THE HIGH COURT

COMMERCIAL

[2016 No. 10991 P.]

BETWEEN

CHRISTOPHER LEHANE

(AS OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF SEAN DUNNE)

PLAINTIFF

AND

YESREB HOLDING

DEFENDANT

AND

CELTIC TRUSTEES LIMITED

NOTICE PARTY

AND

THE HIGH COURT

COMMERCIAL

[2017 No. 2146 P.]

BETWEEN

CELTIC TRUSTEES

PLAINTIFF

AND

CHRISTOPHER LEHANE

(AS OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF SEAN DUNNE)

DEFENDANT

Judgment of Mr. Justice Robert Haughton delivered on the 19th day of December, 2018

1. This judgment covers two rulings in respect of applications challenging privilege claimed in the above entitled related proceedings:-

> (i) The section 21 challenge: in the proceedings second named in the title hereof ("the Celtic proceedings") the plaintiff ("Celtic") challenges litigation privilege claimed by the defendant ("the Official Assignee") over the transcript of an examination carried out by the Official Assignee pursuant to s. 21 of the Bankruptcy Act 1988 of Ms. Caroline Crowley dated 28th October, 2014. In the proceedings first named in the title hereof ("the Lehane proceedings") the defendant ("Yesreb") joins with Celtic (as Notice Party) in mounting, *inter alia*, the same challenge to the same privilege claimed by the Official Assignee (as plaintiff in those proceedings) in respect of the same transcript.
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> (ii) In the proceedings secondly named in the title hereof, an application by the Official Assignee challenging litigation privilege claimed by the plaintiff, Celtic Trustees Limited ("Celtic") in respect of three of five documents ("the Celtic documents") listed in the affidavit of discovery of Suzanne McNulty sworn on 14th May, 2018, and also challenging legal advice privilege claimed by the plaintiff in respect of the other two Celtic documents.

(i) The section 21 challenge

2. The background to both sets of proceedings is that Sean Dunne ("the bankrupt") was adjudicated a bankrupt in the US on his own application on 29th March, 2013, after the Ulster Bank had presented a petition in this jurisdiction in February 2013. He was later adjudicated bankrupt in Ireland on 29th July, 2013, and he remains in bankruptcy in both jurisdictions.

3. The bankrupt is the husband of Gayle Dunne (nee Killilea) and the father of John Dunne. The bankrupt's estate was extensive and complex. Investigations by the Official Assignee disclosed that by Memorandum of Agreement dated 1st July, 2005, made between Caroline Crowley and Eamon Walsh, as vendors and the bankrupt as purchaser, the bankrupt agreed to purchase a property known as Walford, 24 Shrewsbury Road, Dublin 4 ("Walford") from the vendors for the sum of €57,950,000.

4. The Lehane proceedings were commenced by Plenary Summons issued on 9th December, 2016. It is pleaded in the Statement of Claim that on 1st July, 2005, the bankrupt paid the said sum of €57,950,000 to the vendors, but the bankrupt did not then take a conveyance of Walford from the vendors in whom the legal title remained.

5. On 12th and 13th December, 2013 and on 28th February, 2014, the bankrupt gave evidence in the US in what are known as s. 341 examinations. On 13th December, 2013, he gave evidence that he had transferred a large proportion of his assets to his wife for love and affection. On 28th February, 2014, he gave evidence that he was buying Walford in trust for his wife and that she was the beneficial owner.

6. It is further pleaded in the Statement of Claim that the defendant Yesreb is a company having its registered office in Limassol, Cyprus and that it was incorporated on the instructions of the bankrupt and/or Gayle Dunne and/or John Dunne on 21st February, 2015, It is pleaded that by a purported Memorandum of Agreement dated 22nd March, 2013, made between the bankrupt as trustee for Gayle Dunne, and Yesreb, the bankrupt purported to agree to sell Walford to Yesreb for €14m. The Memorandum of Agreement was executed by Ross Connolly as attorney of the bankrupt. By Deed of Conveyance dated 29th March, 2013, Caroline Crowley and Aidan Walsh then conveyed Walford to Yesreb. The Deed of Conveyance records, *inter alia*, that pursuant to a Declaration of Trust dated 23rd July, 2005, the bankrupt declared and confirmed that he held the interest in Walford acquired on 1st July, 2005, in trust for Gayle Dunne, and that by a Nominee Agreement made between Matsack Nominees Limited and Gayle Dunne of 9th October, 2006, Gayle Dunne nominated Matsack Nominees Limited to hold the premises on her behalf under the terms of the Nominee Agreement. The receipt clause in the Deed of Conveyance recorded payment of the consideration of €14m to Gayle Dunne.

7. The Official Assignee contends that as of 1st July, 2005, the bankrupt was the beneficial owner of Walford and that he remained the beneficial owner as of 22nd March, 2013, and that the transactions whereby the property was purportedly transferred to Yesreb was part of a series of sham transactions and/or void under the Bankruptcy Acts 1988 – 2015.

8. Celtic was joined as a notice party to the Lehane proceedings because Celtic purported to purchase Walford from Yesreb on or about 6th September, 2016, for €14,250,000.

9. Yesreb delivered a full defence and counterclaim on 6th July, 2017, in which it pleads Yesreb conveyed Walford to Celtic by Deed of Conveyance dated 15th December, 2016. Yesreb further pleads that the issued share capital of Yesreb was held in trust for John Dunne. It pleads that the purchase of Walford by Yesreb was financed by way of loan made to it by Gayle Dunne, in the amount of €15m. It pleads that the 2013 purchase was subject to a side letter exchanged between Yesreb, John Dunne and Gayle Dunne, agreeing that in the event of any subsequent sale of Walford by Yesreb any proceeds of sale exceeding the amount outstanding and/or the loan agreement between Gayle Dunne and the defendant would be held on trust for four named members of the Dunne family, including John Dunne, as tenants in common.

10. Against this background, the Official Assignee in the Lehane proceedings was required to make discovery, and swore his affidavit of discovery dated 23rd May, 2018. This discloses*, inter alia*, a s. 21 Transcript of Caroline Crowley which is document reference number 1267982(ID) 187. The reason given by the Official Assignee for claiming privilege was as follows:-

> "Internal Insolvency Service of Ireland Memo Re Caroline Crowley.
>
> As of the date of the creation of the document, the Official Assignee was contemplating litigation in respect of the ownership of Walford. The query document was created for the dominant purpose of investigating or prosecuting said contemplated litigation."

