

THE HIGH COURT
BANKRUPTCY
IN THE MATTER OF SECTION 85A OF THE
BANKRUPTCY ACT 1988 AS AMENDED
IN THE MATTER OF MICHAEL HINTZ, A BANKRUPT

[2022] IEHC 681

Record No. 5267

BETWEEN

NICOLE – ANNETTE HINTZ

APPLICANT

AND

MICHAEL HINTZ

RESPONDENT

JUDGMENT of Mr Justice Mark Sanfey delivered on the 7th day of December
2022.

Introduction

1. This is an application for an extension of the bankruptcy of the respondent ('the bankrupt' or 'Mr Hintz') pursuant to s.85A(4) of the Bankruptcy Act 1988 as amended ('the Act'). The applicant seeks a two-year extension from the date on which the bankrupt would in the normal course be entitled to a discharge from bankruptcy

pursuant to s.85(1) of the Act, *i.e.* the first anniversary of the date of making of the adjudication order.

2. Applications for extension of a bankruptcy are usually made by the Official Assignee in Bankruptcy ('the Official Assignee'). This is because the basis for the application is a demonstrable failure of the bankrupt to cooperate with the Official Assignee in the realisation of the assets of the bankrupt, and/or 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 bankrupt's creditors.

3. Section 85A(1) however makes it clear that a creditor can make application to the court under the section. The applicant ('Ms Hintz') is the former wife of the bankrupt, and is a significant creditor in the bankruptcy. Accordingly, she is entitled to apply under the section. The Official Assignee has declined to invoke the section in circumstances which he sets out on affidavit.

4. The application involved an extensive exchange of affidavits and detailed written submissions by each party, both of whom were represented by counsel at a keenly contested hearing over two days.

Background

5. Ms Hintz swore a grounding affidavit on 9th February, 2022 which set out the background to the matter. She avers that she is the ex-wife of the bankrupt and had two children with him, born in 1998 and 2002 respectively. The applicant and the bankrupt separated in or about 2004.

6. Ms Hintz avers that, in or about June 2019, her understanding is that the respondent commenced bankruptcy proceedings in Ireland and that "...these proceedings resulted in this Honourable Court adjudicating the respondent bankrupt by way of an order dated 22 February 2021...". It emerged during the hearing that this

was a misunderstanding on Ms Hintz's part: the bankrupt had in fact applied to court for relief under the Personal Insolvency Acts 2012-2015, but was unsuccessful in this regard. He subsequently applied for an order of adjudication as a bankrupt, and was granted an order in this regard on 22nd February, 2021.

7. The applicant avers that, after the separation and divorce, the respondent assumed obligations to support her and their two children financially, but "consistently failed to do so". She avers that this resulted in her in having to commence proceedings against the bankrupt to compel him to pay sums due and owing. She states that, on or about April 2019, she obtained a consent judgment from the Hanseatic Higher Regional Court in the sum of €249,935.50, which was subject to interest backdated to 1 November, 2005 at a rate of 5% above the base rate of interest.

8. It appears that Ms Hintz obtained a garnishee order on 4th November, 2020 against the respondent, and exhibited a letter of 27th November, 2020 from the Association of Statutory Health Insurance Dentists confirming that the garnishee order had been delivered to them in respect of the sum of €455,979.49 plus further interest and costs on 25th November, 2020. The bankrupt lodged an appeal against the garnishee order to the District Court of Pinneberg. As a result of this appeal, an order of 16th February, 2021 was made temporarily suspending the operation of the garnishee order. However, on or about 26th May, 2021, the District Court of Pinneberg issued a ruling rejecting the bankrupt's appeal against the garnishee order and certifying that the total sum owed plus interest as of that date was €461,314.35. As such, Ms Hintz maintains her claims as a creditor of the bankrupt.

9. Ms Hintz avers that the adjudication order on 22nd February, 2021 was made on the basis that the bankrupt had: -

- (a) An address at 56, Cedar Square Ridgewood Swords, Co. Dublin and

(b) A centre of main interest ('COMI') in Ireland.

10. Ms Hintz contended that the respondent "has no genuine COMI in Ireland", and that he does not satisfy any of the criteria which would normally entitle a person to establish COMI, such as residence, having a place of business in the State, *etc.* She exhibits searches to demonstrate that the address in Swords ('the property') belongs to a company called AJ Implantological and Medical Services Limited ('the company'). Ms Hintz avers that Companies Registration Office searches "...indicate that the company is wholly owned by a Ms Astrid Jentsch ('AJ'), a person who I know to be the respondent's current romantic partner". Ms Hintz avers that AJ appears to be the *de facto* owner of the property, and that the company's accounts suggest that the company has accumulated substantial profits in 2020 and 2021; that its tangible assets seem to consist of the property and its contents; that AJ, as sole director received €25,000 in remuneration in the year ending 31st January, 2021; that the €25,000 received by AJ, together with the associated social insurance payments, account for the entirety of the payroll expenditures of the company in the year ending 31 January, 2021; and that the bankrupt has not received any remuneration from the company.

