THE HIGH COURT

COMMERCIAL

[2014 No. 7820 P]

[2014 No. 164 COM]

BETWEEN

CHRISTOPHER LEHANE AS OFFICIAL ASSIGNEE IN BANKRUPTCY

IN THE ESTATE OF SEAN DUNNE

PLAINTIFF

AND

GAYLE DUNNE

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on 19th day of February, 2016.

Introduction

1. In this case the applicant has applied to the Court pursuant to O.40, r.1 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the Court requiring Mr. Timothy Miltenberger attend court for examination by the defendant's counsel in relation to the contents of affidavits sworn by him on 28th May, 2015, and 24th June, 2015, and ancillary relief. The plaintiff sought a reciprocal order in respect of Mr. Alec Ostrow on the basis that if Mr. Miltenberger's evidence has to be challenged then Mr. Ostrow's evidence also has to be tested and cannot be left unchallenged. Order 40, r. 1 of the Rules of the Superior Courts provides:-

> *"[u]pon any petition, motion, or other application, evidence may be given by affidavit, but the Court may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit."*

Background

2. In 2005, the defendant married Mr. Seán Dunne ("the Bankrupt"). The Bankrupt filed for a Chapter 7 Bankruptcy in the United States on 29th March, 2013, and his Chapter 7 Trustee in Bankruptcy in the United States is Mr. Richard Coan. Under the provisions of Chapter 7 of the U.S. Bankruptcy Code the Bankrupt's estate in bankruptcy vested in the Chapter 7 Trustee and an automatic worldwide stay on all enforcement proceedings against the Bankrupt came into effect.

3. A petition to adjudicate the Bankrupt a bankrupt in this jurisdiction was pending at the time. The U.S. Bankruptcy Court modified the automatic stay so as to permit the petitioner to continue with the Irish bankruptcy proceedings. The Bankrupt was adjudicated a bankrupt in Ireland on 29th July, 2013. The Bankrupt challenged the adjudication by an application to show cause. The High Court refused his application to show cause and the Bankrupt appealed to the Supreme Court. On 15th May, 2015, the Supreme Court rejected his appeal.

4. In 2005 and 2008 the Bankrupt made very substantial transfers of assets to the defendant. The Bankrupt was the legal or beneficial owner of shares in an unlimited company, Mavior. The shares were transferred by the Bankrupt to the defendant and/or companies controlled by the defendant on 28th October, 2008. The Bankrupt transferred his interest in a hotel in the Republic of South Africa to the defendant pursuant to an agreement dated 15th February, 2008. He also transferred the full book value as calculated as of 15th February, 2008, of all loans made by him to Mavior and all of its related companies and subsidiaries to the defendant pursuant to the agreement dated 15th February, 2008. These transactions are subject to challenge in these proceedings and proceedings in the United States.

5. The Chapter 7 Trustee instituted two proceedings against the defendant and other parties referred to as Adversary Proceedings 15-5020 and 15-5019. Adversary Proceedings 15-5020 precisely mirror the claim in these proceedings. They were commenced on the last day permitted to the Chapter 7 Trustee to bring the proceedings under the U.S. Bankruptcy Code so that the claims would not become statute barred. They were commenced prior to the determination of the Bankrupt's appeal by the Supreme Court. Following the confirmation of the Irish bankruptcy, the Chapter 7 Trustee and the plaintiff decided that the matters were best pursued by the plaintiff through proceedings in Ireland rather than through the existing Adversary Proceedings 15-5020. Once the uncertainty created by the outstanding appeal to the Supreme Court in relation to these proceedings was resolved, the Chapter 7 Trustee, with the consent of the defendant, dismissed Adversary Proceedings 15-5020. He did so in order that the claims could be pursued in Ireland by the plaintiff.

6. Adversary Proceedings 15-5019 are being pursued in the U.S. Bankruptcy Court. In those proceedings, the Chapter 7 Trustee is seeking to recover assets in the United States, Ireland and the Republic of South Africa from the defendant herein and other parties to whom she in turn has transferred the assets. He does so on a number of grounds including that they constituted fraudulent conveyances by the Bankrupt to the defendant or that they are covered by a constructive trust in favour of the Bankrupt's creditors.

