

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 LIMITED

DEFENDANT

AND

CELTIC TRUSTEES LIMITED

NOTICE PARTY

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 15th day of January, 2019

1. This ruling relates to the balance of a Notice of Motion dated 25th July, 2018, issued on behalf of Yesreb Holdings Limited, the defendant in the proceedings, first named in the title hereof ("the Lehane proceedings"), in which the defendant seeks to inspect a sum of 228 documents over which the plaintiff ("the Official Assignee") asserts privilege.

2. This ruling should be read with and is supplemental to the Judgment and rulings which I delivered in the above entitled matters on 19th December, 2018. In those proceedings I determined, *inter alia*, that the Official Assignee was not entitled to claim litigation privilege over the transcript of an examination carried out by him in his office pursuant to an order of Costello J. made pursuant to s. 21 of the Bankruptcy Act 1988, of Ms. Caroline Crowley dated 28th October, 2014. That judgment set out the background to both of the above titled proceedings, and dealt with s. 21 examinations and s. 134 of the Bankruptcy Act 1988 generally, more specifically with Ms. Crowley's interview, and dealt with the principles applicable to litigation privilege. It is not proposed to repeat these matters unnecessarily in this judgment.

3. Counsel for Yesreb and the Official Assignee have usefully agreed that the remaining dispute over documents can be broken down into four categories, some of which can be subdivided according to date. These are as follows:-

(1) Correspondence between the Official Assignee's Solicitors, O'Grady Solicitors and Matheson Solicitors which occurred in 2015. Matheson Solicitors acted as the solicitors for Sean Dunne ("the Bankrupt") and for Gayle Dunne from the "Doc Description" provided in the Official Assignee's affidavit of discovery, it appears that the correspondence concerns the s. 21 examination of Paddy Sweetman, a former partner of Matheson who acted for the Bankrupt and Gayle Dunne in 2005 and 2006.

(2) Correspondence between the Official Assignee and his solicitors on the one hand and other solicitors on the other. A good proportion of this correspondence is with Hayes Solicitors who were representing Ms. Caroline Crowley, and much of the correspondence relates to those who are the subject matter of s. 21 examinations/interviews. The correspondence occurred in 2014, 2015 and 2016.

(3) Correspondence between the Official Assignee and his solicitors on the one hand and An Garda Síochána and the Revenue Commissioners or other individuals or organisations who are not parties to this litigation, on the other. This occurred during the years 2014, 2015 and 2016.

(4) A transcript of the Official Assignee's examinations pursuant to s. 21 of the Bankruptcy Act 1988. As the court has already directed, Yesreb is entitled to have a sight of the transcript in respect of Ms. Caroline Crowley's examination held on 28th October, 2014, and, as the court was informed, Yesreb has already been furnished with a copy of the transcript of the examination of Mr. Patrick Sweetman held on 30th January, 2017, and this category only applies to a Mr. Denis O'Sullivan.

4. The litigation privilege claimed by the Official Assignee in respect of these categories of documents is set out in a revised exhibit

"JF1" exhibited in the second replying affidavit of Jennifer Fay solicitor, sworn on 5th November, 2018. This revised schedule provides more detailed descriptions of the documents under columns headed "Type of Document" and "Description of Document", and in the fourth column sets out "Reason why this Plaintiff is maintaining a claim of privilege". In some instances this column states "However, Privilege is no longer being maintained". In other instances the "Type of Document" column indicates that duplicates of the document are to be found in other identified numbered documents. In this way the real number of documents in which privilege is disputed has been considerably whittled down.

5. Typical of the wording used to claim privilege is document no.32, which is a letter from Matheson Solicitors to O'Gradys Solicitors dated 9th April 2015 described as a "letter [which] concerns the Property known as Walford and Properties at Newbridge, County Kildare":

"This correspondence relates to the Official Assignee's investigations into, *inter alia*, the ownership of the Property known as Walford.

As of the date of the creation of the document, the Official Assignee was contemplating litigation in the ownership of Walford.

