THE HIGH COURT

[2014 No. 7820 P.]

BETWEEN

CHRISTOPHER LEHANE

AS OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF SEAN DUNNE

PLAINTIFF

- AND -

GAYLE DUNNE

DEFENDANT

JUDGMENT of Mr. Justice McGovern delivered on the 3rd day of October, 2018

1. This judgment should be read together with a judgment delivered by the Court on the 22nd day of June 2018 ("the U.S. Law judgment"). The defendant brought a motion seeking an order striking out and/or dismissing the plaintiff's claim in these proceedings pursuant to the inherent jurisdiction of the court on the grounds of *forum non conveniens* and abuse of process. The motion was originally heard in the High Court by Costello J. rejecting the defendant's request that she should be allowed to cross examine Mr. Timothy Miltonberger, a U.S. lawyer, on his affidavits filed in these proceedings.

2. The background is explained in more detail in the U.S. Law judgment at paras 2 and 3. Costello J. also went on to deal with the substantive motions. The defendant appealed both those decisions and in a judgment of the Court of Appeal delivered on the 30th January 2018 the court allowed the defendant's appeal on the cross examination issue and vacated the order made on the substantive issue pending a determination by the court of U.S Law. having regard to the cross examination of Mr. Miltonberger and Mr. Alec P. Ostrow, a bankruptcy lawyer, who swore an affidavit on behalf of the defendant.

3. Having decided the issue of U.S. Law, I must now determine the substantive issue on the motion, namely whether or not the proceedings should be struck out and/or dismissed on the grounds of *forum non conveniens* and abuse of process.

4. At para 44 of the Court of Appeal judgment delivered on the 30th January 2018, Hogan J. stated:-

> "44. I cannot conclude this judgment without making two observations. First, events in the last two and a half years or so have entirely confirmed the anxieties which Laffoy J. expressed in *Dunne* regarding the complex questions which were likely to emerge arising from the inter-action of any dual bankruptcy regime in both the United States and Ireland. While I appreciate that the Official Assignee and the Chapter 7 Trustee are determined to work together co-operatively (and have done so to date), the potential for overlapping jurisdiction, inconsistent judgments, dual recovery, additional costs and even opportunistic legal stratagems are all the inevitable by-products of parallel bankruptcy proceedings in two separate jurisdictions. If it can at all be done, the case for centralizing all these claims in one single jurisdiction is, I should think, a pressing one."

5. The defendant relies strongly on this passage of the judgment in contending that all the issues arising out of the bankruptcy should be determined in one jurisdiction only. The court is also referred to the case of *Racy v. Hawila* [2004] EWCA Civ 209 where Parker L.J. quoted the trial judge who stated at para 59 of his judgment:-

> "59. I emphasise, as I have made clear more than once, that Mr Hawila does not suggest that Mr Racy should not be able to pursue both actions, merely that he should not have to defend both actions at the same time. I therefore look to see, in conformity with the approach outlined in *McHenry and Peruvian Guano* (and endorsed in *Aerospatiale*), what it is about the two actions which might provide good reasons for Mr Racy wishing to pursue both of them simultaneously."

6. Parker L.J. stated at para 61 of the Court of Appeal judgment:-

> "61. Thus, as the judge rightly recognised, and as Mr Nasir has accepted in the course of his oral submissions this morning, this is not a *forum non conveniens* case. There is no appropriate alternative forum for the claims made in the English action, any more than the English court would be an appropriate forum for the claims made in the Lebanese action. Hence no anti-suit injunction is sought. So the *Spiliada* principles are not applicable. There is no question here of a stay being granted *so that the issues can be litigated in some other appropriate forum*. The starting-point in the instant case is that there is no other appropriate forum."

7. Counsel for the plaintiff argues that it is not intended that the plaintiff and the trustee will pursue two similar actions simultaneously against the defendant. The lifting of the automatic stay *nunc pro tunc* was to allow the official assignee maintain these proceedings for the benefit of the Chapter 7 bankruptcy. Similar proceedings involving what may be called the Mavior issues of fraudulent transfer, have been discontinued by the Chapter 7 trustee in the U.S. proceedings. But the defendant argues that there is no reason why the Mavior proceedings cannot be re-activated in the U.S. I have already held in the U.S. Law judgment at para 44 that the U.S. court will be bound by any decision of this court in these proceedings either on the basis of *res judicata* or collateral estoppel. I accepted the evidence of Mr. Miltonberger that it would be extremely difficult for the Chapter 7 trustee to re-activate the Mavior fraudulent transfer claims in the U.S. having regard to the fact that they have been dismissed or discontinued in the U.S. for the purpose of allowing the U.S. court to lift the automatic stay so as to enable the plaintiff in these proceedings to maintain an action against the defendant in Ireland.