11. Ms Hintz caused a private investigator to conduct an "occupancy check" in relation to the property. A Mr William Hughes of Aserve Investigators and Process Servers compiled a report dated 18th November, 2021, which suggested that the property was largely unoccupied, although a neighbour did comment that an occupant, whom Ms Hintz accepted was "probably the respondent" had been seen at the property "a couple of times during the summer".

12. Ms Hintz stated in her affidavit that the respondent's personal affairs had been "opportunistically configured" so that he could give the appearance of having a place

of business in Ireland, having a dwelling house in Ireland, and being ordinarily resident in Ireland, and that he had represented this to be the position in correspondence in December 2019 with Ms Stefanie Meldau, a bailiff of the District Court of Pinneberg.

13. The bankrupt is by profession a maxillofacial surgeon, and until 2011, owned what Ms Hintz terms a “clinic” – although the bankrupt in his evidence disputed this description. Ms Hintz averred that the respondent conducted business at the clinic prior to 27th August, 2018, at which point he sold the clinic, which was ultimately acquired by Ms Jentzsch. Ms Hintz avers that the clinic operates under the name of “Medical Smile”, and is owned by Ms Jentzsch who is the practice manager.

14. The contention of Ms Hintz is that the bankrupt has continued to practise and reside in Germany, and has no COMI in Ireland or any sufficient link to the country to enable him to seek adjudication. Counsel for Ms Hintz did intimate to this Court at a directions hearing on 9th May, 2022 that Ms Hintz might apply for an annulment of the adjudication order on this basis. However, having taken appropriate advice, Ms Hintz ultimately declined to proceed with that application. Accordingly, the only application presently before the court relates to whether or not an order pursuant to s.85A(4) would be appropriate.

15. In the applicant’s submissions, at paras. 15 to 23, the applicant sets out matters which she maintains provide “ample evidence” to suggest that the respondent has concealed assets from the Official Assignee, and has failed to cooperate with the Official Assignee. These may be briefly summarised as follows: -

- It is suggested that Ms Jentzsch is the owner of “a €700,000 commercial premises and the full and unencumbered owner of the Irish property (which is worth €285,000)” ..., notwithstanding that,

according to Ms Hintz, there are no obvious sources of income or resources which would have enabled Ms Jentzsch to acquire such assets. It is suggested that she is holding assets on behalf of, or with the financial assistance of, another party, and the court is invited to conclude that the bankrupt is that other party, given that “the applicant has historically practised from AJ’s German property and is the secretary of the company through which she owns the Irish property”.

- The bankrupt maintains that he lives in the Irish property and, by his own admission, does not pay AJ a commercial rent. Ms Hintz maintains that this suggests that the bankrupt is the true owner of the Irish property “...or that AJ has acquired it with monies that have been given to her for the purposes of defeating creditor claims”.
- Ms Hintz refers to “...the transfer of a €100,000 bookdebt [sic] from the respondent to AJ during the bankruptcy process and without informing the Official Assignee” and maintains that this “...is demonstrative of a clear intent to conceal assets”. This transfer was the subject of much affidavit and oral evidence during the hearing, and I will refer to it further below.
- It is suggested that the bankrupt “has made transfers to the account of AJ” for which no explanation was proffered.
- The bankrupt has held himself out as practising from the German clinic and has rarely been seen at his Irish address. Ms Hintz suggests that “...there is clear evidence that the respondent has established a false COMI for the purposes of conducting a bankruptcy at a congenial remove from his main assets and professional activities”.

- Ms Hintz notes that the bankrupt denies being in a romantic relationship with Ms Jentsch, but suggests that, if this claim is shown to be false, this is indicative of non-cooperation with the Official Assignee, given the continuing business dealings between the bankrupt and Ms Jentsch.
- Ms Hintz refers generally to the bankrupt's financial affairs, stating that he "provides no sense of how he is able to finance the shortfall in his practice...he has not explained how he is financially supporting himself in circumstances in which he is living (supposedly alone) in a country in which he has no business interests or remunerated occupation".

Cross-examination of the applicant and the bankrupt

16. There was an extensive exchange of affidavits between the applicant and the bankrupt in advance of the hearing. The affidavits were replete with speculation and hearsay evidence on both sides. Mr Hintz, who is a fluent English speaker, drafted his own affidavits and represented himself in directions hearings in advance of the hearing of the application. It must be said that his affidavits, drafted without the benefit of legal advice, did not always address the issues in a focused and satisfactory manner. Wisely, Mr Hintz engaged solicitor and counsel for the hearing itself, with the result that the written and oral submissions proffered on his behalf were appropriate and focused on the issues.