The queried document was created for the dominant purpose of investigating said contemplated litigation."

In the case of documents post-dating the commencement of the Lehané proceedings, slightly different wording replaces the latter two sentences. For example, document no.1388 is described as an email exchange between the Insolvency Service of Ireland ("ISI") and the Revenue Commissioners on 24th January, 2017, and the following appears in the fourth column:

"This is correspondence between the Office of the ISI and Office of the Revenue Commissioners and relates to the Official Assignee's investigations into the ownership of the Property known as Walford.

As at the date of the creation of the document, the Official Assignee had commenced litigation in respect of the ownership of Walford. The queried document was created for the dominant purpose of prosecuting said litigation."

6. The issue of when recovery proceedings were first apprehended/contemplated by the Official Assignee is more fully explored in the affidavit sworn by him on 26th October, 2018. That affidavit was extensively considered by this court in its First ruling – see particularly paras. 17-21, and the discussion, in the context of the transcript of the interview with Ms. Crowley, at paras. 42-46.

7. In considering these categories of documents it is important to consider the different years because of the different proceedings that have been instituted. The Bankrupt was adjudicated bankrupt in the USA on 29th March, 2013, and in this jurisdiction on 29th July, 2013, at which time the Official Assignee had a statutory obligation to get in and realise the assets in the Bankruptcy estate. On 27th January, 2014, the Official Assignee sought to intervene in family proceedings involving the Bankrupt. On 21st January, 2014, a search was carried out at the behest of the Official Assignee in relation to the ownership of Walford. This revealed that on 3rd January, 2014, a conveyance dated 29th March, 2013, had been registered as between Caroline Crowley, Eamonn Walsh, Sean Dunne, Gayle Dunne, Matsack Nominees Limited as grantors and Yesreb as grantee. Also evidence was given by the Bankrupt on 28th February, 2014, in the course of a s. 341 interview in relation to Walford (in the US) which led the Official Assignee to pursue further investigations including causing interviews to be carried out in respect of Caroline Crowley, Patrick Sweetman and others.

8. The first recovery proceedings that the Official Assignee commenced were against Ms. Gayle Dunne (arising out of a purported "Property Transfer Agreement" dated 23rd March, 2005, between the Bankrupt and Gayle Dunne). Those proceedings titled *Lehané v. Dunne 2014/7820P* issued on 5th September, 2014. At para. 23 of his said affidavit, the Official Assignee states that:-

"Those proceedings seek to set aside transfers based on two agreements dated 23 March 2005 and 25 February 2008, which gave effect to the transfer of the Lagoon Beach hotel in South Africa."

9. However, it is apparent from para. 25 of his affidavit that the Official Assignee continued to investigate the position with regard to Walford, which property had remained derelict for three years, and at para. 26 he states:-

"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 Section 21 applications and investigations in relation to the Bankrupt were aimed at establishing the true ownership of the property"

The Plenary Summons in the Lehané proceedings (against Yesreb) was issued on 9th December, 2016. It is reasonable to conclude that those proceedings were within the contemplation of the Official Assignee at least in the months leading up to December 2016.

Categories (1), (2) and (3)

10. In relation to the first three categories of documents outlined above, counsel for Yesreb argued, firstly, that the Official Assignee, at the time documents were created in 2014 and 2015, was still carrying out investigations into the ownership of Walford, and reliance was placed on findings at paras. 43-46 in my First Ruling. Secondly, counsel was critical of the claim for litigation privilege based on the wording used in exhibit "JF1", and in particular the words "The queried document was for the dominant purpose of investigating said contemplated litigation."