7. The Official Assignee instituted these proceedings seeking to set aside the transfers by the Bankrupt to the defendant and/or companies controlled by her as set out above. They relate to the shares in Mavior and the principal asset, Lagoon Beach Hotel in Cape Town, Republic of South Africa. The plaintiff seeks an order requiring the defendant and her servants and agents, including any corporate entities of which she is a director or has control, to restore any assets reportedly transferred to her by reason of the

agreement dated 15th February, 2008, and/or the share transfer date of 28th October, 2008, to the estate of the Bankrupt or damages in lieu of such an injunction and if necessary an order for the tracing of all assets purportedly transferred pursuant to the agreement dated 15th February, 2008.

8. Thus there are two bankruptcies being administered, one in the U.S. Bankruptcy Court and one in this Court in respect of the estate of the Bankrupt. There are two fiduciaries acting to gather in the assets of the Bankrupt, the Chapter 7 Trustee and the Official Assignee. They have each instituted proceedings against the defendant seeking to recover assets they allege were wrongfully transferred to her or companies under her control by the Bankrupt. These proceedings overlap with the Adversary Proceedings 15-5019, though the precise extent of the duplication has not yet been established. In these circumstances, the defendant has brought a motion in these proceedings seeking to strike out and/or dismiss the plaintiff's claim pursuant to the inherent jurisdiction of the Court on the grounds of *forum non conveniens* and abuse of process.

9. There has been an exchange of affidavits between the parties in relation to the Motion including affidavits sworn by U.S. attorneys in relation to U.S. bankruptcy law and the proceedings in the United States, Mr. Miltenberger on behalf of the plaintiff and Mr. Ostrow on behalf of the defendant. This judgment is concerned with the Motions to cross-examine Mr. Miltenberger and Mr. Ostrow in respect of their affidavits filed in relation to the Motion to dismiss the proceedings.

Cross-examination on affidavit

10. The Rules of the Superior Courts expressly provide for a deponent to be cross-examined on any affidavit filed by him. The extent of the entitlement of a party to cross-examine a deponent depends upon the nature of the proceedings or the application in which the affidavit has been sworn. Where the procedures are by way of summary summons or special summons or, in the case of proceedings commenced by a plenary summons, a trial on affidavit has been directed, a party who wishes to cross-examine a deponent can serve a notice to cross-examine on the party who filed the affidavit requiring that the deponent be produced for cross-examination at trial. Unless a deponent is produced for cross-examination, his affidavit cannot be used as evidence except by leave of the court. Leave of the court to serve such a notice is not required.

11. On interlocutory applications and proceedings commenced by petition or originating notice of motion, a notice to cross-examine may only be served with leave of the court. The court may order the attendance for cross-examination of the person making the affidavit (see O.40, r.1 of the Rules of the Superior Courts). There is no absolute right to cross-examine a deponent even if the relief sought is the dismissal of the proceedings. It was emphasised by Denham J., in *Bula Limited v. Crowley (No. 4)* [2003] 2 I.R. 430 at p. 459, that a trial judge has a discretion in relation to such an application and in general leave will only be granted if there is a conflict of fact upon the affidavits that it is necessary to resolve in order to determine the proceedings.

12. In *Irish Bank Resolution Corporation Limited (In Special Liquidation) v. Moran* [2013] IEHC 295, Kelly J. stated that the party seeking the order directing cross-examination of a deponent must:-

> *"demonstrate (1) the probable presence of some conflict on the affidavits relevant to the issue to be determined and (2) that such issue cannot be justly decided in the absence of cross examination."*

13. It is not necessary that the conflict be one of fact. This is clear from *The Director of Corporate Enforcement v. Seymour* [2006] IEHC 369. In that case there was no conflict of fact but there was a significant conflict on the conclusions to be drawn from those facts. O'Donovan J. stated:-

