Neutral Citation [2016] IEHC 690

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 the 27th day of July, 2016

Introduction

1. The plaintiff is the Official Assignee in bankruptcy in the estate of Mr. Sean Dunne. Mr. Dunne petitioned for a Chapter 7 bankruptcy in the United States on the 29th March, 2013. He was subsequently adjudicated a bankrupt and Mr. Richard Coan was appointed his trustee in bankruptcy ("the Trustee"). Ulster Bank Ltd., a major creditor of Mr. Dunne, petitioned for his bankruptcy in Ireland on 12th February, 2013. He was adjudicated a bankrupt in Ireland on 29th July, 2013. Mr. Dunne applied to show cause and to have his adjudication as a bankrupt in Ireland set aside. This was refused by the High Court on the 6th December, 2013, and Mr Dunne appealed to the Supreme Court. His appeal was refused by the Supreme Court on 15th May, 2015.

2. Thus there are two bankruptcies running in tandem in respect of Mr. Dunne. There is considerable litigation involving his estates on both sides of the Atlantic and beyond.

3. The defendant is the wife of Mr. Dunne. She is sued in a number of jurisdictions in relation to transactions involving the transfer of assets owned directly or indirectly by Mr. Dunne to her (and to other parties). There is an overlap between the claims in these proceedings and the claims brought by the Trustee and claims brought by creditors of Mr. Dunne in the United States.

4. The defendant has brought this application to dismiss these proceedings on the grounds of forum non conveniens or, in the alternative, on the grounds that they constitute an abuse of process. For the reasons set out below I refuse the application.

The agreements between Mr. Dunne and the defendant

5. Mr. Dunne and the defendant are Irish citizens and up until 2010 they were resident in Ireland. Prior to his bankruptcy, Mr. Dunne was a very major property developer in Ireland and in other jurisdictions. In these proceedings the plaintiff seeks to challenge the validity of two agreements allegedly entered into between Mr. Dunne and the defendant and his subsequent transfer of assets to the defendant to the value of approximately €100 million. The Irish proceedings largely, though by no means exclusively, concern his interest in a property in South Africa called the Lagoon Beach Hotel, Lagoon Gate Drive, Milnerton, Cape Town, South Africa.

6. The first alleged agreement is dated 23rd March, 2005 and it provided that the defendant was to receive 70% of the profits accruing from the sale of various properties including the Lagoon Beach Hotel. In relation to the Lagoon Beach Hotel the agreement stated that the hotel was owned by Mountbrook Homes Ltd. (subsequently renamed Mavior) and that Mr. Dunne had loaned Mountbrook Homes Ltd. approximately €4 million. The agreement transferred the debt owing to Mr. Dunne to the defendant.

7. The second agreement was dated the 15th February, 2008. It recited as follows:

> *"As the sale of item 3, Lagoon Beach Hotel, Cape Town, SA has not been possible I hereby irrevocably transfer to my wife Gayle Dunne (Killilea) my full interest in this property with immediate effect. Any and all tax issues arising in the future sale of this property are also hereby transferred to my wife Gayle Dunne (Killilea).*
>
> *I also hereby transfer with immediate effect the full book value as calculated as of today's date all loans made by me to Mountbrook Homes Ltd., and all of its associated companies and subsidiaries."*

8. The plaintiff seeks to set aside the transactions pursuant both to s. 59 of the Bankruptcy Act 1988 and s. 10 of the Irish Statute of Fraudulent Conveyances 1634 (10 Chas.1 Sess.2, c.3). Specifically the proceedings concern the transfer of directors' loans to Mavior, the transfer of shares in Mavior, the Lagoon Beach Hotel and various properties in Ireland.

Ownership of the Lagoon Beach Hotel

9. The ownership of the assets is complex. The Lagoon Beach Hotel is owned by Lagoon Beach Hotel (Proprietary) Ltd. ("LBHPL") which is a company registered and domiciled in the Republic of South Africa since 10th February, 2003. The sole shareholder in LBHPL was Mountbrook Homes Ltd., an Irish registered company. On 22nd March, 2011 Mountbrook Homes Ltd. changed its name to Mavior. In 2009 it became an unLtd. company. The defendant became a director of Mavior on 29th March, 2011.

10. On 28th October, 2008 the shares held directly by Mr. Dunne (either personally or, allegedly, in trust for his children) in Mavior were transferred to two companies, Zabingo Ltd. which held 499 shares and Zintkala Ltd. which held 1 share. Those shares constitute 50% of the shares in the company. The balance of 50% of the shares in Mavior was owned by a company called Sispara Ltd. The Sispara Ltd. shareholding was transferred to Zabingo Ltd. also in 2008. All three companies were registered in the Isle of Man and all three companies were dissolved in the course of 2012 and 2013.

11. On 29th June, 2012 the shares in LBHPL were transferred by Mavior to a Mauritian company called Castorena Ltd. and since

November, 2013 the shares have been transferred to another South African company called Volcren Management Ltd. which is ultimately owned by the defendant.

Proceedings in South Africa
12. The plaintiff obtained an order from the High Court seeking the recognition of the Irish bankruptcy of Mr. Dunne by the High Court of South Africa (Western Cape division) and the recognition of the High Court of Ireland and the Official Assignee in Bankruptcy as trustee and assignee of the estate of the Mr. Dunne. He also obtained liberty from the High Court, if recognised by the High Court of South Africa, to apply to that court for an anti-dissipation order in respect of the proceeds of sale of the Lagoon Beach Hotel and further ancillary reliefs. In the event the plaintiff obtained a final order from the High Court of South Africa against, *inter alia*, LBHPL restraining it from disposing of the Lagoon Beach Hotel. The South African proceedings are solely asset preservation measures addressed to South African based respondents. The substantive proceedings in relation to the actual transactions are the subject of these proceedings.