Counsel argued that reference to a dominant purpose implies that there was another purpose. Reliance was placed on the recent decision of McDonald J. in *Artisan Glass Studio Limited v. The Liffey Trust Limited and Ors* [2018] IEHC 278, where the question of dual purpose was addressed in the context of fire reports obtained by an insurer. At para. 25 McDonald J. stated:-

"25. The fact that litigation was apprehended at the time of creation of these reports is not of itself determinative that they are protected by litigation privilege. While the apprehension of litigation is an essential element of the requirements to establish litigation privilege, it is not the end of the analysis if it transpires that the reports in question were created for more than one purpose. In this context, it appears to be clear from the averments made by Mr. Corrigan and Ms. Murphy respectively that Burgoyne's were retained for more than one purpose. There would be no need for the deponents to each address the question of 'dominant purpose' if the sole purpose of retaining Burgoyne's and obtaining their views was the litigation which was reasonably apprehended as of November 2002. If litigation was the sole purpose of the documents, I have no doubt but that Mr. Corrigan and Ms. Murphy would have said so. As noted above, neither deponent went so far as to suggest that litigation was the sole purpose of the report. They both said that litigation was the 'dominant purpose'."

McDonald J. therefore considered that the question he had to decide was whether the party seeking litigation privilege had demonstrated "...that the dominant purpose of the Burgoyne's Report and the record of inspection was apprehended litigation by third party claimants...in respect of the fire." (para. 28). He noted on the authorities that "the court is not bound by a bald assertion in an affidavit contending that litigation is the dominant purpose of a document" (para. 29), and at para. 30 he stated:-

"I have to say that it is unsatisfactory that the other purposes of the report have not been specifically addressed and explained. In an application of this kind, I believe that it is essential that a party claiming privilege over a discoverable document should place before the court sufficient explanations or sufficient materials to identify all of the purposes of the document with a view to assisting the court in assessing whether or not it can properly be said that apprehended litigation was the dominant purpose of the creation of the document."

11. In that case McDonald J. was concerned with two documents and in the case of one of them he inspected it himself and concluded that:-

"...it is impossible for me to form any view based on my consideration of this document that the dominant purpose of the document was apprehended litigation. It seems to me, having read the document, that it is equally capable of being referable to enquiries being made on behalf of the insurance company as to whether it had a liability to make a payment to its own insured." (para. 38).

In para. 40 McDonald J. reached a different conclusion in relation to Burgoyne's Report.

12. Counsel argued that the Official Assignee's affidavit, while it refers to his investigations, and contains his averments that he contemplated litigation as early as November/December 2013, equally refers to continuing *investigations*, and his affidavit does not assist because it contains no information or averments specific to the particular documents in the three categories with which we are concerned. Counsel therefore argued that the onus of proof that rests with the Official Assignee had not been discharged in respect of the 2015 Matheson correspondence, the correspondence between the Official Assignee/his solicitors and other solicitors, and the Official Assignee and the third party/state agencies.

13. Finally, counsel argued that the Official Assignee has also failed to adduce evidence to show that these documents were intended to be confidential documents. Indeed, the information available suggested that the correspondence related for the most part to arrangements for forthcoming examinations/interviews, or discussing issues around those arrangements, and on the face of it this would not normally be confidential.

14. Counsel for the Official Assignee argued that a different view should be taken of the evidence in Mr. Lehane's affidavit, that is, that it is clear he was contemplating litigation from late 2013/early 2014 – and urged that this evidence should be accepted.

15. In particular, counsel pointed to the commencement of proceedings by the Official Assignee against Ms. Gayle Dunne in September 2014 as evidence, not just of contemplation of proceedings, but actual institution of proceedings. While those proceedings relate to the Lagoon Beach hotel, common to those proceedings and to the present proceedings concerning Walford is reliance by the defence on the "Property Transfer Agreement" dated 23rd March, 2005, purporting to create a trust of property for the benefit of Ms. Gayle Dunne.