> *"while it seems to me that, where it is debateable as to whether or not the cross examination of a deponent on his or her affidavit is either necessary or desirable, the court should tend towards permitting the cross examination, 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 cross examination if the court considers that it is necessary for the purpose of disposing of the issues which the court has to determine."*

He concluded by saying as follows:-

> *"The function of cross examination is to cast doubt upon the veracity, accuracy or reliability of evidence given by a witness. In this case, the issue to be determined by the court is, as laid down by Kelly J. in the course of an unreported judgment which he delivered on the 26th October, 2005, in a case of the Director of Corporate Enforcement v. D'Arcy the commercial probity of the respondent's conduct. In that regard, s. 22(b) of the Companies Act, 1990, provides that the report of an inspector appointed under s. 8 of the Act shall be evidence of the opinion of the inspector and, accordingly, it seems to me that, if that opinion is challenged, notwithstanding that the facts upon which the opinion is based are not disputed, the court is entitled to know the mindset of the challenger and, in my view, the only way that that can be ascertained is by confronting the challenger under cross examination. In that regard, it seems to me that the volume of affidavit material sworn by the respondent in defence of the applicant's claim herein, incorporating, as it does, a total rejection of the opinions and conclusions of the inspectors is, in itself, a justification for testing by cross examination of the respondent the reliability and, indeed, reasonableness of the contrary views expressed by him. In my view, in the absence of such a cross examination, it would be difficult, if not impossible, for the trial judge to come to a reasoned conclusion with regard the commercial probity of the respondent and, accordingly, it seems to me that the interests of justice require that such a cross examination be conducted."*

14. In *Irish Bank Resolution Corporation Ltd. & Ors v. Quinn & Ors* [2012] IEHC 510, Kelly J. dealt with an application to cross-examine a number of the defendants in respect of affidavits sworn by them pursuant to orders to disclose all assets held in Ireland or worldwide in which they had any direct or indirect legal and/or beneficial and/or other interests. The orders were made pursuant to a Mareva injunction directing the defendants not to reduce their assets below €50 million without leave of the Court. It was alleged that there had been significant breaches of the order. The Court held that the plaintiffs had demonstrated sufficient grounds for making the order by reference to the material contained in the defendants' disclosure affidavits when examined in the light of complaints as to non-disclosure made in the affidavit grounding the application. It was in this context that Kelly J. stated that he was satisfied that cross-examination was necessary to "*fill the vacuum*". I do not believe that this judgment is authority for the general proposition that a deponent may be cross-examined to deal with factual matters which were not covered in his or her affidavit to fill "*an information deficit*". This judgment relates to an affidavit of disclosure of assets and an alleged failure to comply with the order to produce a comprehensive affidavit and should be read in that light.

Approach of the Court

15. In applying these principles, it seems to me that the Court must first identify the issues that fall to be determined on the Motion in respect of which the affidavits were filed. It is then necessary to consider any matters in the deponents' affidavits which have

been identified as giving rise to the need for cross-examination. These must then be assessed in light of the issues that must be determined on the Motion. If there is a conflict on the affidavits in relation to an issue that needs to be determined, can this issue be justly decided in the absence of cross-examination?

Matters which do not require to be determined on the Motion to dismiss
16. As set out above, the application is for an order striking out and/or dismissing the plaintiff's claim pursuant to O.40, r.1 and/or the inherent jurisdiction of the Court on the grounds of *forum* non conveniens and abuse of process.

17. Certain matters raised in the affidavits are no longer required to be determined. A significant dispute turned upon the worldwide stay on the institution of proceedings for the benefit of creditors of the estate of the Bankrupt by a party other than the Chapter 7 Trustee and whether the plaintiff breached the order by instituting these proceedings. Since this Motion was part heard, Judge Shiff in the U.S. Bankruptcy Court has delivered a judgment and order stating that these proceedings do not breach the terms of the U.S. Bankruptcy Court order imposing a worldwide stay on litigation. He ordered that the automatic stay is inapplicable to these proceedings and that, to the extent necessary, the automatic stay was annulled, *nunc pro* tunc to 4th September, 2014, so that no action or event taken in these proceedings or in support of these proceedings (including actions in the Republic of South Africa) violates, violated or is voided by the automatic stay. Therefore it is not necessary for the Court to consider this issue or therefore, to cross-examine Mr. Miltenberger upon his views on this issue.

