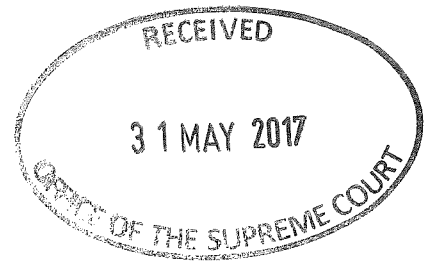


**THE SUPREME COURT  
RESPONDENT'S NOTICE**



**Supreme Court Record No. S:AP:IE:2017:000074  
Court of Appeal Record No. 2016/327  
High Court Record No. Bankruptcy 2431**

**RE: THOMAS MCFEELY (A BANKRUPT)**

**Date of Filing:** 31<sup>st</sup> May, 2017  
**Named of Respondent:** Official Assignee in Bankruptcy:  
**Respondent Solicitors:** O'Gradys Solicitors, 8-34 Percy Place,  
Dublin 4  
**Name of Appellant:** Thomas McFeely  
**Appellant's Solicitors:** Litigant in person  
**Respondent:** Christopher Lehane, Official Assignee in  
Bankruptcy, Insolvency Service of  
Ireland, Conyngham Road, Dublin 7

The Respondent was served with the application for Leave to Appeal and Notice of Appeal on 17<sup>th</sup> May, 2017.

**1. The Respondent intends: -**

To oppose the application for Leave to Appeal and, in the event of such leave being granted to ask the Supreme Court to dismiss the Appeal and/or to ask the Supreme Court to affirm the decision of the Court of Appeal.

*If the details of the Respondent's representations are correct and complete on the Notice of Appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included, or are different from those included on the Notice of Appeal.*

Details of Respondent representation are correct and complete on Notice of Appeal save that the email address for O'Grady Solicitors should be [jfay@ogradysolicitors.ie](mailto:jfay@ogradysolicitors.ie).

**2. Respondent's reasons for opposing extension of time**

There is no good or sufficient reason set out in the Notice of Appeal which – in the respectful submission of the Respondent – would warrant the

Supreme Court exercising its discretion to afford the Appellant an extension of time for the present appeal. Nothing has altered in the Appellant's circumstances which impeded him from complying with the appropriate time limitations, which did not affect the Appellant when this matter was before the High Court and the Court of Appeal.

### **3. Information about the decision that it is sought to appeal**

The Appellant has not set out anything in Section 4 of the Notice of Appeal about the decision that is sought to appeal.

### **4. Respondent's reasons for opposing Leave to Appeal**

The decision in respect of which Leave to Appeal is sought does not involve a matter of general public importance nor is such an appeal necessary in the interests of justice.

It is not the function of the Supreme Court in exercising its appellate jurisdiction conferred upon it by Article 34.4.3 of the Constitution to correct errors (and there were no errors in the Court of Appeal decision), rather the article provides that the Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from the decision of the Court of Appeal if the Supreme Court is satisfied that:-

- The decision is a matter of general public importance; or
- In the interests of justice it is necessary that there be an appeal to the Supreme Court.

The issues raised by the Bankrupt are not matters of general public importance but are specific to the facts of this case. The primary issue raised by the Bankrupt in his application for Leave and Notice of Appeal involve, at its absolute height, an exercise by the High Court of its discretion to admit evidence in a case (which exercise of discretion was approved of by the Court of Appeal). Both courts found that no constitutional right of the Appellant had been violated and made no finding in respect of any violation of rights in respect of Coalport Building Company Limited (see paragraph 35 of the Court of Appeal decision).

It is not necessary – in the interests of justice – that there be an appeal to the Supreme Court. This is particularly so in circumstances where the non-cooperation by the Appellant with the Bankruptcy is ongoing as set out below. The costs of these applications – as with the costs occasioned

by the hearings in the High Court and the Court of Appeal – fall to be borne by the Bankrupt's creditors rather than the Bankrupt.

The reasons raised by the Bankrupt at part 5 of the Notice of Appeal are dealt with below:-

- (i) The Court of Appeal/High Court did not err in law in exercising its discretion by admitting evidence obtained from the business premises of Coalport Building Company Limited. The Court of Appeal did not fail to recognise or sanction any alleged "*criminal conduct*" of the Official Assignee. The Official Assignee's conduct did not amount to a "*wilful and deliberate burglary which is a criminal offence.*" In fact, in coming to the conclusion that the High Court was justified in allowing reliance to be placed on the evidence obtained from an unlawful entry of the Coalport premises, the Court of Appeal at Paragraph 39 of the Judgment stated as follows:-

1. The Official Assignee was invited into the premises by the receiver and this went to the bona fides of the Official Assignee;
2. The documents and material found and seized were materials which had already vested in the Official Assignee by virtue of the Bankruptcy Act;
3. The search was not made of a premises then occupied by the Bankrupt for business or other purposes.