NALM Proceedings in the United States of America
13. Three sets of proceedings brought in the United States of America are relevant to this application. The first is a case brought by *National Asset Loan Management Ltd. (NALM) v. Sean Dunne, Gayle Killilea Dunne, Mountbrook USA, LLC, Molly Blossom LLC, Barclay Beattie & Browne, LLC, Whal, LLC, Thomas J. Heagney, Esq, John F. Slane Jr. Esq. and Heagney, Lennon & Slane LLP* case number 13-50484 (AHWS). These proceedings were instituted prior to the commencement of Mr. Dunne's bankruptcy in the United States and in Ireland. NALM, a major creditor of Mr. Dunne, was seeking to set aside certain transfers of property allegedly effected by him on the basis that they amounted to fraudulent transfers carried out with a view to defeating his creditors. It also sought to recover assets from the defendants on the basis of unjust enrichment. The Trustee has intervened in those proceedings as an additional plaintiff and NALM continues to have an involvement in the proceedings in respect of non monetary reliefs that are not relevant to the Trustee. In addition the Trustee has sought the removal of the *NALM v. Dunne* proceedings to the federal District Court.

Adversary proceedings 15-5020 and 15-5019
14. On 27th March, 2015 the Trustee commenced two adversary proceedings against the defendant just before the expiration of the time allowed under the Statute of Limitations for commencing the adversary proceedings and prior to the Supreme Court judgment on Mr Dunne's appeal. In one of the proceedings, adversary proceeding 15-5020, the Trustee sought to avoid the transfers of the Mavior debt and the Mavior shares to the defendant. This was a protective writ issued to stop time running as it was the intention of the Trustee and the Official Assignee that these claims would be prosecuted by the Official assignee in Ireland, assuming Mr Dunne's appeal was rejected. In the event that the Irish bankruptcy did not proceed, it would be necessary for the Trustee to pursue these actions himself.

15. The Trustee and the Official Assignee agree that there should be a division of labour between them in relation to realising the assets of the estate of Mr. Dunne. In particular, both the Trustee and the Official Assignee believe that it would be more beneficial for the creditors of the estate of Mr. Dunne if the Official Assignee –rather than the Trustee - pursues the claims the subject of these proceedings. Mr. Timothy Miltenberger, attorney for the Trustee, averred in his affidavit of 28th May, 2015 that:

> *"The Trustee commenced [adversary proceeding 15-5020] to protect the rights of creditors in the unlikely event that Mr. Dunne's adjudication as a bankrupt was overturned. Less than a few days after the Supreme Court of Ireland affirmed Mr. Dunne's adjudication as a bankrupt, the Trustee advised Judge Shiff of the United States Bankruptcy Court that Adversary Proceeding No. 15-5020 would be dismissed. On May 28, 2015, Adversary Proceeding 15-5020 was dismissed."*

16. In the second adversary proceeding 15-5019, *Richard M. Coan v. Gayle Killilea, John Dunne, Mountbrook USA, LLC, Molly Blossom LLC, Barclay Beattie & Brown, LLC, Whal, LLC, SRQ, LLC, TJD21, LLC, 151 Milbank, LLC, Thomas J. Heagney, Esq, John F. Slane Jr. Esq. and Heagney, Lennon & Slane LLP*, the Trustee seeks:

> (i) a declaration that assets titled in the name of Mrs. Killilea-Dunne are actually owned by Mr. Dunne;
>
> (ii) to impress certain assets of Mrs. Killilea-Dunne with a constructive trust on the basis that Mrs. Killilea-Dunne was unjustly enriched by transfers to her by Mr. Dunne, and/or;
>
> (iii) to avoid certain transfers as fraudulent.

17. The assets at issue in adversary proceedings 15-5019 are located in both the United States and elsewhere. Some are in Ireland. The Trustee says that the assets were fraudulently transferred to the defendant and that Mr. Dunne has concealed in the name of various persons and entities ostensibly owned, directly and indirectly by the defendant assets which Mr. Dunne controls and benefits from. He seeks to avoid the fraudulent transfers and to recover the assets or the proceeds of the transferred assets for the benefit of the bankruptcy estate. In addition he seeks to impose a constructive trust on the assets that he alleges Mr. Dunne controls, directs and benefits from despite the fact that the assets are nominally held by the defendant or other third parties.

18. Adversary proceeding 15-5020 had five counts relating to the avoidance of the transfer of the Mountbrook Ireland directors' loans and the avoidance of the transfer of the Mountbrook Ireland shares. Adversary proceeding 15-5019 contains 36 counts. No specific count in relation to the Mountbrook Ireland directors' loans or the Mountbrook Ireland shares is sought in adversary proceeding 15-5019. Count XXX provides:

> *"The Trustee repeats and re-alleges the allegations set forth in the introduction and paras. 1 through 144, inclusive, as is fully set forth herein[.]*
>
> *As a result of Dunne's actual or constructive fraudulent conduct and/or wrongful transfer and concealment of his interests in real and personal property, Killilea holds title, directly and indirectly, to property,* **including but not limited to** *TJD 21, LLC, 151 Milbank, LLC, 22 Stillman Lane, WHAL, LLC, the proceeds of the sale of the Swiss Condominiums, Mountbrook USA,* **Mavior Ireland, the Beara Property loans, the IGB Lands and other monies and assets."**
> [Emphasis added]