18. It is not necessary to deal with any of the issues relating to the distribution of the assets in the estate of the Bankrupt or the difficulties which may arise in that regard where the Bankrupt has been adjudged bankrupt in both the United States and in Ireland and where the Chapter 7 Trustee and the Official Assignee are each gathering in assets of the estate and administering the estate. The defendant is not a creditor of the Bankrupt and as such has no *locus standi* to raise issues relating to these matters. They have no application or relevance to her or her proceedings. So it will not be necessary to cross-examine Mr. Miltenberger on the agreement reached between the Chapter 7 Trustee and the plaintiff in relation to the distribution of the fruits of their asset gathering efforts.

Matters upon which Mr. Miltenberger may not be cross-examined
19. In *IBRC v. Moran,* the defendant applied to cross-examine a special liquidator of the plaintiff in the context of an application for security for costs. One of the points raised was the possibility that the Minister for Finance might dissolve the plaintiff before the completion of the proceedings and thus there might be no monies available to meet the costs of the defendant if he were to succeed in the proceedings. In opposing the application, counsel for the plaintiff argued that the ultimate decision in relation to the dissolution of the company resided not with the Liquidator but with the Minister. Kelly J. agreed and on that basis held that cross-examination of the Liquidator as to what the Ministerial intent may be would be futile. Applying this reasoning to this case, it follows that Mr. Miltenberger cannot be cross-examined about possible future decisions of the Chapter 7 Trustee in relation to the administration of the estate or the conduct of litigation, still less about possible future decisions of the U.S. Bankruptcy Court or U.S. Federal Court in relation to pending litigation.

20. As I have stated above, *IBRC v. Moran* is not authority for the general proposition that a deponent may be cross-examined to fill the information deficit in the deponent's evidence. The circumstances which justified the cross-examination in that case do not arise here. Where Mr. Miltenberger has simply not addressed many of the issues canvassed by the defendant's counsel as areas or topics for cross-examination (though not by the defendant's American lawyer, Mr. Ostrow), there is no conflict on the affidavits which requires to be resolved. This is not a plenary procedure. The Court does not direct the evidence a party sets before it, absent a specific direction to address particular issues or matters which does not arise in this case. This Motion will proceed upon the affidavits the parties have chosen to file. If there is no evidence placed before the Court in relation to certain matters, this may have certain consequences. However, it does not mean that the Court should authorise the cross-examination of a deponent on matters not addressed at all and therefore in respect of which there is no conflicting testimony which the Court must attempt to resolve. Accordingly, I conclude that there is no basis for directing the cross-examination of Mr. Miltenberger in respect of matters he has not addressed or considered at all in his affidavits.

Issues for determination on the Motion
21. In dealing with a motion to dismiss proceedings on the basis of the principle of *forum non conveniens,* the court will first need to consider with which forum the action has the most real and substantial connection. In this case, is a trial in Connecticut or New York more suitable then Ireland? In answering this question, the court will consider issues such as where the witnesses, the assets in issue and the causes of action are largely based and the law applicable to the transactions in issue. The defendant's case on the need for cross-examination may be distilled to the following points:

> (i) Does the plaintiff have title to bring these proceedings or does the Chapter 7 Trustee have the sole title to sue in respect of the claims?
>
> (ii) Problems created by the duplication of the claims in these proceedings and in the two proceedings instituted in the United States, Adversary Proceedings 15-5020 (which has been dismissed by consent of the defendant) and Adversary Proceedings 15-5019.
>
> (iii) Is there a risk of conflicting decisions on the same issues of fact or claims?
>
> (iv) Could the Chapter 7 Trustee disclaim the outcome of these proceedings if they are unfavourable to the plaintiff?
>
> (v) Might he be duty bound so to do?
>
> (vi) Would any court in the U.S. recognise and uphold any determination of the courts of Ireland on the claims and issues in these proceedings?
>
> (vii) Is there a possibility that Adversary Proceedings 15-5020, which have been dismissed, might be revived if the outcome of these proceedings is unfavourable to the plaintiff and, by implication, to the Chapter 7 Trustee?
>
> (viii) General unfairness in relation to the expense of dealing with two sets of proceedings in two countries dealing with the same matters.
>
> (ix) The burden and expense of discovery associated with the two parallel sets of proceedings.

Point (i)
22. The defence submits that as a matter of U.S. bankruptcy law the estate of the Bankrupt vested in the Chapter 7 Trustee and this includes the right to bring proceedings in respect of the estate of the Bankrupt. The adjudication of the Bankrupt in this jurisdiction was subsequent to the appointed of the Chapter 7 Trustee. It is argued that the right to bring these proceedings is vested solely in the Chapter 7 Trustee and that therefore the plaintiff has no title to bring these proceedings. She submits that this matter is in dispute between the parties and which will require to be determined as a matter of fact at the hearing of the Motion. Thus, Mr. Miltenberger will require to be cross-examined in relation to this matter.

23. I do not accept that this is a matter of fact in dispute in these proceedings. Mr. Ostrow, on behalf of the defendant, does not go so far as to say that the sole title to bring the proceedings vested in the Chapter 7 Trustee, though he confirms that he has power to bring the proceedings in the United States in the circumstances. The Chapter 7 Trustee is aware of, and has supported, the plaintiff in the institution and conduct of the proceedings. He applied for the dismissal of Adversary Proceedings 15-5020. The Chapter 7 Trustee has not asserted that he solely has the right to bring these proceedings. Furthermore, it is clear that Judge Shiff in the U.S. Bankruptcy Court has recognised the right of the plaintiff to institute and to maintain these proceedings on behalf of the estate of the Bankrupt. To hold otherwise would be to make a nonsense of his order of 25th November, 2015. I do not believe that it is necessary to cross-examine Mr. Miltenberger in relation to this matter in order to justly determine the issues between the parties on the Motion to dismiss.

Points (iv), (v), (vii)
24. These relate to possible decisions the Chapter 7 Trustee may take in the future in the light of the plaintiff failing in whole or in part in these proceedings. These are quintessentially matters falling outside the scope of Mr. Miltenberger's expertise on U.S. bankruptcy law and procedure. As in *IBRC v. Moran*, cross-examining Mr. Miltenberger on the future intentions of Chapter 7 Trustee would be futile.

Points (ii), (iii), (vi)
25. On behalf of the plaintiff, Mr. Miltenberger states that the plaintiff and the Chapter 7 Trustee are seeking to coordinate their actions and avoid duplication. In particular they wish to reduce the potential for inconsistent judgments and to avoid the potential for duplicate recoveries. To that end, the Chapter 7 Trustee intends to amend his complaint by removing certain counts seeking to recover assets located in Ireland and/or that are being pursued by the Official Assignee. It is the intention of the Chapter 7 Trustee and the Official Assignee that the Official Assignee should seek the recovery of Irish assets (and the South African assets) through litigation conducted in Ireland and the Chapter 7 Trustee should seek to recover U.S. assets through litigation conducted in the United States. As part of this cooperation the Chapter 7 Trustee sought an order dismissing Adversary Proceedings 15-5020 shortly after the plaintiff commenced these proceedings. The defendant consented to that order.

26. Mr. Miltenberger points out that the issues related to the venue of the proceedings and the ultimate trial proceedings are "*not ripe for resolution*". He notes that the defendant is seeking to dismiss many of the claims that the Chapter 7 Trustee commenced in the United States and the Chapter 7 Trustee has been revising his proceedings to reduce the overlap between his Adversary Proceedings 15-5019 and these proceedings. He states that because of the incomplete financial information available to the Chapter 7 Trustee, his revised complaint will most likely contain some claims that the defendant believes are overlapping but he cannot determine however whether the claims or defences to the claims do in fact overlap without the benefit of discovery.