The Official Assignee entered into a building in respect of which a Receiver had taken vacant possession. He entered into it on the invitation of the Receiver. It was accepted in the High Court and the Court of Appeal that in fact Coalport Building Company Limited retained a leasehold interest as lessee in the premises although the premises had been vacated. The High Court therefore noted it was a technical unlawful entry. This finding was not appealed to the Court of Appeal however, it was an unwitting and technical unlawful entry at its absolute height. Most importantly however, the High Court made it clear in its Judgment that it did not need to rely on the evidence which had been obtained by the Official Assignee from the offices of Coalport Building Company Limited for the purpose of reaching its determination to extend the Appellant's period of bankruptcy.

- (ii) At 5(2)(a) and (b) the Bankrupt claims that the Court of Appeal failed to uphold and vindicate his property rights. The

Court of Appeal recognised that all of the documentation taken was documentation relating to the assets of the estate and had vested in the Official Assignee. The documentation constituted leases and similar. None of the documentation was personal documentation which would have breached the Appellant's privacy rights. Nor was it commercial documentation which the Appellant had any right to retain as against the Official Assignee.

- (iii) The Court of Appeal did not err in law in failing to recognise a violation of the Appellant's rights under the European Convention on Human Rights. No such alleged violation was identified and at paragraph 31 of the Judgement the Court of Appeal stated "it cannot be said by the Appellant that any right of his under Article 8 of the European Convention of Human Rights was engaged on these facts, much less infringed".
- (iv) The sanction imposed was appropriate having regard to the non-disclosure of assets and the total non-cooperation with the bankruptcy, most fundamentally the refusal to provide an address. The non-cooperation continues in that the address on the Notice of Appeal remains the same and the Bankrupt will still not disclose where he lives.
- (v) The Court of Appeal did not err in law by accepting disputed evidence of fact on a summary basis without affording the Appellant the right of testing such disputed evidence by cross-examination at trial. The evidence in respect of the Bankrupt's address was not disputed. The Court of Appeal was satisfied that in respect of assets of which the Bankrupt denied having ownership, the documentation – and more importantly the Appellant's own averments – corroborated the allegations of the Official Assignee. Most importantly, the Bankrupt at no stage sought to cross-examine the Official Assignee. The evidence considered largely consisted of documentary evidence in relation to the Bankrupt's estate presented by the Official Assignee – and in respect of the matters on which the High Court based its findings uncontested by the Appellant – as opposed to significant disputes of fact.

## **5. Respondent's reasons for opposing appeal if Leave to Appeal is granted**

**Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the Ground(s) of Appeal set out in the Appellant's Notice of Appeal (Section 6 of the Notice of Appeal):**

### **Ground 1**

It is not clear from the Ground of Appeal precisely what statutory requirement is being referenced. It appears to be a contention that the Official Assignee was obliged to get a warrant under Section 28. The Official Assignee was invited onto the premises of Coalport Building Company Limited at 1 Holles Street, Dublin 2 (hereinafter "Coalport"). The Company held a 25-year lease as lessee but had vacated the premises. The Official Assignee was therefore invited into the property by a receiver who had taken possession at a point when the property was vacant. Insofar as Coalport may have had a complaint in relation to the Receiver's actions in inviting the Official Assignee into the property or the Official Assignee's acceptance of that invitation in the absence of a warrant pursuant to section 28 of the Bankruptcy Act, 1988, no complaint has ever been made by Coalport. The documents which were seized by the Official Assignee were documents to which the Official Assignee was entitled as a right, relating as they did, to the property of the Bankrupt and the Bankrupt was obliged – and had failed – to furnish the same to the Official Assignee.

### **Ground 2:**

The Courts did not err in admitting the documents in circumstances where they were not obtained unconstitutionally. There was no violation of any parties' constitutional rights, either those of the Bankrupt or of Coalport. In any event, given the factual circumstances, the Bankrupt's constitutional rights could not have been violated, since the Official Assignee took possession of property which had vested in the Official Assignee at the time it was seized by the Official Assignee.

The High Court and Court of Appeal gave fully appropriate and adequate consideration to the Appellant's constitutional rights. No constitutional right of the Appellant Bankrupt was violated and nowhere during the course of the hearing in the High Court or in the Notice of Appeal is it evident what facts are relied on to suggest that the Appellant's rights under Article 40.3.1 or the European Convention on Human Rights as

incorporated into Irish Law pursuant to the provisions of the European Convention on Human Rights Act, 2003, have been violated.

Without prejudice to the foregoing, the High Court and Court of Appeal specifically found that there was more than adequate evidence of non-cooperation and non-disclosure of assets without reference to the information obtained by the Official Assignee in the course of his visit to the Coalport premises in circumstances where interests in assets acknowledged by the Bankrupt had not been disclosed to the Official Assignee and where the Bankrupt had persistently – including during the course of the hearing – refused to identify his place of residence.

### **Ground 3**

For the reasons set out above the Appellant's rights under the ECHR are not, as found by the Court of Appeal, engaged – much less infringed – on the facts of the case.