16. Counsel argued that a "cloak" was thrown over the Walford transactions, and the Official Assignee was given misinformation, which therefore forced him to make further inquiries to establish the factual position, and a connection between Yesreb and members of the Dunne family before the present proceedings could be instituted. Counsel rely particularly on the Official Assignee's averments at paras. 22-29 in his affidavit:-

"22. I was also conscious that 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 believe 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 Dunes maintained that 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 23 March 2005 or 25 February 2008. Those proceedings issued on 5 September 2014 and bear the record number *Lehane v. Dunne 2014/7820P*. Those proceedings seek to set aside transfers based on two agreements dated 23 March 2005 and February 2008 which gave effect to the transfer of Lagoon Beach hotel in South Africa. I say that the root of the alleged transfer of Walford from the Bankrupt to Gayle Dunne is the handwritten agreement dated 23 March 2005. I beg refer to a true copy of same which is exhibited at CL2 above.

24. Insofar as we then understood Gayle Dunne to have received, from an independent third party, the proceeds of sale of Walford that was my primary concern rather than the property itself and that would have been covered in the proceedings which substantially related to Lagoon Beach.

25. However, having regard to the involvement of Clerkin Lynch as solicitors for Yesreb Holding Limited and the Bankrupt, and the fact that Walford remained derelict for 3 years and no party came to claim ownership through Yesreb, I remained concerned in relation to the true ownership of Walford. That is why throughout 2014 and through 2015 I was investigating same with a view to recovering the asset.

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 section 21 applications and investigation in relation to the Bankrupt were aimed at establishing the 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 5 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 23 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 Conveyance dated 29 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 (1) whether Walford was a recoverable asset in the Bankruptcy; (2) whether I should take proceedings; and (3) 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."

17. Accordingly, counsel's principal submission was that in 2014 the Official Assignee had within his reasonable contemplation not only the proceedings which he instituted against Ms. Gayle Dunne, but also further apprehended proceedings in respect of Walford, which were the Leane proceedings instituted in December 2016.

18. Counsel further respectively submitted, in the light of the Official Assignee's affidavit evidence and in particular the commencement of the proceedings against Ms. Gayle Dunne in September, 2014, that this Court's First Ruling was incorrect.

19. Counsel also argued that the fact that the transcript of Ms. Crowley's interview, or any other 'section 21 interview', was not protected by litigation privilege did not necessarily mean that the same applied to correspondence between the Official Assignee/his solicitors and the interviewee or his/her solicitors. This did not follow automatically, and each document needed to be considered separately as it might still attract privilege. It was suggested that the Official Assignee's solicitors would undertake a fresh review of this correspondence to see whether privilege was being maintained.

Discussion

20. Privilege, whether litigation privilege or legal advice privilege, is an exception to the normal rule under which relevant documents must be discovered. As McDonald J. emphasises in *Artisan Glass*, there is an onus of proof on the party asserting privilege to satisfy the court of the entitlement to privilege. That applies equally to the Official Assignee, notwithstanding the statutory basis for his office, functions and powers.

21. I am not satisfied that the Official Assignee has satisfied this onus of proof in relation to the documents in categories (1), (2) and (3) created prior to the commencement of the Leane proceedings, or prior to the period in the immediate run up to that commencement. No evidence has been adduced to demonstrate that the correspondence between the Official Assignee/his solicitors, and Matheson Solicitors and other solicitors or third parties was undertaken under conditions of confidentiality. I also agree with the submission made by counsel on behalf of Yesreb to the effect that the Official Assignee's averments are not particular to the documents in these categories.