27. Mr. Miltenberger indicates the approach that the Chapter 7 Trustee and Official Assignee intend to take in relation to discovery. They intend trying to reach agreement with the defendant in relation to their proposals and an order from the U.S. Bankruptcy Court in relation to their proposals. He states that once the parties have engaged in this proposed discovery, the Chapter 7 Trustee and the plaintiff will seek to achieve a consensual resolution of the proper venue for any of the claims that still remain and a consensual process for trying all of the claims in the most efficient and expeditious manner. He points out that this may include joint hearings, the use of collateral estoppel or *res judicata* of facts found in one forum on the proceedings in the other, or having one forum adopt, in whole or in part, the proceedings held in the other. He points out that the Chapter 7 Trustee is agreeable to discussing all of these options and others but he is not in a position to determine what process is in the best interest of creditors without obtaining disclosures from the plaintiff and third parties.

28. In the light of this evidence, it is difficult to understand what purpose cross-examination of Mr. Miltenberger would serve. As stated above, he cannot be cross-examined in relation to the intention of the Chapter 7 Trustee or the Official Assignee. Nonetheless he has indicated that it is their intention to coordinate their actions so as to avoid duplication in relation to litigation. It is clear that the efforts in this regard are ongoing but not yet concluded. It is also clear that the outcome is determined to some extent upon the conduct of the plaintiff. Therefore, while superficially, it would be attractive to cross-examine Mr. Miltenberger in relation to the overlap between these proceedings and Adversary Proceedings 15-5019, in truth it would not actually serve to assist in resolving matters which will fall to be determined by this Court on the hearing of the Motion to dismiss these proceedings.

29. Insofar as the strategy proposed on behalf of the Chapter 7 Trustee and the Official Assignee may require the consent or approval of the U.S. Bankruptcy Court, it is noteworthy that the transcripts of the hearings before Judge Shiff indicate that he does not believe that the existence of these proceedings amounts to an abuse of process. He is prepared to fashion orders and procedures to facilitate the conduct of the litigation in the two jurisdictions and, it would appear, does not believe that the conduct of the litigation gives rise to insuperable difficulties which cannot be resolved by agreements or orders along the lines of those indicated by Mr. Miltenberger whether by agreement or otherwise.

30. Of course, as I have already pointed out, it would be futile to cross-examine Mr. Miltenberger in relation to the possible arrangements, procedures or orders which might be followed at some future date in the U.S. Bankruptcy Court or indeed the U.S. Federal Court.

Points (viii), (ix)
31. Under these headings the plaintiff seeks to cross-examine Mr. Miltenberger in relation to the general unfairness in relation to the expense of dealing with two sets of proceedings in two countries dealing with the same matters and the burden and expense of discovery associated with two parallel sets of proceedings. It is not necessary to cross-examine Mr. Miltenberger in relation to these two issues. Mr. Miltenberger has set out proposals which would ease the burden and expense of discovery if all parties were to agree that a unified discovery could be used in these proceedings and in Adversary Proceedings 15-5019. He points out that there are matters to be resolved, including the use of discovery from one set of proceedings in the other. Essentially, his affidavits deal with possible procedural solutions to the difficulties resulting from the existence of these proceedings and Adversary Proceedings 15-5019. As such, cross-examination on his proposals will not help to resolve a conflict which needs to be determined at the hearing of the Motion.

Conclusion

32. For the reasons set out above, cross-examination of Mr. Miltenberger on his two affidavits sworn in relation to the defendant's Motion would not assist in the Court's determination of that Motion and is not necessary for a just decision on the Motion. Therefore, I refuse the defendant the relief sought in the Notice of Motion. As Mr. Miltenberger will not be subject to cross-examination, the plaintiff's application to cross-examine Mr. Ostrow does not arise.