Neutral Citation: [2013] IEHC 583

THE HIGH COURT

BANKRUPTCY

[2013 No. 2478]

IN THE MATTER OF SEAN DUNNE (A BANKRUPT)

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 6th day of December 2013

1. This matter comes before the court on foot a Notice to Show Cause against the validity of a bankruptcy adjudication made on 29th July, 2013. The notice was issued on behalf of Mr. Sean Dunne (hereinafter "the bankrupt"). The petitioner, Ulster Bank plc. opposes this application.

2. On 21st May, 2012, in proceedings bearing the Record Number [2012 1229 S], the petitioner obtained judgment against the bankrupt in the sum of €164,586,493.05. No payments have been made in discharge of that debt.

3. By order made on 12th February, 2013, Dunne J. gave the petitioner liberty to issue a Bankruptcy Petition, and serve proceedings on the bankrupt outside of the jurisdiction, pursuant to O. 11, r. 1 (c) of the Rules of the Superior Courts 1986.

4. The bankrupt currently resides at an address in the state of Connecticut in the United States. On 29th March, 2013, the debtor filed a voluntary bankruptcy petition under Chapter 7 of the US Bankruptcy Code in Connecticut, Bridgeport Division. Mr. Richard Coan (the "US Bankruptcy Trustee") was appointed as trustee of the bankruptcy estate. The order of the Connecticut court included an automatic worldwide stay on any further proceedings by operation of the US Bankruptcy Code. An order was granted by Judge Shiff of the United States Bankruptcy Court, District of Connecticut, Bridgeport Division on 12th June 2013, varying the stay in the following terms:-

> *"[It is] Ordered that the Automatic Stay is hereby modified pursuant to 11 U.S.C. 362(d) to permit parties in interest to continue with the Irish Bankruptcy Proceedings and to take all actions necessary in connection with or relating to Ulster's application to have the Debtor adjudicated "bankrupt" in the Irish Bankruptcy Proceedings, provided however, that nothing in this Order shall deprive this Court of jurisdiction over the Debtor or over the property of the bankruptcy estate."*

5. Various difficulties arose as to the service of the Bankruptcy Petition. An order for substituted service dispensing with the requirement for personal service of these proceedings and directing service by delivery to the bankrupt's address and at the offices of his attorneys was granted by order of Dunne J. dated 10th June, 2013. The bankrupt disputes the validity of the service purportedly effected pursuant to this order.

6. On 29th July, 2013, Dunne J. made an adjudication of bankruptcy (the "Adjudication") in this case. The following day, solicitors for the bankrupt applied for, and were granted, an extension of time in which to issue a Notice to Show Cause. A "conditional" Appearance was entered on behalf of the bankrupt on 8th August, 2013, "*limited to an appearance for contesting the jurisdiction*" of this court, and on 12th August, 2013, a Notice to Show Cause was filed.

Legal Issues Arising

7. Section 16 of the Bankruptcy Act, 1988 (the "Act of 1988") provides, *inter alia*, as follows:-

> *"(1) The bankrupt may, within three days or such extended time not exceeding fourteen days as the Court thinks fit from the service of the copy of the order of adjudication on him, show cause to the Court against the validity of the adjudication.*
>
> *(2) On an application to show cause under subsection (1) the Court shall, if within such time the bankrupt shows to its satisfaction that any of the requirements of section 11 (1) have not been complied with, annul the adjudication and may, in any other case, dismiss the application or adjourn it on such conditions as the Court thinks fit, having regard to the interests of the bankrupt, his creditors and any persons who might advance further credit to him..."*

8. The application to set aside the adjudication is based on a number of grounds. Although the Notice to Show Cause is ostensibly based on the bankrupt's assertion that the requirements of s. 11(1) of the Act have not been complied with, it is clear from a perusal of the Notice that it goes beyond allegations of non-compliance with s. 11(1) and encompasses other arguments based, for example, on inadequacy of service and infringement of the principle of universality by virtue of the adjudication in this jurisdiction when he has already filed for Chapter 7 bankruptcy in the United States. It seems to me, therefore, that it is appropriate to deal with this application on the basis of an application pursuant to s. 16 and also s. 85(5) of the Act of 1988 which states:-

> *"A person shall be entitled to an annulment of his adjudication*
>
> *(a) where he has shown cause pursuant to section 16 or*
>
> *(b) in any other case where, in the opinion of the court, he ought not to have been adjudicated bankrupt."*

9. The burden of proof rests on the bankrupt to show to the satisfaction of the court that the requirements of s.11(1) have not been complied with, or that there are other grounds under s. 85(5)(b) entitling him to an annulment of the Adjudication.

10. The legal issues falling for consideration in this application are as follows:-

> (a) Was good and sufficient service of the petition and other proceedings effected upon the bankrupt? If this question is to be answered in the negative, how will this affect the validity of the adjudication?
>
> (b) Is the bankrupt domiciled in the jurisdiction or does he have sufficient connection to this jurisdiction to satisfy the requirements of the s. 11(1) of the Act of 1988 ?

(c) Is this court necessarily precluded from upholding the adjudication on the basis that another set of bankruptcy proceedings are in being in the United States?

(d) Are there any other circumstances operating in this case which should cause the court to exercise its discretion to set aside the Adjudication pursuant to s. 86(5)(b) of the Act of 1988?

Service of Proceedings

11. The Bankruptcy Petition herein was issued on 12th February, 2013. When the Irish proceedings issued, the petitioner made enquiries of the solicitors who acted for the bankrupt in this application, asking whether or not they would be able to get authority to accept service of the proceedings. The solicitors agreed to discuss the matter with the bankrupt and to revert to the petitioner but the petitioner heard nothing further in relation to the matter. It is hard to imagine that the solicitors did not make contact with the bankrupt and enquire as to whether or not they were to be given authority to accept service of the proceedings. An officer of the petitioner avers to the following attempts at service on the bankrupt in the United States:-

> *"Connecticut State Marshal Robert Wolfe attempted service on seven separate occasions between 6th March, 2013 and 20th March, 2013 at his address at Indian Field Road.*
>
> *Marshal Wolfe attempted service of the documents at (1) 421 Field Point Road, Greenwich, CT 06830 and (2) 22 Stillman Lane, Greenwich, CT 06830.*
>
> *A second Connecticut State Marshal, Mr Charles Valentino, attempted personal service of the Irish Petition on the [Bankrupt] at each of the above mentioned addresses on Wednesday, 27th March, 2013; Friday, 29th March, 2013 and Saturday, 30th March 2013."*

12. As set out in paras 3-5, supra, by order of Dunne J. dated 10th June, 2013, the petitioner was granted substituted service of these proceedings by delivering them to the bankrupt at 526, Indian Field Road, Greenwich, Connecticut, as well as at offices of Zeisler & Zeisler, the bankrupt's attorneys in the United States, at their offices at PC 558, Clinton Avenue, Bridgeport, Connecticut. By order of Judge Shiff of the United States Bankruptcy Court dated 12th June, 2013, the automatic worldwide stay on proceedings against the bankrupt pursuant to US law was varied so as to allow for service of the within proceedings.