In the prayer for relief the Trustee seeks:

> *"As to Count XXX, a constructive trust in favour of the Bankruptcy Estate of Sean Dunne over and against all assets fraudulently or wrongfully transferred by Dunne, as well as over the proceeds of those assets."*

19. In relation to these proceedings, Mr. Miltenberger averred at paras. 27-28 of his affidavit of 28th May, 2015:-

> *"While Mr. Dunne's Irish adjudication as a bankrupt was subject to appeal, this required the Trustee to bring any and all claims available to him prior to the running of his statute of limitation even if the claim duplicated, wholly or partially, a claim commenced or under investigation by the Official Assignee.*
>
> *28. Shortly after the complaint initiating Adversary Proceeding 15-5019 was filed, the adjudication of Mr. Dunne as a bankrupt in Ireland was affirmed by the Supreme Court of Ireland. Previously and thereafter, the Trustee and the Official Assignee, though counsel, conferred about how they would co-operate in their pursuit of their claims against Mrs. Killilea-Dunne and others. These conversations are ongoing and are focused on the prevention of a duplication of effort by the two bankruptcy administrators, the reduction of the potential for inconsistent judgments, and the avoidance of the potential for duplicate recoveries."*

20. The defendant argues that these proceedings should be dismissed and the Trustee may pursue the issues raised in these proceedings in his existing proceedings. These proceedings, she alleges, offend the rule of *forum non conveniens*.

The law of forum non conveniens

21. The law of *forum non conveniens* is a longstanding rule of the conflict of laws. The relevant test was considered by Dunne J. in *Abama & Ors v. Gama Construction Ireland Ltd. & Anor* [2001] IEHC 308. This case concerned a claim by Turkish workers in relation to their employment in Ireland. Dunne J. considered the question whether Turkey was the appropriate jurisdiction as opposed to Ireland. Dunne J. held as follows:

> *"The test in respect of forum non conveniens could be summed up in the phrase, the forum "with which the action has the most real and substantial connection". I have previously set out in detail the matters relied by the defendants to demonstrate that Turkey is the most appropriate forum. Of those, the fact that many witnesses, including the plaintiffs, will have to be brought to this jurisdiction to give evidence is a significant factor. The case will involve many witnesses who will have to give evidence with the assistance of interpreters. On the other hand, the plaintiffs have relied on the fact that the proper law applicable to any proceedings is Irish law. The issues involve the enforcement of REAs applicable to workers in this jurisdiction. The events at issue in the proceedings concern the involvement of the plaintiffs with the defendants on work in projects in this jurisdiction. There are issues relating to the movement from this jurisdiction of moneys apparently due to workers. There are issues of Irish public policy to be considered."*

In her decision she held that a primary consideration was that the matter fell to be determined under Irish law and therefore this outweighed the undoubted difficulty in bringing parties and witnesses to the jurisdiction and coping with the inevitable language difficulties.

22. The onus rests on the party alleging that Ireland is a *forum non conveniens* to demonstrate that there is a more appropriate forum elsewhere. Hardiman J. stated in *McCarthy v. Pillay* [2003] 1 I.R. 592 at pp. 601-602:-

> *"On this aspect, there is agreement that an onus rests on the third party of demonstrating that there is a distinctly more appropriate forum outside the jurisdiction, i.e. in this case that the courts of New York are a distinctly more appropriate forum for the resolution of the issue between the defendant and the third party. If it does this, then the onus passes to the defendants to demonstrate that justice requires that a stay should be refused."*

The defendant's case in relation to forum non conveniens

23. The motion was originally advanced upon three grounds:

> i. The proceedings violated the order of Judge Shiff in the U.S. Bankruptcy Court imposing a worldwide stay on litigation relating to Mr. Dunne's estate.
>
> ii. Adverse proceeding 15-5020 duplicates the claims in these proceedings.
>
> iii. Problems and prejudice said to arise from the maintenance of these proceedings and adverse proceedings 15-5019.

The first point fell away prior to the hearing of the motion. While a motion to cross examine the American attorneys on their affidavits filed in this motion was part heard and adjourned, the Trustee brought an application before Judge Shiff to assist this Court in dealing with this point raised by the defendant. In a judgment dated 25th November, 2015 Judge Shiff ruled that these proceedings do not violate this order. Accordingly this is no longer a ground for the relief sought.

24. The Supreme Court affirmed Mr Dunne's bankruptcy on the 15th May, 2015. The Trustee and the plaintiff agreed to divide the recovery effort in respect of the estates and agreed that the plaintiff should pursue the defendant in respect of the claims comprised in adversary proceeding 15-5020. He then instituted these proceedings the following September in this jurisdiction and the Trustee, working in conjunction with the plaintiff, applied to dismiss adversary proceeding 15-5020. The defendant consented to the dismissal of the proceeding. Counsel for the defendant accepted that the dismissal of adversary proceedings 15-5020 "*removes the most flagrant and obviously duplicative proceedings*." His arguments were advanced on the basis of adversary proceeding 15-5019. The defendant n longer relied upon the original second ground at the hearing of the motion.

25. The case ultimately advanced by the defendant was confined to the third point. This was in turn broken down to (i) the *locus standi* of the plaintiff in circumstances where the estate of the Mr Dunne vested in the Trustee pursuant to the Chapter 7 proceedings and therefore, according to the defendant, no estate vested in the plaintiff and therefore he had no title to sue, (ii) Duplication of issues in these proceedings and adversary proceeding 15-5019 and (iii) a variety of issues contributing to the alleged unfairness of her defending two suits in two jurisdictions.