### **Ground 4:**

- (a) The sanction imposed in extending the discharge date of the Bankruptcy to the 30<sup>th</sup> of May, 2020 was not disproportionate. The Trial Judge (as upheld by the Court of Appeal) found the Bankrupt's non-cooperation and non-disclosure of assets to be at the grave end of the spectrum. The Bankrupt continued to maintain – right up to the conclusion of the High Court hearing and to date – that he would not commence co-operating or disclose his actual address. The non-cooperation remains ongoing since the hearing of the Appeal and the delivery of judgments by the Court of Appeal.
- (b) The Learned Trial Judge (as upheld by the Court of Appeal) did not err in law or misapply the Judgement of the Supreme Court in *Killally (A Bankrupt) .v. The Official Assignee [2014] IESC 76*, in circumstances where the facts of the case were different to the facts of the case herein and the relevant principles were correctly applied.
- (c) The Learned Trial Judge (as upheld by the Court of Appeal) did not err in law or fail to properly apply or consider the principle of proportionality in imposing the said sanction.

- (d) The Learned Trial Judge (as upheld by the Court of Appeal) did not fail to consider properly or at all any mitigating factors, which mitigating factors are denied. In particular, there was no conduct or misconduct on the part of the Official Assignee at all or which bore any relevance to the sanction imposed on the Bankrupt.
- (e) The Learned Trial Judge (as upheld by the Court of Appeal) did not fail to treat the Bankrupt with proportionality having regard to his personal circumstances.
- (f) The Learned Judge did not err in law or fail to give adequate consideration to the communication process adopted by the Official Assignee in Bankruptcy. In fact the Trial Judge specifically dealt with that matter in the course of the Judgment and the basis of this aspect of the Appeal is consequently unclear.

The legal principles set out in relation to Ground 4 have no application.

- (i) It is denied that the Bankrupt's rights under Article 40.1, 40.3.1., 40.3.2, 40.4.1 of the Constitution of Ireland have been violated in any way.
- (ii) The sanction imposed by the High Court and upheld by the Court of Appeal was proportionate, rational and clearly within the range of sanctions envisaged by the Oireachtas.
- (iii) It is unclear why the Appellant suggests that his affairs were not handled impartially, fairly or within a reasonable time at 4(v) of the Notice of Appeal, but in any event any partiality, unfairness or unreasonableness by the Official Assignee is denied.
- (iv) It is unclear why the Bankrupt suggests he was denied an effective remedy or a right to a fair trial at 4(i) of the Notice of Appeal, but in any event it is denied that there was any denial of his rights or remedies as aforesaid.
- (v) Both Courts clearly took into account the age of the Bankrupt and the High Court fixed the period of extension accordingly.

#### **Ground 5**

Both the High Court and the Court of Appeal noted section 20(1) of the Act of 1988, which provides "[a] Bankrupt shall forthwith notify the Official Assignee in writing of any change in his name or address which occurs

*during his bankruptcy.” The Court of Appeal noted that it is necessary that the Official Assignee knows where a Bankrupt lives not just so he can correspond with the Bankrupt but “so that the Official Assignee can perform his own statutory functions for example by investigating the bankrupt’s lifestyle as deposed to by him as I have set forth. In this case, the appellant has decided what he will and will not choose to disclose as far as his living arrangements are concerned. He is not entitled to do that. His failure in this regard, despite the reason that he has given, is a matter which, with others, the trial Judge was entitled to take account of when deciding whether the extent of his non-cooperation overall merited an extension of his bankruptcy and the length of any such extension for the purposes of s.85A of the 1988 Act.”*

In seeking Leave to Appeal, the Bankrupt maintains his refusal to furnish his address in the face of the judgement of the High Court and the Court of Appeal. His current postal address is given as 258 Foreglen Road, Claudy, County Derry BT47 15EE on the Notice of Appeal.

The Appellant did not set out where he had been resident for the previous 3 ½ years. The Appellant did set out that he had been living and working in London but did not disclose any information, either to the High Court/Court of Appeal or to the Official Assignee in relation to where he had actually been living and went further and declined to provide such information. The failure to provide an address is a fundamental ground of non-cooperation. If the Official Assignee cannot identify the principal private residence of the Bankrupt, he is in no position to assess the Bankrupt’s living standards, commercial dealings and therefore whether all income and assets have been disclosed.

The Learned Trial Judge did not err in law in interpreting this element of non-cooperation to be a deliberate breach of the statutory obligations of the Bankrupt. It is not understood how the legal principles relied on, being the principle of reasonableness, Article 40.1., 40.3.1, 40.3.2, 40.4.1 of the Constitution of Ireland, the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union have any bearing on this.

**Edward Farrelly**

**Bernard Dunleavy SC**



**6. Additional grounds on which decision should be affirmed**

**Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:**

None

Please submit your completed form to:

The Office of the Registrar of the Supreme Court  
The Four Courts  
Inns Quay  
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.

*O'Grady*

**THE SUPREME COURT  
RESPONDENT'S NOTICE**

**Supreme Court Record No.  
S:AP:IE:2017:000074**

**Court of Appeal Record No.  
2016/327**

**High Court Record No.  
Bankruptcy 2431**

**THOMAS MCFEELY  
(A BANKRUPT)**

**RESPONDENT'S NOTICE**

**O'GRADYS  
Solicitors for the Respondent  
4<sup>th</sup> Floor 8-34 Percy Place  
Dublin 4**