5,000 to assist her son with the purchase of a house in New Zealand. She said at para.12 of her affidavit:

> *"I considered same to be a long-term loan or gift made for the purposes of assisting my son and facilitating his future needs. I say that I did not expect this loan to be repaid to me in the immediate future or at all and as such I did not include same on my statement of affairs. I say that this omission was a*

genuine error and was not made knowingly in an attempt to defraud my creditors or to avoid my obligations under the Bankruptcy acts."

14. She further stated that part of the monies were used for renovations to the rented accommodation to which she moved following the surrender of her former family home. She said that the sum of €2,248.50 paid on the 21st March, 2016 was used to pay legal costs incurred in her application for bankruptcy.

Jurisdiction

15. The relevant provisions of s. 85A of the Bankruptcy Act, 1988, as amended, provide:

"(1) The Official Assignee ... 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 ...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...

(4) Where the court is satisfied that the bankrupt has:-

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

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

the Court may, where it considers just to do so, order that, in place of the discharge provided for in section 85, the bankruptcy shall stand discharged on such later date

(i) being not later than the 8th anniversary of the date of the making of the adjudication order, as the Court considers just, or

(ii) being not later than the 15th anniversary of the date of the making of the adjudication order, which the Court considers just in view of the seriousness of the failure to co-operate referred to in paragraph (a) or the extent to which income or assets referred to in paragraph (b) where hidden or not disclosed, or both as the case may be."

Application To The Facts In This Case:

16. The Official Assignee's case is brought under s. 85A (4)(b). He alleges that the Bankrupt failed to disclose assets which could be realised for the benefit of her creditors. He raised queries in relation to sums totalling €59,181.15, which is a significant portion of the lump sum of €72,460.34. She repaid loans to AIB, her Credit Union, her brother and Ms. O'Keeffe in addition to the payment of legal fees. No real case was made that these were improper disbursements and represented assets which could be realised by way of recovery for the benefit of her creditors. The case made was that these payments ought to have been disclosed so that the Official Assignee could make his own assessment in relation to these matters.

17. The Bankrupt was criticised for failing to disclose the fact that in September 2015 she withdrew €12,500 in order to purchase a car for herself which she valued in her statement of affairs, seven months later, at €11,000. In other words, she

purchased an asset for herself using the funds available to her rather than reducing her liabilities to other creditors. While there may be other issues arising from this conduct, I fail to see how this amounts to a failure on her part to disclose assets which could be realised for the benefit of her creditors. The car was disclosed. The fact that it had been bought in the relatively recent past, does not detract from the fact that monies had been expended and an asset acquired and the asset disclosed.

18. Two matters were not disclosed which should have been disclosed: the loan (or possibly gift) of €5,000 to her son in New Zealand to assist him in buying a house and the purchase of a car for €3,000 for another son, who is resident in Ireland. She was required to disclose this information to the Official Assignee upon which it would become a matter for him to assess whether or not these were assets which could be realised for the benefit of her creditors. Furthermore, the failure to disclose the loan of €5,000 to her son in New Zealand was a failure to properly complete the statement of affairs and therefore amounted to a breach of the statutory requirement of all bankrupts to complete a statement of affairs accurately within the time prescribed.

19. The statement of affairs was also incorrect insofar as the deficiency in the estate was recorded as €41,592.63 whereas it should in fact have read €26,593.63. This does not reflect a failure to disclose assets but rather a failure of mathematics in that the total value of her assets was incorrectly deducted from the total value of her liabilities.

20. Insofar as the bankrupt expended monies on herself or indeed her family in going to New Zealand or in removal expenses when moving from Donegal to County Tipperary, it is difficult to see how these could amount to assets which could be recovered or realised for the benefit of her creditors. Whether she ought to have

expended such sums at a time when she was potentially insolvent is a different question.

Discussion:

21. In *Killally (a bankrupt) v. the Official Assignee* [2014] IESC 76, Clarke J. referred to a "significant failure" or "serious breach" of a bankrupt's obligation to cooperate with the Official Assignee when considering the jurisdiction conferred on the court pursuant to s. 85A of the Act of 1988. In *McFeely (a bankrupt)* [2016] IEHC 299, I held at para.30:-

> *"The Oireachtas clearly contemplates a spectrum of such orders [extending the period of bankruptcy]. It is clear that grave breaches of the statutory obligations by bankrupts will attract the full period of extension and that lesser failures will attract a lesser sanction. The issue, therefore, for the court to consider is where along such a spectrum do the particular established acts of each individual bankrupt fall."*

22. In *Gaynor, a bankrupt* [2017] IEHC 27 the bankrupt had concealed the existence and value of his assets from the Official Assignee and withdrawn the sum of €46,567 a few days after his adjudication. I regarded these as grave matters and extended the period of bankruptcy for a period of five years from the date when the Bankrupt would otherwise have been discharged automatically from bankruptcy in accordance with the law.

