

## THE HIGH COURT

[2013 No. 2478]

## IN THE MATTER OF SEAN DUNNE, A BANKRUPT

## JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 10th day of April 2014

1. This matter comes before the court on foot of a number of notices of motion. On 3rd December, 2013, the bankrupt issued a notice of motion seeking to cross-examine the Official Assignee. This motion was returnable for 9th December, 2013, and was heard on 5th March, 2014. On 6th March, 2014, I delivered a judgment arising out of the hearing of that motion. I concluded that the Official Assignee is not a "witness" within the meaning of O. 76, r. 73, and that if the bankrupt wished to cross-examine the Official Assignee on foot of an application made pursuant to O. 76, r. 76(1), it would be necessary for him to bring an application to the court for liberty to cross-examine, setting out on affidavit the matters on which he wishes to cross-examine the Official Assignee and why it is necessary for him to do so.

2. On 4th December, 2013, a motion was issued on behalf of Traviata Ltd., Gayle Dunne, John Dunne and Lucy Rainey, directing the Official Assignee to return items of property seized at 19, Churchfield, Straffan, County Kildare to the applicants, an order directing the Official Assignee to account to the applicants in respect of items of property removed and for an injunction restraining the Official Assignee from entering upon or interfering with the property at 19, Churchfield, Straffan, County Kildare. This motion was returnable for 9th December, 2013, and was adjourned on 5th March, 2014, to the hearing that took place on 19th March, 2014.

3. On 28th February, 2014, the bankrupt issued a notice requiring the attendance of the Official Assignee for cross-examination on three affidavits. This application was brought pursuant to O. 76, r. 73 of the Rules of the Superior Courts. This matter was canvassed in argument before the court on 5th and 19th March, 2014.

4. By notice of motion issued on 13th March, 2014 (returnable for 19th March, 2014), the bankrupt sought an order directing the Official Assignee to attend for cross-examination on his affidavits sworn on 26th November, 2013, 9th December, 2013 and 10th February, 2014. He also sought an order excising so much of the said affidavits of the Official Assignee as contain hearsay evidence, and he sought a declaration that the Search Warrant of 26th November, 2013, permitting the Official Assignee to search the premises at 19, Churchfield, Straffan, County Kildare is defective on its face and invalid.

5. In March 2014, the Official Assignee brought a motion pursuant to O. 76, r. 73 and/or O. 40, r. 1 of the Rules of the Superior Courts directing that the following parties attend for cross-examination on their affidavits:

The bankrupt, in respect of affidavits sworn on 30th November, 2013, and 17th January, 2014;

John Dunne, in respect of affidavits sworn by him on 6th and 11th December, 2013;

Gayle Dunne, in respect of affidavits sworn on 30th November, 2013, and 18th December, 2013, and

Martine Fleming, in respect of affidavits sworn on 29th November, 2013, and 9th January, 2014.

6. At the hearing of the motion on 19th March, 2014, counsel for the Official Assignee informed the court that if no order for cross-examination was directed against the Official Assignee, he will not be seeking to cross-examine the other deponents.

7. The main issue arising on foot of the various motions before the court is the bankrupt's challenge to the validity of the Warrant obtained pursuant to s. 28 of the Bankruptcy Act 1988. It is important to note that s. 28 provides for a Search Warrant to be issued "where it appears to the Court that there is reason to believe that any other property of the bankrupt is concealed in any house, building, room or other place not belonging to the bankrupt . . ." [emphasis added]. It is clear, from what is disclosed on affidavit, that there is a dispute on the issue of the beneficial ownership of 19, Churchfield, Straffan, County Kildare ("the premises"). But so far as the validity of the warrant is concerned, this is not relevant. The application for a warrant under s. 28 was made in circumstances where the bankrupt alleges that the premises are owned by Traviata Ltd., which is wholly owned by an Isle of Man trust and the beneficiaries of the trust are claimed to be the lineal descendants of the bankrupt. While the beneficial ownership of the premises is something which may have to be determined in the future, it is not relevant to the validity of the s. 28 warrant and there is no valid reason why there should be cross-examination of the Official Assignee on matters pertaining to this issue.