13. Pursuant to this order, papers were delivered by hand to the offices of Zeisler & Zeisler on 18th July, 2013. A further affidavit, sworn on behalf of the petitioner, together with a covering letter indicating that "*the hearing of the bankruptcy petition has been adjourned to Monday 29 July 2013 at 11 am*" were served in similar fashion on 22nd July, 2013, at approximately 4.30 pm in Connecticut time. The bankrupt says that he was out of the state of Connecticut at the time, and that because the papers, delivered to his lawyers, were addressed to him personally and marked '*Strictly Private and Confidential – To be opened by the Addressee only'*, they were not opened or examined until the bankrupt instructed his attorneys to do so in the course of a telephone conversation on 25th July, 2013.

14. I find it inconceivable that the bankrupt did not discuss with his US lawyers the possibility of Irish bankruptcy proceedings as he swore an affidavit saying he was "*. . . aware in general terms that the petitioner was seeking to bring bankruptcy proceedings against me in Ireland*". Furthermore, at a creditors' meeting in the United States on 10th June, 2013, the bankrupt was asked if he was aware that an Irish petition in bankruptcy had been filed prior to his voluntary petition in the United States to which he replied "*yes, I've heard that*". The US bankruptcy documents show that when the bankrupt filed for bankruptcy there on 29th March, 2013, his address was stated to be 526, Indian Field Road, Grenwich, Connecticut 06830. At the hearing on 10th June, 2013, he said that he and his wife were in the process of moving the same week as he filed for bankruptcy there and that he moved at the end of March. Attempts were made to serve him at that new address on 27th March, 29th March and 30th March.

15. A written decision of Judge Shiff, which issued on 18th July, 2013, establishes that the US bankruptcy court was on notice of the fact that the Irish petition hearing date was listed for 22nd July, 2013. It follows that the bankrupt's US attorneys, Zeisler & Zeisler, were on notice of this fact. In these circumstances, when the papers were delivered to the offices of Zeisler & Zeisler on 18th July, 2013, it is extraordinary that they did not contact their client immediately to take instructions as to what they should do. They must have known that there was, at the very least, a high probability that the documents were related to an application before the Irish courts. Either the lawyers wilfully shut their eyes to the obvious or failed to make such enquiries as a reasonable person would make in the circumstances. There is circumstantial, but nonetheless compelling evidence, that the bankrupt was evading service of the Irish bankruptcy petition.

16. Attempts were made to personally serve the bankrupt with the Irish bankruptcy petition, the affidavit of debt, the notice of motion and an order of the High Court, all dated 12th February, 2013, at the Indian Field Road address on the following dates:-

> Wednesday 6th March 2013 at approximately 6.25pm;
>
> Thursday 7th March 2013 at approximately 7.15pm;
>
> Friday 8th March 2013 at approximately 8.30am;
>
> Saturday 9th March 2013 at approximately 11.45am;
>
> Tuesday 12th March 2013 at approximately 5.10pm;
>
> Saturday 16th March 2013 at approximately 10.40am and
>
> Wednesday 20th March 2013 at approximately 12.35pm

The bankrupt submits that he no longer resided at this address at the time, but rather had moved to 22, Stillman Lane, Greenwich, Connecticut in late March 2013. The bankrupt asserts that the petitioner had been made aware of this change of address through its US attorney at a creditor's meeting in the US Bankruptcy held on 10th June, 2013. But it seems likely the petitioner knew of this at the end of March 2013 since service was effected at the Indian Field Road address and this address on 27th, 29th and 30th March, 2013.

17. The bankrupt's US attorneys wrote to the solicitors for the petitioner on 26th July, setting out objections as to the sufficiency of service and expressing "*sceptic[ism] of the purpose or benefit*" of the Irish bankruptcy proceedings. The letter indicated that the bankrupt intended to "*take further advice in relation to the jurisdiction of the Irish Court to entertain a Bankruptcy application against him*" and requesting that contents of the letter be brought to the attention of the court at the hearing on 29th July.

18. The petitioner's application was heard by Dunne J. on 29th July, 2013, and the adjudication was made. The contents of the letter of 26th July, 2013, were brought to the attention of the judge. Surprisingly, the bankrupt did not instruct lawyers to appear at the hearing, if only to ask for an adjournment. On 30th July, counsel on behalf of the bankrupt applied before Dunne J. for an extension of time in which to file a Notice to Show Cause and for various other directions, which application was granted.

19. Order 76, r. 25 of the Rules of the Superior Courts provides that:-

> *"Every petition by a person other than the debtor shall be served, not less than seven days before the hearing of the petition, by delivering to the debtor personally a copy of such petition and by showing to the debtor at the time of such service the sealed original, or shall be served in such substituted manner as the Court may direct. The petitioner shall file in the proper office an affidavit of service of the petition not later than two clear days before the hearing."*

20. The bankrupt submits that this provision should be strictly construed. In support of this proposition, he cites the case of *O'Maoileoin v. Official Assignee* [1989] I.R. 647, wherein Hamilton P stated at p. 654:-

> *"These cases clearly establish that the bankruptcy code, having regard to the consequences which flow from an adjudication of bankruptcy, is penal in nature and that the requirements of the statutes must be complied with strictly; that the debtor's summons to be served within the provisions of s. 21 of the Bankruptcy Ireland (Amendment) Act, 1872, must be served in the prescribed manner and the amount due in accordance with a judgment, when a judgment is relied upon, must be accurate and that a claim for an amount in excess of the amount due in accordance with such judgment would render the notice defective and a subsequent adjudication void."*

21. In *Society of Lloyds v. Loughran* [2004] IEHC 1 (Unreported judgment, Finlay Geoghegan J., 2nd February 2004) the learned judged noted that *In Re Collier*, 8 Morr [1891] 64 L.T. 752, Cave J. made a distinction between the bankruptcy notice (now the bankruptcy summons) and the petition. In *O'Maoileoin v. The Official Assignee*, it was a debtor summons that was at issue. At p. 5 of her judgment, she said:-

> *"I have concluded that the principles set out in the judgment of Hamilton P in O'Maoileoin v. The Official Assignee do not preclude me from exercising the discretion which it is accepted the court otherwise has under O. 124 of the Superior Court Rules in relation to the consequences of non-compliance with O. 76, r. 20 of [sic] a petition. Whilst, I note the distinction between the approach to a bankruptcy summons and petition made by Cave J. above, in general I accept that there ought to be compliance with the Rules of Courts even on a petition, but conclude that there is nothing on the authorities which appears to absolutely preclude the Court from exercising its discretion in a proper case under O. 124 of the Superior Court Rules where there is a failure to comply with the Rules on a petition."*

The petition in this case is based on an act of bankruptcy other than the failure to satisfy a bankruptcy summons.