Further in the replying affidavit of Jennifer Fay sworn on behalf of the Official Assignee in the Lehane proceedings on 17th October, 2018, the privilege is advanced in the following terms:-

> "7. …I say that having sought an independent legal opinion from Mr. William Abrahamson, B.L., the plaintiff has maintained a claim of privilege in respect of the said transcript in circumstances where the plaintiff conducted the interview in private and as part of his investigations into the property known as Walford."

11. In a supplemental affidavit sworn by David Lynch on 18th October, 2018, on behalf of Yesreb, it was contested that the Official Assignee was entitled to assert privilege over this statutory examination (and two other section 21 examinations), or that the dominant purpose of the examination was litigation in relation to Walford, or that litigation was in contemplation at the time of the relevant examination.

12. The examination of Ms. Crowley took place on 28th October, 2014, whereas the Lehane proceedings were not commenced until the Plenary Summons issued on 9th December, 2016. There was, therefore, a gap in time in excess of two years between the interview/creation of the transcript and the commencement of the proceedings.

13. Mr. Lynch also contested the Official Assignee's claim to privilege based on the fact that the examination was conducted in private in the offices of the Official Assignee, as opposed to within the confines of the court, as this "does not in any way alter the essential character of an examination conducted pursuant to s. 21 of the Act".

14. The same issue as to privilege in respect of the transcript of Ms. Crowley's s. 21 examination arises in the Celtic proceedings, commenced by Plenary Summons issued on 7th March, 2017, in which Celtic, claiming to be purchaser of Walford from Yesreb, seeks to establish good title to Walford. In that case, the Official Assignee also swore an affidavit of discovery on 23rd May, 2018, and claimed privilege over the transcripts of examinations ordered by the High Court under s. 21 of the Bankruptcy Act 1988. In a letter dated 24th July, 2018, Messrs. O'Grady's Solicitors on behalf of the Official Assignee asserted this privilege in the following terms:-

> "Regarding your query with respect to our client's assertion of litigation privilege over the s. 21 transcript with Ms. Crowley, you might know that this is a recorded note/internal transcript of our client's interview with Ms. Crowley pursuant to section 21. The Official Assignee is maintaining a claim of privilege in respect of the said transcript in circumstances where the plaintiff conducted the interview in private and as part of his investigations into Walford. The interview was conducted pursuant to a court order which enabled Ms. Crowley to avoid a public examination in open court. We have obtained an opinion from an independent counsel to this effect."

15. Ms. Jennifer Fay of Grady's Solicitors repeats this in an affidavit which she swore on 17th October, 2018 in the Celtic proceedings relying on the fact that "the interview with Ms. Crowley was conducted in private at the offices of the Official Assignee pursuant to an order of the court". She also again relied on the "opinion from an independent junior counsel who advises that where the aforementioned interview was conducted pursuant to an order of the court in private, as part of its investigations into Walford and not in open court, a claim of privilege may be maintained by the defendant".

16. Having initially heard argument in relation to the privilege issue on 19th October, 2018, I was concerned that, apart from the short statements in the affidavits of discovery themselves, the only affidavits filed on behalf of the Official Assignee seeking to support the claim of privilege were the brief and somewhat conflicting averments of Ms. Fay set out above, and that there was no evidence from the Official Assignee himself as to context or his actual intentions and purpose at the time of examination of Ms. Crowley. Notwithstanding polite protest from counsel for Yesreb, I adjourned argument and afforded an opportunity to the Official Assignee to file a further affidavit to clarify this aspect. Following this, an affidavit was sworn by the Official Assignee on 26th October, 2018 (in

the Celtic proceedings, but applicable to the same issue arising in both cases), and all parties having considered this new evidence argument resumed on 12th November, 2018.

17. The Official Assignee's affidavit sets out much more fully the background to the statutory examination of Ms. Crowley. He says at para. 9 that he "first contemplated significant litigation in relation to assets recovery in the estate of the bankrupt between November and December 2013". He then sets out various steps that were taken by him. Thus, on 26th November, 2013, he obtained a warrant to search property in the K Club in relation to chattels that he believed belonged to the bankrupt. By Notice of Motion dated 27th January, 2014, he sought to intervene in family proceedings involving the bankrupt and obtained papers therefrom. On 19th February, 2014, he met with his solicitor and creditor representatives and "considered fraudulent conveyance proceedings in relation to Walford". He refers to the bankrupt giving evidence in the US in December 2013 and February 2014, and refers particularly to exchanges between counsel and Mr. Dunne in relation to his interaction with Gayle Dunne in 2005 and he exhibits the Property Transfer Agreement dated 23rd March, 2005, purporting to record an agreement between Sean Dunne and Gayle Dunne in relation to his assets. At para. 14 of his affidavit, he says:-

> "14. For the avoidance of any doubt, although it took some time to establish who the appropriate defendant was in respect of Walford, and the situation in relation to Yesreb, I was contemplating litigation in relation to the purported property settlement agreement dated 23rd March, 2005, from late 2013 or January 2014…"

18. In para. 16 of his affidavit, the Official Assignee says:-

> "I say that the position of Walford itself was a difficult question from the outset of the Bankruptcy. This arose in the circumstances set out below. It required me to investigate the necessity of issuing proceedings against Yesreb and to take advice in relation to the appropriateness of doing so. All of the investigations into Walford were aimed at this. I simply had no other reason to be seeking information in relation to the property."

19. The Official Assignee then relays searches carried out in January 2014, in relation to the ownership of Walford which revealed the conveyance dated 29th March, 2013, to Yesreb, which the Official Assignee considered to be a transaction amenable to being set aside given that it occurred within five years of the date of adjudication. He then states:-

> "However, prior to being able to institute litigation, it was necessary to establish the position of the other parties listed as vendors and what was alleged as to the ownership structure at the date of sale. In that regard, and with a view to recovering the asset if possible, during the course of 2014 and 2015, I caused interviews to be carried out in respect of Caroline Crowley, Patrick Sweetman (representing Matsack Nominees Limited), Seamus Reddan and Colm Rogers. Seamus Reddan is a quantity surveyor advised in relation to Walford and Colm Rogers worked with KPMG who had given tax advice in relation to the premises."