17. Both parties agreed in advance of the hearing that it would be necessary for the respective deponents to be cross-examined on their evidence. Accordingly, the bankrupt was cross-examined by counsel for Ms Hintz, and Ms Hintz in turn was, with the aid of an interpreter, cross-examined by the bankrupt's counsel. The evidence

which emerged from these examinations was helpful to the court in resolving the issues.

The bankrupt's evidence

18. The bankrupt was asked about his motivation in coming to Ireland in 2018. He stated that he had severe addiction problems in relation to narcotics, and part of the motivation in coming to Ireland was that he “wanted to get clean”. His addiction had led to him becoming indebted to certain persons of unsavoury character, and he saw Ireland as an opportunity to address his addiction and, effectively, to make a fresh start.

19. Counsel asked as to why his client was “only hearing about this now” and why this motivation had never been addressed in any of his affidavits. The bankrupt stated that he thought that it was up to the applicant to prove her case, and that he did not have to address matters not raised by her. It also became clear during his evidence that his relationship with Ms Hintz is characterised by bitterness on both sides, and what the bankrupt characterises as a vindictive campaign on the part of Ms Hintz and her father to destroy his life and make it impossible for him to function normally.

20. The bankrupt stated that he had spent “250 days a year in Ireland since 2018”. He denied that he resided or worked other than occasionally in Germany. The “clinic” was not correctly described as such; while there were a number of rooms occupied by medical professionals, each constituted a separate operation whereby doctors maintained a presence to avail of surgical facilities. The bankrupt was asked about certain responses he had given to online reviews of operations done by him in the last couple of years. The bankrupt maintained that he did not write the responses, which were more likely composed by administrative staff of the clinic.

21. The bankrupt stated that he had a salary of €1,069.00 net per month from the Irish company. He had agreed with the Official Assignee in July 2022 that a sum of €257.86 would be paid from his net earnings every month to the Official Assignee for a period of three years. His salary had been disclosed to the Official Assignee prior to agreement of the appropriate payment.

22. The bankrupt was asked in detail about the company. He acknowledged that he was the secretary of the company, which he stated advertises widely and acquires patients who are subsequently treated in the clinic, with a share of the fees for the surgery being paid to the company. The bankrupt described this as “medical treatment tourism”, and said that the company acquired patients for other clinics also. The patients would typically be German, with other patients sourced in Europe, and Russian and Japanese patients are not unusual. He stated that Ms Jentzsch speaks Russian; patients requiring maxillofacial treatment in Germany would need to liaise with somebody who spoke their own language.

23. Counsel asked why the business was being operated by an Irish company. The bankrupt speculated that there were tax reasons for this, although he stated that he only saw the payments coming in and out in his capacity as a bookkeeper, rather than making any financial decisions as such. He also said that he vetted applications, and that this was primarily the reason he received remuneration. He characterised this as a screening process of the information supplied by or on behalf of prospective patients to see whether treatment for them would be appropriate.

24. The bankrupt referred to his friendship with Ms Jentzsch. He acknowledged that there had been a romantic relationship at one point, but said that this had ended many years ago. He stated that Ms Jentzsch had not wanted to get involved in the Irish proceedings, and that he accordingly did not ask her to proffer an affidavit.

25. Mr Hintz was examined particularly closely in relation to a transfer agreement executed between him and Ms Jentzsch on 22nd October, 2020 ('the transfer agreement'). This agreement had been exhibited to the applicant's grounding affidavit. Its provisions are set out in both German and English. It acknowledges that Mr Hintz "is entitled to a claim against the Kassenärztliche Vereinigung Schleswig-Holstein for the fees of panel doctors from panel doctor activities ... as well as all future fee claims", and states that "the amount of the claim is 100,000 euros [sic] plus 14.6% interest p.a....". In the document, Mr Hintz "hereby assigns to the assignee [Ms Jentzsch] all claims to which he is entitled, including those arising in the future, in full amount until the claim including accrued interest has been settled".

26. Ms Hintz refers to this agreement at para. 39 of her affidavit, and states that "...the transfer agreement was entered into in circumstances in which the Respondent's letter to Ms Meldau, the Court bailiff...stated that he did not have the right to dispose of residual assets due to his ongoing Irish bankruptcy process...".

27. In his affidavit of 21st April, 2022, the bankrupt addresses the issue of the transfer agreement. Mr Hintz acknowledges that the transfer agreement should have been disclosed to the Official Assignee, but characterises the assignment as security for a loan given to him by Ms Jentzsch in circumstances where he had been denied credit by a number of financial institutions. In his oral evidence under cross-examination, the bankrupt explained the circumstances in which he obtained a loan from Ms Jentzsch. He said that his plan was to stop operating from the clinic on 31st December, 2020. He was aware in October 2020 of the money that he would require over the following months to close down the business and cover wages to employees and social welfare costs. He said that "not one Euro" of the loan was for him personally. His view of the assignment was that it provided security for Ms Jentzsch

in respect of repayment of the debt of which she could avail after the bankrupt's discharge from bankruptcy.