22. The bankrupt claims that the service effected at the offices of his US attorneys did not represent sufficient service on the basis that it was effected at 4.30 pm Connecticut time on 22nd July, 2013. The bankrupt says that the package was first opened and its contents brought to his attention on 25th July, 2013, less than seven days prior to the hearing on 29th July, 2013. If the service on Zeisler & Zeisler was, in all other respects, good service, then the fact that it was made at 4.30pm Connecticut time, which was 9.30pm Irish time, is of no consequence. It makes no sense to suggest that the time reckonable for service should be anything other than the time at the place where the documents are served.

23. The bankrupt admits in his affidavit, sworn on 7th August, 2013, that:-

> *"For the avoidance of doubt it is the case that I was aware in general terms that the Petitioner was seeking to bring bankruptcy proceedings against me in Ireland. It is also the case that I believed, following the June [US Bankruptcy] Order and the July Memorandum of Decision, that any bankruptcy proceedings in Ireland would be limited to the consideration of whether an 'Ad Hoc' protocol could be presented, agreed and mandated by the Irish Courts. Accordingly I had decided not to instruct Irish solicitors until such time as I had received all documentation relevant to the hearing of the petition since I thought it would be apparent from a review of this documentation, specifically what orders would be sought. It was an open question in my mind as to whether, in the event that the orders sought simply related, as I believed they would, to orders necessary to facilitate the distribution of my assets that I would simply consent to the orders sought."*

24. Having regard to the contents of s. 85(5)(b) (see para. 8) it seems to me that a challenge to the adjudication on the basis of service in this case would be permissible only if there was some new evidence that had not been available before the judge who made the adjudication. In this case, the learned High Court Judge who made the adjudication did so, having been satisfied that the service was in order. While submissions on the issue were made for the first time at the hearing before me, there is no new evidence on the issue of service. In those circumstances, the bankrupt cannot now argue that the evidence available to the learned High Court judge did not disclose proper service having been effected when she has already determined that there had been compliance with the order made for substituted service. In the absence of some fresh evidence, it is impermissible for the bankrupt to seek to re-open the question of validity of service. To do so would effectively amount to an appeal. But even if I am incorrect in that statement of the law, the facts outlined above establish that proper service of the petition documents was effected in accordance with the order of Dunne J. made on 10th. June 2013 and the bankrupt had sufficient notice of the hearing on 29th. July 2013.

Section 11(1)(d) of the Act of 1988

25. Section 11(1)(d) of the Act of 1988 provides that the bankruptcy jurisdiction of this court is contingent upon it being established that:-

> *"[T]he debtor (whether a citizen or not) is domiciled in the State or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in the State or has carried on business in the State personally or by means of an agent or manager, or is or within the said period has been a member of a partnership which has carried on business in the State by means of a partner, agent or manager."*

26. Section 11(1)(d) was amended by section 30(a) of the Civil Law (Miscellaneous Provisions) Act, 2011, so as to extend the one year period referred to therein to three years. That section came into operation on 2nd August, 2011.

27. The bankrupt submits that this amendment cannot in law have retrospective effect, referring to the case of *Dublin City Council v Fennell* [2005] IR 604, where Kearns J. (as he then was), having recited the relevant sections of the Interpretation Act, 1937, cited what he described as the "*useful commentary on this topic*" contained at section 97, pp. 265 to 266 of Bennion on '*Statutory Interpretation*' (4th Ed.):-

> *"The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. '… those who have arranged their affairs … in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset'.*
>
> *Dislike of ex post facto law is enshrined in the United States Constitution and in the constitutions of many American states, which forbid it. The true principle is that lex prospicit non respicit (law looks forward not back). Retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.' The basis of the principle against retrospectivity 'is no more than simple fairness, which ought to be the basis of every legal rule'.*
>
> *Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power of Parliament to produce such an effect where it wishes to do so is nevertheless undoubted."*

28. The petitioner did not dispute this summary of the law, but submitted that the act of bankruptcy relied upon in this application, namely, the return marked *nulla bona* of an execution order in favour of the petitioner against the bankrupt, took place on 5th December, 2012. The petitioner submitted that this is the operative event for the purposes of determining whether the amended section applies.

29. I am satisfied that this is an accurate representation of the position. It is clear to me that the amendment of the Act of 1988 by way of section 30(a) of the Civil Law (Miscellaneous Provisions) Act, 2011, became operative following the commencement of the section on 11th August, 2011. Therefore, a petition grounded upon an act of bankruptcy which occurred on or after 12th August, 2011, will be subject to the amended section, as is the case in this application. Accordingly, in adjudicating upon compliance with section 11(1)(d) of the Act of 1988, the court must consider the three year period preceding the presentation of the petition.

30. The stipulations contained at section 11(1)(d) are disjunctive, so it will be sufficient for the court to be satisfied that any one of the criteria specified therein is met.

Domicile

31. The bankrupt claimed that he left Ireland in January 2007, and lived for relatively brief periods in Paris and London before moving to Geneva in August 2008. He said that he moved to Greenwich, Connecticut in June 2010, and has lived there since that point. The petitioner's evidence, contained in an affidavit sworn on its behalf by Mr. Niall Hurson on 28th August, 2013, is that the bankrupt took up residence in the United States in January 2012.

32. The bankrupt submitted that he should now be considered to be domiciled in the United States. He relied on the speech of Arden L.J. in *Barlow Clowes v Henwood* [2008] EWCA Civ 577 where she held that the following principles, derived from Dicey, Morris and Collins on '*The Conflict of Laws*' (14th Ed. Sweet & Maxwell, 2006), apply:-

> *"(i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it (Dicey, pages 122 to 126).*
>
> *(ii) No person can be without a domicile (Dicey, page 126).*
>
> *(iii) No person can at the same time for the same purpose have more than one domicile (Dicey, pages 126 to128).*
>
> *(iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired (Dicey, pages 128 to 129).*
>
> *(v) Every person receives at birth a domicile of origin (Dicey, pages 130 to 133).*
>
> *(vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise (Dicey, pages 133 to138).*
>
> *(vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice (Dicey, pages 138 to143).*
>
> *(viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious (Dicey, pages 144 to151).*
>
> *(ix) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise (Dicey, pages 151 to153).*
>
> *(x) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but, if it is not acquired, the domicile of origin revives (Dicey, pages 151 to 153)."*

33. Arden L.J. went on to note, at paragraph 10 of her judgment, that:

> *"The intention of residence must be fixed and must be for the indefinite future. it is not enough for instance that at any given point in time its length has not been determined."*

34. Arden L.J. then referred to the case of *Udny v Udny* (1869) LR 1 Se & D and noted that perhaps the most useful test to be applied is to ask whether the person in question has "settled" in a new place. She then referred at paragraph 12 to the fact that in *Udny*:-

> *"The House of Lords held that the respondent's father had lost his domicile of choice in England and that his domicile of origin had revived. One of the issues was whether revival of his domicile of origin was precluded by the fact that he had a possible intention to leave Scotland again if his creditors pursued him there. At 449, Lord Hatherley L.C. held that this possible intention did not mean that he could not have a domicile in Scotland if he had decided that Scotland would be 'his chosen and settled abode'"*