20. At para. 22 of his affidavit, the Official Assignee states:-

> "22. I was also conscious of the bankrupt identified Clerkin Lynch as the solicitors for Yesreb Holding Limited. They were also the bankrupt's solicitors dealing with me at the time which gave me reason to suspect that Walford had not been purchased by a third party. However, that took another two years of investigations to confirm, due to the fact that the Dunnes maintained they had no connection with Yesreb although subsequently they have asserted that it is in fact owned by John Dunne having been gifted to him by Gayle Dunne.
>
> 23. I say that at the time these matters were coming to light, I was already contemplating litigation against Gayle Dunne in relation to all transfers of assets that arose out of the agreement of 23rd March, 2005, or 25th February, 2008. Those proceedings issued on 5th September, 2014 and bear record number *Lehane v. Dunne* [2014 No. 7820 P.]. Those proceedings seek to set aside transfers based on two agreements dated 23rd March, 2005, and 25th February, 2008…"

21. The Official Assignee then notes that Walford had remained derelict for three years with no party claiming ownership through Yesreb, he then avers:-

> "26. It was not until the end of 2016 that I was in a position to prove that the bankrupt still had an involvement with Yesreb Holding Limited and it must therefore have had a connection to his family. The s. 21 applications and investigations in relation to the bankrupt were aimed at establishing the true ownership of the property.
>
> 27. I formed the intention to seek to set aside the transfers from Sean Dunne to Gayle Dunne in January 2014, and issued proceedings in relation to same on 5th September, 2014. The lapse of time which occurred in issuing those proceedings involved taking detailed advices in relation to the ownership of the Lagoon Beach Hotel in South Africa which was owned and transferred from the Bankrupt to Gayle Dunne through companies in the Isle of Man, Mauritius, Cyprus and South Africa.
>
> 28. In those circumstances while I had formed the intention to challenge any transaction which arose out of the handwritten agreement dated 23rd March, 2005, it simply took some time to formulate proceedings against Yesreb because of the manner in which the ownership was hidden. At that date, I did not know whether Walford remained in the ownership of any members of the Dunne family or not.
>
> 29. There is no question but that I would intend to recover any asset which a bankrupt has disposed of within five years of the date of the bankruptcy or earlier if the transfer was to defeat creditors. The fact that the bankrupt was on the deed of conveyance dated 29th March, 2013, the date of his self-adjudication in America, the fact that he said he held Walford in trust for his wife until then meant that I was obliged to investigate the title to Walford to a significant degree in order to ascertain (i) whether Walford was a recoverable asset in the bankruptcy; (ii) whether I should take proceedings; and (iii) whether Yesreb was the appropriate defendant. The delay in issuing those proceedings arises solely from the efforts of the bankrupt and Gayle Dunne to hide the family's connection to Yesreb Holding Limited.

30. I therefore believe and am advised that the information collected, with a view to litigating over the ownership of Walford, is privileged as having been created in contemplation of litigation."

While para. 27 refers to the issue of proceedings on 5 September, 2014, this must be a reference to other proceedings as the Lehane proceedings were not commenced until 9th December, 2016.

The section 21 order addressed to Caroline Crowley

22. It is common case that the order for examination of Caroline Crowley was made by Costello J. on 13th October, 2014. This Order recites that the court considered an affidavit of the Official Assignee filed on 29th August, 2014 and an affidavit of Caroline Crowley filed on 9th October, 2014, and in the curial part the order states:-

> "The court DOES DIRECT that Caroline Crowley do before the expiry of 21 days from the date hereof attend at the office of the Official Assignee in Bankruptcy for interview concerning and touching upon matters relating to her dealings and affairs with respect to the involvement by Caroline Crowley with respect of the sale of the property known as Walford, 24 Shrewsbury Road, Ballsbridge, Dublin 4 for the purchase price of €57,950,000."

23. While the Order does not mention section 21, it was not disputed that the jurisdictional basis for the making of the order was section 21 of the Bankruptcy Act, 1988, and the Notice of Motion expressly referenced section 21.

That section provides:-

> "(1) The Court may summon before it a bankrupt or any person who is known or suspected to have in his possession or control any property of the bankrupt or to have disposed of any property of the bankrupt or who is supposed to be indebted to the bankrupt, or any person whom the Court deems capable of giving information relating to the trade, dealings, affairs or property of the bankrupt.
>
> (2) The Court may examine him on oath concerning the matters aforesaid, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.
>
> (3) The Court may require him to produce any books of account and papers in his possession or control relating to the matters aforesaid but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien and the Court may determine all questions in relation to the lien.
>
> (4) A bankrupt or other person who is examined under this section shall not be entitled to refuse to answer any question put to him on the ground that his answer might incriminate him but none of his answers shall be admissible in evidence against him in any other proceedings, civil or criminal, except in the case of any criminal proceedings for perjury in respect of any such answer."

24. A number of observations should be made on this important section and its use on this occasion.

25. Firstly the section is couched in terms of the court summoning a person before it, for examination under oath and/or the production of relevant records. The court was informed that, in practice, these examinations seldom take place in court, and usually take place in the office of the Official Assignee. This is mentioned by Costello J. in her judgment in *Re Sean Dunne, a Bankrupt* (unreported, 2 October, 2018) when considering whether to make an order postponing the automatic discharge of Mr. Dunne from bankruptcy. At para. 178 she notes that the Bankrupt complained about the certain s.21 interviews not being held in open court. Costello J. stated:

> "179. The s.21 interviews are separate from the s.85A application. The court regularly hears s.85A applications which do not involve any s.21 interviews. Likewise, a s.21 interview may be conducted in bankruptcies in respect of which no s.85A application is brought. As I have already stated, s.21 is a power conferred to enable the estate of a bankrupt to be properly investigated. It is not always necessary that s.21 interviews be conducted in open court. Sometimes parties are perfectly willing to cooperate with the Official Assignee in his investigations but by reason of professional or contractual obligations of confidentiality, they cannot do so unless an order is made pursuant to s.21. Once such an order is made many such witnesses are perfectly happy to cooperate with the Official Assignee. This is what occurred in the case of Mr. Sweetman and Mr. Rogers.
>
> 180. On the other hand, sometimes the investigation is conducted before the court…."