22. The court is thrown back on considering Ms. Fay's schedule in exhibit "JF1", and more particularly the revised version of that schedule exhibited in her second affidavit sworn on 5th November, 2018. In the fourth column under "Reason why the plaintiff is maintaining a claim of privilege" it is consistently stated that the described document "relates to the Official Assignee's investigations into the ownership of the property known as Walford" (emphasis is added). For example, document no.29 is a letter from O'Grady's to Matheson Solicitors dated 20th January, 2015, and is described as correspondence which "... relates to files on Walford and Whitewater". The opening sentence of the reason for maintaining privilege then states – "This correspondence relates to the Official Assignee's investigations into the ownership of *inter alia* the property known as Walford". Similar statements appear in relation to items 32 (a letter from Matheson Solicitors to O'Grady's Solicitors dated 9th April, 2015) and 34 (a letter from Matheson Solicitors to Julie Ralph of the ISI dated 14th July, 2015), in response to a request for information and documentation in respect of various properties, including Walford). It is apparent that similar wording is used in relation to other correspondence listed and undertaken between the ISI and the Revenue Commissioners e.g. documents no.s 16, 19 and 21. The same applies to queries raised by O'Grady's solicitors with Stephen Noonan Solicitor acting for Mr. Seamus Reddin, in respect of Walford – see document no.27. Another example is correspondence between the ISI and Mr. Des Twomey, of Plus Architecture, dated 6th January, 2015, concerning the planning application for Walford, raising queries in respect of Yesreb (item 87), and the same applies to other correspondence raised by the Official Assignee/ISI or their solicitors prior to December, 2016. The critical point is that these documents were created in the course of the Official Assignee's investigations, and came into being long before the present proceedings were initiated.

23. While the Official Assignee and Ms. Fay have categorised the prosecution of the (contemplated) Leane proceedings as being the "dominant purpose" in each instance, whether that is so is a matter for the court to determine on an objective basis. In each case it is stated that "the queried document was created for the dominant purpose of investigating said contemplated litigation", but, as Counsel for Yesreb argued, the secondary/subsidiary purpose is not expressly stated. However, unlike the *Artisan Glass* case, the other purpose for which the document is created may readily be inferred from the first sentence in the Reasons column where reference is made to the Official Assignee's investigations.

24. Having regard to the fact that the investigations were ongoing, and could potentially have resulted in a determination by the Official Assignee not to prosecute proceedings, and that the Leane proceedings were not commenced until December, 2016, I am of the view that such of the disputed correspondence and communications that arose in the course of investigations up to at least mid-2016 cannot be said to be predominantly for the purpose of prosecuting proceedings, and do not attract privilege.

25. While I note that the Official Assignee's offer at hearing to review correspondence with solicitors acting for s.21 examinees, on the basis that this may well be concerned only with the making arrangements for interview or otherwise of little or no import, this offer came too late to be a satisfactory answer to the dispute over privilege, and in any event would only apply to some of the documents. The court must assume that the listed correspondence was discovered as being relevant and necessary, and if it turns out on inspection to be irrelevant then so be it.

26. As to the argument that the Official Assignee should be entitled to rely on litigation privilege based on the institution of the proceedings in September, 2014 against Ms. Gayle Dunne, on the basis that the defence of those proceedings and the present proceedings involved reliance on the same purported "Property Transfer Agreement" dated 23rd March, 2005, in my view this does not assist the Official Assignee. The reason is that the 2014 proceedings do not concern the ownership of Walford, which is central to the present proceedings. It is the investigation of the ownership of Walford, and contemplated litigation in respect of the ownership of Walford, that is repeatedly stated to be the reason for privilege claims in the Leane proceedings. Nowhere in the revised "JF1" schedule is there any mention of the investigation of ownership of the Lagoon Beach hotel, or the 2014 proceedings. This is only mentioned in the Official Assignee's affidavit.

27. Moreover, the mere fact that an underlying trust document from 2005 may form the basis for a defence to both actions does not alter the direction or intent of the ongoing investigations of the Official Assignee into Walford up to late 2016 when the present proceedings were clearly in contemplation.

28. Accordingly, the claim to litigation privilege over documents that came into being earlier than mid to late 2016 is not made out, and Yesreb is entitled to inspect these documents.

29. However I do accept the Official Assignee's submission that different considerations apply to documents created at or shortly before the date of issue of the Lehané proceedings, and to documents created after that date. In respect of these I am more inclined to accept at face value the Official Assignee's averments that they were created in contemplation or furtherance of the Lehané proceedings. For instance, document 171 is a letter from the ISI to Andrew Ingram of the National Crime Agency, dated 16th January, 2017 which "... raises queries in respect of various assets and the Bankruptcy Estate of Mr. Sean Dunne". Although that document is stated to be part of the Official Assignee's investigations into the Bankruptcy Estate of Sean Dunne, the Reasons column goes on to state – "as of the date of the creation of the document, the Official Assignee had commenced litigation in respect of the ownership of Walford. The query document was created for the dominant purpose of prosecuting said litigation."