35. The Court then quoted with approval from the following statement by Lord Hatherly in *Udny* at page 449:-

> *"A change of [a person's domicile of choice] can only be effected animo et facto -that is to say, by the choice of another domicile, evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. He, in making this change, does an act, which is more nearly designated by the word "settling" than by any one word in our language. Thus we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England, and the word is frequently used as expressive of the act of change of domicile in the various judgments pronounced by our Courts."*

36. Arden L.J. also quoted with approval from *Bell v Kennedy* (1868) LR 1 Se and Div 307, in which Lord Cairns held at p. 311, that it was unnecessary to consider the competing definitions of domicile and found that the test was whether the appellant:-

> *"Had determined to make, and had made, Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country?"*

37. The petitioner broadly accepted these principles, but places particular emphasis upon principles iv, v and vi set out in the judgment of Arden L.J., *supra*, to the effect that the domicile of origin can only be superseded by a domicile of choice where, "*an intention of permanent or indefinite residence [in another jurisdiction] but not otherwise*".

38. The petitioner submitted on various grounds that the bankrupt has not demonstrated an intention of permanent or indefinite residence in the United States of America. The bankrupt stated that:-

> *"I cannot currently conceive of any circumstance in which I would uproot my family and return to Ireland and I believe that, for a wide variety of reasons, this would be contrary to the interests of my young children."*

39. The petitioner urged on the court to find that this statement, in its careful and conscious choice of the words "*currently conceive of any circumstance*", reflects a level of equivocation as to the permanence of the bankrupt's residence in the United States, such that he cannot be said to have acquired a domicile of choice in that jurisdiction for the purposes of this application.

40. The bankrupt, in response, stated in a supplemental affidavit that:-

> *"To the extent that I have used words and made comments that reflect the fact that my intentions, might possibly change at some point in the future, I have done so simply as a reflection of the inescapable truth that life is unpredictable and is liable to change."*

41. The petitioner further submitted that the bankrupt maintains significant ties to this jurisdiction, including in regularly visiting and providing financial support to family members, remained on the Register of Electors in Ireland until September 2013, maintains an Irish mobile phone, an Irish credit card and up until February 2013, maintained a motor vehicle in this jurisdiction.

42. The bankrupt claimed that his non-dependent children also have taken up residence in the United States and do not intend to return to Ireland. However, the petitioner has furnished evidence to the court, in the form of forms lodged with the Companies Registration Office, that they remain as directors of a company registered in the State, and state their usual residential address as being 61 Carysfort Avenue, Blackrock, Dublin 4.

43. The bankrupt resides in the United States the basis of an E-2 Visa. The bankrupt avered that:-

> *"This visa is often referred to as an investor visa and my eligibility for this visa arises from the fact that my wife, Ms. Killilea, made an investment in her US business Mountbrook USA LLC, which is a development company. The visa application was also made on the basis that I am an experienced developer and would apply my professional skills and expertise, derived from my many years of experience in the development industry, to Mountbrook USA LLC. Therefore the investment necessary to qualify for this visa was made by my wife and not, as suggested by Mr. Hurson, by me."*

44. The bankrupt exhibited an opinion from Mr. Bruce A. Morrison, an attorney practising in Connecticut and purporting to act on his behalf with respect to his immigration status and applications, in the following terms:-

> *"In my opinion, Mr. Dunne's current and prospective immigration status is consistent with the intent to reside indefinitely in the United States. Unless and until he changes his intention to continue to renew his E-2 status, his only domicile, for the purpose of U.S. law, would be in the U.S.*
>
> *Mr. Dunne is currently present in the United States in E-2 "treaty investor" status. While this is a "nonimmigrant", rather than an "immigrant" status, U.S. immigration law imparts several distinctive characteristics to this category that support a conclusion that a person in this status can have the intent to reside indefinitely in the country and have no other domicile.*
>
> *Most nonimmigrant categories require the maintenance of a residence abroad that the alien has no intention of abandoning. No such requirement applies to the E-2 status. Many non-immigrant categories have limited numbers of available visas that can be issued in a year, giving rise to doubts about seeming a renewal. No such annual limit applies to the E-2. Most nonimmigrant categories have a limit on the total number of years an alien can remain in that status.*

No limit exists for the E-2, which can be renewed (every five years in the case of Irish nationals) for as long as the investment in the U.S. is maintained.

The State Department, which administers this visa category, has explained the rules on the necessary intent as follows in its Foreign Affairs Manual (9 FAM 41.51 N15):

> *An applicant for an E visa need not establish intent to proceed to the United States for a specific temporary period of time. Nor does an applicant for an E visa need to have a residence in a foreign country which the applicant does not intend to abandon. The alien may sell his or her residence and move all household effects to the U.S. The alien's expression of an unequivocal intent to return when the E status ends is normally sufficient, in the absence of specific indications of evidence that the alien's intent is to the contrary ...*

And the last requirement is more specifically, as stated in State Department regulations, that the applicant "intends to depart from the United States upon the termination of E-2 status." 22 CFR 41.51(b)(l)(iii). Thus an E-2 has no obligation to return to his country of nationality ever, just to depart the U.S. when and if the E-2 can no longer be renewed.

In addition, Mr. Dunne has confirmed his intention to maintain his domicile in the United States in the form of an instruction to me to prepare a petition and application for him to acquire lawful permanent residence (a "green card") as quickly as that status can be obtained. The required documents are currently being prepared and will be filed this fall. Processing of such submissions is expected to be concluded in approximately one year. Based on a prior application involving very similar facts, approval is anticipated. A lawful permanent resident must at all times intend to be domiciled in the United States, irrespective of his physical location. A permanent resident is eligible for U.S. citizenship after five years in that status."

45. Exhibited in Mr. Hurson's affidavit is an email exchange dated 8th November, 2010, between Mr. Paul Kelly, an officer of the petitioner, and the bankrupt. In response to Mr. Kelly's query regarding newspaper reports indicating that he had taken up residence at an address in the United States, the bankrupt indicated that he was domiciled in Ireland at that time, stating:-

> *"Please note I don't normally comment on idle press speculation, but in this instance for the purpose of clarity will do so but don't expect me to do so in the future.*
>
> *I am not living in the Belle Haven gated community. I do not own any property what so ever in the USA. My own inquiries confirm that a 90 year old lady with house care lives in the house and anonymous letters addressed to me have been sent there …*
>
> *My Domicile is Ireland. It is not a secret that I like every other property developer in Ireland is seeking work and development opportunities outside of Ireland . I am also seeking to interest funds in investing in some of our developments in Ireland which is a challenging process.*
>
> *I have a duty and obligation to try and provide for my wife and young children and do not believe I should have to explain or account for my lawful movements to anybody in doing so. I have refrained from speaking to the press over the last two years and you are well aware of the daily publicity regarding bankers and property developers generated in Ireland. I am a victim of lots of inaccurate publicity from time to time that I have refrained from engaging in for obvious reasons…"*

46. I am not satisfied that the bankrupt has discharged the onus upon him to show cause for the Adjudication to be set aside on the basis of his domicile. While it is clear that he now resides in the United States, I have particular regard to his plain and unambiguous statement by email to an officer of the petitioner on 8th November 2010 that, "*My Domicile is Ireland*". The Bankruptcy Petition herein issued on 12th February, 2013. The bankrupt has not sought to resile from this statement or to clarify or explain its meaning. Indeed, it is impossible to envisage any alternate interpretation other than that the bankrupt, by his own admission, was domiciled in the State within the three years preceding the presentation of the Petition. Therefore there is no need to inquire further as to other potentially relevant matters identified by Arden L.J. in *Barlow Clowes v Henwood*, such as his motives in seeking to assert a domicile of choice in the United States of America or his present "*intention of permanent or indefinite residence*" in that jurisdiction.