8. There is also a dispute on the question of the ownership of the contents of the premises. It is the duty of the Official Assignee to ascertain whether or not there is any property of the bankrupt at the premises which can be claimed as part of the bankrupt's estate. The bankrupt, and other parties seeking to cross-examine the Official Assignee, disputes the basis of the Official Assignee's belief that there is artwork and other contents in the premises which are the property of the bankrupt and his concern that items may be removed from the premises to the detriment of the bankrupt's estate and his creditors. It is clear that the applications to cross-examine the Official Assignee are for the purpose of establishing the basis of his information and his belief. In particular, the bankrupt and other applicants claim that the Official Assignee is not entitled to rely on hearsay evidence. In *Simple Imports Ltd. v. Revenue Commissioners* [2000] 2 I.R. 243, Keane J. said at 251:

*"While the syntax is rather odd, the meaning is clear: the District Judge, before issuing the warrant, must have come to the conclusion, from the information on oath of the customs officer, not merely that he (the officer) suspects that there are uncustomed or prohibited goods on the particular premises but that his suspicion is 'reasonable'. The District Judge is no doubt performing a purely ministerial act in issuing the warrant. He or she does not purport to adjudicate on any *lis* in issuing the warrant. He or she would clearly be entitled to rely on material, such as hearsay, which would not be admissible in legal proceedings. It is to be presumed, moreover, that the district judge, in issuing the warrant, will act in accordance with the requirements of the relevant legislation and the onus of establishing that he or she failed to do so rests on the person challenging the validity of the warrant."* [Emphasis added]

I entirely agree with that statement of the law and, in any event, I am bound by it.

9. In issuing the s. 28 warrant, the judge of the High Court (Cooke J.) was not purporting to adjudicate on any *lis*. There is no dispute or no "accuser" to be faced and challenged. Either the warrant is valid on its face or it is not. The bankrupt has shown no grounds on which the s. 28 warrant is invalid or defective on its face. Counsel for the bankrupt challenged the validity of the warrant, *inter alia*, on the basis that it had been issued to both the Official Assignee and the Bankruptcy Inspector, whereas s. 28 provides that ". . . the

*Court may grant a Search Warrant to the Bankruptcy Inspector of any of his assistants . . .*" There is no merit in this point. At most, the issuing of the warrant to both the Bankruptcy Inspector and the Official Assignee was superfluous, but it does not in any way affect the validity of the warrant.

10. As the issuing of the warrant was not a *lis*, the judge issuing it was entitled to rely on hearsay evidence contained in the grounding affidavit of the Official Assignee sworn on 26th November, 2013. In granting the Search Warrant, the court had concluded that the facts made out in the affidavit of the Official Assignee had been established for that purpose. This is not something which, at this stage, requires cross-examination. As there is a dispute concerning the ownership of property on the premises, this may have to be resolved by an oral hearing if no agreement can be reached between the Official Assignee and other claimants to the property.

11. It is a matter for the court to decide whether its officers should be cross-examined in the interests of the administration of justice (see in *Re K. (Infants)* [1962] 3 WLR 752). O. 76, r. 76(1) of the Rules of the Superior Courts provides that anyone wishing to require the attendance in court of the Official Assignee or any other officer serving in the Office of the Official Assignee must apply to the court for liberty to do so. There are good public policy reasons for such a filtering process. It protects a court official from frivolous or vexatious applications which could have a significant impact on how he conducts the business of the court. The court should be sparing in the exercise of its discretion to order the attendance of the Official Assignee or one of his officers for cross-examination on affidavits sworn in bankruptcy proceedings. In *Irish Bank Resolution Corporation & Ors v. Quinn & Ors* [2012] IEHC 510, Kelly J. referred to the decision of O'Donovan J. in *Director of Corporate Enforcement v. Seymour* [2006] 1 IEHC 369, at p. 5 where the learned judge said:

*"At the end of the day, it is within the discretion of the Court as to whether or not such a cross-examination should be directed and that discretion should only be exercised in favour of such a cross-examination if the Court considers that it is necessary for the purpose of disposing of the issues which the Court has to determine. That appears to me to be the import of a statement of Keane C.J. in the course of an unreported judgment of the Supreme Court delivered on 15th December, 2003, in a case of Holland v. The Information Commissioner and represents the current jurisprudence in that behalf in this country."*

12. The notices of motion issued on behalf of John Dunne, Gayle Dunne and Traviata Ltd., seek reliefs in relation to the return of goods that are on the premises. The applicants do not seek cross-examination of the Official Assignee in respect of the ownership of any of the property or goods at the premises. Just as there is a dispute as to the beneficial ownership of the premises, it appears that the ownership of property and goods thereon is also in dispute. These issues may be resolved by discussion between the Official Assignee and the other interested parties, and if it is not possible to resolve the issue in this way, then an inquiry may have to take place within the bankruptcy proceedings to determine whether or not the bankrupt is the owner of any goods or property found on the premises. While the bankrupt has brought a notice of motion for cross-examination of the Official Assignee on three affidavits, it is neither necessary nor desirable in the interests of justice to make such an order. It is clear from the affidavits which have been furnished by the bankrupt that he is principally interested in obtaining the source of information relied on by the Official Assignee in applying for a warrant to search the premises. In *Irish Bank Resolution Corporation & Ors. v. Quinn & Ors.* [2012] IEHC 510, Kelly J. said at para. 65:

*"The order which is sought is specifically focused on the defendants' relevant affidavits. It is not and will not be permitted to become a trawl through material which will fall to be determined at trial. Neither will it amount to what counsel for the defendants called a deposition before trial. Depositions before trial are not part of the trial process in this jurisdiction such as they are in the United States of America."*

In that case the court stated that it would not permit a fishing expedition or a roving commission.

13. While the bankrupt wishes to establish the source of the Official Assignee's information grounding the application for the s. 28 warrant, there are good public policy reasons why he should be entitled to maintain informer privilege. Such a privilege was allowed by the court in *Director of Consumer Affairs v. Sugar Distributors* [1991] 1 I.R. 225. *Marks v. Beyfus* [1890] 25 Q.B.D. 494 had established that, in criminal matters, police informers need not be disclosed as otherwise the information to enable the police to deter and detect crime might not be forthcoming. In *D. v. N.S.P.C.C.* [1978] A.C. 171, Lord Diplock, at 218, said:

*"The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. By the uniform practice of the judges which, by the time of Marks v. Beyfus, 25 Q.B.D. 494 had already hardened into a Rule of Law, the balance has fallen upon the side of non-disclosure except where, upon the trial of a defendant for a criminal offence, disclosure of the identity of the informer that helped to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure."*

In the UK, the principle was extended to persons from whom the Gaming Board received information for the purpose of the exercise of their statutory functions and to persons who give information to the NSPCC about alleged ill-treatment of children. It seems to me that in a case such as this, the Official Assignee is entitled to rely on information without disclosing its source when he makes an application for a s. 28 warrant. That is not to say that in due course, if the question of ownership of the contents at the premises remains in issue, that evidence will have to be tendered in the usual way to establish, on the balance of probabilities, whether or not the bankrupt is the owner of such property.

14. No useful purpose can be served by directing the cross-examination of the Official Assignee on this issue. The warrant has been executed, and insofar as there is a dispute concerning the fruits of that warrant, these issues can be resolved in due course by whatever hearings may be necessary for that purpose.

15. I will now deal with the other issues that arise on foot of the notices of motion issued by the bankrupt and other parties. The bankrupt seeks an order for the delivery of confidential papers associated with Family Law litigation in which he is involved. The Official Assignee has been joined as a notice party in the Family Law proceedings. Whether the Official Assignee is entitled to retain and examine the papers which he has seized at the premises is a matter for legal argument if the issue cannot be resolved by agreement. It does not require cross-examination. Insofar as an order is sought directing the Official Assignee to deliver an inventory in respect of items removed from the premises, this has already been done.

16. The application by the bankrupt for an order staying any further applications by the Official Assignee pending the determination of

his application to show cause against the bankruptcy is now moot as the application was determined in my judgment of 6th December, 2013, when the application was refused. The bankrupt's application for an order restraining the Official Assignee from exercising any of his functions or powers pursuant to s. 61 of the Bankruptcy Act 1988, must also fail on the same ground.

17. This leaves the issue of the declaration sought by the bankrupt that by virtue of his prior US bankruptcy, all the bankrupt's property, wherever situated, is vested in the US bankruptcy estate. This is a question of law in respect of which cross-examination does not arise. It has to be considered against the background of a dual bankruptcy in both the United States and in this State, having regard to the fact that by order of the US bankruptcy judge, dated 12th June, 2013, the automatic worldwide stay on proceedings against the bankrupt pursuant to US law was varied so as to allow for the adjudication hearing in this jurisdiction.

18. I refuse the reliefs sought by the bankrupt in the notices of motion dated 3rd December, 2013, 28th February, 2014, and 13th March, 2014. I also refuse the relief sought in the notice of motion of 4th December, 2013, by Gayle Dunne, John Dunne, Traviata Ltd. and Lucy Rainey.

19. As the Official Assignee has informed the court that he does not wish to cross-examine the bankrupt or Mr. John Dunne, Ms. Gayle Dunne or Ms. Martine Fleming if no order is made directing his cross-examination, I will make no order on the Official Assignee's application for cross-examination of those parties.