It should be noted in passing that Costello J. refers here to the Official Assignee's "investigations".

26. Such a practice may recommend itself for reasons of confidentiality – and indeed of cost and efficiency because it must result in a considerable saving of precious court time. However it must be questioned whether section 21 empowers the court to make an order compelling a person to be examined by the Official Assignee *otherwise* than before a judge of the High Court, and – subject to section 134 which will be mentioned shortly – in open court where the bankrupt and other members of the public have a right to attend and listen to the examination. On its face the wording of s.21 is limited. It contemplates that either the Official Assignee obtains the information/statement on a truly voluntary basis, or he obtains a s.21 order that results in the examination before a judge of the High Court, and the section does not seem to permit of a halfway house.

27. This is particularly so having regard to the obligation imposed by subsection (4) to answer all questions, and the fact that knowingly false answers to the court may result in a charge of perjury. Section 21 must be viewed in the light of the property interests of creditors of a bankrupt, and the broader public interest in the successful functioning of the Official Assignee. The legislature must have intended that such examinations would generally be conducted in open court in circumstances which give transparency and maximise the prospects of securing information and documents of material use to the Official Assignee in conducting investigations of bankrupts and pursuing recovery proceedings. The legislature cannot have intended such consequences to follow from a private interview in the Official Assignee's office, and it is hard to see how subsection (4) could apply at all to such an interview.

28. Secondly, as the extract from Costello J. suggests, in practice the issuance of a s. 21 order is usually sufficient to prompt the person to whom it is directed to attend for interview/examination at the office of the Official Assignee. This seems to be what happened in the present case. Presumably most people from whom information in relation to the bankrupt's affairs is sought would prefer this rather than facing the formality and potential publicity of an examination in court, and possible compromise of their professional or other relationships. However in my view the section only permits the Official Assignee to obtain an order compelling the informant to attend before the court for examination where, absent a section 134 order, the examination will be in public.

29. This would not prevent the Official Assignee, having obtained such an order, from reaching agreement with the individual concerned to conduct the interview privately – and indeed agreeing that it be confidential, or confidential save and insofar as the individual might subsequently be called upon by the Official Assignee to give evidence in recovery proceedings. In such a case the

s.21 order could then be vacated.

30. Section 134 of the Bankruptcy Act 1988, provides:-

> "The Court may direct that the whole or any part of any sitting of the Court or proceeding in any matter under this Act shall be in private."

31. There is no reference to s. 134 in the order of Costello J. of 13th October, 2014, and I must assume that no such ancillary order was sought by the Official Assignee. Equally, while the direction was that Ms. Crowley attend at the office of the Official Assignee for interview, there was no direction of the court that the interview should be in private. Again it must be questioned, for the reasons given in the preceding paragraphs, whether any such order could have been made given that the court does not appear to have the power to direct attendance at the office of the Official Assignee for examination in the first place.

32. This section is of significance, because, had the Official Assignee wished to keep the examination of Ms. Crowley private, there was a means by which this could have been achieved. He could have obtained the s.21 order and an ancillary s.134 order, but he did not do so.

33. The foregoing also means that, at least in theory, Ms. Crowley could have been accompanied to her examination in the Official Assignee's office on 28th October, 2014 by one or more members of the public who would - just as they would if the examination would have been undertaken in open court - have been entitled to attend and observe the proceeding. Of course the Official Assignee might have objected, but in that event in my view Ms. Crowley would have had a case for refusing to be interviewed and challenging the validity of the order, and requiring the Official Assignee to obtain a correctly worded s.21 order stipulating examination before the court.

Principles Applicable to Litigation Privilege

34. Passmore on Privilege (2013 Ed.) at p.213 states –

> "In order to make a successful claim to litigation privilege, the client must establish that what is sought to be protected is a communication, whether written or oral, that is made:
>
> - between either (i) himself or (ii) his lawyer (who is acting for him in a professional capacity) and a third party;
> - in either case under conditions of confidentiality;
> - for the dominant purpose of use in litigation, thus, that at the time the communication is made (i) is either preceding or pending, or reasonably anticipated or in contemplation, and (ii) is litigation in which the client, or reasonably anticipates becoming a party; and
> - for the purpose of either (i) enabling legal advice to be either sought or given and for/ or (ii) seeking or obtaining information to be used in or in connection with the litigation concerned."

35. These principles, and the rationale for litigation privilege was restated by the Court of Appeal (Finlay-Geoghegan J.) in *University College Cork v Electricity Supply Board* [2014] 2 I IR 255, at p. 529 para:

> "(i) Litigation privilege constitutes a potential restriction and diminution of a full disclosure, both prior to and during the course of legal proceedings which is desirable for the purpose of ascertaining the truth and rendering justice. As such, it must be constrained. *Smurfit Paribas v. AAB Export Finance* [1990] 1 I.R. 469 per Finlay C.J. at p. 477.
>
> (ii) The purpose of litigation privilege is to aid the administration of justice, not to impede it. In general, justice will be best served where there is candour and where all relevant documentary evidence is available. *Gallagher v. Stanley* [1998] 2 I.R. 267 per O'Flaherty J. at p. 271.
>
> (iii) The document must have been created when litigation is apprehended or threatened.
>
> (iv) The document must have been created for the dominant purpose of the apprehended or threatened litigation; it is not sufficient that the document has two equal purposes, one of which is apprehended or threatened litigation. *Gallagher v. Stanley* [1998] 2 I.R. 267 at p. 274 approving the test propounded by the House of Lords in *Waugh v. British Railways Board* [1980] AC 521.
>
> (v) The dominant purpose of the document is a matter for objective determination by the Court in all the circumstances and does not only depend upon the motivation of the person who caused the document to be created. *Gallagher v. Stanley and Woori Bank & Hanvit LSP Finance Ltd. v. KDB Bank Ireland Ltd.* [2005] IEHC 451.
>
> (vi) The onus is on the party asserting privilege to prove, on the balance of probabilities, that the dominant purpose for which the document was brought into existence was to obtain legal advice or enable his solicitor prosecute or defend an action. *Woori Bank and Downey v. Murray* [1988] N.I. 600."