47. As stated at para. 23, the bankrupt's application pursuant to s.16 of the Act of 1988 must fail if any one of the various requirements set out at s.11(1)(d) thereof is satisfied. However, for completeness, I propose to address in turn the other arguments raised by the bankrupt pursuant to those sections.

Ordinary Residence

48. The bankrupt asserted that he very rarely visits Ireland, and that he has only travelled to this jurisdiction on two occasions in the past 12 months, so as to attend to personal matters. However, the court must also have regard to the position as operating in the three year period preceding the presentation of the petition.

49. In December 2010, Mrs. Gayle Dunne (née Killilea), wife of the bankrupt, engaged in email correspondence with Mr. Ted Thaxter of Sotheby's International Realty, based in Greenwich, Connecticut, in relation to the Mountbrook USA LLC venture. Following the publication of an article in a local newspaper that was uncomplimentary towards the bankrupt in its tone, Mrs. Dunne communicated the following to Mr. Thaxter by email dated 6th December, 2010:-

> *"Hi Ted, please do not draw anyone else's attention to the ad re Sean in the Greenwich Time as I would imagine his lawyers will be able to get it pulled. Besides the fact that he does not own 38 Bush and is not involved in the planning process for the houses he spends far more time in Ireland than the USA and has 200 employees and 3 hotels in Dublin, it is unbelievable that they are describing him as a refugee who 'left Ireland'. As you may have noticed, trying to get him to spend time in the US is proving difficult.*
>
> *I got a copy of the paper yesterday after your call but I haven't been reading the paper since I got here so I don't know what it is like. It strikes me as a paper full of local community stories and a lot of ads. Does it occasionally run scurrilous tabloid stories on people that are badly researched or do they usually go softer than that?"*

50. A meeting took place between the bankrupt, Mr. Gerard Prendergast and Mr. Joe Molloy, both officers of the petitioner on 14th December, 2010. Various matters were discussed, including the question of the bankrupt's residence at the time. Mr. Prendergast said

that the bankrupt exhibited "*vagueness as to where 'home' might actually be, [but] nevertheless had and intended to continue to have an ongoing and permanent relationship with Ireland, spending material amounts of each year there and continuing to carry on business there*." Mr. Prendergast's contemporaneous note records that the bankrupt indicated that he spent two weeks out of every month in Ireland. This account of the meeting conflicts with that proffered by the bankrupt, who also exhibits a file note purportedly prepared contemporaneously, setting out in detail an account of his residence:-

> *"It is untrue to say when we done [sic] the deal that Sean Dunne was living around the corner because since January 2007 which is a matter of public knowledge (as it appeared In the Sunday Impendent [sic]) Gayle and myself relocated to Paris. From Paris we relocated to London where Gayle was studying for her Masters. From London we relocated abroad and lived and have predominantly lived abroad and Gayle has lived abroad since January 2007 and he [sic] have spent a large amount of time outside of Ireland. Sd's last two children (Harrison and Ryan) were born outside of Ireland. He brought it to Joe Molloy and Ger Prendergast's attention that when he left 67 Merrion Square he did not leave my brain behind [sic] and always brought it with him. When he was travelling he was continuously in contact with the office which is easy in the modern world and is an every day necessity in carrying out business. SD stated that Ross Connolly could vouch for the amount of time he spent on all of my Irish based projects, in particular the Ulster Bank ones and also stated that Ross himself devoted approximately 60% of his time looking after D4 Hotels. SD also advised that when he was overseas he decided to acquire the furniture and had to get an agent to do so on my behalf in order to open D4 Hotels."*

51. Annual returns filed at the Companies Registration Office in relation to various companies between 22nd March, 2010 and 5th April, 2012, were produced to the court, showing the bankrupt as a director and recording his residential address as being 67 Merrion Square, Dublin 2. This address was also the registered office of each of these companies.

52. The bankrupt referred the court to Binchy's statement in Irish Conflicts of Laws (1988, Butterworth (Ireland) Ltd.) at p. 53, where the author states:-

> *"At all events, it appears that 'residence' does not extend to a casual presence in a country, or on a shopping expedition, for example – or presence there as a traveller. An American judge captured the essence of the concept when he described residence as 'bodily presence as an inhabitant'.*
>
> *There is no minimum period for establishing residence: a residence can be established immediately on arrival in a country in which one intends to settle.*
>
> *It should not be thought, however, that an intention to reside is an essential ingredient in the concept of residence …*
>
> *Conversely, an intention or desire to reside in a particular place will not be sufficient if one lacks a sufficient quantum of physical presence there."*

53. With regard to the proper interpretation of the term "ordinary residence", the bankrupt referred the court to the cases of *Levine v. IRC* [1928] AC 217 and *Lysaght v IRC* [1928] AC 234. In the latter case, Lord Buckmaster held that:-

> *"[I]f residence be once established, 'ordinarily resident' means, in my opinion, no more than that the residence is not casual and uncertain, but that the person held to reside does so in the ordinary course of his life".*

54. While the evidence discloses a material conflict between the accounts of Mr. Prendergast and the bankrupt as to his account of his living arrangements in December, 2010, I must have regard to Mrs. Dunne's statement that, "*trying to get him to spend time in the US is proving difficult*", as tending to corroborate Mr. Prendergast's account. It appears that, whether or not the estimate in Mr. Prendergast's note of two weeks spent in Ireland out of every month is correct, the bankrupt had sufficient "*quantum of physical presence*" in this jurisdiction in the period directly preceding December 2010 so as to establish residence. I note, also, that the bankrupt has failed to serve a Notice to Cross-Examine on the petitioner's deponent. The onus of proof is on the bankrupt to show cause on this issue, and he has failed to do so.

Maintaining a Dwelling House or Place of Business in the State

55. The bankrupt is the registered owner of a property at Ouragh, Shrewsbury Road, Dublin 4, ("Ouragh Property"). The site was purchased in 1999, with construction work being completed in 2002. The bankrupt stated that he and his wife lived in the Ouragh Property as their family home together with their son for a period of thirty months following its completion. The property is now leased to the Government of South Africa for use as an embassy (para. 64).