8. Counsel for the defendant argued that the basis of this court's judgment delivered on the 6th December 2013 dismissing the bankrupt's application to show cause against his adjudication was made on the basis that a protocol would be agreed between the official assignee in Ireland the Chapter 7 trustee in the U.S. The defendant relies on the evidence of Mr. Miltonberger who represents the trustee and who has said that no protocol has ever been agreed. While this is so it is clear that a degree of cooperation exists between the plaintiff and U.S. trustee and that while the U.S. court did not formally sanction the commencement of these proceedings by the official assignee Judge Shiff granted relief from the automatic stay *nunc pro tunc* so as to allow these proceedings to continue in Ireland. And, as I pointed out in the U.S. Law judgment at para 30, this was affirmed by the U.S. District Court on

appeal.

9. This court has already held that the plaintiff does have standing to prosecute these proceedings and that in doing so he is not in conflict with U.S. law because Judge Shiff has granted relief from the automatic stay.

10. This court has also held that the determination of these proceedings creates a *res judicata* or collateral estoppel that would bind the Chapter 7 trustee from re-litigating the matter in the U.S. courts.

11. Having reached those conclusions it is difficult to see how the defendant will be unfairly prejudiced if the matters proceed in this jurisdiction.

12. It is clear that if the proceedings were to take place in the U.S. they would involve questions of Irish law and evidence of Irish law would have to be ruled on by a jury after hearing expert evidence from an Irish lawyer. The court accepts the plaintiff's argument that this would tend to show that the U.S. was not a convenient forum for the resolution of the disputes arising in these procedures. The expert witnesses in respect of the solvency of the bankrupt at various stages are likely to be Irish accountants. All of the assets claimed are Irish assets with the exception of the Lagoon Beach hotel in South Africa which is held through an Irish company. The transfer culminated in an Irish share transfer and the assignment of the Irish loans which were payable by Irish companies. None of the assets loans transaction, share transfers or assignments which are the subject matter of these proceedings have any connection with the United States and this has been recognised by the U.S. courts.

Legal principles
13. In *IBRC v. Quinn* [2016] 3 I.R. 197, Clarke J. (as he then was) set out the general principles in relation to *forum non conveniens*. He quotes from the seven key principles established in the United Kingdom since Sp*iliada Maritime Corporation v. Cansulex Limited* [1987] A.C. 4 60, in which a passage from Dicey, Morris and Collins, *The Conflicts of Law* (15th Ed. Sweet & Maxwell, London 2012) was quoted as follows:-

> "First, in general the legal burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay, although the evidential burden will rest on a party who seeks to establish the existence of matters which will assist him in persuading the court to exercise its discretion in his favour. Secondly, if the court is satisfied by the defendant that there is another available forum which is clearly a more appropriate forum for the trial of the action, the burden will shift to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in England. Thirdly, the burden on the defendant is not just to show that England is not the natural or appropriate forum, but to establish that there is another forum which is clearly or distinctly more appropriate than the English forum; accordingly, where (as in some commercial disputes) there is no particular forum which can be described as the natural forum, there will be no reason to grant a stay. Fourthly, the court will look to see what factors there are which point in the direction of another forum as being the 'natural forum', i.e. that with which the action has the most real and substantial connection. These will include factors affecting convenience or expense (such as availability of witnesses) and such other factors as the law governing the transaction and the places where the parties reside or carry on business, and also whether the claim is part of a larger overall dispute which would be damaged by being fragmented. Fifthly, if the court considers at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, the court will ordinarily refuse a stay. Sixthly, if, however, the court concludes that there is some other available forum which *prima facie* is clearly more appropriate, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted. In that enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. Seventhly, a stay will not be refused simply because the claimant will thereby be deprived of 'a legitimate personal or juridical advantage', provided that the court is satisfied that substantial justice will be done in the available appropriate forum."

14. The defendant accepts that Irish law applies in this transaction. Furthermore the U.S. court has said that Ireland is the appropriate forum.

15. In circumstances where the Supreme Court has held in the bankruptcy appeal that the official assignee has a jurisdiction to collect in the assets of the bankrupt, it can hardly be described as an abuse of process for him to maintain these proceedings.

16. I accept the remarks of Hogan J. at para 44 of the Court of Appeal judgment of the 30th January 2018. There is a compelling argument for centralising all the claims in one single jurisdiction if this can be done. But in the particular circumstances of this case and having regard to the decision of the U.S. court, it seems to me that principles of comity require this court to recognise that Ireland is in fact the *forum conveniens* for these proceedings and there is no abuse of process because the official assignee has jurisdiction in the matter and the U.S. court approves his conduct in maintaining these proceedings.

Conclusion
17. There is no question that the defendant will have to litigate or defend the Mavior proceedings in two jurisdictions. She will have to do so in Ireland but not in the U.S. The defendant has not satisfied the seven tests referred to by Clarke J. in *IBRC v. Quinn*. There are a number of unusual features set out earlier in this judgment which take it outside the usual boundaries of *forum non conveniens* principles.

18. As the defendant has failed to discharge the burden of proof on this issue and as the issues are subject to Irish law and the issues connected with Ireland and furthermore have no obvious connection with the United State, I would dismiss the defendant's motion.