26. On 9th November, 2015, the Supreme Court gave Judgment in *A.A. v. B.A.* [2015] IESC 102. In light of the decision, counsel for the defendant accepted that this Court could not rule on the issue of the plaintiff's *locus standi* as the Trustee was not before the Court. Accordingly, this argument could no longer be advanced as a ground for the relief sought.

27. The defendant and her American attorney swore affidavits to support her case. In paras. 15 and 16 of her grounding affidavit sworn on 4th May 2015 the defendant states:-

> *"I say that having to defend identical proceedings in two different jurisdictions is clearly an abuse of process and oppressive to me. I cannot be expected to fund my defence in almost identical cases and I am also being put in jeopardy of having to suffer conflicting Judicial decisions in two different jurisdictions arising from the duplication of the issues of both fact and law to be determined in the two cases….*
>
> *16. The US proceedings are broader in scope when compared to the Irish proceedings and I say that in those circumstances the obvious jurisdiction for the resolution of those issues should be the United States. If the Irish proceedings continue to trial, the US proceedings will also require to be tried in light of the broader scope of the US proceedings. These will mean two trials will have to be held on substantially the same issues of the property I allegedly received from the Bankrupt. As the US Proceedings encompass all issues covered by the Irish proceedings, if the Irish proceedings are struck out, just one trial will be necessary and one judge can determine the relevant issues. If these proceedings are not struck out then the possibility of differing decisions of different Courts is very real."*

28. Mr. Alec Ostrow, the defendant's American attorney, accepts at para. 15 of his affidavit of 11th June, 2015, that Irish law is applicable law in relation to those proceedings. He says that there is no reason why the Trustee in bankruptcy in the US cannot pursue all viable fraudulent transfer claims against the defendant in the US Bankruptcy Court for the benefit of the creditors. At paras. 16-18 of his affidavit he states:-

> *"The US is the superior forum for other reasons. All defendants in fraudulent transfer actions by the Official Assignee and Trustee are present in the US. They are not all present in Ireland. The principal Irish creditors, NAMA and Ulster Bank, which account for 95% of Sean Dunne's debt, have also appeared in the Bankruptcy Court. Moreover, if the Irish proceedings result in a judgment first, and the judgment is adverse to Gayle Killilea, the Trustee will likely seek to have the facts necessarily determined by the Irish proceeding be binding in Gayle Killilea and any other US defendant in privity with her in Adversary Proceeding 15-5019. Moreover, if the Irish proceeding results in a judgment first, and the judgment is adverse to the Official Assignee, the Trustee will likely disclaim the result is binding on him….*
>
> *17. In the US, Gayle Killilea and the other defendants sued by the Trustee are entitled to a jury trial on the Trustee's fraudulent transfers claims because they have not submitted claims to be paid from Sean Dunne's US bankruptcy estate. …Moreover, this jury trial will take place in the federal district court, rather than in the Bankruptcy Court, because the defendants are entitled to have the dispositive judgment entered by a US court that exercises "the judicial power of the United States" under Article III of the US Constitution…*
>
> *18. Litigation in the US protects the rights of all parties through discovery (including both the production of documents and depositions by the parties and third-party witnesses), public proceedings and audio transcription of all proceedings. The court encourages settlements, and formal mediation procedures are available and their use can be compelled."*

29. In written and oral submissions counsel for the defendant argued that there should be one case in one jurisdiction and that it was impermissible to split what was really one case into two in two different jurisdictions. He relied upon the doctrine of modified universalism in insolvency cases. He relied upon the unfairness of facing two cases in two jurisdictions involving duplication of facts and issues. He said the process confronting the defendant amounted to an abuse of process and the proceedings should be dismissed by the application of the rule in *Hendersen v. Hendersen* by analogy. He said that it was fairer that the issues were tried in the United States as the Trustee might disclaim the result of the Irish proceedings if the result went against the plaintiff. In any event the issues would have to be litigated in adversary proceeding 15-5019 as there were defendants to those proceedings who were not party to these proceedings. Therefore they would not be bound by the outcome of these proceedings or any determinations of fact, such as the solvency of Mr Dunne at any particular date.

Submissions on the part of the plaintiff

30. In relation to the question of Ireland as a *forum conveniens*, the plaintiff submits that the fact that Irish law is the applicable law is of paramount importance. In addition, he emphasises the fact that the expert witnesses in respect of the solvency of Mr. Dunne at the various relevant dates will be Irish experts. Valuation evidence in relation to his assets at the crucial date(s) will have to be obtained from Irish valuers. The assets claimed are either Irish assets or the Lagoon Beach Hotel in South Africa, which was held ultimately through an Irish company. The transfers culminate in an Irish share transfer and the assignment of the Irish loans payable by Irish companies. He points to the fact that not a single one of the assets, loans, transactions, share transfers or assignments has any connection whatsoever with the United States. He points out that the only connection with the United States is that both the Bankrupt and the defendant went to the United States after the unprecedented economic turmoil of 2008 and the complete collapse of the Irish property market thereafter.

31. He says the defendant has failed to show that Ireland is not *a forum conveniens* as she is required to do and so the application fails. She has not shown that New York is a *forum conveniens* as she must do if she is to succeed. He emphasises the fact that the judge having charge of Mr Dunne's bankruptcy in Connecticut, Judge Shiff, endorses the pursuit of the claims the subject of these proceedings by the Official Assignee rather than by the Trustee, either pursuant to adversary proceeding 15-5020 or 15-5019. The Trustee's attorney, Mr Miltenberger, swore that the Trustee believes that the High Court is the most convenient forum for this litigation and that it is the intention of the Trustee to discontinue any claim which is being pursued in these proceedings which is also currently maintained in the adversary proceedings 15-5019. He will no longer pursue those claims against the defendant.