56. The petitioner submitted that, in the course of the US Proceedings, the bankrupt referred to the Ouragh Property as being his principal private residence. Indeed, it is referred to as such in the bankrupt's Statement of Affairs filed with the US Court on 5th March, 2013. The petitioner further submitted that the bankrupt maintained this premises as his "dwelling-house" in the State, for the purposes of s. 11(1)(d) of the Act of 1988, including by making arrangements to maintain furniture and fittings in the property. In response, the bankrupt claims that these items are owned by his wife.

57. The petitioner maintained that the fact of the property's being leased to the Government of South Africa does not materially affect its status as a dwelling. The case of in *re Ross and Leicester Corporation* (1932) 96 JP 459 is referred to in support of this proposition. This case addressed the question of whether a fully furnished house let to tenants constituted a "dwelling-house" within the meaning of the British Housing Act, 1930. Swift J held that:-

> *"... a dwelling house does not cease to be a dwelling house because the people who dwell in it are of such a character and live under such conditions as to make it a common lodging house."*

This case is of limited assistance. I do, however, take the view that because the property is currently let to tenants is sufficient in and of itself to establish that it is not currently the bankrupt's "dwelling-house" for the purposes of s.11(1)(d). Rather, it seems appropriate to inquire as to the extent to which the bankrupt has ceased to treat the property as such. Clearly, it is of some relevance that furniture has been maintained in the Ouragh Property, although its significance is dependent upon the extent to which it can inferred that the furniture was being maintained with a view to renewed occupancy by the bankrupt, rather than a necessary element of its use as a rental property.

58. It is further alleged that the bankrupt has an interest in, or the use of, a property at the K Club, Straffan, County Kildare. The petitioner exhibited various newspaper articles referred to the bankrupt as the owner of a property at the K Club, as well as a

planning objection lodged on behalf of Traviata Limited by Mr. Feargall Kenny, consultant architect. The petitioner refered to a newspaper article stating that Mr. Kenny "confirmed" that the bankrupt was his client in relation to this matter, as well as other dealings in which Mr. Kenny had in fact acted for the bankrupt. The bankrupt avers that he does not own or control this property, and claims never to have owned a property at the K Club.

59. I find the evidence on this point to be inconclusive. While it is clear that the bankrupt is the owner of the Ouragh Property, the evidence of ownership of the property at the K Club remains somewhat vague.

60. The references by the bankrupt to the Ouragh Property as principal private residence and family home in the context of Chapter 7 bankruptcy proceedings in the United States, however, do tend to support the view that the bankrupt intends to resume residence there at some point of the future and that the property was his "dwelling-house" within 3 years of the presentation of the petition. Furthermore, the bankrupt has indicated on papers filed at the Companies Registration Office that he resided at an address at 67 Merrion Square, Dublin 2, also being the registered office of a number of companies in which he acted as a director (para. 51). The bankrupt has failed to discharge the onus upon him under s.16 of the Act of 1988 on the "dwelling-house" issue.

Carrying on Business in the State

61. The bankrupt was engaged in the business of property development and property management, and was the director and owner of a number of companies registered in the State. The bankrupt stated that in July 2011, the National Asset Management Agency appointed statutory receivers over all companies in which he held an interest that were indebted to the said agency. He further claimed that all of the companies in which he had an interest had entered receivership or liquidation by January 2012.

62. The bankrupt said that in December 2009, his assets that had been secured in favour of the petitioner, including the D4 Hotels site in Ballsbridge, were transferred to Qulpic Limited and Zrko Limited, being special purpose vehicles established by the petitioner as syndicate agent. On 10th December, 2009, the bankrupt entered into an agreement to act as project manager on behalf of these companies, and continued to manage D4 Hotels Ballsbridge up until January 2012. The bankrupt's primary duties under this agreement related to the preparation of an application for planning permission for the hotel site. Permission was, in fact, granted in September 2011. The bankrupt further avered that he was engaged in other business activities in the State up until January 2012.

63. The special purpose vehicles also entered into option agreements with Mavior Ltd, and short term letting agreements with MJBCH Ltd. The bankrupt was a director of the former company until 29th March, 2011, when he was replaced by Mrs. Dunne. The bankrupt remains as a director of MJBCH Ltd, though that company is now in liquidation. The petitioner exhibited copies of bank drafts dated 13th January, 2012, showing payments in the sum of €3,382,500 in favour Maivor Limited, purportedly relating to the option agreements. The petitioner submitted that any profit accruing to MJBCH Ltd in relation to its operation of the D4 Hotels, pursuant to the letting agreement with the special purpose vehicles was retained by the company.

64. The Ouragh Property is currently leased to the Government of South Africa for use as an embassy, for an annual rent in the sum of €180,000, with an additional service charge of €20,000. While rents in relation to this property are paid into the bank account of the bankrupt's wife, the bankrupt holds a freehold interest in the Ouragh Property, and is named as a landlord in the relevant letting agreement. The bankrupt submitted that the property is in "dry receivership" and that all rents received go towards servicing borrowings secured on the Ouragh Property, in favour of Bank of Scotland (Ireland), now trading as Certus.

65. The petitioner also alleged that the bankrupt sold lands at Portlaoise late in 2011. A solicitor's statement of account, addressed to the bankrupt at the Ouragh Property, is exhibited in support of this proposition. It is further alleged that the an entry corresponding with the dollar equivalent of the revenue obtained from this sale was included in the bankrupt's Statement of Affairs, filed in relation to the US Bankruptcy proceedings, under the heading "*Income from employment or operation of business*".

66. The bankrupt argued that he did not make any personal profit from his activities in the state, and that they should therefore not be characterised as carrying on business in the State.

67. Regarding the question of what level of activity constitutes "carrying on business" for the purposes of s. 11(1)(d) of the Act of 1988, the court was referred to a number of authorities. In *Graham v. Lewis* (1888) 22 Q.B.D. 1, Frye L.J., sitting in the Court of Appeal of England and Wales, stated:-

> *"In this case we have to construe the words 'carry on business within the city of London' as a ground for founding jurisdiction. One must inquire what is the natural meaning of those words? … I think that the expression has a narrower meaning than that of doing business or having business to do. In my opinion it imports that the person has control and direction with respect to a business, and also that it is a business carried on for some pecuniary gain."*

68. In *Martin v. Galbraith Ltd.* [1942] 1 I.R. 37, the Supreme Court considered the meaning of the words "business is carried on" for the purposes of s. 3 of the Shops (Conditions of Employment) Act, 1938. The Court held that the defendants carried on business through the plaintiff's operating a bread van on its behalf, notwithstanding the very loose arrangement of control and supervision between the parties.

69. In *Attorney General v. Manorhamilton Co-Operative Livestock Mart Ltd.* [1966] 1 I.R. 192, Davitt P. held that the payment of a fee by the defendants to a third party to conduct an auction was sufficient to constitute carrying on the business of an auctioneer within the meaning of s. 6(3) of the Auctioneers and House Agents Act, 1947.