30. This may be contrasted, for example, with the interview of Ms. Crowley which was undertaken in October, 2014. As the present proceedings were in being in January 2017, I am prepared to accept the averment that the dominant purpose of the correspondence with the National Crime Agency was for the purpose of prosecuting that litigation.

31. Similar considerations apply to other documents created in or shortly before December, 2016, or thereafter, and on this basis a check through revised "JF1" suggests that litigation privilege can be maintained in respect of the following documents (this list seeks to exclude documents over which privilege is no longer being maintained):

Document ID numbers 46, 48, 58 (and all listed duplicates), 73 (and all listed duplicates), 91 (and all listed duplicates), 137 (ISI correspondence with the Revenue Commissioners dated 25th October, 2016 – and all listed duplicates), 137 (and duplicate 502), 158 (and all listed duplicates), 171, 172 (and all listed duplicates), 184 (and the listed duplicate), 251 (and all listed duplicates), 252 ("updated File Note created by Mr. Denis O'Sullivan of RMI", and all duplicates of that document, recording details of investigations of Walford up to and including 1st December, 2016), 268 (and duplicates), 279, 338 (and all duplicates), 404, 405, 406 (and duplicate), 412, 414, 417, 501 (letter from Revenue Commissioners dated 6th October, 2016 and duplicate 1240), 502 (and duplicate), 516, 517 (and all listed duplicates), 541, 550, 570, 577, 578, 581 (and all listed duplicates), 582 (and all listed duplicates), 589, 622, 623, 624, 625, 627, 663, 825 (and all listed duplicates), 965, 1240, 1270, 1280, 1282 (and all listed duplicates), 1283 (and listed duplicate), 1285, 1287 (and all listed duplicates), 1290, 1388 (and duplicate at 1399), 1404, 1405, 1406, 1407, 1465 (and all listed duplicates), 1523, 1526, 1570, 1575, 1697 (and all listed duplicates), 1698, 1723, 1762 (and all listed duplicates), 1803, 1819, 1827, 1830, 1839, 1847 (and all listed duplicates), 1852 (and all listed duplicates), 1854, 1855 (and all listed duplicates) 1863, 1873 (and all listed duplicates).

Note – where there are duplicates the above generally lists only that copy of the document listed first in "JF1", and the reader will need to consult that entry to identify all duplicates.

32. In the above list the court has included all documents over which litigation privilege is still claimed and which came into being from December, 2016 onwards. In addition a small number of documents created from October 2016 onwards are included on the basis that these were created on the cusp of the issue of proceedings and it is reasonable to accept the Official Assignee's reason for claiming litigation privilege during this period. See documents no. 137 (and 502), 158 (and all duplicates – although undated it can be inferred that this File Note was created in or about 1st December, 2016)), 501 (and 1240), 502 (and 137), 516, 622, and 624 (which may be a duplicate of 501 as the date and description are identical).

Undated documents

33. There are a number of documents in respect of which no date is given. Where the fourth column indicates that the Lehané proceedings had commenced, this does not give rise to a problem, and privilege can be maintained. In other instances without being given even an approximate date of creation it is not possible for the court to make a determination as to whether litigation privilege applies. This relates to following document ID numbers:-

105 – An Index listing "Forensic Reports, Transcripts, internal memos and investigations in relation to the Property known as Walford".

394 – "Summary of required financial information" prepared by Ms. Julie Ralph of the ISI.

881 - this is a "Spreadsheet created by the Insolvency Services of Ireland" and entitled "transfers and dispositions" in relation to the bankruptcy estate of Sean Dunne. It is further described as "Internal work product of the Insolvency Services of Ireland". No date is given for the creation of this document, although it is said to have been "created for the dominant purpose of prosecuting said contemplated litigation".