As to whether a particular purpose of a document is its dominant purpose, it is established that if litigation is mentioned only in the context of a "possible option", then privilege does not arise: See Carroll J. in *Irish Press v The Minister for Enterprise* [2002] 4 IR 110, at p. 114.

36. Mr. Farrelly B.L. in argument on behalf of the Official Assignee relied particularly on the cases of *Learoyd v Halifax Joint Stock Banking Company* [1893] 1 HC 686, and the judgment of Lord Hoffmann in *AKI Holdings Limited (in liquidation) v Ernst & Young* [2009] HKCFA 14 (in the Court of Final Appeal of the Hong Kong Special Administrative Region). In the headnote in *Learoyd* it is stated:

> "When an examination of witnesses has taken place under Sect. 27 of the Bankruptcy Act, 1893, upon the application of a trustee in bankruptcy, and with the view of enabling his solicitor to advise him whether an action should be brought with reference to the bankrupt's affairs, the transcript of the shorthand/writer's note of the proceedings that such examination is a document entitled to privilege. *Wheeler v Le Marchant* (i) Discussed."

37. However, in that case the objection was on the basis that the transcript had "come into existence for the purpose of furnishing

to his solicitors evidence to be used in this litigation, or information that which might lead to the obtaining of such evidence for the use of his solicitors to enable them to conduct this litigation and advise him in reference thereto." That is not said in the present case where the interview of Ms. Crowley was for the purpose of investigation, albeit that litigation was apprehended and - it was not stated to be for the purpose of obtaining or furnishing evidence for litigation.

38. It is apparent from the judgment of Stirling J. that there was a somewhat different attitude to the openness of statutory interviews undertaken by liquidators or Official Assignees in 1893. Stirling J. refers to a passage from Chitty J. in a case concerning a liquidator, in which the following was stated: "What is being done is this: discovery is sought to be obtained which may be useful to the Court in the conduct of the proceedings in the winding up, and to my mind, looking at the section and the purpose for which the provisions of that section were inserted, *an examination of this kind must be considered in the nature of a secret proceeding."* [Emphasis added]

39. In my view, this broad approach does not survive Article 34.1 of the 1937 Constitution which reads-

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and save, in as such limited circumstances may be prescribed in law, shall be administered in public."

The older ideas of secrecy have no part to play in relation to modern day Section 21 interviews ordered by the Court under the Bankruptcy Act, 1988, save where the Court further orders that they should be held in private under Section 134.

40. In the second case relied upon by Mr. Farrelly of *AKI*, Lord Hoffmann at paragraph 121 stated that-

> "The two cases which seem to be most on point are L*earoyd v Halifax and Joint Stock Banking and Company* [1893] ICh 686 and *Dubai Bank Limited v Galadari* [1990] BCLC 90. In these two cases, a century apart, the judges simply asked themselves whether the trustee in bankruptcy (in the first case), or the liquidator (in the second) had conducted the examinations for the dominant purpose of obtaining material on which they could seek advice from their lawyers as to whether to bring proceedings. Neither appear to think that it made any difference that the information had been obtained under statutory powers rather than in some other way. The authority of these cases has never been questioned."

Although *AKI* is a recent decision, it cannot carry the same weight or authority in this jurisdiction in the light of Article 34.1 and section 134 of the 1988 Act.

41. Section 21 interviews do not *per se* have as their dominant purpose the collection of material to commence apprehended proceedings, or for seeking advice from lawyers for such purpose. Their purpose may and frequently will be investigative. But most importantly the legislature has decided that such interviews should be conducted as examinations before a court sitting in public, and with open access, save in those special or limited circumstances contemplated by Section 134 of the 1988 Act, where the Court decides that the proceedings should be held in private. Accordingly, it is the more general principles enunciated earlier in relation to the confidentiality or otherwise of the interview and its dominant purpose that govern my determination.

Discussion

42. Applying these principles to the transcript of the interviewer with Ms. Crowley firstly I am not satisfied that it was undertaken under conditions of confidentiality. Indeed, there is no evidence put before me by or on behalf of the Official Assignee that addresses this question. It is merely stated by Ms. Fay that the interview was conducted in private. The affidavit of the Official Assignee does not address this issue at all. There is of course a world of a difference between an interview that is said to be in private and one that has the additional quality of confidentiality in which the mutual agreement or understanding is that the content will not be disclosed by either party, save to any extent that may be agreed between them (or required by law). Of course the first step in establishing confidentiality in respect of such an interview/ examination would logically to have been to apply to the Court for an Order under Section 134, for the court examination to held in private, but that was not done.

43. On this ground alone I am not satisfied that the Official Assignee is entitled to assert litigation privilege. There is a second reason for coming to this decision. Ms. Fay initially asserted privilege on behalf of the Official Assignee on the basis that the interview was "part of his investigations into Walford". The Official Assignee goes much further than this and in his affidavit sworn on 26th of October, 2018 in several places he says that he was contemplating litigation in relation the purported Property Settlement Agreement dated 23rd of March, 2005, and litigation to set aside the transfers/transactions relating to Walford, for the benefit of the bankruptcy Estate. He avers that this was in his contemplation in late 2013- November and December of that year, and well before the interview of Ms. Crowley on 28th of October, 2014.

44. I accept the evidence of the Official Assignee that he was at the time of the interview apprehending litigation. To use the words in Passmore, litigation was in his mind "reasonably anticipated or in contemplation". However, it is apparent from the Official Assignees affidavit that he was still at the *investigation* stage, and, Costello J. points out, s.21 orders are an important tool in investigation. In paragraph 16 he notes that the difficult questions arising in the bankruptcy "... required me to investigate the necessity of issuing proceedings against Yesreb and to take advice in relation to the appropriateness in doing so", and that "all of the investigations into Walford were aimed at this". His evidence is that he had a certain amount of evidence and had reason to suspect that the sale of Walford was not a genuine sale to a third party.