23. In this case it is important to distinguish between a failure to disclose assets and a failure to disclose payments. They are not necessarily the same thing. In this case the Official Assignee has established that there were two assets which were not disclosed to him by the Bankrupt: a loan of €5,000 to her son in New Zealand and a gift of a car purchased for €3,000 for her son in Ireland. The other payments which

were not disclosed were not assets of the Bankrupt capable of being recovered for the benefit of her creditors. Thus, the established failure in this case is the failure to disclose a loan to one son in the sum €5,000 of and the gift of a car purchased for €3,000 to another.

24. In determining an application brought pursuant to s. 85A it is appropriate to consider the conduct and attitude of the bankrupt and whether the established failure was wilful or deliberate. In *McFeely* I held, at para. 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."*

25. In this case the bankrupt failed to disclose the two assets identified until they were raised by the Official Assignee in the initial correspondence of 3rd August, 2016. She replied within a fortnight and answered each of the queries raised by the Official Assignee. The Official Assignee was not satisfied with those replies but it was not until the 24th March, 2017 that he responded to her letter of August 2016. While I appreciate that his office required time to investigate her replies, the result was that she had no opportunity in which to respond further to that letter in view of the fact that the Official Assignee was obliged to bring this application, if it were to brought at all, prior to the date of her automatic discharge from bankruptcy which would have occurred on the 17th April, 2017. She cannot be criticised for not clarifying any questions that remained to be clarified prior to the bringing of the motion.

26. The Official Assignee was severely critical of her failure to disclose the receipt of the pension lump sum in her statement of personal information or the other matters I have identified. It is true that the obligation is on a bankrupt to disclose on a proactive basis the necessary information regarding his or her assets, liabilities and affairs and it is not sufficient simply to respond to queries from the Official Assignee. However, I do not regard the actions of the Bankrupt in this case to be either wilful or deliberate or to be designed to hide assets from the Official Assignee or to otherwise frustrate the realisation of assets for the benefit of her creditors. As I have said, only two assets with a maximum value of €8,000 which might have been realised for the benefit of her creditors were not disclosed. Her conduct was not persistent and ongoing, as occurred in *McFeely*. Unlike *Farrell's Case,* she answered the Official Assignee's questions promptly and, so far as has been established, truthfully. As I stated in *Gaynor,* at para.38:-

> *"What is important from the perspective of the court is the degree of non co-operation and concealment of assets which has led to loss."*

27. Taking all these factors into account, I do not regard the breaches of her obligations to fall on the grave end of the spectrum. Rather, I would place them at the lighter end.

28. In determining whether and, if so, for how long, the bankruptcy ought to be extended where there is an established breach of the obligations placed on a bankrupt the court is required to bear in mind the fact 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 breaches, as was stated by Clarke J. in *Killally.*

29. Taking this into account, and having regard to the established non disclosure of assets and the conduct of the bankrupt responding to the queries raised by the

Official Assignee, I believe that it is appropriate to extend the period of her bankruptcy, pursuant to the provisions of s. 85A (4) of the Act of 1988, for a period of nine months from the 17th April, 2017. In view of the fact that this period has been exceeded, the Bankrupt is entitled to an automatic discharge from her bankruptcy as of today's date.

General discussion

30. My decision has been based upon the provisions of the Bankruptcy Act, in particular s. 85A, and the jurisprudence based upon that section. However, an analysis of this case does raise grounds for disquiet. The true deficit in the estate at the date of her petition was only €26,593.63. At the time the Bankrupt petitioned bankruptcy her only creditor was her mortgagee to whom she owed €149,682.63 in respect of a property she valued at €105,000.

31. The evidence established that in the seven months prior to the presentation of her petition she purchased two cars, one to replace her old car and one for her son, incurring an expenditure of €15,500 and she expended the sum of €12,703 paying for herself, her daughter and her grandson to attend the wedding of her son in New Zealand and advancing said son a loan of €5,000. The total of this discretionary expenditure came to €28,203. Had some or all of these monies not been expended in such a fashion then the Bankrupt would not have qualified to apply for bankruptcy. The final expenditure (the sum of €12,703) was incurred at or about the time that her personal insolvency practitioner, her solicitor Mr. Lynch, was to advise whether or not her debts could have been more appropriately dealt with by means of either a debt settlement arrangement or a personal insolvency arrangement. Prior to incurring this expenditure (or even a part of it) it might have been possible to reach an accommodation with her secured creditor and thereby avoid bankruptcy. It is a matter

of concern that, whether innocently or otherwise, the Bankrupt in effect manufactured her own insolvency sufficient to meet the threshold for bankruptcy by entering into these relatively modest transactions.

32. While I have stated these reservations, it appears to me that they were not matters which could properly be taken into account in determining the application brought pursuant to s. 85A of the Act of 1988 and, therefore, I have not done so. It is the entitlement of debtors who are genuinely insolvent to seek a fresh start by means of petitioning for their own bankruptcy in appropriate circumstances. Nonetheless it is important that this is not abused or that debtors who do not in fact satisfy the statutory threshold do not petition for bankruptcy. In this regard the court must rely upon the diligence and vigilance of personal insolvency practitioners to ensure, as far as possible, that this does not occur when they are advising debtors in relation to their financial affairs.