28. The Official Assignee, Michael Ian Larkin, swore an affidavit on 21st March, 2022. In relation to the transfer agreement, the Official Assignee acknowledges that the bankrupt did not disclose the agreement in the statement of personal affairs provided to him. The bankrupt has now provided information in relation to the agreement to the Official Assignee, who states that the bankrupt provided him with an email of 26th February, 2022 detailing further advances made by Ms Jentsch, "post the swearing of the statement of affairs in August 2020...according to the Bankrupt, further loans totalling €51,100 were made by AJ to the Bankrupt with the rationale being that the Bankrupt was an important tenant of AJ. The Bankrupt has provided my office with bank statements which he says show that the loan proceeds went to pay the salaries of the employees...". The Official Assignee avers that he does not have sufficient information as regards the transfer agreement to determine if it was entered into in good faith and for valuable consideration, or if the sums involved are material, and that his investigations are ongoing.

Evidence of the applicant

29. Ms Hintz gave evidence with the assistance of an interpreter. She stated that she first heard that Mr Hintz had applied for bankruptcy in "summer 2020". This appears to be a reference, not to the bankruptcy proceedings, but rather to the application by Mr Hintz for relief under the Personal Insolvency Acts in 2019. She consulted German lawyers, who recommended that she get advice from an Irish solicitor, and eventually located a solicitor in Ireland who spoke fluent German. She said that she became aware that Mr Hintz had been adjudicated bankrupt in Ireland in or about July 2021.

30. Counsel for the bankrupt put to Ms Hintz that she had waited until the very last minute prior to Mr Hintz's prospective discharge to make the application for an extension, and that similarly, when Mr Hintz had been adjudicated bankrupt in Germany in 2005 in circumstances in which he would have been entitled to discharge after six years, she had caused a similar application to be made which caused the discharge to be delayed for a further year. Ms Hintz was unable to remember the circumstances in which that application had been made. It was put to Ms Hintz that she had raised in her affidavits a number of "historical complaints" which had no relevance to the application which was before the court.

31. It was suggested to Ms Hintz that the bankrupt had in fact cooperated with the Official Assignee and had furnished him with his tax return for 2020, which was exhibited to the Official Assignee's affidavit. In addition, the Official Assignee had available to him accounts for Mr Hintz's operation at the clinic for the year ending 31st December, 2020, which Ms Hintz herself had exhibited to her grounding affidavit. These accounts appeared to indicate that the clinic was operating at a loss, as the bankrupt contended. It was suggested to Ms Hintz that the Official Assignee was satisfied with the information that he had received and had no complaint to make in relation to the cooperation of the bankrupt in relation to his financial affairs.

Submissions on behalf of the applicant

32. In his oral submissions, counsel for the applicant submitted that it was not appropriate for the bankrupt to complain about the length of time taken to bring the application. It had been necessary to collate information and hire a private investigator to establish the true position. The High Court had in fact permitted short service of the application to ensure that it was brought before the court prior to the first anniversary of the adjudication; counsel submitted that it was clear from this that the court at that

point did not consider that the application should not be permitted by reason of any alleged delay.

33. Counsel placed considerable emphasis on the transfer agreement, contending that it was a clear disposition and concealment of an asset shortly prior to adjudication. The Official Assignee was not alerted to it in the bankrupt's statement of affairs. Counsel submitted that it was a straightforward disposition of an asset rather than the granting of security which could be redeemed, and that as such, it was a preference of Ms Jentsch by the bankrupt. The failure to inform the Official Assignee clearly constituted non-cooperation. It was suggested that the explanations provided by the bankrupt were simply a post-facto rationalisation in circumstances where the assignment had been discovered.

34. Counsel contended that the bankrupt had failed to provide an appropriate residential address, in that the balance of the evidence suggested that he was not resident at the Swords address. It was submitted that failure to provide an accurate residential address amounted to a failure to cooperate with the Official Assignee, and dicta to that effect by Costello J in *Re McFeely* [2016] IEHC 299 and *Re Daly, A Bankrupt* [2018] IEHC 579 were cited. It was suggested that it was not credible, in the absence of proof such as utility bills, that the bankrupt resided permanently in the Swords address, and the evidence indicated that he frequently stayed in the clinic in Germany and admitted using a room there. The responses to the reviews online of his performance in surgeries suggested that his involvement in the clinic was greater than the bankrupt contended. It was suggested that Mr Hintz had a history of arranging his business affairs in a manner which would suggest that he did not own the business in which he was involved. It was further suggested that he had arranged his affairs in this manner with the active assistance of Ms Hintz before their separation and divorce, and

that this was relevant to the interpretation of his current circumstances as regards his residence and his business affairs.

35. Counsel also made reference to matters which had not been revealed by Mr Hintz in his affidavits, in particular the nature of his relationship with Ms Jentsch, both personally and commercially. It was suggested that the bankrupt was a “financially sophisticated individual”, and that his attempts to portray himself as somebody without significant business interests or assets must be regarded with suspicion.