45. But one of the difficulties that the Official Assignee faces is that the proceedings did not in fact issue until 9th of December, 2016, over two years after the interview with Ms. Crowley, and that suggests on an objective basis, that the dominant purpose of the interview at that time was to further the Official Assignee's investigations, rather than the institution of proceedings. But even if I were to accept that this is an instance where the creation of the transcript/ notes of the interview had two equal purposes, one being investigation and the other apprehended litigation, that is not sufficient for the transcript to attract litigation privilege. It seems to me that at such a temporal remove from the institution of proceedings the Official Assignee had yet to undertake further investigations and obtain legal advice before determining whether to institute proceedings, deciding whom to sue, and the nature of such proceedings, and that litigation open remained a "possible option".

46. In my view, the primary purpose of Section 21 of the Bankruptcy Act, 1988, is to enable the Official Assignee to properly investigate the state of affairs of a bankrupt with a view to identifying what property should be available to the bankrupt's Estate. While this may, and often will, lead the Official Assignee to decide to commence proceedings to recover a bankrupt's Estate in the hands of third parties, this does not necessarily flow from the conduct of such interviews. While it is possible that a Section 21 interview may be for the sole or dominant purpose of instituting proceedings, a broader investigative purpose is more likely to be the norm.

47. Further it is beyond question that the Official Assignee cannot simply place reliance on the Opinion of learned counsel, however expert that may be, to support and maintain a claim of litigation privilege. Clearly, whether a claim to privilege is sustainable is an issue of law to be decided by the Court, and not one in respect of which expert opinion is admissible.

48. In conclusion, the transcript of the s.21 interview of Ms. Caroline Crowley must be disclosed.

(ii) The Celtic Documents
49. This part of my ruling considers the Official Assignee's application to inspect the Celtic Documents. Although this originally extended to a greater number of documents, the court's ruling is only required in relation to five documents.

50. At the close of submissions, both parties agreed that the court should be permitted to view the five disputed documents to assist it in reaching its decision, and copies were duly furnished to the court and considered by it. However, I approached this by first considering the full description of each document, and the reasons given on affidavit for claiming privilege, with a view to ascertaining whether the dispute could be determined without recourse to the actual content of the documents. Where that could be done, I refrained from any detailed consideration of contents.

The three emails

Document No. 1
51. The first document is number WF001002494, and dated 22nd February, 2017, and in the replying affidavit sworn on behalf of Celtic by Eoin O'Sullivan on 17th October, 2018, this document is described, and the privilege claimed, in the following terms:-

> "This is an email sent by Sean Dunne to Dermot Desmond in contemplation of and/or for the purpose of the litigation. The email concerns the letter from O'Gradys to William Fry dated 22 February 2017.
>
> Sean Dunne is the bankrupt in the bankruptcy proceedings *In the matter of the Bankruptcy Act 1988 as amended in the matter of Sean Dunne, a bankrupt — 2478*. The Official Assignee is prosecuting his claims in these proceedings in his capacity as the bankruptcy trustee of Sean Dunne's estate. A central question in this litigation is the nature of the interest, if any, which Sean Dunne held in Walford. Sean Dunne is likely to be an important witness of fact in these proceedings.
>
> This email was not sent during the course of the impugned transaction, nor was the dominant purpose of the document related to the transaction.
>
> As averred to in the affidavit of discovery, the dominant purpose for this communication was litigation. As stated above, litigation was in contemplation from 12 December 2016 and at the very latest by 3 January 2017.
>
> The fact that neither of the parties to the communication are lawyers does not preclude the document being subject to a claim of litigation privilege, as the Official Assignee has incorrectly asserted.
>
> The fact that Sean Dunne is not a party to this litigation does not preclude the document being subject to a claim of litigation privilege, as the Official Assignee has incorrectly asserted."

52. The sender, Sean Dunne, the Bankrupt, is not a party to the proceedings. Nor is Dermot Desmond. It is not therefore a communication by a client (Celtic) or the client's solicitor (William Fry) to a third party, albeit that it was sent shortly before the Celtic proceedings were initiated by Plenary Summons issued on 7th March,2017. Insofar as it refers to a letter from O'Grady's to William Fry, that is correspondence from the Official Assignee's solicitors to Celtic's solicitors and this does not confer it with litigation privilege. Had William Fry, on behalf of Celtic, corresponded on a confidential basis with the Bankrupt, and the Bankrupt had replied in confidence, in the context of apprehended and imminent litigation, such communications would have attracted litigation privilege. Accordingly, this email does not on its face attract litigation privilege.

53. It argued in the alternative by Mr. Fanning S.C., counsel for Celtic, in respect of this and the other two emails passing between the Bankrupt and Dermot Desmond, that Dermot Desmond was the agent of Celtic and could stand in the shoes of Celtic as the "client" and maintain privilege over communications from the Bankrupt as a third party where the dominant purpose was to prepare for the apprehended litigation which Celtic commenced by Plenary Summons on 7th March, 2017.

54. In the replying affidavit of Eoin O'Sullivan, sworn on behalf of Celtic in opposition to the application to inspect, in the context of one of the disputed documents, Mr. Desmond's position is clarified in the following terms:-

> "Celtic Trustees acquired Walford. It is prosecuting this litigation in its capacity as trustee as Merdon Trust. Dermot Desmond is a settlor of the Merdon Trust. Dermot Desmond's family members are the beneficiaries of the Merdon Trust. Dermot Desmond negotiated the purchase of Walford on behalf of the Merdon Trust. This document was discovered by Celtic Trustees Limited because it was within the power, possession or procurement of Dermot Desmond for the purpose of Celtic Trustees Limited's discovery. Documents in the power, possession or procurement of Dermot Desmond were treated as having been in the power, possession or procurement of Celtic Trustees Limited.
>
> Insofar as Celtic Trustees Limited has received the document from Dermot Desmond, the doctrine of common interest privilege operates to prevent the loss of Dermot Desmond's privilege and confer upon Celtic Trustees Limited, an entitlement to assert privilege over the document."

55. Accordingly, insofar as the disputed documents contained advice given to Mr. Desmond, which thereby came into the possession, power or procurement of Celtic, it was claimed that Celtic was entitled to maintain common interest privilege referable to the date of the creation of the relevant documents in 2011.

56. In support of this counsel cited a passage from Abramson & Fitzpatrick (2013) at para. 39-46 which opens with the following sentence:-

> "Communications between either a client or his lawyer and a third party are privileged where the dominant purpose of that communication is to prepare for actual or reasonably apprehended litigation."

