

**THE HIGH COURT
BANKRUPTCY**

[2021] IEHC 725
[Bankruptcy No. 3714]

**IN THE MATTER OF SECTION 85A OF THE BANKRUPTCY ACT 1988
AND IN THE MATTER OF GODFREY LALOR (A BANKRUPT)**

(NO. 2)

JUDGMENT of Humphreys J. delivered on Friday the 26th day of November, 2021

1. In *In Re Lalor (No. 1)* [2019] IEHC 599, [2019] 7 JIC 3108 (Unreported, High Court, 31st July, 2019), Pilkington J. decided in principle to extend the term of the bankruptcy in this case under s. 85A of the Bankruptcy Act 1988. The issue now is, for how long?

Procedural history

2. The debtor was adjudicated a bankrupt on 27th June, 2016.
3. On 9th June, 2017, the Official Assignee filed a motion seeking an extension of the bankruptcy on grounds of non-cooperation and failure to disclose assets and also seeking an interim extension under s. 85A(3) of the 1988 Act.
4. There have been 33 adjournments of this motion to date, which by any standard is a generous period for the bankrupt to address the matter and rectify any concerns. A full history of the motion would make the judgment excessively long, but I can mention some of the highlights.
5. On 19th June, 2017, Costello J. ordered an interim extension of the bankruptcy.
6. On 12th March, 2018, the same judge made the relatively unusual order that, pursuant to s. 21 of the 1988 Act, a summons would issue requiring the bankrupt to appear before the court, to be examined on oath and to produce documentation.
7. That hearing took place before O'Connor J. on 23rd April, 2018. At its conclusion, the court made orders for the collection by the Official Assignee of documentation held by the bankrupt at a property, Rosedale House, and that two firms of solicitors furnish documentation in respect of title to another property, Monte Rosa, Sorrento Road, Dalkey, Co. Dublin.
8. On 25th January, 2019, the s. 85A motion was heard in full by Pilkington J. and judgment was reserved.
9. That judgment was delivered on 31st July, 2019 and included a finding adverse to the bankrupt under s. 85A, but left over the question of the length of the extension pending an adjournment which would permit the possibility of further co-operation.
10. The matter seems to have been last mentioned to Pilkington J. on 7th December, 2020 at which point it was indicated by the learned judge that the Official Assignee should liaise with the Examiner's Office with a view to having a remote hearing of the matter.

11. In October 2021, in circumstances where Pilkington J. had unfortunately become indisposed, it was proposed that I should complete the matter by finalising the question of the length of the extension.
12. On 11th October, 2021, the matter was listed, and while there was no appearance by the bankrupt, the Official Assignee indicated that both parties were agreeable to the matter now being finalised by me. I should add that in circumstances such as arose here, consent of the parties isn't in fact necessary, but it is nonetheless welcome.
13. The motion was listed for hearing on 8th November, 2021, but the bankrupt did not appear on that occasion when the matter was called (he later explained that he had mistimed his remote connection), so I adjourned it peremptorily to the following day. The matter was then heard in full on 9th November, 2021 and judgment reserved.

Section 85A

14. The normal term of bankruptcy is for one year, but can be extended in cases of non-cooperation or non-disclosure of assets. Subsection (1) allows an application to extend the bankruptcy, and the jurisdiction of the court is set out in sub-s. (4) as follows:

“(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) were hidden or not disclosed, or both, as the case may be.”

15. The fact that the maximum extension is now fifteen years means that previous caselaw has to be read in the light of that increase, and, in particular, references to periods of extension in caselaw before the amendment have to be qualified by bearing in mind the lower maximum applicable at that time. The increase indicates a view by the legislature that a firmer approach can now be taken by the court in cases of non-cooperation.

Appropriate procedure to be adopted

16. Noting the judgment of Clarke J. in *Killaly (A Bankrupt) v. The Official Assignee* [2014] IESC 76, [2014] 4 I.R. 365, it seems to me there are essentially three questions that arise in this kind of situation:

- (i). whether there has been non-cooperation or failure to disclose assets;
- (ii). if so, whether the matter should be adjourned to allow further cooperation or disclosure to take place; and
- (iii). what extension of bankruptcy is appropriate within the maximum of fifteen years.