70. On the balance of the evidence before the court, it am quite satisfied that that the requirements of s. 11(1)(d) of the Act of 1988 been fulfilled, on the basis that the bankrupt has carried on business in the state within in the past three years. It seems to me that, to adopt the formulation of Frye L.J. in *Graham v. Lewis*, he has had control and direction with respect to a business. By his own admission, he was engaged in what he himself described as "*business activities*" relating to the D4 Hotel up until January 2012.

71. The bankrupt argued that he did not make any personal profit from his activities in the state, and that they should therefore not be characterised as carrying on business in the State. He submitted that the second limb of that test, that there must be some pecuniary gain to him, has not been satisfied. I find this argument wholly unconvincing. While the bankrupt's activities with regard to the D4 Hotel site may not have resulted in his drawing a salary, it had pecuniary value insofar as it went to reduce his indebtedness to the petitioner, among others. Similarly, taking the bankrupt's argument that the arrangement in relation to the Ouragh Property was a form of "dry receivership" at its height, this nevertheless results in payments being made to service his debts. Similarly, there is evidence that the sale of lands at Portlaoise was undertaken in the ordinary course of the bankrupt's business. Taking this evidence as a whole, there can be no doubt but that the bankrupt was carrying on business in the state in the three year period preceding the presentation of the petition.

Jurisdictional Issues and Dual Bankruptcy

72. This case raises interesting questions concerning whether or not a dual bankruptcy is permissible. It is a general principle of private international law and the common law that bankruptcy should be unitary and universal. The principle suggests that there should be a unitary bankruptcy proceeding in one jurisdiction which applies universally to all of the bankrupt's assets and which receives worldwide recognition. In *Cambridge Gas Corporation v. Unsecured Creditors* [2007] 1 A.C. 508, Lord Hoffmann said at para. 16 of his judgment in the Privy Council:-

> *"The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove."*

73. In *Re HIH Casualty and General Insurance Ltd.* [2008] 1 WLR 582, Lord Hoffmann said in the House of Lords at para. 6 of his speech:-

> *"Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets."*

He continued at para. 7 to say:-

> *"This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere, I have described it as an aspiration. . . "*

At para. 30 of his speech, Lord Hoffmann goes on to note:-

> *"The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal."*

74. The law has been struggling to keep up with issues that present themselves in cross-border insolvency, whether it be personal or corporate. In *Flightlease (Ireland) Ltd. (In Voluntary Liquidation)* [2006] IEHC 193, Clarke J. stated at para. 5.14.:-

> *"It is inherent in the common law that it will necessarily evolve to meet new circumstances and that, in the course of any such evolution, new principles may, in time, be developed to reflect the changing world in which the law has to operate."*

In this case, I am asked to consider whether an adjudication of bankruptcy by the Irish courts can stand side by side with a Chapter 7 bankruptcy in the United States. Obviously, the EU Insolvency Regulation 2000 (Regulation EC No. 1346/2000) does not have any application in this matter. Neither does the UNCITRAL model law on cross-border insolvency apply because it has not been adopted by the State although the United States has done so. Therefore, one falls back on such assistance as can be obtained from the 1988 Act and the common law, including, where applicable, principles of comity.

75. While the principle of universality applies and is the norm, it is not absolute (see remarks of Lord Hoffmann quoted at paras. 72 and 73 *supra*). I can find nothing in the 1988 Act which prohibits a dual bankruptcy. In this jurisdiction, s. 11 of the Act sets out the circumstances in which a person may be adjudicated bankrupt. The Act does not state that the existence of a foreign bankruptcy is a bar to the making of an order of adjudication in the Irish courts. Clearly, however, the existence of a foreign bankruptcy is something which the court should take into account in deciding whether or not to exercise its discretion to make an order of adjudication.

76. In Dicey, Morris & Collins, '*The Conflict of Laws'* (2006, 14th Ed.), the authors state at para. 31-077:-

> *"The fact that a foreign bankruptcy acts as an assignment of the debtor's movables situate in England does not necessarily preclude the English court from adjudicating in bankruptcy, though it may be a factor to be taken into consideration."*

This was the position in *In Re Thulin* 1 W.L.R. 165, where the High Court in England and Wales allowed an English bankruptcy to proceed notwithstanding the fact that there was a Swedish bankruptcy. The petitioner also cited in support of this proposition the following cases: *ex parte Cridland* [1814] 3 V&B 415; *Lyall v. Jardine, Matheson & Co*. [1870] L.R. 3 PC 318; R*e O'Reardon* [1873] L.R. 9 Ch. App. 74; *Re Artola Hermanos* [1890] 24 QBD 640, and *Re P. MacFadyen & Co.* [1908] 1 KB 675.

77. In *Flightlease (Ireland) Ltd. (In Voluntary Liquidation)* [2012] 1 I.R. 722, Finnegan J. at p. 752, cautioned against judges being over-adventurous in developing the common law unless a broad consensus has developed. He said:-

> *". . . it is desirable that it should occur by way of legislation rather than by judicial development having regard to the significant changes which would be wrought in the common law."*

In the same case, O'Donnell J. said at p. 760:-

> *"[82] Accordingly, for my part, I would not wish to entirely rule out the possibility of the development of an insolvency principle as a matter of common law as indeed was discussed by Lord Hoffman in The Privy Council in Cambridge Corpn v. Unsecured Creditors [2006] UKPC 26, [2007] 1 A.C. 508, and in the United Kingdom House of Lords in In re HIH Insurance Ltd [2008] UKHL 21, [2008] 1 W.L.R. 852 and in the United Kingdom Court of Appeal in Rubin v. Eurofinance SA [2010] EWCA Civ 895, [2011] Ch. 133. It would of course be desirable that this situation could be achieved by international agreement and domestic legislation, but I would not rule out a possible development of the common law, if that appeared necessary."*

78. In *Mount Capital Fund Ltd. (In Liquidation)* [2012] 2 I.R. 486, Laffoy J. stated at p. 503:-

> *"[36] I consider that the court does have an inherent jurisdiction to give recognition to insolvency proceedings in jurisdictions outside the European Union. However, I consider that, in the exercise of that jurisdiction, the court should be satisfied that recognition is being sought for a legitimate purpose. I believe that a legitimate purpose has been demonstrated in this case, in that the objective of the liquidators is to seek to obtain relief of the nature provided for in s. 245 of the Act of 1963, having demonstrated that, there is equivalence between the law of the British Virgin Islands and the law in this jurisdiction in relation to corporate insolvency generally and, in particular, in relation to disclosure, production of documentation and such like for the purpose of performance by a liquidator of his principal duties of taking possession, protecting and realising the assets of the company and distributing the assets, or the proceeds of realisation, in accordance with law."*

Laffoy J. also pointed out that she did not discern any prejudice to any creditor in this jurisdiction or the infringement of any local law in affording such recognition. Of course, that was a case involving recognition of a foreign (non-EU) liquidation and a request for the High Court to act in aid of the British Virgin Islands High Court, unlike this matter where the court has to decide whether a dual bankruptcy can exist.