Submissions on behalf of the bankrupt

36. Counsel for the bankrupt began by referring to the criteria set out in s.85A(4) which must be established in order for the court to have jurisdiction to make an order postponing the discharge of the bankrupt. Counsel laid considerable emphasis on the evidence of the Official Assignee as set out in his affidavit. At para. 5 of Mr Larkin’s affidavit, he averred that his office “did not bring an application to extend the bankruptcy of the Respondent in circumstances where there was no evidence of demonstrable non-cooperation by the Bankrupt”. While in his affidavit the Official Assignee did note the failure by the bankrupt in his statement of personal affairs to bring the transfer agreement to his attention, it was submitted that it was clear from the Official Assignee’s averments that the application now being maintained by Ms Hintz was not warranted.

37. In relation to the second criterion set out in s.85A(4), *i.e.* that the bankrupt had “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...”, it was submitted on behalf of the bankrupt that there was “a great deal of suggestion, but no tangible evidence of assets hidden from the Official Assignee”. It was submitted that the report

from the private investigator was unhelpful, in that it related primarily to the investigator's attendance on an evening in November when there happened to be no one at the property. The neighbours consulted had been vague in their evidence, but one of them effectively acknowledged that the bankrupt had been at the premises during the summer. The bankrupt had acknowledged that he was not in the premises all the time. It was submitted that there could be no comparison between the bankrupt's situation and the situation of the bankrupt in *McFeely*. There had been no failure to cooperate in relation to his residence, and the bankrupt's COMI was not an issue before the court.

38. In relation to his income or business affairs, it was submitted that there was no evidence that the bankrupt had failed to cooperate with the Official Assignee, and no basis for suggesting that his affairs had been arranged in such a manner as to hide assets from the Official Assignee. The bankrupt's tax return had been furnished to the Official Assignee together with details in relation to the business. As regards the suggestion that the income of Ms Jentsch did not justify her ability to buy the clinic or that she was in some way acting as a "front" for the bankrupt, it was submitted that this was entirely speculation on the part of the applicant, with no tangible proof. It was contended that the applicant was not in a position to have a full picture of what assets or resources were available to Ms Jentsch.

39. Counsel submitted that the context of the bankrupt's situation must be borne in mind. There had been "protracted litigation" between himself and the applicant ever since their separation and divorce. He was criticised for not alluding to certain matters in relation to the circumstances in which he chose to come to Ireland and the depth of his personal problems. However, his evidence to the court had been that he was reluctant to put these matters on affidavit for fear that they would be used against him

by the applicant and her father. Counsel submitted that this context explained why he was limiting his involvement in the Irish company to bookkeeping and reviewing patients' information. It was suggested that he had cooperated fully with the Official Assignee, and in recognition of the fact that he was not paying rent in respect of his residence, agreed a monthly payment to his creditors over a three-year period.

40. As regards the transfer agreement, counsel drew attention to the sequence of events. The agreement itself had been executed on 20th October, 2020. On 4th November, 2020, the applicant obtained a garnishee order from the German courts, and this had been communicated to the entity whose indebtedness to Mr Hintz was the subject of the assignment to Ms Jentzsch in the transfer agreement. The applicant accepts that no payments were actually made by that entity to Ms Jentzsch. Counsel therefore submitted that the transfer agreement had not produced any payment prejudicial to creditors and, as the Official Assignee acknowledged in his affidavit, the matter was the subject of an ongoing investigation by him. The bankrupt accepted completely that the matter should have been disclosed to the Official Assignee, but maintained that his failure to do so was due to a misunderstanding, as he perceived the transfer agreement to be in the nature of a security of which Ms Jentzsch could avail after his discharge from bankruptcy, rather an assignment to her of an asset.

Submissions of the Official Assignee

41. Counsel for the Official Assignee set out in her submissions the position from the Official Assignee's point of view. A statement of affairs had been provided by the bankrupt in August 2020, and a statement of personal information was furnished by him on 22nd February, 2021. In late January 2022, there was correspondence between the Official Assignee and the applicant in which the applicant suggested that an extension of the bankruptcy was appropriate. The Official Assignee replied to the

effect that there was no evidence which suggested that an application for extension was appropriate. On receipt of the grounding affidavit for the present application, the Official Assignee investigated those matters. The only notable matter which it appeared had not been disclosed to the Official Assignee was in relation to the transfer agreement.

42. Counsel for the Official Assignee was unequivocal in submitting on behalf of the Official Assignee that the bankrupt had responded to all of the Official Assignee's queries, and that the Revenue records submitted by the bankrupt tied in with his account of his affairs. It was submitted that the Official Assignee could only deal in facts, and that there was no evidence of failure to cooperate on the part of the bankrupt. Neither did it appear, on the evidence available to the Official Assignee, that the bankrupt had hidden assets or, with the exception of the transfer agreement, failed to disclose them to the Official Assignee. The Official Assignee had in fact exhibited to his affidavit the detailed queries put by email to the bankrupt, together with the bankrupt's equally detailed responses.