32. The plaintiff argues that the defendant has created the appearance of unfairness in order to advance this motion but she cannot have it both ways. She complains of unfairness, duplication and splitting of cases but she refuses to engage in any steps to seek to resolve or mitigate her concerns. If the Court decides that Ireland is a *forum conveniens* and that the defendant is not being subjected to any unfairness, then the question of duplication of issues/facts falls away and the difficulties identified are essentially either matters to be resolved by case management or unavoidable given the tangled nature of the claims, assets and transactions engaged in by Mr Dunne, the defendant, the multitude of corporate vehicles employed by them and the range of jurisdictions where they chose to operate. He says the continuance of the proceedings is not an abuse of process. The motion should be dismissed.

Decision

33. I am satisfied that the defendant has failed to satisfy the test in respect of *forum non conveniens* as set out in *Abama*. Ireland is the forum with the most real and substantial connection to the dispute the subject matter of these proceedings. Crucially, Irish law is the applicable law. Mr. Ostrow does not state that the U.S. Bankruptcy Court is a more appropriate forum than the High Court in Ireland. He states that:-

> *"US courts often apply the law of foreign countries where such law is the appropriate law to apply to a particular dispute".*

This is very far from saying that it is more appropriate that a U.S. court as opposed to an Irish court should apply Irish law.

34. While all the *defendants* in the fraudulent transfer actions by the Official Assignee and the Trustee may be present in the U.S., many of the other essential witnesses are not. The principal question will be the validity of the transactions between Mr. Dunne and the defendant. His solvency at the relevant dates will be central to this issue. That must be determined by reference to his assets and liabilities. His assets include many Irish companies and properties and thus his solvency will be determined by reference to the value of these assets at the critical time. The evidence will by no means be confined to the assets in dispute in the proceedings.

35. The defendant has averred that she resides between the U.S. and London. She has not identified witnesses, other than herself and Mr Dunne, who are not in the jurisdiction and who will have to travel to give evidence. She has not said she is not in a position to deal with a trial in the jurisdiction or that she will be prejudiced by the absence of any witness. The fact that Mr. Dunne's principal creditors have appeared in the U.S. Bankruptcy Court is neither here nor there. Both NAMA and Ulster Bank are based in Ireland and are perfectly capable of attending at any trial in this jurisdiction if they so wish. No party has suggested that they support the defendant's application.

36. It is said that in assessing whether Ireland is a *forum non conveniens*, I must look at the entirety of the case advanced against the defendant by the two administrators of Mr Dunne's estates. On this basis, it is said, the Court should not confine its assessment of the question by reference solely to the pleadings. No authority for this proposition was cited to the Ccourt and I cannot agree with the submission. Any assessment as to whether a particular action should be stayed on the grounds of *forum non conveniens* must be made solely by reference to that particular case. The Court cannot consider other litigation in other jurisdictions between the same parties (treating the plaintiff and the Trustee as the same party solely for the purpose of this argument) in judging this issue. There could be any number of valid reasons, either known or unknown to this Court, why multiple actions between the parties are brought in other jurisdictions. There may the property claims that can only properly be brought in particular courts. The parties may have agreed to submit a dispute to resolution by a particular court. The existence of multiple suits in different jurisdictions is not of itself a factor in assessing whether or not a particular jurisdiction is a *forum conveniens*.

37. The defendant argued that the principle of modified universalism required that there should be a unitary bankruptcy proceeding in the Court of the Bankrupt's domicile which receives worldwide recognition and it should apply universally to all of the Bankrupt's assets. On that basis these proceedings infringed this principle and therefore should not be countenanced.

38. This submission is based upon a misunderstanding or misconstruction of the principle. In *Rubin and Anor. v. Eurofinance SA and Ors*. [2010] 1 All E.R. (Comm) 81, Mr. Nicholas Strauss Q.C., sitting as a deputy judge of the Chancery Division of the High Court of England and Wales, stated at para. 62:-

> "*…the principle of universalism is directed at ensuring so far as possible a uniform and fair system for distributing the assets of an insolvent estate with assets in more than one jurisdiction as between those who have a claim to them.* **It has nothing whatsoever to do with how or in what jurisdiction a possible asset of the insolvent estate consisting of a claim against third parties is to be established."** (Emphasis added)

These are just such proceedings. Thus the principle is of no relevance to the issue in this case.

39. It is instructive to place the defendant's argument in favour of one plaintiff (the Trustee) in one case in one jurisdiction (the U.S. Federal District Court) in context. It is inconsistent with positions she has adopted in the past with rulings of Judge Shiff. The defendant and Mr Dunne filed a motion in the NAMA proceedings to dismiss the case on the basis that the courts in Connecticut lacked jurisdiction over the transfers alleged as they occurred in Switzerland between two Irish nationals domiciled in Switzerland. The inevitable result of success on this motion would be to multiply rather than reduce the number of suits concerning Mr. Dunne's estate and against the defendant.

40. Following the decision of the Supreme Court refusing Mr. Dunne's appeal and confirming the Irish bankruptcy, the Trustee indicated that he was withdrawing adversary proceedings 15-5020 *on the basis that the claims comprised in the proceeding were to be pursued by the Official Assignee in Ireland.* The defendant's attorney consented to an order dismissing the proceeding. No argument was made that the claims should be pursued in adversary proceeding 15-5019. No argument was made that there should be one case in one jurisdiction. It was not suggested that this amounted to an improper and unfair splitting of one case into two to the prejudice and detriment of the defendant.