79. The starting point in my approach to this issue is that the Act of 1988 does not preclude a dual bankruptcy. There is a broad equivalence between the bankruptcy regimes of Ireland and the United States in that both strive to achieve the same objective, namely, an orderly gathering in and distribution of the assets of an insolvent person who has been adjudicated a bankrupt. While there are differences in terms of practice and procedure and timescales, the broad objectives of the two bankruptcy regimes are similar and there is no evidence that there is anything in the US bankruptcy regime which would be contrary to public policy in this jurisdiction.

80. It is important to have regard to the statement made by the US trustee, Mr. Richard N. Coan, in support of the petitioner's motion for relief from the worldwide stay on further proceedings against the applicant which came into effect on the filing of the bankruptcy petition under Chapter 7 in the US. He filed a statement "*. . . in support of the entry of an order granting Ulster Bank Ireland Limited relief from the automatic stay so that it can continue with Irish bankruptcy proceedings*". It is clear therefore that the trustee and the court in the US were aware that it was intended to proceed with the adjudication hearing in Ireland and that this course of action was supported by the trustee. In his statement, the trustee informed the court that he had "*. . . concluded that Irish bankruptcy proceedings will be beneficial to the creditors of the bankruptcy estate and necessary for a complete and just administration of the assets of the bankruptcy estate . . ."* In supporting the motion, he expressed the hope that this would allow for the appointment of an estate representative in the Irish proceeding and the negotiation of an *ad hoc* protocol for presentation to the US court and to the Irish High Court.

81. The US trustee set out a number of facts which were relevant, namely:

> (i) The majority of the assets and liabilities of the bankrupt are located outside of the United States;
>
> (ii) all of the bankrupt's real estate is located in Ireland;
>
> (iii) apart from a US$15 bank account and less than US$30,000 of personal effects, the bankrupt's personal property of more than $14m is located outside the United States and the vast majority of his personal property is located in Ireland.
>
> (iv) the bankrupt's schedules reveal that all of his secured creditors are Irish institutions and the same is true for all his priority claimants. Furthermore, the bankrupt's schedules reveal that all of his unsecured creditors, contract parties, and co-debtors reside outside the United States and the overwhelming majority of them are located in Ireland.
>
> (v) Irish law will govern significant issues in the bankruptcy, and Irish law (and perhaps Swiss law) will have a significant impact on the validity and allowance of priority claims against the estate that arose from in camera proceedings.

82. The trustee also argues that the Irish bankruptcy proceedings are entitled to comity and he stated that Irish proceedings do not violate the laws or policies of the United States.

83. The US trustee argues that "*an Irish bankruptcy case is necessary in this matter for an expeditious, economical and just liquidation of the bankruptcy estate and distribution of its property*".

84. The courts in this jurisdiction must have regard to principles of comity and should be slow to ignore the express wishes of the US trustee which were accepted by the US court in granting the stay which was sought.

85. There is compelling evidence that shows the bankrupt made a deliberate choice to file for Chapter 7 bankruptcy in the US at a time when he knew the petitioner was moving to adjudicate him a bankrupt in this jurisdiction. While the principle of unitary bankruptcy is one that should be followed, save in exceptional circumstances, I am of the view that in this particular case, there are exceptional circumstances. The bankrupt contrived a situation whereby the US courts became involved because he filed for Chapter 7 bankruptcy when he knew the petitioner was taking steps to adjudicate him a bankrupt in Ireland. Furthermore, the US trustee has persuaded the court in that jurisdiction to impose a stay limited to the purpose of the Irish adjudication proceeding. In addition, he supports the Irish bankruptcy for the reasons set out above. In those circumstances, unless the 1988 Act precluded the Irish court from making an adjudication, I see no legal impediment to having a dual bankruptcy in this case, even if it departs from the general principle of universality.

86. I take into account the fact that the Chapter 7 bankruptcy in the US vests the property of Bankrupt in the US bankruptcy trustee and that if the bankrupt does not succeed in this application to set aside the adjudication in Ireland, that the official assignee has vested in him the property of the bankrupt also. Once the criteria in s. 11 of the Act had been met, the court had jurisdiction to adjudicate Mr. Dunne bankrupt. The court could have had regard to the fact that under the Chapter 7 bankruptcy in the US the property of the debtor had vested in the US bankruptcy trustee. But in circumstances where the trustee supports the Irish bankruptcy co-existing with the Chapter 7 bankruptcy in the US and proposes that a protocol be set up to ensure the efficient administration of the bankrupt's estate, there is no good argument for setting aside the adjudication here.

87. So far as the administration of the bankrupt's estate is concerned, this is largely a procedural matter, although the US and Irish courts will have to determine what laws govern the rights of creditors and priorities. But the US bankruptcy trustee has already stated that Irish law will govern significant issues in the bankruptcy and will have a significant impact on the validity and allowance of priority claims against the estate so it would appear that, on a practical level, there is likely to be little disagreement as to what law will apply to many of the issues in the bankruptcy.

88. It is worth noting that while the bankrupt seeks to have the protection of the US courts arising under a Chapter 7 bankruptcy, he and his wife, are seeking to oust the jurisdiction of the US courts in proceedings brought against them prior to the Chapter 7 bankruptcy. Those proceedings allege that Mrs. Dunne has received fraudulent transfers from the bankrupt, or is otherwise asserting rights and title to assets to which she is not rightfully entitled and to the detriment of the bankrupt's creditors. The bankrupt and his wife have filed a motion to dismiss those proceedings, arguing that the courts of the state of Connecticut lacked jurisdiction over the transfers alleged as they occurred in Switzerland between two Irish nationals domiciled in Switzerland. Such a position, viewed in isolation, would hardly invite any comment. But in the context of what is at issue in the bankruptcy hearings, it does tend to show a willingness to engage in forum shopping.

Conclusion

89. For the reasons set out above, the bankrupt's application under s.16 of the Act of 1988 to show cause as to why the Adjudication against him should be set aside must fail. I am satisfied that at least one of the criteria set out at s. 11(1)(d) of the Act has been met. The bankrupt has failed to discharge the onus upon him to show cause against the validity of the Adjudication on this basis.

90. Having regard to the balance of this application, which seeks to invoke the court's discretion pursuant to s. 85(5)(b) of the Act of 1988, having carefully considered the appropriateness of a "dual bankruptcy" in this case, I am quite satisfied that it is proper in this case for the Adjudication to stand, having particular regard to the views of the US Bankruptcy Trustee. I can see no impediment to such an arrangement in Irish law, or based on the principle of comity, which might move me to exercise my discretion to set aside the Adjudication on that basis. Similarly, having considered the totality of the evidence, I have found no basis upon which to form the opinion that the Adjudication should not have been granted in all the circumstances.

91. I therefore refuse the bankrupt's application.