Discussion

43. It is important to state that the court's function is to rule on the application before it, and not to be distracted from that task by the maelstrom of history and context between the parties. The court must resist the invitation of the parties to become embroiled in their complicated past, or to enter upon a consideration of issues raised by the parties which are not germane to the issue at hand.

44. Issues and grievances were raised in the affidavits between the applicant and the bankrupt which go back over twenty years. While I have considered all of the evidence and submissions made to the court, I have not attempted to set out all of the matters which were raised, many of which display an unfortunate level of mutual

distrust and bitterness between the parties. On the one hand, the applicant is a very substantial creditor of the bankrupt who seeks payment of monies due to her for the support of herself and her children by a debtor who she maintains orders his affairs in such a way as to do everything he can to avoid payment; on the other hand, the bankrupt's perception is that he is being relentlessly pursued by the applicant and her father in a vindictive and vengeful manner, the motives for which pursuit extend far beyond recovery of a debt.

45. The court must decide whether the applicant has discharged the onus of proof so as to satisfy the court 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...”

46. If the court is so satisfied, the court may extend the bankruptcy in the manner envisaged by s.85A(4). It is to be noted that the court has a discretion in this regard.

47. Any such extension would date from the first anniversary of the adjudication order. As the matter first came before the court on notice to the bankrupt and the Official Assignee on 21st February, 2022 – the day before the first anniversary of the adjudication, on which, in the normal course, the bankrupt would be entitled to an automatic discharge - the court made an order pursuant to s.85A(3) of the Act extending the bankruptcy until 8th April, 2022. On 28th March, 2022, an order was made extending the bankruptcy pending determination of the present application. Accordingly, as of the date of delivery of this judgment, the bankruptcy has already been extended by over nine months.

48. It is not necessary to set out in detail the principles that govern the present application, and indeed there was no significant disagreement between counsel as to the principles to be applied. However, while the principles set out in the case law are clear, one must be cautious in drawing analogies between such cases and the present application, as the decision in each case is very dependent on the established facts.

49. The applicant submits that an extension can be granted to penalise the bankrupt for established failure to cooperate or hiding or failing to disclose assets: as Clarke J (as he then was) put it in *Re Killally* [2014] 4 IR 365:

“6.1...I am, therefore, satisfied that, on its proper construction, s.85A of the Act of 1988 confers on the Official Assignee a jurisdiction to seek, and on the High Court a jurisdiction to impose, a postponement of the entitlement of a bankrupt to be discharged provided that the court is satisfied that a failure to cooperate or a hiding of or failure to disclose assets, in accordance with the terms of the section, has been established. That jurisdiction exists even though any wrongdoing thus established may be completed and, indeed, remedied. It is not necessary, in order for the jurisdiction to arise, that it be established that there are further enquiries to be made or action to be taken for the purposes of furthering the getting in and distribution of the estate of the bankrupt. I am, therefore, satisfied that a jurisdiction arose to make the order in this case.”

50. The purpose of such a section is primarily to protect the integrity of the bankruptcy process. As Costello J put it in *Re Gaynor* [2017] IEHC 27:

“37. The conduct of the bankrupt in relation to his bankruptcy challenges the integrity of the bankruptcy process. It cannot be ignored by the court. The maintenance of the integrity of the bankruptcy process requires to be encouraged by the imposition of sanctions for breaches of the process, as was

held by Clarke J. in *Killally's* case following the decision in the High Court of McGovern J.”

51. In *Killally*, the Supreme Court accepted that the length of any extension must be proportionate to the established wrongdoing. In *Re Farrell* [2016] IEHC 637, the bankrupt had been uncooperative with the Official Assignee; however, as Costello J commented at para. 19 of her judgment: -

“The non-cooperation of the respondent was severe but the effect of the non-cooperation was not greatly to prejudice the realisation of her estate for the benefit of her creditors. In my opinion, this is a mitigating factor in her favour. When the Supreme Court says that the extension of the period of bankruptcy should be proportionate to the established wrongdoing, I take that to mean not merely the wrongful acts or omissions of the bankrupt but also the consequences to the creditors of the bankrupt. In this case, it has not been clearly established that the creditors have been gravely prejudiced by the admittedly egregious behaviour of the respondent.”

52. In *McCarthy v Sheerin* [2018] IEHC 179, the applicant in a s.85A(3) application was deemed by the court to be a creditor by virtue of a contingent liability of the bankrupt for costs arising out of family law proceedings, and thus had standing to invoke the s.85 jurisdiction. In her judgment, Costello J considered the attitude to the application of the Official Assignee, who had declined to make an application pursuant to the section: -

“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.” [Paragraph 19].