41. At a pre-trial conference in adversary proceeding 15-5019 before Judge Shiff on 14th July, 2015, the defendant sought to bring these proceedings to an end by seeking an injunction in the U.S. Bankruptcy Court enjoining NAMA and Ulster Bank, the overwhelming majority of Mr. Dunne's creditors in value, from funding the Official Assignee in his maintenance of these proceedings. Judge Shiff was highly sceptical of an application to enjoin two non parties from funding another non-party in respect of litigation outside the United States and ultimately the defendant withdrew her application three weeks later.

42. At the hearing on 14th July, 2015, Mr. Ostrow, on behalf of the defendant, submitted that there should only be one forum. He said there should be one court and one case. Judge Shiff rejected the defendant's argument that there should only be one forum and he observed that suits in a number of jurisdictions was not uncommon. He also held that the argument that the proceedings should be brought in the United States where the estate was created first, rather than in Ireland was not really relevant. Its seems to me the fact that the Court which the defendant maintains should be the one forum to try all of the disputes concerning the alleged fraudulent transfers and unjust enrichment claims has already rejected the argument that there should be one case in one court is highly relevant. It supports my view that the issue as to whether the claims should be pursued through one or more proceedings is not one of principle, as implied by the submissions of the defendant, but is a question to be assessed in respect of the facts of each case.

43. The reality of the defendant's position is to be seen from the transcripts of the case conference of 15th July, 2015. The Trustee's counsel submitted to the court:

> *"She argues in her papers that there is something about the two pieces of litigation, one in Ireland and one in the U.S., that is burdensome or vexatious to her. I would like to note for the record that we have attempted to negotiate with Mrs. Killilea about three issues that we think would create expenses that the trustee would like to avoid.*
>
> *One is with regard to dropping causes of action from the trustee's adversary proceedings. We have offered to drop 10 of the counts of our complaint from our adversary proceeding so that they could be pursued by the OA in Ireland if he sees fit.*

However, Mrs. Killilea is seeking to have all of the OA's claims dismissed in Ireland and the quid pro quo for our dropping the case in the U.S. would be her agreement that it could proceed in Ireland. She has not agreed to do that. We've offered to have unified discovery so that no interrogatory would be asked twice. No witness would be deposed twice; that the discovery would be streamlined. Mrs. Killilea has not responded with a substantive counter proposal to our proposal to have unified discovery.

We've also offered to agree that if the Irish courts were to go to trial first, … that the Trustee would agree to be bound by the determinations of the High Court, with this Court's permission of course, if Mrs. Killilea would also agree to be bound so that we wouldn't be litigating the same factual issues. And we have not received any substantive response to that offer.

So to the extent that there is unnecessary burden it seems to be a burden that Mrs. Killilea is prepared to suffer if she can gain some litigation advantage by not reaching an agreement with the trustee or the OA on these matters. And we have reached agreement [with] the Official Assignee on all of that.

With regard to the overlap there is a chart on page 9 and 10 and 11 of Mrs. Killilea's brief. She talks about overlap in the 2005 and 2008 agreement in the U.S. and Ireland. Again, Your Honor, we've agreed that if the Irish Court would rule on those matters we won't litigate them again if she will not litigate them again. We've received no response to that offer.

On page 10 they talked about overlap with regard to Mountbrook Ireland shares and the transfer of Mountbrook loans. We have affirmative causes of action regarding those things in Adversary Proceeding 15-5020.

We dismissed that case because it overlapped with what the Official Assignee was doing. That case is gone. There are factual allegations in our complaint but there's no cause of action about any of those things.

The remaining things on her chart of overlap are between the Trustee's complaint and NAMA's state court complaint. We've sought to intervene in that action. All of those claims will be pursued by the trustee.

The only reason we didn't move to substitute the trustee as the party plaintiff for NAMA, and intervened instead, is because there are other claims, such as an accounting claim, which are not monetary claims that NAMA will continue to pursue.

So there is no duplication of effort between what the trustee is doing and what NAMA is doing. Those will all be pursued by the trustee.

In essence, Your Honor, we have tried to resolve all of these vexatious and burdensome issues, but we've had no co-operation from the defendant. They don't need to co-operate."

44. In response to these submissions the defendant's attorney was asked if she would agree that the result of the Irish proceedings would be binding on both sides in adversary proceeding 15-5019. Judge Shiff stated:-

"It seems to me that you're the one that's complaining about duplicity, and if you're true to what you're claiming you would be filling that very same suggestion with Mr. Miltenberger. You would be saying, 'We don't like this duplicity'.

It's costing my client money and inconvenience, and it's not proper, it shouldn't happen. And I would like you to agree with me that what happens on matters that are pending both in Ireland and here, for both sides, both us and you, Mr. Miltenberger, to agree on what happens there will be binding on both of us.

Consistent with your argument you will be the one who is pushing that argument. Instead you are saying, well, we'll wait and see what he does. But you are making the argument. … the point of the matter is, you're being inconsistent."

45. The Court invited the defendant's attorney to draft the proposal on the basis that she was the person concerned about duplicity. Mr. Ostrow on behalf of the defendant accepted the suggestion and said that he would confer with Irish counsel and "*we will put together a proposal that we will deliver to the counsel for the trustee.*" Later on he confirmed:

"I will draft the proposal with consultation from Irish counsel, and it will be conveyed so that it's applicable both to the trustee and to the Official Assignee."