1283 and 1288 "RMI" File Note entitled "SD File Note 1.0 doc" and duplicate.

1529 this is also "an Excel Spreadsheet" consisting of "financial analysis in relation to asset transfers and the bankruptcy estate of Sean Dunne". It may be a repetition of the document no. 881, but it bears no date, and the same considerations apply.

34. While the descriptions of these documents are suggestive of internal preparations for the purpose of prosecuting the Lehané proceedings, their status as privileged or otherwise cannot be determined without more information. It may be helpful to make two observations. First, the Official Assignee's evidence is clear that for some considerable time prior to the institution of the Lehané proceedings they were in his contemplation. Secondly, it may readily be accepted that these proceedings were in the course of preparation over a number of months prior to the actual issue of the plenary summons, and it would not take much to persuade the court that correspondence relating to the collection of relevant documents/documentary evidence and the raising of queries in relation to same arising in the three to six month period prior to the institution of these proceedings should, in all the circumstances, be covered by litigation privilege.

35. I would note in passing that, unlike in the *Artisan Glass* case, I was not invited by either party to inspect any of the documents with a view to deciding whether they attract litigation privilege. This might be necessary in respect of these undated documents,

although I would be surprised, given that presumably they were computer generated, if the date of creation cannot be established by further searching. I will, in the event that the dispute over these undated documents cannot be resolved by agreement, give the parties liberty to apply.

Category (4) – Denis O’Sullivan interview

36. In relation to this Ms. Fay states in para. 7.iii of her affidavit sworn on 17th October, 2018:

“I say that no transcript exists in relation to any examination/interview/meeting which took place between the plaintiff and Denis O’Sullivan. Internal notes/documents were created and same are to be located at document reference nos. 1268702 and 1268703 to the First Schedule, Second Part of the plaintiff’s Affidavit of Discovery. The plaintiff maintains a claim of privilege over said documents. The internal note/documents relates to the plaintiff’s sources of information and are privileged on that basis also.”

37. In fact an application by the Official Assignee pursuant to s. 21 of the Bankruptcy Act, 1988 for the examination of Mr. O’Sullivan was heard by this court in late 2016. I recall the application, which I permitted to be made *in camera*. I duly made an order pursuant to s. 21, and also, having been requested so to do, made an order pursuant to s. 134 of the 1988 Act, directing that the examination take place in private. I do recall reasons being given which persuaded me to conduct the hearing of the application *in camera*, and to direct that the examination of Mr. O’Sullivan should take place in private. It would be inappropriate to go into these further but it is sufficient to state that there were good reasons, shared both by the Official Assignee and Mr. O’Sullivan, for ensuring mutual privacy and confidentiality.

38. I was informed by counsel for the Official Assignee that after the making of the order on 20th December, 2016 it did not become necessary for Mr. O’Sullivan to be examined in court because agreement was reached that Mr. O’Sullivan would provide written information in lieu of being examined. According to counsel that is what has been discovered by way of internal notes/documents, and in respect of which privilege is claimed. Of course the evidence before me was limited to the affidavit of Ms. Fay, but for the purpose of this ruling I accept that no transcript as such exists in relation to any information provided by Mr. O’Sullivan, but that there are “internal notes/documents” which were created as a result of Mr. O’Sullivan’s communications with the Official Assignee’s office.

39. Counsel for Yesreb argued that the fact that there was no formal interview or transcript makes no difference, and that the resulting notes/documents should be regarded by the court as information procured pursuant to the s. 21 process, and treated comparably with, for instance, the transcript of the interview of Ms. Crowley. Counsel also referred me again to the decision of the Federal Court of Australia in *Trade Practices Commission v. Ampol Petroleum (Victoria) PTY Limited and Others* [1994] FCA 1530. That case concerned investigation/proceedings by the Trade Practices Commission in relation to alleged engagement in resale price maintenance contrary to legislation. In advance of the proceedings the Commission had conducted examinations under statutory authority similar to s. 21 of the Bankruptcy Act, 1988, and sought privilege in relation to those examinations on the basis that they were held for the purpose of obtaining evidence for use in contemplated legal proceedings. The court stated:

“18. However, in an examination under s. 155, the element of a confidential communication is absent. Information given by an examinee in the course of examination is not given in confidence. It is given under coercion. The privilege against self-incrimination is expressly abrogated and the privilege against exposure to a penalty is applicably abrogated ...