53. The court found in that case that the evidence established that the Official Assignee had considered all of the material provided by the creditor and had met with the bankrupt to address the queries raised by the Official Assignee’s investigations and some of the issues raised by the applicant. A list of questions and queries drawn up by the Official Assignee had been comprehensively addressed by the bankrupt. The Official Assignee accordingly confirmed to the court by affidavit that: -

“21. ...All the normal steps in the bankruptcy process took place and...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. [The Official Assignee] 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.”

54. While that case related to an application for an interim order pursuant to s.85A(3) rather than the final order contemplated by s.85A(4), the approach of the court is instructive. As the section is designed to address failures to cooperate with the

Official Assignee in the realisation of assets and the hiding of, or failure to disclose, assets or income from the Official Assignee, the view of the Official Assignee as to whether the criteria in s.85A(4) have been established, and indeed whether or not an application is warranted, are factors to which the court attaches particular weight.

55. Section 61(2) of the Act provides that the functions of the Official Assignee “are to get in and realise the property, to ascertain the debts and liabilities and to distribute the assets in accordance with the provisions of this Act”. The Official Assignee has been given a range of powers to carry out these functions. Section 19 of the Act sets out the duties of the bankrupt on adjudication, and s.19(d) provides that the bankrupt shall “give every reasonable assistance to the Official Assignee in the administration of the estate”. The Official Assignee has powers which enable him to investigate the bankrupt’s affairs, most notably the power in s.21 of the Act to apply to court to have the bankrupt or other persons summoned before the court for examination on oath in relation to the bankrupt’s affairs.

56. In most cases, it is not necessary to invoke the power under s.21, as most bankrupts – particularly those who themselves have applied for adjudication – cooperate with the Official Assignee in an appropriate manner. At the date of swearing of his affidavit in the present proceedings – 21 March, 2022 – the Official Assignee’s position was that he did not consider that, prior to the first anniversary of the bankrupt’s adjudication, that there was any “evidence of demonstrable non-cooperation by the bankrupt”. He noted in his affidavit that his investigations in relation to the transfer agreement in particular were ongoing, but commented at para. 14 that: -

“...my office remains in a position to continue its investigations, and to pursue assets, regardless of whether a bankrupt remains in bankruptcy. In addition, as

required by s.85A, there is a continuing obligation on a bankrupt, even if discharged from bankruptcy, to cooperate with me in the administration of the bankruptcy estate”.

57. By the time the application had been heard, the Official Assignee had had the opportunity to assess the contents of all of the affidavits, and to form a judgment on the oral evidence proffered at the hearing. The court accordingly enquired of counsel for the Official Assignee as to the Official Assignee’s view of the matter, and in particular whether his view that an application for extension of the bankruptcy was not warranted as expressed in his affidavit had changed in the light of the evidence before the court. Counsel said that the Official Assignee’s view had not changed, and that he was “not recommending any further extension”. The bankrupt had cooperated fully with the Official Assignee’s enquiries, and the only matter which raises significant issues from the Official Assignee’s point of view was the issue of the transfer agreement, which was being investigated by the Official Assignee. The bankrupt remained under an obligation under s.19 to cooperate with the Official Assignee, and this would remain the case notwithstanding his discharge from bankruptcy.

58. The bankrupt, in his oral evidence to the court, referred to a number of matters which were not addressed in a meaningful way in his affidavits. He had chosen in his affidavits not to be forthcoming about his motivation for coming to Ireland, his addiction problems, the nature of his relationship with Ms Jentzsch, and certain other allegations relating to his activities in the past. He had not exhibited any vouching documentation to corroborate his assertion that he lives for most of the year in Swords, County Dublin. In his evidence before the court, he explained that this reticence was motivated by his belief that the onus of proof in the application was on

Ms Hintz, and that he should not reveal any more information than was necessary for fear that it might be used against him in some fashion by Ms Hintz or her father.

However, Mr Hintz gave evidence before the court which addressed all questions put to him in a forthright manner, whether or not his answers were deemed satisfactory by Ms Hintz.

59. If the bankrupt's answers – or any further material unearthed by Ms Hintz – require further investigation by the Official Assignee, the discharge of the bankrupt is no impediment to this process. The bankrupt remains under a duty to assist the Official Assignee notwithstanding his discharge. The bankrupt's assets as of the date of his adjudication remain vested in the Official Assignee. All powers of investigation remain available to the Official Assignee, as do the powers to set aside certain transactions pursuant to ss. 57 to 59 of the Act. The Official Assignee has acknowledged his obligation to continue his investigations and to pursue assets where appropriate.

60. In such circumstances, it is not clear to me why the applicant sought an extension of two years. It is not necessary to extend the bankruptcy to enable investigation of the bankrupt's affairs to take place. If the evidence had supported the intimations and suspicions of Ms Hintz that there have been wholesale failures of cooperation and disclosure and hiding of assets on the part of the bankrupt, a much longer extension might well have been warranted. In any event, whatever period the applicant seeks or the Official Assignee may recommend by way of extension, s.85A(4) makes it clear that whether or not an extension is granted or the length of any such extension are matters solely for the court in the exercise of its discretion in all the circumstances.