Despite this undertaking to the Court, no proposal was put forward on behalf of the defendant. Her application for an injunction before Judge Shiff was withdrawn and shortly thereafter this motion was issued in lieu of any attempt to resolve issues said to be of concern to her.

46. On the 25th November, 2015, Judge Shiff gave judgment on the Trustee's motion s to whether these proceedings by the Official Assignee violated the worldwide stay on proceedings brought by anyone other than the Trustee in relation to the bankruptcy case. He noted that the Trustee has sought the continuation of the Irish proceedings to assist him in the liquidation of the estate's assets. The Trustee repeatedly expressed his support of the Irish litigation, arguing that it will benefit the creditors. He has been actively supporting the Irish litigation by working constructively and co-operatively with the Official Assignee. The judge noted:-

"It is noteworthy that on several occasions, Ms Killilea's counsel requested this Court to urge the parties to work towards an effective, efficient, and economical resolution of both this bankruptcy case and the Irish Bankruptcy Proceeding. MS Killilea has apparently abandoned her stated initiative as she now seeks to thwart the Trustee's efforts to achieve that objective." (Emphasis added).

In relation to the objection that the proceedings breached the worldwide stay he stated at pp. 13-14:-

"Ms. Killilea's attorney's argument that he is relying on bankruptcy law for his assertion that Trustee is required to get relief from the automatic stay is employing a tactic which is frustrating and delaying the efficient and "expeditious" administration of this case § 704(a)(1), and, consequently, the administration of the Irish Bankruptcy Proceeding.

…The Trustee has correctly concluded that it would be consistent with his statutory duties here to rely on the Official Assignee's attempt to pursue the two estates' shared properties. That symbiotic relationship is well- documented in the

> *record of this case. The Trustee and the Official Assignee are acting together and are, in essence, de facto co-administrators of each other, working for the same purpose. At the November 17, 2015 hearing on the instant motion for Order, NAMA's attorney characterized Ms. Killilea's position regarding the automatic stay as "absurd". That observation is appropriate. …*
>
> *…What the Trustee has done is yield the pursuit of property to the Official Assignee, rather than independently prosecute a duplicative and expensive action against Ms. Killilea. Moreover, having the Official Assignee prosecute his [Irish] litigation is consistent with the Court's [relief from stay] Order and the stated wishes of Ms. Killilea that the two estates be administered in a co-ordinated, efficient manner."*

Finally on p. 17 of the judgement he observed:

> *"…the Trustee appropriately yielded to the Official Assignee so that the Official Assignee could attempt to collect property and share with the Trustee any success achieved by the [Irish] litigation. … Finally, the Trustee has reasonably relied on the Official Assignee to pursue the [Irish] litigation by not pursuing that litigation himself and he persuasively argues that the [reliefs sought from the Court] would be helpful by thwarting any effort by Ms. Killilea to frustrate the administration of this case and the Irish Bankruptcy Proceeding."*

47. I am satisfied that the defendant has not discharged the burden on her of establishing that Ireland is not the case with the most real and substantial connection with the proceedings. There is no improper or artificial carving up of a single action. Much of the matters in respect of which she complains could be resolved if she was minded to explore the possibilities in the regard, but she in not.

48. Further, the defendant has failed to demonstrate that there is a "*distinctly more appropriate forum outside the jurisdiction*" as required in *McCarthy v. Pillay*. Many of the arguments advanced by the defendant on affidavit to support the idea that a trial in the United States is preferable to a trial in Ireland simply do not apply. It is unclear to me why the possibility that the defendant and the other defendants sued by the Trustee in the United States may be entitled to a jury trial renders the U.S. a superior forum to the High Court or why the fact that it may take place in the Federal District Court rather than the U.S.Bankruptcy Court is a factor establishing it as a *forum conveniens*. In Ireland, as in the United States, litigation protects the rights of all the parties through discovery, public proceedings and these proceedings have been the subject of a transcript shared with both sides. In Ireland, as in the United States, the court encourages settlements and formal mediation procedures are available. Therefore these arguments by Mr. Ostrow in no way established the fact that a trial in the Federal District Court is a *forum conveniens* to be preferred to a trial in this Court.

49. It is striking to note that the U.S. Bankruptcy Court having carriage of Mr. Dunne's bankruptcy and in particular adversary proceedings 15-5020 and 15-5019 has rejected the defendant's argument that there should be one case, in one forum and that should by the United States. Judge Shiff is quite clear that it is preferable that the two proceedings in two different jurisdictions be maintained. He accepts, as do I , that this course is in the best interests of Mr. Dunne's creditors and that the Trustee and the Official Assignee are co-operating and working together to avoid and avert, insofar as is possible, the scope for duplication, unnecessary expense or conflicting decisions between the two different courts.

50. Much of the defendant's argument was based on the alleged unfairness in forcing her to defend the same issues twice in two different proceedings and the risk of conflicting decisions from different courts. This is a matter which should be avoided or minimised as far as possible. The defendant has done nothing to assist herself in this regard. Her attorney undertook to the U.S. Bankruptcy Court that she would present a proposal (in response to the proposal of the Trustee quoted above). She presented no proposal at all. She has not agreed to be bound by the outcome of these proceedings on the basis that the Trustee also will agree to be bound by the outcome. Her response was to issue this motion and to argue that the duplication as it currently stands is oppressive and unfair. In response to the Trustee's withdrawal of adversary proceeding 15-5020, her attorney says that it is without prejudice and could be revived. He says that the Trustee might have a duty to repudiate the result of these proceedings if the plaintiff looses the case. It is clear that if an agreement were reached along the lines suggested by the Trustee's attorney in open court, it would be acceptable to the Court. Otherwise there was no point in Judge Shiff persuading Mr Ostrow to present his proposal. Any such agreement would remove these points as difficulties in the overall litigation and considerably reduce the duplication of which she complains.