Whether there was non-cooperation

17. The plaintiff's non-cooperation or non-disclosure has already been determined in the No. 1 judgment as of 31st July, 2021. It is clear on the evidence that there was further non-cooperation following the judgment, especially given that the tenor of the bankrupt's responses was not accepting of the findings of the court. In particular, the bankrupt by email of 26th August, 2019 failed to respond to the Official Assignee's inquiries and directed him to third parties.

Whether the matter should be adjourned for further possible cooperation

18. Pilkington J. has afforded time for further cooperation already even though she was not obliged to do so. As matters turned out, the bankrupt has had two years and four months since then to fully co-operate, but has not done so. Where such an opportunity has already been afforded, I don't see much basis for any further adjournment.

The appropriate length of an extension

19. The question of the length of an extension was recently considered by Birmingham P. (Edwards and Kennedy JJ. concurring), in *In Re Hoey* [2021] IECA 158, [2021] 5 JIC 2605 (Unreported, Court of Appeal, 26th May, 2021), noting the approach to disqualification of directors as set out in *In Re Sevenoaks Stationers (Retail) Ltd.* [1991] Ch. 164, [1990] 3 WLR 1165, as applied by Kelly J. in *Director of Corporate Enforcement v. D'Arcy* [2005] IEHC 333, [2006] 2 I.R. 163.

20. That approach suggested dividing a potential fifteen-year directorship disqualification period into three segments as follows:

- (i). the lower bracket of 2 to 5 years' disqualification should apply where, though disqualification is mandatory the case is, relatively, not very serious;
- (ii). the middle bracket of 6 to 10 years should apply for serious cases which do not merit the top bracket; and
- (iii). the top bracket of disqualification of over 10 years should be reserved for particularly serious cases, for example where a director who has been previously disqualified falls to be disqualified again: see para. 16 to 18 of the judgment of Birmingham P.

21. In *In Re Daly (A Bankrupt)* [2018] IEHC 579, [2018] 10 JIC 1506 (Unreported, High Court, 15th October, 2018), Costello J. emphasised (at para. 21) that a bankrupt has a duty to be proactive: "[The Bankrupt's] duty in this regard is not confined to answering questions put to him by the Official Assignee. He must proactively disclose relevant information to the Official Assignee ... The Official Assignee is entitled to his assistance and entitled to investigate whether these three assets could be recovered for the benefit of the bankruptcy

estate.” Following the bankrupt’s appeal in that case relating to the period of disqualification (*In Re Daly (A Bankrupt)* [2019] IECA 491 [2019] 12 JIC 1810 (Unreported, Court of Appeal, 18th December, 2019)), Birmingham P. (McCarthy and Kennedy JJ. concurring) said (at para. 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.”

22. The Official Assignee in the present case submits as follows: “[i]t is essential for the integrity of the bankruptcy process that a bankrupt’s obligation to co-operate fully and disclose everything in relation to assets is strictly enforced. If that does not occur, the system is simply unworkable. It is in that context that the period should be assessed.” I would endorse that as a correct statement of the approach
23. A number of factors are worth mentioning:
 - (i). the bankrupt sought to conceal his interest in Monte Rosa and therefore to prevent it being realised;
 - (ii). the fact that assets were realised ultimately does not assist him because that was not as a result of his cooperation;
 - (iii). the very fact that s. 21 of the Act had to be triggered does not assist his position;
 - (iv). some of the evidence given by him under cross-examination was misleading;
 - (v). the bankrupt’s attitude after the No. 1 judgment was one of not accepting the court’s conclusions, and involved continued failure to co-operate;
 - (vi). his assertions as to his lack of control over relevant corporate assets and accounts are lacking in credibility in all of the circumstances; and
 - (vii). it is an exacerbating factor that an opportunity to provide full disclosure has not been fully taken up - a point made by Costello J. in *In Re Daly* at para. 55.
24. In the circumstances here, I think that the Official Assignee’s characterisation in submissions of the bankrupt here as adopting a “catch me if you can” approach is justified. The presumptive situation must be that near total non-cooperation warrants a near maximum period. The circumstances here come into the top bracket and possibly would have warranted the full period of fifteen years, but being as indulgent as possible by having regard to any limited elements of information that could arguably be said to have been

supplied by the bankrupt, and to his circumstances insofar as they can arguably be said to be relevant, I would extend the bankruptcy to its thirteenth anniversary.

Order

25. Accordingly, the order will be one under s. 85A(4) of the 1988 Act extending the bankruptcy until the thirteenth anniversary of the adjudication, namely until midnight on 26th June, 2029.