61. Ms Hintz is a very substantial creditor of the bankrupt. It would appear that the bankrupt has not complied with his duties to discharge amounts due to her for a prolonged period, and she has accordingly obtained judgment against him in Germany. It is understandable that she wishes to leave no stone unturned in seeking to recover as much as possible of what she is owed.

62. Her application has brought the transfer agreement to the attention of the Official Assignee. The bankrupt accepts that this should have been disclosed, and apologises for his failure in this regard and attributes it to a misunderstanding on his part of his obligations. He points out that the estate of the bankrupt has in fact suffered no loss as a result of the agreement, as no payments have been made to Ms Jentzsch. With this exception, the Official Assignee is satisfied that there has been full disclosure and cooperation with the bankrupt with his office, and considers that he should not recommend a further extension of the bankruptcy.

63. Having considered all of the affidavit and oral evidence and the submissions of the parties, I am not satisfied that the bankrupt has failed to cooperate with the Official Assignee in the realisation of his assets, or 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 sole exception to this is the failure to disclose the existence of, or circumstances relating to, the transfer agreement, which certainly on the face of it involves a disposition of assets to a third party at a time when the bankrupt had applied to court for his adjudication. I note that this transaction remains under investigation by the Official Assignee.

64. To the extent that the bankrupt's failure in this regard warrants a penal sanction, I am satisfied that this requirement has been fulfilled in practical terms by the extension of the bankruptcy pursuant to s.85A(3) to date. I do not believe that any

purpose would be served by any further extension. Mr Hintz's COMI has not been challenged, and his invocation of the bankruptcy jurisdiction was appropriate. He is entitled to his discharge from bankruptcy, although his estate as of the date of his adjudication remains vested in the Official Assignee and subject to the requirements and strictures of Irish bankruptcy law.

65. For the sake of clarity, I should say that this judgment should not be taken as a determination as to any of the substantive issues raised by Ms Hintz in connection with the bankrupt's estate. The investigation of such issues, and whether or not any action should be taken on foot of them, remain entirely matters for the Official Assignee in the exercise of his statutory duties.

Conclusion and orders

66. Due to the fact that there has been "a failure to disclose" within the meaning of s.85A(4) of the Act in one material respect as outlined above, I accept that a penal sanction in accordance with s.85A(4)(i) is warranted. However, I consider that the period from the date of the first anniversary of the adjudication to the date of delivery of this judgment is a sufficient sanction in all the circumstances. I shall therefore order that the bankrupt's adjudication shall stand discharged as of today's date – 7th December, 2022.

67. As regards costs, a number of factors must be taken into account. In circumstances where a s.85A(4) application brought by the Official Assignee or a creditor against a bankrupt is entirely successful, there is a case to be made that an order for costs *simpliciter* against the bankrupt should follow, as an order in favour of the applicant for her own costs in the bankruptcy, *i.e.* to be deducted from the recovered assets of the bankrupt prior to a distribution by the Official Assignee to the creditors, penalises the creditors including the applicant by reducing the amount

available for distribution. As against that, there may be no reality in imposing a costs liability on a bankrupt who may have no assets with which to satisfy the award of costs. Also, implicit in the notion of discharge is the idea that a bankrupt gets a “fresh start” and a clean slate in economic terms. If a bankrupt on his discharge were to be saddled with a possibly substantial costs liability, this could seriously hamper his economic rehabilitation and even render him liable to a second bankruptcy.

68. In the present case, although the application has been successful in the sense that I am satisfied that the order in relation to the sanction to date is warranted, it must be said that the applicant was mostly unsuccessful in attempting to persuade the court that the matters of which the applicant complained were extensive and serious instances of the criteria set out in s.85A(4) which warrant extension of the bankruptcy. Modern principles on costs indicate that regard should be had in complex matters to the extent to which, in relation to the various “events” in a case, a party may be said to have won or lost. At very least, it may be said that the applicant was unsuccessful in persuading the court that an extension of two years was warranted.

69. In the circumstances, my view is that I should not make an order for costs in favour of the applicant against the bankrupt personally. Given that the court has found that a sanction is warranted, and that the applicant has brought to the attention of the Official Assignee a number of matters which may warrant further investigation, I consider that the applicant is entitled to her costs as part of the costs of the bankruptcy, to be adjudicated in default of agreement, and that there should be no order in respect of the bankrupt’s costs. The Official Assignee is entitled to his costs in the bankruptcy in the normal way.

70. The foregoing paragraph indicates the orders which it seems to me are appropriate. As the parties have not had an opportunity to make submissions as to

costs, I shall allow the parties the opportunity to make written submissions of not more than 750 words as to the appropriate orders should they disagree with the orders proposed above, or wish to suggest alternatives, such submissions to be lodged with the Examiner's office by close of business on Wednesday 14th December, 2022, after which I shall make orders without further recourse to the parties.