No other authority was cited. On the other hand there is ample authority, some of which is recited earlier in this decision, to the

effect, that the purpose of litigation privilege is to protect communications between *lawyers* and their clients where litigation is in being or is apprehended.

57. I reject Celtic's contentions. Firstly, Mr. Desmond is not a lawyer. Secondly, Celtic is a company with a separate legal personality; thirdly Mr. Desmond as settlor of the Merdon Trust appears to have divested himself of property to a corporate trustee. Further a settlor is not usually in the position of agent of a trustee, and there was no evidence that would lead the court to conclude that in respect of this email Mr. Desmond could or should be treated as an agent of Celtic. Nor can it be said, on the case pleaded by Celtic and Yesreb in these two proceedings, that the Bankrupt, who is not a party to the proceedings, has any interest in the proceedings that could be the subject of protection under the heading of litigation privilege or common interest privilege. Celtic is not therefore entitled to rely on common interest privilege or litigation privilege and this email must be disclosed.

Document No. 2
58. This is document WF001002430 dated 24th February, 2017. It is a further email sent by Sean Dunne to Dermot Desmond, and Mr. O'Sullivan's affidavit states that "…it identifies statements made by the Official Assignee in various affidavits regarding Walford". In other respects, litigation privilege is sought in virtually identical terms to that sought in respect of document No. 1. For similar reasons already given, I have come to the conclusion that litigation privilege does not attach to document No. 2. Further common interest privilege does not apply.

Document No. 3
59. This document numbered WF001002433, is a further email dated 27th February, 2017, sent from Sean Dunne to Dermot Desmond, which Mr. O'Sullivan says in his affidavit "analyses statements made by the Official Assignee in his Third affidavit regarding the Matsack Nominee Agreement". Litigation privilege is claimed again in similar terms to documents No.1 and 2 above.

I am satisfied for the same reasons as given in respect of documents No's 1 and 2 that document No. 3 does not attract litigation or common interest privilege and must be disclosed.

Documents No.4 and 5 – Legal Advice Privilege
60. The privilege asserted here is legal advice privilege. The applicable principles were succinctly summarised by Gilligan J. in *Lyons v. O'Mahoney* [2017] IEHC 649, where he stated:-

> "5. The first element is that there must be a communication between the client and the lawyer. The second feature is that the communication must be made in confidence. The third feature of legal advice privilege is that the communication was made either to or by a lawyer during the course of a professional legal relationship and the final condition is that the communication must have been made for the purpose of the giving or receiving of legal advice."

61. The foundation for legal advice privilege was referred to by Lord Brougham L.C. in *Greenough v. Gaskell* (1833) 1 My. & K 98, at p. 103 in the following terms:-

> "But it is out of regard to the interests of justice, which cannot he upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case."

62. This passage was quoted with approval by Finlay C.J. in Sm*urfit Paribas Bank Limited v. A.A.B. Export Finance Limited* [1990] 1 I.R. 469, and at p. 477 he stated:-

> "The existence of a privilege or exemption from disclosure for communications made between *a person and his lawyer* clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice. Such privilege should, therefore, in my view, only be granted by the courts in instances which have been identified as securing an objective which in the public interest in the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts."

63. It is clear from a reading of *Smurfit*, that the Supreme Court was seeking to limit any general expansion of legal advice privilege, and was careful in that instance not to extend it to communications made to a lawyer "for the purpose of obtaining his *legal assistance* other than advice".

64. The factors to be considered by a court when assessing whether the purpose of documents was the obtaining and giving of legal assistance as opposed to legal advice, was explored by Clarke J. (as he then was) in *Prendergast v. McLoughlin* [2010] 3 I.R. 445, where he approved the criteria set out by Lavan J. in *Ochre Ridge Limited v. Cork Bonded Warehouses Limited* [2004] IEHC 293, and summarised them as follows:-

> "(i) the communication must be made between a person and a lawyer acting on behalf of such person as a lawyer for the purpose of obtaining from such lawyer legal advice;
>
> (ii) the dominant purpose of the communication must be the seeking or giving of legal advice (*Three Rivers D.C. v. Bank of England (No. 5)* [2003] EWCA Civ 474, [2003] Q.B. 1556);
>
> (iii) advice does not extend to business matters nor to conveyancing documents but does cover correspondence associated with a conveyance for the purpose of seeking or giving legal advice (*Balabel v. Air India* [1988] Ch. 317);
>
> (iv) the necessity to obtain legal advice envisages the possibility of a legal challenge or query as to the correctness or effectives of some step which a person is contemplating (*Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd.* at p. 478);
>
> (v) the provision of legal assistance may, in certain circumstances, also entail the provision of legal advice because of the fact that a solicitor's duty of care extends beyond the scope of instructions and requires the solicitor concerned to consider the legal implications of the facts;
>
> (vi) there may be circumstances where surrounding documents consulted for the purpose of drafting and for the purpose

of obtaining legal advice, which included elements of assistance, are privileged; (H*urstridge Finance Ltd. v. Lismore Homes Ltd.* (Unreported, High Court, Costello J., 15th February, 1991));

(vii) communications between solicitor and client giving advice in respect of conveyancing transactions may be privileged if they contain legal advice: see R. v. Crown Court, *ex parte Baines* [1988] 1 Q.B. 579, where at p. 587, Watkins L.J. explained:-

> 'In many conveyancing transactions advice will be given by the solicitor to his client on factors which serve to assist toward a successful completion, the wisdom or otherwise of proceeding with it, the arranging of a mortgage and so on. I doubt if it can possibly be denied that advice of that kind is a privileged communication';

(viii) a solicitor will not be required to disclose information as to the details of a client where it is so intertwined with the legal advice that the effect of revealing it would be to disclose the advice (*Miley v. Flood* [2001] 2 I.R. 50);

(ix) privilege does not attach to copies of pre-existing documents which are made for the purposes of obtaining legal advice (*Tromso Sparebank v. Beirne* [1989] I.L.R.M. 257);

(x) the details of when a client met with their lawyer are usually not the subject of legal advice privilege unless in the exceptional instance of where such details are required by a solicitor to give legal advice (*R. v. Manchester Crown Court, ex parte, Rogers* [1991] 4 All E.R. 35);

(xi) communications from an opponent's solicitor to a client do not benefit from legal advice privilege as such communication is hardly likely to convey legal advice, unless it contemplates settlement; and

(xii) finally, the objective, as stated by Finlay C.J. in *Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd.* [1990] 1 I.R. 469, at p. 473, that 'the public interest in the proper conduct of the administration of justice' arising from the restriction of a disclosure should be kept in mind in any discussion on legal privilege."