51. Further, the Trustee's attorney has informed the Court in Connecticut and this court that it is the intention of the Trustee to drop from adversary proceeding 15-5019 those claims that overlap with or duplicate the reliefs sought in these proceedings. Mr. Miltenberger has said that the Trustee cannot yet be certain which are the claims that overlap and that it is premature to press the Trustee to drop the claims in advance of discovery in adversary proceeding 15-5019. The facts relating to the transfers the subject of the recovery actions could fairly be described as tortuous. In those circumstances I believe it is prudent, and certainly not unfair or otherwise improper, for the Trustee to adopt his *current* position in relation to the dropping of claims. He has not resiled from his undertaking not to pursue duplicative claims and I will not proceed on the assumption that he will not do what he has promised Judge Shiff he will do in due course. I am satisfied therefore that the Trustee will take steps to drop those claims which are in fact being pursued by the plaintiff in these proceedings. This is a further reason for rejecting the defendant's motion.

52. Likewise I find her argument based on lack of privity to be without merit. If the Trustee agrees to be bound by the results of the Irish litigation on the basis that she also agrees to be so bound, it matters not that there is no privity between the Official Assignee and the Trustee. He will be bound by the agreement. I see no reality to the argument that the Judge in the United States would not permit him to reach such an agreement or would permit, or possibly oblige, him to disclaim the result.

53. She argued that any decision of the Irish courts on either the substantive claims or the underlying facts could not be binding in adversary proceeding 15-5019 as there were other defendants who were not party to the Irish proceedings. This means that the Federal District Court will have to rehear all of the evidence in relation to the agreements of 2005 and 2008 and Mr. Dunne's solvency. Insofar as this relates to the other defendants, she may not advance their case as a basis for saying these proceedings against her are either oppressive or being pursued in the wrong forum. Insofar as she says she would be exposed to the expense and risk of relitigating these issues, that of course would all or largely be avoided if she reached an agreement along the lines outlined by Mr Miltenberger.

54. I should emphasise that I accept that she is not obliged to enter into discussions or to reach an agreement with either the Trustee or the plaintiff in relation to any of the matters under discussion. However, when she raises complaints which potentially could be resolved by agreement of all the parties or case management, the Court is entitled to take into account her failure so to do when considering her arguments based upon those very complaints. She cannot thwart the efficient and fair conduct of the litigation in that manner and then obtain the relief she now seeks.

Abuse of process
55. The defendant seeks to have these proceedings dismissed in their entirety on the basis that the maintenance of the proceedings constitutes an abuse of process. She advances this argument on the basis, as she alleges, that she is obliged to litigate the same matters in two sets of proceedings; these proceedings and adversary proceedings 15-5019. She says that this is vexatious, unnecessarily expensive and runs the risk of inconsistent judgments which could perpetrate an injustice upon her. She says that the way to avoid these evils is to dismiss these proceedings in their entirety and to leave the Trustee, as opposed to the Official Assignee, to pursue the causes of action comprised in the Irish proceedings in adversary proceeding 15-5019.

56. Firstly of course it is relevant to note that proceedings 15-5020 were dismissed by the U.S. Bankruptcy Court upon the application of the Trustee once the Irish bankruptcy was confirmed and the Trustee was satisfied that the Official Assignee would be in a position to maintain these proceedings. The defendant consented to the dismissal of adversary proceeding 15-5020. Secondly, both the Official Assignee and the Trustee believe that it is beneficial to the creditors of the estate of Mr. Dunne that the claims be pursued by both of them pursuing different causes of action rather than by the Trustee alone in one set of proceedings. As I have set out above, the Court having seisin of the proceedings in America has endorsed this approach and rejected the defendant's arguments repeated before this court.

57. The defendant argued that the concurrent proceedings amounted to an abuse of process by analogy with the rule in *Hendersen v. Hendersen*. She said that the principle was not confined to litigation pursued by identical parties based upon *Re Vantive Holdings* [2010] 2 I.R. 118. On that basis it could and should apply as between the plaintiff and the Trustee. She could point to no case where the rule applied when there was no final judgment in either proceedings.

58. In my judgment the argument is misconceived. The rule is concerned with successive proceedings, itrequires a party to bring forward all of its arguments in the first proceedings so that they may be considered and ruled upon by the court deciding the first case. The rule is directed towards a second action commenced or continued after there has been a decision in the first action. In the present situation neither case has proceeded to trial. In the circumstances the rule can have no application. This is particularly so where the plaintiffs in two-actions are actively seeking to ensure that there is no duplication of claims between the two cases.

Conclusion
59. The defendant has failed to establish that Ireland is a *forum non conveniens* for the trial of these proceedings. She has not established that there exists another jurisdiction where it is more convenient for the issues in dispute to be tried and determined. I therefore reject her motion for a stay based upon the doctrine of *forum non conveniens*.

60. She has not established that the continuance of these proceedings by the plaintiff amounts to an abuse of process or perpetuates an injustice to her. The resolution of most, if not all, of the difficulties of which she complains, it is open to her agreement with the plaintiff and the Trustee if she wishes to resolve the issues in a constructive manner. If she does not, she cannot cry foul. I therefore reject her application to dismiss the proceedings as constituting an abuse of process.