19. In my opinion, a s. 155 examination is outside the ambit of communications which are encompassed within the concept of legal professional privilege. The TPC does not conduct such an examination solely to obtain legal advice but in pursuance of its statutory purposes. It does so as a statutory authority established under the Trade Practices Act, to undertake the functions which the Act reposes in it. One of those functions is to gather information and evidence with respect to contraventions or possible contraventions of the Act ...”

40. The view taken by the Federal Court in respect of Trade Commission examinations is reflective of this Court’s observations on the status of s. 21 examinations in my First ruling, at paras. 25-33. Having commented that the wording of s. 21 is limited and contemplates that either the Official Assignee obtains the statement on a truly voluntary basis, or that he obtains a s. 21 order that results in examination before a judge of the High Court, I observed:-

27. This is particularly so having regard to the obligation imposed by subs. (4) to answer all questions, and the fact that knowingly giving 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 in 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 a prospect 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 subs. (4) could apply at all to such an interview.”

41. It should be noted that this observation related in *general* to such examinations/interviews. Significantly I went on to observe –

“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 in so far 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.”

42. I then go on to deal with s. 134 of the 1980 Act which 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”.

43. That of course is the further order that was made in respect of Mr. O’Sullivan, and, as I have indicated, the privacy order was made, *inter alia*, for the purpose of protecting Mr. O’Sullivan, and ensuring confidentiality over the information that he might supply to the Official Assignee. The invocation of s. 134 was highly significant and introduced the elements of privacy and confidentiality that would not normally be features of s. 21 examinations (or examinations of the sort undertaken by the Australian Trade Practices Commission).

44. I am satisfied for these reasons that the Official Assignee is entitled to maintain litigation privilege over these internal notes/documents. It would also be inconsistent of this Court to decide otherwise having deliberately, on a previous occasion,

excluded all other parties from the interview/examination process which ultimately resulted in agreed voluntary disclosure. In that regard it is also relevant to note that part of this court's s. 21 order in respect of Mr. O'Sullivan granted leave to him to issue a motion to set aside the order, and when the matters came back before the Court on 20th December, 2016, when the hearing was again in private, the order of the court was as follows:-

"On hearing respective counsel for the parties hereto, and counsel intimated to the court the parties had reached an agreement, it was ordered that the motions be struck out and that they each be entitled to costs incidental to the motions in the bankruptcy."

45. Accordingly, the internal notes/documents which were discovered resulted not from a statutory interview or examination, but resulted from agreement between the parties. At the time they came into being either the orders had been struck out, or there was agreement in place that they would be set aside, and hence there was no longer coercive effect, or at least not to the same extent. The internal notes/documents may therefore be compared to the record that would be kept by a litigant or his solicitors of relevant information obtained from a potential witness for the purpose of prosecuting proceedings already in being or contemplated, and thus attract privilege.

46. It is also significant that the application to this Court for s. 21 and s. 134 orders in the case of Mr. O'Sullivan proceeded *after* the institution of the present proceedings, and the internal notes/documents with which we are concerned are stated to have been created post the institution of these proceedings. Where the contemplated proceedings have actually been commenced it is reasonable to accept the Official Assignee's averments that the *dominant* purpose for which the documents were created is for prosecuting existing proceedings, albeit that there is still reference to investigations as to Walford and/or the Bankrupt's estate. Objectively the timing combined with these averments is sufficient to establish that litigation privilege attaches to these particular notes.

47. Accordingly an order for inspection of the internal notes/documents relating to information provided by Mr. Denis O'Sullivan is refused.