Document No. 4

65. This is document number BD001000052-0001, and is dated 21st October, 2011. Mr. O'Sullivan in his affidavit describes this document and asserts legal advice privilege and/or common interest privilege in the following terms:-

"This is a letter of advice from Brendan Dillon Solicitors to Maria O'Sullivan on behalf of Dermot Desmond in relation to the tender document provided by McAuliffe & Company Solicitors when Walford was put to tender in October 2011. The letter also acts as an engagement letter. The letter is tagged legal advice privilege.

At this point in time, Maria O'Sullivan was the General Counsel for Dermot Desmond and was authorised to instruct Brendan Dillon in relation to the potential purchase of Walford in 2011.

This letter clearly comprised confidential communications between a lawyer and a client for the purposes of giving legal advice. Legal advice is private between the parties and cannot be disclosed to another person without the consent of the particular client. The Plaintiff has no right to unilaterally disclose another party's legal advice.

The Official Assignee has asserted that this legal advice could not be privileged "*in the hands of Celtic Trustees Limited"*. This position is not understood.

Celtic Trustees Limited acquired Walford, and is prosecuting this litigation, in its capacity as trustee of the Merdon Trust, Dermot Desmond is the settlor of the Merdon Trust. Dermot Desmonds's family members are the beneficiaries of the Merdon Trust. Dermot Desmond negotiated the purchase of Walford on behalf of the Merdon Trust.

This document was discovered by Celtic Trustees Limited because it was within the power, possession or procurement of Dermot Desmond. For the purposes of Celtic Trustees Limited's discovery, documents in the power, possession or procurement of Dermot Desmond were treated as having been in the power, possession or procurement of Celtic Trustees Limited.

Insofar as Celtic Trustees Limited has received the document from Dermot Desmond, the doctrine of common interest privilege operates to prevent the loss of Dermot Desmond's privilege and confer upon Celtic Trustees Limited an entitlement to assert privilege over the document."

66. On the face of this description, the document does constitute advices from one firm of solicitors to a lawyer acting as agent/counsel for Dermot Desmond. The description also gives context – it was *inter alia* a letter of engagement of Brendan Dillon Solicitors in relation to the potential purchase of Walford in 2011.

67. However, the first point that must be made is that Celtic was not incorporated until 2013 and, therefore, did not exist at the date of these advices. Celtic, therefore, cannot assert joint privilege or common interest privilege arising at a time (2011) when it did not exist as an entity.

68. As to legal advice privilege, it is necessary to apply the criteria summarised by Clarke J. in *Prendergast v. McLoughlin* to determine whether Dillon Solicitors were giving legal advice or merely legal assistance.

69. Criterion (iii) provides that "advice does not extend to business matters nor to conveyancing documents but does cover correspondence associated with a conveyance for the purpose of seeking or giving legal advice (*Balabel v. Air India* [1988] Ch. 317)".

70. Mr. O'Sullivan states that "the letter also acts as an engagement letter. The letter is tagged legal advice privilege". Insofar as the letter is concerned with engagement – and part of the letter is concerned with engagement, fee structure etc - it advises of matters that would generally be regarded as confidential and commercially sensitive. Further it could not conceivably be relevant to issues arising in these proceedings.

71. Criterion (v) states that "the provision of legal assistance may, in certain circumstances, entail the provision of legal advice

because of the fact that a solicitor's duty of care extends beyond the scope of instructions and requires the solicitor concerned to consider the legal implications of the facts".

72. Criterion (vi) is also relevant because it contemplates that there may be circumstances "where surrounding documents consulted for the purpose of drafting and for the purpose of obtaining legal advice which include elements of assistance, are privileged". Particularly relevant is Criterion (vii) which provides:-

> "(vii) Communications between solicitor and client giving advice in respect of conveyancing transactions may be privileged if they contain legal advice: see *R. v. Crown Court ex parte Baines* [1988] 1 Q.B. 579, where at p. 587 Watkins L.J. explained:
>
> > 'In many conveyancing transactions advice will be given by the solicitor to his client on factors which serve to assist toward a successful completion, the wisdom or otherwise of proceeding with it, the arranging of a mortgage and so on. I doubt if it can possibly be denied that advice of that kind is a privileged communication'."

73. For the most part, the letter from Dillons Solicitors is in the nature of legal assistance in relation to the proposed purchase and to that extent it does not attract legal advice privilege. In the first two pages of the letter of Dillon Solicitors go through tender documentation and, in my view, this text consists of legal assistance, no more than that and does not attract privilege.

74. However, Dillon Solicitors do tender advice in respect of certain special conditions, and in particular, at paragraph 1.g(v). This contains legal advice, and attracts privilege under criterion (vii) of *Prendergast v. McLoughlin*.

75. I will, therefore, direct disclosure of document No. 4 but permit the following redactions:

> (1) the contents of the commentary at para. 1.g(v).
>
> (2) section 12 headed "Costs."

Document No. 5

76. This is document number BD001000016, and dated 17th November, 2011, and is described by Mr. O'Sullivan in his affidavit as "a draft of the letter of advice described above". Legal advice privilege and/or common interest privilege are asserted on precisely the same basis as in respect of document No. 4.

77. Unfortunately, the court appears to have been furnished not with a document/draft dated 17th November, 2011, but a second copy of document No. 4 dated 21st October, 2011. Certainly, this second copy appears to be in identical terms, and the only part that I would determine attracts privileged and should be redacted, is identified as being paragraph 1.g(v) and the section headed "Costs". It is odd that in Mr. O'Sullivan's affidavit, document No. 5 is listed as being dated 17th November, 2011, notwithstanding that it is only a "draft" of the letter dated 21st October, 2011. Suffice to say that if document No. 5 is a similar document to document No. 4, then I will apply the same principles.